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

KANAUTICA ZAYRE-BROWN, Plaintiff, v. THE NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION, *et al.*, Defendants.	No. 3:22-cv-00191-MOC-DCK

<u>PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR SUMARY JUDGMENT</u>

While the subject matter of this case may feel novel, the basic controlling principles are long-established: where a prisoner has a serious medical need that "is curable or may be substantially alleviated," and denying treatment creates a substantial risk of serious harm, withholding treatment is deliberate indifference in violation of the Eighth Amendment. *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977). The violation becomes even more obvious when prison officials "intentionally interfer[e] with the treatment once prescribed" by a patient's treating physician. *See Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

Gender dysphoria is an objectively serious medical need, and denying medically necessary gender-affirming surgery violates the Eighth Amendment. *De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 794 (9th Cir. 2019). It also violates the ADA. *See United States v. Georgia*, 546 U.S. 151, 157 (2006) (denial of "disability-related . . . medical care" may violate

the ADA); *Williams v. Kincaid*, 45 F.4th 759, 766 (4th Cir. 2022) (gender dysphoria is a disability under the ADA).

Here, the Court has already found that Plaintiff's gender dysphoria is a serious medical need. (Doc. 92 at 8 & n.5 ("That Defendant's denial caused Plaintiff to suffer significant injury is beyond genuine dispute.").) And Defendants have never disputed that they sent Plaintiff to be evaluated by specialists at UNC who prescribed gender-affirming surgery—treatment that Defendants have now been denying Plaintiff for years.

In support of their renewed motion for summary judgment, Defendants double down on contentions already rejected by this Court. They claim to have applied an appropriate standard in reviewing Plaintiff's request for gender-affirming surgery, but, citing zero medical authority, they strain to defend their untenable and shifting standard. They also advance an incredible and self-serving interpretation of their testimony, which contradicts the plain meaning of the record evidence.

In sum, Defendants' conduct does not represent a reasonable "disagreement over the proper course of medical care." (Doc. 111 at 13.) It is instead an ongoing, unjustifiable denial of treatment that Plaintiff needs to end her suffering. Therefore, Defendants' motion should be denied and, instead, summary judgment and permanent injunctive relief should be awarded to Plaintiff.

I. Plaintiff Requires Gender-Affirming Surgery Under the WPATH Standards and Generally Accepted Principles of Medical Necessity.

"Accepted standards of care and practice within the medical community are highly relevant in determining what care is medically acceptable and unacceptable"

for Eighth Amendment purposes. *Edmo*, 935 F.3d at 786. The WPATH Standards of Care are the prevailing guidelines for medical professionals treating gender dysphoria (Doc. 62-2 at 14–15); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020) (recognizing the WPATH standards as "the authoritative standards of care" in both carceral and non-carceral settings" (citing *De'lonta v. Johnson*, 708 F.3d 520, 522−23 (4th Cir. 2013).). Defendants concede that Plaintiff meets the WPATH criteria to qualify for gender-affirming surgery but argue that "WPATH does not provide a workable medical necessity framework." (Doc. 111 at 1.) That is wrong.

Dr. Ettner testified, and Defendants acknowledge, that WPATH relies upon the widely accepted and commonly utilized medical necessity framework articulated by the AMA. At the evidentiary hearing, Dr. Ettner addressed all of the AMA criteria for medical necessity, testifying that Plaintiff met or exceeded each one and concluding that gender-affirming surgery is necessary for Plaintiff.[1] Defendants, on the other hand, have failed to directly address any of those factors or their application to Plaintiff.

Defendants argue that their process was consistent with the AMA definition because it "requires individualized application akin to a risk/benefit analysis," which

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[1] *See* Tr. 111:14-21 ("a health care provider exercising prudent clinical judgment would have to conclude that gender-affirming genital surgery is medically necessary for Mrs. Zayre-Brown for the purpose of treating her gender dysphoria"); 111:22-112:2 (providing Plaintiff surgery would "be in accordance with generally accepted standards of medical practice."); 112:5-7 (surgery would not be for Plaintiff's or her provider's convenience); and 112:8-12 (there is no "alternative service or sequence of services at least as likely to produce equivalent therapeutic results.").

they say they did for Plaintiff. (Doc. 111 at 3.) But Defendants have failed to conduct any "risk/benefit analysis" as to Plaintiff's need for gender-affirming surgery. In all their filings, Defendants have never identified what specific risks Plaintiff faces that would caution against *her* receiving gender-affirming surgery, and they concede that Plaintiff would *benefit* from such surgery. (*E.g.,* Tr. 72:4-15, 33:23-36:18.) Indeed, their expert psychologist testified that Plaintiff cannot be cured without it. (Doc. 62-1 at 166:21-25, 167:12-21.)

Although Defendants claim to have reviewed Plaintiff's medical records, Defendants ignore all indications that Plaintiff was experiencing serious ongoing distress.[2] Moreover, Defendants concede that they have neither the experience nor the expertise to inform what "prudent clinical judgment" would be for the treatment of gender dysphoria. (Tr. 25:17-21, 64:6-9, 85:15-86:6.) And despite repeated assertions that Plaintiff did not need surgery because her symptoms would be "responsive to other interventions," (*e.g.,* Doc. 111 at 5), they have never identified *any* alternative to surgery that would be likely to produce equivalent therapeutic results for Plaintiff.

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[2] Defendants contend that during the hearing Plaintiff's counsel "cherry-pick[ed] isolated text from a single document (suggesting distress)." (Doc. 111 at 12.) However, Plaintiff has already highlighted for the Court, and the Court has already acknowledged, the ongoing and repeated reports of distress obvious upon a comprehensive review of her medical records. (Doc. 66 at 9 n.2; Doc. 92 at 8 n.5.)

II. Defendants' "Individualized Review" Amounts to a Sham Process and a *De Facto* Ban.

The Court observed regarding Dr. Campbell—the "medical authority" responsible for making the medical necessity determinations on all gender-affirming surgery requests—"it's obvious Dr. Campbell has a problem with" gender-affirming surgery. (Tr. 122:.1.) As evidenced by Plaintiff's case and DTARC's unbroken string of surgery denials, this "problem" has manifested as a *de facto* ban. (Doc. 103 at 12-14; Doc. 113 at 4.)[3]

Defendants acknowledge, as they must, that by February 17, 2022, Dr. Campbell had concluded that "generally gender-affirming surgery would not be considered medically necessary," except for where a patient "presents as an exceptional case." (Doc. 111 at 11.) Although Defendants attempted to reject severity as a definitive standard in their opposition to Plaintiff's renewed motion for summary judgment (Doc. 112 at 3), Defendants now argue that "severity," by their subjective standards, is *exactly* what is required to overcome Dr. Campbell's biased starting position. (*See* Doc. 111 at 5 ("Dr. Peiper testified that he determined that Plaintiff did not have severe symptoms associated with Gender Dysphoria that would not be responsive to other interventions"), 7 ("Dr. Sheitman concluded . . . that he did not see severe symptoms."), 9 ("Drs. Peiper, Campbell, and Sheitman each testified that

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[3] Defendants complain that, in Plaintiff's first motion for summary judgment, she did not base her Eighth Amendment claim on the idea that Defendants have a blanket ban against surgery. This is irrelevant because the Court has asked the parties to renew their motions in part to address that issue. Further, as noted in her reply, Plaintiff's ADA claim has always attacked Defendants' overall practice of denying gender-affirming surgery for treatment of gender dysphoria. (Doc. 113 at 4.)

their review of Plaintiff's records did not indicate that her symptoms were severe, worsening, or uncontrolled, such that further intervention was warranted.").)

As noted in Plaintiff's previous briefing, this standard has no basis in any medical authority and is a moving target of Defendants' own creation. (Doc. 103 at 10-12; Doc. 113 at 1-3.) Does surgery require "extreme" and "debilitating" symptoms? Or is it "persistent dysphoria?" Or sleep disturbances, appetite disturbances, perseveration, hypo or hyper energy levels, suicidal ideation, and/or psychomotor agitation? Or something else? Defendants cannot say. Assuming that a gender-dysphoric patient must meet Defendants' moving threshold of severity to overcome Defendant Campbell's presumption against medical necessity, that threshold is functionally insurmountable.[4]

Defendants assert that there is no evidence that concerns about the medical literature resulted in denial of Plaintiff's request, and that Dr. Campbell's Position Statement was not a factor in the DTARC's determination as to Plaintiff. These contentions defy credulity, as they are contradicted by both the documentary evidence and Defendants' own briefing and testimony.

Dr. Campbell concluded, based on his literature review, that "to support [gender-affirming surgeries] would be in conflict with *the most critical imperative in medicine* . . . First, do no harm." (Doc. 104-5 at 8 (emphasis added).) He has asserted,

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[4] While Dr. Ettner testified that "severe" symptoms were not required for gender-affirming surgery to be considered medically necessary, she noted that Plaintiff's gender dysphoria is, in fact, severe, and likely to worsen with age. (Tr. at 114:16-116:14.)

as to Plaintiff's case and in general, that providing gender-affirming surgery would create concern that a physician has violated that oath. (*Id.* at 8, Doc. 104-4 at 3; Tr. 65:12-66:3.) Where Dr. Campbell has already stated repeatedly, in writing, that the relevant literature guided his first principles and ethical duties as a physician, *post hoc* testimony to the contrary should carry little weight.

Further, to contend that the Position Statement did not affect the DTARC's determination is to deny reality. Dr. Campbell has testified multiple times that the Position Statement reflected his views when he considered Plaintiff's request. (Tr. 67:7-14.) And much of the Position Statement is proffered as justification for denying Plaintiff's request for surgery in the medical analysis section of DTARC's case summary for Plaintiff; indeed, Dr. Campbell conceded that many of the passages in the Position Statement and the case summary for Plaintiff are identical. (Tr. 71:10-20). That much is evident on the documents' face.[5] The idea that one did not inform the other is preposterous.

[5] *Compare*, *e.g.,* Doc. 104-4 at 3 *with* Doc. 104-5 at 8-9 (identical passage beginning with "In order to ensure . . . ." and ending with "The evidence regarding [GCS] does not provide sufficient confidence that the procedures should be undertaken without concern for having violated that oath."); Doc. 104-4 at 2 *with* Doc. 104-5 at 7 (identical paragraph beginning with "Medically necessary treatments . . . ." and ending with "physicians are derelict in their duties when they stray from these critical considerations."); Doc. 104-4 at 3 *with* Doc. 104-5 at 7 (three identical paragraphs beginning with "WPATH remains under increasing scrutiny . . . ." and ending with "(Tawani Foundation)"); Doc. 104-4 at 3 with 104-5 at 8 (two identical paragraphs beginning with "When as clinicians we encounter concerns" and ending with "When further research is conducted, as we have done in this case, it becomes even more apparent why there is indeed not consensus among the medical community in the treatment of gender dysphoria, and particularly GCS").

CONCLUSION

Defendants' claim of providing individualized review to Plaintiff's case and their disclaiming of a de facto ban fail. Their testimony and the evidence make clear that, though they may have looked at Plaintiff's medical records, their conclusion that gender-affirming surgery was not medically necessary for Plaintiff cannot be squared with the WPATH or any generally accepted definition of medical necessity. Defendants instead followed an amorphous standard of their own making that is unmeetable, and in fact, has never been met. Applying such a standard does not provide Plaintiff with meaningful, individualized review, but rather constitutes a de facto ban against gender-affirming surgery, in violation of the Eighth Amendment and the ADA. The Court accordingly should deny Defendants' renewed motion for summary judgment and instead award summary judgment and permanent injunctive relief in favor of Plaintiff.[6]

Respectfully submitted, this 1st day of April, 2024.

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[6] Defendants' request that, should summary judgment not be granted, "all factual issues that remain be submitted to a jury," (Doc. 111 at 13), must be rejected as it is the Court's province to resolve any factual issues relating to Plaintiff's claims for injunctive relief. (*See* Doc. 113 at 5.)

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CERTIFICATE OF SERVICE

I certify that on April 1, 2024, I electronically filed the foregoing document using the ECF system which will send notification of such filing to all counsel of record.

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