IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In the Matter of D.P. (a minor),
By and through his parents,
RICHARD PIERCE and
MARGARET PIERCE,

Plaintiffs,

v.

SCHOOL DISTRICT OF POYNETTE,
ABC INSURANCE COMPANY,
BARBARA WOLFE, JIM CARELLI and
NORMA LIMMEX,

Defendants.

ORDER

03-C-310-C

On November 18, 2003, this court denied defendants' motion to strike plaintiffs' expert witnesses, instead giving plaintiffs one more chance to bring their disclosures into full compliance with F. R. Ev. 26(a)(2) and warning that I would cut them no further slack. *See* dkt. 19. Plaintiffs reassessed the situation, dropped all but two experts from their list, then served new disclosures on defendants. Defendants still are unhappy and have moved to strike one of the proposed experts, Dr. Susan Isensee. *See* dkt. 25. (I assume from their failure to argue the point that defendants are not moving to strike the second expert, Dr. Jocelyn Miller). Because Dr. Isensee is the plaintiffs' family physician, she was not required to comply with all of the Rule 26(a)(2) requirements that apply to other experts. Therefore, I am denying defendants' motion to strike her testimony.

In support of their motion to strike, defendants quote back that portion of the court's July 17, 2003 pretrial conference order warning the parties of the consequences of not meeting their obligations under Rule 16(a)(2). Defendants neglected to include the court's qualifying language:

> Treating physicians who will be testifying in that capacity and who will not be offering expert opinions must be listed as experts according to the schedule set forth above, but they need not prepare a written report.

See dkt. 5 at 3. This qualifier captures the intent of the Advisory Committee Notes to the 1993 amendments:

> For convenience, [Rule 26(a)(2)] continues to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case . . .. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.
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> *See* F.R. Civ. Pro., Thompson-West 2003 rev. ed., at 161.

Although the court's order could be phrased more clearly, it does not forbid a treating physician from offering diagnostic or treatment opinions that are based on the historic treatment relationship. Here, Dr. Isenee has identified D.P. as her patient and has provided a cursory background of D.P.'s diagnosis, his resulting problems in the public schools, and his current private school enrollment which Dr. Isensee opines is necessary because of D.P.'s ADHD. This is more than is required of a treating care-giver to put the

defendants on notice. It is up to defendants to flesh this out, if they wish, by other discovery techniques.

Finding no violation of Rule 26(a)(2), defendants' motion to strike is DENIED. Technically, under Rule 37(a)(4), plaintiffs would be entitled to reimbursement of their costs responding to the motion, but because I did not require plaintiffs to pay defendants after losing the first motion regarding experts, I will not require defendants to pay plaintiffs after losing the second.

Finally, the parties jointly have moved for a slight extension of the defendants' expert disclosure deadline and the summary judgment deadline. I already have granted one extension and the proposed second extension stretches the court's calendar very thin. Even so, I will grant the extension, but the parties should not expect a ruling on any summary judgment motion until the eve of trial at the earliest.

Entered this 12th day of January, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge