

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA E. MANNING, :
 :
 Plaintiff, :CA No. 14-1609
 :
 v. :
 :
 CHUCK HAGEL, et al, :
 :
 Defendants. :

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE
Friday, September 26, 2014

APPEARANCES:

For the Plaintiff: CHASE B. STRANGIO, ESQUIRE
JAMES ESSEKS, ESQUIRE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

For the Defendant: DANIEL SCHWEI, ESQUIRE
United States Department of
Justice
Civil Division, Federal
Programs Branch
20 Massachusetts Ave. NW.
Room 7340
Washington, DC 20530
(202)305-8693

Proceedings reported by machine shorthand, transcript
produced by computer-aided transcription.

P R O C E E D I N G S

1
2 THE COURT: This is Judge Kollar-Kotelly. I
3 have a court reporter here, so I'm going to call the case
4 and then I'll have people identify themselves.

5 This is Manning v. Hagel, 14-CV-1609. Who is on
6 the phone for plaintiffs?

7 MR. STRANGIO: This is Chase Strangio from the
8 ACLU for the plaintiffs.

9 MR. ESSEKS: James Esseks from the ACLU.

10 THE COURT: Can you spell your names for me?

11 MR. STRANGIO: It's Chase, C-h-a-s-e, last name
12 is Strangio, S-t-r-a-n-g-i-o.

13 THE COURT: Okay.

14 MR. ESSEKS: And James Esseks, Your Honor. The
15 last name is E-s-s-e-k-s as in Sam.

16 THE COURT: Who do we have for the defendant?

17 MR. SCHWEI: Good morning, Your Honor. This is
18 Daniel Schwei, and I'm joined by Tony Coppolino. My last
19 name is spelled S-c-h-w-e-i.

20 THE COURT: Okay. What I'm going to ask is I'm
21 going to go through some issues and I'll call on you, and
22 instead of people just speaking up without being called
23 on, I will give everybody an opportunity to say something,
24 but I may say "plaintiffs" or "defendants." And if you
25 would identify yourself by your last name to identify who

1 is speaking so the court reporter ascribes the comments to
2 the correct people.

3 So let me just say, set some things out.
4 Plaintiffs have filed a preliminary injunction requesting
5 that certain treatment be provided to Plaintiff who's been
6 diagnosed with gender dysphoria. Before I start, I
7 presently, I only have obviously Plaintiff's motion and
8 the attachments. It does include some records from the
9 defendant from the Army regarding this issue. So I just
10 want to let you know, my questions and my comments don't
11 reflect any position or any decision on my part as to this
12 case since I haven't received everything. But I am going
13 by what I have at least in hand. So I'll give you
14 opportunities to indicate if I'm correct about stating
15 what's in the documents or if you have other positions on
16 it.

17 Let me say that the first thing before getting
18 into some of the issues that are here is whether you're
19 willing to roll the preliminary injunction into a decision
20 on the merits. So the complaint and the preliminary
21 injunction asks for the same relief. Frankly, it would be
22 more efficient to rule on the merits at one time unless
23 there's discovery or something that you're expecting not
24 associated with the PI.

25 We can set an expeditious briefing schedule and

1 I would, you know, promise to rule expeditiously. So I
2 asked both sides through an email for you to be thinking
3 about it and hopefully speak to your clients. Plaintiffs
4 could either rely on their merits argument or we can set a
5 date for you to supplement it. There would then be
6 whatever the response was from the defendants in a reply
7 unless you're going to be doing some sort of cross
8 motions.

9 So let me start with the plaintiffs. What's
10 your position on this?

11 MR. STRANGIO: Thank you, Your Honor. This is
12 Chase Strangio speaking. Depending on the defendant's
13 position and the defense that they plan to raise, we're
14 amenable to rolling the PI into the permanent injunction
15 merits as you've identified, particularly if it's done
16 expeditiously. In terms of the timing, everything will
17 depend on sort of where the defendants are with that.

18 THE COURT: Okay.

19 MR. STRANGIO: But we are amenable to it.

20 THE COURT: Okay. And where is the defendant on
21 this?

22 MR. SCHWEI: This is Daniel Schwei speaking.
23 Our position would be that we prefer not to roll the PI
24 into a decision on the merits, and there are a couple of
25 reasons for that. One is just the timing issue, but

1 secondly, we believe we have certain threshold defenses to
2 this lawsuit that we can present through a motion to
3 dismiss. So rather going down the route of, you know, a
4 reaching -- going through any discovery and then going
5 through a full proceeding --

6 THE COURT: Let me interrupt you. Let me
7 interrupt you. My assumption is if you're doing it on the
8 merits, then there's no discovery. If you're doing
9 discovery, you know, substituting a merits decision, which
10 can be a combination of, you know, a motion to dismiss
11 versus something else, but it would not -- it doesn't work
12 expeditiously if you're going to do discovery unless
13 Plaintiff is agreeable.

14 My assumption is if they filed a PI they want an
15 answer quicker than later, and the merits we can do,
16 probably give you a little bit more of time to get
17 briefing in, not a lot more, but the PI briefing is going
18 to be very quick. You're going to get like two days. So
19 it gives you a little bit more time, but not an enormous.
20 But I don't think it particularly works for discovery
21 unless both sides agree you want discovery before you file
22 your motions.

23 You can do cross motions doing it on the merits.
24 If your response on the merits is to have it dismissed,
25 their position is that they think that they have an

1 Eighth Amendment case here and they set it out, and your
2 response is the motion to dismiss. You can do cross
3 motions. We can still do it on an expedited basis.

4 So, you know, I'm assuming that the plaintiff --
5 let me go back to the plaintiff. I'm assuming you're not
6 planning on, if we did it on the merits, you would not be
7 doing discovery.

8 MR. STRANGIO: Your Honor, you know, that
9 depends what they put in in opposition.

10 THE COURT: Okay.

11 MR. STRANGIO: But, you know, depending on
12 whether or not they contest our expert declaration, but
13 other than that I think we can move on the papers.

14 THE COURT: Okay. All right. So from the
15 defendant -- let me get back to the defendant's
16 perspective. I don't see any reason -- if we did it on
17 the merits, what you can do is file a cross motion for,
18 you know, on a motion to dismiss as well as respond to the
19 merits from their perspective. I don't know what -- what
20 would be the motion to dismiss? They haven't made out an
21 Eighth Amendment claim or what? Defendants?

22 MR. SCHWEI: This is Daniel Schwei. I think
23 that may be part of it, but the more quintessential motion
24 to dismiss argument is this lawsuit is subject to the
25 Prison Litigation Reform Act, and we don't believe that

1 the requests for medical treatment have been properly
2 exhausted and gone up through the appropriate
3 administrative channels. Some of them are currently in
4 those administrative channels, but at least two of the
5 requests for medical treatment for mainly the grooming and
6 hormonal therapy we do not believe, at least right now
7 based on my understanding of the facts, that they've been
8 properly exhausted.

9 THE COURT: And Plaintiffs, what's your position
10 on the Prison Litigation Reform Act? I know you're caught
11 short on this.

12 MR. STRANGIO: No. Our position is that all of
13 the requests for relief have been properly exhausted under
14 the PLRA. Under the PLRA the only exhaustion required is
15 the exhaustion that's available, and our client has
16 exhausted through both the internal prison available
17 channels as well as through the military channels for
18 exhaustion and has been told that no further relief via
19 the administrative grievance process is available. So
20 from our position exhaustion has been effectuated for
21 purposes of the PLRA.

22 THE COURT: Okay. So we don't have a dispute
23 that the PLRA applies, but there's a dispute as to whether
24 it's been exhausted? You can still do a -- I don't know
25 whether Plaintiffs would want to supplement their argument

1 on the merits, although it's fairly fulsome on the merits,
2 if we did, you know, your request considering on the
3 merits that he's entitled to it. The government would
4 oppose it, and you would have an opportunity to reply.
5 The government could file at the same time. We can do a
6 schedule of their motion to dismiss; you respond to that
7 and you would just have a combination of either, you know,
8 the motion to dismiss, and if that is not successful
9 what's briefed already is the merits. We can do it on a
10 fairly expedited schedule.

11 I'm also in a position, I don't have any trials
12 coming up at this point. There are a couple in the wind,
13 but they are not here. And they would be later so I have
14 time actually to get this out quickly, if you want to do
15 this. It seemed to make more sense than to do this
16 piecemeal.

17 The preliminary injunction, which you have, they
18 filed their motion to dismiss, why not just have it all
19 briefed and obviously you deal with the motion to dismiss
20 and decide that. But if the government succeeds, that
21 holds them in abeyance. If they don't succeed, then we
22 move to the actual merits. Does that work for the
23 plaintiffs?

24 MR. STRANGIO: That works for the plaintiffs.
25 This is Chase Strangio speaking.

1 THE COURT: What about for the defendants?
2 You'll get your motion to dismiss.

3 MR. SCHWEI: Right. And I think we are amenable
4 to that subject to one caveat, which is --

5 THE COURT: Okay.

6 MR. SCHWEI: -- going back to something Your
7 Honor mentioned earlier, which is discovery. What I heard
8 the plaintiff say was that if we were to put forth our own
9 medical experts, then they would want discovery. As you
10 know, they've already put forth a medical expert.

11 THE COURT: Right.

12 MR. SCHWEI: And so, you know, I think Your
13 Honor is correct that it doesn't make sense to consolidate
14 it with the merits, if there is going to be this discovery
15 period, and what I heard them say is that they likely
16 would want discovery if we were to put forth a medical
17 expert.

18 THE COURT: I guess the one, you know, the
19 one -- and I was going to get into a little bit further,
20 which I can do at this point, about what's disputed and
21 what's not disputed, leaving aside the exhaustion of
22 remedies issue. But looking at one of the disputes
23 between the plaintiff and the Army about some things
24 because it's not totally clear to me and obviously, as I
25 said at the caveat at the beginning, I've only got the

1 material that the plaintiffs had provided. But it does
2 have material from the Army in there.

3 So I've certainly been able to take a look, and
4 there's a fair amount of material from Dr. Galloway that
5 sets certain things out. We can take a look at that. If
6 your idea -- the reason I was still going forward with
7 this, even if we wound up, you know, wanting to depose the
8 two experts on it, depending on what the experts would
9 actually say -- and why don't I go through a couple of
10 questions and then we can see whether this would work.
11 Because it seems to me that if you're filing a motion to
12 dismiss and if you're not successful with that and it gets
13 granted, you're going to still be, I assume, responding to
14 the merits, because if you don't succeed with the
15 exhaustion remedies, then you will not have responded to
16 the rest of it.

17 So I'm assuming the government is going to want
18 to do, yes, a motion to dismiss, but a backup that if they
19 are not successful that the PI is still out there. So
20 that's why I'm suggesting instead of fooling around with
21 this we do the motion to dismiss and the merits briefing
22 at the same time but on an expedited schedule. Not with
23 the kind of schedule you have with the PI but certainly
24 one that you would have otherwise.

25 But let me go through a couple of things that

1 just in reading the papers that I had questions about or
2 wanted to see whether I was interpreting this correctly
3 and whether there are or not disputes about it. Again,
4 with the caveat that I'm just looking at what the
5 plaintiff had provided.

6 It looks like it's undisputed that the plaintiff
7 has been diagnosed with gender dysphoria. It also looks
8 like it's undisputed that there's a treatment protocol
9 associated with this diagnosis that's accepted in the
10 medical community and WPATH based on what Dr. Galloway,
11 who is obviously representing the Army, seems to have put
12 together in the materials. The treatment protocol seems
13 to have certain elements that are at issue in this case.

14 The first one is the psychotherapy focused on
15 gender dysphoria. The defendant is providing
16 psychotherapy through Dr. Galloway, which has expanded
17 from July 18 of this year for gender dysphoria. The
18 plaintiff raises the question whether Dr. Galloway has the
19 expertise to actually prepare a treatment plan and provide
20 the treatment since she indicated back in October of 2013
21 that she lacked an expertise. So it's not clear to me
22 whether Dr. Galloway is actually providing psychotherapy
23 with another professional with an expertise from the
24 Transgender Institute or some other expert. So let me
25 stop here. I have a couple of other things. But am I

1 correct, Mr. Schwei -- did I pronounce that correctly?

2 MR. SCHWEI: Yes, Your Honor.

3 THE COURT: -- that it's undisputed about the
4 diagnosis and the general treatment protocol, without
5 getting into its application to this particular patient.
6 Are you agreeable -- are you agreeing to that?

7 MR. SCHWEI: With regard to -- I think it is
8 undisputed that there has been a diagnosis. With regard
9 to the treatment protocol, I think based on my current
10 understanding the treatment protocol is universally
11 recognized as helpful guidelines. That doesn't
12 necessarily mean that it is a medically accepted standard
13 of care. I think part of it is that these issues are so
14 new and there have been so few patients and so few
15 published studies that it's hard to say that these
16 protocols actually meet the definition of a universally
17 accepted medical standard of care.

18 I think we all recognize that they are helpful,
19 but I just want a caveat that we may not agree that they
20 are, you know, a medically accepted standard of care.

21 THE COURT: Okay. So if somebody had a
22 treatment plan that included these things, then you would
23 be arguing back that they would not necessarily be the
24 treatment that would be provided or required, or would you
25 be arguing it in terms of as it applied to the particular

1 individual? Or both?

2 MR. SCHWEI: I think that the -- I think the
3 answer is probably both, that the guidelines set out the
4 right things to consider and they are not -- so they set
5 out the right considerations for providers to take into
6 account when evaluating their individual patients, but the
7 guidelines themselves are not necessarily, you know, a
8 medically accepted standard of care about what to do in a
9 particular treatment situation for a particular patient.

10 THE COURT: Okay. And this is based on what?
11 I'm just trying to get a sense, because it sounded as if
12 Dr. Galloway was presenting it as this was the, was the
13 type of treatment, and she set out at the beginning --
14 I've forgotten whether it was the October plan or
15 something else -- where she seemed to have consulted with
16 the Transgender Institute and said some other
17 psychologist, whose name I can't think of right now, who
18 had set out what is generally done.

19 In terms the psychotherapy, I don't know what
20 the in-between thing is in terms of becoming more
21 feminized is my summary term of using it, the -- generally
22 some hormone therapy. I mean, how long, when you get to
23 these points or whether they are appropriate and
24 particular for particular people, I'm assuming varies with
25 the individual. And she sets them out, so that's why I

1 made the assumption. She wouldn't have set them out if
2 she didn't think that this generally was the treatment,
3 the course of treatment, not necessarily applied to every
4 patient, but that this is generally what's considered.

5 Would you disagree with that?

6 MR. SCHWEI: No, Your Honor. I agree that the
7 various treatment options that are set forth in the WPATH
8 standards of care, I think everyone agrees those are
9 generally what providers consider, but I think the point
10 where we disagree is, number one, looking at individual
11 cases how those general guidelines are applied in
12 individual cases. But number two, whether the guidelines
13 are a medical -- a medically necessary standard of care.
14 This would be, you know, incorporated into the
15 Eighth Amendment.

16 We think they set out the right treatment
17 options that the providers generally consider, but we're
18 not necessarily agreeing that they are a universally
19 medically accepted standard of care that sets forth what
20 is medically necessary for treating patients with gender
21 dysphoria.

22 THE COURT: Okay. And so what would your
23 position be? I mean, obviously the DSM has the diagnosis
24 in there, and although certainly it's new in terms of
25 accepting it into the DSM, it used to be gender identity,

1 I think, but I don't know whether it was ever in the DSM
2 or not. But certainly WPATH sets out what is generally
3 viewed as treatment. Do you have an alternative? I mean,
4 you can't decide that if somebody has a condition that
5 there's no, you know, there's no way of looking at what
6 should be given as treatment. I assume you're not taking
7 that position.

8 MR. SCHWEI: Your Honor, I'm not sure I'm
9 prepared to answer that question about whether we have an
10 alternative. You know, I've been talking to my client and
11 trying to get up to speed on all these issues, but it's
12 only been a few days. I'm not prepared to say we have
13 necessarily an alternative. I think we do agree that the
14 WPATH standards of care set out the right things to
15 consider and the right treatment options. We're just not
16 agreeing that they set out a standard of care of medical
17 necessity.

18 THE COURT: Okay. So that's to build into your
19 argument on the Eighth Amendment, I take it?

20 MR. SCHWEI: That's correct, Your Honor.

21 THE COURT: Okay. So getting back to this. Do
22 you know, I mean, Dr. Galloway has been and has evidently
23 developed some rapport with the plaintiff. Is she getting
24 some sort of other, you know, expert help, because she's
25 moved in July to focusing on treatment for gender

1 dysphoria? But in an earlier, I think back in 2013 she
2 didn't think she had the expertise. So it wasn't clear to
3 me based on the documents I have that in providing this
4 she's perhaps getting some additional assistance from some
5 other expert from the Transgender Institute. Do you know?

6 MR. SCHWEI: I have a general sense, Your Honor.
7 We would certainly set this out in far more detail in
8 whatever we end up filing, but my general sense right now
9 is that Dr. Galloway herself now believes that she is
10 qualified to provide therapy treatment for Ms. Manning,
11 specifically regarding gender dysphoria.

12 THE COURT: Okay.

13 MR. SCHWEI: She previously said in I think
14 October of 2013 that she didn't feel qualified. She now
15 does feel qualified. The change has been, as I understand
16 it, to give her additional resources and connect her with
17 a provider network. I believe it's through the Veterans
18 Administration, but basically a provider network that
19 allows her to discuss her cases with other providers who
20 have more experience regarding transgender and gender
21 dysphoria patients, and she can get guidance from them and
22 is able to take advantage of those resources and that
23 network.

24 Again, you know, we would lay that out in more
25 detail in what we file, and I want you to know that that's

1 my current understanding. I do know that she now believes
2 she is qualified. So since July 18, I believe, she has
3 been providing this therapy with more of a focus on gender
4 dysphoria.

5 THE COURT: Okay. I mean, these are just
6 questions. I'm not going to assume that you cannot
7 analyze them or change your position actually, but I just
8 wanted to get some information which may inform how we set
9 this up.

10 In terms of, Dr. Galloway set out what I would
11 view as sort of a treatment plan back on November of 2013.
12 Indicated Plaintiff I think was likely or I forgot, there
13 was some -- or eventually would need hormone treatment.
14 So somewhat acknowledging at least that this was a
15 treatment modality. I didn't see any kind of recent
16 treatment plan. Usually treatment plans are updated. Has
17 she done one that would indicate, you know, where, where
18 they are? I know what she's doing is she did the therapy
19 and expanded it and she's now able to use -- Plaintiff has
20 now had female underwear. Plaintiff is asking for some
21 additional things in terms of grooming, growing hair and
22 doing some other more outwardly female accouterments is
23 the best way of putting this thing.

24 It wasn't clear to me whether she has redone
25 this plan so that you have some sense whether she's

1 decided at this point it's not appropriate to do the
2 hormone treatment or where you are on that, and you may
3 not know, so I'm just asking if you do know.

4 MR. SCHWEI: I have again a rough sense, and I'd
5 be happy to lay that out.

6 First with respect to the treatment plan, my
7 understanding is that the document from November 2013
8 remains the current treatment plan. Dr. Galloway herself
9 has not recommended any additional forms of treatment,
10 including the provision of under -- or of the grooming
11 standards or hormone therapy. Now, separately Private
12 Manning herself has requested the female grooming
13 standards.

14 THE COURT: Right.

15 MR. SCHWEI: She's made I believe sort of an
16 agreement or a request that is currently in the
17 administrative channels, and where that lies is right now
18 the U.S. Disciplinary Barracks is conducting a risk
19 assessment about what challenges they might face were they
20 to grant Private Manning's request for the female grooming
21 standard. So that request is still in the administrative
22 channels, but that request came from Private Manning
23 herself, not from Dr. Galloway.

24 And as for hormone therapy, I believe our
25 current position is that Private Manning has not actually

1 submitted a request saying I want hormone treatment right
2 now, nor has Dr. Galloway. So the hormone issue is not
3 currently even in the administrative channels. But the
4 female grooming standards, that request is being currently
5 evaluated by the U.S. Disciplinary Barracks. As a result
6 of her request from Private Manning, Dr. Galloway has not
7 recommended either.

8 THE COURT: Okay. But I guess the question that
9 I had is whether she was, you know, whether she had
10 considered and rejected them or whether -- I mean, she
11 would be since she's the treating -- at this point is the
12 treating physician, whether she has considered these or
13 not. At least on the documents I have, it doesn't seem to
14 indicate one way or the other other than she has made the
15 recommendation relating to -- it seems to be in response
16 to different requests that the plaintiff has made, other
17 than the original one that set out psychotherapy, some
18 issues, and I forgot how she worded it precisely that I
19 would view as more outwardly female aspects to at least
20 becoming more female, feminized outwardly maybe is a
21 better way to put it.

22 And then the hormone therapy, which she either
23 used "likely" or "eventually" or something like that. It
24 was somewhat qualified. But has she then taken, from your
25 perspective taken a position that these are not

1 appropriate at this time, or has she not considered them,
2 or do you know?

3 MR. SCHWEI: I think the extent of my knowledge
4 is just that she has not affirmatively recommended them.
5 I don't think I know the precise reasons for that, whether
6 it's just not happened yet or she has affirmatively
7 rejected that. I just don't know at this point.

8 THE COURT: Okay. So in terms of proceeding
9 with this particular case, if we did a combination of --
10 which I still think is a good idea -- a combination if you
11 want to do your motion to dismiss, I think that can be
12 done. It can be filed at the same time as your -- as, you
13 know, a more specific response to what I'll call an
14 argument on the merits, which would, I assume, be framed
15 in an Eighth Amendment. Is that correct from the
16 plaintiff's perspective?

17 MR. STRANGIO: That is correct from our
18 perspective, Your Honor.

19 THE COURT: Okay. Were you planning on, if we
20 did a merit, supplementing what you've already filed?

21 MR. STRANGIO: I think as long as we had a
22 reply, we wouldn't need to supplement.

23 THE COURT: Okay. All right. From your
24 perspective having had this discussion to some degree of
25 where the defendant seems to be, are you still willing to

1 do -- they can do the motion to dismiss which you'll
2 respond to; and presumably it would be around each of the
3 requests that have been made as to the treatments that you
4 are claiming that need to be, that need to be made.

5 The defendants would focus in on whether or not
6 they've been, you know, that you've exhausted those
7 particular channels. If I could ask one sort of a
8 question on an aside. From the plaintiff's perspective,
9 were you asking to have someone else other than
10 Dr. Galloway provide the psychotherapy? It wasn't clear
11 to me. And -- or if she does it in consultation with
12 other experts, is that satisfactory? And are you
13 suggesting that the plaintiff stay in the present setting,
14 or were you making a suggestion that sort of the treatment
15 without doing anything with the housing? It wasn't clear
16 to me whether you were taking any position on the housing
17 or not or simply focusing on the treatment. So I can hear
18 from the plaintiffs on this.

19 MR. STRANGIO: With respect to your second
20 question, we're taking no position on the housing setting,
21 strictly a medical care concern.

22 With respect to the psychotherapy, our position
23 is, you know, we don't know whether Dr. Galloway is
24 qualified to provide the psychotherapy. We're taking a
25 position that she's not qualified to develop a treatment

1 plan or at least she wasn't when the current treatment
2 plan was developed. And the recommendations of our expert
3 are that the hormone therapy, the outwardly feminizing,
4 the grooming items are medically necessary.

5 So separate and apart from whether the
6 psychotherapy is sufficient on its own, you know, as to
7 whether Dr. Galloway is qualified to provide it, that
8 doesn't really have any bearing on whether the other two
9 medically necessary items are themselves, whether she's
10 able to provide those because we're still taking the
11 position that she was not qualified to develop the
12 treatment plan in November of 2013.

13 THE COURT: Okay. And Dr. Ettner, who is your
14 expert, it wasn't clear to me whether Dr. Ettner was
15 suggesting that the grooming and the outwardly feminized
16 aspects of it be done at the same time as the hormone or
17 whether it was to be done in stages.

18 MR. STRANGIO: Dr. Ettner's position is that it
19 be done at the same time.

20 THE COURT: Okay. All right. So having put all
21 of that on the record, if we -- if we have Plaintiff's
22 position on the merits, we would have an opposition or
23 reply, and then we would have a motion to dismiss with
24 dates set for that where the defendant would file it,
25 plaintiff would file an opposition, and then the defendant

1 would have an opportunity to reply. So we have the two
2 things together.

3 Do you think that's still going to work? It may
4 be that it will flesh out. I mean, the motion to dismiss
5 is an up-and-down decision. The merits one once it gets
6 filed, it may be that there will be sort of a battle of
7 the experts and some sort of hearings would need to be
8 done connected to it, which is something that would, can
9 be done either way. I mean, it could -- it would probably
10 be required at some point anyway depending on how this
11 plays out.

12 But Plaintiffs, are you still willing to do it
13 this way? In other words, I'm not closing that option if
14 it turns out that we have a battle of the experts, and I
15 would not be in a position to decide without hearing from
16 them, so I'm not closing that door is another way to put
17 it.

18 MR. STRANGIO: Your Honor, from the plaintiff's
19 perspective that still works.

20 THE COURT: Are you willing to do the two things
21 instead of the PI so that we can move this case forward
22 and go through it to resolution on the merits?

23 MR. SCHWEI: Yes. Generally, Your Honor, I
24 think so. I'm a little unsure whether Your Honor is
25 suggesting separate merits briefing and separate motion to

1 dismiss briefing or whether Your Honor is suggesting
2 basically just doing four briefs where the government
3 files a motion to dismiss along with its merits argument.
4 The plaintiff could file their reply/opposition to our
5 motion to dismiss, and then we would file a fourth brief.

6 THE COURT: I'm amenable to however you want to
7 do it. We can either do it, you know, separating the two
8 things out. I mean, it depends on what your arguments are
9 as to which lends itself better. In both instances you
10 would be setting it out. So I don't have any problem if
11 you want to set a separate schedule that's compatible but
12 has a separate brief on the merits versus the motion to
13 dismiss or whether you want to have the, you know,
14 plaintiff's merits and then have the defendant's
15 opposition be an opposition to the merits and basically a
16 motion to dismiss.

17 Plaintiff would file a reply on the merits and
18 an opposition to the motion to dismiss, and then the
19 defendants would have just a reply only on the motion to
20 dismiss. Whichever way works for the parties.

21 MR. SCHWEI: At the risk of not being called on,
22 Your Honor -- this is Daniel Schwei -- our preference
23 would be just to do four briefs, because I think it would
24 be more efficient and more logical, particularly given
25 that, you know, some of these facts are in a fluid state.

1 And so rather than having lots of different briefs where
2 the facts may be slowly evolving, I think it would be more
3 efficient and easier for everyone if it was just one
4 omnibus set of briefing.

5 THE COURT: Okay. I don't have a problem.
6 Plaintiff, do you have a problem with this?

7 MR. STRANGIO: We do not, Your Honor.

8 THE COURT: Okay. So then we'll do it that way
9 What we then need is dates. So we have Plaintiff's, you
10 know, filing on the merits already. When would you be
11 proposing, Mr. Schwei, to file your opposition on the
12 merits and the motion to dismiss?

13 MR. SCHWEI: Well, Your Honor, before this call
14 when I spoke with the plaintiffs and we were sort of
15 thinking we would only be doing the PI and we had come to
16 the date of October 16, I think now that we're expanding
17 this to be much broader and do the full merits, I think we
18 would need more time than that. I think two weeks beyond
19 that date to Thursday, October 30, would be sufficient on
20 our end.

21 THE COURT: All right. Well, and what,
22 Plaintiffs, what would you prefer in terms of your -- you
23 would be a reply and an opposition to the motion to
24 dismiss.

25 MR. STRANGIO: Going out, assuming that the

1 30th is the day that --

2 THE COURT: Right.

3 MR. STRANGIO: Then we would need, you know, two
4 weeks from that date, let's say, so that puts us
5 November 13.

6 THE COURT: Okay. It seems to me you should be
7 able to turn this around. Let me look. You need to do
8 this in a week or we're going to run into Thanksgiving.
9 All you're going to be having is your reply to the motion
10 to dismiss at that point. I would think until November 20
11 should work.

12 MR. SCHWEI: That's fine with us, Your Honor.

13 THE COURT: All right. This is somewhat a
14 general schedule, but I don't have a problem if it gives
15 you an opportunity to sort of make sure that I get all of
16 the material.

17 In terms of your exhaustion, there are different
18 requests that have been made that you not lump them
19 together, number 1, different treatment requests that are
20 being made. The other thing is to make sure that we get
21 some way -- and perhaps there could be some discussion
22 between Plaintiff's counsel and defense counsel relating
23 to what Dr. Galloway has done to see whether there's still
24 some -- because what we have on the record is back in
25 November of 2013 she didn't have an expertise. You have

1 nothing on the record to indicate that she now thinks she
2 does or who she is consulting with or anything else; and I
3 think it's somewhat unfair to the plaintiffs, if you're
4 going to make that argument, not to have produced
5 something so they can look at it. Since you're not filing
6 until October 30, it seems to me you should be able to do
7 something if that's your position.

8 MR. SCHWEI: Yes, Your Honor. We're happy to
9 continue to have conversations with the plaintiff counsel.
10 We were only able to have one substantive conversation
11 before this call, but I thought it was productive. And
12 that certainly is something that we're looking into is,
13 you know, getting a further explanation and more
14 information regarding Dr. Galloway's new treatment.

15 I would note for Your Honor there's a letter
16 dated September 2, 2014, in the record. It's a letter
17 from the commandant responding to a demand letter from the
18 ACLU, and that letter notes that Dr. Galloway has been
19 providing treatment since July 18. And although it's not
20 explicit within the letter, I think the implicit premise
21 is that Dr. Galloway believes she's qualified to treat. I
22 think Your Honor is absolutely right.

23 THE COURT: There's nothing there that -- you
24 know, the reason I raised the question is at one point
25 she's raised on the record she's not qualified. She's

1 expanding it in July. There's nothing to indicate -- I
2 assume she was consulting with somebody and now she's
3 doing the gender dysphoria that there must be something
4 else that's missing and presented. I know what you're
5 talking about, September 2. That doesn't tell you what
6 has made her decide she's now qualified. Since what she
7 has -- I mean, this is not the plaintiff saying she's not
8 qualified. This is Dr. Galloway saying she's not
9 qualified back in 2013. Granted sometime has passed, but
10 it certainly would be helpful in terms of getting
11 something so that on the merits issue we have a
12 better idea of the, you know, the psychotherapy and what
13 her actual position is on some of these other things. So
14 you can tell whether, you know, what her thinking is in
15 terms of the treatment plans and stuff.

16 MR. SCHWEI: Yes, Your Honor. We'll make every
17 effort to address those issues both in whatever we file,
18 if necessary, as well as in conversations with the
19 plaintiff's counsel.

20 THE COURT: Well, and also in some filings it
21 would be -- I mean, some materials back and forth, you
22 know, not with me necessarily, although eventually it
23 would come to me, but certainly in terms of setting out,
24 you know, in terms of the treatment plan why she thinks
25 this works and why she's not since she originally had said

1 that there would be some things related to the hormone
2 treatments, what she thinks that the plaintiff isn't ready
3 for which I assume is what you seem to be conveying to me.

4 MR. SCHWEI: Right. And we'll make our best
5 effort to address that both with the plaintiff's counsel
6 beforehand and in our eventual filings.

7 THE COURT: And Dr. Galloway and whatever her
8 materials are. It's not just in pleadings. It actually
9 has some support. I raise this because you have until
10 October 30th, so there's a fair amount of time here within
11 which to have this set out and to see whether perhaps you
12 can narrow some of the concerns and issues here as to what
13 treatment is really in dispute and what's not and whether
14 it's strictly a timing problem or whether there's a
15 dispute about getting the treatment, period.

16 I realize that the Army has raised some issues
17 about -- how will I word this -- has raised some issues
18 relating to what I think would be called, that they are
19 not equipped to handle a highly feminized inmate is the
20 way I would summarize what they've said, which is a
21 different issue from the treatment.

22 So that's why I was trying to see whether, in
23 narrowing this down we can narrow down whether it's that
24 issue that's being raised or whether it's an issue of
25 actually having a disagreement about the medical treatment

1 and whether these are appropriate treatments but, you
2 know, this may not be the time or whatever. So it's a
3 timing issue or not in addition to whatever else the Army
4 is saying about the housing. But I do think those two
5 things fit into the issue of the merits. I've given you
6 my 2 cents worth.

7 But I've given you a generous schedule, so I'm
8 hoping that you will do all of this in between so there is
9 a record that plaintiffs can look at to see whether this
10 thing is progressing and I can make a decision on it.

11 MR. STRANGIO: Your Honor, this is Chase
12 Strangio for the plaintiffs. We appreciate the Court's
13 narrowing in on this, and we do have outstanding medical
14 records, FOIA requests on these issues that can be
15 supplemented.

16 THE COURT: Okay. Well, perhaps you can
17 circumvent a little bit of the FOIA formality of it and
18 some of these can be provided in terms of if, their own
19 treatment. I don't know what they do in the setting of a,
20 of a prison setting; frankly, I've forgotten what, you
21 know, what, the medical records. Most hospitals, the
22 medical records belong to the patients. So I don't know
23 whether this is something that the records could be
24 provided short of a FOIA request by simply having the
25 plaintiffs authorize that you get it if you don't already

1 have it. I have an authorization. I don't know the
2 answer to what, you know, what Leavenworth has as their
3 procedures for medical or psychiatric treatment.

4 MR. SCHWEI: Your Honor, this is Daniel Schwei.
5 My understanding is that Private Manning has already given
6 releases for her medical records to her plaintiff's
7 counsel, and they have a substantial portion of those
8 medical records. I don't think they are all the way up to
9 date, but I believe they already have a significant
10 portion of those medical records.

11 THE COURT: Okay. Well, if you can sort of
12 expedite the rest of it, that would be most helpful. All
13 right. So I will issue an order that indicates that the
14 plaintiff has agreed to in essence do, instead of a,
15 going, doing a preliminary injunction, that they would be
16 briefing on the merits of their claim, which is the
17 underlying claim in the complaint.

18 The defendants are going to move to dismiss it
19 based on lack of exhaustion, and that we've set a schedule
20 out that will move forward and then I'll set out the
21 schedule. And I'll put it in an order. If you do, I'm
22 sure that the combination will be more than 25 pages. My
23 orders require that you deliver a paper copy, they are
24 delivered to the C Street entrance so we don't have to cut
25 a lot of trees printing this stuff out if it's fairly

1 substantial. So obviously you're going to be posting it
2 on the docket, but if you can also give me a paper copy
3 including exhibits, if it's 25 pages or more, I'd
4 appreciate it and I'll put that in the materials that we
5 have.

6 Are there any other questions from plaintiff's
7 counsel?

8 MR. STRANGIO: No, Your Honor.

9 THE COURT: Defense counsel?

10 MR. SCHWEI: No, Your Honor.


11 THE COURT: Okay. All right. Then the parties
12 are excused. Take care. Thank you.

13 (Proceedings adjourned at 10:22 a.m.)
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF OFFICIAL COURT REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Barbara DeVico, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



SIGNATURE OF COURT REPORTER

10-1-14

DATE