UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

REIYN KEOHANE,

Plaintiff,

v.

JULIE JONES, in her official capacity as Secretary, Florida Department of Corrections; TRUNG VAN LE, in his official capacity as Chief Health Officer of the Desoto Annex; TERESITA DIEGUEZ, in her official capacity as Medical Director of Everglades Correctional Institution; and FRANCISCO ACOSTA, in his official capacity as Warden of Everglades C.I.,

Defendants.

CASE NO. 4:16cv511-MW/CAS

DEFENDANTS, DOCTOR TRUNG VAN LE AND DOCTOR TERESITA DIEGUEZ'S, RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [DE #3] AND INCORPORATED MEMORANDUM OF LAW

Defendants, DOCTOR TRUNG VAN LE and DOCTOR TERESITA DIEGUEZ, respond in opposition to Plaintiff, REIYN KEOHANE's Motion for Preliminary Injunction. [DE #3]. In support of their Motion, Dr. Le and Dr. Dieguez incorporate the following Memorandum of Law, and state as follows:

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PREFACE[1]

Plaintiff, Reiyn Keohane, filed a one count Complaint for Declaratory and Injunctive Relief against all Defendants (Secretary of Corrections Jones, Warden Acosta, Dr. Le and Dr. Dieguez) for the alleged denial of medically necessary care for gender dysphoria in violation of the Eighth Amendment to the United States Constitution. [DE #1 ¶¶ 87-98]. Dr. Le and Dr. Dieguez moved to dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief for pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) for failure to state a claim and lack of subject matter jurisdiction based on mootness. [DE #22].

Plaintiff is serving a 15 year prison sentence within the Florida Department of Corrections. [DE #3 p. 3]. Plaintiff was born male, but identifies with the female gender identity. [DE #3 p. 6]. While Plaintiff alleges various interactions with persons she groups together collectively as "DOC officials," she has had very limited interaction with Dr. Le and Dr. Dieguez. *See generally* [DE #3].

Concurrent with the filing of Plaintiff's Complaint for Declaratory and (Permanent) Injunctive Relief, Plaintiff also filed a Motion for Preliminary Injunction [DE #3]. Plaintiff's Motion for Preliminary Injunction requests this

[1] Many of Plaintiff's allegations in her Complaint for Declaratory and Injunctive Relief [DE #1] overlap with Plaintiff's Motion for Preliminary Injunction. [DE #3]. Therefore, some of the arguments and facts in the Doctors' Motion to Dismiss [DE #22] and this response in opposition overlap in order to respond to the allegations in each of Plaintiff's requests for injunctive relief.

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Court to direct "[all] Defendants to provide Plaintiff with hormone therapy and access to female clothing and grooming standards." [DE #3 p. 34]. For the reasons discussed in this response, Plaintiff's motion must be denied.

INCORPORATED MEMORANDUM OF LAW

Pursuant to N.D. Fla. Local Rule 7.1(E), Dr. Le and Dr. Dieguez incorporate the following memorandum of law into this document in support of their Opposition to Plaintiff's Motion for Preliminary Injunction.

LEGAL STANDARD

A preliminary injunction may only be granted if the moving party establishes four elements: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (internal citations omitted). A "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly carries the burden of persuasion as to the four prerequisites." *Uber Promotions, Inc. v. Uber Techs., Inc.*, 162 F. Supp. 3d 1253, 1261 (N.D. Fla. 2016) (citing *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir.1983)). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception

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that the plaintiff must show a likelihood of success on the merits rather than actual success." *Winter*, 555 U.S. at 32 (internal citations omitted).

ARGUMENT

Plaintiff fails to make a clear showing as to any of the four elements of a preliminary injunction – likelihood of success, irreparable harm, balance of equities, and public interest – in order to be entitled to such an extraordinary remedy.

A. Plaintiff fails to establish a substantial likelihood of success on the merits to obtain injunctive relief against Dr. Le or Dr. Dieguez.

For the reasons more fully discussed in Dr. Le and Dr. Dieguez's Motion to Dismiss Plaintiff's Complaint for Declaratory and Injunctive Relief [DE #22], Plaintiff fails to state a claim against either Doctor. Specifically, Plaintiff's allegations fail to allege a deliberate indifference claim against either Doctor, that Plaintiff's request for hormone therapy is moot since the hormones have been provided and expect to be continuously provided, and neither Doctor is charged with enforcing any Department of Corrections' policy, including those related to grooming or clothing. [DE #22].

Similar to Plaintiff's Complaint, Plaintiff's Motion for Preliminary Injunction seeks relief against "DOC Officials" without distinguishing either Doctor from each other or from the other Defendants. [DE #3 pp. 21-29]. Neither

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Doctor disputes Plaintiff's diagnosis of gender dysphoria; however, the Doctors deny that they are denying medical treatment for Plaintiff's gender dysphoria.

1. Plaintiff cannot obtain injunctive relief against Dr. Le as a matter of law.

Plaintiff cannot obtain injunctive relief against Dr. Le as a matter of law because "a prisoner's request for injunctive relief relating to the conditions of his confinement becomes moot when he is transferred." *Davila v. Marshall*, No. 15-10749, 2016 WL 2941929, at *2 (11th Cir. May 20, 2016) (citing *Spears v. Thigpen*, 846 F.2d 1327, 1328 (11th Cir.1988)); *see also Smith v. Courtney*, No. 3:14CV231/MCR/CJK, 2016 WL 1554137, at *5 (N.D. Fla. Mar. 22, 2016), *report and recommendation adopted*, No. 3:14CV231-MCR/CJK, 2016 WL 1532246 (N.D. Fla. Apr. 15, 2016) (denying prisoner's claim for declaratory and injunctive relief against three employees of the Santa Rosa Correctional Institution as moot because Plaintiff was transferred from the institution). Because Plaintiff is no longer committed at the Desoto Annex, her challenges seeking injunctive relief against Dr. Le in his official capacity as the former Chief Health Officer of Desoto Annex are moot. A case that is moot is properly dismissed for lack of subject matter jurisdiction. *Lobianco v. John F. Hayter, Attorney at Law, P.A.*, 944 F. Supp. 2d 1183, 1186 (N.D. Fla. 2013) (citing *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1532 (2013)).

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Dr. Le has not had any interaction with the Plaintiff at any time since the Plaintiff was transferred from the Desoto Annex on January 13, 2015. [Le Decl. ¶ 7]. Moreover, Dr. Le is neither currently responsible for providing the Plaintiff with health care services or enforcing Department of Corrections policies on clothing and grooming standards. [Le Decl. ¶¶ 9-10].

"[A] claim for injunctive relief can stand only against someone who has the authority to grant it." *See, e.g., Williams v. Doyle*, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007). Dr. Le retired from his position as Chief Health Officer of the Desoto Annex on April 30, 2015. [Le Decl. ¶ 2]. Therefore, Plaintiff has not only failed to establish a substantial likelihood of success of obtaining an injunction against Dr. Le, Plaintiff cannot show any chance of success in obtaining an injunction against Dr. Le as a matter of law. Accordingly, Dr. Le must be dismissed from this lawsuit.

2. Plaintiff has not established a substantial likelihood of success on the merits as it relates to Dr. Dieguez.

Injunctive relief is not available when a defendant does not have control over a plaintiff and cannot provide the requested relief. *See, e.g., Schneider v. Ferguson*, No. CV 305-158, 2007 WL 1521610, at *7 (S.D. Ga. May 23, 2007) (citing *Trailer Rental Co., Inc. v. Buchmeier,* 800 F.Supp. 759, 762 (E.D.Wis.1992)). The hormone therapy is already being provided to Plaintiff and is

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expected to continue to be provided. [Hernandez Decl. ¶¶ 5-6].[2] To the extent the Plaintiff nonetheless seeks to challenge Department of Corrections Procedure 602.053(2)(a)(5), what Plaintiff deems the "Freeze-Frame Policy," neither Doctor has the power to enforce or grant an exception to the policy. [DE #3 pp. 18-19]. Therefore, injunctive relief based on the hormone treatments or the Freeze-Frame Policy is not available.

Because Dr. Dieguez does not have any control over providing the remaining requested relief to the Plaintiff, Plaintiff has not established a substantial likelihood of success on the merits of obtaining an injunction against Dr. Dieguez. The record is devoid of evidence which shows that Plaintiff's vaguely alleged "access to female clothing and grooming standards" is a form of medical treatment which is currently being denied by Dr. Dieguez. [DE #3 p. 34]. As an initial matter, Plaintiff fails to establish what type of "female clothing" and "female grooming standards" she seeks "access" to. As for clothing, Plaintiff alleges she seeks a preliminary injunction "to permit her to wear clothing approved by the DOC for women." [DE #3 pp. 2-3]. Nowhere in the Plaintiff's preliminary

[2] Dr. Dieguez will also submit an Declaration in support of the factual assertions that the Plaintiff is currently receiving treatment for gender dysphoria, which includes hormone therapy, mental health, and psychological counseling. Her Declaration was unavailable to be executed by the deadline as she was on a previously planned vacation. The undersigned spoke with Dr. Dieguez, who advised she would provide the executed Declaration on September 27, 2016.

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injunction request does she specify exactly what type of approved clothing she seeks to wear or that she sought such specific clothing items from Dr. Dieguez.

Nonetheless, lack of access to female clothing in a male prison does not support an inmate's claim for cruel and unusual punishment. In *Hood v. Department of Children and Families*, the court found no authority "indicating that a transgender person has the right to choose the clothing worn while confined or that the facility is constitutionally obligated to purchase all the clothing and feminine products requested." *Hood*, No. 2:12-CV-637-FTM-29, 2015 WL 686922, at *8 (M.D. Fla. Feb. 18, 2015). In support of its conclusion, the Court noted that federal courts have generally held the opposite. *Id.* (citing *Murray v. United States Bureau of Prisons*, 106 F.3d 401 (6th Cir.1997) (transsexual prisoner not entitled to wear clothing of his choice and prison officials do not violate the Constitution simply because the clothing is not aesthetically pleasing); *Star v. Gramley*, 815 F.Supp. 276 (C.D.Ill.1993) (noting that provision of female clothing to transsexual prisoner would be unduly burdensome for prison officials and would make little fiscal sense); *Jones v. Warden of Stateville Corr. Ctr.*, 918 F.Supp. 1142 (N.D.Ill.1995) ("Neither the Equal Protection Clause nor the First Amendment arguably accord [Plaintiff] the right of access to women's clothing while confined in a state prison."). The Court therefore dismissed Plaintiff's claims. *Hood*, 2015 WL 686922 at *8.*; See also Brown v. Wilson*, No. 3:13CV599,

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2015 WL 3885984 at *6 (E.D. Va. June 23, 2015) (dismissing inmate's claim that the inmate was subjected to cruel and unusual punishment "by failing to allow her to purchase commissary products appropriate for assisting her in her transition to a female gender, *i.e.*, facial makeup, clothing, and other items.") (internal quotations omitted).

Regarding "female grooming standards," Plaintiff seeks an injunction allowing her to "grow[] her hair to a length allowed for female inmates, and otherwise following grooming standards approved by the DOC for women." [DE #3 pp. 2-3]. As to hair length, neither Doctor has the power to enforce the Department of Corrections' policy on hair length, or to grant Plaintiff an exception to the policy.

Presumably,[3] Plaintiff seeks an exception to the following male hair length requirement: "Male inmates shall have their hair cut short to medium uniform length at all times with no part of the ear or collar covered." Rule 33-602.101(4), Fla. Admin. Code. Despite idenitifying as female, Plaintiff is anatomically male and incarcerated in a male facility. [DE #3 p. 6]. Like the other inmates at the male facility, Plaintiff is obligated to comply with the DOC standards for hair length for male inmates, absent an exception from Secretary Jones, who is responsible for the

[3] Plaintiff fails to allege, and the undersigned is unaware of, any specific hair length at which female inmates are permitted to grow their hair.

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enforcement of the standards. This is pursuant to the Secretary of Corrections' authority and responsibility for security and institutional operations, under which the hair length standard falls. § 20.315(3)(c)(1), Fla. Stat., Rule 33-602.101(4), Fla. Admin. Code. (describing certain grooming standards applicable to inmates as being "[f]or security and identification purposes" and those which "otherwise pose a threat to institutional security."). Neither Doctor is constitutionally obligated to violate Department of Corrections policy and provide the Plaintiff with the female clothing Plaintiff demands. Accordingly, any enforcement or exceptions to these policies must be granted by the Secretary or her designee, and there is no cause of action for injunctive relief against either Doctor.

Additionally, neither Dr. Le nor Dr. Dieguez are constitutionally obligated to violate Department of Corrections Policy in order to provide Plaintiff with "access to female…grooming standards" as alleged. In addition to not being responsible for enforcing or excepting grooming standards, neither Doctor is in a position to permit the Plaintiff the ability to grow hair longer than "short to medium" length as required by Rule 33-602.101(4). Plaintiff does not suffer from any medical need which allegedly prevents the Plaintiff from being able to grow long hair. Rather, it is the DOC Policy, as codified by Rule 33-602.101(4), which apparently prevents the Plaintiff from being able to grow long hair. Because neither Doctor enforces these procedures, there is no cause of action against either Doctor based on an alleged constitutional violation.

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Moreover, "restrictions placed on [the prisoner's] choice of haircut do not present the type of deprivation of life's necessities that rise to an Eighth Amendment violation." *Casey v. Hall*, No. 2:11-CV-588-FTM-29, 2011 WL 5583941, at *3 (M.D. Fla. Nov. 16, 2011) (citing *Chandler v. Crosby*, 379 F. 3d 1278, 1298 (11th Cir. 2004)); *Taylor v. Gandy*, No. CIV.A. 11-00027-KD-B, 2012 WL 6062058, at *4 (S.D. Ala. Nov. 15, 2012), *report and recommendation adopted*, No. CIV.A. 11-00027-KD-B, 2012 WL 6062072 (S.D. Ala. Dec. 6, 2012) (prisoner's disagreement with prison grooming policy or Defendants' interpretation of the policy fails to support a deliberate indifference claim under the Eighth Amendment).

B. Plaintiff has failed to show irreparable injury absent an injunction against Dr. Le or Dr. Dieguez.

Plaintiff argues that she will suffer irreparable injury absent an injunction as long as "DOC Officials" "withhold[] medically necessary care." [DE #3 p. 30]. Plaintiff further argues that she "will also suffer irreparable harm in the deprivation of her constitutional rights" absent an injunction. [DE #3 p. 31]. As discussed above, Plaintiff is currently is receiving hormone therapy. [Hernandez Decl. ¶¶ 5-6]. To the extent Plaintiff alleges that denial of "access female clothing and grooming standards" constitutes cruel and unusual punishment and will lead to irreparable injury, Plaintiff fails to cite a single case of binding authority which

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establishes a constitutional right to "access female clothing and grooming standards" in a male prison facility.

The gravamen of Plaintiff's medical treatment request, hormone therapy, has been provided and is expected to continue to be provided. [Hernandez Decl. ¶¶ 5-6]. While at Desoto Annex, Plaintiff filed a formal grievance directed to the Warden dated October 31, 2014. [DE #3-6 p. 6]. Plaintiff's grievance alleged that it was "cruel and unusual punishment for me to be denied my medication." *Id.* Plaintiff further wrote: "[t]o deny [the medication] is to cause depression and suicidal tendencies, which I must face on a daily basis." *Id.* Plaintiff also stated: "[t]o take my medication from me is to force this misery upon me – hormone therapy is necessary for me to liv on a daily basis and to complete my time in a positive and productive manner." *Id.* Plaintiff concluded the grievance with "the law is supposed to protect my right to my hormone therapy." *Id.* Nowhere in the October 31, 2014 grievance did Plaintiff ever express a desire to wear female clothing or grow her hair to an unspecified length. The record is devoid of any evidence that Plaintiff is either currently at risk of self-harm as to either of these issues.

Plaintiff's specific allegations against Dr. Le for the denial of Plaintiff's request for treatment of her gender dysphoria appear to be based on Dr. Le's denial of Plaintiff's grievance in 2014 [DE #3 pp. 9-10]. While Dr. Le denied the

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grievance on November 20, 2014, he noted that hormone therapy was not provided at the time because Plaintiff had cancelled her last appointment with her Doctor in November of 2013 and that her Doctor noted the prescription for the hormone therapy would be suspended as it would be dangerous to continue without any close endocrine supervision. [DE #3 p. 10]. Plaintiff does not allege that she ever attempted to correct Dr. Le's understanding that the reason of the cancellation of the appointment was because Plaintiff was in jail. There are no allegations that Dr. Le knew of the true facts, let alone was deliberately indifferent to a serious medical need. Dr. Le also advised Plaintiff that she was being seen by mental health staff with an individualized service plan and that Plaintiff could contact the health care staff. *Id.* There is simply no basis for the Plaintiff to allege she will suffer irreparable injury absent an injunction against Dr. Le because there is no risk that Dr. Le is currently causing Plaintiff any irreparable injury, or that he will do so in the future.

Plaintiff alleges that Dr. Dieguez denied Plaintiff's grievance for treatment on May 18, 2016. [DE #3 p. 15]. The grievance was denied, however, based on the request for the Plaintiff to sign an authorization for the release of information for all pertinent outside medical and mental health records related to the Plaintiff's gender dysphoria. [DE #3 p. 15]. Plaintiff failed to comply with the request. Instead, Plaintiff appears to take the position that she was not required to sign the

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release because she did so previously while she was confined at two separate institutions, neither of which Dr. Dieguez worked at. [DE #3 p. 15]. Plaintiff does not allege any further interaction with Dr. Dieguez. Based on these interactions, there is no basis to believe that Dr. Dieguez is currently causing Plaintiff any irreparable injury, or that she will do so in the future.

C. The balance of equities does not favor the Plaintiff.

Plaintiff alleges that "DOC officials will not suffer any harm—much less irreparable harm—from providing necessary medical care to Plaintiff consistent with their constitutional obligations." [DE #3 p. 32]. Neither Dr. Le nor Dr. Dieguez is a "DOC Official" charged with enforcing DOC policies. *See supra pp.* 9-10.

To the contrary, "[a]n injunction should not impermissibly prohibit conduct that [defendant] ... has the right to do." *PODS Enterprises, LLC v. U-Haul Int'l, Inc.*, 126 F. Supp. 3d 1263, 1287–88 (M.D. Fla. 2015) (citing 1288 *Planetary Motion, Inc. v. Techsplosion, Inc.,* 261 F.3d 1188, 1203 (11th Cir.2001)) (internal quotations omitted). As discussed above, Dr. Le has been retired since April 30, 2015, and therefore, is in no position to grant the requested relief to the Plaintiff, even assuming Plaintiff is entitled to any relief. Dr. Le has the right to enjoy his retirement without being forced to provide the Plaintiff with hormone therapy, which Plaintiff is already being provided, and "access to female clothing and

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grooming standards," which Dr. Le is unable to provide. As to Dr. Dieguez, the hormone treatment is already being provided, and Dr. Dieguez would be forced to violate Department of Corrections policies to grant the Plaintiff an exception to the policy's on hair length and clothing, which is not within her authority to do so. Therefore, the balance of equities does not favor Plaintiff.

D. Plaintiff fails to show the requested injunction is in the public interest.

Plaintiff argues that an injunction should be entered simply because it is in the public interest to uphold constitutional protections generally. [DE #3 pp. 33-34]. While the Doctors do not dispute it is in the public interest to uphold constitutional rights as a general principle, Plaintiff's argument simply assumes that a constitutional violation has been established in this case and that one is expected to continue absent injunctive relief. For the reasons discussed in this Opposition and the Doctors' Motion to Dismiss Plaintiff's Complaint [DE #22], Plaintiff's allegations against Dr. Le and Dr. Dieguez fail to establish a plausible claim of a constitutional violation by Dr. Le or Dr. Dieguez. To the contrary, it is not in the public interest to grant an extraordinary remedy such as a preliminary injunction against a retired Doctor who no longer works at the facility where Plaintiff was previously incarcerated and a Doctor who is not empowered to enforce the Department of Corrections policies which Plaintiff appears to be challenging.

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REQUEST FOR RELIEF

WHEREFORE, Defendants, TRUNG VAN LE and TERESITA DIEGUEZ, respectfully request that Plaintiff's Motion be denied.

WORD COUNT CERTIFICATE

Pursuant to N.D. Fla. Local Rule 7.1(F), I hereby certify that this Motion is in compliance with the Court's word limit. According to the word processing program used to prepare this Motion, the total number of words in the document, inclusive of headings, footnotes and quotations, and exclusive of the case style, signature block, and any certificate of service is 3688.

Respectfully submitted,

By: ***s/Daniel R. Lazaro***

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **26th day of September 2016**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

By: ***s/Daniel R. Lazaro***

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