IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v. Case No. 4:15-cv-54

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

REPLY BRIEF IN SUPPORT OF GLOUCESTER COUNTY SCHOOL BOARD'S MOTION TO STRIKE AND EXCLUDE EXHIBITS FILED WITH GAVIN GRIMM'S MOTION FOR SUMMARY JUDGMENT

Defendant Gloucester County School Board ("School Board"), by counsel, submits its Reply Brief in Support of its Motion to Strike and Exclude Exhibits Filed with Gavin Grimm's ("Grimm") Motion for Summary Judgment, as follows:

I. The Court should strike and/or exclude medical records submitted by Grimm in support of his Motion for Summary Judgment.

Grimm seeks to testify (1) he was diagnosed with gender dysphoria, (2) his treatment for gender dysphoria required he be treated as a boy, (3) his treatment for gender dysphoria included hormone therapy, and (4) he underwent chest reconstruction surgery as part of his gender dysphoria treatment. See Declaration of Gavin Grimm at ¶¶ 24, 60, and 62 [ECF No. 186]. Grimm claims these are "historical facts." [ECF Doc. 216 at 5]. In reality Grimm's testimony amounts to hearsay, expert opinions that were not properly disclosed.

To remedy this problem, Grimm submitted records from Drs. Lisa Griffin, Hope Sherie, and Melinda Penn pursuant to Rule 803(6) of the Federal Rules of Evidence "for the sole purpose of responding the Board's hearsay objections to paragraphs 24, 60, and 62 of [his]

Declaration, ECF No. 186." [ECF Doc. 216]. Grimm does not dispute he failed to disclose Drs. Griffin and Sherie as experts in accordance with Rule 26(a)(2)(C) of the Federal Rules of Civil Procedure. Grimm also does not dispute he failed disclose Dr. Penn to offer testimony concerning opinions, diagnoses, and treatment of Grimm, even though Dr. Penn was disclosed to provide opinions on the standard of care for treating individuals with gender dysphoria. While Grimm's submission of the medical records may solve some of the hearsay problems he faces, it does not make the opinions of the treating physicians admissible.

Grimm, apparently recognizing that he did not disclose his treating physicians as experts, seeks to rely on Rule 803(6) of the Federal Rules of Evidence to bring the opinions of his doctors in through the back door. Rule 803(6) permits the introduction of medical records, including opinions and diagnoses contained therein, over a hearsay objection if a proper foundation is laid. Fed. R. Evid. 803(6). Rule 803(6) does not, however, absolve Grimm from his failure to comply with the disclosure requirements of Rule 26(a)(2)(C).

Rule 26(a)(2)(A) of the Federal Rules of Civil Procedure provides that "a party *must* disclose to the other parties the identity of any witness it may use to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2)(A) (emphasis added). Rule 26(a)(2)(C) requires the disclosure of non-retained experts to include the "subject matter" of the expert's testimony and a "summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C).

"A party seeking to introduce treating physician testimony should generally comply with Rule 26(a)(2)(C)." Schmitt-Doss v. Am. Regent, Inc., No. 6:12-CV-00040, 2014 WL 3853184, at *13 (W.D. Va. Aug. 5, 2014), aff'd, 599 F. App'x 71 (4th Cir. 2015); Daniels v. D.C., 15 F. Supp. 3d 62, 70 (D.D.C. 2014) (a plaintiff's treating doctors must be disclosed in accordance

with Rule 25(a)(2)(C), because "[t]estimony as to the diagnosis and treatment of a patient, and the reasons therefore, is beyond the ability of the average lay witness' competency and is necessarily based on the expert's scientific, technical, or other specialized knowledge, in the form of doctors' medical training and experience."); Cripe v. Henkel Corp., 318 F.R.D. 356, 362 (N.D. Ind.), aff'd, 858 F.3d 1110 (7th Cir. 2017) (excluding plaintiff's treating physicians from testifying at trial since they were not disclosed pursuant to Rule 26(a)(2)(C)).

Unquestionably, Grimm's gender dysphoria diagnosis is an opinion requiring expert testimony. Certain Underwriters at Lloyd's London v. Sinkovich, 232 F.3d 200, 203 (4th Cir. 2001) (Fed. R. Evid. 701 does "not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness."); In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig., 227 F. Supp. 3d 452, 469 (D.S.C. 2017), aff'd sub nom. In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. *(No II) MDL 2502*, 892 F.3d 624 (4th Cir. 2018) (noting that all jurisdictions require expert testimony at least where the issues are medically complex and outside common knowledge and lay experience.) Likewise, the treatments Grimm received to ameliorate his gender dysphoria are expert opinions concerning medical necessity. Grimm may be able to testify that he received certain treatments, but he cannot testify why the treatments were provided to him since such testimony crosses over to the realm of expert testimony.

Given that Grimm's proposed testimony concerning his diagnosis and the treatment resulting from that diagnosis is expert testimony, that evidence must be offered through an expert who was properly disclosed. Tenney v. City of Allentown, No. 03-3471, 2004 U.S. Dist. LEXIS 24183, at *2-5 (E.D. Pa. Nov. 30, 2004) (excluding opinions and diagnoses of treating health

care providers proffered pursuant to Rule 803(6) since those providers were not offered as experts under Rule 26(a)(2)(A)).

In Martin v. Disc. Smoke Shop, Inc., 443 F. Supp. 2d 981, 988–90 (C.D. Ill. 2006), the interplay between Rule 803(6) and Rule 26(a)(2) was examined. The plaintiff sought to introduce documentary evidence concerning an assessment of the plaintiff's level of academic functioning by invoking Rule 803(6). Id. at 988. The Court found the evidence constituted an expert opinion. Id. While Rule 803(6) permits the admission of business records containing opinions and diagnoses, the Court found the expert opinions contained in the document were required to have also been disclosed pursuant to Rule 26(a)(2)(C). Id. at 989-90. Citing Musser v. Gentiva Health Servs., 356 F.3d 751, 757-58 (7th Cir.2004), the court found

> Formal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial. [The defendant] should not be made to assume that each witness disclosed by [the plaintiffs] could be an expert witness at trial. [Citation omitted.] The failure to disclose experts prejudiced [the defendant] because there are countermeasures that could have been taken that are not applicable to fact witnesses, such as attempting to disqualify the expert testimony on grounds set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report.

Martin, 443 F. Supp. 2d at 990.

Pursuant to Rule 26(a)(2)(C), Grimm was required to disclose that he intended to introduce evidence he was diagnosed with gender dysphoria and that the treatments he underwent were necessary to treat his gender dysphoria. Grimm should not be permitted to make an end-run around the requirements of Rule 26(a)(2)(C) by relying purely on the business records exception to hearsay set forth in Rule 803(6). If litigants are permitted to introduce expert testimony through documents without having made the proper disclosure, there would be no need for Rule 26(a)(2)(C).

Disclosure requirements and fair notice are of paramount importance. This conclusion is further buttressed by Grimm's failure to provide notice of his intent to introduce the medical records. Rule 803(6)(D) provides that the foundation requirements for admissibility must be shown by the testimony of the records custodian or other qualified witness "or by a certification that complies with Rule 902(11) . . . ." Fed. R. Evid. 803(6)(D). Rule 902(11) sets forth the requirements for certification of domestic records of a regularly conducted activity. It specifically requires the proponent of the records to provide the adverse party "reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection – so that the party has a fair opportunity to challenge them." Fed. R. Evid. 902(11). The Advisory Committee notes to the 2000 Amendments state, "The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration." United States v. Laguerre, 146 F. App'x 595, 597-98 (4th Cir. 2005) ("The Government did not give [defendant] written notice of its intention to use [records pursuant to Rule 803(6)] and thus they were not properly authenticated.").

Grimm's failure to properly disclose expert testimony concerning his diagnosis and treatment – along with Grimm's failure to provide notice that the records of Drs. Griffin, Sherie, and Penn might be used as business records – unfairly prejudiced the School Board in preparing its defense. Just as the court observed in Martin, knowing whether expert testimony will be presented helps opposing litigants prepare for trial. Had Grimm properly disclosed he intended to introduce expert evidence concerning his diagnosis and treatment, the School Board would have conducted depositions to test the foundation of those opinions and potentially would have

disclosed rebuttal experts. As such, Grimm should not be permitted to use the records at this time for any purpose.

II. The medical records of Dr. Griffen and Dr. Sherie do not meet the requirements for admissibility under Rule 803(6).

In addition to offering previously undisclosed expert testimony, the letters of Drs. Griffin and Sherie have no indicia of trustworthiness. Rule 803(6) permits the introduction of business records into evidence over a hearsay objection if the foundational requirements of subparagraphs (A)-(C) are established – either by testimony of a custodian or by submission of a proper certification – and if the opponent does not show circumstances indicating that the documents are untrustworthy. Fed. R. Evid. 803(6). Two of Dr. Griffin's letters are not addressed to anyone, and one her letters was addressed to "To Whom It May Concern." Dr. Sherie, in turn, also has a letter addressed to "To Whom It May Concern" that was completed over two months after the act its attempts to memorialize – i.e. that "irreversible Female to Male Gender Reassignment Surgery" was performed.

None of these letters appear to be prepared for regular business purposes. Indeed, no foundation at all has been laid by these witnesses that writing un-addressed letters is part of their regular practice. As such, the letters must be excluded. See e.g., Payne v. McHugh, No. 13-CV-2732, 2017 WL 4969887, at *3 (W.D. La. Oct. 31, 2017) (finding two unsigned letters addressed to "To Whom It May Concern" related to plaintiff's diagnosis and treatment did not meet the requirements of admissibility under Rule 803(6)); Eubanks v. St. Tammany Par. Hosp., Serv. Dist. No. 1, No. CIV.A. 03-2878, 2004 WL 1403403, at *3 (E.D. La. June 22, 2004) ("letters from physicians "to whom it may concern" or to attorneys giving opinions about matters in litigation are generally not business records."); Kantor v. Comm'r, 73 T.C.M. (CCH) 2170 (T.C.

1997) (finding letters addressed to an attorney or to "To Whom It May Concern" lacked sufficient guarantees of trustworthiness and could not be admitted into evidence).

III. The WPATH Standards of Care, Endocrine Society Guidelines, Amicus Briefs, and policy statements are inadmissible.

Grimm seeks to establish the standard of care applicable to individuals with gender dysphoria by relying on hearsay opinions espoused in the WPATH Standards of Care, the Endocrine Society Guidelines, and the views expressed in the various Amicus Briefs. In Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, Grimm specifically asserts, "The standard of care for the treatment of gender dysphoria that is recognized by the American Academy of Pediatrics and every major medical and mental health professional organization in the United States is to eliminate the clinically significant causes of stress . . . ." [ECF Doc. 185 at 10-11]. Grimm, citing to the School Administrator Amicus, further argues exclusion from common restrooms interferes with the ability of students to learn. [ECF Doc. 185 at 15]. None of the opinions contained in those sources is admissible as evidence in this case since they are hearsay for which no exception applies.

Grimm asserts this information is needed to provide "background" to assess whether the School Board's restroom and locker room policy is "sufficiently related to its asserted governmental interests" and to evaluate the testimony provided by Grimm and Principal Collins as being consistent with the view of Amici that schools should allow transgender students to use the same restrooms as their peers consistent with their gender identity. [ECF Doc. 216 at 8-9]. Thus, it is clear Grimm seeks to introduce the hearsay opinions of outside organizations for the truth of the matter asserted in direct violation of Rules 801 and 802 of the Federal Rules of Evidence.

Grimm further seeks to introduce hearsay opinions to improperly bolster the testimony of Dr. Penn. Grimm designated Dr. Penn, a pediatric endocrinologist, to testify concerning the diagnosis and treatment of gender dysphoria. In forming her opinions, Dr. Penn relies on the WPATH Standards of Care and the Endocrine Society Guidelines. Experts may rely on hearsay in providing expert testimony if "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Fed. R. Evid. 703; United States v. Rivera, 442 F. Supp. 2d 274, 278 (E.D. Va. 2005). Experts, however, cannot testify concerning the expert opinions of others. United States v. Tran Trong Cuong, 18 F.3d 1132, 1143 (4th Cir.1994) (holding that an expert witness could not bolster his opinion testimony by testifying that a non-testifying expert's conclusions were essentially the same as the expert witness's); Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 409 (6th Cir. 2006) (rejecting "argument that Rule 703 extends so far as to allow an expert to testify about the conclusions of other experts."); United States v. Grey Bear, 883 F.2d 1382, 1392–93 (8th Cir.1989) ("We are persuaded that Fed.R.Evid. 703 does not permit an expert witness to circumvent the rules of hearsay by testifying that other experts, not present in the courtroom, corroborate his views."). Accordingly, Dr. Penn should not be permitted to testify, and Grimm should not be permitted to argue, that the WPATH Standards of Care or the Endocrine Society Guidelines establish the standard of care and are in accord with Dr. Penn's opinions concerning the standard of care.

IV. The Court should strike and/or exclude references to statements of School Board counsel concerning settlement.

The School Board held a public hearing in February 2019 to consider a proposed restroom policy that was the product of settlement negotiations with Magistrate Judge Miller. Grimm asserts statements of counsel for the School Board in introducing the potential policy are

relevant to show that the School Board's current policy is discriminatory and not substantially related to the School Board's governmental interest. [ECF Doc. 216 at 9]. Those statements and the School Board's decision not to act on the proposed policy or change its current restroom policy are not evidence of anything relevant to whether the School Board's restroom policy complies with Title IX and the Equal Protection Clause. Further, permitting this evidence violates Rule 408 of the Federal Rules of Evidence.

Rule 408(2) precludes plaintiffs from proving the validity of their claim with evidence of "conduct or a statement made during compromise negotiations about the claim." Fed. R. Evid. 408. The purpose of this rule is to "insulate[ ] the particular parties to settlement discussions from possible adverse consequences of their frank and open statements." In re A.H. Robins Co., Inc., 197 B.R. 568, 572 (E.D. Va. 1994). "The Rule supports a strong public policy of encouraging settlements." Xcoal Energy & Res., LP v. Smith, 635 F. Supp. 2d 453, 454 (W.D. Va. 2009) (citing Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654–55 (4th Cir.1988)).

The School Board is a public body, and Grimm's attorneys were well aware the proposed settlement of adopting a new restroom policy was to be presented publicly. The purpose and spirit of Rule 408 is to prevent exactly what Grimm attempts to do. In accordance with Rule 408, the School Board should be insulated from any adverse consequences of making a good faith attempt to participate in the settlement process.

CONCLUSION

For the foregoing reasons, Gloucester County School Board respectfully requests the Court to exclude from its consideration on summary judgment the foregoing exhibits (ECF Docs. 192-5 192-6, 192-38-43, 203-3, 203-4, 203-5, and 203-6).

GLOUCESTER COUNTY SCHOOL BOARD

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C E R T I F I C A T E

I hereby certify that on the 13th day of May, 2019, I filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send a Notice of Electronic Filing to all counsel of record.

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