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

GAVIN GRIMM, Plaintiff, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant.	)	Civil Case No. 4:15-cv-54-AWA-DEM

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE

Plaintiff Gavin Grimm ("Gavin") respectfully submits this Memorandum of Law in Opposition to Defendant's Motion to Strike. ECF No. 213.

I. Gavin Submitted His Medical Records to Document the Undisputed Fact that He Received a Diagnosis and Treatment.

The Gloucester County School Board's (the "Board's") Motion to Strike Gavin's medical records is based on the faulty premise that Gavin seeks to prove that his social transition—and his need to use the boys' restroom as part of that transition—were medically necessary to treat his gender dysphoria. To the contrary, for purposes of summary judgment, "[t]he Board's attempt to create a disputed question of fact with respect to the medical necessity of gender-affirming transition-related care is not material to Gavin's actual legal claims." Pl.'s Reply Mem. 12, ECF No. 203. There is no reason to issue an order excluding Gavin's medical records from being considered "for whether it was medically necessary for [Gavin] to use the restroom at school," Def.'s Mem. at 9 n.6, ECF No. 214, because Gavin has not submitted the records for that purpose.

Gavin's medical records have been submitted for the sole purpose of responding to the Board's hearsay objections to paragraphs 24, 60, and 62 of Gavin's Declaration, ECF No. 186. In support of his Motion for Summary Judgment, Gavin testified that he had been diagnosed with gender dysphoria, that his clinical psychologist provided him with a treatment documentation letter stating that he was socially transitioning as part of his treatment for gender dysphoria, and that he subsequently underwent hormone therapy and chest-reconstruction surgery as treatment for gender dysphoria:

> At my request, I began therapy with a psychologist who had experience with working with transgender patients. The psychologist diagnosed me with gender dysphoria. The psychologist recommended that I immediately begin living as a boy in all respects. That included using a male name and pronouns and using boys' restrooms. The psychologist gave me a "treatment documentation letter" to confirm I was receiving treatment for gender dysphoria and that, as part of that treatment, I should be treated as a boy. A copy of that treatment documentation letter is attached as Exhibit A. In addition, the psychologist recommended that I see an endocrinologist to begin hormone treatment for gender dysphoria.
>
> In December 2014, shortly after the Board's policy went into effect, I began hormone therapy, which has deepened my voice, increased my growth of facial hair, and given me a more masculine appearance.
>
> In June 2016—at the end of eleventh grade—I underwent chest-reconstruction surgery, as part of my treatment for gender dysphoria.

Grimm Decl. ¶¶ 24, 60, 62, ECF No. 186.

Gavin submitted this evidence in support of summary judgment to establish that these events occurred—not to prove that these treatments are medically necessary.[1] As explained in Gavin's reply brief, "Gavin's gender dysphoria diagnosis and treatment documentation letter are relevant to show the sincerity and objective verifiability of Gavin's statements to school officials

[1] Paragraph 10 of Gavin's Statement of Undisputed Material Facts states: "With the help of his medical providers, Gavin transitioned to living in accordance with his male identity as part of medically necessary treatment for gender dysphoria. See Gavin Grimm Decl. ¶ 24." That sentence refers to the fact that Gavin's medical providers believed the treatment to be medically necessary, regardless of whether Defendant's designated expert disagrees.

that he is a boy who is transgender." Pl.'s Reply Mem. 19, ECF No. 203. Gavin's hormone therapy and chest-reconstruction surgery are relevant as "background for understanding Gavin's lived experience as a boy who is transgender and show[] that the challenged policy does not, as the Board contends, actually assign students to facilities based on their anatomical characteristics." *Id*

Instead of acknowledging the indisputable fact that these events occurred, the Board responded with objections that Gavin's testimony was based on impermissible hearsay. *See* Def.'s Opp. Mem. 7, ECF No. 200 ("Paragraph 24 of Grimm's declaration is nothing more than unsupported hearsay."); *id.* ("Furthermore, the 'treatment letter' is unsupported hearsay."); *id.* at 11 (disputing Gavin's testimony regarding hormone therapy and surgery because "Grimm does not present expert testimony to support his assertion of continued medical treatment for gender dysphoria."); *id.* at 19 ("The 'evidence' that Grimm offers on summary judgment, including a 'treatment letter' provided by a psychologist, is nothing more than unsupported hearsay.").

The Board then argued that "Grimm is left with the bare assertion that he is a girl that identifies as a boy." *Id.* at 22. As explained in Gavin's opposition to the Board's Motion for Summary Judgment, that argument misrepresents Gavin's claims and dismisses his transgender status. Pl's. Opp. Mem. 32, ECF No. 201:

> Gavin did not seek to use the boys' restrooms based on his subjective, internal perception of being a boy. He sought to use the boys' restrooms because he transitioned and was *living* in accordance with his identity. At the time the Board's policy was passed, Gavin had supplied school administrators with a "treatment documentation letter" from his psychologist, he had legally changed his name, and he was preparing to undergo hormone therapy. By the time Gavin graduated, he had undergone hormone therapy and chest reconstruction surgery, and he had received a state I.D. card and birth certificate stating that he is male.

Id.

Gavin submitted copies of his underlying medical records as part of his reply brief for the sole purpose of responding to the Board's hearsay objections. The "treatment documentation letter" is not hearsay because it qualifies as a business record. The other medical records (which are also admissible as business records) corroborate that Gavin was, in fact, diagnosed with gender dysphoria and that he did, in fact, receive a treatment documentation letter, hormone therapy, and chest surgery as treatment for that condition. The medical records are submitted to document *the fact* that these events occurred, regardless of whether the Board and its purported expert agree or disagree with that diagnosis and treatment.

The Board nevertheless contends that the information contained in Gavin's medical records must be presented as expert evidence in accordance with Federal Rule of Civil Procedure 26(a)(2). But Gavin has not presented expert testimony or called his medical providers as witnesses (as opposed to document custodians); he presented his medical records, which are admissible pursuant to Rule 803(6) "regardless of whether the declarant is available as a witness." Fed. R. Evid. 803. The Board does not cite any case requiring a party to present expert disclosures for the statements of treating physicians in medical records. Moreover, "most authorities take the view that a party offering a document admissible as a 'report of regularly conducted activity' under Rule 803(6) (covering a 'memorandum, report, record ... of acts, events, conditions, opinions, or diagnoses')—as medical records generally are, *see* Fed. R. Evid. 803(6) advisory committee's note (1972)—need not also show, under Rule 702, the qualifications of the document's author to render any opinions in the report." *Aumand v. Dartmouth Hitchcock Med. Ctr.*, 611 F. Supp. 2d 78, 85 (D.N.H. 2009).

Even if disclosure requirements for expert witnesses applied to business records, *the fact* that Gavin received a gender dysphoria diagnosis and *the fact* that he received medical

treatments for that condition are not "expert evidence." Def.'s Mem. 5, ECF No. 214. No expert testimony—and no expert disclosure report—is necessary to establish these historical facts because "treating physicians testify as percipient witnesses regarding the treatment they rendered to plaintiff, including the plaintiff's presentment of symptoms, their diagnoses, the treatment they provided to plaintiff, and the medical bills incurred for their treatment." *Baker v. Baker Huges Oilfield Operations, Ind.*, No. 3:16-CV-038 JWS, 2018 WL 3437080, at *2 (D. Alaska July 16, 2018); *see Morris v. Bland*, 666 F. App'x 233, 239 (4th Cir. 2016) (physicians testifying as fact witness may "discuss their examination of [patient] and their diagnoses or findings" but may not offer "expert opinions as to proximate cause") (alterations incorporated).[2]

The Board asserts that "if Grimm had properly disclosed that he intended to introduce expert evidence through these witnesses, the School Board would have had the opportunity to designate an expert witness to contest Grimm's diagnosis, treatment plan and whether it was medically necessary for Grimm to use the boys' restroom at school," and the opportunity to depose Gavin's treating physicians regarding "the opinion that he should be permitted to use of the boys' restroom at school." Def.'s Mem. 5, ECF No. 214. But Gavin has not submitted his medical records for any of those purposes. The medical records are submitted to document the fact that he received a gender dysphoria diagnosis and treatment, not to offer the physician's opinions about what diagnosis and treatment were appropriate.

Because Gavin has submitted his medical records solely for the purpose of responding to the Board's hearsay objections to his evidence that he was diagnosed with and received treatment

[2] By contrast, the Board cites cases in which a party sought to present opinions from a treating physician about causation or medical necessity. Def.'s Mem. 6-7, ECF No. 214. Gavin is not offering his medical records to prove that the opinions of his treating physicians were correct. He is offering the medical records solely to respond to the Board's hearsay objections and establish the historical fact that he received the diagnosis and treatment.

for gender dysphoria, there is no need to issue an order excluding Gavin's medical records from being considered "for whether it was medical necessary for [Gavin] to use the restroom at school." Def.'s Mem. at 9 n.6, ECF No. 214. The records have not been submitted for that purpose.

II. The Board Has No Basis to Contest the Admissibility of Gavin's Medical Records from Dr. Griffin or Dr. Sherie Under Rule 803(6).

The Board's attempt to dispute the admissibility of Gavin's medical records from Dr. Griffin and Dr. Sherie is baseless. "Rule 803(6) makes clear that the burden of showing untrustworthiness rests on the party seeking exclusion of a document." *Garrett v. City of Tupelo, Mississippi*, No. 1:16-CV-197-DMB-DAS, 2018 WL 2994808, at *3 (N.D. Miss. June 14, 2018). Dr. Griffin's treatment documentation letter and her letter referring Gavin for hormone therapy were created contemporaneously with Gavin's treatment and have been maintained by Dr. Griffin in the ordinary course of business. The Board offers no support for its bare assertion that such letters "are not the type of records regularly kept in the course of a medical practice." Def.'s Mem. 7-8. To the contrary, under the World Professional Association for Transgender Health ("WPATH") Standards of Care, the role of a mental health professional working with gender dysphoric youth and adolescents includes providing referral letters for hormone therapy and advocating on behalf of their patients at school. WPATH Standards of Care at 13, 31-32, ECF No. 192-5. Any competent psychologist would retain copies of such letters as part of their medical practice.[3]

[3] In arguing that medical records are not trustworthy if addressed "to unknown recipients," Def.'s Mem. 8, the Board egregiously misrepresents the district court's holding in *Garrett*. That decision states that "courts have found medical opinions to be untrustworthy under Rule 803(6) when the information in the opinion came from the patient, rather than the doctor, and when ***the source*** of the information is unknown." *Garrett*, 2018 WL 2994808, at *4 (emphasis added).

The Board complains that Dr. Griffin's records are not sufficiently reliable unless they are accompanied by her "underlying records, notes, or assessments" to "corroborate the purported diagnosis." Def.'s Mem. 7. But Gavin is merely documenting *the fact* that he was diagnosed with gender dysphoria, not seeking to prove the validity of the diagnosis. The medical records he submitted are more than sufficiently reliable to demonstrate that simple fact.

The Board also complains that Gavin's records from Dr. Sherie include a declaration that she performed irreversible gender reassignment surgery. Def.'s Mem. 8. Gavin submitted the medical records for the sole purpose of documenting that his chest-reconstruction occurred, not to offer an opinion on whether the surgery qualifies as gender-reassignment surgery under Virginia law. (Moreover, even if Gavin had submitted the document for the purpose of arguing that Gavin's chest-reconstruction surgery is gender-reassignment surgery, the Board's 30(b)(6) witness testified that the Board was *not* contesting that the chest-reconstruction surgery was gender-reassignment surgery for purposes of updating a birth certificate. *See* Pl.'s Opp. Mem. 20, ECF No. 201).

Finally, the Board complains that the surgery referral letter from Dr. Abel was not accompanied by a business-record certification from Dr. Abel. Def.'s Mem. 8. But the referral letter was maintained by Dr. Sherie as part of her *own* business records. Under Rule 803(6), "a document prepared by a third party is properly admitted as part of the business entity's records if the business integrated the document into its records and relied upon it." *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1342 (Fed. Cir. 1999). As a surgeon who operates in accordance with the WPATH Standards of Care, Dr. Sherie relies upon the referral letters of mental health providers. Like Gavin's other medical records, the document has been presented

for the sole purpose of showing that Gavin received chest-reconstruction surgery as treatment for gender dysphoria, not to offer an opinion that the surgery was medically necessary.

III. The Board's Arguments Regarding Amicus Briefs and Policy Statements Have Already Been Addressed.

The Board improperly attempts to file a sur-reply objecting to the amicus briefs and policy statements from medical and professional organizations. The Board already made these arguments in its opposition brief, and Gavin already addressed the Board's arguments in his reply. Pl's. Reply Mem. 2, 5-6, 8, 9, 19, ECF No. 203. As explained in Gavin's reply memorandum—and as the Board concedes in its Motion to Strike—the documents are admissible to show those organization's views. *See* Def.'s Mem. 12 ("Grimm may be able to assert, through citation to the AAP Amicus, that the American Academy of Pediatrics [and the other signatories of the brief] has stated that eliminating clinically significant causes of distress is the standard of care.").

Regardless of whether Defendant's purported expert agrees with gender-affirming care, the undisputed evidence establishes that the treatment is endorsed by the AAP and other leading major medical organizations and is provided to transgender youth in Virginia and throughout the country. *See* Van Meter Dep. 109:22-110:1, ECF No. 192-14 (agreeing that gender identity clinics "all over the country" are providing gender-affirming transition-related care). That reality is relevant background in assessing whether the Board's discriminatory policy is sufficiently related to its asserted governmental interests.

To the extent that the Board argues that the amicus briefs and statements of professional organizations are not sufficient to prove that being excluded from the restroom interferes with a student's ability to learn or can cause urinary-tract infections (Def.'s Mem. 12-13), those objections are not proper basis for a motion to strike the documents. The amicus briefs and

position statements simply provide background context for evaluating the testimony provided by Gavin and Principal Collins. *See* Pl.'s Mem. 10, ECF No. 185 ("Principal Collins' decision was consistent with the views of the National Association of School Psychologists, National Association of Secondary School Principals, National Association of Elementary School Principals, and American School Counselor Association, which have all called upon schools to allow boys and girls who are transgender to use the same restrooms as their peers consistent with their gender identity."); *id.* at 36-37 (citing amicus briefs to corroborate reasonableness and plausibility of Gavin's own lay testimony).

IV. The Board Provides No Basis for Striking the Prior Public Statements of Counsel.

Finally, the Board asks the Court to disregard statements made by the Board's counsel at a public School Board meeting. *See* Def.'s Mem. 13. To the extent the Board argues that the statements are not relevant, that is not a proper basis for a motion to strike. Moreover, the statements *are* relevant to show that the Board has rejected an alternative policy that would have fully addressed the Board's asserted privacy interests without categorically excluding transgender students from the common restrooms. The Board's action in the face of counsel's public statements shows that its discriminatory policy is not substantially related to the asserted governmental interests and casts doubt on the sincerity of the Board's assertions about its motives.

The Board also asserts that counsel's public statements were settlement communications, despite the fact that the statements were made to the public at large at a public School Board meeting. The Board offers no authority for its assertion that such statements are "settlement communications" when they are not confidential, not made as part of settlement negotiations,

and not made to the plaintiff. Public statements from the Board to its constituents are not settlement communications.

CONCLUSION

For the foregoing reasons, the Board's Motion to Strike should be denied.

Dated: May 6, 2019

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May 2019, I filed the foregoing Memorandum of Law In Opposition to Defendant's Motion to Strike with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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