IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JESSICA HICKLIN,

Plaintiff,

v.

GEORGE LOMBARDI, et al.,

Defendants.

Case No. 4:16-CV-01357-NCC

PLAINTIFF'S CONSOLIDATED REPLY MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Other Authorities

INTRODUCTION

In their attempt to defend the legally indefensible, Defendants Missouri Department of Corrections ("MDOC") and its contracted medical provider, Corizon LLC ("Corizon"), (collectively, "Defendants"), rely on factual misrepresentations; inapposite and outmoded case law and baseless, after-the-fact rationalizations. Notably, the only "scientific" evidence Defendants offer to counter Plaintiff Jessica Hicklin's expert evidence on gender dysphoria and its treatment is a discredited report condemned by hundreds of scientific experts and health professionals and described by another federal district court as lacking "any . . . indicia of reliability." *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537, 2017 WL 770619, at *5 n.12 (W.D. Pa. Feb. 27, 2017).

Defendants can provide no valid reason why Ms. Hicklin has not received the care prescribed by her psychiatrists, which include hormone therapy, access to gender-affirming canteen items, and permanent hair removal. In fact, the evidence indicates that Ms. Hicklin's medical and mental health provider, Corizon, has determined she should receive that care. *See, e.g.*, Corizon Opposition ("Corizon Opp'n"), D.E. 69 at 3 (asserting that Corizon Defendants have not "refused the particular care that Plaintiff seeks"). This further establishes that, contrary to what the Eighth Amendment requires, ultimate decisions about Ms. Hicklin's care are being made not by her medical and mental health providers, but by MDOC officials pursuant to non-medical policies—including MDOC's unconstitutional "freeze-frame" prohibition on initiating hormone therapy for inmates who did not receive it prior to incarceration.

Ms. Hicklin brings this Motion now due the continuous and worsening nature of the serious and irreparable harm she faces due to Defendants' deliberate indifference. She has met and surpassed her burden by producing ample evidence, including testimony from a leading

expert on gender dysphoria treatment, to show that a preliminary injunction is necessary to stop this harm. Defendants have already caused Ms. Hicklin severe mental and physical anguish, as demonstrated by her medical records, which show recent exacerbation of her gender dysphoria symptoms, including worsening intrusive thoughts of harming herself by removing her testicles. *See* Ex. A to Declaration of Demoya R. Gordon ("Gordon Decl."), D.E. 64-6, at EM 0822-27, 0832-33. Despite this obvious and escalating danger to Ms. Hicklin, Defendants still refuse to provide her with the medically necessary gender dysphoria treatment she desperately needs. Thus, both the law and the facts support issuing a preliminary injunction to prevent further irreparable harm to Ms. Hicklin.

ARGUMENT

Ms. Hicklin has met all the preliminary injunction requirements: she is suffering and will continue to suffer irreparable harm, she is likely to succeed on the merits of her claim, and both the balance of harm and the public interest weigh in her favor. *See Kirkeby v. Furness*, 52 F.3d 772, 774 (8th Cir. 1995).

I. Ms. Hicklin Has Demonstrated That She Will Continue To Suffer Irreparable Harm Without A Preliminary Injunction.

Ms. Hicklin has proffered expert testimony and medical records showing that she is suffering from serious mental and physical symptoms due to her inadequately treated gender dysphoria (including panic attacks, anxiety, tachycardia, shortness of breath, sleep disturbance, loss of appetite, headaches, excessive sweating, and intrusive thoughts of cutting off her testicles) and that she is at severe risk of self-harm (indeed, she has already tried to remove her testicles with a tourniquet) and suicide. *See generally* Memorandum Law in Support of Plaintiff's Motion ("Pl.'s Mem."), D.E. 64.

MDOC offers no argument against this evidence, presumably conceding the point, while Corizon misstates both the law and the facts. Corizon incorrectly claims that Ms. Hicklin asserts "possible or speculative" harm. Corizon Opp'n, D.E. 69, at 4. In fact, both U.S. Supreme Court and Eighth Circuit precedent establish that the standard for prevailing on a motion for preliminary injunction is a *likelihood* of irreparable harm, precisely what Ms. Hicklin has demonstrated. *See, e.g.*, *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 992-96 (8th Cir. 2011). Moreover, there is nothing merely "possible or speculative" about the harm Ms. Hicklin faces, as she is *already* suffering irreparable harm and continues to be at very high risk for certain and imminent future harm in the absence of a preliminary injunction. *See* Pl.'s Mem., D.E. 64, at 7-9. Defendants ignore this evidence completely and proffer none of their own to rebut or contradict it. Additionally, the ongoing deprivation of Ms. Hicklin's constitutional rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

II. Ms. Hicklin Has Demonstrated A Likelihood Of Success On The Merits.

There is no dispute that Ms. Hicklin has serious medical needs, and the evidence cogently demonstrates Defendants' ongoing deliberate indifference to those needs.

A. Ms. Hicklin Has Established That She Has Serious Medical Needs.

Ms. Hicklin's gender dysphoria and her substantial risk of future harm are objectively serious medical needs. *See* Pl.'s Mem., D.E. 64, at 10-11. Defendants concede that Ms. Hicklin has gender dysphoria. *See* Complaint, D.E. 19, at ¶ 8; Corizon Answer, D.E. 27, at ¶ 8; MDOC Answer, D.E. 42, at ¶ 8. They also provide no rebuttal to the substantial body of precedent establishing that gender dysphoria is a serious medical need. *See, e.g.*, *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *see also Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Fields v. Smith*, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011). As

discussed above, Ms. Hicklin has also separately established a serious risk of future harm with both expert testimony and documentary evidence. Defendants offer no rebuttal to this evidence beyond conclusory statements.

B. Ms. Hicklin Has Established Defendants' Deliberate Indifference To Her Serious Medical Needs.

Trying unsuccessfully to show that they have not been deliberately indifferent, Defendants ignore the supportive, on-point case law cited in Ms. Hicklin's opening brief. They instead misrepresent the facts and rely on out-of-date and inapposite case law; baseless, after-the-fact rationalizations; and discredited, unreliable opinions.

i. Both the law and facts establish that Defendants' withholding of the medical treatment prescribed by their own doctors was deliberate indifference.

Contrary to Defendants' assertions, Ms. Hicklin does not seek hormone therapy, access to gender-affirming canteen items, and permanent body hair removal pursuant to her own "opinion," but because her psychiatrists have prescribed these treatments pursuant to the medically accepted, evidence-based World Professional Association for Transgender Health Standards of Care ("WPATH Standards of Care"). *See* Pl.'s Mem., D.E. 64, at 2-6. Ms. Hicklin requested these medical treatments *after* Dr. Meredith Throop's evaluation and recommendation. *See* Complaint, D.E. 19, at ¶¶ 71-73; 75.

The crux of the problem is, while Ms. Hicklin's mental health providers have recommended she receive gender dysphoria treatment in accordance with the WPATH Standards of Care, they have been prevented from actually providing that care pursuant to MDOC's policies and practices, including but not limited to the "freeze-frame" policy, which MDOC previously admitted was the basis for its denial of hormone therapy for Ms. Hicklin. *See* Complaint, D.E. 19, at ¶ 79; MDOC Answer, D.E. 42 at ¶ 79 (admitting that Defendant Kempker

emailed Defendant Larkin citing this policy as the reason for denying Ms. Hicklin hormone treatment). Corizon also essentially admits this by alleging that it was not Corizon that denied Ms. Hicklin the particular care she seeks. *See* Corizon Opp'n at 3; *see also* Ex. A to Gordon Decl., D.E. 64-6, at EM 0181 (non-contact medical note stating that Corizon's Gender Dysphoria Clinical Supervision Group ["GDCSG"] has agreed on "appropriate hormone therapy" for Ms. Hicklin).

Thus, both the evidence and Defendants' own statements and court filings belie their current attempts to skew the factual record by suggesting that their denial of medically necessary care is based on medical judgment as opposed to blanket, non-medical MDOC policies and practices. Courts have repeatedly held these types of blanket policies unconstitutional because they do not account for the individualized needs of the particular patient. *See, e.g.*, *Kothmann v. Rosario*, 558 F. App'x 907 (11th Cir. 2014); *Fields v. Smith*, 653 F.3d 550, 557-58 (7th Cir. 2011); *De'lonta v. Angelone*, 330 F.3d 630, 634-35 (4th Cir. 2003); *Allard v. Gomez*, 9 F. App'x 793, 795 (9th Cir. 2001); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 247-50 (D. Mass. 2012).

Realizing no legal defense exists for the policies underlying its denial of medically necessary treatment, MDOC tries to obscure the record by attaching two never-before-produced documents to its brief: Exhibits I and J. Exhibit I, a housing policy, is irrelevant to the issues presented here. Exhibit J, a Corizon document created the same month Ms. Hicklin filed her Complaint, actually supports her claims by showing, *inter alia*, that, in violation of the Eighth Amendment, Defendants' policy and practice is to give ultimate decision-making authority with respect to the medical treatment of gender dysphoria to MDOC officials, as opposed to knowledgeable medical and mental health staff. *See* Ex. J to MDOC Opposition ("MDOC Opp'n"), D.E. 68-10, at 3, 4. *See Colwell v. Bannister*, 763 F.3d 1060, 1069-70 (9th Cir. 2014)

(prison overriding medical recommendations because of administrative policy may constitute deliberate indifference). Thus, nothing in either Exhibit I or J changes what the evidence shows: Defendants have been deliberately indifferent to Ms. Hicklin's serious medical needs by taking a "gross departure" from the evidence-based WPATH Standards of Care. *See* Declaration of Randi C. Ettner ("Ettner Decl."), D.E. 64-1, at ¶ 73; *see also id.* at ¶¶ 35-37; *Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (it is "clearly established" that a significant deviation from the applicable standard of care evinces deliberate indifference); *Konitzer v. Frank*, 711 F. Supp. 2d 874, 908 (E.D. Wis. 2010).

ii. Defendants ignore the substantial body of supportive case law cited by Ms. Hicklin and rely on out-of-date, inapposite cases.

Ms. Hicklin's opening brief cites an extensive body of case law from throughout the country demonstrating that the Eighth Amendment prohibits the policies and practices at issue here. Pl.'s Mem., D.E. 64, at 9-13. By contrast, the main case relied on by MDOC, *Smith v. Rasmussen*, is a 2001 Medicaid case based on outdated science that is almost a quarter-century old.[1] *See generally Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001). *Smith* is inapposite for several reasons.

First, *Smith* involved an entirely different legal standard: the statutory requirements for Medicaid coverage. While "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs," *Smith*, 249 F.3d at 761, as discussed above, such individualized treatment determinations are exactly what the Eighth Amendment requires.[2]

[1] The agency in *Smith* based its decision on a literature review conducted in 1993. *Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001).

[2] Also, while *Smith* noted fiscal concerns as part of the proffered basis for Iowa Medicaid's decision not to cover surgical gender dysphoria treatment, *Smith*, 249 F.3d at 761, under the Eighth Amendment,

Second, as numerous courts have recognized, in the almost 25 years since the research cited in *Smith* was conducted, there have been significant strides in the scientific understanding of gender dysphoria, with the WPATH Standards of Care (the most recent version issued in 2011) providing the current authoritative consensus model for treatment. *See, e.g.*, *De'lonta v. Johnson*, 708 F.3d 520, 522-523 (4th Cir. 2013); *Lynch v. Lewis*, No. 7:14-CV-24, 2015 WL 1296235, at *10 (M.D. Ga. Mar. 23, 2015); *see also Soneeya*, 851 F. Supp. 2d at 231-232; *Fields*, 712 F. Supp. 2d at 844; *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 n.4 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).[3]

Thus, the most in-depth legal analysis offered by MDOC or Corizon is of an out-of-date case with no legal bearing on the Eighth Amendment issue before the Court.[4] In fact, of the three cases involving medical care for a transgender inmate cited by either MDOC or Corizon, *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996), and *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997), are at least two decades old and readily distinguishable, while *Phillips v. Michigan Department*

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prison officials cannot deny treatment merely because it is expensive or controversial. *See Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003).

[3] *Smith* also relied on the fact that, at the time of the case, Medicare refused to cover gender-affirming surgeries, as did 36 state Medicaid programs. *Smith*, 249 F.3d at 761. But, due to the now expansive body of scientific research demonstrating the safety, efficacy, and medical necessity of such surgeries, Medicare rescinded its ban in 2014 and only15 state Medicaid programs still maintain such bans. *See* Department of Health and Human Services, Departmental Appeal Board, Appellate Division, NCD 140.3, Transsexual Surgery, Docket No. A-13-87, Decision No. 2576 (May 30, 2014), *available at* https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf (last visited April 26, 2017), Ex. A to Second Declaration of Demoya R. Gordon ("2d Gordon Decl."); MOVEMENT ADVANCEMENT PROJECT, HEALTHCARE LAWS AND POLICIES, http://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited April 26, 2017).

[4] Also, contrary to MDOC's insinuation, the fact that Ms. Hicklin was convicted of murder in no way diminishes her Eighth Amendment rights. In fact, the Supreme Court has held that people in prison *must* be provided constitutionally adequate care because they cannot procure such care for themselves. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015) (granting preliminary injunction in favor of transgender inmate who had been convicted of murder and sought surgical treatment for gender dysphoria).

of Corrections, 731 F. Supp. 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991), actually *supports* Ms. Hicklin's claims.

In sharp contrast to the instant case, the court in *Long* ruled against that plaintiff in large part because the plaintiff refused to cooperate with prison psychologists and psychiatrists, "never . . . show[ed] a continued interest in psychiatric evaluation or treatment," and was described as "hostile and belligerent" and "verbally abusive and abrasive." *Long*, 86 F.3d at 763. Here, the evidence and Defendants' own statements show that Ms. Hicklin has actively sought both evaluation and treatment for her gender dysphoria and has been polite and cooperative with her medical and mental health providers. *See generally* Ex. A to Gordon Decl., D.E. 64-6; *see also* Complaint, D.E. 19, at ¶¶ 69-102; Ettner Decl., D.E. 64-1, at ¶ 51; MDOC Opp'n, D.E. 68, "Statement of Facts."

In *Maggert* the psychiatrist did not believe the inmate had gender dysphoria, and the plaintiff offered no expert testimony to contradict that opinion. *Maggert*, 131 F.3d at 671. Here, it is undisputed that Ms. Hicklin has gender dysphoria, and she has proffered compelling expert testimony supporting that diagnosis and the recommended treatment in line with the prevailing WPATH Standards of Care. MDOC makes much of the fact that, after finding that the district court correctly dismissed the plaintiff's claim in *Maggert*, the Seventh Circuit stated in dicta that "it does not follow" that prisons have a duty to "cure" a prisoner's gender dysphoria. *Id.* But MDOC fails to mention that, in 2011, the same Circuit specifically disapproved that part of *Maggert*, holding that denying medically necessary treatment for gender dysphoria—such as hormones and surgical interventions—and choosing instead to provide inadequate treatments based on factors such as cost and convenience, violates the Eighth Amendment. *See Fields*, 653 F.3d at 555-56.

Similarly, contrary to MDOC's assertion, nowhere does *Phillips* say that prisons are not obligated to provide so-called "curative treatment" for gender dysphoria. In fact, *Phillips* directly supports Ms. Hicklin's claims because the court granted the plaintiff's preliminary injunction motion, holding that where, as here, adequate treatment for gender dysphoria includes hormone therapy, withholding such treatment is deliberately indifferent. *See Phillips*, 731 F. Supp. at 800.

Additionally, MDOC's arguments regarding whether or not Defendants are constitutionally required to "cure" Ms. Hicklin's gender dysphoria mischaracterizes the issue as well as the applicable law. Whether or not gender dysphoria—or any other illness—can be "cured" is beside the point. The Constitution may not require a "cure," but it does mandate adequate treatment in accordance with prevailing medical standards of care and tailored to the individualized needs of the patient. By analogy, diabetes and some cancers are currently not "curable," but the Constitution nevertheless requires that prisoners suffering from these conditions receive adequate treatment. *See Fields*, 653 F.3d at 556 ("Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional."); *see also* Ettner Decl., D.E. 64-1, at ¶¶ 23, 35, 58, 69. In the words of the Seventh Circuit in *Fields*, "[r]efusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture." 653 F.3d at 556.

In addition to relying on inapposite and distinguishable cases, Defendants also repeatedly misstate the law. For example, MDOC's assertion that no "court has ever suggested" that constitutionally adequate care may require providing female clothing and grooming products to a transgender inmate is false. *See, e.g.*, *Soneeya*, 851 F. Supp. 2d at 246-48 (recognizing transgender inmate's medical need for female undergarments and canteen items such as

cosmetics); *Konitzer*, 711 F. Supp. 2d at 908 (denial of female gender expression to a transgender inmate with gender dysphoria may constitute deliberate indifference). In any event, it does not matter whether another court has held that a particular medical treatment was or was not deemed medically necessary *for someone else*. Ms. Hicklin has provided evidence showing that access to gender-affirming products and permanent body hair removal are medically necessary *for her*. *See* Pl's. Mem., D.E. 64, at 5; Ettner Decl., D.E. 64-1, at ¶ 77.

Likewise, MDOC wrongly asserts that *Farmer v. Brennan*, 511 U.S. 825 (1994), requires Ms. Hicklin to show that Defendants have withheld medical treatment with the specific intent to punish. MDOC Opp'n, D.E. 68, at 9-10. The Court's point in *Farmer* was that the test for deliberate indifference is subjective, not objective. *Id.* at 837-38. But, in making that point, the Court was careful to state that "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842; *see also Watson v. Caton*, 984 F.2d 537, 540 (1st Cir. 1993) (denial of needed medical treatment in order to punish the inmate is not the sole means of establishing deliberate indifference).

Also, contrary to MDOC's assertions, the Supreme Court has made clear that conditions of confinement *can* violate the Eighth Amendment. *See Farmer*, 511 U.S. at 847 ("a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement"). Thus, it does not matter whether Defendants are withholding treatment specifically to punish Ms. Hicklin; what matters is they know that doing so puts her at substantial risk of serious harm and yet they continue. *See id.* Therefore, Ms. Hicklin has established

Defendants' deliberate indifference and is likely to prevail on the merits of her Eighth Amendment claims.

iii. The New Atlantis *report MDOC cites contains inaccurate and unreliable views that have been thoroughly discredited within the scientific community and rejected by courts.*

While Ms. Hicklin has proffered expert testimony from Dr. Randi C. Ettner, a WPATH Board Member and recognized expert in the treatment of gender dysphoria with forty years' experience on the subject, MDOC offers no expert testimony and instead relies on an unscientific, non-peer reviewed report published by a conservative think-tank to promulgate outdated views that have been rejected by the scientific community and the courts.[5]

The report is merely the latest attack on the lesbian, gay, bisexual, and transgender ("LGBT") community by Paul McHugh, who has a long history of anti-LGBT advocacy.[6] McHugh's anti-transgender activism dates as far back as 1979, when he became chief of psychiatry at Johns Hopkins and quickly shut down that university's then-pioneering gender confirmation surgery program, arguing for decades (contrary to modern science and years of

[5] MDOC's statement that report author Paul McHugh is "arguably the most important American psychiatrist of the last half-century" is a self-serving assertion lifted verbatim from the report itself (*see* Ex. K to MDOC Opp'n, D.E. 68-11, at 2). Neither MDOC's brief nor the *New Atlantis* report contains any support for this statement, which is belied by the scientific community's robust opposition to McHugh's views.

[6] For example, McHugh has stated that "[homosexuality] is erroneous desire" and has pushed the idea that the Catholic sex abuse scandal was not about pedophilia but rather "homosexual predation on American Catholic youth." *See* Lydia Evans, *Charleston, SC: Dr. Paul McHugh: "There is No Gay Gene,"* VIRTUE ONLINE, THE VOICE FOR GLOBAL ORTHODOX ANGLICANISM, Jan. 26, 2010, http://www.virtueonline.org/charleston-sc-dr-paul-mchugh-there-no-gay-gene (last visited April 26, 2017); *Adopting Chaos*, NATIONAL CATHOLIC REGISTER, Apr. 10, 2006, http://www.ncregister.com/site/article/adopting_chaos (last visited April 26, 2017). He has also filed amicus briefs opposing constitutional protections for LGBT people, including a brief supporting Proposition 8, which banned same-sex couples from marrying in California and was held unconstitutional in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Ca. 2010), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). *See* Brief Amicus Curiae of Paul McHugh, M.D., *available at* http://cdn.ca9.uscourts.gov/datastore/general/2010/10/26/amicus21.pdf (last visited April 26, 2017).

accumulated research) that gender dysphoria treatment should focus solely on counseling and psychotropic medications.[7]

McHugh's views, including the "findings" highlighted in MDOC's opposition, are unsupported by modern science. Most relevant to this case, McHugh's outdated opinions on gender dysphoria treatment in accordance with the WPATH Standards of Care—including hormone therapy and gender confirmation surgery—ignores the substantial body of research establishing that these are safe, efficacious, and medically necessary treatments.[8]

It is unsurprising then, that despite his affiliation with the prestigious Johns Hopkins University, McHugh's views—including those expressed in the *New Atlantis* report—have been repeatedly discredited and roundly criticized by the scientific community. In fact, nearly 600 health professionals—including experts at Johns Hopkins, Harvard Medical School, Northwestern, and other prestigious institutions—issued a letter condemning the report and stating that it "does not represent prevailing expert consensus opinion about sexual orientation or gender identity related research or clinical care."[9] In addition, 670 Johns Hopkins faculty, staff, students, and alumni signed a formal petition calling on the institution to publicly disavow the report,[10] and three Johns Hopkins faculty members penned an op-ed questioning the report's

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[7] Katherine Pratt, *The Tax Definition of "Medical Care": A Critique of the Startling IRS Arguments in O'Donnabhain v. Commissioner*, 23 MICH. J. GENDER & L. 313, 334-40 (2016), Ex. B to 2d Gordon Decl.

[8] *See, e.g.*, Ettner Decl., D.E. 64-1, at ¶¶ 28, 31, 32, 34; Department of Health and Human Services, Departmental Appeal Board, Appellate Division, NCD 140.3, Transsexual Surgery, Docket No. A-13-87, Decision No. 2576 (May 30, 2014) at 11-24, *available at* https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf (last visited April 26, 2017), Ex. A to 2d Gordon Decl.

[9] Letter from Lauren Abern, MD, et al. (March 22, 2017), *available at* https://medschool.vanderbilt.edu/lgbti/files/lgbti/publication_files/ExpertLGBTIConcensusLetter.pdf (last visited April 26, 2017), Ex. C to 2d Gordon Decl.

[10] Petition to Hopkins to Address False LGBT Reports, *available at* http://assets.hrc.org//files/documents/Petition_to_Hopkins_9.29.16.pdf?_ga=1.68679700.485287463.1461889361 (last visited April 26, 2017), Ex. D to 2d Gordon Decl.

credibility.[11] Not long after, Johns Hopkins announced the coming reinstatement of the gender confirmation surgery program that was shut down in 1979 under McHugh's leadership.[12]

The sustained outcry from the scientific community against the views reflected in the *New Atlantis* report demonstrates the falsity of MDOC's assertion that "there is no consensus among scientists that . . . gender dysphoria . . . can be treated." MDOC Opp'n, D.E. 68, at 15. In fact, every major medical organization—including the American Medical Association, the Endocrine Society, the American Psychological Association, the American Psychiatric Association, the World Health Organization, the American Academy of Family Physicians, the National Commission on Correctional Health Care, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, and the American Society of Plastic Surgeons—endorses the WPATH Standards of Care.[13]

In addition to being discredited within the scientific community, McHugh's views have also been rejected by the courts. For example, in *Evancho v. Pine-Richland School District*, the defendants cited the *New Atlantis* report as a basis for denying three transgender students access

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[11] Chris Beyrer, et al., *Hopkins Faculty Disavow 'Troubling' Report on Gender and Sexuality*, THE BALTIMORE SUN, Sept. 28, 2016, *available at* http://www.baltimoresun.com/news/opinion/oped/bs-ed-lgbtq-hopkins-20160928-story.html (last visited April 26, 2017), Ex. E to 2d Gordon Decl.

[12] *See* Johns Hopkins Medicine's Commitment to the LGBT Community (Oct. 7, 2016), *available at* http://www.hopkinsmedicine.org/lgbt-resources/lgbt-community.html (last visited April 26, 2017), Ex. F to 2d Gordon Decl.

[13] *See* Ettner Decl., D.E. 64-1, at ¶ 19; *see also, e.g.*, American Medical Association (2008) Resolution 122 n(A-08), *available at* http://www.tgender.net/taw/ama_resolutions.pdf (last visited April 26, 2017), Ex. G to 2d Gordon Decl.; American Psychiatric Association Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012), *available at* https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-transgender-gender-variant-access-care.pdf (last visited April 26, 2017), Ex. H to 2d Gordon Decl.; National Commission on Correctional Health Care, Policy Statement, Transgender Health Care in Correctional Settings (2009), *available at* http://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care (last visited April 26, 2017), Ex. I to 2d Gordon Decl.; American Psychological Association Policy Statement on Transgender, Gender Identity and Gender Expression Nondiscrimination (2008), *available at* http://www.apa.org/about/policy/transgender.aspx (last visited April 26, 2017), Ex. J to 2d Gordon Decl.

to school restrooms consistent with their gender identity. *Evancho*, 2017 WL 770619, at *5 n.12. In granting the plaintiffs' motion for preliminary injunction, the court rejected the opinions expressed in the report, noting that it had "no indicia of admissibility . . . nor . . . any other indicia of reliability." *Id.*[14]

Thus, contrary to MDOC's assertion, there is no legitimate uncertainty or disagreement regarding the evidence-based WPATH Standards of Care for gender dysphoria treatment. Defendants' "gross departure" (Ettner Decl., D.E. 64-1, ¶ 73) from those standards establishes their deliberate indifference. *See Moore*, 255 F.3d at 545.

III. The Balance of Harms And The Public Interest Both Favor Issuing A Preliminary Injunction.

MDOC addresses neither the balance of harms nor the public interest in its brief, apparently conceding that both weigh in Ms. Hicklin's favor. While Corizon states without any support that no balancing of harm can fall toward Ms. Hicklin, it offers nothing to contradict Ms. Hicklin's substantial evidence of the irreparable harm she is suffering and will continue to suffer without a preliminary injunction. Nor does Corizon point to a single harm that an injunction would cause Defendants. Thus, the balance of harms tips strongly in Ms. Hicklin's favor. Moreover, Corizon's suggestion that this case does not impact the public interest because it involves only one plaintiff contradicts applicable case law. *See Phillips*, 731 F. Supp. at 801 (holding in case involving only one transgender plaintiff that "the public interest will be served by safeguarding Eighth Amendment rights" of prisoners); *see also Phelps-Roper v. Nixon*, 545

[14] McHugh's views on gender dysphoria treatment were also rejected in *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. 34 (2010). *See O'Donnabhain*, 134 T.C. at 67 n.47, 70 (finding that hormone therapy and gender-affirming surgery are well-recognized and medically accepted treatments for gender dysphoria and discounting another McHugh article proffered by the agency because, like the *New Atlantis* report, it was not peer reviewed and was published in a religious publication).

F.3d 685, 690 (8th Cir. 2008) ("[I]t is always in the public interest to protect constitutional rights.").

CONCLUSION

For the foregoing reasons, Ms. Hicklin respectfully requests that the Court grant her Motion for Preliminary Injunction.

Date: April 27, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Consolidated Reply Memorandum in Support of Plaintiff's Motion for Preliminary Injunction was made on April 27, 2017 via the Court's CM/ECF system to:

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