UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

JENNIFER ELLER, *Plaintiff*, v. PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS, et al., *Defendants*.	Case Number: 18-cv-03649-TDC

PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF DR. MARCELLUS R. CEPHAS

Pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 105(1), Plaintiff Jennifer Eller, by and through her undersigned counsel, respectfully moves this Court for an order to exclude the expert testimony of Dr. Marcellus R. Cephas.

Dated this 7th day of September, 2022.

Respectfully submitted,

/s/ Lori B. Leskin
Kevin A. Cline (D. Md. Bar No. 27793)
Jocelyn A. Wiesner (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Fax: +1 202.942.5999
kevin.cline@arnoldporter.com
jocelyn.wiesner@arnoldporter.com

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
(admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
Telephone: (212) 809-8585
ogonzalez-pagan@lambdalegal.org

Lori B. Leskin (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: +1 212.836.8000
Fax: +1 212.836.8689
lori.leskin@arnoldporter.com

Douglas F. Curtis (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
70 West Madison Street
Suite 4200
Chicago, IL 60602-4231
Telephone: +1 312.583.2300
Fax: +1 312.583.2360
douglas.curtis@arnoldporter.com

Carl S. Charles
(admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1 West Court Square, Suite 105
Decatur, GA 30030
Telephone: (404) 897-1880
ccharles@lambdalegal.org

Kell L. Olson
(admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Telephone: (213) 382-7600
kolson@lambdalegal.org

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: September 7, 2022

/s/ Lori B. Leskin
Lori B. Leskin (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: +1 212.836.8000
Fax: +1 212.836.8689
lori.leskin@arnoldporter.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JENNIFER ELLER, *Plaintiff*, v. PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS, et al., *Defendants*.	Case Number: 18-cv-03649-TDC

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF DR. MARCELLUS R. CEPHAS

Pursuant to Local Rule 105(1), Plaintiff Jennifer Eller respectfully submits this memorandum of law in support of her motion *in limine* to exclude expert testimony of Dr. Marcellus R. Cephas.

INTRODUCTION

Jennifer Eller faced years of cruel and threatening discrimination, harassment, and physical attacks while she worked as a teacher in three separate schools within the Prince George's County Public Schools ("PGCPS") system. As a direct and proximate result, she suffers severe and complex post-traumatic stress disorder ("PTSD")—a diagnosis that she only received when her work environment became unbearable and caused her to seek professional help in dealing with her debilitating mental health issues. Ms. Eller's medical records, and the independent medical examination of expert Dr. Randi C. Ettner, an experienced psychologist, confirm that Ms. Eller's severe, complex PTSD was caused by the unrelenting hostile work environment she experienced at PGCPS schools, and the lack of any meaningful response or support from PGCPS officials.

To refute these facts, Defendants engaged Dr. Marcellus R. Cephas to conduct an independent medical examination of Ms. Eller. But in the end, Dr. Cephas submitted an expert report that offers no actual opinions about the cause of Ms. Eller's PTSD. Indeed, Dr. Cephas acknowledges that Ms. Eller exhibits symptoms of PTSD, and that she suffered distress from the hostile work environment she experienced across three schools within the Prince George's County Public Schools system. JR 505, 514-15 (Ex. 35 at 124:19-125:5; 161:17-162:4; 164:3-12).[1] Nor does Dr. Cephas deny that Ms. Eller's PTSD could have been caused by the hostile work environment she experienced at PGCPS. JR 513-14 (Ex. 35 at 157:20-158:3). Instead, Dr. Cephas lists several other factors that he speculates *may* have also contributed to Ms. Eller's PTSD, without ever opining that any of them actually did. Nonetheless, Defendants have proffered Dr. Cephas to create uncertainty or confusion and undermine the determination that Ms. Eller's PTSD was caused by the hostile work environment she suffered at PGCPS.

Dr. Cephas's opinions are speculative, baseless, and would be of no assistance to any factfinder. Accordingly, Dr. Cephas's testimony should be excluded as unreliable under Rule 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny. His opinions are also inadmissible under Rule 403 because any probative value they may have (and they have none) is substantially outweighed by the danger of unfair prejudice and confusion of the issues they would cause.

[1] Citations to "JR [#]" refer to the Joint Record submitted in relation to the parties' cross-motions for summary judgment. A redacted version of the Joint Record is available at ECF Nos. 105-108 and the unredacted sealed copies of redacted portions of the Joint Record are available at ECF Nos. 110-113. The transcript of the deposition of Dr. Cephas is Exhibit 35 of the Joint Record and the transcript of the deposition of Dr. Ettner is Exhibit 60 of the Joint Record. The expert declaration of Dr. Ettner and its attachments, including her expert report, is Exhibit 36 of the Joint Record. To the extent that the Court wishes to have these documents appended to this memorandum and motion, Plaintiff will provide them accordingly.

Prior to the filing of this motion, Plaintiff's counsel reached out to Defendant's counsel in an effort to avoid the need for judicial resolution of this issue. Defendant refused to stipulate to the requested relief.

BACKGROUND

Plaintiff Jennifer Eller, a transgender woman, was employed as a teacher within PGCPS from 2008 to 2017. *See Eller v. Prince George's Cnty. Pub. Sch.*, No. CV TDC-18-3649, 2022 WL 170792, at *1 (D. Md. Jan. 14, 2022). Ms. Eller worked as a reading and English teacher at three schools within PGCPS, namely, Kenmoor Middle School, Friendly High School, and James Madison Middle School. *Id.* Following years of discrimination, harassment, physical attacks, and retaliation, Ms. Eller was forced to resign on August 18, 2017. The details of the abuse suffered by Ms. Eller is set out in detail in the Court's Memorandum Opinion on the parties' summary judgment motions. *Id.*

Of relevance here, on October 18, 2016, Ms. Eller took unpaid leave pursuant to the Family and Medical Leave Act ("FMLA") because of the profound mental health effects of the sustained harassment she had experienced. *Id.* at *4. During her FMLA leave, Ms. Eller was, for the first time, diagnosed with post-traumatic stress disorder ("PTSD"). She received outpatient psychiatric care at Georgetown University Hospital from November 2, 2016 through December 16, 2016 and, to this day, she continues to take medication and attend dialectical behavioral and talk therapy to treat her PTSD. *Id.*

On November 18, 2019, at the behest of Defendants, Dr. Cephas conducted an independent medical examination of Ms. Eller and thereafter Defendants disclosed an expert report authored by Dr. Cephas. In his report, with regard to Ms. Eller's responses to a PTSD Symptom Scale he administered, Dr. Cephas noted that Ms. Eller's "worst recollection of [a] traumatic event is considered to be her hostile work environment. She states she was physically injured by her work environment and that she felt her life was in danger. She also reports that she has been having upsetting thoughts about the events and that her life has changed with these events. It is [sic]

impacted her work, her household, her friendships, her fun and leisure activities and in general her life." Ex. A at 5.[2] Dr. Cephas also concludes that "Ms. Eller has clear diagnosis of gender dysphoria, depression, anxiety, and symptoms of PTSD," and that Ms. Eller's "view of her [] work environment contributing significantly to the perception of her safety, mental well being and her self image" is "notable." *Id.* at 19. *See also* JR 492 (Ex. 35 at 70:10-19) (not disputing that Ms. Eller's suffers from gender dysphoria).

Still, while Dr. Cephas does not dispute that the hostile work environment Ms. Eller experienced at PGCPS caused her PTSD, JR 513-14 (Ex. 35 at 157:20-158:3, 159:6-16), Dr. Cephas concludes that there is "significant difficulty and complexity [] diagnosing Ms[.] Eller with PTSD caused from a hostile working environment." Ex. A at 19. Dr. Cephas therefore opines "that there needs to be consideration of alternative diagnosis, including general anxiety disorder, depression and borderline personality disorder … before assigning causality to the hostile work environment to the PTSD diagnosis." JR 486-87 (Ex. 35 at 49:6-51:2). Beyond concluding that other things need to be considered, however, Dr. Cephas provides *no answers*.

Indeed, Dr. Cephas does not offer any opinions about what caused Ms. Eller's PTSD. He "do[es] not dispute that there are doctors that says [sic] she has PTSD." JR 514 (Ex. 35 at 158:18-19). Rather, Dr. Cephas only says that other factors must be taken "into consideration" in evaluating the cause of her PTSD, "the diagnosis of depression, of anxiety, … her personal background, the medication that she is on, as well as … the personality that may have developed secondary to traumatic events in her childhood." JR 514 (Ex. 35 at 158:19-159:2). For example, despite the uncontested fact that Ms. Eller was first diagnosed with PTSD in 2016, and notwithstanding her work with mental health professionals for years prior to treat other conditions

[2] Exhibits A thru G cited herein are exhibits to the Declaration of Omar Gonzalez-Pagan filed concurrently herewith.

(such as her gender dysphoria and attendant anxiety and depression), Dr. Cephas queries whether the hostile work environment Ms. Eller experienced at PGCPS was the "worst" trauma for her. Ex. A at 5; JR 512 (Ex. 35 at 151:22-152:12). Dr. Cephas then goes on to speculate that other unrelated events from Ms. Eller's past may have played some role in her PTSD diagnosis. Ex. A at 17; *see also* JR 506, 514 (Ex. 35 at 127:19-128:5, 159:6-13). He further states that Ms. Eller's need for social acceptance, as well as the early onset of gender dysphoria, "makes it imperative to rule out borderline personality disorder vs PTSD." Ex. A at 18. He offers no medical or psychological support for this speculation, nor does he cite any authority in psychiatric literature for this unsubstantiated claim. *Id.* Dr. Cephas further states, again without any citation, that the use of Estrace, which is a hormone treatment for gender dysphoria (as well as multiple other medical conditions), "may cause or contribute significantly to the previous mentioned symptoms of depression, anxiety, and PTSD." Ex. A at 19. Again, he offers no medical or psychological support for this speculation, nor does he cite any authority in psychiatric literature for this unsubstantiated claim. JR 508 (Ex. 35 at 136:3-16).

Plaintiff's expert, Dr. Randi C. Ettner, also evaluated Ms. Eller. Dr. Ettner is a licensed clinical and forensic psychologist who has diagnosed and treated thousands of individuals with gender dysphoria and diagnosed and treated hundreds of patients with PTSD. JR 541-42, 563 (Ex. 36 at 2-3, 24). Unlike Dr. Cephas, Dr. Ettner provides an affirmative medical answer as to the causation of Ms. Eller's PTSD. And more to the point, Dr. Ettner engages in the differential diagnosis that Dr. Cephas says is necessary but does not perform. *See*, *e.g.*, JR 557, 572 (Ex. 36 at 18, 33) ("Ms. Eller has two comorbid disorders: depressive disorder, and generalized anxiety disorder…Approximately 80% of patients with PTSD have at least one other comorbid psychiatric

disorder, with depression and anxiety disorders being the most common."). Dr. Ettner explains that:

> Prior to Ms. Eller's transition, she was never diagnosed with PTSD. A review of her medical records and those of her mental health provider clearly document the hostile environment Ms. Eller endured as the genesis of PTSD, and the corresponding treatments prescribed for the disorder. Additionally, I corroborated these findings through psychological testing of Ms. Eller, specific to PTSD. … There is no doubt that Ms. Eller's current chronic symptomatology and complex PTSD are the predictable result of the prolonged and repetitive assaults she endured while employed at Prince George's County Public Schools.

Ex. B ¶ 15. She further explained that "the ceaseless harassment, discrimination and humiliation to which Ms. Eller was subjected completely eroded her coping strategies and resilience, and resulted in the irremediable damage of what has now become chronic PTSD." Ex. B ¶ 16.

LEGAL STANDARD

Federal Rule of Evidence 702 places "a special gatekeeping obligation" on a trial court, *Nease v. Ford Motor Co.*, 848 F.3d 219, 230 (4th Cir. 2017), to ensure that an expert's testimony "both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597; *see also Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021). And "the importance of the gatekeeping function cannot be overstated." *Sardis*, 10 F.4th at 283 (cleaned up).

"Where the admissibility of expert testimony is specifically questioned, Rule 702 and *Daubert* require that the district court make explicit findings, whether by written opinion or orally on the record, as to the challenged preconditions to admissibility." *Id.* "The proponent of the expert testimony bears the burden of establishing its admissibility, that is, the burden of coming forward with evidence from which the trial court could determine that the evidence is admissible under *Daubert*." *Morris v. Biomet, Inc.*, 491 F. Supp. 3d 87, 97 (D. Md. 2020) (internal citation omitted).

First, this Court must determine whether the proposed expert is even qualified to render the proffered opinion, which requires examining the expert's professional qualifications and "full range of experience and training." *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 162 (4th Cir. 2012). If the purported expert is not qualified, the court should exclude the testimony. *See SMD Software, Inc. v. EMove, Inc.*, 945 F. Supp. 2d 628, 639 (E.D.N.C. 2013).

Second, even if the expert has the appropriate qualifications, the court must separately consider the relevancy of the expert's testimony as it is "a precondition to admissibility." *Sardis*, 10 F.4th at 282. To be relevant, the testimony must have "a valid scientific connection to the pertinent inquiry." *Id.* at 281. "[I]f an opinion is not relevant to a fact at issue, *Daubert* requires that it be excluded." *Id.*

Third, the court must inquire if the opinion is based on a reliable foundation, focusing on "the principles and methodology" employed by the expert to assess whether it is "based on scientific, technical, or other specialized *knowledge* and not on belief or speculation." *Id.* at 281-82 (emphasis in original). In evaluating reliability, courts consider, among other things: (1) whether the theory "can be (and has been) tested"; (2) whether it has been "subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) "whether the expert's methodology is generally accepted in his field of expertise." *Id.* at 281; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149-50 (1999). These factors are "neither definitive, nor exhaustive." *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199–200 (4th Cir. 2001) (citation omitted).

Even when an expert relies upon his experience and training, and not a specific methodology, so that the application of the *Daubert* factors is more limited (*see Freeman v. Case Corp.*, 118 F.3d 1011, 1016 n.6 (4th Cir. 1997)), "such testimony is admissible ... so long as an

experiential witness explains how his experience leads to the conclusion reached, why his experience is a sufficient basis for the opinion, and how his experience is reliably applied to the facts." *United States v. Bynum*, 604 F.3d 161, 167 (4th Cir. 2010) (cleaned up); *Morris*, 491 F. Supp. 3d at 98.

Finally, the Fourth Circuit has cautioned that although the trial court has "broad latitude" to determine reliability, it must still engage in the gatekeeping process and not simply "delegate the issue to the jury." *Sardis*, 10 F.4th at 281. Even rigorous cross-examination is not a substitute for the court's gatekeeping role. *See Nease*, 848 F.3d at 231.

ARGUMENT

I. Dr. Cephas Is Not Qualified to Offer Opinions on the Diagnosis or Treatment of Gender Dysphoria, or the Diagnosis or Treatment of PTSD in Patients with Gender Dysphoria.

An expert witness must possess the requisite "knowledge, skill, experience, training, or education" that would assist the trier of fact. *Kopf v. Skyrm*, 993 F.2d 374, 377 (4th Cir. 1993). If not qualified, the expert's testimony is unreliable. *Reliastar Life Ins. Co. v. Laschkewitsch*, No. 5:13-CV-210-BO, 2014 WL 1430729, at *1 (E.D.N.C. Apr. 14, 2014).

Moreover, "an expert's qualifications must be within the same technical area as the subject matter of the expert's testimony; in other words, a person with expertise may only testify as to matters within that person's expertise." *Martinez v. Sakurai Graphic Sys. Corp.*, No. 04 C 1274, 2007 WL 2570362, at *2 (N.D. Ill. Aug. 30, 2007); *see also Lebron v. Sec. of Fla. Dept. of Children and Families*, 772 F.3d 1352, 1369 (11th Cir. 2014). "Generalized knowledge of a particular subject will not necessarily enable an expert to testify as to a specific subset of the general field of the expert's knowledge." *Martinez*, 2007 WL 2570362, at *2. "For example, no medical doctor is automatically an expert in every medical issue merely because he or she has graduated from medical school or has achieved certification in a medical specialty." *O'Conner v. Commonwealth*

Edison Co., 807 F. Supp. 1376, 1390 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir. 1994); *see also*, *e.g.*, *Hartke v. McKelway*, 526 F. Supp. 97, 100-01 (D.D.C. 1981).

Dr. Cephas has not conducted any primary research or published any literature, whether peer-reviewed or not. JR 482 (Ex. 35 at 30:7-15). And by his own admission, Dr. Cephas has crossed paths professionally with only approximately 10 transgender people over the course of his career. JR 484-85 (*Id*. at 41:21-42:3). He has never diagnosed a person with gender dysphoria or gender identity disorder. JR 485 (*Id.* at 42:4-11). He also has never diagnosed a transgender person with PTSD. JR 485 (*Id.* at 44:10-11). At most, Dr. Cephas testified that he had encountered "five or six" transgender persons with PTSD. JR 485 (*Id.* at 44:13-17). However, even then, Dr. Cephas "would not be specifically treating them for PTSD," rather he would "treat them for comorbid psychiatric illnesses, depression, anxiety." JR 485 (*Id.* at 43:12-19).

Dr. Cephas thus only possesses the sort of "generalized knowledge of a particular subject" that courts have frequently rejected as a qualification under Rule 702, particularly when it comes to the interaction and differentiation of gender dysphoria and PTSD diagnoses. Like other experts excluded from offering their opinions on the diagnosis of gender dysphoria, Dr. Cephas "has never diagnosed a patient with gender dysphoria, treated gender dysphoria, treated a transgender patient, conducted any original research about gender dysphoria diagnosis or its causes, or published any scientific, peer-reviewed literature on gender dysphoria." *Kadel v. Folwell*, No. 1:19-CV-272, 2022 WL 3226731, at *9 (M.D.N.C. Aug. 10, 2022); *see also Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 825 (7th Cir. 2010) ("Dr. Hirsch was not qualified to testify about Heidi's MS, the exacerbation of her MS, or other related physical ailments because he had very limited experience with MS patients (most of whom sought his expertise specifically for the treatment of smell disorders or mouth pain) and the opinion was not supported by relevant medical literature.").

Moreover, at his deposition, Dr. Cephas demonstrated a complete lack of familiarity with the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People. JR 485-86 (Ex. 35 at 45:1-46:10; *see also id.* at 69:5-9). "Developed by the World Professional Association for Transgender Health (WPATH), the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th Version 2012) … represent the consensus approach of the medical and mental health community, and have been recognized by various courts, including [the Fourth Circuit], as the authoritative standards of care." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (internal citation omitted). Importantly, and most relevant given the nature of Dr. Cephas's opinions, "[t]he WPATH promulgated Standards of Care, Section VII 'Competency of Mental Health Professionals Working with Adults Who Present with Gender Dysphoria,' includes the criteria that such clinicians have the 'Ability to recognize and diagnose coexisting mental health concerns and to distinguish these from gender dysphoria.'" Ex. B ¶ 12.

In sum, Dr. Cephas does not have the necessary experience to opine about how Ms. Eller's gender dysphoria diagnosis, nor any attendant development of depression or anxiety, might have complicated or affected Ms. Eller's PTSD diagnosis. Dr. Cephas's "degree of specialized knowledge is simply too thin to give his testimony the foundation needed to permit a [factfinder] to consider it." *United States v. Jacques*, 784 F. Supp. 2d 59, 62 (D. Mass. 2011). Dr. Cephas is "not qualified by background, training, or expertise to opine" about any of the factual issues presented by this case, let alone the complex and nuanced facts relating to Ms. Eller's gender dysphoria diagnosis, nor the manner in which any attendant development of depression or anxiety might have complicated or affected Ms. Eller's PTSD diagnosis. *See Lebron*, 772 F.3d at 1369.

II. Dr. Cephas's Opinions and Testimony Are Unreliable.

Even if this Court were to credit Dr. Cephas with appropriate expertise in the abstract, "qualifications alone do not suffice." *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999); *see also Patel ex rel. Patel v. Menard, Inc*., No. 1:09-CV-0360-TWP-DML, 2011 WL 4738339, at *1 (S.D. Ind. Oct. 6, 2011). Even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under … *Daubert*." *Clark*, 192 F.3d at 759 n.5.

An expert's testimony should only be admitted if it is sufficiently reliable. And "proffered evidence that has a greater potential to mislead than to enlighten should be excluded." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 632 (4th Cir. 2018). Indeed, before any expert testimony is presented to the trier of fact, the Court must assess whether there is some factual basis for the expert's opinion, *see Doe v. AE Outfitters Retail Co*., No. WDQ-14-508, 2015 WL 9255325, at *5 (D. Md. 2015), and whether the expert's testimony fits the facts of the case, *see Shreve v. Sears, Roebuck & C*o., 166 F. Supp. 2d 378, 392-93 (D. Md. 2001). Here, Dr. Cephas's opinions fail all indicia of reliability and do not fit with the facts of the case. To the contrary, Dr. Cephas's proffered opinions are based on nothing more than rank speculation, "untested" theories, and assumptions that are obsolete, flawed, and completely disconnected from the facts.

a. Dr. Cephas's testimony regarding alternative causes for Ms. Eller's PTSD symptomatology is based entirely on speculation, and is not supported by any scientific evidence, facts, or reliable methodology.

Dr. Cephas's opinions are not based on fact – they are rather based (generously) on *hypotheses*, which is just a different way of saying that they are based on speculation. As such, Dr. Cephas lacks knowledge "of facts which enable him to *express a reasonably accurate*

conclusion as opposed to conjecture or speculation." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988) (emphasis added). And opinions based on "subjective belief or unsupported speculation" should be rejected. *Daubert*, 509 U.S. at 589-90.

"While hypothesis is essential in the scientific community because it leads to advances in science, speculation in the courtroom cannot aid the fact finder in making a determination." *Dunn v. Sandoz Pharms. Corp.*, 275 F. Supp. 2d 672, 684 (M.D.N.C. 2003). "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). Indeed, such "speculation is unreliable evidence and is inadmissible." *Dunn*, 275 F. Supp. 2d at 684; *see also Sardis*, 10 F.4th at 291; *Small v. WellDyne, Inc.*, 927 F.3d 169, 176-77 (4th Cir. 2019); *Samuel v. Ford Motor Co.*, 112 F. Supp. 2d 460, 470 (D. Md. 2000).

Plaintiff addresses here each of Dr. Cephas's proffered "alternative causes" for Ms. Eller's PTSD symptomatology.

i. Unsupported Speculation Regarding Ms. Eller's Gender Dysphoria, Anxiety, and Depression Diagnoses

In his report, Dr. Cephas notes that Ms. Eller "had depression and anxiety and gender dysphoria prior to the incident of 2011," (Ex. A at 16), referring to the year in which Ms. Eller socially transitioned to live as a woman and immediately faced discrimination, harassment, and a hostile work environment. Dr. Cephas then notes that because Ms. Eller "has had significant depression, and anxiety which are overlapping symptoms with PTSD," "[s]he clearly has several diagnoses that would have to be considered in the differential diagnoses of PTSD." Ex. A at 18.

But the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Version 5 ("DSM-5") notes that "[i]mpairment, … the development of depression and anxiety, may be a consequence of gender dysphoria." Ex. B ¶ 14. And as noted above, the

WPATH Standard of Care recommend that "clinicians have the 'Ability to recognize and diagnose coexisting mental health concerns and to distinguish these from gender dysphoria.'" Ex. B ¶ 12.

Under questioning, Dr. Cephas admitted that a person with PTSD may also have comorbid depressive disorder and anxiety disorder, and that "a diagnosis of anxiety disorder or depressive disorder does not eliminate the possibility that a patient also suffers from PTSD." JR 496 (Ex. 35 at 88:14-89:8). Indeed, according to the American Psychiatric Association's Practice Guideline for the Treatment of Patients with Acute Stress Disorder and Posttraumatic Stress Disorder (hereafter "APA PTSD Practice Guidelines"), "[p]atients with PTSD often have comorbid major depressive disorders, anxiety disorders, and substance use disorders (use of alcohol, tobacco, and other substances)." Ex. C at 21. And importantly, the APA PTSD Practice Guidelines notes that "[i]t is important to note that if the [DSM] criteria are met, a major depressive episode can be diagnosed *in conjunction* with … PTSD." *Id*. at 44.

Here, following her experiences at PGCPS, a number of Ms. Eller's mental health care providers diagnosed her with PTSD separate and apart from her pre-existing diagnoses of gender dysphoria, anxiety, and depression. This includes mental health care professionals at Georgetown University Hospital, where Ms. Eller received outpatient psychiatric care during her FMLA leave in 2016. *See Eller*, 2022 WL 170792, at *4; JR 502-03 (Ex. 35 at 113:13-114:4). It also includes Ms. Eller's providers at Whitman-Walker Health, who noted in their assessments that Ms. Eller had a *primary* diagnosis of PTSD and *secondary* diagnoses of depression, attention deficit disorder, and gender dysphoria. JR 505 (Ex. 35 at 122:8-123:16 (emphasis added)). These multiple and *distinct* diagnoses were confirmed by Dr. Ettner based on her evaluation of Ms. Eller and review of Ms. Eller's medical history. JR 572-73 (Ex. 36). And of course, Ms. Eller had been working with mental health professionals *prior to* the onset of the hostile work environment she

experienced at PGCPS, JR 511 (Ex. 35 at 146:18-21), but did not experience the symptoms of PTSD and was not diagnosed with PTSD until 2016, *after* she endured years of discrimination, harassment, and retaliation at PGCPS because she is transgender.

In the end, Dr. Cephas cannot dispute – and does not attempt to deny – that Ms. Eller's mental health providers have diagnosed her with PTSD as a result of the discrimination, harassment, and retaliation she experienced at PGCPS, nor that she has PTSD. Instead, Dr. Cephas seeks to inject uncertainty by saying that making such a diagnosis involves "significant difficulty and complexity," without reaching or providing any *conclusions*. Ex. A at 19.

ii. Unsupported Speculation Regarding Borderline Personality Disorder

In his report, Dr. Cephas states that Ms. Eller's "clear need for social acceptance as well as the early onset of gender dysphoria makes it imperative to rule out borderline personality disorder vs PTSD," and that her symptoms could be attributed to borderline personality disorder because "she has been treated with a specific type of treatment for BPD," in reference to Ms. Eller undergoing dialectical behavioral therapy ("DBT") as a form of treatment. Ex. A at 18. Mr. Cephas's testimony in this regard is completely speculative and unsupported by any evidence.

No mental health professional has ever diagnosed Ms. Eller with borderline personality disorder, and no medical record reviewed by Dr. Cephas reflects a diagnosis of borderline personality disorder. JR 493 (Ex. 35 at 74:9-14). And under questioning, Dr. Cephas clarified that he was not making such a diagnosis as that cannot be done from one sitting. JR 493 (Ex. 35 at 75:1-9).

In addition, Dr. Cephas's assertion that Ms. Eller's symptomatology may be due to borderline personality disorder because she has been treated with DBT is completely unmoored from the facts and scientific literature. Again, under questioning, Dr. Cephas admitted that DBT

is used to treat other mental disorders besides borderline personality disorder, and that research shows that DBT has been successfully used to treat depression, bulimia, PTSD, and other disorders. JR 493 (Ex. 35 at 76:15-17; 77:19-22). Dr. Cephas cites to no research studies or peer-reviewed articles in support of his speculation. Indeed, he did not rely on either to prepare his report. JR 491(Ex. 35 at 68:21-69:4).

iii. Unsupported Speculation Regarding Estrace Medication

Dr. Cephas also posits that "the use of Estrace may cause or contribute significantly to [Ms. Eller's] symptoms of depression, anxiety, and PTSD" and that "[t]his contributes to the significant difficulty and complexity of diagnosing Ms[.] Eller with PTSD caused from a hostile working environment." Ex. A at 19. Estrace (also known as estradiol) is a form of estrogen medication used to treat a variety of conditions, including menopause and gender dysphoria. *See*, *e.g.*, Exs. D, E. It is recommended as a form of endocrine treatment for gender dysphoria. Ex. D. However, Dr. Cephas admits that he did not review the Endocrine Society's Clinical Practice Guidelines for the Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons. JR 507 (Ex. 35 at 132:18-133:2). And when asked about what studies he relied for his conclusion that the use of Estrace can contribute significantly to Ms. Eller's symptoms of PTSD, his only response was that he relied on the package insert for Estrace. JR 508 (Ex. 35 at 135:3-15).[3] Indeed, when asked, Dr. Cephas could not point to any published research to support his opinion that Estrace contributed to Ms. Eller's symptoms of PTSD. JR 508 (Ex. 35 at 136:3-15). And when asked if he could "say with any medical certainty that Estrace caused Ms. Eller's PTSD symptoms," Dr. Cephas simply responded: "No." JR 508 (Ex. 35 at 136:17-19). What is more, Ms. Eller has been on Estrace

[3] In his deposition, Dr. Cephas stated that he also referenced the PDR, more widely known as the Physicians' Desk Reference. JR 508 (Ex. 35 at 135:17-22). This is of no importance. "The written material for a given drug [contained in the PDR] is a compilation of data and recommendations that are identical to those in the drug's package insert." *See* Ex. F.

since 2011 (Ex. A at 19), and there is absolutely no evidence that she experienced the symptoms of PTSD until after she experienced years of discrimination, harassment, and even violence while working at PGCPS because she is transgender.

iv. Unsupported Speculation Regarding Past Traumatic Experiences

Lastly, Dr. Cephas speculates that prior traumatic (and deeply personal) experiences in Ms. Eller's life could have resulted in Ms. Eller's PTSD. Ex. A at 17-18. This includes "several instances of assault and sexual abuse that had happened prior to [Ms. Eller] describing herself in a hostile work environment." Ex. A at 18. But Ms. Eller experienced these traumatic events *years, if not decades*, before she exhibited the symptomatology required for a diagnosis of PTSD in 2016. And Ms. Eller was able to practice, quite successfully, as a teacher without any impairment for three years prior to her transition in 2011, continuing thereafter to work as a teacher through years of harassment and even violence. It was not until 2016, *after* enduring five years of discriminatory harassment and violence, that she ultimately developed PTSD. Given such history, Dr. Cephas cannot—and indeed, he does not—explain how Ms. Eller's PTSD could be caused by events that predated her diagnoses by several years, if not decades, and did not cause any earlier impairment. He also ignores that people with prior traumatic experiences can develop PTSD. As Dr. Ettner explains, "[m]any, if not most, people have experienced upsetting or traumatic incidents during their lifetime," but "[t]hese historic events in no way preclude the subsequent development of PTSD." Ex. B ¶ 13. "By analogy, the presence of type-one diabetes in childhood does not prevent the development of cancer or other chronic or acute diseases across the lifespan." *Id*. Indeed, the APA PTSD Practice Guidelines acknowledge that PTSD patients may have "prior trauma exposure." Ex. C at 12.

Dr. Cephas not only fails to account for such an obvious fact, but he also cites to no research studies or peer-reviewed literature in his report to support his contentions. And when confronted with a scientific peer-reviewed study looking at discriminatory experiences associated with PTSD among transgender adults, Dr. Cephas could not dispute the study's conclusion that many transgender adults "experience[] known sources of trauma, including childhood abuse and intimate partner violence, but the association between discrimination experiences and PTSD symptoms existed after statistically adjusting for these [factors]." Ex. G; *see also* JR 509-10 (Ex. 35 at 138:10-143:17 (discussing and not refuting the conclusions contained within Exhibit F, a peer-reviewed study titled "Discriminatory experiences associated with posttraumatic stress disorder symptoms among transgender adults")).[4]

* * * * *

Dr. Cephas's proffered testimony is an exercise in "kicking up dust" around Ms. Eller's PTSD so as to create doubt about it, or what caused it—without actually contradicting the findings of qualified medical professionals who have determined that Ms. Eller's workplace trauma caused her severe PTSD. Instead, he engages in speculation and conjuncture to try to confound the jury. The Court should reject such unmoored and unreliable testimony.

In *O'Neill v. Windshire-Copeland Assocs.*, 372 F.3d 281 (4th Cir. 2004), the Fourth Circuit affirmed a district court's exclusion of a proffered expert's testimony regarding causation because his testimony was based on speculation. Specifically, the expert in *O'Neill* had concluded that the plaintiff's "fall was '*much more likely*' to have been caused by the wind because 'it *does not appear likely* ... that someone of Ms. O'Neill's athletic skill and ability would have accidentally leaned over too far backwards and lost her balance.'" *Id.* at 285 (emphasis added). But as the

[4] Plaintiff is concurrently filing a separate motion *in limine* to exclude questioning and testimony about Ms. Eller's prior experiences with sexual assault, which the Court should consider once it grants this motion.

Fourth Circuit has noted, an expert should not be allowed to testify as to potential alternate causes when his methods for forming his opinion did not allow him to testify with "any degree of precision." *Testerman v. Riddell, Inc.*, 161 F. App'x 286, 289 (4th Cir. 2006); *cf. Waytec Elecs. Corp. v. Rohm & Haas Elec. Materials, LLC*, 255 F. App'x 754, 759 (4th Cir. 2007) (affirming district court's reasoning when, "[b]ecause Waytec's experts failed to … offer an explanation for why the proffered alternative causes were not the sole cause of the problem, the district court determined that the experts opinions on causation lacked sufficient reliability and so would not be admitted into evidence") (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999) (cleaned up). Thus, like the expert testimony at issue in *O'Neill*, Dr. Cephas's "opinion appears to be based more on supposition than science," especially when, like the *O'Neill* expert, Dr. Cephas is "not clear" on the causation of Ms. Eller's PTSD. *O'Neill*, 372 F.3d at 285.

"[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). And this is one of those circumstances in which "there is simply too great an analytical gap between the data and the opinion proffered." *Id.* "[T]o the extent an expert makes inferences based on the facts presented to him, the court must ensure that those inferences were derived using scientific or other valid methods." *Sardis*, 10 F.4th at 281 (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999) (cleaned up).

Here, Dr. Cephas' testimony is, at best (and being charitable), an "inspired hunch." *Happel*, 602 F.3d at 826. Dr. Cephas did not use any recognized scientific method or actually perform any differential diagnosis to reach his "opinions." His testimony amounts to pure guesswork, unmoored from any scientific evidence, and it will serve (by apparent design) to

confound, rather than aid, the jury. The Court should exclude Dr. Cephas's testimony because it is unreliable.

b. Dr. Cephas reaches no conclusion on causation and therefore his testimony is of no aid to a factfinder.

Putting aside Dr. Cephas's lack of qualifications, and his lack of reliance on appropriate methods and standards, his testimony should be precluded for the entirely separate reason that he does not actually offer any specific conclusion as to the cause for Ms. Eller's PTSD. Rather, he only identifies potential issues in her past that might have impacted her mental health, but then fails to state, with any degree of medical certainty, that any of these issues caused her current PTSD-related symptoms. In fact, he hedges at multiple points, noting only that alternative explanations need to be considered "before assigning causality to the hostile work environment to the PTSD diagnosis." JR 486-87 (Ex. 35 at 49:17-50:4). He further states that he cannot say that plaintiff's PTSD symptoms are not caused by the hostile work environment, but rather that it is "complex" to assign causality. JR 513-14 (Ex. 35 at 157:20-158:3).

To be relevant and reliable, an expert's opinion needs to "fit" with the facts at issue. *Bourne v. E.I. DuPont de Nemours & Co.*, 85 F. App'x 964, 966 (4th Cir. 2004). "Expert testimony is relevant where it is sufficiently tied to the facts of the case so that it will *aid the jury in resolving a factual dispute*." *Morris v. Biomet, Inc.*, 491 F.Supp.3d 87, 98 (D. Md. 2020) (quoting *Casey v. Geek Squad Subsidiary Best Buy Stores, L.P.*, 823 F. Supp. 2d 334, 341 (D. Md. 2011)) (cleaned up) (emphasis added).

Here, Dr. Cephas's testimony "w[ill] not [] aid[] the jury in understanding the causation question" or in determining whether the discrimination, harassment, retaliation, and hostile work environment Ms. Eller experienced at PGCPS caused her PTSD. *Ervin v. Johnson & Johnson, Inc.*, No. 2:04CV0205-JDT-WGH, 2006 WL 1529582, at *9 n.6 (S.D. Ind. May 30, 2006), *aff'd*,

492 F.3d 901 (7th Cir. 2007). To the contrary, Dr. Cephas's testimony "would [] only justif[y] speculation on the part of the jurors as to causation," rather than assist them in resolving a factual question. *Id.* Offering the jury a series of hypothetical possibilities, without being able to definitively identify any of them as causes of Ms. Eller's PTSD, not only has the potential to confuse the jury but will require them to speculate about personal issues that Ms. Eller may have experienced at one point in her life without any proof that Ms. Eller's PTSD symptoms are in any way related to these other matters.

Moreover, Dr. Cephas' testimony, if allowed, will only further outdated stereotypes that transgender individuals have mental health problems and that such mental health issues are the cause of their gender dysphoria. But as the Fourth Circuit has noted, "a long line of decisions in this circuit … have emphasized that proof of causation must be such as to suggest 'probability' rather than mere 'possibility,' precisely to guard against raw speculation by the fact-finder." *Sakaria v. Trans World Airlines*, 8 F.3d 164, 172–73 (4th Cir. 1993).

The Court should exclude Dr. Cephas's testimony because it is of no aid to a factfinder.

III. Dr. Cephas's Opinions Lack Probative Value and Are Therefore Inadmissible Under Federal Rule of Evidence 403.

Finally, the Court should exclude Dr. Cephas's testimony because its introduction will mislead the jury, resulting in unfair prejudice and confusion of the issues. Fed. R. Evid. 403. Dr. Cephas' questioning of plaintiff's contention that the hostile work environment she encountered in defendant's schools was the worst trauma she had experienced impermissibly intrudes on the jury's function. It is not for Dr. Cephas, as an expert, to comment on the validity of plaintiff's experience and perception; that is something that the jury will have to decide for themselves. *See Nichols v. American Nat. Ins. Co.,* 154 F.3d 875, 883 (8th Cir. 1998); *United States v. Dorsey*, 45

F.3d 809, 815 (4th Cir. 1995). Defendant should not be permitted to call an expert merely to argue to the jury that plaintiff should not be believed.

CONCLUSION

For the reasons explained herein, the Court should exclude Dr. Cephas's testimony. Given the flaws in his analysis, his lack of expertise with gender dysphoria and transgender patients, and his inability to state with any medical certainty what caused Ms. Eller's PTSD, Dr. Cephas's testimony must be excluded.

Respectfully submitted this 7th day of September 2022.

/s/ Lori B. Leskin
Kevin A. Cline (D. Md. Bar No. 27793)
Jocelyn A. Wiesner (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Fax: +1 202.942.5999
kevin.cline@arnoldporter.com
jocelyn.wiesner@arnoldporter.com

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
(Admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
Telephone: (212) 809-8585
ogonzalez-pagan@lambdalegal.org

Lori B. Leskin (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: +1 212.836.8000
Fax: +1 212.836.8689
lori.leskin@arnoldporter.com

Carl S. Charles
(Admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1 West Court Square, Suite 105
Decatur, GA 30030
Telephone: (404) 897-1880
ccharles@lambdalegal.org

Douglas F. Curtis (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
70 West Madison Street, Suite 4200
Chicago, IL 60602-4231
Telephone: +1 312.583.2300
Fax: +1 312.583.2360
douglas.curtis@arnoldporter.com

Kell L. Olson
(Admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Telephone: (213) 382-7600
kolson@lambdalegal.org

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: September 7, 2022

/s/ Lori B. Leskin

Lori B. Leskin (admitted *pro hac vice*)
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: +1 212.836.8000
Fax: +1 212.836.8689
lori.leskin@arnoldporter.com