

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
ADULT CORRECTION, et al.,

Defendants.

**DEFENDANTS' REPLY IN SUPPORT
OF THEIR RENEWED MOTION FOR
SUMMARY JUDGMENT**

Introduction

The record evidence in this case confirms two key factual points. First, WPATH does not set a standard that can be used to determine medical necessity in this case and instead refers to the AMA definition that calls for an individualized application of clinical judgment—which is exactly what the DTARC did in this case. Second, the North Carolina Department of Adult Correction (the “Department”) does not now have, and has never had, a blanket ban on gender-affirming surgery—instead, each request, including Plaintiff’s, is reviewed on a case-by-case basis. Therefore, this Court should grant Defendants’ renewed motion for summary judgment on all claims and dismiss this matter with prejudice. Alternatively, Defendants request that this Court send any remaining factual issues to a jury for determination.

A. The Record Evidence Confirms That WPATH Does Not Provide A Workable Medical Necessity Framework.

There is no dispute and the record is clear—WPATH does not contain a standard for assessing whether and when a particular intervention is medically necessary. Rather, WPATH refers to the AMA’s generalized definition of medical necessity. That definition also does not dictate whether and when a particular intervention is medically necessary and instead references

general factors for providers to consider on a case-by-case basis. The record demonstrates that after reviewing and considering all of Plaintiff's medical and mental health records, the DTARC determined that the surgery was not medically necessary for Plaintiff because her symptoms were well controlled. Plaintiff's disagreement with the DTARC's assessment and its conclusion is insufficient to support a deliberate indifference claim.

In her Response, Plaintiff makes multiple arguments that are unsupported by and ignore key testimony. Plaintiff argues that Defendants failed to address the factors of medical necessity described by the AMA. (*See* DE-114 at 3) However, the testimony at the February 20 hearing demonstrates that the DTARC conducted an evaluation of Plaintiff's request that comports with the general considerations outlined in the AMA definition of medical necessity.

Essential to the AMA definition is the provider's clinical judgment that the intervention would "prevent[], evaluate[], diagnose[] or treat[] an illness, injury, disease or its symptoms[,] and that the intervention: (1) comports with "generally accepted standards of medical practice[,] (2) is "clinically appropriate . . . and considered effective for the patient's illness, injury, or disease; and" (3) is "not primarily for convenience of the patient, physician, or other health care provider . . ." (DE-104-3 at 18-19) Drs. Peiper, Campbell, and Sheitman each testified to their independent judgment (after reviewing Plaintiff's records) that the surgery was not needed because her symptoms appeared well controlled by existing interventions. (*See* DE-104-7 at 11:15-19:25, 46:23-49:14, 78:18-81:3) Thus, the record shows that the DTARC's clinical judgment was that Plaintiff did not have an "illness, injury, disease or its symptoms" for which surgery would be "clinically appropriate." Plaintiff, and her expert's disagreement with this conclusion does not make that determination unconstitutional.

Plaintiff's contention that Defendants failed to conduct any risk benefit analysis (*see* DE-114 at 4), also misses the mark because it ignores the testimony. Dr. Campbell testified that the DTARC does "a risk-benefit analysis of every patient that [they] see. And if their treatment is adequate and they're doing well, then that risk-benefit analysis does not necessarily tip to the point of making this a medical necessity." (DE-104-7 at 54:10-14) (*See also* DE-104-7 at 60:15-20, 64:4-6) Moreover, this contention overlooks other record evidence that reflects the risks/needs assessment conducted by the DTARC. (*See* DE-61-9 at 45-46, 91-92; DE-61-5 at 96-98, 112-114).

Additionally, Plaintiff's contention that Defendants "ignore[d] all indications that Plaintiff was experiencing serious ongoing distress" (DE-114 at 4), is flatly refuted by the record. Drs. Peiper, Campbell, and Sheitman each testified that their review of Plaintiff's records did indicate that she experienced episodic distress. (DE 104-7 at 13:22-14:3, 47:12-17, 79:13-80:5) Thus, contrary to Plaintiff's assertion, the record shows that the DTARC was aware of and considered the whole of Plaintiff's presentation, including instances where she exhibited signs and symptoms of distress. Their review of that information, however, in context with other information in Plaintiff's records, did not lead them to conclude that surgery was necessary.

B. The Record Evidence Confirms That The Department Does Not Have A Blanket Ban.

Plaintiff argues that the fact that Department has denied all requests for gender affirming surgeries is *per se* evidence of a *de facto* ban. (DE-114 at 5) This argument lacks merit. In making this assertion, Plaintiff does not contend with the testimony which indicates that each of the requests made by the 15 people was evaluated on a case-by-case basis and denied for various reasons, including contraindications to surgery. (DE-104-7 at 23:4-24:16) Plaintiff points to no evidence to contradict this testimony or support her conjecture that these requests were summarily denied because of some blanket ban.

Plaintiff's contention, that Defendants have set an insurmountable standard which has no basis in medical authority and is a moving target (*see* DE-114 at 5), also lacks merit. Drs. Peiper, Campbell, and Sheitman each testified that their review of Plaintiff's records did not indicate that her symptoms were severe, worsening, or uncontrolled, such that further intervention was warranted. (DE 104-7 at 19:9-20, 56:22-25, 81:13-24) Moreover, they testified that the DTARC would approve surgery in cases where a patient's dysphoria was not stable or well controlled and provided examples of how those situations would manifest through various symptoms. (*See* DE-104-7 at 18:12- 19:20, 51:17-52:3, 55:6-57:3, 60:21-25, 81:13-82:15) This testimony demonstrates that the DTARC was describing various scenarios in which a patient's particular presentation would warrant a higher-level intervention. The DTARC's evaluation of the necessity of an intervention based on their assessment of the state of the condition and whether the symptoms indicate a higher-level intervention is in keeping with the AMA's definition of medical necessity. Plaintiff's argument to the contrary rests merely on her disagreement with the outcome of the DTARC's conclusion.

Lastly, Plaintiff's assertion that Dr. Campbell's position statement clearly impacted the DTARC's decision on her requests is refuted by the testimony. Drs. Peiper, Campbell, and Sheitman each testified that if their review of the records indicated that the patient's symptoms related to gender dysphoria were worsening, severe, or uncontrolled by existing interventions, they would recommend surgery regardless of the state of the medical literature. (*See* DE 104-7 at 104-7 at 18:12- 19:20, 52:4-7, 81:13-82:15) Rather than wrestling with this testimony, Plaintiff merely dismisses it as "preposterous." (DE-114 at 7) But Plaintiff has no basis to dismiss the sworn testimony of three separate dedicated public servants. And disagreement with prison officials'

conclusion on medical necessity does not equate to deliberate indifference; nor does it preclude summary judgment for Defendants here.

Conclusion

For these reasons, and those arguments and legal authorities set forth in their first motion for summary judgment and in opposition to Plaintiff's first motion for summary judgment. (*See* DE 60-61, 64-65, 69), Defendants respectfully request that the Court enter summary judgment in their favor on all claims. Alternatively, Defendants request that all factual issues that remain be submitted to a jury.

This the 4th day of April 2024.

JOSHUA H. STEIN
Attorney General

/s/ Orlando L. Rodriguez
Orlando L. Rodriguez
Special Deputy Attorney General
NC Bar No. 43167
orodriguez@ncdoj.gov

Stephanie A. Brennan
Special Deputy Attorney General
NC Bar No. 35955
sbrennan@ncdoj.gov
NC Department of Justice
PO Box 629
Raleigh, NC 27602-0629
(919)716-6900

Attorneys for Defendants