

INTRODUCTION

Defendants continue to grasp at straws. This Court has made its decision and affirmed it. It is time to move forward rather than re-litigating the same issues, causing delay and additional cost. This motion constitutes Defendants' *third* attempt to persuade the Court to deny Plaintiffs justice, relying on what amounts to the same evidence: the U.S. Department of Health and Human Services' ("U.S. DHHS") *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices* ("HHS Report"). The Court considered the HHS Report in deciding Defendants' motion to vacate the scheduling order before granting Plaintiffs' motion for summary judgment. Dkt. 278. The Court then considered the HHS Report a second time when Defendants filed their first motion seeking relief from judgment under Rule 60(b). Dkt. 308. And now, Defendants are asking the Court to reconsider the HHS Report because of several immaterial changes, some of which should have been known to Defendants well before this Court issued its summary judgment order, and none of which would have changed the outcome of the parties' cross-motions for summary judgment. The Court should thus deny Defendants' second motion for relief from judgment under Rule 60(b)(2).

ARGUMENT

I. Defendants Fail to Establish Grounds for Relief Under Rule 60(B)(2).

Pursuant to Montana Rule of Civil Procedure 60(b)(2), a district court considers the following four factors when granting a motion for relief for newly discovered evidence:

- (1) The alleged ‘newly discovered’ evidence came to the moving party after the trial;
- (2) It was not a want of diligence which precluded its earlier discovery;
- (3) The materiality of the evidence is so great it would probably produce a different result on retrial; and
- (4) The alleged ‘new evidence’ is not merely cumulative, and not tending to impeach or discredit witnesses in the case.

Dkt. 308 at 2.

Defendants fail to establish that any of these factors entitle them to the relief they seek. Their motion relies exclusively on the U.S. DHHS’ *Supplement to Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices, Peer Reviews and Replies* (“HHS Supplement”). Dkt. 312. But as Defendants acknowledge, this Court has already considered the HHS Report well before granting Plaintiffs’ motion for summary judgment and Defendants’ subsequent Rule 60 motions seeking relief from that judgment. Dkt. 311 at 2-3. Defendants now claim

that the HHS *Supplement* constitutes “newly discovered evidence” because it identifies the previously undisclosed contributors to the [HHS Report], includes several peer reviews and responses to those reviews, and reflects “minor editorial revisions[.]” *Id.* These are immaterial.

A. The HHS Supplement Does Not Constitute Newly Discovered Evidence because it Does Not Materially Differ from the HHS Report and Some Additions Should Have Been Known to Defendants.

In Defendants’ own words, “[t]he most important new information from the [HHS] Supplement is the identity of each contributor,” which includes two of Defendants’ own experts, Michael K. Laidlaw, MD, and Farr Curlin, MD. Dkt. 311 at 6. Presumably, with any reasonable diligence, Defendants could have discovered the identities of the additional contributors from their own experts. And even if they could not have learned the specific identities, they certainly could have learned about the contributors’ purported “collective professional judgment, knowledge and experience[.]” that Defendants’ allege the HHS Supplement “confirms.” *Id.* Regardless, this information does not materially alter the record that was before the Court when it granted Plaintiffs’ motion for summary judgment. *See infra I.B.*

While Defendants allege that the HHS Report and HHS Supplement “raise significant points” about the “health risks” associated with gender affirming care used to treat gender dysphoria in minors, they fail to identify any specific health risks that this Court has not already considered. Defendants cannot identify any new

alleged “health risks” in the HHS Supplement because it discusses the same risks identified in the HHS Report, which the Court has already considered. This Court’s summary judgment order thoroughly reviewed the evidence and provided extensive analysis about all the risks that Defendants alleged justified SB 99. Dkt. 279 at 20-27. The Court’s conclusions hold true here: “There is certainly risk inherent in all medical treatments, including gender-affirming care, but that is exactly why ‘some risk’ is not the standard [under *Armstrong*].” *Id.* at 27.

Defendants further claim that the HHS Supplement presents new evidence in the form of the “peer review process.” Dkt. 311 at 8. For one, publishing reviews of the document after the fact does not constitute “peer review,” which ordinarily requires “a formal *pre-publication* peer review process,” *United States v. Monteiro*, 407 F. Supp. 2d 351, 366 (D. Mass. 2006) (emphasis added). Post-publication “peer review,” in which anonymous authors merely “respond” to criticism, is a far cry from the indicia of scientific reliability required in order for evidence to be admissible. Moreover, the fact that two of Defendants’ experts contributed to the Report but did not disclose either their authorship nor the Report’s existence until this late in the litigation—even after Plaintiffs noted similarities between expert reports in this case and passages of the Report (dkt. 275 at 6-9)—suggests that neither the Report nor the Supplement would be legitimate grounds for any expert opinions offered by Defendants in this case (in which the parties stipulated that

Federal Rules would govern expert report discovery). Dkt. 33; Fed. R. Civ. P. 26(a)(2)(B).

Nothing about the American Psychiatric Association's (APA) review of the HHS Supplement or its authors' response to the APA review constitutes new evidence because it is entirely cumulative of the evidence that the HHS Report included and that this Court has already considered. Defendants' suggestion that the APA's review of the HHS Supplement, in and of itself, demonstrates that the APA believes the HHS Report was "a new contribution to the medical community's understanding of [gender affirming care]" is disingenuous. Dkt. 311 at 9. The HHS Report's authors specifically solicited comments from the APA, whose review only *reinforces* this Court's earlier conclusions: the APA found that the HHS Report's "claims fall short of the standard of methodological rigor that should be considered a prerequisite for policy guidance in clinical care." Dkt. 312 at 7.

The peer review process described by HHS Supplement is not a material change but in fact reinforces this Courts' prior order denying Defendants' first Rule 60 Motion. Dkt. 308 at 4 ("[T]he HHS [Report] simply summarize[d], synthesize[d], and critically evaluate[d] the *existing literature* on the best practices for promoting the health and well-being of children and adolescents with distress related to their sex or to social expectations associated with their sex." (internal quotations omitted)). Given that the contributors to the HHS Report included two of the

Defendants’ own expert witnesses, there was nothing preventing them from “pull[ing] back the veil on the process they used for producing the [HHS Report,]” Dkt. 311 at 10, well before this Court entered summary judgment for Plaintiffs.

Finally, Defendants’ claim that “[f]or the first time, the [HHS] Supplement describes an ‘ongoing misinformation campaign against’ the Cass Review.” Dkt. 311 at 10. But this discussion is materially the same as the HHS Report’s description of the critiques of the Cass Review. *Compare* HHS Supplement (Dkt. 312) at 64, *with* HHS Report (Dkt. 274) at 63-64 (alleging bias and improper motivations for the criticism of the Cass Review). The HHS Supplement claims that the APA’s criticism of the Cass Review is an example of “misinformation,” but the APA response accurately criticized the HHS Report for relying so heavily on the Cass Review yet omitting the conclusion that “for some [minors with gender dysphoria], the best outcome will be transition.” HHS Supplement at 64-66. An inconvenient truth is not “misinformation.”

B. The HHS Supplement Constitutes Cumulative Evidence that Would Not Produce a Different Result.

While the HHS Supplement may indicate that some in the medical field disagree with the medical consensus, that disagreement cannot displace the overwhelming support of the provision of gender affirming care to treat minors with gender dysphoria by major American medical organizations. Contrary to Defendants’ claims, acknowledging this reality is not “an arbitrary assignment of

power[,]” but a recognition that there is overwhelming agreement among major American medical organizations, which far outweighs the few who are critical of the care.

Furthermore, even assuming that Defendants had presented newly discovered evidence, such evidence would be insufficient to obtain the relief they seek. In granting Plaintiffs’ motion for summary judgment, this Court recognized that “even if SB 99 cleared the *Armstrong* threshold, the statute is still constitutionally infirm because it cannot survive strict scrutiny review.” Dkt. 279 at 27. Nothing in Defendants’ present motion, or in the HHS Supplement addresses, let alone disturbs, the sound and proper findings of this Court, including: (1) that Defendants failed to establish that SB 99 serves a compelling state interest and that it “is clear in its purpose: ensuring minors in Montana are never provided treatment to address their perception that their gender or sex is something other than their sex assigned at birth[,]” (internal quotation marks omitted); and (2) that SB 99 is not narrowly tailored because it is both overinclusive and underinclusive, and “a categorical ban is the antithesis of a narrowly tailored law.” Dkt. 279 27-34.

Finally, neither the HHS Report nor the HHS Supplement would have impacted this Court’s decision to grant Plaintiffs’ motion for summary judgment. In addition to ruling in favor of Plaintiffs on their medical privacy claim, the Court’s decision was also based on the independent and sufficient claims under Montana’s

constitutional equal protection guarantee, and right to freedom of speech and expression. None of these claims would be disturbed by the HHS Supplement.

CONCLUSION

For all of the above reasons, the Court should deny Defendants' motion for relief under Rule 60(b).

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Respectfully submitted,

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