

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

No. 3:22-cv-191

KANAUTICA ZAYRE-BROWN,

Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF  
PUBLIC SAFETY, et al.,

Defendant.

**DEFENDANTS' REPLY IN SUPPORT  
OF THEIR MOTION FOR AN ORDER  
COMPELLING RULE 35  
EXAMINATIONS**

Plaintiff opposes Defendants' Rule 35 motion even though the allegations in her complaint put her condition squarely at issue, Plaintiff's own expert has already performed (and relies upon) the same type of examination requested by Defendants, and Plaintiff's expert *has already submitted an affidavit criticizing one of Defendants' experts for failing to do the examinations they now request*. Under these circumstances, denial of this motion would meaningfully impair the Defendants' ability to defend this case and would place them at a significant disadvantage relative to Plaintiff.

Defendants have satisfied the two factors required under Rule 35. Plaintiff's arguments to the contrary are not compelling and should fail for three reasons. First, Defendants have sufficiently demonstrated that good cause exists to support the requested examinations. Second, Drs. Penn and Boyd are qualified to conduct the requested examinations. Lastly, Plaintiff's allegations and her expert's assertions firmly place the scale, scope, causes, and manifestations of Plaintiff's gender dysphoria and the potential efficacy of treatment options in controversy, and these matters are central to her claims.

**A. The Requested Rule 35 Examinations are Supported by Good Cause.**

Fundamentally, Plaintiff's claims are rooted in her contention that, given the severity of her gender dysphoria, Defendants' decision not to approve surgery constitutes deliberate indifference and discrimination based on her disability. Indeed, Plaintiff acknowledges that her "need for gender-affirming surgery and the harm she has suffered without it" is central to the litigation. (*See* DE-39 at 15). Thus, the nature of Plaintiff's gender dysphoria and the potential treatment options are central to this litigation. The Rule 35 motion seeks the opportunity to explore these issues through qualified professionals. Without the requested examinations, Defendants' experts will be forced to rely solely on second-hand information gleaned from static sources, leaving Defendants at a significant disadvantage to counter Plaintiff's expert-backed claims based on an in-person assessment. Therefore, Defendants have a genuine need for their experts to conduct these examinations. Such a need is the "element that separates the procedures involving independent medical examinations and other tools of discovery[.]" *EEOC v. Maha Prabhu, Inc.*, No. 3:07-cv-111-RJC, 2008 U.S. Dist. LEXIS 74393, at \*6 (W.D.N.C. June 23, 2008).

Plaintiff incorrectly argues that the requested examinations are unnecessary because Defendants could evaluate her condition in other ways. More specifically, Plaintiff contends that Defendants have access to Plaintiff's medical records, have deposed her, could depose her expert, could depose other medical providers, and could serve additional written discovery. But relying solely on those other discovery tools will significantly impede the ability of Defendants' experts to fully explore a central issue in this litigation—the nature of Plaintiff gender dysphoria and the potential treatment options. Moreover, without these examinations, Defendants will be at a significant disadvantage vis-à-vis Plaintiff's own expert, who is relying on her own in-person examination. Additionally, in arguing that Defendants have not shown good cause, Plaintiff cites

a series of cases that are all distinguishable.

**1. The Requested Rule 35 Examinations are Necessary to Allow a Full Opportunity to Develop Evidence.**

While it is true that a plaintiff's examination by her own expert does not automatically entitle a defendant to secure a Rule 35 examination, it is also true that many courts have found good cause in that very situation. *See* DE-38 at 7 (citing several cases for this point). Plaintiff attempts to sidestep this fact by arguing that the examinations are not necessary because other discovery tools are available to Defendants. *See* DE-38 at 8-10. That contention fails because none of the other tools can provide the opportunity to fully develop and support expert testimony—a point their own expert not only concedes but used affirmatively to attack one of Defendants' experts at the preliminary injunction phase.

Plaintiff first suggests that a review of her medical records can serve as a substitute for the requested examinations. *See* DE-37 at 2, 5-6, 9-10. Such a suggestion, however, misunderstands the need for the requested examinations. As articulated in Defendants' supporting memorandum (DE 38 at 4-5, 10-13), the proposed examiners intend to explore aspects of Plaintiff's condition to further inform their expert opinions. No amount of record review could serve as an adequate substitute for that task.

Medical records are static documentary evidence that only capture specific information at a point in time. Medical records cannot be questioned or tested. And the records reflect only what is entered therein, often without context or explanation. In short, a records review, while a necessary and useful tool, cannot seriously be said to serve as a substitute for an in-person examination. This much is reflected by the fact that Dr. Ettner did not solely rely on a records review. So too, Drs. Penn and Boyd should not be limited to a review of medical records to inform their expert opinions and conclusions on the central matter in this litigation—the nature of

Plaintiff's gender dysphoria and the potential treatment options. Indeed, this Court has found good cause where the movant demonstrates that review of medical records is insufficient to fully inform a responding expert's conclusions. *See Simon v. Bellsouth Advert. & Publ'g Corp.*, No. 3:09-CV-177-RJC-DCK, 2010 U.S. Dist. LEXIS 46388, at \*9 (W.D.N.C. Mar. 31, 2010) (accepting the moving party's position regarding "the inadequacy of relying on Plaintiff's medical records, and the necessity for an independent assessment, for a fair opportunity to defend against the claims brought by" the plaintiff.)

Plaintiff also appears to suggest that the fact that she was deposed somehow defeats a showing of good cause under Rule 35 because Defendants and their experts could simply review a deposition transcript. *See* DE-39 at 5-6, 10. Not so. This contention ignores the reality that an expert report based on the reading of a transcript simply cannot have the same weight as a report that is based on that expert's personal observations. Moreover, a lawyer's deposition cannot substitute for an expert's own personal examination that allows the opportunity for questions and follow up that are guided by medical or psychological expertise and dictated by the purpose of the examination.

In fact, Plaintiff's expert has already attacked one of Defendants' experts for offering opinions without the benefit of an in-person examination or an explanation as to why one was not necessary. DE-22-1 ¶ 21. Defendants' experts would surely be open to the same attack if they offer full expert reports at this stage in the litigation (as opposed to affidavits in response to a motion for preliminary injunction), without the benefit of in-person assessments. In short, while certainly a useful and productive discovery tool, it is difficult to see how one can conclude that a party-deposition can somehow foreclose Rule 35 examinations aimed at gathering information that is pertinent to forthcoming expert reports.

Courts have acknowledged as much. *See Saul Yonko v. City of Upland*, No. 5:18-cv-2259-SVW (SPx), 2022 U.S. Dist. LEXIS 110582, at \*8 (C.D. Cal. Jan. 28, 2022) (finding that even though the subject condition may be “documented in medical records and through deposition testimony, this does not preclude a Rule 35 examination[;]”) *Perona v. Time Warner Cable*, No. ED CV 14-2501-MWF (SPx), 2016 U.S. Dist. LEXIS 202950, at \*13-14 (C.D. Cal. May 5, 2016) (allowing a Rule 35 motion despite documentation of the non-moving party’s medical condition in medical records and deposition testimony); *Ferrell v. Shell Oil Co.*, CIVIL ACTION NO. 95-0568 SECTION “R” (2), 1995 U.S. Dist. LEXIS 17647, at \*3 (E.D. La. Nov. 20, 1995) (“plaintiff may not avoid [a Rule 35] examination simply on the grounds that other sources of information, including reports and depositions[.]”)

Similarly, contrary to Plaintiff’s suggestion, depositions of Dr. Ettner, or other medical providers of Plaintiff, cannot serve as a substitute for in-person examinations by Drs. Penn and Boyd. *See* DE-39 at 9. As explained, the requested Rule 35 examinations are intended to allow Defendants’ experts an opportunity to obtain the information necessary to inform their opinions and conclusions. No matter the testimony, expert reports based solely on the statements and observations of others (*i.e.*, Dr. Ettner or other providers of Plaintiff) about Plaintiff, will never be the same as reports informed by personal observations from an in-person assessment. In short, an expert who is forced to rely on what others say about a person to form their opinion is not on equal footing with an expert who relies on direct observation of that person in forming their opinion. Indeed, when a “plaintiff intends to prove [a] claim at trial through the testimony of [an] expert witnesses, [this] constitutes good cause for permitting the defendant to conduct its own psychiatric examination of the plaintiff.” *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 25 (D. Conn. 1994).

Plaintiff also suggests that because Defendants could serve more written discovery this

somehow obviates the need for the requested examinations. DE-39 at 9. For the same reasons explained above, responses to written discovery cannot serve as an adequate substitute for the requested examinations.

Additionally, to the extent that Plaintiff suggests that the requested Rule 35 examinations are not necessary because Defendants have had her in custody for years and could have conducted whatever examinations they saw fit (*see* DE-39 at 2, 11), such a suggestion is completely without merit. Surely Plaintiff would not agree that Defendants could have unilaterally undertaken the sort of examinations they now seek at any point *after* this action was filed. Moreover, *before* the action was filed, Defendants could not possibly have intuited the need to conduct these specific examinations to rebut expert testimony that did not yet exist.

In sum, Plaintiff's argument that the availability of these other discovery tools, either independently, or cumulatively, somehow defeats the need for the requested examinations is not supported by the facts of this case nor the case law surrounding the "good cause" requirement of Rule 35. The requested examinations will allow Defendants' experts a full opportunity to explore the nature of Plaintiff's gender dysphoria and the potential treatment options, which in turn will permit Defendants to respond to Plaintiff's allegations and her expert's assertions. No amount of medical record review, depositions, or other written discovery can serve as a viable substitute for the first-hand information that would be gleaned from in-person examinations.

## **2. Plaintiff's Cited Cases are Distinguishable and Unconvincing.**

The through line of the cases cited by Plaintiff, at least as she positions them, is that since there are other sources of information available, the Rule 35 examinations are not necessary. However, "[w]hile the probability of obtaining the information through other sources is pertinent to the 'good cause' inquiry ... a plaintiff may not avoid a Rule 35 examination simply on the

grounds that other sources of information, such as medical reports and depositions of plaintiff's treating physicians, are available." *Gross-Quatrone v. Mizdol*, Civil Action No. 17-13111 (JXN) (LDW), 2022 U.S. Dist. LEXIS 14824, at \*12 (D.N.J. Jan. 27, 2022) (quoting *Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388 (S.D. Tex. 2013)), *aff'd*, 2022 U.S. Dist. LEXIS 232452 (D.N.J. Dec. 28, 2022). The cases cited in the preceding section further demonstrate this point. And the cases cited by Plaintiff in support of her contrary argument are all readily distinguishable.

First, Plaintiff points to *Shumaker v. West*, 196 F.R.D. 454 (S.D.W. Va. 2000). In that case, in response to a discrimination case, the VA filed a Rule 35 motion to confirm the plaintiff's PTSD diagnosis. *Id.* at 455. The district court denied the motion, in part because the request was filed days before expert disclosures were due. *Id.* at 456-57. On the merits, the district court concluded that good cause did not exist because there was "ample evidence relating to plaintiff's PTSD" already available to defendant. *Id.* at 457.

*Shumaker* is readily distinguishable. First, unlike in *Shumaker*, the Rule 35 motion at issue in this case was not untimely. Second, and more importantly, unlike in *Shumaker*, in the instant case, Defendants are not seeking Rule 35 examinations merely to confirm or deny the diagnosis of a particular condition. Instead, the purpose of the Rule 35 examinations that Defendants have requested is to explore the nature of Plaintiff's gender dysphoria and the potential treatment options. Thus, Plaintiff's reference to *Shumaker* is not compelling.

Plaintiff then cites to *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990), *superseaded by statute*, see *Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388 (S.D. Tex. 2013), in arguing that the availability of other discovery tools somehow forecloses a Rule 35 motion. See DE 39 at 8-9. *Acosta*, just like *Shumaker*, is readily distinguishable. Moreover, Plaintiff's cursory treatment of *Acosta* overlooks key aspects of that case that factored heavily into the court's decision and that

severely limit the applicability of *Acosta* to the instant case.

As an affirmative defense in an age discrimination case, the employer asserted that the plaintiff failed to mitigate damages. *Acosta*, 913 F.2d at 207. In response, the plaintiff retained a vocational rehabilitation expert to establish the reasonableness of his efforts to secure substitute employment. *Id.* The defendant filed a Rule 35 motion seeking its own vocational expert to examine the plaintiff. *Id.* The district court granted the motion and the plaintiff appealed. *Id.*

The Fifth Circuit reversed for multiple reasons. First, the court concluded that there was no mental or physical condition in controversy. *Id.* at 208-209. Second, the proposed examiner was not a physician or psychologist, as required by Rule 35<sup>1</sup> at the time. *Id.* at 209. Lastly, the court found that the defendants failed to show good cause because they had already conducted discovery focused on the mitigation issue and already had information concerning the mitigation claim without the need for a “repetitive examination” of their own. *Id.*

*Acosta* is distinguishable from the instant case on several grounds. For starters, the fact that the proposed examiner was not a physician or psychologist appears to have heavily influenced the Fifth Circuit’s decision. *See Id.* at 209-211. Here, the proposed examiners are all suitably licensed professionals. Additionally, the focus of the proposed examination in *Acosta* was related to the narrower issue of the mitigation defense and not related to the core issue of age discrimination. *Id.* at 207. Additionally, the Fifth Circuit characterized the examination sought as repetitive. However, as explained above, the requested examinations here would provide information that cannot be derived by a review of medical records, depositions, or other discovery, and so the requested examinations in this case are not repetitive.

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<sup>1</sup> The “holding [in *Acosta*] was subsequently abrogated by the amendment to Rule 35[.]” which extended the Rule to include examinations by “other certified or licensed professionals[.]” *Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388, at 393 n.1, 396 (S.D. Tex. 2013). (S.D. Tex. 2013).

The other cases that Plaintiff cites are similarly unconvincing. *See* DE-39 at 8. Plaintiff cites to *Stanislawski v. Upper River Servs., Inc.*, a case involving a personal injury claim for permanent disability, disfigurement, and pain and suffering. 134 F.R.D. 260, 261 (D. Minn. 1991), *rev'd*, 6 F.3d 537 (1993). The defendant sought an examination by a vocational rehabilitation expert to examine “present and future employability.” *Id.* The district court denied the motion because Rule 35 does not permit vocational rehabilitation examinations, and even if it did, the defendant did not establish good cause. *Id.* at 261-262.

*Stanislawski* suffers from some of the same distinguishing factors present in *Acosta*. The proposed examiner in *Stanislawski*, a vocational rehabilitation expert, was clearly not permitted by the Rule, as it existed at the time. *Id.* at 261. Moreover, the district court determined that the issue to be examined (*i.e.*, the plaintiff’s present and future employability) was neither a mental nor medical condition and thus no such condition was in controversy. *Id.* at 262. Additionally, unlike the proposed examinations in the present case, the proposed examination *Stanislawski* was germane to only a single aspect of the plaintiff’s claim, his “present and future employability.” *Id.* at 261. Accordingly, *Stanislawski* is distinguishable, just like *Acosta*.

Plaintiff also cites to *Conforti v. St. Joseph’s Healthcare Sys., Inc.*, No. 2:17-cv-00050-CCC-CLW, 2020 U.S. Dist. LEXIS 11575 (D.N.J. Jan. 21, 2020), in which a transgender plaintiff brought a suit against a defendant-hospital alleging discrimination based on its refusal to provide a hysterectomy on religious grounds. The district court denied the hospital’s motion for a Rule 35 examination on multiple grounds. First, the district court found that the plaintiff had not put a mental condition in controversy. *Id.* at \*5-6. Specifically, the district court noted that the plaintiff did not assert claims for emotional distress and did not plan on offering expert testimony in support of emotional distress damages. *Id.* at \*4. Nor was the plaintiff going to introduce evidence that the

defendant’s “conduct caused or exacerbated any clinical conditions.” *Id.* at \*6. Additionally, the district court concluded that the plaintiff’s gender dysphoria diagnosis was not in controversy because the liability question turned on the propriety of the hospital’s “Religious Directives[,] [which] prevented [the hospital] from performing a hysterectomy for gender reassignment purposes.” *Id.* at \*8. Lastly, the district court concluded that even if mental health was in controversy, there was not good cause for examination—because the desired information could be obtained through other discovery methods. *Id.* at \*9.

Each of the bases upon which the district court denied the Rule 35 motion in *Conforti*, serve as a distinguishing factor. First, unlike *Conforti*, in the instant case, the nature of Plaintiff’s gender dysphoria and the potential treatment options are indeed in controversy. Additionally, unlike the plaintiff in *Conforti*, Plaintiff in this case has claimed unusually severe emotional distress (*see* DE-1 ¶¶ 2, 4, 74, 87, 143, 162, 172), has alleged a specific type of disorder or other psychiatric injury (*see id.* ¶ 1); and has offered her own expert testimony—based on an in person psychological examination—to supplement her claim of emotional distress (*see* DE 13-1; 22-1, and Ettner Report). Moreover, despite Plaintiff’s contention otherwise, there is no “blanket ban” at issue in this case,<sup>2</sup> as there was in *Conforti*. Lastly, as articulated above, the nature of the information sought through the requested examinations cannot be gleaned from other available sources.

Plaintiff also cites *Brennan v. Thomas*, 780 F. App’x 813 (11th Cir. 2019), offering only a

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<sup>2</sup> Plaintiff contends that “discovery has confirmed” that Defendants have established a blanket ban on gender-affirming surgery. DE-39 at 15. This is not correct. The Department’s policy expressly provides that “when reviewing non-routine accommodations [which includes requests for surgical interventions], the Division TARC will consider [such accommodation requests] on case-by-case basis[.]” DE 10-1 at 7. Thus, there is no “blanket ban” and Plaintiff’s contention to the contrary is a disputed point of fact that will be rebutted by Defendants’ witnesses. Notably, Plaintiff makes this bold assertion as a fact without yet having taken any depositions.

parenthetical describing the case as “similar.” DE-39 at 9. However, *Brennan* is not similar to the other cases that Plaintiff cites, nor is it similar to the instant case. In *Brennan*, the plaintiff, an inmate, sued prison officials and medical providers, alleging violations related to a decision regarding his access to narcotic pain medication and work assignments. *Id.* 816-818. The plaintiff then filed a Rule 35 motion in which he requested “the magistrate judge to order [...] a disability determination and [for] an independent pain management specialist” to [...] determine[e] the appropriate treatment for his chronic pain.” *Id.* at 819.

The Eleventh Circuit affirmed the denial of the Rule 35 motion because the plaintiff failed to show good cause for the examinations that he requested. *Id.* The court noted that the plaintiff had already been examined by multiple physicians, that his medical records were available, and that he could take depositions. *Id.* A notable and inescapable aspect of *Brennan* is that it presents the atypical case where the Rule 35 movant is seeking a medical examination of himself. Indeed, most courts hold that Rule 35 does not allow for a physical examination of oneself. *See Berg v. Prison Health Servs.*, 376 F. App’x 723, 724 (9th Cir. 2010); *Lindsay v. Lewis*, No. 1:11CV67, 2012 U.S. Dist. LEXIS 48971, at \*1 (M.D.N.C. Apr. 6, 2012). Therefore, the district court’s analysis of good cause in *Brennan* must be evaluated in light of the unusual circumstances presented therein.

Lastly, Plaintiff cites *Wrangen v. Pennsylvania Lumbermans Mut. Ins. Co.*, No. 07-61879-CIV, 2009 U.S. Dist. LEXIS 20931 (S.D. Fla. Jan. 16, 2009), again simply describing the case as “similar” in a parenthetical. However, as with *Brennan*, *Wragnen* is not similar to the other cases cited by Plaintiff, nor is it similar the instant case. The plaintiff in *Wragnen* filed suit against an insurer alleging breach of contract based on the insurer’s refusal to pay the full amount of a claim, which the plaintiff had previously resolved against his employer, who was insured by insurer. *Id.*

at 3-4. The insurer sought a Rule 35 examination to assist in determining the reasonableness of the settlement. *Id.* at 4. The district court concluded that the plaintiff's medical condition was not in controversy as it would have been in the underlying personal injury litigation. *Id.* at 14. Moreover, the district court concluded that the insurer simply had not articulated why the proposed examination was necessary. *Id.* at 16. Specifically, the district court noted that the defendant sought to "conduct blood tests directed at liver function, and perform a physical examination, including a palpitation of the liver area" and that this information could be gleaned from the medical records. *Id.* Likewise, the district court's analysis of good cause in *Wragnen* must be understood in consideration of the particular circumstances of that case.

In fact, it is not surprising that the cases that Plaintiff cites are distinguishable from the instant case. "The good cause analysis is fact-sensitive, and 'what may be good cause for one type of examination may not be so for another.'" *Conforti*, 2020 U.S. Dist. LEXIS 11575, at \*9 (quoting *Schlagenhauf*, 379 U.S. 104, 118 (1964)). Thus, the determination of good cause must be made based on the particulars of the given case. And those particulars can cut both ways.

For example, in *Gross-Quatrone v. Mizdol*, Civil Action No. 17-13111 (JXN) (LDW), 2022 U.S. Dist. LEXIS 14824, the district court allowed the Rule 35 motion. In that case, the plaintiff alleged that she was the victim of a hostile work environment in which she was discriminated against because her gender. *Id.* at \*2. The plaintiff alleged severe emotional distress with physical manifestations, and she reiterated the severity in a subsequent deposition. *Id.* The defendants moved for a medical examination to explore the cause and severity of plaintiff's emotional distress. *Id.* at \*5. The district court allowed the Rule 35 motion, finding that good cause existed because "[the] [p]laintiff's alleged emotional distress is the primary source of her damages, and she has indicated that she intends to offer the testimony of her treating physicians as well as

her own testimony to support those alleged damages.” *Id.* at \*11. The district court went on to note that “fundamental fairness demands that defendants equally be allowed to inquire into the cause and extent of plaintiff’s complex web of physical and mental symptoms with the assistance of a qualified expert.” *Id.* at \*11-12. *See also Andrade-Tafolla v. United States*, No. 3:20-cv-01361-IM, 2022 U.S. Dist. LEXIS 140432, at \*6-7 (D. Or. Aug. 8, 2022) (permitting Rule 35 examination and acknowledging that while “Defendant may use tools like cross-examination to rebut Plaintiff’s evidence, here, basic principles of fairness warrant that Defendant have a meaningful opportunity to examine Plaintiff’s condition for itself.”)

The particulars of the instant case demonstrate that Defendants have established good cause. In this action, Plaintiff’s primary contention is that the decision not to approve her requested surgery violates her constitutional and other rights because without the surgery she has and will continue to experience severe distress. Moreover, Plaintiff alleges, and her expert asserts, that the need for the surgery is driven by her distress, and that such distress has and will continue to be impacted by the lack of the surgery. *See* DE-1 ¶¶ 1-7, 74, 87, 143, 151-154, 162, 168, 172, 178; Ettner Report ¶¶ 21, 76-77, 79-80, 83-84, 89, 91, 133-134. Thus, Plaintiff’s “need for gender-affirming surgery and the harm she has suffered without it” (*see* DE-39 at 15) are at the heart of this litigation. The requested examinations are targeted directly at fully understanding and testing those claims and the assertions of Plaintiff’s expert. No other discovery tool can more fully inform Defendants’ experts’ opinions regarding Plaintiff’s need for gender-affirming surgery and the harm she has suffered without it. Accordingly, the requested examinations are not only relevant but necessary, and, therefore, Defendants have established good cause pursuant to Rule 35.

**B. Drs. Penn and Boyd are Qualified to Conduct the Rule 35 Examinations Proposed by Defendants.**

As stated above, the purpose of the Rule 35 examinations is to allow Drs. Penn and Boyd

to fully explore the nature of Plaintiff's gender dysphoria and the potential treatment options. These issues are pertinent to the central pillar of Plaintiff's claims—that the surgery is medically necessary because of the severity of her dysphoria. And Drs. Penn and Boyd are indeed qualified to explore these issues from a medical and psychological perspective. Plaintiff's contention to the contrary (*see* DE-39 at 12-150), is based on several faulty grounds. First, Plaintiff misunderstands the purpose of the contemplated examinations. Second, Plaintiff's discussion of the professional experience of Drs. Penn and Boyd is cursory and inaccurate. Lastly, Plaintiff's contention echoes arguments about the weight to be given to yet-to-be submitted expert reports.

**1. Drs. Penn and Boyd Intend to Explore Pertinent Issues Related to Plaintiff's Gender Dysphoria from Medical and Psychological Perspectives.**

Plaintiff's suggestion that Drs. Penn and Boyd are not qualified to conduct the requested examinations because they lack expertise in evaluating persons for gender-affirming surgery (*see* DE-39 at 12-13), is both incorrect and misses the point of the examinations. The requested examinations are not aimed at the provision of the surgery in the technical sense. Incidentally, Plaintiff's expert is not a surgeon nor a medical doctor, but rather is a psychologist. Rather, the requested examinations are aimed at exploring Plaintiff's *need* for gender-affirming surgery and the *harm* she has suffered without it. To address the assertions of Plaintiff and her expert on those issues, Defendants are requesting that Drs. Penn and Boyd be permitted to examine various dimensions of Plaintiff's gender dysphoria from a medical and psychological perspective. Accordingly, the extent of experience evaluating patients for surgery is not an appropriate litmus test.

**2. The Record Shows that Drs. Penn and Boyd Have Sufficient Experience Conducting the Types of Examinations Requested.**

With a proper focus on the nature of the requested examinations and the connection to the

primary issue in this case, it is clear that Drs. Penn and Boyd are qualified to conduct the requested examinations. In an attempt to argue otherwise, Plaintiff makes incomplete or inaccurate references to the proposed experts' body of experience.

With respect to Dr. Penn, Plaintiff argues that he is not qualified to conduct these examinations because he has not evaluated a “patient for a vulvoplasty—or any other gender affirming surgery.” DE-39 at 13. This is simply not correct. Dr. Penn’s affidavit clearly states that he has consulted with “several state prison systems [...] regarding gender dysphoria diagnoses, evaluation and treatment programs, policies, and practices, and medical and *surgical* interventions.” *Id.* (emphasis added). Plaintiff also states that “it is unclear how many patients he has worked with, what clinical guidelines he has used, or what treatments he has provided.” DE-39 at 13. But Dr. Penn’s relevant experience is already well documented in the record.

Dr. Penn is a triple-board certified psychiatrist with decades of experience in correctional healthcare. DE-18-8 ¶¶ 2-3, 5-7. Dr. Penn has significant “clinical knowledge of the unique mental health and health care needs of incarcerated transgender individuals[.]” *Id.* ¶13. Dr. Penn has “evaluated, diagnosed, and treated incarcerated [] patients with gender dysphoria and ha[s] performed second opinion evaluations/consultations throughout Texas and other states[.]” *Id.* ¶ 15. Additionally, Dr. Penn “oversaw the development and implementation of a specialized gender dysphoria referral and clinical program[.]” *Id.* Dr. Penn has also served as a consultant to several state prison systems [...] regarding gender dysphoria diagnoses, evaluation and treatment[.]” *Id.*

Plaintiff critiques Dr. Boyd’s “credentials on treating gender dysphoria” as “sparse.” DE-39 at 14. Additionally, Plaintiff cites a single line from Dr. Boyd’s CV regarding specific work performed as part of a post-doctoral fellowship and claims it is the sum total of all similar work. *Id.* A review of Dr. Boyd’s experience, however, firmly establishes that she is indeed qualified to

conduct the forensic psychological evaluation of Plaintiff requested by Defendants.

Dr. Boyd is a licensed clinical and forensic psychologist with direct and current experience conducting forensic psychological examinations of incarcerated persons. DE-18-6 ¶ 1. This experience extends to conducting “forensic mental health assessments of transgender and gender diverse people in correctional settings.” *Id.* Specifically, Dr. Boyd “has conducted independent psychological evaluations related to gender-affirming care for incarcerated individuals at the request of correctional officials.” *Id.* And, Dr. Boyd is also the co-author of a book chapter “concerning psychological evaluation, management, and treatment of transgender and gender diverse people housed in correctional settings.” *Id.*

There can be no reasonable debate about whether Drs. Penn or Boyd are qualified to examine Plaintiff with respect to the nature of Plaintiff’s gender dysphoria and the potential treatment options from a medical and psychological perspective. This is precisely what Drs. Penn and Boyd are aiming to do. And these examinations will help determine how Defendants respond to Plaintiff’s contentions regarding her “need for gender-affirming surgery and the harm she has suffered without it[.]” *See* DE-39 at 15.

### **3. Plaintiff’s Attacks on Drs. Penn and Boyd are Misplaced.**

Plaintiff further contends that since Dr. Penn has already endorsed Defendants’ decision not to approve the surgery on general, rather than specific, grounds, an examination by Dr. Penn would be irrelevant to his opinions. *See* DE-39 at 13. Such an assertion is both inaccurate and not supported by the record or the law. First, the statements in Dr. Penn’s affidavit—submitted at the preliminary injunction phase of litigation—were based on his professional background, and his review of Plaintiff’s “medical and mental health records, her motion for preliminary injunctive relief, and supporting materials, which included a declaration signed by Randi C. Ettner, Ph.D.”

DE-18-8 ¶ 23. Thus, Plaintiff's claim that Dr. Penn's statements in his affidavit were only based on general information and nothing specific to Plaintiff is belied by the record.

Additionally, the implication of Plaintiff's statement that "Dr. Penn has already reached his conclusion on the main issue in this case[,]” seems to be that because he has already weighed in on aspects of this case, an in-person examination is not likely to change his mind and is therefore unnecessary. This is a troubling and problematic assertion that lacks support. In any event, Plaintiff cites no authority to support the inference that already having an opinion on aspects of a case somehow precludes the use of other discovery tools (*i.e.*, Rule 35) to confirm previous opinions or develop additional opinions. Indeed, because Dr. Penn had not personally evaluated Plaintiff when he submitted his affidavit (something Plaintiff's expert criticized), his preliminary opinions were necessarily limited. In short, that Dr. Penn has provided some limited opinions to-date says nothing about his qualifications to conduct the requested examination, which is intended to inform his forthcoming opinions.

Plaintiff also attempts to criticize Dr. Penn's qualification to conduct the requested examination by pointing to a single instance where a district court declined to give Dr. Penn's expert testimony any weight. *See* DE-39 at 13-14. Review of that case indicates that it was fact-intensive and had nothing to do with the medical treatment of transgender patients.

Similarly, Plaintiff references the fact that Dr. Boyd has not pointed to peer-reviewed papers on certain topics or specific prior expert testimony. *See* DE-39 at 14. Here again, this sort of contention has no bearing on whether Dr. Boyd is qualified to conduct the requested in-person psychological evaluation of Plaintiff. Rather, such a contention goes to the weight that Dr. Boyd's testimony should carry, a matter that is not presently at issue. In short, a review of the credentials and experience of Drs. Penn and Boyd clearly indicates that they are both "suitably licensed" and

certainly qualified to conduct the requested examinations.

**C. The Nature of Plaintiff's Gender Dysphoria and the Potential Treatment Options are Squarely in Controversy.**

Despite conceding that Plaintiff's "need for gender-affirming surgery and the harm she has suffered without it" are in controversy, Plaintiff contends that the requested examinations are not necessary because of the limited extent to which the nature of Plaintiff's gender dysphoria and the potential treatment options are in controversy. Such a contention, however, cannot be squared with the allegations in Plaintiff's complaint and her proffer of evidence to date. *See* DE-1 ¶¶ 1-7, 74, 87, 143, 151-154, 162, 168, 172, 178; Ettner Report ¶¶ 21, 76-77, 79-80, 83-84, 89, 91.

Plaintiff also attempts to distract from the matter in controversy by stating, as fact, what amounts to nothing more than her interpretation of evidence. Plaintiff asserts that her "health status is not truly in controversy." DE-39 at 15-16. In her view, "Defendants would have denied gender-affirming surgery to anyone who requested it." DE-39 at 15-16.

Plaintiff is simply incorrect. As noted above, the Department does not have a "blanket prohibition" on gender-affirming surgery. Instead, the Department's policy, which is in the record, expressly provides that requests for non-routine accommodations, including surgical interventions, are decided "on a case-by-case basis[.]" DE 10-1 at 7. Thus, when Plaintiff states, as a fact, that "[d]iscovery has confirmed" a "blanket prohibition," a more accurate statement would be that Plaintiff intends to argue that such a ban exists based on her interpretation of certain documents, despite record evidence to the contrary, and without the benefit of a single deposition.

In short, Plaintiff's attempt to convert a disputed fact into a factual certainty fails. Plaintiff has placed her condition at the heart of this controversy, and the requested examinations are necessary to allow Defendants' experts an opportunity to fully examine the nature of Plaintiff's gender dysphoria and the potential treatment options. That exploration is necessary for Defendants

to respond to the central inquiry in this litigation—Plaintiff’s need for gender-affirming surgery and the harm she has suffered without it.

**D. The Requested Examinations Should Not Be Limited by Plaintiff’s Desired Restrictions.**

Plaintiff requests, in the alternative, that the Court limit the requested examinations to a maximum of five hours total. DE-39 at 17. Plaintiff appears to have arrived at that number by referencing the length of Dr. Ettner’s in-person assessment.<sup>3</sup> But Plaintiff references no case law indicating that the length of time of a Rule 35 examination must mirror that of the time spent by Plaintiff’s expert. Indeed, such a limitation would seem arbitrary without consideration of the precise scope of both sets of examinations.

Plaintiff has not revealed the logistical or technical details of Dr. Ettner’s in-person assessment. Dr. Ettner simply reports that she conducted an in-person assessment, including psychometric testing, the results of which have not been provided (although relevant discovery requests are pending), and an interview. *See* DE-13-1 ¶ 76; Ettner Report ¶ 80. However, the assessment was not recorded, nor was a detailed report of the assessment provided. Thus, Defendants do not know to what extent the requested examinations will involve the same interview questions or testing that already occurred.

With respect to the length of time, rather than limiting the requested examinations, the Court should defer to the amount of time forecasted in Defendants’ motion. The requested time frames were developed in consultation with Defendants’ experts and are based on reasonable estimates of how long the examinations should actually take. DE-37. *See Smith v. Bd. of*

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<sup>3</sup> The length of Dr. Ettner’s in-person assessment has been variably reported: five hours in the response brief (DE-39 at 17); four hours in Dr. Ettner’s affidavit and her expert report (DE-13-1 ¶ 76; Ettner Report ¶ 80); and three hours in Plaintiff’s deposition. (Pl.’s Dep. 101:8-10).

*Governors*, No. 7:08-CV-30-D, 2008 U.S. Dist. LEXIS 91271, at \*7 (E.D.N.C. Nov. 10, 2008) (declining to enter a protective order limiting a Rule 35 examination on several dimensions, including length); *Young v. CareAlliance Health Servs.*, Civil Action No. 2:12-2337-RMG-BM, 2013 U.S. Dist. LEXIS 201496, at \*4-5 (D.S.C. Feb. 20, 2013) (declining to impose time restrictions).

Plaintiff acknowledges that her “need for gender-affirming surgery and the harm she has suffered without it” are central to the litigation. (*See* DE-39 at 15). The requested examinations by Drs. Penn and Boyd will be distinct from one another and both are necessary to explore that central issue, from a medical and psychological perspective. As a medical doctor, Dr. Penn’s examination will focus on Plaintiff’s medical history, current medical functions, and detailed aspects of past and prospective medical interventions. DE-38 at 4. As a clinical and forensic psychologist, Dr. Boyd’s examination will include a differential diagnosis/ascertaining cooccurring conditions and will focus on assessing Plaintiff’s historical psychological responses to prior interventions, evaluating her expectancies regarding prospective interventions, and other psychosocial factors. *Id.* at 3-4. Additionally, Dr. Boyd will conduct psychometric testing. *Id.* at 4. Thus, the requested examinations are not duplicative, and both are necessary to defend the case. And Defendants respectfully request that the Court permit the examinations as requested in their motion, DE-37.

### **CONCLUSION**

For the reasons articulated herein, and in Defendants’ Motion for an Order Compelling Plaintiff to Submit to Rule 35 Examinations, and their supporting memorandum, (DE-37 and 38) Defendants respectfully request, pursuant to Rule 35, that the court enter an order compelling Plaintiff to submit to a mental examination before Joseph V. Penn, MD, CCHP, FAPA, and separately to submit to a mental examination before Sara E. Boyd, Ph.D., ABPP.

This the 3rd day of March 2023.

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