IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DOE 6, FATHER, *et al*., **Plaintiffs,** **v.** **WASHINGTON HEBREW CONGREGATION, INC., *et al*.,** **Defendants.**	**2019 CA 002488 B** **Judge Alfred S. Irving, Jr.** **Next: Status Hearing** **Date: January 10, 2023**
PARENT 1-A, *et al*., **Plaintiffs,** **v.** **WASHINGTON HEBREW CONGREGATION, INC.,** **Defendant.**	**2019 CA 003193 B** **Judge Alfred S. Irving, Jr.** **Next: Status Hearing** **Date: January 10, 2023**

ORDER

Before the Court is *Defendant Washington Hebrew Congregation's Opposed Motion to Compel Mental Examinations Pursuant to Rule 35* ("Rule 35 Motion"), filed on May 23, 2022. On June 13, 2022, Plaintiffs filed an opposition. On June 27, 2022, Defendant Washington Hebrew Congregation ("WHC") filed a reply. Pursuant to Superior Court Civil Rule 35, WHC seeks an order compelling each minor Plaintiff to submit to a mental examination.[1] WHC also seeks a mental examination of the minor child of Plaintiffs Mother Doe 8 and Father Doe 8 in

[1] Plaintiffs Parent 1A, 2A, and John Doe, previously resolved their opposition to WHC's instant request, and minor Plaintiff John Doe submitted to a mental health examination. Therefore, the request to compel John Doe to submit to an examination is moot and not considered in this Order.

Case No. 2019 CA 002488 B.[2] *Id.* Because the Court concluded that it lacked sufficient information to decide whether to require allegedly abused minor children to submit to mental examinations, the Court, by order dated September 15, 2022, requested supplemental briefing from the Parties on the evidence they each possessed regarding injury to each minor Plaintiff. Accordingly, on October 14, 2022, WHC filed its supplemental briefing and, on October 28, 2022, Plaintiffs filed their responsive supplemental briefings.

The Court will dispense with a full recitation of the factual background in this matter and incorporates by reference the facts set forth in its October 13, 2022 Order. WHC pursues an independent forensic mental examination of each of the minor children in this matter pursuant to Rule 35, contending that such examinations are necessary to challenge the Plaintiffs' evidence that sexual abuse occurred while the minor Plaintiffs were in the care of WHC and, to the extent that such abuse did occur, to calculate appropriate past, present and future damages. *See* Rule 35 Motion. WHC contends that the evidence is lacking that certain minor Plaintiffs suffered sexual abuse at the hands of then-employee Jordan Silverman. *Id.*

Having considered the Parties' supplemental memoranda and voluminous exhibits inclusive of forensic interviews, therapy notes, depositions, and contemporaneous notes of the families, the Court remains unpersuaded that mental examinations will yield additional evidence whether sexual abuse occurred. Further, the Court finds that such examinations pose a serious risk of causing further harm to the minor Plaintiffs. As such, and as explained in detail below, the Court must deny WHC's motion.

[2] The child of Plaintiffs Mother Doe 8 and Father Doe 8 is not a party to this litigation. However, the analysis herein is relevant to the child. Where the Court refers to the "minor Plaintiffs," the Court includes by reference the child of Plaintiffs Mother Doe 8 and Father Doe 8.

I. DISCUSSION

Superior Court Civil Rule 35(a)(1) provides, as follows: "The court may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Rule 35(a)(2) provides that the order "may be made only on motion for good cause and on notice to all parties and the person to be examined" and "must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it." The "in controversy" and "good cause" requirements impose a burden on the movant to show justification for an invasion into the privacy of another individual. *Neuman v. Neuman*, 377 A.2d 393, 398-99 (D.C. 1977). "Rule 35 was intended to vest broad discretion in the trial judge and that, even upon a showing that the condition is in controversy and that good cause exists for the examination, the trial judge may still refuse to issue the order." *Id.* at 399.[3]

i. In Controversy Requirement

Plaintiffs concede that the minor Plaintiffs' mental conditions are in controversy. Indeed, "the pleadings alone may meet the 'in controversy' requirement." *Doe v. District of Columbia*, 229 F.R.D. 24, 26 (D.D.C. 2005) (citing *Schlagenhauf v. Holder*, 379 U.S. 104 (1964)). Plaintiffs allege that the minor Plaintiffs were sexually abused and, while the minors may have been too young to articulate affirmatively that sexual abuse had occurred, their behavioral patterns and current mental states provide, in Plaintiffs', view undeniable and unequivocal evidence that such abuse occurred. Thus, as noted above, there is no dispute that the minor

[3] "[T]rial court rules which have similar or identical counterparts in federal rules will be construed consistent with the latter." *Neuman*, 377 A.2d at 398. Federal Rule of Civil Procedure 35 is nearly identical to Superior Court Civil Rule 35.

Plaintiffs' mental conditions, past, present, and future, are in controversy as each claims emotional and mental injury.

ii. Good Cause Requirement

In *Doe v. District of Columbia*, which the Court finds instructive, the District Court for the District of Columbia wrote of the "good cause" requirement as follows:

> The standard for good cause is not as clear [as the in-controversy requirement] question because what may be good cause for one type of examination may not be so for another. The movant's ability to obtain the desired information by means other than [a mental examination] is also relevant to the good cause analysis. When the submission of a party to [a mental examination] is contested, granting the order to submit to the examination is not a matter of right but is left to the sound discretion of the trial court.

229 F.R.D. at 26. Here, the Parties' pleadings largely raise two questions for the Court to resolve in determining whether good cause exists. The first concerns whether the risk of harm to the minor Plaintiffs is so great that the Court should decline subjecting them to a forensic examination, and the second concerns whether Defendants have available to them sufficient information to proceed in the litigation without conducting the forensics examinations of the children. The Court considers each question, in turn.

1. Risk of Harm to the Minor Plaintiffs

Plaintiffs are of the view that, given the minors' ages—all are under ten years old—and with the alleged sexual abuse having occurred when they were toddlers, the likelihood of adverse mental health reactions is great, and, relatedly, examinations are rarely requested in such factual circumstances. In response, WHC argues that its expert has conducted many examinations similar to those WHC currently seeks and that she will approach the task as a trained psychologist, with the appropriate compassion and sensitivity to ensure that there is little to no harm wrought upon the minors. Rule 35 Motion at 8-9. She opines that the risk of harm to the

children as Plaintiffs articulate will be minimal or nonexistent. Shelby Decl. ¶ 4. Despite Plaintiffs' claims of likely harm, case law reveals that court-ordered Rule 35 examinations of minors in cases of alleged sexual assault are not unprecedented. *See, e.g.*, *Doe*, 229 F.R.D. at 28; *Harris v. Fort Bend Indep. Sch. Dist.*, Case No. H-07-635, 2007 U.S. Dist. LEXIS 99223, at *6 (S.D. Tex. Dec. 27, 2007).

On the other hand, the Court notes that it has discretion to decline for good cause a request for Rule 35 examination when the examination would be unduly intrusive. *Peters v. Nelson*, 153 F.R.D. 635, 638 (N.D. Iowa 1994) ("[C]ourts have more recently held that good cause has not been shown where examinations would be needlessly duplicative, cumulative, or invasive."); *Stinchcomb v. United States*, 132 F.R.D. 29, 30-31 (E.D. Penn. 1990) (refusing to order a ten-year-old child to be subjected to "lengthy, invasive, painful and stressful testing absent a clear and convincing showing of a compelling need"); *Dunlap v. Monroe County Bd. Of Educ.*, Case No. 1:16-CV-11535, 2017 U.S. Dist. LEXIS 214649, at *11 (S.D. W. Va. Aug. 24, 2017) ("The opinion of [a] counselor, who actually examined [the minor plaintiff] on several occasions, is compelling, and leaves little doubt that the appropriate action here is not to subject [the minor plaintiff] to any further examination."); *Neuman*, 377 A.2d 393, 399 (D.C. 1977) ("[I]t is imperative that a strict standard of good cause be imposed and strictly enforced by the Superior Court" because "the moving party is seeking to invade the privacy of another individual.").

As an initial matter, the Court shares Plaintiffs' concerns about the effects a forensic examination may have upon the current and future mental state of the minors who may have been sexually abused. The Court finds it unnecessary to order allegedly abused minors to submit to an invasive examination if sufficient information, available from alternative sources, exists to

provide Defendants with the exact information it now seeks through forensic examinations. At the same time, the Court appreciates WHC's position that the risk of harm is only present if the minor children were in fact sexually abused, and the abuse claimed here has not yet been proven. No matter, the Court must make its assessment based on the information that is available.

After considering the Parties' supplemental memoranda and exhibits, the Court is persuaded that the risk of harm to *each* minor Plaintiff is significant if the court compels any of the minors to sit for a forensic examination. As detailed extensively in the record, each minor Plaintiff has experienced, to varying levels of severity, behavioral issues consistent with having been victimized by sexual abuse. Furthermore, Plaintiffs' expert, Dr. Silberg, explains that, "due to the ages of the children at the time of their abuse, a court-ordered forensic examination may likely result in mental injury to each child." Pls.' Supp. at 7, Ex. 28 ¶ 10. (Silberg Aff.). In fact, each past and current therapist of every minor Plaintiff has opined that such an examination would be mentally injurious to each respective minor Plaintiff. Pls.' Supp. at 7-8. The Court bears in mind this risk, that multiple children will be forced to relive trauma in a way that will stunt the development and healing they have thus far managed. Such risk weighs heavily against compelling Rule 35 forensic examinations of minor children and will only be overcome by a showing that there is significant value in conducting such examinations. The Court will next consider whether forensic examinations of minor Plaintiffs would yield information that cannot be obtained by other means.

2. Availability of Information Elsewhere

"One factor that is relevant to the determination of 'good cause' is the possibility of obtaining the desired information by other means." *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 315 F.R.D. 612, 616 (N.D. Fla. 2016). WHC argues that the existing mental health

records are insufficient for it to evaluate the harm the minor Plaintiffs suffered. Plaintiffs argue that the record evidence is sufficient, and that Plaintiffs intend to prove their claims without further examination of the minor Plaintiffs.

In *Doe v. District of Columbia*, the court ordered a ten-year-old plaintiff, alleging both physical and sexual abuse, to submit to a mental examination to assess the extent of the alleged abuse and the minor plaintiff's injuries. 229 F.R.D. at 26-28. The minor plaintiff objected to his examination, asserting that he had submitted to many mental examinations, including to examinations while he was in the defendant's custody; he had produced substantial documentation from his past and current therapists and past psychological evaluations; he and his family had already been deposed; and any additional questioning or assessments would amount to harassment, serving no therapeutic purpose. *Id.* at 27. The district court was not persuaded, noting that each of the various examinations already conducted, including those conducted during a five-day stay at the Psychiatric Institute of Washington, appeared to be an "incomplete snapshot." *Id.* The court concluded that the proposed examination would, indeed, provide new information. *Id.* The court also concluded that the records were "not sufficient for defendant to ascertain the nature and extent of the injuries that resulted from the incidents alleged in this litigation." *Id.* The court further noted that, even though plaintiff had produced additional assessment documents by way of an update, plaintiff never "asserted that [the documents] contain[ed] a thorough assessment of his current mental and emotional condition." *Id.* Finally, having considered all of the supporting documentation that plaintiff presented for the court's consideration, the court concluded that plaintiff "has not made an independent showing that harm will result from submitting him to an IME." *Id.* at 28.

In contrast, in *J.S.X. v. Foxhoven*, the United States District Court for the Southern District of Iowa denied a request to compel a Rule 35 examination. No. 4:17-CV-00417-SMR-HCA, 2018 U.S. Dist. LEXIS 220396, at *10-13. There, the court distinguished *Doe v. District of Columbia*, finding that the defendants in the case before it had failed to show why new examinations would not be repetitive of examinations previously conducted by defendants, and how new examinations would cure any information deficiency. *J.S.X.*, 2018 U.S. Dist. LEXIS 220396, at *9-11. *See also Dunlap*, 2017 U.S. Dist. LEXIS 214649, at *11.

Here, the Court first notes that, unlike in *Doe v. District of Columbia*, where the minor Plaintiff allegedly suffered abuse around the age of seven and was compelled to sit for an examination at the age of ten, the minor Plaintiffs in this matter were toddlers at the time of the alleged abuse and are all still under the age of ten. Furthermore, in the *Doe v. District of Columbia* matter, the court found that existing records constituted an "incomplete snapshot" of the factual narrative, and that some of the records which had been produced "focused on earlier physical abuse allegations and behavior problems, not the alleged sexual abuse." 229 F.R.D. at 27. Not so here—the record in this matter is extensive, and none of the minor Plaintiffs has sought treatment for prior instances of abuse. Finally, as noted above, and unlike in the *Doe v. District of Columbia* case, Plaintiffs here have shown that harm would result from compelled examinations. The Court thus finds that the instant matter is more analogous to *J.S.X. v. Foxhoven*, in that compelled examinations pose a serious risk of harm and would likely produce largely duplicative evidence.

While the Court appreciates WHC's argument that, in a clinical setting, the primary obligation is to treat the patient rather than explore the causes of her symptoms, the Court remains skeptical that the examinations WHC seeks will elucidate "possible etiologies" that have

not already come to light. WHC Supp. at 3-4. Indeed, after having reviewed the extensive evidence the Parties proffered, the Court is simply not persuaded that additional compelled examinations will yield much, if any, new evidence probative of whether abuse occurred and the extent of past, present, and future harm the abuse has caused. The Court notes that the nature of this case—the alleged sexual abuse of toddlers—makes difficult the gathering of testimonial evidence on the part of the alleged victims. Plaintiffs' expert, Dr. Silberg, explains that "children abused at this age may only have implicit memories of events that they may not be able to articulate in a narrative after the passage of time." Pls. Supp. at 8, Ex. 28 ¶ 10. (Silberg Aff.). It is thus unsurprising that most of the available evidence is behavioral. Given that the alleged abuse occurred when the minor Plaintiffs were so young, and that the minor Plaintiffs are still very young, it is difficult to imagine that they will now, years later, be able to provide a forensic examiner clearer testimonial evidence. In addition, WHC has not provided support for its contention that examinations will yield new information beyond stating that "existing mental health records are insufficient" and that its expert, Dr. Shelby, has "performed or supervised hundreds of examinations." Rule 35 Motion at 8-9.

The Court is satisfied that there exists sufficient behavioral evidence in the record for each minor Plaintiff, and that examinations now, years after the alleged sexual abuse, are unlikely to uncover new behavioral evidence that is not already present in the extensive therapeutic, examination, and deposition records. The Court agrees with Plaintiffs' assertion that the contemporaneous records in this case provide a more reliable picture of the symptoms and reactions of the children at the time of, and in the immediate aftermath of, their alleged abuse. Pls. Supp. at 8. Plaintiffs also aptly note that the record in this matter is extensive, and already includes testimony from each minor Plaintiff's parents; testimony and medical records of all

mental health providers of all Plaintiffs; testimony of relevant law enforcement officials; testimony of child welfare agency personnel; testimony of employees of the E-T ECC; testimony from WHC's independent investigators; testimony and reports of experts hired by both Plaintiffs and Defendants; and testimony of the alleged abuser. *Id.* This amounts to tens of thousands of pages of documents and videotaped interviews of minor Plaintiffs—all of which the Court has reviewed—and upon which WHC's expert, Dr. Shelby, relied to reach a presumably informed conclusion as to whether each minor Plaintiff was sexually abused.

In sum, the Court does not believe that compelled examinations will prove useful by way of uncovering new evidence of abuse or injury. The Court is doubtful that minor Plaintiffs will reveal new probative information in their statements to an unfamiliar examiner, years after the alleged traumatic events, especially given that they remain so young. The Court finds that such a slight potential benefit does not support good cause, especially when weighed against the risk of harm to the minor Plaintiffs. Therefore, WHC has not carried its burden of proving justification for the "invasion into the privacy" of minor Plaintiffs. *Neuman*, 377 A.2d at 398-99.

ACCORDINGLY, it is by the Court this 6th day of December 2022, hereby

ORDERED that Defendant Washington Hebrew Congregation's *Opposed Motion to Compel Mental Examinations Pursuant to Rule 35* is **DENIED.**

Judge Alfred S. Irving, Jr.

Copies to:

All Counsel of Record
Via Odyssey