UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Reiyn Keohane,

Plaintiff,

v. Case No. 4:16-cv-511-MW-CAS

Julie Jones,
in her official capacity as
Secretary of the 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,

Francisco Acosta,
in his official capacity as
Warden of Everglades Correctional Institution,

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANTS JONES AND ACOSTA'S MOTION TO DISMISS

Plaintiff Reiyn Keohane ("Plaintiff"), through undersigned counsel, responds in opposition to Florida Department of Corrections Defendants Julie Jones and Francisco Acosta's ("DOC Defendants") Motion to Dismiss ("Motion"), Doc. 21, and states as follow:

INTRODUCTION

Plaintiff is a transgender woman currently in the custody of the Florida Department of Corrections who seeks medically necessary treatment for her Gender Dysphoria. Her complaint, which is brought under the Eighth Amendment, specifically challenges the failure of Department of Corrections officials and agents (including the contracted medical provider, Wexford Health Sources, including Defendants Le and Dieguez) (collectively, "the DOC") to provide her with hormone therapy and access to female clothing and grooming standards so that she can live in accordance with her female gender identity.

When reviewing a Rule 12(b)(6) motion to dismiss, "the pleadings are construed broadly," and "the allegations in the complaint are viewed in the light most favorable to the plaintiff." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quotation marks omitted); *see also Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014) (per curiam) (holding under *Twombly* and *Iqbal* that "substantive plausibility" requires only that plaintiffs state "simply, concisely, and directly events that" entitle them to relief).

In their Motion, the DOC Defendants finally admit—soon after the initiation of litigation, but more than *two years* after Plaintiff began requesting and explaining her documented need for treatment to numerous prison officials, *see* Complaint ¶ 37—that she "needs" hormone therapy. Motion at 11. The DOC Defendants nevertheless contend that Plaintiff's complaint should be dismissed on the asserted grounds that (1) Plaintiff's request for hormone therapy is now moot, Motion at 6; (2) restrictions on hair length and denial of access to female clothing can never violate the Eighth Amendment, *id.* at 7, 11; (3) Plaintiff fails to allege facts showing that DOC officials were subjectively aware of the risk of serious harm to Plaintiff posed by lack of access to female clothing and grooming standards, *id.* at 12; and (4) Defendants were not deliberately indifferent to Plaintiff's medical needs because they provided her with some treatment, *id.* at 14. As set forth below, each contention lacks merit, and the Motion should be denied.

LEGAL ARGUMENT

I. Plaintiff's Eighth Amendment claim is not moot, in whole or in part.

Plaintiff seeks medically necessary treatment for her Gender Dysphoria, specifically, hormone treatment, access to female clothing and grooming standards, and all other treatment for Gender Dysphoria deemed medically necessary by a medical professional qualified in the treatment of Gender Dysphoria. Complaint ¶ 98. After Plaintiff filed her Complaint, the DOC began providing Plaintiff with

hormone therapy. Motion at 4. But it continues to deny Plaintiff access to female clothing and grooming standards. Providing a portion of Plaintiff's necessary treatment does not moot her claim. "[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot." *Byrd v. U.S. E.P.A.*, 174 F.3d 239, 244 (D.C. Cir. 1999) (alterations and quotations marks omitted); *see also Wiley v. National Collegiate Athletic Ass'n*, 612 F.2d 473, 476 (10th Cir. 1979).

Even if the only treatment at issue in this case were hormone therapy, the DOC's voluntary cessation of the unlawful denial of this treatment does not moot Plaintiff's claim. "[T]he doctrine of voluntary cessation provides an important exception to the general rule that a case is mooted by the end of the offending behavior[.]" *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 (11th Cir. 2007) (emphasis and quotation marks omitted). Without this exception, courts would be forced to release a defendant from potential liability while leaving the defendant free to resume its allegedly unlawful behavior. *See id.* A defendant bears a "heavy burden" to overcome the voluntary-cessation exception and show that the controversy is moot. *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1265 (11th Cir. 2010).

A government actor will be extended a rebuttable presumption that the complained-of behavior will not recur, but only if it can establish an *unambiguous* termination. *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014). The Court

must determine whether the ceased behavior is unambiguously terminated by considering "(1) whether the termination of the offending conduct was ambiguous; (2) whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction; and (3) whether the government has consistently applied a new policy or adhered to a new course of conduct." *Id.* at 1323.

The timing of the termination of the offending conduct is important to this analysis. A termination of behavior that occurs well before litigation has commenced will be viewed with favor by the Court, whereas a termination that occurs "late in the game" will cause the Court to view the change with suspicion. *Harrell*, 608 F.3d at 1266; *accord Doe*, 747 F.3d at 1325 ("[T[he BOP suddenly changed its position days before Mr. Doe's trial . . . . This timing suggests a change was made simply to deprive the District Court of jurisdiction."); *Rich v. Sec'y, Florida Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013) (citing *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 833-34 (11th Cir.1989) (finding that a claim was not mooted by the school district's voluntary cessation of the challenged activity in part because the change was only made when there was an "imminent threat of [a] lawsuit")); *see also Doe*, 747 F.3d at 1325 (finding no evidence of substantial deliberation because defendant did not explain why the change happened during litigation, but not earlier). In addition, a one-off change or a

change that appears targeted to just the Plaintiff will not support a finding that the change is applied consistently. *See Rich*, 716 F.3d at 532 ("Notably, Florida implemented the plan at the prison where Mr. Rich is incarcerated, and only at that prison . . . ."). Where the termination is not consistently applied and appears to manipulate the Court's jurisdiction, the claims will not be considered moot. *See id.*

Here, the DOC's post-litigation provision of hormone therapy falls squarely within the voluntary-cessation exception to mootness. Plaintiff has been seeking treatment of Gender Dysphoria for over two years, *see* Complaint ¶ 37, and the DOC only allowed Plaintiff to meet with an endocrinologist and begin a hormone regimen after this lawsuit was filed, *see* Motion at 4. While Plaintiff is currently receiving hormone treatment, there is no indication in the Motion that such treatment will continue throughout her incarceration if her claims are dismissed.[1] The DOC has provided no proof that the change in Plaintiff's medical treatment is due to a change in policy. With no explanation from the DOC for its sudden change of heart, it appears that its recent decision to provide hormone therapy to Plaintiff was the result of the litigation at hand, not a policy change. As a result, even putting aside Plaintiff's current need for access to female clothing and

[1] In contrast to the facts here, the case relied upon by the DOC involved a one-time medical treatment that was provided, *see Smith v. Sec'y, Dep't of Corr.*, 602 F. App'x 466, 471 (11th Cir. 2015) (claim that inmate needed crown on molar was moot once tooth was fixed), not ongoing treatment like Plaintiff needs.

grooming standards and focusing just on hormone therapy, Plaintiff's claim is not moot and remains a live controversy.

II. Plaintiff has stated an Eighth Amendment medical-necessity claim.

"A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Brown v. Plata*, 563 U.S. 493, 511 (2011). Corrections officials inflict cruel and unusual treatment on a prisoner, in violation of the Eighth Amendment, when they are deliberately indifferent to a prisoner's serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The Eighth Amendment standard requires that the alleged deprivation be "objectively, sufficiently serious," and requires, subjectively, that the official acted with "deliberate indifference to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quotation marks omitted).

A. Plaintiff has plausibly alleged the denial of medically necessary treatment for an objectively serious medical need.

In her Complaint, Doc. 1, Plaintiff alleges that she "is a transgender woman with Gender Dysphoria, a serious medical condition," Complaint ¶ 88, that she "was receiving hormone therapy and expressing her female gender in all aspects of her life under the care of a doctor prior to her incarceration," *id.* ¶ 89, and that "it is medically necessary for Plaintiff to live as female, to once again receive hormone

therapy, and to receive all other treatment for Gender Dysphoria deemed medically necessary by a qualified provider," *id.* ¶ 90 (emphasis added). Eleventh Circuit precedent demonstrates why this alone is sufficient to establish the objective prong of the Eighth Amendment standard. *See Kothmann v. Rosario*, 558 F. App'x 907, 911 (11th Cir. 2014) ("At this Rule 12(b)(6) stage, we do not decide whether hormone treatment in fact was medically necessary to treat Kothmann's GID [(Gender Identity Disorder)] or whether Rosario knew in fact that hormone treatment was medically necessary for Kothmann. Nor do we address what other kinds of treatment could adequately address Kothmann's GID or whether Rosario actually provided other adequate treatment to Kothmann. Our review is limited to the four corners of the complaint, and the complaint alleges sufficient facts to survive Rosario's motion to dismiss.").

Even ignoring *Kothmann*, other case law makes clear that Plaintiff has adequately alleged that she has an objectively serious medical need.

1. Gender Dysphoria is a serious medical need.

Courts have routinely held that Gender Dysphoria (also referred to as transsexualism and Gender Identity Disorder) is a serious medical need for purposes of the Eighth Amendment. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011) *see also Diamond v. Owens*, No. 5:15-cv-50 (M.D. Ga.), Statement of Interest of the United States

(ECF No. 29) at 8 (collecting cases), https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/diamond_soi_4-3-15.pdf.

Here, the DOC Defendants do not appear to dispute that Gender Dysphoria is a serious medical need for the purposes of the Eighth Amendment, and they admit that Plaintiff has Gender Dysphoria, Motion at 16.

2. The question whether Plaintiff has a serious medical need to access female clothing and grooming standards cannot be resolved on a motion to dismiss as a matter of law.

The DOC Defendants contend, that as a matter of law, access to female clothing and grooming standards is not a serious medical need. *See* Motion at 7, 11. This is incorrect.

The established medical protocols for treating Gender Dysphoria, the World Professional Association of Transgender Health's ("WPATH") Standards of Care, make clear that for individuals with this condition, social transition, which involves "dressing, grooming, and presenting oneself to others in accordance with one's gender identity," can be medically necessary care. Complaint ¶ 24. Plaintiff has alleged that such care is medically necessary *for her*. Complaint ¶ 90 ("It is medically necessary for Plaintiff to live as female . . . .").

The DOC Defendants rely on court decisions that have denied inmates' claims concerning denial of access to certain clothing and grooming items or

standards. Motion at 8-11. In none of the cases cited by the DOC Defendants in their analysis of Plaintiff's medical needs did the courts evaluate whether denying access to female clothing or grooming standards to prisoners with Gender Dysphoria was a denial of medically necessary treatment in violation of the Eighth Amendment.[2] Indeed, many of the cases did not even involve transgender prisoners,[3] and the ones that did either addressed clothing and grooming claims outside of the Eighth Amendment—for example, First Amendment or Equal Protection claims[4]—or Eighth Amendment claims where clothing and grooming standards were not part of the court's evaluation of medical necessity.[5]

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[2] Incidentally, there is one case cited by the DOC Defendants that analyzes a claim for access to makeup in the context of an Eighth Amendment medical-necessity claim, although they did not cite it in their brief in any discussion of the Eighth Amendment. *See* Motion at 11 n.3 (citing *Arnold v. Wilson*, No. 1:13-cv-900, 2014 WL 7345755, at *8 (E.D. Va. Dec. 23, 2014)). That case, in any event, was decided on a motion for summary judgment, not a motion to dismiss. *Arnold*, 2014 WL 7345755, at *1, 5.

[3] *LaBranch v. Terhune*, 192 F. App'x 653-54 (9th Cir. 2006); *Larkin v. Reynolds*, 39 F.3d 1192, 1994 WL 624355, at *2 (10th Cir. 1994) (Table); *Blake v. Pryse*, 444 F.2d 218, 219 (8th Cir. 1971); *Taylor v. Gandy*, No. 11-cv-27, 2012 WL 6062058, at *4 (S.D. Ala. Nov. 15, 2012); *Casey v. Hall*, No. 2:11-cv-588-FTM-29SPC, 2011 WL 5583941, at *2 (M.D. Fla. Nov. 16, 2011); *Star v. Gramley*, 815 F. Supp. 276, 278 & n.2, 279 (C.D. Ill. 1993); *Jones v. Warden of Stateville Corr. Ctr.*, 918 F. Supp. 1142, 1145-46 (N.D. Ill. 1995).

[4] *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401, 1997 WL 34677, at *2-3 (6th Cir. 1997) (Table); *Hood v. Dep't of Children & Families*, No. 2:12-CV-637-FTM-

In any case, the fact that such a claim might fail in one case does not mean that access to female clothing and grooming standards can *never* constitute a serious medical need. The DOC Defendants' suggestion to the contrary is akin to saying that if some courts have found that chemotherapy was not required to treat cancer for some individual prisoners, any claim that chemotherapy is a serious medical need must fail as a matter of law, regardless of a patient's individual needs. Plaintiff is not alleging that any particular clothing- or grooming-related treatment is always required for every prisoner with Gender Dysphoria, but simply that access to female clothing and grooming standards are medically necessary *for her*. *See, e.g.*, Complaint ¶¶ 27, 36, 57, 66, 90, 93.

That a prisoner may not be entitled to the treatment of her choice, Motion at 15, does not change a prison's obligations to adequately address the medical needs of prisoners, including those of gender dysphoric patients. *See De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (*De'lonta II*) (although "a prisoner

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29, 2014 WL 757914, at *8 (M.D. Fla. Feb. 26, 2014); *Smith v. Hayman*, No. 09-cv-2602, 2010 WL 9488822, at *12-13 (D.N.J. Feb. 19, 2010).

[5] *Praylor v. Texas Dep't of Criminal Justice*, 430 F.3d 1208, 1208-09 (5th Cir. 2005), involved an Eighth Amendment claim, and the court denied Plaintiff's motion for a preliminary injunction seeking "hormone therapy and brassieres," but the court's medical-necessity analysis addressed only hormone therapy. In *Long v. Nix*, 877 F. Supp. 1358, 1365 (S.D. Iowa 1995), the court held that the inmate did not have a serious medical need for treatment for gender identity disorder, and thus the court did not address whether access to female clothing or grooming standards was medically necessary.

does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address the prisoner's serious medical need."). In *De'lonta II*, the court rejected the defendants' argument that the denial of a particular form of treatment for Gender Dysphoria is "a matter of discretion that carries no constitutional implications." *Id*. at 524. This Court should decline the DOC Defendants' similar invitation here.

Plaintiff has alleged that she has a serious medical need not only for hormone therapy but also access to female clothing and grooming standards in order to be able to live in accordance with her gender identity. *See* Complaint ¶ 90. Accepting the DOC Defendants' invitation to rule as a matter of law that an inmate's medical need to access female clothing and grooming standards cannot be objectively serious would effectively permit a blanket ban on such treatment for all prisoners. Because the Eighth Amendment requires that prisoners be provided with adequate medical care "based on an individualized assessment of an inmate's medical needs in light of relevant medical considerations," *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 242 (D. Mass. 2012), blanket bans on certain forms of medical treatment regardless of medical need violate the Eighth Amendment. *See Colwell v. Bannister*, 763 F.3d 1060, 1063, 1068 (9th Cir. 2014) (holding that the "blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that one eye is good enough for prison inmates is the

paradigm of deliberate indifference") (quotation marks omitted); *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) ("[I]nmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of [her] condition, the likelihood and imminence of further harm and the efficacy of available treatments."); *Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005) (denial of hepatitis C treatment to a prisoner based on a policy that a particular drug could not be administered to inmates with recent history of substance abuse could constitute deliberate indifference if relied upon without consideration of individual medical need); *Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) (alleged violations of the Eighth Amendment "obviously var[y] depending on the medical needs of the particular prisoner"); *Mahan v. Plymouth Cty. House of Corr.*, 64 F.3d 14, 18 & n.6 (1st Cir. 1995) (suggesting that "inflexible" application of prescription policy may violate Eighth Amendment); *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 & n.32 (3d Cir. 1987) (by virtue of a blanket policy, "the County denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care"); *Jorden v. Farrier*, 788 F.2d 1347, 1348-49 (8th Cir. 1986) (citing with approval case holding that application of prison medication policies must be instituted in manner that allows individualized assessments of need).

This principle encompasses treatment for Gender Dysphoria: automatic exclusions of certain forms of treatment for Gender Dysphoria violate the Eighth Amendment. *See Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (state law that barred hormone therapy and gender-confirming surgery as possible treatments for prisoners with gender identity disorder facially violated the Eighth Amendment); *De'lonta v. Angelone*, 330 F.3d 630, 634-35 (4th Cir. 2003) (*De'lonta I*) (prisoner with gender identity disorder stated a claim for deliberate indifference where the Department of Corrections withheld hormone therapy pursuant to a categorical policy against providing such treatment rather than based on individualized medical judgment); *see also Allard v. Gomez*, 9 F. App'x 793, 795 (9th Cir. 2001) ("[T]here are at least triable issues as to whether hormone therapy was denied Allard on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to Allard's medical needs."); *Soneeya*, 851 F. Supp. 2d at 249, 253 (holding that a prison policy that "removes the decision of whether sex reassignment surgery is medically indicated for any individual inmate from the considered judgment of that inmate's medical providers" violated Eighth Amendment); *Houston v. Trella*, No. 04-1393, 2006 WL 2772748, at *8 (D.N.J. Sept. 22, 2006) (claim that prison doctor's decision not to provide hormone therapy to prisoner with gender identity disorder based not on medical reason but policy restricting provision of hormones stated

viable Eighth Amendment claim); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs [for treatment related to gender identity disorder] and prescribing and providing adequate care to treat those needs violates the Eighth Amendment.").

On the motions to dismiss, Plaintiff's allegations must be accepted as true, and Plaintiff has plausibly alleged the objective prong of her Eighth Amendment medical-necessity claim. *See Kothmann*, 558 F. App'x at 911.

B. Plaintiff has plausibly alleged deliberate indifference to her serious medical needs.

The subjective prong of the Eighth Amendment standard concerns deliberate indifference, which "entails something more than mere negligence . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. If the DOC knew that the risk existed and either intentionally or recklessly ignored it and will continue to do so in the future, then the subjective test has been met. *See id*. at 837-40, 845-46. This indifference is impermissible "whether . . . manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 105-06.

1. The named Defendants are proper parties.

The DOC Defendants contend that Defendant Acosta—the Warden of Everglades Correctional Institution—is an improper defendant because Plaintiff only mentions Acosta to say that he "will respond to any injunctive relief ordered by the Court." Motion at 4 n.2 (citing Complaint ¶ 10). Yet that was the relevant allegation to make. In *LaMarca v. Turner*, 995 F.2d 1526, 1530 (11th Cir. 1993), the Eleventh Circuit considered a Florida prisoner's claim *for damages* against a *former* warden in his *individual* capacity, along with a claim *for injunctive relief* against the *current* warden in his *official* capacity. There, the district court awarded damages against the former warden and injunctive relief against the current warden. *See id.* The current warden "argue[d] that the [district] court erred in ordering injunctive relief. In essence, he assert[ed] that the court should have focused on *his* deliberate indifference, instead of the *institution's historical* indifference." *Id.* at 1542 (alterations and emphasis added). The Eleventh Circuit rejected that approach. *See id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.") (citation omitted; emphasis in original); *see also Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011) ("Though Gonzalez

does not allege any specific involvement by Gaetz in the treatment of his hernia, the warden of Menard is a proper defendant since Gonzalez seeks injunctive relief. . . . If Gonzalez was seeking only damages, the warden's lack of personal involvement would be conclusive, but since Gonzalez also seeks injunctive relief it is irrelevant whether the warden participated in the alleged violations[.]") (alteration added; citations omitted); *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011) ("Because the individual defendants are sued only in their official capacity for injunctive relief and no damages are sought, qualified immunity is not an issue nor need the separate roles of individual defendants be sorted out."); *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988) ("Personal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity."); *accord Parkell v. Danberg*, --- F.3d ----, ----, No. 14-1667, 2016 WL 4375620, at *10 (3d Cir. Aug. 17, 2016); *Colwell*, 763 F.3d at 1070.[6]

[6] The only case cited by the DOC Defendants for the proposition that the named defendants must have been "'informed' or otherwise *actually knew*" that Plaintiff was a substantial risk of serious harm without the requested treatment is *Chatham v. Adcock*, 334 F. App'x 281 (11th Cir. 2009), a damages cases involving defendants sued both in their official and individual capacities, *see Chatham v. Adcock*, No. 3:05-cv-127-JTC, 2007 WL 2904117, at *1 n.1 (N.D. Ga. Sept. 28, 2007) (noting claim for injunctive relief was moot because the plaintiff was no longer incarcerated). It says nothing about an institution's historical indifference in an injunctive-relief case.

Because it is the DOC's (including its medical contractor, Wexford Health Sources) *historical* indifference to Plaintiff's serious medical needs that is at issue, Plaintiff adequately asserts a claim merely by naming individuals who will respond to any injunctive relief. Plaintiff has alleged that, "[a]long with the other named defendants, Acosta will respond to any injunctive relief ordered by the Court." Complaint ¶ 10. The Defendants are thus properly named as such.

Here, the historical indifference to Plaintiff's serious medical needs is plausibly alleged. "DOC officials . . . are aware that Plaintiff is seeking hormone therapy and access to female clothing and grooming standards to treat her Gender Dysphoria; that proper, necessary medical care for Plaintiff's Gender Dysphoria includes allowing her to live as female and providing her with hormone therapy; and that the denial of this needed medical care is causing serious harm to Plaintiff." Complaint ¶ 93. This allegation is eminently plausible and supported by other allegations throughout the Complaint. *See id., e.g.*, ¶ 35 (partial list of "DOC psychiatrists, psychologists, mental-health specialists, and other medical and mental-health officials" who recognize Plaintiff's Gender Dysphoria); ¶ 36 ("Plaintiff repeatedly requested treatment for her Gender Dysphoria. From the first conversations Plaintiff had with DOC officials concerning her need for treatment, Plaintiff made clear both her need for hormone therapy and her need to be able to live as female in all aspects of life—including dressing and grooming (including

growing her hair)—as she did prior to her incarceration. Through to the present day, in nearly all conversations Plaintiff has had with mental-health and medical officials at the DOC in which her transgender status and need for treatment for Gender Dysphoria were discussed, Plaintiff raised both her need for hormone therapy and her need to access female dressing and grooming standards. Plaintiff made repeated requests to mental-health and medical officials that she be provided comprehensive, medically necessary treatment for Gender Dysphoria, including hormone therapy and the ability to dress and groom in accordance with female grooming standards."); ¶ 37 (grievance describing need for hormone therapy; "Without it I consider self-harm and suicide every single day."); ¶ 47 (grievance describing "needless suffering I face every day"); ¶ 49 (Plaintiff attempted to hang herself because of the DOC's refusal to provide her with transition-related care); ¶ 53 (grievance: "No amount of counseling can ever make who I am on this most fundamental level change . . . . .This treatment is literally necessary for me to have a future – there is no possible chance that I could endure the absolute agony of waking up every day to my own body forcing me to hate myself, to the point where I struggle not to hurt or kill myself every day."); ¶ 56 (grievance describing her prior hormone therapy and her continued need for it); ¶ 57 (grievance: "I would like to schedule an appointment to discuss the psychological necessity of myself dressing as a female, and the availability of a pass for this way of dressing. I have,

for the past 6 years consecutively, always dressed in a way that presents me as female in appearance through the use of padded bras, etc. For me, this is a necessary facet of my life, and deeply ingrained in my personality. In the treatment of a trangendered person, this behavio[r] is not only encouraged, but required as a prerequisite for the prescription of hormone replacement therapy [and] sexual reassignment surgery – I have lived my entire life past the age of 13 as female, and it is extremely detrimental to my mental health to forbid this practi[c]e; it is also well documented as a legitimate and proper treatment for a person who is transgender. As I am transgender, I should rec[ei]ve a pass to allow me to continue this behavior for my wellbeing. This is part of who I am – it is not the place of the DoC to try to change the fact that I am transgender. That is not able to be changed."); ¶ 59 (Plaintiff attempted self-castration and told officials, including Defendant Dr. Le, that she did so "because of their failure to provide her with treatment for her Gender Dysphoria"); ¶ 65 (grievance describing needed treatment for Gender Dysphoria—"1) the patient must be able to live and dress as the gender with which they identify[,] 2) hormone therapy, 3) gender confirmation surgeries [and] procedures"—requesting "full" treatment, and stating "my symptoms include severe depression, anxiety, fatigue, and eating disorders. Additionally, other symptoms that can occur are self-injury, rage, addiction, and suicide, in the most severe instances."); ¶ 66 (grievance requesting return of confiscated personal sports

bras and female underwear); ¶ 72 (Plaintiff offered to provide medical records documenting her Gender Dysphoria to Defendant Dieguez, who refused to look at them); ¶ 76 (grievance listing symptoms as "severe depression, fatigue, anxiety, body-image disorders, fear, eating disorders, persecution, a constant state of unease, and self-harming behaviors, including a history of genital mutilation," and stating that she needs "1) the ability to live as the gender I identity as (female) in all aspects of life[;] 2) Hormone therapy (aforementioned)[;] 3) Gender-confirmation Surgery"); ¶ 79 (grievance appeal describing diagnosis and symptoms and stating she needs "1. The ability to live as the gender I identify as (female)[;] 2. Hormone therapy[;] 3. Gender-confirmation Surgery").

Although it is not required to state a claim for the reasons described above, given the facts alleged in the Complaint it is even eminently plausible that Defendant Acosta and Jones themselves "*actually knew*," Motion at 12 (emphasis in original), that Plaintiff was seeking treatment for a serious medical need, that she was not receiving it, and that there was a substantial risk of serious harm to her as a result. But, regardless, Plaintiff has more than plausibly alleged the institutional historical indifference sufficient to plead an Eighth Amendment medical-necessity claim for injunctive relief against the named defendants, including Defendant Acosta.

2. The provision of counseling and the woefully belated provision of hormone therapy do not immunize the DOC Defendants' refusal to provide additional medically necessary treatment.

The DOC Defendants contend that "so long as the prison provides the plaintiff with at least *some* treatment, and that treatment is not 'so cursory as to' in reality 'amount to no treatment at all,'" deliberate indifference is not established. Motion at 15 (quoting *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)). But the "no treatment at all" language merely demonstrates *one* of several ways to *establish* deliberate indifference. *See McElligott*, 182 F.3d at 1255. It does not establish that standard as the floor above which all deliberate-indifference claims must rise. The DOC Defendants appear to believe that if an inmate has a serious medical need and gets "some" treatment—regardless whether the "some" treatment provided adequately addresses the inmate's serious medical need—then there is no problem and any contention otherwise is a simple difference of medical opinion. *See* Motion at 14-16. Yet the DOC Defendants cannot discharge their constitutional obligations by providing some treatment for Gender Dysphoria and calling it a day. The relevant inquiry is not whether "some" care has been provided but whether *constitutionally adequate* care has been provided. *See Estelle*, 429 U.S. at 103-06 (prison officials may not adopt an "easier and less efficacious treatment" that does not adequately address a prisoner's serious medical needs); *Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010) ("a total deprivation of care

is not a necessary condition for finding a constitutional violation"); *Jones v. Muskegon Cty.*, 625 F.3d 935, 944 (6th Cir. 2010) (prison officials may not avoid liability "simply by providing some measure of treatment"); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (Eighth Amendment guarantees medical care "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards").

This rule holds true just as strongly in the context of treatments for Gender Dysphoria. Numerous courts have held that simply providing an inmate some treatment for Gender Dysphoria does not mean that the prison is providing constitutionally adequate care. *See, e.g.*, *Kothmann*, 558 F. App'x at 910 (in reviewing order on motion to dismiss, denying qualified immunity to prison official who allegedly knowingly failed to treat transgender prisoner with medically necessary hormone therapy even though some treatment—counseling and anti-depression and anti-anxiety medications—had been provided); *De'lonta II*, 708 F.3d at 526 ("[J]ust because Appellees have provided De'lonta with *some* treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment.") (emphasis in original); *Fields*, 653 F.3d at 556 ("Although DOC can provide psychotherapy as well as antipsychotics and antidepressants, defendants failed to

present evidence rebutting the testimony that these treatments do nothing to treat the underlying disorder.").

Plaintiff has plausibly alleged that "DOC officials . . . are aware that Plaintiff is seeking hormone therapy and access to female clothing and grooming standards to treat her Gender Dysphoria; that proper, necessary medical care for Plaintiff's Gender Dysphoria includes allowing her to live as female and providing her with hormone therapy; and that the denial of this needed medical care is causing serious harm to Plaintiff." Complaint ¶ 93. She has thus plausibly alleged deliberate indifference to her serious medical needs.

Remarkably, the DOC Defendants rely on language from a Tenth Circuit opinion stating that "'the Department of Corrections made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff's medical needs.'" Motion at 16 (quoting *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986). It is quite a bold assertion to suggest that an "informed judgment" was made concerning Plaintiff's care when the DOC so assiduously ignored and denied her repeated requests for treatment over more than two years, yet now—after the initiation of litigation—suddenly concedes that she is in fact transgender and that she "needs" hormone therapy. *See* Motion at 11. In fact, the DOC's "freeze-frame" policy specifically *prohibits* any such informed judgment, *see* Complaint ¶ 86 ("Under this 'freeze-frame' policy, the medical care of inmates with Gender

Dysphoria is determined not by their current medical needs but rather by specific treatment they received or did not receive in the past, and such inmates are denied certain treatments despite the medical need for such treatments."). Moreover, in their own motion to dismiss, the doctor defendants—Drs. Le and Dieguez—deny having any involvement in the decision to deny Plaintiff access to female clothing and grooming standards, noting that clothing and grooming standards are DOC policy. Doc. 22 at 9, 11-12. All of these facts make plain the lack of any informed judgment with respect to the denial of the needed care.

The DOC Defendants' citation to *Barnhill v. Cheery*, No. 8:06-cv-922, 2008 WL 759322 (M.D. Fla. Mar. 20, 2008), *cited in* Motion at 17, 19, is of no help. There, on a motion for *summary judgment*, the court deferred to a DOC doctor's statement that the plaintiff's "'mental status and adaptive functioning appears to be adequate in his present environment with his current mental health treatment plan,'" noting that "[i]n particular, Drs. Roberts and Do have noted that the plaintiff's health records 'do not show any attempts at suicide, castration, or other self mutilation since his most recent incarceration with the Department of Corrections.'" *Barnhill*, 2008 WL 759322, at *12 (alteration omitted). Of course, here, the posture is a motion to dismiss where the Plaintiff's allegations must be accepted as true, and those allegations include that Plaintiff is suffering distress because of the denial of medically necessary treatment and has attempted both

suicide and castration while incarcerated. Complaint ¶¶ 37, 47, 49, 53, 56, 57, 59, 61, 65, 66, 76, 79.[7]

3. The DOC Defendants' purported security concerns cannot justify dismissal of the complaint.

Without any analysis of how security interests interact with Eighth Amendment medical-necessity claims, the DOC Defendants cite security concerns to justify not providing Plaintiff with access to female clothing and grooming standards. Motion at 11 n.3, 12, 20. Of the three cases they cite, only one references access to female clothing or grooming standards in a discussion of an Eighth Amendment medical-necessity claim.[8] And that case, which involved a

[7] And it is peculiar for the DOC Defendants to rely on a case suggesting that counseling was sufficient for the transgender plaintiff on the facts of that case when they now concede in this case that Plaintiff "needs" hormone therapy. Motion at 11.

[8] *Id.* at 11 n.3 (citing *Knight v. Thompson*, 797 F.3d 934, 944-45 (11th Cir. 2015) (claim under Religious Land Use and Institutionalized Persons Act ("RLUIPA")); *Smith*, 2010 WL 9488822, at *12-13 (Equal Protection Claim); and *Arnold*, 2014 WL 7345755, at *6-7 (Eighth Amendment medical-necessity claim).

In *Knight*, the Eleventh Circuit examined a hair-length policy in the context of a least-restrictive-means analysis under RLUIPA—not an Eighth Amendment medical-necessity analysis—and relied on district-court factual findings *following a bench trial*. 797 F.3d at 947. The factual finding made by the district court based on witness testimony in response to the male plaintiff's complaint about different grooming standards for female inmates was that "men pose greater safety and security risks than women in prison populations." *Id.* There has been no fact development here as to whether that is the case or whether transgender women like Plaintiff pose a greater security risk than other women in prison.

request for make-up and hormones, was decided on a motion for summary judgment, not a motion to dismiss. *Arnold*, 2014 WL 7345755, at *1, 5.

The DOC Defendants' position appears to be that their assertions about security should be given determinative weight at the motion-to-dismiss stage, but their security arguments cannot override Plaintiff's medical needs without evidentiary proof that their asserted concerns are valid and that any alternate treatment plan adequately meets her serious medical needs. *See Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1194 (N.D. Cal. 2015) (in order granting preliminary injunction and directing prison officials to provide gender-confirming surgery to transgender inmate, stating, "The Court is not persuaded that CDCR's safety and security concerns override Norsworthy's interest in receiving constitutionally adequate care."), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015); *Fields v. Smith*, 712 F. Supp. 2d 830, 868 (E.D. Wisc. 2010) (holding that the proffered security justifications in defense of a ban on hormone therapy and surgical treatment for prisoners with gender identity disorder were "not reasonable," and noting that the defendant's own expert had admitted that they were "an incredible stretch"), *aff'd*, 653 F.3d 550 (7th Cir. 2010); *Konitzer v. Frank*, 711 F. Supp. 2d 874, 910 (E.D. Wis. 2010) (denying defense summary-judgment motion concerning Eighth Amendment claim for access to female clothing and grooming standards; rejecting defense's security concerns). If alleged

security reasons to deny medically necessary care could justify dismissal of an Eighth Amendment claim like that alleged here, the defendants in any case could assert security reasons for denying treatment in a motion to dismiss, and that would end the case without the plaintiff having any opportunity to test the factual basis for the assertion. *Cf. Holt v. Hobbs*, 135 S. Ct. 853 (2015) (prison's security argument found not credible after evidentiary hearing); *Walker v. City of Calhoun, Ga.*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016) (rejecting defendant's concerns that modifying its bail system would "result in the release of individuals who pose a risk or danger to the community," stating: "Any difficulties that Defendant may suffer if the Court grants injunctive relief are not so significant as to outweigh the important constitutional rights at issue"). A wide variety of necessary medical care implicates security—wheelchairs, care requiring transport to outside facilities, in-patient surgical stays—but that does not mean prison officials can immunize the denial of such care from all judicial review by reciting security concerns at the motion-to-dismiss stage.

Finally, to the extent the DOC Defendants blame the existence of security issues on the fact that Plaintiff is in a male facility, the solution is obvious—place her in a women's facility. *See* 28 C.F.R. § 115.42(c) ("In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider

on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems."); *cf. also* 28 C.F.R. § 115.42(d) ("Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate."); 28 C.F.R. § 115.42(e) ("A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.").

CONCLUSION

For these reasons, the DOC Defendants' motion to dismiss, Doc. 21, should be denied.

Rule 7.1(F) Certificate on Word Count: This document contains 7,484 words, including the headings, footnotes, and quotations, and excluding the case style, signature block, and any certificate of service.

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Respectfully submitted,

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