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 REPLY IN SUPPORT OF HER MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Reiyn Keohane ("Plaintiff"), by and through the undersigned counsel, with leave of Court hereby files this consolidated Reply in support of her Motion for Preliminary Injunction, Doc. 3 ("Motion"), and states as follows:

INTRODUCTION

After Plaintiff's Motion was filed, Defendants began providing her with hormone therapy. *See* Hernandez Decl. (Doc. 24-1) at 1-2 ¶ 5. But Defendants continue to deprive Plaintiff of other medically necessary care for Gender Dysphoria that she seeks in her Motion—specifically, access to female clothing and grooming standards. Defendants wrongly contend that the fact that they are providing some of the medically necessary care sought by Plaintiff means that her Motion must be denied. Doc. 23 (Defendants Jones and Acosta's Response to the Motion ("DOC Defendants' Response")) at 20; *see also* Doc. 24 (Defendants Le and Dieguez's Response to the Motion ("Doctor Defendants' Response")) at 11-12. Plaintiff continues to suffer irreparable harm from the denial of access to female clothing and grooming standards, which prevents her from dressing and living as a woman, a critical part of the accepted medical protocols for Gender Dysphoria. The provision of hormone therapy, by itself, does not resolve her Gender Dysphoria, and she remains in distress and at significant risk of serious harm. The denial of this medically necessary care based on DOC policy—not the medical judgment of prison doctors—constitutes deliberate indifference to a

serious medical need. This harm will continue unless injunctive relief is issued by this Court.

LEGAL ARGUMENT

I. Plaintiff continues to suffer irreparable harm.

Contrary to Defendants' argument, Plaintiff's Motion was not limited to hormone therapy. *See* Motion at 2-3 ("Plaintiff moves for a preliminary injunction requiring the DOC to provide her with hormone therapy *and to permit her to wear clothing approved by the DOC for women, growing her hair to a length allowed for female inmates, and otherwise following grooming standards approved by the DOC for women.*") (emphasis added). Plaintiff's Motion makes clear that her serious medical need includes not only hormone therapy but also access to female clothing and grooming standards, and that denial of each of those causes her serious harm. *See id.* at, *e.g.*, 7 (citing Keohane Decl. (Doc. 3-1) ¶ 10), 12 (citing Keohane Decl. (Doc. 3-1) ¶ 29), 14-15 (citing Keohane Decl. (Doc. 3-1) ¶ 38), 16 (citing Keohane Decl. (Doc. 3-1) ¶ 41)), 18 (citing Keohane Decl. (Doc. 3-1) ¶ 45, Combined Grievances (Doc. 3-6) at 9, 12, 14, 16)). The evidence submitted by Plaintiff includes a Discharge Summary after she attempted to hang herself, and the notes, signed by Defendant Dr. Le, among others, indicate that Plaintiff "continues to argue need for hormone therapy, [and the] ability to dress as female, etc." Doc. 3-10. Additional medical records indicate that Plaintiff engaged in self-

harm in response to having bras confiscated. *See* Healthcare Note dated 1/8/15 (reporting Plaintiff as saying, "I'm upset because officer asked me to take off my bras, I cut my testicle."), attached as **Exhibit 1**; *see also* Emergency Room Record (Doc. 3-11) (describing injuries from the incident).

Since the provision of hormone therapy by the DOC, Plaintiff has been evaluated by a psychologist, Dr. David Baker-Hargrove, whose report confirms her continuing serious medical need for access to female clothing and grooming standards. *See* Baker-Hargrove Report (Doc. 33-2), attached as **Exhibit 2**. The report states that providing Plaintiff hormone therapy, by itself, does not address her serious medical need and that denying her access to female clothing and grooming standards, which prevents her from living consistently with her gender identity, is causing her serious distress and places her at risk of additional self-harm. *See id.* at 10-12. Indeed, Dr. Baker-Hargrove evaluated Plaintiff shortly after the DOC forcibly cut her hair, causing her significant distress. *See id.* at 9; *see also* Keohane Decl. (Doc. 33-3) ¶ 7 ("I very strongly considered many ways to hurt or kill myself."), attached as **Exhibit 3**. Moreover, Dr. Baker-Hargrove observed that while Plaintiff is not currently suicidal, that is a product of her hope that this Court will grant her the relief requested. *See* Baker-Hargrove Report (Doc. 33-2) at 11. The longer Plaintiff is denied this medically necessary treatment, the greater the risk of self-harm. *See id.*

Finally, Plaintiff's declaration vividly describes the distress she experiences every day due to the DOC's refusal to allow her to wear female undergarments, grow her hair, and otherwise groom as a woman, which did not end with the initiation of hormone therapy. *See* Keohane Decl. (Doc. 33-3).

II. Plaintiff is likely to succeed on the merits of her Eighth Amendment medical-necessity claim.

A. Plaintiff has established that she has a serious medical need for access to female clothing and grooming standards.

Defendants argue that the objective prong of Plaintiff's Eighth Amendment claim is not met because access to clothing and grooming standards is not a serious medical need. DOC Defendants' Response at 20-25; Doctor Defendants' Response at 11. Contrary to Defendants' suggestion, this issue is not a matter of mere "comfort" or "personal desire" to wear certain clothes or hairstyles. DOC Defendants' Response at 2, 31. In none of the cases cited by Defendants in their analysis of the objective prong did the courts evaluate whether access to female clothing or grooming standards for prisoners with Gender Dysphoria constituted medically necessary treatment.[1] Indeed, many of the cases did not even involve

[1] 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 discussion of an objectively serious medical need. *See* DOC Defendants' Response at 19 11 n.3 (citing *Arnold v. Wilson*, No. 1:13-cv-900, 2014 WL 7345755 (E.D. Va. Dec. 23, 2014)).

transgender prisoners,[2] and the ones that did either addressed clothing and grooming claims outside of the Eighth Amendment—for example, First Amendment or Equal Protection claims[3]—or Eighth Amendment claims where clothing and grooming standards were not part of medical-necessity analyses.[4] Here, however, the issue is the denial of medically necessary care. The accepted protocols for treatment of Gender Dysphoria make clear the importance of social transition and being able to live in accordance with one's gender identity. WPATH Standards of Care (Doc. 3-16) at 171 (PDF p. 7). To understand that this is not

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[2] *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).

[3] *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-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).

[4] *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 the 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. Finally, in *DeBlasio v. Johnson*, 128 F. Supp. 2d 315 (E.D. Va. 2000), the Eighth Amendment claim was not even about medical care at all. Instead, the plaintiff contended that the hair-length policy violated the Eighth Amendment "because the severity of the repercussions an inmate faces for noncompliance are extreme." *Id.* at 325.

simply a style preference, one merely has to imagine how any man would feel if forced to wear ladies' underpants and bras or how women would feel if forced to wear men's boxers and close cropped hair. As Dr. Baker Hargrove's report confirms, access to female clothing and grooming standards in order to be able to live as a woman is medically necessary treatment for Plaintiff. *See* Baker-Hargrove Report (Doc. 33-2) at 2, 10, 12.

The Doctor Defendants argue that Plaintiff cites no case establishing the constitutional right to access female clothing and grooming standards in a men's prison. Doctor Defendants' Response at 11-12; *see also* DOC Defendants' Response at 22. In *Konitzer v. Frank*, 711 F. Supp. 2d 874, 908 (E.D. Wis. 2010), which involved a transgender prisoner's medical-necessity claim for access to female clothing and grooming standards, the court denied the prison's motion for summary judgment, holding that "a reasonable jury could find that the defendants were deliberately indifferent to [the inmate's] serious medical need when they failed to provide . . . the real-life experience . . . ."[5] *See also Soneeya v. Spencer*, 851 F. Supp. 2d 228, 246, 248 (D. Mass. 2012) (recognizing transgender inmate's medical need for female undergarments and female canteen items such as cosmetics). In any case, the Doctor Defendants mischaracterize the nature of the claimed right at issue: it is the right to medically necessary care for a serious

[5] The "real-life experience" is a term used to refer to the social-transition component of treatment for Gender Dysphoria.

medical condition. It does not matter whether another court has held that the particular medical treatment sought by Plaintiff here was or was not deemed medically necessary *for someone else*. Plaintiff has offered evidence demonstrating that access to female clothing and grooming standards are medically necessary *for her*. Keohane Decl. (Doc. 3-1) ¶¶ 4, 10, 23, 29, 30, 38, 41; Keohane Decl. (Doc. 33-3) ¶¶ 2, 4-9, 11.[6] Defendants have cited no cases holding as a matter of law that access to female clothing or grooming standards is not medically necessary for treatment of an inmate's Gender Dysphoria.

Finally, the Doctor Defendants argue that Plaintiff does not allege any specific hair length at which female inmates can grow their hair, Doc. 24 at 9 n.3, and they cite the regulation governing hair length for male inmates, *id.* at 9 (citing

[6] The DOC Defendants attempt to dispute this by pointing to a photo in a news story in which Plaintiff did not have long hair. DOC Defendants' Response at 29 (citing Doc. 23-3). As Plaintiff explains, she was told she needed to lose weight to get on hormones, and she was so uncomfortable with her body that she wondered if it could be because of her weight and wondered if she lost weight, she would feel okay about her body. *See* Keohane Decl. (Doc. 33-3) ¶ 10. So she wore gender neutral clothes, got a short haircut, and embarked on a serious weight-loss effort. *See id.* But within a few months, after losing about 70 pounds, it was clear to her that weight was not the issue, and she was certain about moving forward with her transition. *See id.* The referenced picture was taken, she believes, several months later, when she was in the process of growing it back. *See id.* It was about the same length as when Plaintiff's hair was forcibly cut last month, *see id.*, which makes confusing the DOC Defendants assertion that her hair in the cited picture was "basically" in compliance with the hair-length policy, DOC Defendants' Response at 29. While in the Lee County Jail prior to entering DOC custody, Plaintiff had no intention of ever cutting her hair, nor did she do so. *See* Keohane Decl. (Doc. 33-3) ¶ 10. Upon arrival in prison, her hair was to her shoulders. *See id.* She has never cut her hair in DOC custody without being ordered to do so. *See id.* ¶ 9.

Fla. Admin. Code r. 33-602.101(4) ("Male inmates shall have their hair cut short to medium uniform length at all times with no part of the ear or collar covered.")). But there does not appear to be any regulation limiting women's hair length. In fact, photos of female inmates on the DOC's website show women wearing a variety of lengths, including many covering both the ears and collar. *See* Sample Profiles of Female Inmates (Doc. 33-4), attached as **Exhibit 4**.

Plaintiff has established that she has a serious medical need for access to female clothing and grooming standards to live consistently with her gender identity in accordance with established medical protocols for treatment of Gender Dysphoria. Defendants have offered neither facts nor law refuting that.

B. Plaintiff has established deliberate indifference.

The DOC Defendants suggest the subjective prong of her Eighth Amendment claim is not met because courts cannot second-guess the judgment of prison medical staff. DOC Defendants' Response at 13, 16-18. But here, the denial of access to female clothing and grooming standards was not based on the judgment of prison medical staff. Rather, it was based on prison policies concerning clothing and grooming. It is simply not the case that the "prison's medical providers deem[ed] [access to female clothing and grooming standards] unnecessary," as the DOC Defendants appear to suggest. DOC Defendants' Response at 18. Indeed, the Defendant prison doctors themselves said they had

nothing to do with Plaintiff's desire to access female clothing and grooming standards and do not have the authority to grant exceptions to these policies. Doctor Defendants' Response at 10.[7]

Defendants provide no evidence that any prison medical staff performed an evaluation of Plaintiff's need for access to female clothing and grooming standards and concluded that she does not have a medical need for that. The Hernandez Declaration states only that the DOC is providing counseling and hormone therapy as long as it is deemed medically necessary. *See* Doc. 24-1 ¶ 5. Hernandez's silence about clothing and grooming is telling. As in *Kothmann v. Rosario*, 558 F. App'x 907 (11th Cir. 2014), the decision to deny the requested treatment here was not made by medical professionals based on an assessment of Plaintiff's individualized medical needs; it was based on a blanket prison policy. That constitutes deliberate indifference. *See* Motion at 26-29.[8]

[7] The Doctor Defendants argue that for this reason—and the fact that Dr. Le no longer treats Plaintiff because she was transferred to another facility and because he is retired—an injunction against the doctors is not needed to prevent irreparable harm to plaintiff. Doctor Defendants' Response at 10, 13-14. Given Dr. Le's purported retirement, Plaintiff agrees that there is no need for the injunction to extend to him, but Plaintiff cannot obtain full relief if the injunction does not extend to medical personnel. Without the recommendation of medical personnel for the requested treatment and thus the need for an exemption to DOC policy, there would be no basis for the DOC to grant such an exemption.

[8] Contrary to the DOC Defendants' suggestion, Doc. 23 at 16-17, Plaintiff does not need to establish that her gender dysphoria is "completely untreated." She must only show that the treatment she is receiving is not constitutionally adequate. *See*

III. The DOC Defendants' asserted security concerns do not permit the denial of Plaintiff's medically necessary treatment.

Relying on the DOC's Bureau Chief of Security Operations, Carl Wesley Kirkland, Jr., the DOC Defendants claim numerous security justifications that, they contend, "outweigh" Plaintiff's "desire" to access female clothing and grooming standards. DOC Defendants' Response at 29-32.

Regarding hair, they cite security concerns about signaling gang association, the ability to hide contraband, and the ease of altering one's appearance upon escape. *Id.* at 30 (citing Kirkland Decl. (Doc. 23-2) ¶¶ 4-6). None of these contentions explain why female inmates are permitted to grow their hair longer, apparently without restriction. *See* Sample Profiles of Female Inmates (Doc. 33-4); *see also Konitzer*, 711 F. Supp. 2d at 911 (rejecting asserted security rationale for denying access to makeup, noting that makeup is permitted at women's prisons).

The DOC Defendants also claim interests in "uniformity" and avoiding "preferential treatment." Doc. 23 at 30-31. It is not clear how this is furthered by denying Plaintiff the ability to wear female undergarments, which are by their nature worn *under the clothes*. And it is hard to credit the suggestion that men will feel jealous that Plaintiff is getting preferential treatment if they are not provided women's underwear as she is. Moreover, Plaintiff is a transgender woman, and

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Motion at 24-25; *accord* Plaintiff's Response to the DOC Defendants' Motion to Dismiss (Doc. 25) at 22-24.

many at Everglades CI, including staff and inmates, know it. *See* Keohane Decl. (Doc. 33-3) ¶ 12.

Defendants have not demonstrated that allowing *Plaintiff*—a transgender woman who is receiving hormone therapy that will further feminize her appearance—to wear underwear, hair, and makeup that female inmates are permitted to wear, would cause the security problems they assert. *See Soneeya*, 851 F. Supp. 2d at 251 (in rejecting security-based defenses to denial of treatment of Gender Dysphoria, court explained that there must be "a good faith security review, which takes into account [the inmate's] individual history of incarceration and present circumstances").[9] And Defendants have not demonstrated that denying Plaintiff access to this medically necessary care is the *only* way to avoid the security concerns they assert. For example, Kirkland Declaration points to the need to quickly identify an inmate in prison by comparing him to his photo I.D. Doc. 23-2 ¶ 8. This security need could be addressed by allowing Plaintiff to grow her

[9] The Supreme Court has explicitly rejected the application of the deferential *Turner v. Safley*, 428 U.S. 78 (1987), "reasonably related" standard to Eighth Amendment claims. *Johnson v. California*, 543 U.S. 499, 511 (2005). In explaining its reasoning, the Court cited Justice (then Judge) Kennedy's decision in *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979), which stated that "[m]echanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary."

hair and get a new photo I.D. and keep her hair at the same length.[10] Depriving Plaintiff of medically needed care is not the only solution. One obvious alternative to denying Plaintiff medically necessary care that would address all of Defendants' asserted security concerns would be to transfer her to a women's prison where she would be in compliance with clothing and grooming standards. There is nothing preventing them from doing that. *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.").

What a prison cannot do is simply deny an inmate with a serious medical condition medically necessary care. Security concerns do not absolve a prison from the obligation to provide constitutionally adequate care to an inmate. *See, e.g.*, *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1194 (N.D. Cal. 2015) (in order

[10] And, as with some of the other security issues raised, it does not explain why prisoners at women's prisons are permitted to grow their hair.

granting preliminary injunction and directing prison officials to provide gender-confirming surgery to transgender inmate, court rejected argument that security concerns "override [inmate's] interest in receiving constitutionally adequate care."), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015).[11] *See* Reply Brief of Appellant Florida Department of Corrections, *Watkins v. Sec'y, Fla. Dep't of Corrs.*, No. 15-15543, at 10 (11th Cir. May 12, 2016) (contending that security concerns justify denying individualized religious diets, distinguishing therapeutic diets, "which are inherently different"; "Because therapeutic diets are medically necessary, deprivation of such diets is prohibited by the Eighth Amendment."), attached as **Exhibit 5**.

CONCLUSION

Plaintiff has demonstrated a serious medical need for access to female clothing and grooming standards, which has been denied based on prison policy, not the judgment of prison medical staff. And she has demonstrated that she is suffering serious irreparable harm as a result. Defendants have offered no facts or law to refute that. And they have failed to demonstrate that they are unable to both

[11] The DOC Defendants contend that "Plaintiff must show that the alleged injury of complying with FDOC's hair-length and clothing regulations outweighs the harm to FDOC if FDOC is required to change its policies for one prisoner." *Id.* at 29-30. That is wrong for the reasons discussed above. And if that were the standard, all of the cases invalidating blanket bans of medical care were necessarily wrongly decided.

provide Plaintiff with the medically necessary care she seeks and maintain prison security.

Plaintiff respectfully requests that her Motion for Preliminary Injunction, Doc. 3, be granted.

Rule 7.1(F) Certificate on Word Count: The Court's order granting leave to file this reply permitted Plaintiff to file of a consolidated reply of no more than 15 pages.

Date: October 6, 2016 Respectfully submitted,

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