DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO 1437 BANNOCK ST., ROOM 230 DENVER, CO 80202 **CADEN KENT**, Plaintiff, v. **CHILDREN'S HOSPITAL COLORADO**, Defendant.	**▲COURT USE ONLY▲**
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CHILDREN'S HOSPITAL COLORADO'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM	

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Defendant Children's Hospital Colorado ("Children's Hospital"), through the undersigned counsel and pursuant to Colo. R. Civ. P. 12(b)(1) and 12(b)(5), respectfully moves to dismiss Plaintiff Caden Kent's ("Plaintiff") Complaint. In support of this Motion, Children's Hospital states as follows:

Certificate of Compliance. Pursuant to Col. R. Civ. P. 121(8), the undersigned counsel in good faith have conferred with counsel for Plaintiff by phone about this Motion. Plaintiff's counsel opposes this Motion.

I. INTRODUCTION

Under the guise of discrimination allegations seeking amorphous relief that this Court is without jurisdiction to structure and grant (let alone compel), Plaintiff and his counsel attempt to override Children's Hospital's authority to independently determine the scope of its services. Children's Hospital operates the only two free-standing, CMS-certified children's hospitals in Colorado and in the seven-state region. It treats and heals more children in its seven-state region than any other hospital and has been doing so since 1908. Yet, in this lawsuit, Plaintiff and his counsel try to portray Children's Hospital as some kind of enemy to gender affirming care. Nothing could be further from the truth.

Children's Hospital strongly supports all of its patients' medical needs—including its transgender and gender-diverse patients. Children's Hospital remains committed to supporting transgender and gender-diverse patients, embracing them for who they are, and providing high-quality care for gender diverse patients under the age of 18. To that end, Children's Hospital continues to offer non-surgical gender affirming care to children and adolescents. However, as indicated by its name, Children's Hospital is a hospital for children. Its focus and expertise is in pediatric healthcare. It needs and has the right to devote its resources and specialized pediatric expertise to caring for children.

In 2016, Children's Hospital established the TRUE Center for Gender Diversity ("TRUE Center") specifically to support its gender-diverse and transgender patients. By volume of unique patients, the TRUE Center is now one of the largest programs in the nation that serves gender-diverse children and adolescents. Children's Hospital never offered surgical gender affirming care to children and adolescents under the age of 18. Therefore, gender affirming surgery on patients who turned 18 was never an extension of Children's Hospital's pediatric expertise. As a transgender pediatric patient, Plaintiff received treatment for gender dysphoria at Children's Hospital for 20 months. When Plaintiff became an adult, he desired further treatment for his gender dysphoria—namely, chest masculinization surgery. Around that same time, Children's Hospital recommitted its resources and specialized pediatric expertise to transgender and gender-diverse children and adolescents under the age of 18, and it decided to refer gender affirming surgeries for transitioning adult patients to adult facilities. Facilities with expertise in treating adults are equipped to address the specific needs of adults and offer a much greater range of gender affirming surgeries than Children's Hospital ever did.

No matter how the claim is cloaked, Colorado law does not require Children's Hospital to offer surgeries for adults. Nevertheless, Plaintiff brings two discrimination claims under the Colorado Anti-Discrimination Act ("CADA") for Children's Hospital's decision to not offer gender affirming surgeries for adults—one claim for discrimination based on disability and another for discrimination based on sex, gender identity, and gender expression. The Court, however, does not have subject matter jurisdiction to decide which treatments and services should be available at Children's Hospital. Plaintiff also lacks standing to seek a mandatory injunction for a surgical treatment that Children's Hospital does not offer and for which Plaintiff admits in the Complaint

has already been scheduled with an adult provider in Colorado. Accordingly, under Colo. R. Civ. P. 12(b)(1), the Court should dismiss this case.

Plaintiff's Complaint fails for additional reasons under Colo. R. Civ. P. 12(b)(5). First, Plaintiff cannot state a claim for discrimination based on disability. He has not shown that his gender dysphoria constitutes a covered disability under CADA because he did not plead that a physical impairment caused his condition. In addition, Plaintiff does not plead a causal link between his alleged disability and the alleged discrimination, as the applicable statutes require. He also does not adequately plead a disability discrimination claim because he failed to plead that he requested a reasonable modification from Children's Hospital prior to filing his lawsuit. Second, Plaintiff's claim for discrimination based on sex, gender identity, or gender expression similarly fails for lack of a causal link. Children's Hospital's decision to not offer gender affirming surgery to Plaintiff was not "because of" Plaintiff's disability, sex, gender identity, or gender expression; rather, the hospital's decision was based on a reasonable distinction among age groups and the resources necessary to provide for children versus adults. As a result, Children's Hospital's judgment and decision-making in this case does not unlawfully discriminate against Plaintiff, and his Complaint should be dismissed.

II. RELEVANT FACTUAL ALLEGATIONS[1]

Children's Hospital is the "No. 1 ranked ***pediatric*** healthcare provider in the state and region." (Compl. at ¶ 8 (emphasis added).) "Its stated mission is to improve the health of ***children*** through the provision of high-quality coordinated programs of patient care, education, research, and advocacy." (*Id*. (emphasis added).) Children's Hospital is also home to the TRUE Center—the only comprehensive care center in the Rocky Mountain region specifically established for

[1] Facts in this section taken from Plaintiffs' Complaint are assumed true for purposes of this Motion only.

transgender and gender-diverse children and adolescents under the age of 18. (*Id*. at ¶ 20.) The TRUE Center follows the World Professional Association for Transgender Health's internationally accepted Standards of Care and "treat[s] gender dysphoria in ***people under 18*** in a multidisciplinary setting that provides, where medically indicated, diagnosis, counseling, and hormone therapy, among other services." (*Id.* at ¶¶ 21-22.) Children's Hospital only "sometimes provides care to non-pediatric patients where [Children's Hospital's] ***pediatric expertise*** carries over to the needs of the patient even though they have legally become an adult; where a clear quality and safety advantage to ***pediatric expertise*** exists; or where the patient received care at [Children's Hospital] before they turned 18." (*Id*. at ¶ 10.)

Plaintiff is a transgender person with gender dysphoria. (*Id*. at ¶ 6.) Gender dysphoria is a medical condition unique to transgender people that is characterized by the distress associated with "incongruence between a person's gender identity and assigned sex at birth." (*Id.* at ¶ 15.) Before receiving "appropriate treatment" at Children's Hospital, Plaintiff described his gender dysphoria as causing severe distress, avoidance of socialization, constant worry, and difficulty sleeping. (*Id*. at ¶ 19.) In 2021, when he was 16 years old, Plaintiff began seeking care at Children's Hospital for his gender dysphoria. (*Id*. at ¶ 23.) A doctor at Children's Hospital initially diagnosed Plaintiff with gender dysphoria and referred him to the TRUE Center. (*Id*. at ¶ 24.) A doctor at Children's Hospital's TRUE Center also prescribed hormone therapy for Plaintiff's condition in May 2022. (*Id*. at ¶ 25.) Before Plaintiff turned 18, he received treatment for his gender dysphoria at Children's Hospital for 20 months. (*Id*. at ¶ 67.) "[H]ormone therapy improved Caden's symptoms[.]" (*Id*. at ¶ 42.)

Plaintiff began discussing chest masculinization surgery with his care team at Children's Hospital in December 2022 before Plaintiff turned 18. (*Id*. at ¶ 43.) Plaintiff understood that

Children's Hospital did not offer any gender affirming surgeries to treat gender dysphoria in pediatric patients. (*Id*. at ¶ 45.) At the time, however, Children's Hospital "would ***sometimes*** perform such surgical procedures for ***non-pediatric patients*** when medically necessary to treat their gender dysphoria." (*Id*. at ¶ 30 (emphasis added).) Children's Hospital gave Plaintiff a list of surgeons, which included surgeons at Children's Hospital. (*Id.* at ¶ 46.) Plaintiff chose to consult with a Children's Hospital surgeon, but a surgery was never scheduled. (*Id.* at ¶¶ 47, 50-55, 64.)

In July 2023, Children's Hospital made the decision that it would no longer offer gender affirming surgeries to any adult patients. (*Id.* at ¶¶ 30, 56.) The "decision was based on judgment that it was medically appropriate to refocus on the gender-affirming care of children and adolescents, and, when patients turn 18, assist them in transitioning their care to adult providers, which exist in greater numbers in Colorado and which offer specific expertise in both a more complete range of gender-affirming surgical options and counseling adults about them, as part of their life-long journey." (Apr. 19, 2024 Dr. Brumbaugh Affidavit ("Aff"). at Ex. 1.) Children's Hospital still offers chest reconstruction surgery to treat ***pediatric*** patients for physical conditions like gynecomastia (the enlargement of breast tissue in boys). (Compl. ¶¶ 37, 62.). Chest reconstruction surgery for gynecomastia is a different medical procedure with different indications, different intra-operative goals, and different post-operative care requirements than chest masculinization surgery for gender dysphoria. (Brumbaugh Aff. ¶ 10.) Plaintiff (now 18 years old and an adult) was able to establish care with a new provider who will perform chest masculinization surgery for Plaintiff for his gender dysphoria in July 2024, before he leaves for college in Fall 2024. (*Id*. at ¶¶ 6, 70-71; Brumbaugh Aff. ¶ 15.) Had Children's Hospital not made the decision to re-focus its resources on pediatric care and discontinue this treatment for adults, it

would have scheduled Plaintiff's surgery within this same time frame, due to its lengthy wait list for elective surgeries. (Brumbaugh Aff. ¶ 16.)

Plaintiff initiated this lawsuit to bring claims against Children's Hospital under CADA for discrimination based on disability (Count I) and discrimination based on sex, gender identity, and gender expression (Count II). (Compl. ¶¶ 74-90.) Plaintiff alleges that Children's Hospital—the hospital where his condition was diagnosed and treated for 20 months—has denied Plaintiff services "on the basis of his gender dysphoria" and "on the basis of his sex, gender identity, and gender expression." (*Id*. at ¶¶ 81, 89.) Plaintiff does not, and cannot, allege that Children's Hospital refuses to treat transgender patients generally, including those with gender dysphoria, or that Children's Hospital refuses to treat pediatric patients specifically. His claims are based solely on Children's Hospital decision not to offer a specific surgery to adults.

III. LEGAL STANDARD

A. Lack of Jurisdiction Over the Subject Matter

"A court may decide only those cases over which it has subject matter jurisdiction." *Long v. Cordain*, 343 P.3d 1061, 1065. (Colo. App. 2014). Lack of subject matter jurisdiction requires dismissal. *Id*. Under C.R.C.P. 12(b)(1), when a question is raised as to whether a court has subject matter jurisdiction over an action, the party asserting jurisdiction bears the burden of establishing that jurisdiction exists. *See Trinity Broad. Of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). When deciding a motion to dismiss on the basis of lack of subject matter jurisdiction, the Court may consider any competent evidence and resolve factual disputes that bear on the Court's decision. *See Lyons v. City of Aurora*, 987 P.2 900, 902 (Colo. App. 1999). Thus, unlike motions to dismiss pursuant to 12(b)(5), in considering a motion to dismiss pursuant to 12(b)(1), the Court need not treat the facts alleged by the non-moving party as true. *See Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Instead, the Court has discretion to consider affidavits, documents,

and evidence pursuant to a limited hearing in order to resolve disputed jurisdictional facts. *Id*. Any factual dispute upon which the existence of jurisdiction may turn is for the trial court, not the jury, to determine. *See Henry-Hobbs v. City of Longmont*, 26 P.3d 533, 535 (Colo. App. 2001).

B. Failure to State a Claim Upon Which Relief Can Be Granted

To withstand a motion to dismiss for failure to state a claim, a complaint must contain enough allegations of fact to state a claim to relief that is plausible on its face. *Warne v. Hall*, 373 P.3d 588, 596 (Colo. 2016)). Conclusory allegations are not entitled to an assumption that they are true. *See Scott v. Scott*, 428 P.3d 626, 632 (Colo. Ct. App. 2018). Indeed, Plaintiff's burden "requires more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Warne,* 373 P.3d at 596 (adopting *Twombly*).

IV. ARGUMENT

Plaintiff's Complaint must be dismissed because the Court does not have jurisdiction to decide the types of treatments or services that Children's Hospital offers to the community. Plaintiff also lacks standing to seek a mandatory injunction. Finally, the Court also should dismiss Plaintiff's Complaint because Plaintiff has not adequately stated a claim for discrimination under CADA.

A. The Court Does Not Have Jurisdiction to Order Which Treatments and Services Children's Hospital Should Offer

At its core, Plaintiff's Complaint seeks to force Children's Hospital—a pediatric hospital—to offer gender affirming surgery to an adult. To accomplish that goal, Plaintiff asks this Court to usurp the authority of the Colorado legislature to control the practice of medicine and override Children's Hospital's independent judgment regarding its scope of services. The Court has no jurisdiction to do so and should decline the invitation, especially where Plaintiff has failed to

establish that jurisdiction exists. Plaintiff has the burden to establish subject matter jurisdiction, and he fails to satisfy that burden here. *See Trinity Broad. Of Denver, Inc.*, 848 P.2d at 925 ("the plaintiff has the burden to prove jurisdiction."); *Capra v. Tucker*, 857 P.2d 1346, 1348 (Colo. App. 1993) (affirming dismissal for lack of subject matter jurisdiction and noting "the plaintiff has the burden to prove jurisdiction"). This Court lacks jurisdiction because this case presents a nonjusticiable political question for at least three reasons. First, the Court cannot undertake "independent resolution without expressing lack of the respect due coordinate branches of government[.]" *Markwell v. Cooke*, 482 P.3d 422, 427 (Colo. 2021) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Second, this case cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion[.]" *Id*. And third, there is "a lack of judicially discoverable and manageable standards for resolving it[.]" *Id*.

1. The Practice of Medicine Is in the Purview of the State Legislature

Only individual states govern the practice of medicine for their respective providers. The Colorado legislature regulates and controls the practice of medicine in the state through the Medical Practice Act. C.R.S. 12-240-101 *et seq*. Importantly, neither the Medical Practice Act nor any other state law mandates that Children's Hospital must offer every conceivable treatment (such as surgery) for gender dysphoria. Nor does any state law mandate that Children's Hospital must allow surgeries to be performed on adults. Federal personnel clearly have no such authority to dictate medical decisions. *See* 42 U.S.C. § 1395 ("Nothing in [the Medicare Act] shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided…"). The same is true for the state judiciary. "The judiciary is called upon to serve in black robes, not white coats. And it must be vigilant to stay in its lane and remember its role." *Texas Health Huguley, Inc. v. Jones*, 637 S.W.3d 202, 214 (Tex. App. 2021). Without the explicit judicial authority to do so, this Court

also should not—and indeed cannot—insert itself in Children's Hospital's decisions about the scope of its services.

2. Policies, Programs, Services, and Treatments Offered Are Determinations Within Children's Hospital's Discretion.

On August 18, 2023, as requested by the ACLU, Children's Hospital wrote a letter explaining its decision to discontinue gender affirming surgeries to adults. (Brumbaugh Aff. ¶ 8.)[2] In the letter, Children's Hospital explained that an influx of out-of-state adults and children seeking gender affirming care had resulted in a 15- to 18-month waiting list at the TRUE Center. (Brumbaugh Aff., Ex. 1 at 2.) In order to devote its resources and specialized pediatric expertise to children and adolescents, Children's Hospital decided to no longer offer gender affirming surgeries to patients ages 18 years and older. *Id*. The "decision was based on judgment that it was medically appropriate to refocus on the gender-affirming care of children and adolescents, and, when patients turn 18, assist them in transitioning their care to adult providers, which exist in greater numbers in Colorado and which offer specific expertise in both a more complete range of gender-affirming surgical options and counseling adults about them, as part of their life-long journey." *Id*. Plaintiff nonetheless brought this lawsuit alleging that because Children's Hospital still offers chest reconstruction for patients with gynecomastia, it is discriminating against patients with gender dysphoria. (Compl. ¶¶ 62-63.) However, the indications for chest reconstruction (such as gynecomastia), its intra-operative goals, and its post-operative care are fundamentally different from chest masculinization. (Brumbaugh Aff. ¶ 10.) The Court should not substitute its own

[2] The Brumbaugh Affidavit and Children's Hospital's August 18, 2023 letter to the ACLU are submitted with this Motion solely in support of Children's Hospital's 12(b)(1) arguments, and not as support for its 12(b)(5) arguments. *See Medina*, 35 P.3d at 452 (unlike motions to dismiss pursuant to 12(b)(5), in considering a motion to dismiss pursuant to 12(b)(1), the Court need not treat the facts alleged by the non-moving party as true and may consider affidavits, documents, and evidence).

judgment for the medical expertise of the providers at Children's Hospital and compel Children's Hospital to offer a surgery for an adult that it has no duty to provide.

Recent cases (from both liberal and conservative jurisdictions) addressing hospitals' responses to COVID-19 emphasize the discretion afforded to medical providers in establishing policies and determining treatment. In *Texas Health Huguley, Inc.,* a man was ill with COVID-19, and his wife sought court intervention to require the hospital to credential a doctor who would administer Ivermectin. 637 S.W.3d at 212. The Texas Court of Appeals reversed and vacated the trial court's temporary injunction order, acknowledging that "[a]s a society, we not only expect, but require, doctors and hospitals to exercise their independent professional judgment." *Id*. at 212. "Even if we disagree with a hospital's decision, we cannot interfere with its lawful exercise of discretion without a valid legal basis." *Id*. at 214. The Delaware Court of Chancery considered a similar request and denied it, relying on the "fundamental" precept that "[p]atients, even gravely ill ones, do not have a right to a particular treatment[.]" *DeMarco v. Christiana Care Health Serv., Inc.,* 263 A.3d 423, 426, 440 (Del. Ch. 2021) (denying mandatory injunction due to plaintiff's "fundamental failure to identify any established right that would serve as a basis for that relief."). The Michigan Court of Appeals considered yet another similar request and denied it, "acknowledge[ing] the judiciary's limited role in equity involving medical issues." *Frey v. Health-Michigan*, No. 359446, 2021 WL 5871744, *5 (Mich. Ct. App. Dec. 10, 2021) (finding plaintiff "has not shown a duty by the hospital or a legal right held by" plaintiff and affirming dismissal of complaint). Similarly here, Plaintiff seeks to use this Court to strip Children's Hospital of its independent judgment and require the hospital to offer a specific treatment for gender dysphoria in adults that it does not offer to patients of any age. (Compl. ¶¶ 56, 73.) But this Court, like other

courts across the country, should find that it "cannot interfere with [a hospital's] lawful exercise of discretion." *Texas Health Huguley,* 637 S.W.3d at 214.

Plaintiff's own ACLU counsel affiliate in Missouri has recognized the inherent danger of an unauthorized entity overriding medical providers' independent judgment. When the Attorney General of Missouri proposed an emergency rule for "experimental interventions to treat gender dysphoria," the ACLU represented plaintiffs who petitioned for a temporary restraining order as well as injunctive and declaratory relief. (Exhibit A, Apr. 24, 2023 Petition at 1.) The ACLU argued that "[m]edical and mental health providers, including [plaintiffs], will be required by the Emergency Rule to speak to and provide specific care for their patients as directed and ordered by the [Attorney General]—who is not a medical or mental health professional—that conflicts with their own medical and mental health training, education, and expertise; current medical and scientific knowledge; evidence-based clinical practice guidelines; and medical, ethical, or legal rules governing their professions." (*Id*. at ¶ 115.)

The ACLU criticized the Missouri Attorney General for "usurping authority and powers outside those of his office[.]" (*Id*. at ¶ 10.) Yet, in this case, the ACLU of Colorado asks this Court to do almost exactly what the ACLU of Missouri argues against, *i.e.,* an unauthorized entity overriding a hospital's independent judgment on the scope of its medical care. Plaintiff asks this Court to usurp authority from the state legislature to regulate the practice of medicine in Colorado and to mandate that Children's Hospital offer a particular treatment for Plaintiff's condition. (Compl. at 11.) The Court should reject the ACLU's about-face request. Just like the ACLU argued that the Missouri Attorney General should not be permitted to control how medical providers provide care for their patients, this Court should deny Plaintiff's request to dictate the care offered at Children's Hospital.

3. No Manageable Standards Exist for the Court to Compel Surgical Procedures

Even if the Court were inclined to override Children's Hospital's independent judgment regarding the services and treatment options it offers, the Court could not compel surgery because no manageable standard exists for such relief. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) (finding a political question exists and holding that none of the proposed "'tests' for evaluating [the] claims. . . meets the need for a limited and precise standard that is judicially discernible and manageable."). If Plaintiff were allowed to sue for surgery, what would be the limits of that type of relief? If Children's Hospital's pediatric expertise were disregarded, would it be required to offer plastic surgery on adult noses simply because it offers rhinoplasties for adolescents who have suffered nasal trauma? If Children's Hospital's independent judgment on the scope of its services were overturned, would it be required to offer gender affirming surgeries on children of all ages? No valid legal basis exists for this Court to interfere with Children's Hospital's lawful exercise of discretion concerning the scope of services it offers, and there are no manageable standards for resolving Plaintiff's claim. Accordingly, this is a nonjusticiable issue over which the Court lacks subject matter jurisdiction, and the Complaint should be dismissed in its entirety.

B. Plaintiff Lacks Standing to Seek a Mandatory Injunction

The Court should dismiss Plaintiff's request in his complaint for injunctive relief. Plaintiff alleges that he was "denied care under [Children's Hospital's] new categorical exclusion." (Compl. ¶ 3.) Plaintiff further claims that he "brings this case to hold [Children's Hospital] accountable for denying him care and for its discriminatory refusal to provide essential medical care to transgender young people." (*Id*. at ¶ 73.) In his prayer for relief, Plaintiff asks for "an injunction and order requiring [Children's Hospital] compliance with CADA." (*Id*. at 11.) Perhaps because Plaintiff's

counsel knows neither they nor this Court is authorized to command Children's Hospital to offer a surgery it does not otherwise provide—*i.e.*, chest masculinization surgery for adults (*see supra* § IV.A)—counsel couches their allegations and demands in general language like "care" and "compliance." But Plaintiff counsel's request for an injunction requiring Children's Hospital's "care" and "compliance" is effectively a request that this Court dictate Children's Hospital's judgment and mandate the surgical procedures Children's Hospital may offer.

"A party seeking a permanent injunction must show that: (1) the party has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Langlois v. Bd. Of Cnty. Comm'rs of Cnty. Of El Paso*, 78 P.3d 1154, 1158 (Colo. App. 2003) (reversing trial court's grant of permanent injunction where plaintiffs did not demonstrate actual success on the merits). "Mandatory injunctions 'affirmatively require the nonmovant to act in a particular way.'" *Schrier v. Univ. of Co.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (denying injunction where plaintiff would not suffer irreparable harm because the "purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance."). Such injunctions are disfavored and should be "more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id*.

Here, Plaintiff alleges that he has established care with a new provider, and Plaintiff's family will pay for his surgery "before he leaves for college in the fall." (Compl. ¶ 71.) Notably, Plaintiff is scheduled for surgery with his new provider at virtually the same time he would have been scheduled for surgery at Children's Hospital, if that treatment were still offered at Children's

Hospital. (Brumbaugh Aff. ¶ 16.) Thus, Plaintiff already has shown the Court that he cannot prove irreparable harm will result absent an injunction. No danger of irreparable harm exists because Plaintiff is scheduled to have the surgery he seeks in a few short months. *See, e.g., Ohio Nurses Assoc. v. Ashtabula Cnty. Med. Ctr.*, No. 1:20-cv-1656, 2020 WL 4390524, *11 (N.D. Ohio July 31, 2020) (denying injunctive relief where plaintiff transferred her care to another physician, "mitigating against any finding of irreparable harm"). Plaintiff's own Complaint is dispositive. As a result, Plaintiff does not have standing to seek a mandatory injunction that would substitute his counsel's amorphous desires for Children's Hospital's independent judgment. Thus, the Court should dismiss Plaintiff's complaint for injunctive relief.

C. Plaintiff Cannot State a Claim for Discrimination Under the Colorado Anti-Discrimination Act

If the Court finds that it does have subject matter jurisdiction over this case, which it does not, this Court should nonetheless dismiss Plaintiff's Complaint for failure to state a claim. CADA provides, in pertinent part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to any individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation[.][3]

[3] Under CADA, the term 'disability' "has the same meaning as set forth in the federal 'Americans with Disabilities Act,'" C.R.S. § 24-34-301(7), which defines the term as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment[.]"42 U.S.C. § 12102(1).

"'Gender identity' means an individual's innate sense of the individual's own gender, which may or may not correspond with the individual's sex assigned at birth." C.R.S. § 24-34-301(10).

"'Gender expression' means an individual's way of reflecting and expressing the individual's gender to the outside world, typically demonstrated through appearance, dress, and behavior." C.R.S. § 24-34-301(9).

C.R.S. § 24-34-601(2)(a). Plaintiff alleges that Children's Hospital violated CADA by discriminating against him on the basis of disability, sex, gender identity, and gender expression when Children's Hospital made the decision to no longer offer gender affirming surgeries to adult patients. In the Complaint, Plaintiff seeks to supersede Children's Hospital's independent judgment and require that the hospital offer certain treatments to him. No statutory interpretation and no case law suggest that CADA grants Plaintiff this authority. CADA protects against discrimination, but it does not give patients the power to dictate the surgical procedures a hospital will allow. Plaintiff does not and cannot state a plausible claim for relief under CADA because Children's Hospital's decision to transition an adult patient to an adult facility for gender affirming surgery is not discriminatory.

1. Plaintiff Fails to State a Claim for Discrimination Based on Disability

"A court that hears civil suits pursuant to [CADA] shall apply the same standards and defenses that are available under the federal 'Americans with Disabilities Act of 1990,' 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations." C.R.S. § 24-34-802(4). Title III of the Americans with Disabilities Act ("ADA") provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation[.]" 42 U.S.C. § 12182(a). Under Title III, a plaintiff must show that he (1) "is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability." *Velez v. Cloghan Concepts, LLC*, 387 F. Supp. 3d 1072, 1074-75 (S.D. Cal. 2019) (dismissing ADA claim where plaintiff offered "only conclusory statements" and failed to allege defendant engaged in violations related to plaintiff's particular disability). As discussed *infra*, Plaintiff's Complaint does not satisfy the first or third of these

elements. Thus, Plaintiff fails to plausibly plead a claim for discrimination based on disability, and this claim must be dismissed.

i. Plaintiff Has Not Adequately Pled That His Gender Dysphoria Constitutes a Disability

Plaintiff has failed to plead that he has a covered disability. The ADA (and therefore CADA) categorically excludes "gender identity disorders not resulting from physical impairments." 42 U.S.C. § 12211(b)(1); C.R.S. § 24-34-802(4). Courts throughout the country have held that where a plaintiff fails to allege that their gender dysphoria results from a physical impairment, their claims under the ADA fail as a matter of law. *See, e.g., Michaels v. Akal Sec., Inc.,* No. 09-cv-01300-ZLW-CBS, 2010 WL 2573988, *6 (D. Colo. 2010) ("Gender dysphoria, as a gender identity disorder, is specifically exempted as a disability by the Rehabilitation Act [of 1973, 29 U.S.C. § 701 et seq.]," which contains exclusionary language that is identical to the ADA); *see also Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018) (granting motion to dismiss ADA claim because "[n]owhere in the Amended Complaint did [plaintiff] allege that her gender dysphoria was caused by a physical impairment or that gender dysphoria always results from a physical impairment"); *Duncan v. Jack Henry & Assoc., Inc.*, 617 F.Supp.3d 1011, 1053 (W.D. Mo. 2022) (granting motion to dismiss because plaintiff did not allege that her gender dysphoria was the result of a physical impairment); *Doe v. Northrop Grumman Sys. Corp.*, 418 F.Supp.3d 921, 930 (N.D. Ala. 2019) (dismissing Plaintiff's ADA disability discrimination claim because plaintiff failed to allege gender dysphoria resulted from a physical impairment); *Lange v. Houston Cnty., Georgia*, 608 F. Supp. 3d 1340, 1363 & n.18 (M.D. Ga. 2022) (dismissing ADA claim on summary judgment because plaintiff submitted no evidence that

her gender dysphoria resulted from a physical impairment, such as "undescended testicles, missing ovaries, hermaphroditic conditions, genetic anomalies, or an androgen receptor disorder").

Plaintiff alleges that gender dysphoria is a medical condition characterized by the "distress associated with incongruence between a person's gender identity and assigned sex at birth." (Compl. ¶ 15.) He alleges that he "experiences gender dysphoria that is exacerbated by being unable to live consistently with his gender identity." (*Id*. at ¶ 18.) Plaintiff also describes the symptoms of his condition. (*Id*. at ¶ 19.) But nowhere in the Complaint does Plaintiff allege that a physical impairment is the cause of his gender dysphoria. Plaintiff does not allege any physical impairment ***causing*** his gender dysphoria, but rather only describes physical pain ***resulting from*** his own attempts to rectify the emotional distress he experiences. Under the ADA, this pleading failure is fatal to Plaintiff's disability discrimination claim.

Plaintiff undoubtedly will argue that some courts have concluded gender dysphoria is a disability included in the ADA's protections. *See Williams v. Kincaid*, 45 F.4th 759, 778 (4th Cir. 2022); *see also Griffith v. El Paso Cnty.*, No. 21-CV-00387-CMA-NRN, 2023 WL 2242503, at *17 (D. Colo. Feb. 27, 2023), *report and recommendation adopted*, No. 21-CV-00387-CMA-NRN, 2023 WL 3099625 (D. Colo. Mar. 27, 2023). Children's Hospital, however, posits that the majority of courts throughout the United States to consider this issue ruled correctly that claims under the ADA fail as a matter of law if a plaintiff fails to allege that their gender dysphoria resulted from a physical impairment. *See supra*. Moreover, under Colorado law, the plain language of a statute is controlling. *See, e.g.*, *Colorado State Bd. Of Med. Examiners v. Roberts*, 42 P.3d 70, 72 (Colo. App. 2001) (holding statutory language was "not ambiguous" and noting "[i]f the intent of the legislature is clear from the plain language of the statute, the courts must give effect to the statute according to its plain language"); *see also Edwards v. New Century Hospice, Inc*., 535 P.3d 969,

975 (Colo. 2023) (internal quotations omitted) (applying statute's plain language and finding "[w]hen a statute is unambiguous, public policy considerations beyond the statute's plain language have no place in its interpretation."). Based on the pleading standard set forth in CADA and the ADA, this Court should dismiss Plaintiff's claim since Plaintiff has not adequately pled a disability.

ii. Plaintiff Does Not Adequately Plead that His Alleged Disability Was the Reason for Children's Hospital's Alleged Discrimination

Even if Plaintiff adequately pled that his gender dysphoria constitutes a disability, another glaring flaw in Plaintiff's claim for disability discrimination is his failure to adequately allege that Children's Hospital denied him treatment "because of" his disability. Plaintiff is required to show this causal link between his alleged disability and the alleged discriminatory act. C.R.S. § 24-34-601(2)(a) (It is a discriminatory practice "to refuse, withhold from, or deny to any individual or a group, ***because of*** disability"); 42 U.S.C. § 12182(a) ("[n]o individual shall be discriminated against ***on the basis of*** disability"). "Discrimination by reason of a disability requires a showing that 'but for' the plaintiff's disability, he would have been able to access the services, programs, or activities of the public entity." *Makeen v. Colorado, Denver City & Cnty.*, No. 14-CV-03452-CMA-CBS, 2015 WL 13215660, at *11 (D. Colo. Dec. 18, 2015) (recommending denial of preliminary injunction because disability was not the "but for" cause of discrimination)*; see also Tesmer v. Colorado High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006) (no causal link when plaintiff was denied full privileges at school for several reasons unrelated to his disability).

Plaintiff's entire relationship with Children's Hospital was premised on treating his alleged disability rather than excluding him because of it. Plaintiff's gender dysphoria is the reason he was afforded access to treatment at Children's Hospital in the first place. Plaintiff even alleges that a doctor at Children's Hospital initially diagnosed Plaintiff with gender dysphoria and referred him

to the TRUE Center. (Compl. at ¶ 24.) The TRUE Center was established specifically for transgender and gender-diverse patients at Children's Hospital (*id*. at ¶ 20), and Plaintiff had access to the full panoply of treatment options that Children's Hospital provides its pediatric and adolescent patients under the age of 18 with gender dysphoria. A doctor at the TRUE Center prescribed hormone therapy for Plaintiff's condition. (*Id*. at ¶ 25.) Plaintiff admits that the treatment he received at Children's Hospital was "appropriate" and improved his symptoms. (*Id*. at ¶¶ 19, 42.)

Plaintiff complains that Children's Hospital's decision to discontinue gender affirming surgery for adults is disability discrimination, but the decision is not based on disability at all. Children's Hospital continues to treat gender dysphoria and many other gender-related conditions in its adolescent patients. Children's Hospital simply no longer performs chest masculinization surgeries on anyone. Plaintiff even knew that Children's Hospital never performed chest masculinization surgeries on pediatric or adolescent patients under the age of 18. (*See* Compl. ¶ 45.) Therefore, when Children's Hospital determined in July 2023 that it would no longer offer chest masculinization surgeries at all (*id*. at ¶ 56), that decision ***only impacted adults***. Anyone denied surgery at Children's Hospital following that particular decision regarding service and treatment offerings was denied because they were no longer a pediatric patient, not because they were transgender, diagnosed with gender dysphoria, or suffering from any particular disability.

The pediatric services that Children's Hospital offers is essentially a list of treatments by condition. Plaintiff, as a pediatric patient, could receive treatments that were offered to manage gender dysphoria, and he did receive hormone therapy. (Compl. ¶ 25.) Chest masculinization surgery simply is not offered at Children's Hospital, for children or adults. Children's Hospital does not offer this surgery as a treatment for gender dysphoria or any other condition. Because

Children's Hospital's decision to not offer chest masculinization surgery is disability-neutral, it cannot form the basis of a claim for disability discrimination. *See Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999) ("ADA requires only that a particular service provided to some not be denied to disabled people" and defendant did not unlawfully discriminate against plaintiffs by "denying a benefit that it provides to no one."); *see also Taylor v. Colorado Dept. of Health Care Policy and Fin.*, No. 12-cv-00300-PAB-KMT, 2013 WL 709058, *8 (D. Colo. Feb. 25, 2013) (plaintiff could not show access to a benefit 'but for' her disability because the alleged benefit was unavailable regardless of disability status).

Plaintiff does not suggest that Children's Hospital refuses to treat transgender patients with gender dysphoria. Indeed, Children's Hospital continues to support the TRUE Center and provide "comprehensive care" for pediatric patients who are gender-diverse and transgender, including those who suffer from gender dysphoria. (Compl. ¶ 20.) Rather, Plaintiff's discrimination claim relies on allegations that Children's Hospital still offers chest reconstruction surgery to treat patients for physical conditions like gynecomastia (the enlargement of breast tissue in boys).[4] (*Id*. at ¶¶ 37, 62.) But Plaintiff never alleges that he sought chest reconstruction surgery for any condition; he only alleges that he sought chest masculinization surgery for gender dysphoria. Plaintiff also does not, and cannot, allege that gynecomastia treatment was unavailable to him or is unavailable to any Children's Hospital patient who also has gender dysphoria. Put another way, chest reconstruction surgery is a treatment that Children's Hospital offers for gynecomastia, regardless of whether the patient has a disability. "[T]here is no discrimination under the ADA where disabled individuals are given the same opportunity as everyone else[.]" *Doe One v. CVS*

[4] Plaintiff's allegations regarding hysterectomy surgery (Compl. ¶¶ 33, 35, 39, 43) are not relevant to this case or this Motion because Plaintiff did not seek a hysterectomy.

Pharmacy, Inc., 348 F. Supp. 3d 967, 987 (N.D. Cal. 2018) (vacated in part on other grounds) (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1107 (9th Cir. 2000) (granting motion to dismiss where defendant's restrictions applied equally to all enrollees regardless of disability status).

Moreover, Children's Hospital is entitled to uphold its pediatric specialty. Under the ADA "[a] health care provider may refer an individual with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization…" 28 C.F.R. 36.302(b)(2). The U.S. Department of Justice has provided additional guidance, confirming that the ADA "does not require modifications to the legitimate areas of specialization of service providers." American with Disabilities Act Title III Regulations, Supp. Information, U.S. DEPT. OF JUSTICE, CIVIL DIV., available at https://www.ada.gov/law-and-regs/regulations/title-iii-regulations/#supplementary-information. As discussed *infra* § IV.C.1.iii, Plaintiff repeatedly acknowledges that Children's Hospital's specialty and expertise is in treating children. While he alleges that prior to July 2023 Children's Hospital would "sometimes perform [gender affirming] surgical procedures for non-pediatric transgender patients," (Compl. ¶ 30), Plaintiff does not allege that Children's Hospital has any expertise in performing gender affirming surgery or providing any other care for adults.[5] Plaintiff also fails to allege that these non-pediatric patients were provided the same procedure Plaintiff seeks and under his same circumstances. Without alleging or providing any facts to support the assertion that other adult patients received

[5] In his 90-paragraph Complaint, Plaintiff makes only one cursory allegation that Children's Hospital offers chest reconstruction surgery to adult patients at all. (Compl. ¶ 63 ("[Children's Hospital] still offers the same procedures to patients, including non-pediatric patients, to treat conditions other than gender dysphoria.") But Plaintiff's bare assertion does not make it so. The Complaint is devoid of any facts to support this conclusory allegation; thus, it is not entitled to an assumption of truth. *See Scott v. Scott*, 428 P.3d 626, 632 (Colo. Ct. App. 2018) (affirming grant of motion to dismiss where plaintiff made only one conclusory statement for an element of the claim). This allegation also does not suffice to show that Children's Hospital has an expertise in treating adults. Plaintiff also fails to recognize that chest reconstruction surgery for gynecomastia is not "the same" as chest masculinization surgery for gender dysphoria. These surgical procedures are fundamentally different. (Brumbaugh Aff. ¶¶ 10-13.)

the same surgery at Children's Hospital for the same reason Plaintiff seeks it, Plaintiff has failed to plead a causal link.

Children's Hospital is entitled to refer patients, disabled or otherwise, to another provider if the patient is seeking services outside of Children's Hospital's area of specialization—*i.e.*, pediatrics—as it did here. *See* 28 C.F.R. 36.302(b)(2). Because Plaintiff has failed to plausibly allege that Children's Hospital denied his surgery "because of" his gender dysphoria, the causal link required in an ADA claim is absent. As a result, this Court should dismiss Plaintiff's disability discrimination claim.

iii. Plaintiff Cannot Allege Discrimination Because He Failed to Request a Reasonable Modification

Plaintiff also seeks an order finding that Children's Hospital discriminated against him on the basis of disability when Children's Hospital decided it would no longer perform gender affirming surgeries on adults and declined to schedule Plaintiff's chest masculinization surgery. (Compl. at ¶¶ 56, 64, 81.) Yet, nowhere in his Complaint does Plaintiff allege that he ever requested a reasonable modification to Children's Hospital's decision or that Children's Hospital refused such a request. "A plaintiff's request for reasonable modification is necessary to determine whether the defendant could reasonably provide such modification and whether the defendant's subsequent failure to do so constitutes discrimination. That is because [the ADA's] Title III requirement that private entities make 'reasonable accommodations' for disabled individuals would be rendered meaningless if the entity had no basis for knowing (1) what accommodations the plaintiff was seeking, and (2) whether those accommodations were reasonable in light of the disability and the test." *Castillo v. Hudson Theatre, LLC*, 412 F. Supp. 3d 447, 451 (S.D.N.Y. 2019) (internal citations omitted) (granting motion to dismiss ADA claim where plaintiff failed to allege that she requested a reasonable modification to defendants' policies that was subsequently refused). Since Plaintiff

did not allege in his Complaint that he requested a modification from Children's Hospital's policy, his claim for disability discrimination should be dismissed. *See id*. at 453.

Even if Plaintiff had requested a modification similar to the injunction he now seeks in this case—to force Children's Hospital to offer surgery to him—that modification is not reasonable.[6] Title III of the ADA "defines discrimination to include 'a failure to make reasonable modifications … unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of the public accommodation.'" *Dahlberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1105 (D. Colo. 2000) (cleaned up) (emphasis in original). A plaintiff "has the burden of proving that a modification was requested and that the modification is reasonable." *Id*. at 1106 (dismissing ADA claim where plaintiff failed to suggest a modification to defendant's system or produce evidence that a modification would be reasonable). When considering reasonableness, "the ultimate question is whether making the plaintiff's proposed modification, given his or her individualized circumstances, would fundamentally alter the defendant's service." *Id*.

Here, Plaintiff's individualized circumstances include two key details: (i) he received 20 months of treatment at Children's Hospital before he turned 18; and (ii) he is now an adult seeking a specific treatment for gender dysphoria that Children's Hospital does not offer. Plaintiff admits that Children's Hospital is a "***pediatric*** healthcare provider" with "***pediatric expertise***" and a stated mission to "improve the health of ***children***[.]" (Compl. ¶¶ 8, 10 (emphasis added).) Plaintiff further admits that Children's Hospital only "sometimes provides care to non-pediatric patients where [Children's Hospital's] ***pediatric expertise*** carries over to the needs of the patient even though they have legally become an adult; where a clear quality and safety advantage to ***pediatric expertise***

[6] When "allegations indicate the existence of an affirmative defense that will bar the award of any remedy," a party may raise that defense in a motion to dismiss. *Williams v. Rock-Tenn Services, Inc.*, 370 P.3d 638, 641-2 (Colo. App. 2016) (finding affirmative defense provided a proper basis for dismissal pursuant to C.R.C.P. 12(b)(5) and dismissing plaintiff's complaint).

exists; or where the patient received care at [Children's Hospital] before they turned 18." (*Id*. at ¶ 10.) In order to devote its resources and expertise to pediatric and adolescent patients under the age of 18, Children's Hospital decided to no longer offer gender affirming surgeries for its patients continuing as adults. (*See id*. at ¶ 56.) A modification requiring a pediatric hospital to offer gender affirming surgery to an adult—whose treatment does not require pediatric expertise—is not reasonable. Such a modification would sweep an unimaginable number of adult patients into Children's Hospital's patient clientele and inherently would "fundamentally alter" the nature of the hospital's pediatric services. *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (disallowing modification where the entity can demonstrate that making such modification would fundamentally alter the nature of its services and facilities). The purpose of a children's hospital is to treat children. Because Plaintiff did not adequately allege a request for a modification from Children's Hospital in his Complaint, and because the modification Plaintiff effectively seeks now is not reasonable, the Court should dismiss this claim.

2. Plaintiff Fails to State a Claim for Discrimination Based on Sex, Gender Identity, or Gender Expression

Plaintiff also has brought a claim under CADA for discrimination based on sex, gender identity, and gender expression. Yet, CADA requires the same causal link for sex- or gender-based claims as it does for disability claims. C.R.S. § 24-34-601(2)(a) ("It is a discriminatory practice and unlawful for a person … to refuse, withhold from, or deny to any individual or a group, ***because of*** … sex, sexual orientation, gender identity, [or] gender expression" (emphasis added).) A dearth of case law on sex- or gender-based discrimination claims under CADA exists in this context, but given the overlapping causal link requirement, the cases related to Plaintiff's CADA disability claim are instructive. *See, e.g., Makeen*, 2015 WL 13215660 at *11; *Tesmer*, 140 P.3d at

253; *Rodriguez*, 197 F.3d at 618; *Taylor*, 2013 WL 709058 at *8; *Doe One*, 348 F. Supp. 3d at 987. Plaintiff has not adequately pled that he was denied treatment "because of" his transgender status.

As discussed *supra*, Children's Hospital treated Plaintiff for 20 months when he was a transgender pediatric patient. Children's Hospital's decision to end gender affirming surgeries only impacted adults, and Children's Hospital made that decision specifically for the purpose of safeguarding hospital resources for transgender and gender-diverse children. Plaintiff was not denied chest masculinization surgery because he is transgender. He was denied this service because he is now an adult, and Children's Hospital does not offer chest masculinization surgery to treat gender dysphoria in adults. Pediatric transgender patients still have the same range of treatments that they always had.

Notably, Plaintiff does not allege that Children's Hospital has offered chest masculinization surgery for some other patient who is similar in all relevant respects to Plaintiff "but for" his transgender status. He alleges that Children's Hospital is providing chest reconstruction surgery to children, but Plaintiff is not a child. (Compl. ¶ 33.) He also alleges that Children's Hospital is providing chest reconstruction surgery "to treat other diagnoses and needs" that Plaintiff does not have. (*Id*. ¶¶ 62-63.) Thus, this claim suffers the same fatal flaw as Plaintiff's claim for disability discrimination. No causal link exists between Plaintiff's transgender status and Children's Hospital's alleged discrimination, and the Court should deny Plaintiff's discrimination claim based on sex, gender identity, and gender expression.

V. CONCLUSION

For the reasons stated above, Children's Hospital respectfully requests that the Court enter an Order: (i) dismissing Plaintiff's Complaint in its entirety with prejudice; and (ii) granting Children's Hospital such further relief the Court deems just and appropriate.

Dated: April 19, 2024

Respectfully submitted,

/s/ Stephanie Adamo

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2024, a true and correct copy of the foregoing **CHILDREN'S HOSPITAL COLORADO'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM** was filed and served via *Colorado Courts Efiling System* and served on the following parties of record:

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