

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

KANAUTICA ZAYRE-BROWN,

Plaintiff,

v.

No. 3:22-cv-00191

THE NORTH CAROLINA
DEPARTMENT OF PUBLIC SAFETY,
et al.,

Defendants.

**PLAINTIFF’S REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

This case is about whether Defendants have unlawfully failed to provide Plaintiff with adequate medical care. The uncontroverted evidence shows that Plaintiff has a serious medical condition. Every healthcare provider with subject-matter expertise who has personally evaluated her—including those employed and engaged by Defendants—has found gender-affirming surgery necessary. Without this treatment, Plaintiff will needlessly suffer and face escalating risks of harm.

Before this case began, Defendants never provided a medical justification for their denial of gender-affirming surgery. Now, in all their filings, Defendants *still* have not provided one. The only Defendant to file an affidavit, Dr. Gary Junker, simply repeats his conclusion that surgery is medically unnecessary with no explanation of how he reached that conclusion.

Defendants rely primarily on the opinion of Dr. Joseph Penn that their decision was reasonable. But Dr. Penn—who has no relevant publications, prior expert

testimony, or prior experience evaluating patients for gender-affirming surgery—is unqualified to render an expert opinion, and he reaches his conclusions using unreliable methodology.

All told, nothing in Defendants’ response justifies their failure to provide gender-affirming surgery. The Court should therefore grant Plaintiff’s motion for preliminary injunction.

I. Defendants’ failure to provide gender-affirming surgery violates the Constitution based on well-established Eighth Amendment standards.

Defendants insist that the Court must adopt a novel and unworkable constitutional standard to conclude that Plaintiff will likely succeed on the merits of her Eighth Amendment claim. That is not the case. As explained in Plaintiff’s briefs, she has shown—based on well-established Eighth Amendment standards—that she has an objectively serious medical need, and that Defendants’ conscious failure to adequately address that need amounts to deliberate indifference.

Defendants ignore the plainly relevant evidence, medical consensus, and binding precedent in urging this Court to credit abstract criticisms that have no bearing on the questions at issue. As an initial matter, Defendants offer no justification specific to the facts of this case as to why gender-affirming surgery is not necessary to treat Plaintiff’s gender dysphoria. Nor do Defendants mention the conclusions of their own health care providers or the UNC providers to whom they referred Plaintiff for specialized care. And neither Defendants nor their affiants can reliably contradict those conclusions, as none of them personally evaluated Plaintiff.

Junker Aff., Doc. 18-4 ¶ 19; Boyd Aff., Doc. 18-6 ¶ 4; Penn Aff., Doc. 18-8 ¶ 23.

Interestingly, Defendant Junker notes that he reviewed “guidance from the World Professional Association for Transgender Health (WPATH)” as the “lead policy developer” for DPS’s Transgender Offenders Policy. Junker Aff. ¶ 6. But Defendant Junker fails to explain why he disregarded the conclusions of Plaintiff’s providers based on the same WPATH standards. Additionally, Defendant Junker notes that “[t]o remain current, prisons’ healthcare staff have frequently engaged with transgender specialists at the University of North Carolina for consultation and educational purposes,” and that “[m]ost, if not all” members of DTARC have participated in trainings conducted by UNC Transgender Health Program. *Id.* ¶¶ 6, 10-11. However, Defendant Junker fails to explain why he disregarded the surgical recommendation of Dr. Figler—the specialist in gender-affirming surgery who founded those training programs¹ and personally evaluated Plaintiff.

In sum, this Court should reject Defendants’ denial of gender-affirming surgery as without medical basis and contrary to law. Defendants cannot rely on irrelevant hypotheticals while turning a blind eye to the documented opinions of Plaintiff’s treating providers and evidence of her ongoing suffering.

A. Without gender-affirming surgery, Plaintiff will continue to face a substantial risk of serious harm.

The Eighth Amendment requires prison officials to provide adequate medical care for a patient’s serious medical need. Prison officials cannot withhold a treatment

¹ See Brad Figler, MD, FACS, *UNC School of Medicine Directory*, at <https://www.med.unc.edu/urology/directory/brad-figler-md-facs/> (last visited Aug. 2, 2022).

when a patient will otherwise face a substantial risk of serious harm. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

Defendants cannot and do not dispute that Plaintiff's gender dysphoria is a serious medical need. Instead, Defendants argue that gender-affirming surgery is not medically necessary to address that need. That view is inconsistent, however, with binding precedent, the overwhelming weight of evidence before the Court, and the consensus of the medical community. This Court should reject Defendants' attempts to ignore the facts, contort the law, and invent post hoc rationalizations for their dangerous decision to withhold treatment.

1. Plaintiff's argument is entirely consistent with long-settled precedent.

Defendants assert that Plaintiff has asked this Court to adopt a "loosen[ed]" standard and define medically necessary treatment as "something that has 'a therapeutic effect' and is not experimental." Doc. 18 at 10, 23. According to Defendants, Plaintiff believes "that the constitution requires the State to provide care that has the mere possibility of aiding a person's well-being . . ." *Id.* at 11. Not so.

Plaintiff asserts that once a serious medical need has been established, the State has a constitutional obligation to provide care that will meaningfully alleviate the patient's suffering. Medical standards of care are highly relevant to what treatment is required. *See* Doc. 14 at 17-18. This view is consistent with established federal law. *Id.*; *see also De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (though "prisoner does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address

the prisoner’s serious medical need”); *United States v. Derbes*, 369 F.3d 579, 583 (1st Cir. 2004) (constitutionally adequate medical care must be on “ a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards”).²

Plaintiff does not seek gender-affirming genital surgery simply because it would be “psychologically pleasing” or would provide a “mere possibility of aiding [her] well-being[.]” Doc. 18 at 11 (cleaned up). She seeks surgery for a far more serious reason: it is the only viable intervention at this stage of her illness when other interventions have proven inadequate. Without surgery, she is suffering greatly and remains at risk of serious harm.

Plaintiff has testified to longstanding disgust with her genitalia stemming from childhood, which has now escalated to clinical levels of distress and a growing desire to self-mutilate. Zayre-Brown Decl., Doc. 13-2 ¶¶ 2, 33-34, 47, 53. It is clear that, even with her other treatments, Plaintiff will not experience relief from her gender dysphoria until she no longer has genitalia inconsistent with her gender identity. *Id.* ¶¶ 48-54. Both DPS providers Dr. Umesi and Dr. Figler prescribed

² In his affidavit, Dr. Penn suggests that determining medical necessity for conditions like gender dysphoria that result in serious mental distress is different than for physical health conditions. He reasons that “there are no objective indicators or metrics” as there are in conditions “such as high blood pressure, diabetes, or glaucoma,” or severe abdominal pain—for which interventions, he concludes, are “unquestionably ‘medically necessary.’” Penn Aff. ¶¶ 62-68. As discussed below, this Court should not credit the testimony of Dr. Penn. Moreover, the Fourth Circuit has rejected the argument that effective treatment for serious mental distress is any less required by the Constitution than such treatment for serious physical distress. *See Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (“We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.”).

gender-affirming genital surgery as treatment for Plaintiff's gender dysphoria. However, their prescribed treatments were blocked by Defendants. This raises an inference that Defendants knew that treatment was medically necessary. *See Jackson v. Lightsey*, 775 F.3d 170, 179 (4th Cir. 2014) (prescription of treatment raises inference that defendant believed that treatment was necessary).

Likewise, all health care providers who have since evaluated Plaintiff agree that her current course of treatment has not adequately alleviated her gender dysphoria, and that nothing short of gender-affirming genital surgery will. In a report to DTARC, Plaintiff's DPS mental health provider observed that despite previous surgeries, hormone therapy, and other gender-affirming care, she "continues to report clinically significant anxiety, depression, and distress associated with her gender dysphoria," and that "the next appropriate step . . . is to undergo trans-feminine bottom surgery." Ettner Decl., Doc. 13-1, at 83.³ Additionally, the endocrinologist to whom DPS referred Plaintiff assessed that gender-affirming genital surgery "is [a] medically necessary part of treatment for this patient. She has been treated with hormones since 2012 and orchiectomy in 2017, with persistent symptoms of gender dysphoria." *Id.* at 86. Following her evaluation of Plaintiff, Dr. Ettner concluded that Plaintiff "cannot resolve the anatomical dysphoria resulting from having male genitalia and a female gender identity and an otherwise female body," that her dysphoria "will continue to intensify, with no means of relief," and thus she "urgently requires gender-affirming genital surgery." Ettner Decl. ¶¶ 89, 90, 92.

³ Citations to records appended to Dr. Ettner's first declaration utilize the ECF-generated pagination.

For these reasons, Plaintiff has not advanced—and need not advance—a novel standard to succeed on her Eighth Amendment claim.⁴ The record and binding precedent demonstrate that gender-affirming genital surgery is medically necessary to treat Plaintiff’s gender dysphoria.

2. The authoritative standards of care for treatment of gender dysphoria apply with equal force in prison.

Defendants downplay Fourth Circuit caselaw regarding the relevant standards of care to assert that “significant dissent within the field” justifies their conduct. Doc. 18 at 15, 17. The argument is meritless.

In citing *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 596 (4th Cir. 2020), Defendants note the Fourth Circuit’s recognition that the “WPATH standards are ‘generally accepted protocols for treatment of [gender dysphoria].’” Doc. 18 at 17 (brackets original). But Defendants neglect to mention that the Fourth Circuit cited the WPATH standards as “the *authoritative* standards of care,” explaining that “[t]here are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.” *Id.* at 595-96 (quoting *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019)) (emphasis added).

Defendants also acknowledge that the Fourth Circuit in *De’lonta* recognized the WPATH standards in the prison context, concluding that failure to evaluate a

⁴ Defendants appear to cite the standard for qualified immunity, which is not at issue here, in claiming that “Plaintiff Cannot Make a Clear Showing of Likelihood of Success on the Merits with No Controlling Precedent or Consensus of Authority in Her Favor.” Doc. 18 at 8. *See, e.g., Booker v. S.C. Dep’t of Corr.*, 855 F.3d 533, 538-39 (4th Cir. 2017). Defendants cite no case indicating that such a showing is required to show a likelihood of success on the merits.

prisoner for gender-affirming surgery could be deliberate indifference. 708 F.3d at 523. But Defendants then illogically dismiss these standards as irrelevant to whether gender-affirming surgery should be *provided* following an evaluation. Defendants rely largely on abstract criticisms of the WPATH standards and their applications in prison to allege “reasonable disagreement in the field” regarding the necessity for gender-affirming surgery. Defendants state that this “disagreement” supports their conclusion as to Plaintiff’s medical needs. Doc. 18 at 15. This argument cannot square with the binding Fourth Circuit precedent,⁵ nor the strong consensus of the medical community.

To dispute the applicability of the WPATH standards here, Defendants rely on the Fifth Circuit’s decision in *Gibson v. Collier*, where the court upheld Texas’s ban on gender-affirming surgery and held that an individualized assessment of a prisoner’s need for such surgery was unnecessary. 920 F.3d 212, 222-23 (5th Cir. 2019). But that same conduct would plainly conflict with *De’lonta*, which held that failure to provide an individualized assessment gives rise to a claim of deliberate indifference. 708 F.3d at 526. Further, *Gibson*’s treatment of the WPATH SOC is an extreme outlier among courts that have addressed this issue. *See, e.g., Flack v. Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1018 (W.D. Wis. 2019) (finding defendants’ contentions that gender-affirming surgery is “inappropriate, unsafe, and ineffective” to be “unreasonable, in the face of existing medical consensus” and rejecting reliance on medical testimony in *Gibson* as outdated); *Edmo*, 935 F.3d at

⁵ Other courts across the country have also endorsed the applicability of the WPATH SOC for the treatment of transgender prisoners. *See* Doc. 14 at 3-4.

795 (explaining why *Gibson* is an “outlier” among courts and the medical community).

Defendants’ own policy, which was drafted with guidance from the WPATH standards, incorporates the requirement for individualized assessment that *De’lonta* mandates, but *Gibson* rejects as unnecessary. Junker Aff. ¶ 6; Doc. 10-1 at 3, 7. Thus, it defies logic to claim that an evaluation of medical necessity is required under the Eighth Amendment, but regardless of the evaluation’s outcome, prisons may deny surgery without violating the Constitution. As discussed in Plaintiff’s other briefing, the other cases Defendants cite for support are inapposite. *See* Doc. 17 at 18-20.

3. Dr. Penn is not qualified to provide expert testimony and his conclusions rest on unreliable methodology.

Defendants rely on an affidavit from Dr. Penn opining that “Plaintiff has received extensive and adequate treatment of her gender dysphoria” and that Defendants’ “determination that the vulvoplasty was not medically necessary as of April 2022, was a reasonable determination.” Penn Aff. ¶¶ 70-71.

At the preliminary injunction stage, this Court has applied a “relaxed” test for expert testimony to assess whether a proffered opinion has “indicia of reliability.” *Parks v. City of Charlotte*, No. 3:17-CV-00670-GCM, 2018 WL 4643193, at *4 (W.D.N.C. Sept. 27, 2018). Here, even under this more forgiving standard, Dr. Penn is unqualified to render an opinion on the necessity of gender-affirming surgery for Plaintiff, and he reaches his conclusions using highly suspect methodology. Therefore, the Court should either exclude his testimony or afford it minimal weight.

Rule 702(a) allows expert testimony if “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or

to determine a fact in issue.” “[G]eneral knowledge, skill, experience, training, or education is insufficient to qualify an expert[.]” *Cooper v. Lab’y Corp. of Am. Holdings, Inc.*, 150 F.3d 376, 380-81 (4th Cir. 1998) (holding that a witness who had “a general knowledge of chemistry” and “experience with breath alcohol testing” was not an expert in “the field of urine alcohol testing”). To qualify as an expert in cases about a specific course of medical treatment, physicians usually must have published relevant peer-reviewed research, given relevant prior expert testimony, or have experience evaluating patients for the treatment at issue. *See, e.g., Kadel v. Folwell*, No. 1:19CV272, 2022 WL 2106270, at *9 (M.D.N.C. June 10, 2022).

Here, Dr. Penn does not claim to have *any* of these qualifications. He has not written any published articles—peer-reviewed or otherwise—on gender dysphoria. Penn Aff. ¶¶ 9-10 & Ex. A, Doc. 18-9, at 9-13. He does not claim to have ever provided expert testimony on the subject. Penn Aff. ¶ 16. Nor does he claim to have any experience evaluating patients for gender-affirming surgery.⁶ *See id.* ¶¶ 5, 15. While Dr. Penn notes that he has some experience treating gender dysphoria, he does not mention how many patients he has treated, what clinical standards guided his practice, or what degree of success he achieved. *See id.* ¶ 15. Dr. Penn is therefore unqualified to opine on the specific issue before the Court: Plaintiff’s individual need for gender-affirming surgery. *See* Ex. 1, Second Expert Declaration of Randi C.

⁶ It is unsurprising that Dr. Penn mentions no experience evaluating patients for gender-affirming surgery, given that he practices predominately within the Texas prison system, for which the Fifth Circuit has upheld a policy imposing a blanket ban on gender-affirming surgery for prisoners. *See Gibson*, 920 F.3d at 228.

Ettner, Ph.D. (“Second Ettner Decl.”) ¶¶ 8-13.

Even assuming that Dr. Penn qualifies as an expert, he must still establish that he used a reliable methodology to reach his conclusions. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001). For several reasons, he cannot.

First, Dr. Penn has not personally examined or interviewed Plaintiff. Dr. Penn’s affidavit contains virtually no discussion of Plaintiff’s individual circumstances—at most, he has reviewed some of Plaintiff’s medical records. Penn Aff. ¶ 23. This alone seriously diminishes the reliability of his opinion approving of Defendants’ treatment decision—an issue that Dr. Penn agrees must involve a rigorous, highly individualized assessment. *See id.* ¶ 31; Ettner Decl. ¶¶ 29, 32; Second Ettner Decl. ¶ 21; *Cooper*, 259 F.3d at 203 (district court properly excluded testimony where doctor did not personally evaluate patient); *Grimm*, 972 F.3d at 596 (observing personalized inquiry necessary for treating gender dysphoria); *Edmo*, 935 F.3d at 769 (observing the same in prison case).

Relatedly, Dr. Penn’s affidavit exclusively addresses hypothetical scenarios about why gender-affirming surgery might be improper for some patients, mostly because of “administrative” or other non-medical considerations. Penn Aff. ¶¶ 35-47. Like Defendants themselves, Dr. Penn never engages with these considerations to explain why gender-affirming surgery is not medically necessary or is otherwise improper for *Mrs. Zayre-Brown*.

For instance, Dr. Penn notes that “[b]ecause correctional agencies are publicly funded, these entities must consider the financial implications associated with

approving certain treatment modalities from the perspective of government leaders such as legislature, public policy leaders, and taxpayers.” Penn Aff. ¶ 44. But there is no evidence that Defendants or Dr. Penn actually considered cost. Moreover, the Eighth Amendment severely constrains their ability to do so. *See Scott v. Clarke*, 64 F. Supp.3d 813, 841 (W.D. Va. 2014) (explaining that “if necessary medical treatment has been delayed for non-medical [*i.e.*, cost-saving] reasons, a case of deliberate indifference has been made out” (brackets original) (quoting *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985))); *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc) (“Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations.”).

Additionally, Dr. Penn notes as relevant “the availability of qualified and willing surgical professionals” to perform vulvoplasty, but does not mention that Plaintiff has already been evaluated by one such surgeon, nor does he indicate that this concern weighs against approving surgery in her specific circumstances. Penn Aff. ¶ 40.⁷ This complete lack of engagement with the circumstances surrounding Plaintiff’s actual medical need renders Dr. Penn’s views not only unreliable, but irrelevant. *See* Second Ettner Decl. ¶ 40.

⁷ Despite his assertion that vulvoplasty is a “highly specialized” procedure, many of the considerations that Dr. Penn cites—such as planning and coordination of transportation, pre-operative tests, custody staff escorts and supervision, and post-operative follow-up—would apply to *any* surgical procedure, not just vulvoplasty. Dr. Penn fails to explain why such considerations would present a problem in Plaintiff’s case in particular, or justify denial of this surgery in particular. *See* Second Ettner Decl. ¶ 29.

Dr. Penn's opinion also appears to rest on the idea that a patient's legitimate need for medical care changes depending on whether she is incarcerated, and relatedly, the idea that "the WPATH standards do not take the correctional context into account[.]" Doc. 18 at 12. Neither contention is true. As a matter of medical practice and common sense, an incarcerated patient needs adequate medical care just like any other patient. Second Ettner Decl. ¶ 15 ("Custodial status is not a medical justification to deviate from accepted standards of care or medically necessary treatment for any medical condition, including gender dysphoria"), *Id.* ¶ 19. And as Dr. Ettner notes, the WPATH standards consider the prison setting by their very text. Ettner Decl. ¶ 30 ("The treatment of incarcerated persons with gender dysphoria has been addressed in the SOC since 1998 the SOC expressly state that all elements of the prescribed assessment and treatment are equally applicable to patients in prison. . . .").

Further, as Dr. Penn acknowledges, "the National Commission on Correctional Health recommends treatment in accordance with the SOC for people in correctional settings." Ettner Decl. ¶ 30; Penn Aff. ¶ 26. And as discussed above, the Fourth Circuit has recognized that the WPATH SOC "represent the consensus approach of the medical and mental health community" in both community and carceral settings. *Grimm*, 972 F.3d at 595 (citing *De'lonta*, 708 F.3d at 522-23). That Dr. Penn's guidance conflicts with the precedent that binds this Court makes his opinion particularly unhelpful.

Dr. Penn also bases his conclusions on a grossly deficient and misleading

review of the scientific literature concerning the necessity and efficacy of gender-affirming surgery. A literature review may be an appropriate part of an expert report. However, the expert must conduct a thorough review in a reliable way. *See Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 472 (M.D.N.C. 2006) (literature review was unreliable because it “relied upon a number of disparate and unconnected studies . . . to reach a piecemeal conclusion”).

Dr. Penn first states that there is no relevant research on gender-affirming surgery in the correctional context. Penn Aff. ¶ 53. But as discussed above, a patient’s incarceration status does not change whether she will continue suffering without a particular course of treatment. Thus, the absence of research “in the correctional setting” has no bearing on whether a denial of gender-affirming surgery will subject Plaintiff to a substantial risk of serious harm. *See* Second Ettner Decl. ¶¶ 15, 19, 31-33.

Dr. Penn then offers a woefully incomplete review of relevant research. As discussed in Dr. Ettner’s declarations, numerous studies show that gender-affirming surgery can be necessary to alleviate a patient’s gender dysphoria when other therapies do not. Ettner Decl. ¶¶ 45-47, 50-57, 62; Second Ettner Decl. ¶ 38. She further discusses how medical organizations in the United States and around the world agree with that conclusion—including organizations of which Dr. Penn is a member. *See* Ettner Decl. ¶ 48 (noting that the American Psychological Association (APA), among others, supports “surgery in accordance with the SOC as medically necessary treatment for individuals with severe gender dysphoria”); Second Ettner

Decl. ¶¶37-38 (discussing same); Penn Aff. ¶¶ 8, 11 (noting contributions to and leadership work in the APA).

Dr. Penn, on the other hand, cites only two articles that he describes as reaching “highly conflicting conclusions.” Penn Aff. ¶¶ 55-59. But these articles fail to support Dr. Penn’s position. *See* Second Ettner Decl. ¶ 37 (noting first article cited by Dr. Penn relies on “questionable methodology” in conflict with “decades of methodologically sound and rigorous scientific research”); *id.* ¶ 39 (noting author of “Swedish Study” has “stated that this research has consistently been ‘mischaracterized’” to support arguments akin to Dr. Penn’s). Though he notes that “[t]here are multiple other studies on the topic,” he fails to provide a bibliography or any other reference to such works. *Id.* ¶ 59 n.10. Such a cursory, highly selective literature review is inherently unreliable. *See Doe*, 440 F. Supp. 2d at 472; *see also McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1255 (11th Cir. 2005) (district court should have excluded expert testimony because “the medical literature does not support such opinions” and doctor “has simply substituted his own *ipse dixit* for scientific proof”).

Accordingly, the Court should afford Dr. Penn’s opinion little or no weight in deciding Plaintiff’s motion.

4. In lieu of providing justification for Defendants’ medical decision-making, Dr. Penn and Dr. Boyd make baseless criticisms of Dr. Ettner’s report.

Instead of addressing whether gender-affirming surgery is necessary for Plaintiff given her circumstances, Defendants and their affiants focus on criticizing

Dr. Ettner's declaration. These attacks are baseless.

In addition to the affidavit of Dr. Penn, Defendants submit the affidavit of Dr. Sara Boyd. It is unclear if Defendants proffer Dr. Boyd as an expert—unlike Dr. Penn, she does not claim to have been engaged as such. In any event, Dr. Boyd's opinions are entitled to minimal weight for the same reasons as Dr. Penn's: she has not evaluated Plaintiff; says nothing about whether gender-affirming surgery is necessary for Plaintiff; and claims no relevant peer-reviewed publications, prior expert testimony, or evaluations of patients for gender-affirming surgery. *See Boyd Aff.* ¶ 4 & Ex. A, Doc. 18-7, at 7-8; *see also* Second Ettner Decl. ¶¶ 45-50. Further, like Defendant Junker and Dr. Penn, Dr. Boyd does not mention the evaluations conducted by DPS providers and specialists to whom DPS referred Plaintiff for care, despite noting that she reviewed Plaintiff's records to prepare her affidavit. *Id.*

Defendants and their affiants criticize Dr. Ettner for failing to include an “exploration . . . regarding Plaintiff's repeated desire for a vaginoplasty (as opposed to the vulvoplasty she now seeks),” asserting that “[a] comprehensive evaluation of the appropriateness of the requested intervention at present should have included an exploration of how the Plaintiff's decision to opt for the vulvoplasty instead of the vaginoplasty . . . affects her expectations.” *See* Doc. 18 at 19, *Boyd Aff.* ¶¶ 7-11; *Penn Aff.* ¶ 41. The assertion that Dr. Ettner did not explore these topics is incorrect. *See* Second Ettner Decl. ¶ 56 (noting discussion of vulvoplasty to alleviate “persistent, severe gender dysphoria” as a result of Plaintiff's “constant, visible primary sex characteristic that is incongruent with her gender”).

Nevertheless, both Dr. Boyd and Dr. Penn fail to explain how this “exploration” should affect whether gender-affirming surgery is medically necessary for Plaintiff. Dr. Boyd and Dr. Penn ignore that Defendants had already denied Plaintiffs request for vaginoplasty, claiming that it was not medically necessary and that the prison could not provide “proper post operative care.” Ettner Decl. at 91; Second Ettner Decl. ¶ 60. They also ignore that, after finally receiving a consultation with experts in gender-affirming surgery, Plaintiff was counseled twice about her surgical options, and decided on vulvoplasty in consultation with these experts.⁸ Zayre-Brown Decl. ¶¶ 36-37; Second Ettner Decl. ¶¶ 25-26, 53, 55, 57, 60 (noting Plaintiff’s discussion of surgical expectations and informed consent with Dr. Figler, her would-be surgeon). Plaintiff’s willingness to move forward with a vulvoplasty following these consultations undermines Defendants’ claim that this case is nothing more than a complaint from Plaintiff that she is being refused the treatment of her “choice.”

Dr. Boyd also criticizes Dr. Ettner for not discussing two instances in 2019 when Plaintiff was sent to the emergency room and suspected of using an illicit substance while housed in men’s facilities, claiming that these instances indicate there may be “additional contributory causes” or “co-occurring mental health conditions” other than gender dysphoria that may be contributing to Plaintiffs

⁸ Dr. Boyd additionally critiques Dr. Ettner for failing to conduct “collateral interviews of . . . other individuals who could provide observations of Plaintiff’s history, symptoms, and response to prior interventions.” Boyd Aff. ¶ 7. Such interviews would be impracticable under the circumstances. *See infra* p. 23. But more importantly, Dr. Boyd provides no support that such interviews are typical or necessary in “the evaluation of gender-dysphoria and need for gender affirming surgery for an adult woman” or for “any other medical condition or procedure.” Second Ettner Decl. ¶ 54.

distress. Boyd Aff. ¶ 13.

As an initial matter, Dr. Boyd acknowledges that “that there were no positive drug test results or contraband recovered . . .” *Id.* ¶ 12; *see also* Mingo Aff. ¶¶ 15-19. But regardless, Dr. Boyd fails to explain how suspected “substance abuse” in 2019—with no documented recurrences in the nearly three years since—has any bearing on Plaintiff’s need for gender-affirming surgery *now*. Further, Dr. Boyd again fails to acknowledge the facts in the medical records that she claims to have reviewed: Dr. Ettner is not the only mental health professional that has concluded Plaintiff has no co-occurring mental health conditions. Ettner Decl. ¶ 79; Second Ettner Decl. ¶ 61. The April 26, 2022 summary that accompanied DTARC’s denial of gender-affirming surgery as not medically necessary also noted that Plaintiff’s medical records “indicated no current evidence of any significant comorbid mental health issues.” Doc. 18-5 at 2.

Most perplexingly, Dr. Boyd and Dr. Penn criticize Dr. Ettner for failing to “discuss relative benefits or disadvantages of pursuing [surgery] in the community versus while incarcerated,” given that prison exacerbates her feelings of gender dysphoria. Boyd Aff. ¶¶ 15-16; Penn Aff. ¶ 47. Dr. Boyd notes that, in addition to better post-operative care, the “[m]ixed gender community setting[]” outside of prison would provide “more opportunity to seek support, information, and guidance,” offering “significant psychosocial advantages for amelioration of Plaintiff’s gender dysphoria.” Boyd Aff. ¶ 16. Dr. Penn similarly notes that “[s]urgery in the community typically carries numerous interpersonal and social benefits over surgery in the

correctional setting.” Penn Aff. ¶ 47.

But Plaintiff has made clear that the main source of her gender dysphoria, both in prison and elsewhere, is her genitalia. Zayre-Brown Decl. ¶¶ 2, 14, 53-54; *see also* Ettner Decl. at 83 (noting that, while Plaintiff’s adjustment to incarceration has improved since transferring to a women’s facility, “it seems to have made her more aware and dysphoric about the one part of her body that does not affirm her gender identity”). While leaving prison may ameliorate Plaintiff’s gender dysphoria or provide a more comfortable environment to recover from surgery, that will not happen until November 2024. Defendants do not suggest that release is an available treatment option at this time. As Dr. Ettner notes, “[t]here are no benefits in such a lengthy delay, especially given how long [Plaintiff] as sought and required surgery.” Second Ettner Decl. ¶24. Rather, “such a delay would perpetuate [Plaintiff’s] acute distress and pose ongoing risks to her mental and physical health” *Id.*

For the rest of Plaintiff’s incarceration, her health is Defendants’ responsibility. Numerous medical conditions may be worsened by incarceration, but that does not obviate a prison’s responsibility to prevent needless suffering and harm. *See, e.g., Adams v. Ferguson*, 884 F.3d 219, 228 (4th Cir. 2018) (deliberate indifference where defendant “declines to intervene to prevent a known substantial risk . . . of suffering serious harm.”) (cleaned up). And Defendants cite no law to support their view that a prison can withhold medically necessary care for more than two years because providing that care may be more comfortable or provide greater benefit

outside of a carceral setting.⁹ In fact, the law dictates the opposite: “Prison staff cannot bide their time and wait for an inmate’s sentence to expire before providing necessary treatment” without violating the Eighth Amendment. *Mitchell v. Kallas*, 895 F.3d 492, 496 (7th Cir. 2018).

Accordingly, Dr. Boyd and Dr. Penn’s criticisms of Dr. Ettner are baseless.

B. Defendants confirm that they have consciously disregarded the substantial risk of irreparable harm Plaintiff faces without immediate relief.

By Defendants’ own telling, they have not meaningfully altered Plaintiff’s course of medical treatment for gender dysphoria since June of 2018. Doc. 18 at 4-5. Although hormone therapy remains necessary to maintain Plaintiff’s basic functioning post-orchietomy, she is now hormonally confirmed—hormone therapy will not provide any further alleviation of her gender dysphoria. Ettner Decl. ¶86 (noting that Plaintiff now has hormone levels “typical for females” and “the secondary sex characteristics of a woman”). Still, her severe emotional distress and desire to self-mutilate persist and worsen. Any competent physician would conclude that this initial course of treatment is no longer adequate. And “[g]overnment officials who ignore indications that a prisoner’s . . . initial medical treatment was inadequate can be liable for deliberate indifference to medical needs.” *Cooper v. Dyke*, 814 F.2d 941,

⁹ The “nearness” of Plaintiff’s release date to the time of this lawsuit is the result of Defendants’ delays in considering Plaintiff medically necessary care. See Doc. 14 at 7 (noting first formal request for gender-affirming surgery in December 2018). Defendants cannot delay care for more than three years and then cite to the “closeness” of a release date more than two years in the future as a reason for denying surgery. Far from supporting their position, Defendants’ apparent “run-out-the-clock” strategy strongly supports a finding of deliberate indifference.

945 (4th Cir. 1987).

To maintain that this medical treatment is adequate, Defendants attempt to contradict, explain away, or ignore Plaintiff's documented distress, attempts of self-harm, and suicidal ideation. But in the end, there can be no "material disagreement about the facts," Doc. 18 at 21, as the medical records available to all parties demonstrate the severe distress to which Plaintiff has testified in her declaration. Defendants' "disagreement" represents, at best, willful ignorance in an attempt to evade liability.

For instance, Defendants urge that "Plaintiff does not link her distress to the surgery denial" but rather that her dysphoria stems from transphobic comments and "the sharp segregation of the sexes." Doc. 18 at 22. Plaintiff's testimony shows otherwise. Zayre-Brown Decl. ¶¶ 26-27, 29, 33, 45, 52-54. Defendants disregard the testimony and records that reflect that the transphobic comments Plaintiff finds most distressing are those relating to the fact that she still retains her unwanted genitalia, *see* Zayre-Brown Decl. ¶ 33; Second Ettner Decl. App. at 1-2, and that "the sharp segregation of the sexes" exacerbates her dysphoria by reminding her of "the one part of her body that does not affirm her gender identity," Ettner Decl. at 83.

Alarming, Defendants seem to contend that Plaintiff cannot show deliberate indifference because she has not attempted or successfully inflicted self-harm. *See* Doc. 18 at 9-10, 22. As an initial matter, this is factually incorrect. Dr. Ettner notes in her second declaration that, while only documented desires of self-harm led to her hospitalization in December 2020, Plaintiff's medical records reflect an incident in

which she arrived to a mental health appointment with a band tied around her genitals that had been in place for over a week. Plaintiff agreed to remove the band after being “cautioned about the effects of impeding blood flow and risk of infection” and being reassured that scheduling for her consult for gender-affirming surgery was in progress. Second Ettner Decl. ¶ 5 & App. at 5.

However, even if Plaintiff had not attempted to self-mutilate, her ongoing desire to do so is well-documented, and apparently not disputed by Defendants. *See* Second Ettner Decl. ¶¶ 5-6 & App. at 1-10; *id.* ¶ 44 (noting “inadequately treated gender dysphoria leads inexorably to . . . emotional decompensation, surgical self-treatment . . . or suicide” and that these outcomes are “not uncommon in prison settings”). To the extent Defendants assert that anything short of an actual attempt at self-harm cannot expose them to Eighth Amendment liability, that assertion is incorrect. “[I]t is inconsistent with the Eighth Amendment for a prison official to withhold treatment from an inmate who suffers from a serious, chronic disease until the inmate’s condition significantly deteriorates.” *Gordon v. Schilling*, 937 F.3d 348, 359 (4th Cir. 2019).

II. The balance of the equities and public interest weigh in Plaintiff’s favor.

As discussed *supra* Section I.B., Defendants know of the risks Plaintiff faces absent relief from this Court. The deprivation of Eighth Amendment rights that Plaintiff has suffered, and the severe and ongoing emotional distress that follows, constitute irreparable harm sufficient to warrant a mandatory injunction. *See* Doc. 14 at 22; *Porter v. Clarke*, 290 F. Supp. 3d. 518, 534 (E.D. Va. 2018) (noting that the

“emotional and psychological harm” underlying an Eighth Amendment violation is itself “paradigmatic irreparable harm.”). Defendants’ arguments to the contrary are baseless, and their asserted “harms” are illusory by comparison.

Defendants argue that “Plaintiff’s two-month delay in filing for preliminary injunctive relief after bringing this lawsuit weighs against granting the relief,” claiming that it demonstrates a lack of urgency. Doc. 18 at 22. But this delay was caused entirely *by Defendants*. Plaintiff’s counsel arranged for Dr. Ettner to visit Anson CI to evaluate Plaintiff on March 30, 2022, nearly a month before filing suit. Ex. 2, Declaration of Jaclyn Maffetore (“Maffetore Decl.”) ¶¶ 3-4. This visit was ultimately denied by Anson CI following consultation with DPS counsel, and Plaintiff’s counsel was informed that no such visit would be approved without a pending lawsuit. Maffetore Decl. ¶¶ 10-16. On May 2, 2022, two business days after filing the complaint, Plaintiff’s counsel again sought to schedule an in-person visit, or alternatively an evaluation by videoconference. Maffetore Decl. ¶ 19, 21. However, given DPS’s refusal to allow an evaluation before filing the complaint, the purported lack of technological capability for a videoconference, and the scheduling constraints imposed by DPS, Dr. Ettner could not evaluate Plaintiff until May 25, 2022. Maffetore Decl. ¶¶ 20, 22-26. It was hardly unreasonable, then, that Plaintiff could not file a preliminary injunction motion until one month later given the time required for Dr. Ettner to prepare her expert report and for Plaintiff to finalize her brief relying on it.

Moreover, the public interest strongly weighs in favor of upholding the constitutional rights at issue in this case. Defendants contend that the public “has a

strong interest in the proper use of public funds.” Doc. 18 at 22-23. But it is undoubtedly a proper use of public funds to provide incarcerated people the medically necessary health care required by the Constitution. *See* Doc. 14 at 23. Defendants argue that “changing” or “loosening” the standard for medical necessity would expose DPS to an excessive financial burden; but, as detailed *supra* Plaintiff has advocated for nothing of the sort. Rather, she asserts that gender-affirming genital surgery is medically necessary for her under longstanding Eighth Amendment precedent.¹⁰

However, to the extent that Defendants argue against preliminary relief because it might require them to provide medically necessary care to other transgender prisoners suffering from gender dysphoria, this is not a “harm” recognized by the Constitution. *See Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) (“vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them”). Instead, what Defendants have articulated is their existing constitutional obligation. *See supra* p. 12; *see also Edmisten v. Werholtz*, 287 Fed.Appx. 728, 734 (10th Cir. 2008) (noting that even medical care amounting to “substantial burden” on prison’s resources would not be “misplaced or undue” if required by the Constitution).

Even if this Court’s order prompts Defendants to provide greater care to other gender-dysphoric transgender patients, Defendant Junker concedes that these

¹⁰ Defendants’ argument that a “lack of clear limits and protocols” to treat gender dysphoria would add to the hypothetical burden they identify is also unavailing. As many circuit courts recognize, the WPATH SOC, which Defendants considered in crafting their policy, do provide protocols for treatment, *see supra* Section I.A.2, Defendants have simply chosen to selectively disregard them.

individuals represent a small percentage of the total prison population. *See Junker Aff.* ¶ 12 (noting only 128 individuals self-identified as transgender or intersex in DPS custody). That is especially so compared to the percentage of prisoners suffering from other serious medical conditions that Defendants must treat. *See, e.g. Gordon*, 937 F.3d at 351 (noting that roughly between “16% to 41% of incarcerated individuals” are affected by hepatitis C). Further, Defendants cannot claim harm from providing a medical treatment that their own policy contemplates may be necessary for some patients.¹¹ *See Doc. 10-1 at 7.*

In short, Plaintiff’s life is at risk without gender-affirming surgery. Ordering that Defendants provide her this care, by contrast, simply requires them to adhere to their existing constitutional obligation and their own policy. The balance of equities and public interest therefore weigh strongly in her favor.

CONCLUSION

This Court should enter a preliminary injunction enjoining Defendants to provide Plaintiff with medically necessary gender-affirming surgery as soon as possible.

Dated: August 2, 2022

Respectfully submitted,

¹¹ Defendants state, without explanation, that this Court should deny the requested relief because of “the potential for abuse.” Doc. 18 at 24. If by “abuse,” Defendants mean to suggest malingering, this concern is mitigated by the requirement for qualified medical providers to make individualized assessments and prescribe those treatments considered medically necessary.

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CERTIFICATE OF SERVICE

I certify that on August 2, 2022, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will effect service on all counsel of record.

Dated: August 2, 2022

Respectfully submitted,

/s/ Jaclyn A. Maffetore

Jaclyn A. Maffetore

Counsel for Plaintiff

EXHIBIT 1

Second Expert Declaration of
Dr. Randi C. Ettner, Ph.D.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

KANAUTICA ZAYRE-BROWN,
Plaintiff,

v.

THE NORTH CAROLINA
DEPARTMENT OF PUBLIC SAFETY,
et al.,

Defendants.

No. 3:22-cv-00191

**SECOND EXPERT DECLARATION OF RANDI C. ETTNER, PH.D., IN
SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

1. I am a clinical and forensic psychologist retained by counsel for Plaintiff Kanautica Zayre-Brown. I have expertise and decades of experience in the diagnosis and treatment of gender dysphoria, more fully set out in my initial declaration in this matter. *See* Declaration of Dr. Randi Ettner, Ph.D., ECF No. 13-1 (“Ettner Decl.”). I am providing this second declaration primarily to address some of the statements, opinions, and conclusions made by Joseph Penn, MD and Sara Boyd, Ph.D., ABPP in their affidavits submitted by Defendants in this matter. *See* Affidavit of Joseph Penn, ECF No. 18-8 (“Penn Aff.”); Affidavit of Sara Boyd, ECF No. 18-6 (“Boyd Aff.”). This declaration is based on my review of those affidavits, Dr. Penn’s curriculum vitae (ECF No. 18-9), Dr. Boyd’s curriculum vitae (ECF No. 18-7), the complaint in this matter (ECF No. 1), my review of Mrs. Zayre-Brown’s North Carolina Department of Public Safety’s (“DPS”) medical records, my clinical interview and assessment of Mrs.

Zayre-Brown, my decades of clinical experience in the evaluation, diagnosis, and treatment of individuals suffering from gender dysphoria, and the relevant literature on these topics.

2. As an initial matter, I will first clarify what has been identified as an inaccuracy in my initial declaration, surrounding the events of Plaintiff's hospitalization in December 2020, and to clarify my understanding of Plaintiff's history of self-injurious thoughts and behaviors in general. A selection of the specific medical records upon which I rely for this clarification are attached to this declaration as an Appendix.

3. In stating that Mrs. Zayre-Brown's December 2020 hospitalization resulted from "her attempt to amputate her penis," Ettner Decl. ¶ 78, I inadvertently conflated the facts of two separate incidents. The medical records pertaining to the December 2020 incident indicate that Mrs. Zayre-Brown was hospitalized after vocalizing suicidal ideation and a desire, rather than an attempt, to amputate her penis, following an incident in which her gender dysphoria was exacerbated. *See App.* at 1-2.

4. However, Mrs. Zayre-Brown's medical records also note an incident in April of 2021 in which she informed her DPS mental health care provider that she had a band tied around her penis that had been in place for more than a week due to increased dysphoria from the lack of gender-affirming surgical care. *App.* at 5. The record of this incident indicates that Mrs. Zayre-Brown's mental health care provider convinced Mrs. Zayre-Brown to remove the band after cautioning her "about the

effects of impeding blood flow and risk of infection,” and reassuring her that scheduling for her consult for gender-affirming surgery was in progress. *Id.* Based on the records, no hospitalization occurred following this incident.

5. As I noted in my initial declaration, my evaluation of Mrs. Zayre-Brown led me to conclude that she is currently struggling with thoughts of auto-penectomy as a result of her intensifying gender dysphoria. Ettner Decl. ¶ 89. Mrs. Zayre-Brown’s medical records indicate that, in addition to the incident described above, she has expressed such thoughts to her DPS mental health care providers on multiple occasions since her December 2020 hospitalization. *See App.* at 3, 7-8.

6. Consideration of these records contributed to my conclusion that Mrs. Zayre-Brown urgently requires gender-affirming genital surgery, *see Ettner Decl.* ¶ 92. As noted below, there is no indication that either Dr. Penn or Dr. Boyd considered these records in formulating the deeply flawed opinions in their affidavits.

A. Affidavit of Dr. Joseph Penn, MD

7. Having reviewed Dr. Penn’s affidavit in full and his curriculum vitae, Dr. Penn’s flawed opinions can likely be primarily attributed to his evident inexperience and lack of expertise in the evaluation, diagnosis, and treatment of gender dysphoria, specifically gender-affirming surgery treatment protocols for the treatment of gender dysphoria. While Dr. Penn proffers various qualifications, Penn Aff. ¶¶ 1-22, to suggest that he is qualified to render his expert opinions on these topics, *id.* ¶¶ at 22-23, and his conclusions, *id.* ¶¶ at 69-71, I respectfully but strongly disagree that he is qualified to offer expert opinions on these subjects. I further

respectfully but strongly disagree with his primary conclusions that the carceral setting somehow factors into the medical necessity criteria for gender-affirming surgery for the treatment of gender dysphoria, that gender-affirming surgery is not medically necessary for the treatment of gender dysphoria, and that gender-affirming vulvoplasty is not medically necessary for the treatment of Mrs. Zayre-Brown's gender dysphoria. I will first address Dr. Penn's lack of expert qualifications on the relevant subject-matter at hand and then his statements, opinions, and conclusions, in turn.

8. Regarding Dr. Penn's qualifications as an expert in this subject-matter, I first note that Dr. Penn has never published on the topic of gender dysphoria or the psychological or medical treatment of gender dysphoria. *See* Penn Aff. ¶ 9. Additionally, Dr. Penn has never been found qualified to serve as an expert witness, served as an expert witness, or given expert testimony on these topics in any court proceedings. *See id.* at ¶ 16. In examining Dr. Penn's asserted qualifications on these topics, there appears to be a high-level of generality, lack of specificity, and notable deficiencies. I will identify a few illustrative examples.

9. In describing his experience in treating transgender patients, Dr. Penn repeatedly offers examples of experience treating transgender patients with and *without* gender dysphoria. *Id.* at ¶¶ 5, 6, 9, 13-14. For transgender patients without gender dysphoria, it appears the treatments he has provided, supervised, provided consultations for, and made recommendations for include treatments like psychotropic medications and therapy for other diagnoses. *Id.* at ¶ 5. Dr. Penn's

experience treating transgender patients without gender dysphoria is irrelevant and does not support his qualifications to render expert opinions on the evaluation, diagnosis, and treatment of gender dysphoria or the medical necessity of gender-affirming surgery. Further, it is notable that he offers no total or approximate number of transgender patients in whose treatment he has been involved, whether it was direct clinical treatment and the scope, and most importantly, no figure for how many of the patients he has treated that had gender dysphoria nor how many patients he has evaluated for gender-affirming surgery.

10. Dr. Penn points to specialized clinical training in the evaluation and treatment of transgender populations under the supervision of Dr. Walter Meyer. *Id.* at ¶ 13. While I agree that Dr. Meyer was a well-respected leader in the field of health care for transgender people, I must point out that Dr. Penn again provides no specificity as to what this clinical training involved, when this clinical training occurred, how long the clinical training lasted, the number of transgender patients with gender dysphoria he treated, or similar important details. Nor does Dr. Penn list this specialized clinical training on his curriculum vitae, where one might expect to find these details. *See* ECF No. 18-9.

11. Like the deficiencies in Dr. Penn's clinical experience in the treatment of gender dysphoria, Dr. Penn is also vague regarding his knowledge of the treatment protocols and the relevant literature for the treatment of gender dysphoria. Dr. Penn states, "I am familiar with mental health and psychiatry best practices, including in the evaluation and treatment of gender dysphoria[.]" Penn Aff. ¶ 9; *see also id.* at

¶ 13. It is important to note that mental health and psychiatric treatments are components of accepted treatment protocols for gender dysphoria, but central here is the surgical treatment of gender dysphoria. Dr. Penn has also provided no bibliography to identify what literature he has relied upon to form his statements, opinions, and conclusions. Based on Dr. Penn's asserted qualifications in his affidavit and curriculum vitae, it is unclear to me to what degree, if any, Dr. Penn is familiar with the surgical treatment options and protocols for the treatment of gender dysphoria.

12. Finally, many of the qualifications and experiences that Dr. Penn identifies to support his expert qualifications on the treatment of gender dysphoria, have nothing directly to do with gender dysphoria, treatment protocols for gender dysphoria, or even incarcerated transgender patients in general. *Id.* at ¶¶ 1-4, 7-8, 10-12, 16-19.

13. Dr. Penn's affidavit and curriculum vitae clearly demonstrate that he has a great deal of education, professional experience, and specialized knowledge in many subsets in the fields of psychiatry, psychology, and mental health care. But they do not demonstrate that he has any specialized expertise, experience, or knowledge in the evaluation, diagnosis, and treatment of gender dysphoria, and gender-affirming surgery treatment protocols for the treatment of gender dysphoria, required to competently render the expert opinions and conclusions that he does. Dr. Penn's qualifications, or lack thereof, actually demonstrate the exact opposite.

14. I will first address Dr. Penn's premise that the carceral setting somehow factors into the medical necessity criteria for gender-affirming surgery for the treatment of gender dysphoria and/or necessitates different standards of care. Dr. Penn notes "that there are currently no published national correctional standards or correctional health standards concerning the policies and/or protocols for the evaluation, treatment, or clinical management of transgender individuals with or without gender dysphoria in the carceral setting." Penn Aff. ¶ 24. This is of no consequence, but it is important to point out because it underscores the primary flaw in almost all of Dr. Penn's purported expert opinions and conclusions.

15. Dr. Penn's premise is that an individual's medical condition and treatment of that condition are somehow different *solely* because of their custodial status. Even more troubling are the notions that medical treatment must be dictated by custodial status and that custodial status can be a justification not to provide recognized medically necessary treatment. Dr. Penn is wrong. Custodial status is not a medical justification to deviate from accepted standards of care or medically necessary treatment for any medical condition, including gender dysphoria, and there is no need for separate "published national correctional standards or correctional health standards" for the medical treatment of gender dysphoria, because those standards are the same whether a person is in custody or not. Ettner Decl. ¶ 30. I am aware of no medical condition that requires deviation from accepted treatment protocols simply because a person is incarcerated and no treatment protocol that is rendered not medically necessary solely because the patient is incarcerated.

16. If Dr. Penn is in search of nationally accepted treatment protocols for the treatment of gender dysphoria, including gender-affirming surgery, he need look no further than the World Professional Association for Transgender Health Standards of Care (“WPATH SOC”) and the endorsement of those standards of care by almost every mainstream medical and professional association in the United States, including the American Medical Association, the American Psychiatric Association, the American Psychological Association, The Endocrine Society, the American Academy of Pediatrics, and the National Commission on Correctional Health Care, which expressly cites to the WPATH SOC as accepted standards of care in their 2020 Position Statement on “Transgender and Gender Diverse Health Care in the Correctional Setting.”¹

17. Dr. Penn devotes a great deal of time articulating what he describes as “[u]nique [c]onsiderations in the [c]orrectional [s]etting” and suggests I did not “meaningfully” consider these unique considerations in my declaration and/or evaluation of Mrs. Zayre-Brown. Penn Aff. ¶¶ 35-47. Again, Dr. Penn is wrong. First, Dr. Penn apparently misunderstands the purpose and scope of the evaluation that I conducted. Second, Dr. Penn apparently misunderstands the interdisciplinary nature of the treatment for gender dysphoria, including evaluations and recommendations for gender affirming surgery for the treatment of gender dysphoria. Again, both misunderstandings are likely attributable to his lack of expertise.

¹ NCCHC Position Statement, *Transgender and Gender Diverse Health Care in Correctional Settings* (2020), <https://www.ncchc.org/transgender-and-gender-diverse-health-care-in-correctional-settings-2020/>.

18. While I disagree, for the sake of relevancy and clarity, I need not address Dr. Penn's flawed assertions in paragraphs 32-38 of his affidavit because as he acknowledges, those examples "concern housing considerations, which I understand are not at issue in this phase of the litigation[.]" *Id.* at ¶ 39. However, Dr. Penn yet again states the deeply flawed premise that "custody, housing and classification determinations and other custody related considerations, that are unique to the correctional setting, must also be seriously considered with regard to any other interventions, including medical (hormonal treatments) and/or surgical interventions." *Id.* Specifically, Dr. Penn identifies the following considerations that he insists must be considered when assessing surgical intervention for an incarcerated transgender person: a person's "legal or criminal history," *id.* at ¶ 37, "disciplinary history," *id.*, and the "trauma and victimization histories" of other incarcerated persons with whom the patient is housed. *Id.* at ¶ 38.

19. I must again emphatically state that an individual's custodial status, housing status, and/or security classification are not *medical justifications* to deny medically necessary care, including surgical care, for the treatment of gender dysphoria or any other medical condition that I am aware of. I am aware of no literature that supports Dr. Penn's positions, nor has he provided citations to any such literature.

20. Dr. Penn states this proposition generally but does not go into any detail in his affidavit on how exactly these specific factors affect the medical necessity of or the provision of gender affirming surgery for the treatment of gender dysphoria to an

incarcerated person. Instead, Dr. Penn quickly moves on to other more traditional surgical considerations. *Id.* at ¶ 39. Dr. Penn then discusses unique considerations related to his understanding of vulvoplasty. *Id.* at ¶ 40. Again, where these understandings come from is unclear based on Dr. Penn’s education, background, and professional experience in his affidavit and curriculum vitae. Dr. Penn then states multiple times that my declaration does not appear to “meaningfully address these numerous important issues or considerations” relating to vulvoplasty. *Id.* at ¶¶ 40-43, 45-47.

21. Before explaining why Dr. Penn is yet again wrong, I make the following important observations: Dr. Penn says that, in preparing his declaration, he reviewed Mrs. Zayre-Brown’s medical and mental health records but does not specify which records, nor attach any records in support of his statements, opinions, or conclusions. *Id.* at ¶ 23. Dr. Penn did not evaluate Mrs. Zayre-Brown and offers no justification as to why an evaluation was unnecessary to reach his conclusions. Dr. Penn fails to address both the health records from the DPS providers supporting and/or recommending gender-affirming surgery for Mrs. Zayre-Brown and the health records from Dr. Brad Figler—the UNC Urologist, founder and director of the UNC Transgender Health Program, and the specialist in gender-affirming genital surgical care, including gender-affirming vaginoplasty and vulvoplasty, to whom DPS referred Mrs. Zayre-Brown for evaluation for gender-affirming surgery.

22. Before I briefly outline why Dr. Penn is wrong when he repeatedly asserts that I did not meaningfully consider numerous important surgical

considerations, it is important to first address the issue of Dr. Penn failing to understand the interdisciplinary nature of the treatment of gender dysphoria and the roles of different providers in the treatment of gender dysphoria, specifically around recommendations for gender-affirming surgery. Dr. Penn notes that Mrs. Zayre-Brown has received “extensive” treatment for her gender dysphoria (though we disagree about the adequacy of that treatment). *Id.* at ¶ 71. While in DPS custody Mrs. Zayre-Brown has sought and advocated for psychotherapy, social transition, hormone therapy, and gender-affirming surgery for the treatment of her gender dysphoria. Ettner Decl. ¶¶ 80-81, 88. I have reviewed records related to her hormone therapy and psychotherapy for the treatment of gender dysphoria. Additionally, I reviewed Mrs. Zayre-Brown’s records from Dr. Brad Figler and the UNC Transgender Health Program.

23. Dr. Penn is wrong when he says that I did not meaningfully consider Mrs. Zayre-brown’s psychiatric/mental health stability. Penn Aff. ¶¶ 39-40. On top of reviewing her DPS mental health and medical records, I conducted my own clinical and psychometric assessment of Mrs. Zayre-Brown. Ettner Decl. ¶¶ 76-82. Dr. Penn is wrong when he says that I did not assess the effectiveness of alternative non-surgical interventions. In both my evaluation and Mrs. Zayre-Brown’s DPS mental health and medical records, there is detailed history and discussion of Mrs. Zayre-Brown receiving other accepted treatments for gender dysphoria, namely, social transition, hormone therapy, and psychotherapy and counseling. Further there is

detailed history and discussion of why those treatments have not been effective and her ongoing symptomology.

24. Dr. Penn is wrong when he says that I did not meaningfully consider the potential benefits of postponing surgery until after Mrs. Zayre-Brown's projected release date, over two years from now. Penn Aff. ¶ 47. There are no benefits in such a lengthy delay, especially given how long Mrs. Zayre-Brown has sought and required surgery, and such a delay would perpetuate Mrs. Zayre-Brown's acute distress and pose ongoing risks to her mental and physical health, as documented in my evaluation and her DPS mental health and medical records.

25. Dr. Penn further asserts that I did not meaningfully consider these additional following factors: the availability of qualified in-state surgeons with competence and expertise in vaginoplasty and gender-affirming genital surgery, attainment of fully informed consent by Mrs. Zayre-Brown, patient surgical and surgeon satisfaction, risks of anesthesia and surgery and post-surgical complications, pre-operative procedures, post-operative care, and costs of the procedure. *Id.* at ¶¶ 39-40. Dr. Penn is wrong on all accounts. First, many of these considerations are for primary discussion with the surgeon, based on the interdisciplinary nature of the provision of gender-affirming surgery. These erroneous assertions only further highlight Dr. Penn's lack of expertise. Mrs. Zayre-Brown was referred, by Defendants, to a highly qualified in-state surgeon at a well-respected university-based hospital system, who founded and directs a specialty program for the provision of gender-affirming care and surgeries for the treatment of gender dysphoria, with specialized

training in gender-affirming genital surgery. Dr. Figler agreed to consult with Mrs. Zayre-Brown, evaluated her, recommend gender-affirming genital surgery, and agreed to perform the surgery following agreed upon pre-surgical weight loss, which Mrs. Zayre-Brown accomplished. Ettner Decl. at 76-82.

26. Additionally, in the records from Mrs. Zayre-Brown's consultation with Dr. Figler, it states that Dr. Figler and Mrs. Zayre-Brown discussed the following: the surgical options and techniques in detail, pre-operative and post-operative management, and a detailed discussion of the numerous surgical risks. In addition, Mrs. Zayre-Brown was provided with an informational packet from Dr. Figler related to gender-affirming genital surgery. *Id.* at 76-77. Further, Dr. Figler conducted his own medical and mental health historical evaluations, including an assessment of the WPATH criteria for gender affirming genital surgery; conducted a physical; and examined previous laboratory work, among other things. *Id.* at 76-82.

27. Given that these facts are documented in her DPS medical records and that Mrs. Zayre-Brown is now in litigation in order to have surgery with Dr. Figler, it is curious that Dr. Penn suggests that I did not meaningfully consider these factors and that informed consent was not fully assessed. If Dr. Penn is questioning Dr. Figler's qualifications, expertise, evaluation, or willingness to operate on Mrs. Zayre-Brown, then he could raise these considerations with DPS. It appears that DPS had no issues referring Mrs. Zayre-Brown to Dr. Figler, given his expertise in the surgical treatment of gender dysphoria and providing gender-affirming surgical care.

28. Dr. Penn continues expressing a laundry list of concerns over various considerations that he feels were not considered in the multiple evaluations of Mrs. Zayre-Brown by myself, Dr. Figler, and the multiple DPS providers that evaluated Mrs. Zayre-Brown and supported and/or recommended gender-affirming surgery for the treatment of her gender-dysphoria. Penn Aff. ¶¶ 40-47. I will not spend additional time addressing each and every incorrect assertion Dr. Penn makes regarding mainly irrelevant considerations. Just like the incorrect assertions and irrelevant considerations that I have identified thus far, my qualifications, first declaration, evaluation, and Mrs. Zayre-Brown's medical and mental health records from other providers refute all of them.

29. I will note specifically, however, that Dr. Penn appears to be dissatisfied that the following considerations were not accounted for in my declaration: surgical cost, transportation to the surgeon's office, pre-operative bloodwork and other testing like an EKG, pre-operative bowel preparation and fasting coordination, prison staff escorts and supervision, any trepidation from Dr. Figler and/or his staff regarding DPS staff being onsite during and after the surgery, post-operative appointments, and potential communicable diseases. *Id.* at ¶ 40. Nearly all of these "considerations" are within the purview and the responsibility of DPS. As Dr. Figler accepted Mrs. Zayre-Brown as a patient and is prepared to perform surgery on her, many of these considerations are resolved. Further, yet again, none of these "considerations" are medical necessity criteria for gender-affirming surgery nor medical justifications to deny medically necessary gender-affirming care, nor any care for that matter.

Additionally, one would need a crystal ball to accurately assess many of the “considerations” that Dr. Penn insists must be taken into account, particularly around risks, complications, and revision. These considerations are not unique to gender-affirming surgical care; they apply to all surgical care as well as other kinds of care.

30. Dr. Penn’s final primary conclusions that I address in this declaration are that gender-affirming genital surgery is not medically necessary in any instance, and that Defendants’ denial of her most recent request, and her previous requests, therefore were correct. *Id.* at ¶¶ 48-68. I will note, however, that Dr. Penn nowhere addresses Mrs. Zayre-Brown’s multiple other requests for gender affirming surgery, Defendants’ handling of those requests, and whether Defendants’ repeated denials and delays of those requests were “appropriate.” The pattern of ignoring the mountain of available evidence contrary to Dr. Penn’s purported expert opinions and conclusions is telling.

31. To support his opinion that gender-affirming genital surgery is not medically necessary, in any instance, Dr. Penn first relies on arguments that the WPATH SOC are flawed and that there are no national *correctional* health care standards for the treatment of gender dysphoria. *Id.* at ¶¶ 48-53. Then Dr. Penn questions the effectiveness of gender-affirming surgery based on “data and research” in the non-correctional setting. *Id.* at ¶¶ 54-60. Finally, Dr. Penn attempts a semantic strategy to suggest that my formulation of the term “medical necessity” is flawed. *Id.* at ¶¶ 61-68. As described in turn, each assertion is profoundly flawed.

32. I have already discussed at length why the “unique correctional considerations” that Dr. Penn discusses are neither medical justifications to deviate from accepted treatment protocols or deny medically necessary treatment, nor “unique” considerations. As such, I will move on to Dr. Penn’s critiques of the WPATH SOC.

33. Dr. Penn first begins with the previously debunked argument that the WPATH SOC have no “meaningful correctional specific guidance.” Penn Aff. ¶ 49. The corrections-specific guidance Dr. Penn is apparently looking for is guidance regarding the same “unique considerations” already explained to be irrelevant to the question of medical necessity or not unique considerations at all. Next, Dr. Penn suggests that the WPATH SOC cannot be trusted because “however well intentioned, [the SOC] appear to direct their efforts in furtherance of advancing transgender health care advocacy.” *Id.* at ¶ 50.

34. It is not novel or controversial that a specialty health care organization, comprised of interdisciplinary experts in various aspects of the lives and health of target patient population, would seek to advance and advocate for the health care of that target patient population. Many other specialty health care organizations do the exact same thing.²

² E.g., the Endocrine Society describes itself as devoted to “advocating on behalf of the global endocrinology community,” including patients with endocrine conditions. Endocrine Soc’y, *Who We Are*, <https://www.endocrine.org/about-us>; *see also* Endocrine Soc’y, *Advocacy*, <https://www.endocrine.org/advocacy>; Endocrine Soc’y, *Shaping Healthcare and Research Policy*, <https://www.endocrine.org/our-community/shaping-healthcare-and-research-policy>. Similarly, see the Am. Psychiatric Ass’n, *APA’s*

35. What Dr. Penn seemingly takes issue with is the interdisciplinary nature of the membership involved in this advocacy and a suggestion that, because the membership is not entirely health care providers, the research and evidence that the SOC supposedly is based on may be improperly influenced at best and unreliable at worst. While I take issue with this entire premise, I must point out that the WPATH SOC, which set forth the treatment protocols promulgated for the medical treatment of gender dysphoria, are developed exclusively by health care professionals with expertise across medical disciplines, including psychiatry, psychology, endocrinology, pediatrics, and surgery. Ettner Decl. ¶ 28.

36. Next, Dr. Penn attacks the available research and evidence around the effectiveness of gender-affirming surgery in the non-correctional community to attempt to further support his conclusion that gender-affirming surgery is not medically necessary. Penn Aff. ¶¶ 53-60. Dr. Penn makes several general critiques, including that none of the empirical studies were done in the United States, his inability to locate original studies as compared to survey studies and re-analyses of survey studies, lack of longitudinal studies to gauge long-term effectiveness, and

Vision, Mission, Values, and Goals, <https://psychiatry.org/about-apa/vision-mission-values-goals> (“The mission of the American Psychiatric Association is to . . . promote universal and equitable access to the highest quality care for all people affected by mental disorders, including substance use disorders.”); Am. Acad. of Pediatrics, *Advocacy*, <https://services.aap.org/en/advocacy/>; American Board of Pediatrics, *About Us*, <https://www.abp.org/content/about-us> (“Certification by the ABP has one objective — to promote excellence in medical care for children and adolescents.”); American College of Obstetricians and Gynecologists, *About Us*, <https://www.acog.org/about> (“ACOG’s mission is to support our members to improve the lives of all people seeking obstetric and gynecologic care, their families, and communities.”).

critiques of particular studies' methodologies, concluding the WPATH SOC are thus unreliable, especially in the carceral setting. *Id.* at ¶ 54.

37. Dr. Penn only directly cites two studies as part of his literature review on the efficacy of gender affirming surgery. *Id.* at ¶¶ 55-58. Dr. Penn first discusses at length one particular study with questionable methodology. *Id.* at ¶¶ 55-57. However, decades of methodologically sound and rigorous scientific research have demonstrated that gender affirming surgery is a safe and effective treatment for severe gender dysphoria and, indeed, for many patients, it is the only effective treatment. The American Medical Association, the Endocrine Society, the American College of Obstetricians and Gynecologists, the American Psychological Association, and the American Psychiatric Association all endorse surgical therapy, in accordance with the WPATH SOC, as medically necessary treatment for individuals with severe gender dysphoria.

38. In 2018, Cornell University published a literature review called *What Does the Scholarly Research Say about the Effect of Gender Transition on Transgender Well-Being?*.³ The researchers enumerated the following conclusions:

- The scholarly literature makes clear that gender transition is effective in treating gender dysphoria and can significantly improve the well-being of transgender individuals.

³ What We Know Project, Cornell University (2018), <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/>.

- Among the positive outcomes of gender transition and related medical treatments for transgender individuals are improved quality of life, greater relationship satisfaction, higher self-esteem and confidence, and reductions in anxiety, depression, suicidality, and substance use.
- The positive impact of gender transition on transgender well-being has grown considerably in recent years, as both surgical techniques and social support have improved.
- Regrets following gender transition are extremely rare and have become even rarer as both surgical techniques and social support have improved. Pooling data from numerous studies demonstrates a regret rate ranging from .3 percent to 3.8 percent. Regrets are most likely to result from a lack of social support after transition or poor surgical outcomes using older techniques.
- Factors that are predictive of success in the treatment of gender dysphoria include adequate preparation and mental health support prior to treatment, proper follow-up care from knowledgeable providers, consistent family and social support, and high-quality surgical outcomes (when surgery is involved).
- Transgender individuals, particularly those who cannot access treatment for gender dysphoria or who encounter unsupportive social environments, are more likely than the general population to experience health challenges such as depression, anxiety, suicidality, and minority

stress. While gender transition can mitigate these challenges, the health and well-being of transgender people can be harmed by stigmatizing and discriminatory treatment.

39. Dr. Penn then cites to a study, commonly called the “Swedish Study,” authored in part by Dr. Cecilia Dhejne, as part of Dr. Penn’s attempt to question the efficacy of gender-affirming surgery. *Id.* at ¶ 58. Dr. Dhejne, who is a colleague of mine, has in fact stated that this research has consistently been “mischaracterized” and that recent studies have shown that treatment in compliance with the WPATH SOC decreases gender dysphoria and improves mental health. According to Dr. Dhejne, only the transgender people who transitioned prior to 1989 had slightly higher rates of suicide attempts than the general public (but still far lower than pre-transition levels for transgender people). According to Dr. Dhejne:

Researchers are happy if their findings are recognized and have an impact. However, once published the researcher loses control of how results are used. Our findings have been used to argue that gender-affirming treatment should be stopped. But the results have also been used to show the vulnerability of the group and that better transgender health care is needed (Arcelus & Bouman, 2015; Zeluf et al., 2016). . . . Most of the articles that use the study to argue against gender affirming health care are published in non-peer reviewed papers and the public media in general. . . . I am grateful to friends, colleagues . . . and journalists who have alerted me when the results of the study have been misinterpreted, giving me a possibility to respond to the authors.⁴

40. Finally, Dr. Penn’s last argument is one of semantics. Dr. Penn argues that my definition of “medical necessity” is incorrect and thus my conclusion that

⁴ On Gender Dysphoria, Dep’t of Clinical Neuroscience, Karolinska Institute, at 65 (Stockholm, Sweden 2017.)

gender-affirming vulvoplasty for the treatment of Mrs. Zayre-Brown's gender dysphoria is incorrect. *Id.* at ¶ 61. Specifically, Dr. Penn mischaracterizes the testimony in my declaration to suggest that my evaluation of medical necessity is premised on the belief that any intervention is medically necessary so long as it has the potential to provide some therapeutic relief. *Id.*

41. Dr. Penn's characterization of my use of the term "medical necessity" is incorrect. Medical necessity for gender-affirming surgery is articulated in the WPATH SOC, and those are the criteria that I used in my evaluation of Mrs. Zayre-Brown. *See, e.g.,* Ettner Decl. ¶ 58. According to Mrs. Zayre-Brown's DPS medical and mental health records, these are the same medical necessity criteria used by Dr. Figler, Dr. Carcaccio, Dr. Umesi, and MSW Dula, in their conclusions that gender-affirming genital surgery is medically necessary for Mrs. Zayre-Brown. Ettner Decl. at 72-75, 76-77, 83, 86. As I have previously pointed out, however, Dr. Penn ignores the recommendations of those providers and their use of the same criteria.

42. In paragraph 63 of his affidavit, Dr. Penn conflates gender dysphoria and body dysmorphia, two very different and distinct diagnoses, to further attempt to support his mischaracterization of my definition of and criteria used in assessing the medical necessity of gender-affirming surgery for the treatment of gender dysphoria. Penn Aff. ¶ 63.

43. In paragraph 64, Dr. Penn compares apples and oranges. *Id.* at ¶ 64. I do not purport to possess any specific knowledge regarding therapeutic massage for individuals experiencing depressed mood, dysphoria due to being incarcerated and

away from family/loved ones, and/or anxiety, insomnia, or other mental health conditions. What I can say is that if research did in fact demonstrate that “therapeutic massage” was ameliorative or curative for those symptoms or conditions, then it *could* be medically necessary in some circumstances, perhaps where, among many other variables, other accepted treatments have not worked to ameliorate a patient’s suffering. Dr. Penn does not discuss the traditional alternative treatments to many of the mental health symptoms and diagnoses he is hinting at, which may include psychotherapy and psychotropic medications. Dr. Penn does not discuss that many conditions have many treatment options, that many patients try various medically necessary treatments to ameliorate or cure their conditions or symptomologies, and that the nature of medicine, inherently, is always evolving and new treatments are always being explored and tested.

44. Dr. Penn further opines that the use of the term “medically necessity” is only applicable when failure to provide an intervention would result in a known high risk of “morbidity/mortality” or “death.” *Id.* at ¶ 65. Consistent with this view, untreated or inadequately treated gender dysphoria leads inexorably to one of three trajectories: emotional decompensation, surgical self-treatment (i.e., auto-castration/auto-penectomy) or suicide. Indeed, these outcomes are not uncommon in prison settings where patients are denied medically indicated care for gender

dysphoria. *See Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WPATH (Dec. 21, 2016).⁵

B. Affidavit of Sarah Boyd, Ph.D., ABPP

45. Dr. Boyd’s affidavit, which claims even fewer qualifications than Dr. Penn, largely contains recycled and restyled arguments proffered in Dr. Penn’s Affidavit to support her opinions and conclusions that my first declaration was inadequate. Dr. Boyd mainly asserts that, because my evaluation purportedly lacked certain “evaluation tasks” Dr. Boyd expected, my opinion that gender-affirming genital surgery is medically necessary for Mrs. Zayre-Brown is insufficiently supported. Boyd Aff. ¶¶ 7, 20-21.

46. To begin, Dr. Boyd, faces many of the same problems as Dr. Penn regarding the requisite expertise, experience, and qualifications to render the opinions and conclusions that she offers. *See id.* at ¶¶ 1-5. These deficiencies unquestionably cast doubt on the validity of her opinions and render her conclusions unpersuasive at best and incompetent at worst.

47. Given the serious matter at the heart of this litigation and what Dr. Boyd is attempting to do—support the denial of medically necessary care for an individual in acute distress—her level of generality around the exact nature of her

⁵ <https://www.wpath.org/newsroom/medical-necessity-statement> (“In some cases, [medical procedures attendant to gender affirming/confirming surgeries] [are] the **only** effective treatment for the condition, and for some people genital surgery is essential and life-saving.”) (emphasis in original).

experience treating transgender patients with gender dysphoria is particularly concerning to me.

48. Specifically, Dr. Boyd begins by saying that she has “experience conducting forensic mental health assessments of transgender and gender diverse people in correctional settings.” *Id.* at ¶ 1. First, a mental health assessment is not the same as an evaluation for gender dysphoria. In theory, it could include a specific evaluation for gender dysphoria, but it is not apparent from Dr. Boyd’s affidavit that that is the case. Dr. Boyd’s curriculum vitae does mention experience “[c]onduct[ing] gender dysphoria evaluations for the Virginia Department of Corrections,” among other clinical services, for one year, August 2013 to August 2014, during her time as a post-doctoral fellow. ECF No. 18-7, at 2. I will also point out that, according to her curriculum vitae, Dr. Boyd did not become a licensed clinical psychologist in any jurisdiction until July 2014, so presumably, much of that experience occurred before she was a licensed clinical psychologist. *See id.*, at 1. Like Dr. Penn, Dr. Boyd provides no figures regarding the number of transgender patients she has treated generally, the number she has evaluated for gender dysphoria, or most importantly the exact or approximate number of transgender patients with gender dysphoria she has treated, the scope of that treatment, or the number of evaluations she has conducted for gender-affirming surgery for the treatment of gender dysphoria.

49. While it appears that Dr. Boyd is not expressly holding herself out as an expert in gender dysphoria, she is ultimately opining on and questioning the adequacy of my assessment of Mrs. Zayre-Brown. As such, I make the following

observations. Dr. Boyd references being a co-author of one forthcoming chapter, in an unknown book “concerning psychological evaluation, management, and treatment of transgender and gender diverse people housed in correctional settings.” Boyd Aff. at ¶ 1. She does not claim to have ever been qualified to serve as, or served as, an expert witness in litigation on the subject matter at issue in this case or on any subject in any court.

50. Dr. Boyd did not interview or evaluate Mrs. Zayre-Brown. *Id.* at ¶ 4. Dr. Boyd relies on Mrs. Zayre-Brown’s motion for preliminary injunction, unspecified DPS records, none of which are attached to her affidavit or identified with any particularity, and my declaration. *Id.* Dr. Boyd states that, in addition to these sources, her education, training, and experience inform her statements, conclusions, and opinions. *Id.* at ¶ 5. Dr. Boyd’s curriculum vitae demonstrates that her education, training, and experience primarily deal with intellectual and developmental disabilities, neither of which are at issue here. *See* ECF No. 18-7.

51. I will now turn to the opinions and statements that Dr. Boyd makes in her affidavit to support her conclusion. Dr. Boyd takes issue with the adequacy of my evaluation of Mrs. Zayre-Brown. Dr. Boyd says there were several “evaluation tasks” that she expected to see referenced in my declaration that were either not undertaken or not described. Boyd Aff. at ¶ 7.

52. As an initial matter, Dr. Boyd provides no sources regarding where her expectations for some of these evaluative tasks come from, specifically regarding assessing Mrs. Zayre-Brown’s gender dysphoria and her need for gender-affirming

surgery for the treatment of her gender dysphoria. Like Dr. Penn, it appears that most of Dr. Boyd's expectations come from her lack of expertise in the subject matter at hand, particularly the interdisciplinary role of multiple providers in the treatment of gender dysphoria, and specifically the assessment and provision of gender-affirming surgical care. Like Dr. Penn, while Dr. Boyd takes issue with my evaluation and medical necessity determination, she never addresses the multiple other evaluations and medical necessity determinations by Mrs. Zayre-Brown's other internal DPS providers and external specialist providers that DPS referred her to. All of those providers, of course, came to the same or similar conclusions as me. *See* ¶ 41, *supra*. Lastly, and again like Dr. Penn, Dr. Boyd tellingly made no undertakings of her own to address her concerns regarding the purported deficiencies in my evaluation and conclusion and provides no justification as to why she did not or could not.

53. Turning to the specific "evaluation tasks" Dr. Boyd addresses, Dr. Boyd first says that informed consent was not described in detail. What additional detail Dr. Boyd expected is unclear. Boyd Aff. ¶ 7, 17, 20. More importantly, informed consent is typically obtained by the surgeon, as that is the provider performing the procedure for which consent is necessary. For that reason alone, and all of the reasons that I stated in response to the same argument from Dr. Penn, Dr. Boyd is also wrong. *See* ¶¶ 20-21, *supra*.

54. Next, Dr. Boyd says there were no "collateral interviews of treatment providers, family members, friends, or other [unidentified] individuals who could

provide observations of the Plaintiff's history, symptoms, and response to prior interventions." Boyd Aff. ¶ 7. I am unfamiliar with the requirement to do "collateral interviews with treatment providers, family members, friends, or other individuals" to obtain further observations for the purpose of evaluating Mrs. Zayre-Brown's gender dysphoria or need for gender-affirming surgery. Mrs. Zayre-Brown has voluminous medical and mental health records detailing her medical history, mental health history, gender dysphoria, previous treatment, continued symptomology, desire and advocacy for gender-affirming genital surgery for the treatment of her gender dysphoria, as well as the thoughts and impressions of her previous providers at DPS and the external specialist providers that DPS referred her to specifically for this care, who all either supported or recommended surgery. I am further unaware that the observations of family members and friends factor into the evaluation of gender-dysphoria and need for gender-affirming surgery for an adult woman. I am additionally unaware of any other medical condition or procedure requiring such inquiries.

55. Next, Dr. Boyd says that I did not identify Mrs. Zayre-Brown's expectations regarding her options for medical intervention, especially expectations and considerations related to choosing vulvoplasty rather than vaginoplasty. Boyd Aff. ¶ 7. Again, Dr. Boyd appears to be confused about which provider, on an interdisciplinary team of providers, is most appropriate to discuss this specific consideration with a patient. In this case, that would be the surgeon.

56. In any event, Dr. Boyd is wrong on two other counts. First, I did identify Mrs. Zayre-Brown's expectations for surgical intervention in the form of gender-affirming genital surgery—namely, alleviation of her persistent, severe gender dysphoria that has not been sufficiently alleviated through her previous medically necessary psychological and medical interventions. Ettner Decl. ¶ 92. During my examination, we fully discussed her specific desire for vulvoplasty. Mrs. Zayre-Brown's penis—a constant, visible primary sex characteristic that is incongruent with her gender—is the source of extreme anatomical dysphoria and distress. She requires removal of the penis via gender-affirming vulvoplasty, creating typical-appearing gender-congruent genitals, and removing the source of her significant gender dysphoria and curing it.

57. Second, Dr. Figler also had “extensive discussion of risks, benefits[,] and alternatives” with Mrs. Zayre-Brown regarding her desire for gender-affirming genital surgery and the differences between vulvoplasty and vaginoplasty, as well as the goal of s alleviation of Mrs. Zayre-Brown's significant gender dysphoria, as documented in those records. Ettner Decl. at 77.

58. Dr. Boyd says that I did not discuss expectations, costs, and benefits, and why earlier surgical interventions proved to be inadequate for substantially mitigating her gender dysphoria symptoms. *Id.* at ¶ 7. Again, Dr. Boyd is wrong. First, Mrs. Zayre-Brown's records clearly identify her expectations regarding her previous gender-affirming surgery. Again, Mrs. Zayre-Brown's primary expectations were to alleviate gender-dysphoria by aligning her primary and secondary sexual

characteristics with her gender identity. Regarding why Mrs. Zayre-Brown's previous gender-affirming surgeries "proved to be inadequate" for substantially mitigating her gender dysphoria, as stated in my first declaration and in accordance with the WPATH SOC, gender-affirming care is patient-centric and the timing and number of gender-affirming interventions, including surgeries are different for each patient. *See* Ettner Decl. ¶¶ 29, 32. Dr. Boyd provides no rationale for, and thus I am unclear as to, why a retrospective evaluation of the "costs and benefits" of Mrs. Zayre-Brown's previous gender-affirming surgeries is necessary, relevant, or helpful in evaluating her current gender dysphoria and need for gender-affirming genital surgery.

59. Dr. Boyd says that I did not discuss the implications of Mrs. Zayre-Brown having vulvoplasty so "relatively close" to her projected release date, over two years from now, and resulting implications for her transition back into the community. Boyd Aff. ¶ 8. Dr. Boyd is wrong for the same reasons Dr. Penn is wrong. *See* ¶ 19, *supra*.

60. Finally, the last "evaluation task" Dr. Boyd says is missing from my evaluation is that I did not discuss the reasons why Mrs. Zayre-Brown chose vulvoplasty over vaginoplasty, when it appears that vaginoplasty was her preferred treatment option and resulting implications. Boyd Aff. ¶¶ 7, 9-11. Again, this expectation appears to be premised on Dr. Boyd's lack of expertise and understanding of the interdisciplinary nature and roles of the providers involved in this kind of care and treatment. First, it is curious that Dr. Boyd does not address the fact that in one of DTARC's denials of Mrs. Zayre-Brown's request for gender-affirming vaginoplasty,

the denial rationale—aside from stating that vaginoplasty is categorically not medically necessary—additionally said that the prison facility was not equipped for the proper post-operative care for vaginoplasty. Ettner Decl. at 91. Beyond this, Dr. Boyd’s central premise is incorrect as both procedures, vaginoplasty and vulvoplasty, were discussed extensively with the relevant expert, Dr. Figler. This is documented in Dr. Figler’s records and Mrs. Zayre-Brown’s declaration, as is the basis for her choosing a vulvoplasty.

61. In her last attempts to support her opinion, Dr. Boyd suggests that I did not investigate potential drug use as a cause of Mrs. Zayre-Brown’s inpatient hospitalizations or account for co-morbidities as factors in Mrs. Zayre-Brown’s acute distress. Boyd Aff. ¶¶ 12-13. Dr. Boyd refutes the relevance of her first point in her own affidavit. “Records indicated that correctional staff speculated that these episodes might be due to illicit drug use, specifically K2. However, the information to support this explanation was sparse in that there were no positive drug test results or contraband recovered that would shed light on (a) the likelihood that these episodes were the result of intoxication versus some other mental health issue, or (b) the type of substance, if any, that the Plaintiff ingested.” *Id.* at ¶ 12. Additionally, none of Mrs. Zayre-Brown’s DPS medical and mental health records indicate illicit drug use, and I explicitly state in my evaluation that Mrs. Zayre-Brown reported no illicit drug use. Again, these same DPS records indicate no psychological comorbidities, and I stated as such in my evaluation. It is unclear to me what more Dr. Boyd expects. The cause of Mrs. Zayre-Brown’s distress is clear: her need for

gender-affirming surgery to remove her penis and Defendants' repeated denials and refusals to provide her with that care without medical justification.

62. Finally, and importantly, I must point out that while Dr. Boyd concludes that my evaluation was insufficient to make a medical necessity determination regarding Mrs. Zayre-Brown's need for gender-affirming surgery, she does not conclude that it is not medically necessary for Mrs. Zayre-Brown. *See Boyd Aff.* ¶ 20.

Pursuant to 28 U.S.C. § 1746, I declare the foregoing is true and correct.

Dated: August 2, 2022

Dr. Randi Ettner PhD
Dr. Randi, Ettner, Ph.D.

APPENDIX

**North Carolina Department of Public Safety
Self-Injury Risk Assessment**

Offender Name: [REDACTED] Off #: 0618705
Date of Birth: [REDACTED] 881 Sex: F Facility: ANSO
Date: 12/11/2020 11:20 Provider: Hahn, Patricia M Ph.D Asst. Dir. of Beh. Health

Type of Housing: Restrictive Housing

FINDINGS

This assessment and the resulting recommendations are based on the following sources of information:
Clinical Interview

Reason for Referral

Ms. [REDACTED] has experienced a worsening of Gender Dysphoria due to recent events and currently expressed self-injurious and suicidal ideation.

Treatment Setting

Outpatient Program at Anson CI.

Current Self-Injurious Behaviors

Ms. [REDACTED] indicated she has thoughts of "ripping the skin off my pee-pee."

Current Plan to Self-Injure

Ms. [REDACTED] currently has no plan to self-injure but is having very frequent thoughts of self-mutilation.

Current Suicidal Ideation

Ms. [REDACTED] stated she wants to be given a medication that will "put me to sleep and keep me asleep." When asked for clarification, she stated "I don't want to die but I feel like it is the best thing for me."

Current Suicidal Intent

Ms. [REDACTED] does not have a current plan to kill herself.

Current Mental Status

Level of Consciousness: Alert and Oriented

Psychomotor Activity: Normal

General Appearance: Normal

Behavior: Cooperative

Mood: Sad/depressed

Thought Process: Appropriate

Thought Content: Other

RISK AND PROTECTIVE FACTORS ASSESSED:

This writer screened the offender for a variety of empirically validated factors commonly associated with risk for self-harm.

The following **STATIC** risk factors were assessed to be present and may increase the inmate's risk for engaging in suicide related behaviors: Chronic Medical Condition, Family history of inpatient psychiatric treatment, Family history of suicide attempt, History of childhood abuse (physical or sexual), History of mental illness, History of self-injurious behavior

The following **DYNAMIC** risk factors were assessed to be present and may increase the inmate's risk for engaging in suicide related behaviors: Anxiety/Panic, Current suicidal ideation, Fear for own safety, Feeling hopeless/helpless, Feeling like a burden to others, Inability to feel pleasure, Sleep problems, Social isolation, Uncontrolled mental health symptoms

The following **PROTECTIVE** factors were assessed to be present and may decrease the inmate's risk of suicide: Able to cope with stress, Able to identify reasons to live, Adequate problem solving skills, Future orientation, Responsibility to loved ones/children, Supportive family relationships, Willingness to engage in treatment

Ms. [REDACTED] has had an increase in symptoms of Gender Dysphoria since August, which have been addressed in therapy but not yet with medication because she was trying to stay off medication. She has had increasing problems coping with institution issues and on November 23 got in an altercation with another offender who implied Ms. [REDACTED] still had a penis -- one of her greatest current fears is that someone will find out she still has part of a penis so it is an extremely emotionally arousing issue

Offender Name: [REDACTED] Off #: 0618705
Date of Birth: [REDACTED] 1981 Sex: F Facility: ANSO
Date: 12/11/2020 11:20 Provider: Hahn, Patricia M Ph.D Asst. Dir. of Beh. Health

for her. Since that time, Ms. [REDACTED] symptoms of depression have significantly increased, and she has had thoughts of ripping the skin of her penis and thinks she may be better off dead.

RECOMMENDATIONS

Suicide Watch: Place on Self-Injury Precautions.

Completed by Hahn, Patricia M Ph.D Asst. Dir. of Beh. Health on 12/11/2020 14:19

North Carolina Department of Public Safety Mental Health Progress Note

Offender Name: ██████████		Off #: 0618705
Date of Birth: ████████/1981	Sex: F	Facility: ANSO
Date: 02/19/2021 11:05	Provider: Hahn, Patricia M Ph.D Asst. Dir.	

Treatment Setting

Outpatient Program at Anson CI.

Reason for Services

Routine Follow-Up Session

Violence Alerts

Ms. ████████ denied any current thoughts of wanting to harm others.

Escape Alerts

None currently noted.

Self-Injury Alerts

Ms. ████████ denied any current thoughts or plans of wanting to harm herself; however, at times she does have thoughts of self-mutilation to get rid of the remaining part of her penis.

MSE/Behavioral Observations

Ms. ████████ presented as a polite 39 year old Black -American female who appeared approximately her stated age. She was pleasant and cooperative during the therapy session. She displayed good eye contact and had no significant psychomotor agitation or retardation. Her speech was of normal rate, rhythm and volume. She was oriented to person, place, and time. Her attention and immediate memory appeared within normal limits. Her affect was somewhat dysphoric, and she described her mood as "I don't know . . . I'm dull." She denied current suicidal or homicidal ideation. She did not currently show active symptoms of psychosis or a thought disorder. Her judgment and insight were at least fair.

Progress Towards Goal(s)

Ms. ████████'s main issue continues to be that her consult appointment with the urologist has not yet been scheduled. The barriers to this scheduling were discussed but it was unclear what has actually happened since there were some discrepancies between what each of us have been told. The main discrepancy is that it is unclear whether Ms. ████████ is supposed to have her consult first or whether she is supposed to wait for her vaginoplasty to be approved by DPS. Ms. ████████ stated one of her DTARC forms said Dr. Junker and Deputy Commissioner Harris agree with the disapproval of the vaginoplasty until the surgery consult was completed but HERO would not open the DTARC notes so this could not be immediately confirmed (and the undersigned wanted to finish her note). The undersigned will try to update Dr. Peiper before the 2/25/21 DTARC meeting. Ms. ████████ would like the following to be considered: 1) she wants her UR approved urology consult, 2) she would like to have an endocrinologist appointment since she has not had one in eight months, and 3) she would like to be considered for compassionate release or ECL. Ms. ████████ stated thoughts of self-mutilation are sometimes on her mind due to her gender dysphoria and not receiving her urology consult despite DTARC and UR approval. She expressed worry because she feels she is increasingly impulsive and her coping mechanisms have not been helping. Therapy focused on examining how the current generation is changing how transgender/non-binary issues are being addressed as to body image. Ms. ████████ acknowledged that some transgender individuals she has met are not as focused on changing their physical characteristics and stated "I think I tried that but I don't think it's possible."

Ms. ████████ indicated her Zoloft did not seem to be working as well, and the undersigned indicated she would ask Mr. Messer about psychiatry clinic. The referral process was also discussed, especially given her concern that she has been "super-impulsive" lately. Ms. ████████ and the undersigned briefly discussed the idea of trying to meet with the offender regarding the incident but it was decided that was not a good idea because the woman may have contacted lawyers.

Plan/Diagnostic Changes

Ms. ████████ has improved since her NCCIW admission but continues to be dysphoric.

Follow-up/Next Appointment

Ms. ████████ will be seen for her next individual therapy appointment in the next 30 to 45 days, if not sooner. She knows to submit a referral if she needs to be seen sooner.

Offender Name: [REDACTED] Off #: 0618705
Date of Birth: [REDACTED]/1981 Sex: F Facility: ANSO
Date: 02/19/2021 11:05 Provider: Hahn, Patricia M Ph.D Asst. Dir.

Co-Pay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Standing Order: No

Completed by Hahn, Patricia M Ph.D Asst. Dir. of Beh. Health on 02/19/2021 13:17

North Carolina Department of Public Safety Mental Health Progress Note

Offender Name: ██████████ Off #: 0618705
Date of Birth: ██████████ 1981 Sex: F Facility: ANSO
Date: 04/28/2021 10:30 Provider: Hahn, Patricia M Ph.D Asst. Dir.

Treatment Setting

Outpatient Program at Anson CI.

Reason for Services

Routine Follow-Up Session

Violence Alerts

Ms. ██████████ denied any current thoughts of wanting to harm others.

Escape Alerts

None currently noted.

Self-Injury Alerts

At the end of the session, Ms. ██████████ denied any current thoughts of wanting to harm herself. As a protest, however, at the beginning of the session she had a band tied around her penis because she had not yet had her urology appointment at UNC. During the session, the undersigned called Ms. Catlett to get an update, and Ms. Catlett has been working with UNC to get everything set up so that Ms. ██████████ can have her appointment. (It involves IT and getting credentialed to use WebEx so can take time.) Ms. ██████████ was satisfied with this response and asked to be excused to remove the band from her penis, which she said she did.

MSE/Behavioral Observations

Ms. ██████████ presented as a polite 39 year old Black-American female who appeared approximately her stated age. She was pleasant and cooperative during the therapy session. She displayed good eye contact and had no significant psychomotor agitation or retardation. Her speech was of normal rate, rhythm and volume. She was oriented to person, place, and time. Her attention and immediate memory appeared within normal limits. She appeared initially dysphoric but after hearing some progress was being made on her appointment, her affect brightened. At the end of the session she described her mood as "mediocre." She denied current suicidal (see above) or homicidal ideation. She did not currently show active symptoms of psychosis or a thought disorder. Her judgment and insight are slightly impaired.

Progress Towards Goal(s)

Ms. ██████████ expressed many concerns about not having her appointment with the UNC-CH urologist scheduled yet. She gave a number of examples of how this is increasing her dysphoria, and she decided to put a band on her penis until her appointment is scheduled. She said she has had the band on for a week and a half. She was cautioned about the effects of impeding blood flow and risk of infection. As described above, the undersigned spoke with Ms. Catlett, and she was able to convey to Ms. ██████████ how Ms. Catlett has been on top of it and has worked hard to facilitate this appointment. Ms. ██████████ then agreed to take the band off her penis.

The rest of the session addressed her specific concerns about having part of a penis left and what defines a woman. She explained it does not bother her if she is called fat or ugly but stated if she is called a man "there is no tool in the [psychology] toolbox to manage that." She stated "I can't live with this any more," and said the situation was acute now and not chronic. She also stated she is not complete now and that "I'm ready to be complete."

Plan/Diagnostic Changes

Ms. ██████████ has increased dysphoric mood but her mood improved when she was provided information that she should have her appointment with the Program Manager of the UNC Transgender Health Program within the next week or the week after. The undersigned will follow-up next Thursday on the progress of this appointment.

Follow-up/Next Appointment

Ms. ██████████ will be seen for her next individual therapy appointment in the next 30 to 45 days. She knows to submit a referral if she needs to be seen by an Anson facility psychologist before then.

Co-Pay Required: No Cosign Required: No

Telephone/Verbal Order: No

Offender Name: [REDACTED] Off #: 0618705
Date of Birth: [REDACTED]/1981 Sex: F Facility: ANSO
Date: 04/28/2021 10:30 Provider: Hahn, Patricia M Ph.D Asst. Dir.

Standing Order: No

Completed by Hahn, Patricia M Ph.D Asst. Dir. of Beh. Health on 04/28/2021 12:29

North Carolina Department of Public Safety Mental Health Progress Note

Offender Name: [REDACTED]		Off #:	0618705
Date of Birth: [REDACTED] 1981	Sex:	F	Facility: ANSO
Date: 09/16/2021 14:10	Provider:	O'Halloran, Maureen C MSW	

Treatment Setting

Outpatient Program at Anson CI; Offender [REDACTED] will be referred to as Ms. Brown in the remainder of this document.

Reason for Services

Crisis Intervention

Violence Alerts

There are no elevated risk factors presently noted for offender Brown.

Escape Alerts

There are no elevated risk factors presently noted for offender Brown.

Self-Injury Alerts

Ms. Brown currently denied suicidal ideation and thoughts of self-injurious behavior, both intent and plan.

MSE/Behavioral Observations

Ms. Brown's mood appeared mildly dysphoric, and her affect was appropriate to content. She was neatly groomed, wearing prison-issued attire, makeup, and a face mask. She was tearful when discussing news that she had been denied gender-affirming surgery. She made comfortable eye contact. Her speech was relevant and goal directed. Her psychomotor activity was somewhat elevated. There was no overt evidence of psychotic or delusional thought processes. Her judgment and impulse control appeared adequate at this time. Ms. Brown voiced complaints regarding feeling emotionally overwhelmed. She appeared to be undergoing situational distress today regarding her medical treatment.

Progress Towards Goal(s)

Progress was not assessed as this was the first encounter with the offender. Ms. Brown reported that she learned that she was denied surgery earlier this week. She stated that she felt emotionally overwhelmed as she has been advocating for this procedure for four years now. She discussed losing weight in order to meet criteria for the procedure. Supportive psychotherapy was provided as Ms. Brown discussed her frustrations and concerns. She denied any suicidal thoughts, plans, or intent. She admitted that she had briefly considered putting a rubber band around her phallus as a means of forcing surgical intervention. The writer explained that Ms. Brown would only undermine her chances for gender-affirming surgery if she was considered to be emotionally unstable for treatment. She acknowledged understanding.

She also reported that she has been eating approximately 700 calories per day and drinking 10 20-ounce bottles of water per day. We discussed a more balanced approach to meeting her nutritional needs. She was open to the writer's suggestions, and reported she would work on eating more. She appeared calmer by the session's conclusion.

Plan/Diagnostic Changes

There are no changes to report at this time. Continue treatment as specified.

Follow-up/Next Appointment

Follow up as previously scheduled with primary therapist.

Co-Pay Required: No **Cosign Required:** No
Telephone/Verbal Order: No
Standing Order: No

Completed by O'Halloran, Maureen C MSW Clinical Social Worker on 09/16/2021 15:40

North Carolina Department of Public Safety Psychiatric Progress Note

Offender Name: [REDACTED]		Off #:	0618705
Date of Birth: [REDACTED]/1981	Sex: F	Facility:	ANSO
Date: 10/27/2021 09:16	Provider:	Younus, Syeda R MD	

Treatment Setting

Outpatient Program at Anson CI.

Violence Alerts

There is no apparent, current, significant risk of violence noted for inmate [REDACTED].

Self-Injury Alerts

There is no apparent, current, significant risk of self-injury noted for inmate [REDACTED].

However, SIRA was performed on 02/16/21.

Pt reports one suicide attempt in 2019 by OD "to get away from men prison."
She was admitted to inpatient NCCIW in December 2020 due to self harming thoughts.

Subjective

This is the 2nd incarceration for this 40 y.o. offender who was admitted to prison on 10/10/2017 on a primary charge of HABITUAL FELON with a project release date in 2024.

Pt was born biologically as a male but she identifies herself as female and going through transition of being female. She goes by Miss. Brown.

Pt was last seen by Dr. Younus in August, at that visit Zoloft dose was increased. Pt was seen today, she reports feeling stressed and overwhelmed. "I was told to lose weight then I can get my surgery but they denied it." She reports not able to focus as she is thinking about her surgery. She also feels that she is not getting the therapy which she needs. She wants "therapist who has knowledge about transgender." She reports recently "I walked out of the office " during her therapy session. She feels Zoloft is helping her. She denies depression. She feels she is not getting adequate therapy. She sleeps good. She has lost weight.
She reports sometimes she thinks she may need to do "self mutilating" behavior to get help. She is upset that her surgery was denied.

No SI,HI, AVH or manic symptoms.

She is taking two classes.

She is married and her husband is supportive.

She has an adult son and she talks to him regularly. She has a grand child.

Pt has tried only Zoloft.

Objective

Identifying Information: 40yrs old, biologically born as male but identified herself as female and is in the process of transitioning to a female
Appearance: fairly groomed, wearing mask
Behavior: cooperative

Offender Name: [REDACTED] Off #: 0618705
Date of Birth: [REDACTED] 1981 Sex: F Facility: ANSO
Date: 10/27/2021 09:16 Provider: Younus, Syeda R MD

Thinking: Logical
Perception: Denies
Mood: "stressed"
Affect: appropriate
Orientation: no evidence of delirium or confusion
Suicidal/Homicidal Ideation: Patient denies both.
Judgment/Insight: fair

Side Effects

Denied.

Response to Treatment

Positive.

Labs/Weights/AIMS/Vitals

Reviewed.

Diagnosis

Gender Dysphoria
Unspecified Anxiety Disorder
Medical: [REDACTED]

Plan

Target Symptoms: Anxiety and mood.

Medications:

- Cont Zoloft Risk/benefits reviewed.
- Discussed Buspar, pt deferred it for now.
- She feels her current symptoms will get better with the help of "adequate" therapy, she was advised to monitor her symptoms and contact mental health if needed.

Referrals: Therapy(staff will notify via email). Encouraged to continue therapy .

Other Treatment/Labs: None

Follow-Up: 2-3 months or sooner as needed.

Renew Medication Orders:

<u>Rx#</u>	<u>Medication</u>	<u>Order Date</u>	<u>Prescriber Order</u>
A4530692	SERTRALINE 100 MG TAB	10/27/2021 09:16	Take two (2) tablets (=200mg) by mouth daily at 11am ** Direct Observation Therapy ** x 120 day(s) Pill Line Only

Indication: Gender Dysphoria in Adolescents and Adults, Unspecified Anxiety Disorder

Schedule:

<u>Activity</u>	<u>Date Scheduled</u>	<u>Scheduled Provider</u>
Psychiatric Progress Note f/u	01/19/2022 00:00	Younus, Syeda R Psychiatrist

Patient Education Topics:

<u>Date Initiated</u>	<u>Format</u>	<u>Handout/Topic</u>	<u>Provider</u>	<u>Outcome</u>
10/27/2021	Counseling	Compliance - Treatment	Younus, Syeda	Verbalizes Understanding
10/27/2021	Counseling	Medication Side Effects	Younus, Syeda	Verbalizes Understanding

Offender Name: [REDACTED] Off #: 0618705
Date of Birth: [REDACTED] 1981 Sex: F Facility: ANSO
Date: 10/27/2021 09:16 Provider: Younus, Syeda R MD

<u>Date Initiated</u>	<u>Format</u>	<u>Handout/Topic</u>	<u>Provider</u>	<u>Outcome</u>
10/27/2021	Counseling	Access to Care	Younus, Syeda	Verbalizes Understanding

Co-Pay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Standing Order: No

Completed by Younus, Syeda R MD Psychiatrist on 10/27/2021 17:44

EXHIBIT 2

Declaration of Jaclyn Maffetore

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

KANAUTICA ZAYRE-BROWN,

Plaintiff,

v.

No. 3:22-cv-00191

THE NORTH CAROLINA
DEPARTMENT OF PUBLIC SAFETY,
et al.,

Defendants.

DECLARATION OF JACLYN MAFFETORE

1. My name is Jaclyn Maffetore. I am lead counsel for the plaintiff, Mrs. Kanautica Zayre-Brown, who is a prisoner in the custody of defendant North Carolina Department of Public Safety (DPS). I make this declaration based on personal knowledge.

2. I am currently employed as a Staff Attorney for the American Civil Liberties Union of North Carolina Legal Foundation (ACLU-NC).

3. On March 17, 2022, I spoke with Sharon Baldwin, Visitation Officer at Anson Correctional Institution (Anson CI) via telephone. I explained that I needed to schedule an in-person visit for March 30, 2022 with myself, other ACLU-NC attorneys, and a doctor we had retained to evaluate our client. In addition to the evaluation, the purpose of the visit would be for Mrs. Zayre-Brown to review and sign legal documents in a timely manner. Ms. Baldwin said she would need a formal

request on letterhead indicating the date, time, attendees, and items we would need to bring into the prison, as well the doctor's photo identification and credentials.

4. On March 18, 2022, I emailed Ms. Baldwin our formal request for a March 30 contact legal visit on letterhead and the required identifications and credentials, consistent with our March 17 phone conversation. A true and correct copy of my email correspondence with Ms. Baldwin is attached as Exhibit A.

5. On March 21, 2022, Ms. Baldwin responded to my request stating that she was still waiting on permission. *See Ex. A at 3.*

6. On March 22, 2022, I asked Ms. Baldwin if she could confirm our requested legal contact visit with our client, Mrs. Zayre-Brown, since we had to make travel arrangements. *See Ex. A at 3.*

7. On March 23, 2022, Ms. Baldwin stated that our request was being reviewed. *See Ex. A at 2.*

8. The morning of Thursday, March 24, 2022, nearly a week after making our formal request, I received a call from Miranda Richardson (Warden of Anson CI) who informed me that Dr. Ettner's attendance would not be approved unless I amended our request to include the fact that Dr. Ettner would be attending in order to provide an evaluation. This was the first time any prison personnel communicated the need for this information.

9. Following the telephone call with Ms. Richardson, I immediately emailed both Ms. Baldwin and Ms. Richardson an updated version of our formal

request that reflected that Dr. Ettner's attendance was needed for her to conduct an evaluation of our client in connection with contemplated litigation. *See Ex. A at 1-2.*

10. On March 25, 2022, I emailed Jodi Harrison (Deputy General Counsel for DPS) regarding my request and the sequence of events that followed. I asked that she help facilitate the requested visit. A true and correct copy of my email correspondence with Ms. Harrison is attached as Exhibit B.

11. Later that day, Ms. Harrison responded that an evaluation by a doctor is not a legal visit. She attached the DPS visitation policy and said she would advise the facility that the doctor's visit should be disapproved. *See Ex. B at 3.*

12. Following this email, I received an email from Ms. Baldwin stating our request for Dr. Ettner to be present had been denied. *See Ex. A at 1.*

13. I explained to Ms. Harrison that Dr. Ettner had been retained to consult upon and assist with Mrs. Zayre-Brown's legal representation. I asked if it was her position that Dr. Ettner's visit would not be allowed under the DPS policy under any circumstance (e.g. not even under provision (f) which allows for "special visitors"), or simply that she does not qualify for a "legal" visit. I also asked if there was another DPS policy that applied to this situation. *See Ex. B at 3.*

14. Ms. Harrison responded that the requested visit did not qualify as a legal visit, and that no other policy authorized the requested visit. *See Ex. B at 2.*

15. On March 28, 2022, I wrote to Ms. Harrison stating that DPS was acting unlawfully by denying our client access to an expert retained by her own legal team for the purpose of contemplated litigation. *See Ex. B at 1-2.*

16. On March 29, 2022, Ms. Harrison stated that she “want[ed] to be clear” that DPS was “not permanently foreclosing a visit by a medical expert in the context of litigation, but that was not the situation with Ms. Zayre-Brown.” *See* Ex. B at 1.

17. Plaintiff filed her Complaint in this action on April 28, 2022.

18. The first date on which Plaintiff’s counsel and Dr. Ettner were available to travel to Anson CI following the filing of the complaint was Friday, May 13, 2022.

19. On May 2, 2022, my colleague Dan Siegel, Staff Attorney with ACLU-NC, emailed Defendants’ counsel seeking to schedule an in-person visit on May 13, 2022 for Dr. Ettner to conduct her evaluation. A true and correct copy of Mr. Siegel’s correspondence with Defendants’ counsel, on which I was copied, is attached as Exhibit C.

20. On May 4, 2022, Defendants’ counsel replied to this email indicating that a Friday visit would not be possible, but that the facility could accommodate a visit with Dr. Ettner on a Wednesday. Defendants’ counsel referred Mr. Siegel to Ms. Harrison for further coordination. *See* Ex. C at 2.

21. On May 4, 2022, Mr. Siegel emailed Ms. Harrison to coordinate an in-person visit, and inquired whether the facility could accommodate a confidential video call to allow more flexibility in scheduling. Ms. Harrison indicated that she would confer with the facility to find out. A true and correct copy of Mr. Siegel’s correspondence with Ms. Harrison, on which I was copied, is attached as Exhibit D.

22. On May 10, 2022, after follow-up from Mr. Siegel, Ms. Harrison responded that Anson CI could not accommodate a 3-hour video call in lieu of an in-

person visit, and that an in-person visit would need to take place on a Wednesday or possibly a Tuesday. *See* Ex. D at 3.

23. The first Tuesday or Wednesday on which Plaintiff's counsel and Dr. Ettner were available to travel to Anson CI was May 25, 2022.

24. On May 11, 2022, Mr. Siegel requested an in-person visit for Dr. Ettner to conduct her evaluation on May 25, 2022, and indicated that travel arrangements would need to be made. In response, Ms. Harrison indicated that her paralegal Ms. Sayball would finalize scheduling. *Id.*

25. On May 17, 2022, I responded to Ms. Harrison and Ms. Sayball seeking confirmation of the May 25, 2022 visit and reiterating the need to make travel arrangements, which Ms. Sayball confirmed.

26. I accompanied Dr. Ettner to Anson CI on May 25, 2022 to ensure that she was permitted access to Plaintiff, and Dr. Ettner conducted her evaluation of Plaintiff on that date.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

Dated: 8/2/2022



Jaclyn Maffetore

EXHIBIT A

Re: [External] Request for Legal Visit with Prisoner Kanautica P. Zayre-Brown, OPUS No. 0618705 on March 30, 2022

Baldwin, Sharon <Sharon.Baldwin@ncdps.gov>

Fri 3/25/2022 10:46 AM

To: Jaclyn Maffetore <jmaffetore@acluofnc.org>; Richardson, Miranda <Miranda.Richardson@ncdps.gov>; Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>

Cc: Daniel Siegel <dsiegel@acluofnc.org>; rettner@aol.com <rettner@aol.com>; Michele Delgado <mdelgado@acluofnc.org>

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This message came from outside your organization.

Good Morning,

After consulting with the General Counsel Office from Raleigh on today, your request for Dr. Ettner to be present has been denied. I apologize for any inconvenience this may have caused. Please advise if you would like a legal visit with your client on Wednesday, March 30, 2022.

Thanks,

Sharon Baldwin

Visitation Officer

NC Department of Public Safety & Juvenile Justice

Anson Correctional Institution #4575

P.O. Box 280

Polkton, NC 28135

Phone: 704-272-4943

Fax: 704-694-1730

sharon.baldwin@ncdps.gov

<http://www.ncdps.gov/>

From: Jaclyn Maffetore <jmaffetore@acluofnc.org>

Sent: Thursday, March 24, 2022 7:53 AM

To: Baldwin, Sharon <Sharon.Baldwin@ncdps.gov>; Richardson, Miranda <Miranda.Richardson@ncdps.gov>

Cc: Daniel Siegel <dsiegel@acluofnc.org>; rettner@aol.com <rettner@aol.com>; Michele Delgado <mdelgado@acluofnc.org>

Subject: Re: [External] Request for Legal Visit with Prisoner Kanautica P. Zayre-Brown, OPUS No. 0618705 on March 30, 2022

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Dear Ms. Baldwin and Ms. Richardson,

Per my phone conversation this morning with Ms. Richardson, I understand that Anson CI has not yet been able to approve our visit because we did not state the explicit reason why our retained expert Dr. Ettner, a psychologist, would be attending this visit. Ms. Richardson conveyed that if Dr. Ettner intends to visit in order to provide a medical evaluation, that needs to be stated explicitly in the visitation request. Accordingly, please find attached an updated version of our formal request for visitation that reflects that Dr. Ettner's attendance is needed in order for her to conduct an evaluation of Ms. Zayre-Brown.

Given that we have to arrange travel, we would greatly appreciate confirmation of this request as soon as possible.

Please do not hesitate to reach out if you have any other questions or concerns.

Best,

Jaclyn Maffetore

Pronouns: she/her/hers

Staff Attorney

ACLU of North Carolina Legal Foundation

PO Box 28004, Raleigh NC 27611

O: 919-354-5070 | C: 919-666-7032

   | acluofnc.org

From: Baldwin, Sharon <Sharon.Baldwin@ncdps.gov>

Sent: Wednesday, March 23, 2022 8:46 AM

To: Jaclyn Maffetore <jmaffetore@acluofnc.org>

Cc: Daniel Siegel <dsiegel@acluofnc.org>; rettner@aol.com <rettner@aol.com>; Michele Delgado <mdelgado@acluofnc.org>

Subject: Re: [External] Request for Legal Visit with Prisoner Kanautica P. Zayre-Brown, OPUS No. 0618705 on March 30, 2022

Good Morning,

Your request is being reviewed.

Thanks,

Sharon Baldwin

Visitation Officer

NC Department of Public Safety & Juvenile Justice

Anson Correctional Institution #4575

P.O. Box 280

Polkton, NC 28135

Phone: 704-272-4943

Fax: 704-694-1730

sharon.baldwin@ncdps.gov

<http://www.ncdps.gov/>

From: Jaclyn Maffetore <jmaffetore@acluofnc.org>
Sent: Tuesday, March 22, 2022 4:43 PM
To: Baldwin, Sharon <Sharon.Baldwin@ncdps.gov>
Cc: Daniel Siegel <dsiegel@acluofnc.org>; rettner@aol.com <rettner@aol.com>; Michele Delgado <mdelgado@acluofnc.org>
Subject: Re: [External] Request for Legal Visit with Prisoner Kanautica P. Zayre-Brown, OPUS No. 0618705 on March 30, 2022

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Hi Ms. Baldwin,

I'm following up to see whether you can confirm our requested legal contact visit with Ms. Zayre-Brown from 11am until approximately 2pm on March 30. Travel arrangements must be made regarding this visit, including booking flights, and we would greatly appreciate a confirmation as soon as possible to facilitate those travel arrangements.

If you are not able to confirm at this time, could you please let me know by when you might be able to confirm?

Thank you,

Jaclyn Maffetore

Pronouns: she/her/hers

Staff Attorney
ACLU of North Carolina Legal Foundation
PO Box 28004, Raleigh NC 27611
O: 919-354-5070 | C: 919-666-7032
   | acluofnc.org

From: Baldwin, Sharon <Sharon.Baldwin@ncdps.gov>
Sent: Monday, March 21, 2022 11:51 AM
To: Jaclyn Maffetore <jmaffetore@acluofnc.org>
Cc: Daniel Siegel <dsiegel@acluofnc.org>; rettner@aol.com <rettner@aol.com>
Subject: Re: [External] Request for Legal Visit with Prisoner Kanautica P. Zayre-Brown, OPUS No. 0618705 on March 30, 2022

Good Morning,

Just wanted to update you. I'm still waiting on permission.

Thanks,

Sharon Baldwin
Visitation Officer
NC Department of Public Safety & Juvenile Justice
Anson Correctional Institution #4575
P.O. Box 280
Polkton, NC 28135
Phone: 704-272-4943
Fax: 704-694-1730
sharon.baldwin@ncdps.gov
<http://www.ncdps.gov/>

From: Jaclyn Maffetore <jmaffetore@acluofnc.org>
Sent: Friday, March 18, 2022 8:59 AM
To: Baldwin, Sharon <Sharon.Baldwin@ncdps.gov>
Cc: Daniel Siegel <dsiegel@acluofnc.org>; rettner@aol.com <rettner@aol.com>
Subject: [External] Request for Legal Visit with Prisoner Kanautica P. Zayre-Brown, OPUS No. 0618705 on March 30, 2022

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Good morning, Ms. Baldwin,

As a follow-up to our phone call yesterday, I am writing to schedule an appointment for a contact legal visit at 11:00 a.m. on Wednesday, March 30, 2022 with our client, Kanautica P. Zayre-Brown, OPUS # 0618705. As we discussed, an in-person legal visit is necessary so that our client can review and sign legal documents regarding a time sensitive matter, among other reasons.

I will be attending this visit, along with ACLU-NC Staff Attorney Dan Siegel and our associate, Dr. Randi Ettner, who has been retained to consult regarding Ms. Zayre-Brown's legal matters.

Please find the following attached:

- A scan of my North Carolina Driver's License (#000031928590).
- A scan of my North Carolina Bar Card (#50849).
- A scan of Mr. Siegel's North Carolina Driver's License (#000022184171) and North Carolina Bar Card (#46397).
- A scan of Dr. Ettner's Illinois Driver's License (#C535-7305-1755)
- A scan of Dr. Ettner's professional license (#071.002646).

I have also attached a formal request on our letterhead for your records.

We will need the scheduled meeting to last approximately three hours. We are intending to bring notepads, pens and pencils, and notes and files pertaining Ms. Zayre-Brown's legal matters.

Please let me know if you have any questions, comments, or concerns, and thank you for your timely

response to this request.

Sincerely,

Jaclyn Maffetore

Pronouns: she/her/hers

Staff Attorney

ACLU of North Carolina Legal Foundation

PO Box 28004, Raleigh NC 27611

O: 919-354-5070 | C: 919-666-7032



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Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

EXHIBIT B

RE: [External] Request for Assistance Facilitating Legal Visit with Kanautica Zayre-Brown

Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>

Tue 3/29/2022 7:57 PM

To: Jaclyn Maffetore <jmaffetore@acluofnc.org>

Cc: Daniel Siegel <dsiegel@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>; Taylor Brown <TBrown@aclu.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>

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Jaclyn:

Thanks for your email. I want to be clear that we are not permanently foreclosing a visit by a medical expert in the context of litigation, but that is not the situation with Ms. Zayre-Brown. I hope you can understand that there are many reasons why we cannot allow access to outside medical professionals for all offenders, which is the basis for the policy. We have arranged for you to have legal calls and meetings with your client. Please let us know if you require additional visits by the legal team.

Thanks,

Jodi

From: Jaclyn Maffetore <jmaffetore@acluofnc.org>

Sent: Monday, March 28, 2022 8:14 AM

To: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>

Cc: Daniel Siegel <dsiegel@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>; Taylor Brown <TBrown@aclu.org>; cbrook@pathlaw.com

Subject: Re: [External] Request for Assistance Facilitating Legal Visit with Kanautica Zayre-Brown

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Jodi,

I understand your position that no DPS policy permits a prisoner to undergo a medical or mental health evaluation by a privately retained doctor in connection with litigation. But our client has a legal right to such an evaluation even if it is not contemplated by DPS policy. *See De'lonta v. Clarke*, No. 7:11-CV-00257, 2013 WL 4584684, at *2 (W.D. Va. Aug. 28, 2013) (granting motion to compel access to privately retained doctor for incarcerated plaintiff with gender dysphoria); *Silverstein v. Fed. Bureau of Prisons*, 2009 WL 1451684, *4 (D. Colo. May 20, 2009) (compelling motion to make prisoner plaintiff available for medical examination by his own expert and stating that "it is beyond cavil that a plaintiff may retain its own expert medical witness to examine himself and render opinion testimony at trial").

DPS is therefore acting unlawfully by denying our request. If necessary, we will seek appropriate

Case 3:22-cv-00191-MOC-DCK Document 22-2 Filed 08/02/22 Page 14 of 27

sanctions including attorney's fees and costs associated with any motion to compel. Please let me know if you will reconsider your decision.

Sincerely,

Jaclyn Maffetore

Pronouns: she/her/hers

Staff Attorney

ACLU of North Carolina Legal Foundation

PO Box 28004, Raleigh NC 27611

O: 919-354-5070|C: 919-666-7032

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From: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>
Sent: Friday, March 25, 2022 10:57 AM
To: Jaclyn Maffetore <jmaffetore@acluofnc.org>
Cc: Daniel Siegel <dsiegel@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>; Taylor Brown <TBrown@aclu.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>
Subject: RE: [External] Request for Assistance Facilitating Legal Visit with Kanautica Zayre-Brown

Jaclyn:

It is my understanding that the doctor's purpose is not to visit in the usual sense but rather to conduct a mental health evaluation. I don't think any part of our visitation policy contemplates a provider, unaffiliated with DPS, accessing the facility to evaluate an offender.

Thanks,

Jodi

From: Jaclyn Maffetore <jmaffetore@acluofnc.org>
Sent: Friday, March 25, 2022 10:51 AM
To: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>
Cc: Daniel Siegel <dsiegel@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>; Taylor Brown <TBrown@aclu.org>; cbrook@pathlaw.com
Subject: Re: [External] Request for Assistance Facilitating Legal Visit with Kanautica Zayre-Brown

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Jodi,

This doctor has been retained to consult upon and assist with Ms. Zayre-Brown's legal representation. Is it your position that her visit would not be allowed under the DPS policy that you have attached under any circumstance (e.g. not even under provision (f) which allows for "special visitors"), or simply that she does not qualify for a "legal" visit? Is there another DPS policy that applies to this situation?

Thanks,

Jaclyn Maffetore

Pronouns: she/her/hers

Staff Attorney

ACLU of North Carolina Legal Foundation

PO Box 28004, Raleigh NC 27611

O: 919-354-5070|C: 919-666-7032

   | acluofnc.org

From: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>

Sent: Friday, March 25, 2022 10:28 AM

To: Jaclyn Maffetore <jmaffetore@acluofnc.org>

Cc: Daniel Siegel <dsiegel@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>; Taylor Brown <TBrown@aclu.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>

Subject: RE: [External] Request for Assistance Facilitating Legal Visit with Kanautica Zayre-Brown

Jaclyn:

An evaluation by a doctor is not a legal visit. I have attached our legal visitation policy for your review. I will advise the facility that the doctor's visit should be disapproved. If you wish to schedule a legal visit involving legal staff as provided per policy, I will ask the facility to immediately accommodate that. My apologies for any inconvenience the facility's hesitation may have caused.

Thanks,

Jodi

From: Jaclyn Maffetore <jmaffetore@acluofnc.org>
Sent: Friday, March 25, 2022 10:02 AM
To: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>
Cc: Daniel Siegel <dsiegel@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>; Taylor Brown <TBrown@aclu.org>; cbrook@pathlaw.com
Subject: [External] Request for Assistance Facilitating Legal Visit with Kanautica Zayre-Brown

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Jodi,

I'm writing about a request for a legal visit with our client at Anson CI. On March 17, I spoke with Anson CI visitation officer Sharon Baldwin by phone, letting her know that we needed to schedule an in-person visit on March 30 with myself, other ACLU-NC attorneys, and a doctor we have retained to evaluate our client. In addition to the evaluation, the purpose of the visit would be for Ms. Zayre-Brown to review and sign legal documents in a timely manner; our legal mail sent to and from DPS prisons can take weeks to be delivered, and is sometimes not delivered at all. I asked Ms. Baldwin what would be necessary to submit in order for this visit to take place, and I was told that along with the formal request on letterhead indicating the date, time, attendees, and items we would need to bring into the prison, I would need to submit the doctor's photo identification and credentials. On March 18, I submitted the formal request on ACLU-NC letterhead to Anson CI for the March 30 in-person visit with the information and documentation Ms. Baldwin indicated as necessary.

I followed up with Ms. Baldwin seeking confirmation for the visit so that we could schedule required travel, but did not receive any. The morning of Thursday, March 24, nearly a week after making our formal request, I received a call from Ms. Miranda Richardson in which she informed me that the doctor's attendance at the visit would not be approved unless I amended our request to explicitly include the fact that she would be attending in order to provide an evaluation. The necessity for this information was not communicated to me when I spoke with Ms. Baldwin on March 17 prior to sending the formal request, or in our subsequent email communications. Nevertheless, as you can see in the attached email, I sent an updated request to Ms. Baldwin and Ms. Richardson within minutes of our phone call.

We complied with all applicable DPS policies and the directions of prison staff, and this visit would not require any accommodations beyond a normal legal visit. However, our request is still being "evaluated" and we have not received any word as to when the visit will be approved. This is unacceptable. Coordinating travel schedules involves time and expense. More importantly, Ms. Zayre-Brown has a legal right to confer with us in-person -- and we have a right to confer with her -- in a timely manner when the circumstances require it. This visit is urgent and its approval cannot continue to be delayed indefinitely.

I am therefore asking your help to facilitate our legal visit. If DPS continues to deny access to our client, we will have no choice but to seek relief in court. Please let me know if you require any further information.

Sincerely,

Jaclyn Maffetore

Pronouns: she/her/hers

Staff Attorney

ACLU of North Carolina Legal Foundation

PO Box 28004, Raleigh NC 27611

O: 919-354-5070|C: 919-666-7032

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EXHIBIT C

RE: Expert visit request — Zayre-Brown v. NCDPS

Rodriguez, Orlando <orodriguez@ncdoj.gov>

Wed 5/4/2022 11:00 AM

To: Daniel Siegel <dsiegel@acluofnc.org>; Brennan, Stephanie <Sbrennan@ncdoj.gov>

Cc: Jaclyn Maffetore <jmaffetore@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>; Taylor Brown <TBrown@aclu.org>; Michele Delgado <mdelgado@acluofnc.org>

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Good morning Dan,

We appreciate your patience. The facility can accommodate the expert visit on a Wednesday.

Friday, May 11, will not work, nor would another Friday. At Anson, general visitation occurs on Fridays and occurs in the same space necessary to accommodate this expert visit. So accommodating this visit on May 11, or another Friday, would mean cancelling or not scheduling general visitation for the other folks housed there.

Your team can coordinate the visit directly through Jodi Harrison who can facilitate the logistics.

Be well,

Orlando

Special Deputy Attorney General

Special Litigation Section

Phone: 919.716.6516

orodriguez@ncdoj.gov

Please note messages to or from this address may be public records.

From: Rodriguez, Orlando

Sent: Monday, May 2, 2022 3:37 PM

To: Daniel Siegel <dsiegel@acluofnc.org>; Brennan, Stephanie <Sbrennan@ncdoj.gov>

Cc: Jaclyn Maffetore <jmaffetore@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>;

cbrook@pathlaw.com; Taylor Brown <TBrown@aclu.org>; Michele Delgado <mdelgado@acluofnc.org>

Subject: RE: Expert visit request — Zayre-Brown v. NCDPS

Hi Dan,

Thank you for the email. Let us discuss with our clients and get back to you

[Case 3:22-cv-00191-MOC-DCK](#) [Document 22-2](#) [Filed 08/02/22](#) [Page 20 of 27](#)

soon.

Be well,

Orlando

Special Deputy Attorney General
Special Litigation Section
Phone: 919.716.6516
orodriguez@ncdoj.gov

Please note messages to or from this address may be public records.

From: Daniel Siegel <dsiegel@acluofnc.org>
Sent: Monday, May 2, 2022 11:05 AM
To: Brennan, Stephanie <Sbrennan@ncdoj.gov>; Rodriguez, Orlando <orodriguez@ncdoj.gov>
Cc: Jaclyn Maffetore <jmaffetore@acluofnc.org>; Jon Davidson <JonDavidson@aclu.org>;
cbrook@pathlaw.com; Taylor Brown <TBrown@aclu.org>; Michele Delgado <mdelgado@acluofnc.org>
Subject: Expert visit request — Zayre-Brown v. NCDPS

Stephanie and Orlando,

A few weeks ago, we requested an in-person visit with Mrs. Zayre-Brown in which Dr. Randi Ettner, who has been retained for this litigation, would conduct a psychological evaluation. DPS denied the request, but Jodi Harrison explained that was because litigation had not yet commenced. Now that it has, we are renewing our request for Dr. Ettner and plaintiff's counsel to have in-person access to our client. As we explained to Jodi, Mrs. Zayre-Brown has a right of timely access to experts she has retained for the purpose of litigation. *See De'lonta v. Clarke*, No. 7:11-CV-00257, 2013 WL 4584684, at *2 (W.D. Va. Aug. 28, 2013) (granting motion to compel access to privately retained doctor for incarcerated plaintiff diagnosed with gender dysphoria). We would like the visit to take place on May 13. It would last at least three hours.

If you would like to discuss this request, please let me know as soon as possible. We intend to seek relief from the court if we cannot reach an agreement.

Sincerely,
Dan

Daniel K. Siegel
(*he, him, his*)
Staff Attorney
ACLU of North Carolina
P.O. Box 28004
Raleigh, NC, 27611
919-307-9242

EXHIBIT D

RE: [External] Zayre-Brown v. NCDPS -- Expert visit request

Tonya Sayball (NCDPS) <tonya.sayball@ncdps.gov>

Tue 5/17/2022 3:21 PM

To: Jaclyn Maffetore <jmaffetore@acluofnc.org>; Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>; Daniel Siegel <dsiegel@acluofnc.org>

Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>

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Good Afternoon,

I have confirmed with Warden Richardson, a scheduled visit on Wednesday, May 25, 2022, from 12:00 p.m. until 4:00 p.m.

Please let me know if you have any questions.

Tonya W. Sayball

Paralegal II

NCDPS

Office of General Counsel

4201 Mail Service Center

Raleigh, NC 27699

Office 919-436-3128

Cell: 919-602-5485

Email: tonya.sayball@ncdps.gov

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From: Jaclyn Maffetore <jmaffetore@acluofnc.org>

Sent: Tuesday, May 17, 2022 1:51 PM

To: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>; Daniel Siegel <dsiegel@acluofnc.org>; Tonya Sayball (NCDPS) <tonya.sayball@ncdps.gov>

Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>

Subject: Re: [External] Zayre-Brown v. NCDPS -- Expert visit request

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Jodi and Ms. Sayball,

I wanted to follow up regarding our request for a visit between Mrs. Zayre-Brown and Dr. Etiner on Wednesday, May 25. Can you confirm the visit for that date? As it is just over a week away, we would appreciate confirmation so that we can arrange for travel.

Please let us know if you need anything additional from us to confirm the visit for May 25.

Thanks,

Jaclyn Maffetore

Pronouns: she/her/hers

Staff Attorney

ACLU of North Carolina Legal Foundation

PO Box 28004, Raleigh NC 27611

O: 919-354-5070 | C: 919-666-7032

   | acluofnc.org

From: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>

Sent: Wednesday, May 11, 2022 11:05 AM

To: Daniel Siegel <dsiegel@acluofnc.org>; Tonya Sayball (NCDPS) <tonya.sayball@ncdps.gov>

Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Jaclyn Maffetore <jmaffetore@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>

Subject: RE: [External] Zayre-Brown v. NCDPS -- Expert visit request

Thanks, Dan. I'm including our paralegal Tonya Sayball on this email, she'll be in touch regarding scheduling.

Thanks,

Jodi

From: Daniel Siegel <dsiegel@acluofnc.org>

Sent: Wednesday, May 11, 2022 10:03 AM

To: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>

Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Jaclyn Maffetore <jmaffetore@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>

Subject: Re: [External] Zayre-Brown v. NCDPS -- Expert visit request

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In that case, we'll do Wednesday, May 25. We're working out travel arrangements, but for now we'd appreciate holding a tentative 1:00 PM start time. Thank you.

Daniel K. Siegel

(he, him, his)

Staff Attorney

ACLU of North Carolina

P.O. Box 28004

Raleigh, NC, 27611

919-307-9242

From: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>

Sent: Tuesday, May 10, 2022 11:57 AM

To: Daniel Siegel <dsiegel@acluofnc.org>

Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Jaclyn Maffetore <jmaffetore@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>

Subject: RE: [External] Zayre-Brown v. NCDPS -- Expert visit request

Hi, Dan:

Anson reports that they cannot accommodate a 3-hour video call, they are not staffed for that. There is no witt in the areas of the facility where the oflenders have access. The Warden indicates they can accommodate your meefing on any Wednesday and probably on a Tuesday if that is preferable.

Thanks,

Jodi

From: Daniel Siegel <dsiegel@acluofnc.org>
Sent: Tuesday, May 10, 2022 8:05 AM
To: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>
Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Jaclyn Maffetore <jmaffetore@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>
Subject: Re: [External] Zayre-Brown v. NCDPS -- Expert visit request

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Good morning, Jodi. Bumping this in your inbox -- please let us know if you have an update. If Anson has wi-fi, I believe one of Mrs. Zayre-Brown's attorneys could simply set up a laptop for her in an office, conference room, or other space that would provide some privacy.

Daniel K. Siegel

(he, him, his)

Staff Attorney

ACLU of North Carolina

P.O. Box 28004

Raleigh, NC, 27611

919-307-9242

From: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>
Sent: Wednesday, May 4, 2022 11:28 AM
To: Daniel Siegel <dsiegel@acluofnc.org>
Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Jaclyn Maffetore <jmaffetore@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com <cbrook@pathlaw.com>; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>
Subject: RE: [External] Zayre-Brown v. NCDPS -- Expert visit request

Hi, Dan, hope you're well.

I'm not sure of Anson's VC capabilities, if three hours would be too long for VC, or flexibility, but I can find out. I'll try to get back to you promptly.

Jodi

From: Daniel Siegel <dsiegel@acluofnc.org>
Sent: Wednesday, May 4, 2022 11:25 AM
To: Harrison, Jodi (CCPS) <jodi.harrison@ncdps.gov>
Cc: Rodriguez, Orlando <orodriguez@ncdoj.gov>; Brennan, Stephanie A <sbrennan@ncdoj.gov>; Jaclyn Maffetore <jmaffetore@acluofnc.org>; Michele Delgado <mdelgado@acluofnc.org>; Lauren Robbins <lrobbins@acluofnc.org>; cbrook@pathlaw.com; Taylor Brown <TBrown@aclu.org>; Jon Davidson <JonDavidson@aclu.org>
Subject: [External] Zayre-Brown v. NCDPS -- Expert visit request

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Good morning, Jodi. I just heard from Defendants' counsel in this case that Anson CI can accommodate a visit between Mrs. Zayre-Brown and Dr. Ettner on a Wednesday of this month, and that I should contact you to work out the logistics. Before we settle on a date, will you please let me know if the facility could accommodate a confidential video call with Dr. Ettner, and if so, whether scheduling that would allow more flexibility than an in-person visit? Thank you.

Best regards,
Dan

Daniel K. Siegel

(he, him, his)

Staff Attorney

ACLU of North Carolina

P.O. Box 28004

Raleigh, NC, 27611

919-307-9242

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

KANAUTICA ZAYRE-BROWN,

Plaintiff,

v.

THE NORTH CAROLINA
DEPARTMENT OF PUBLIC SAFETY,
et al.,

Defendants.

No. 3:22-cv-00191

**EXHIBIT INDEX TO PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

Exhibit	Description
Exhibit 1	Second Expert Declaration of Dr. Randi C. Ettner, Ph.D.
Exhibit 2	Declaration of Jaclyn Maffetore