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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO (a/k/a MASON EDMO),

Plaintiff,

v.

IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity; JEFF ZMUDA, in his official capacity; HOWARD KEITH YORDY, in his official and individual capacities; CORIZON, INC.; SCOTT ELIASON; MURRAY YOUNG; RICHARD CRAIG; RONA SIEGERT; CATHERINE WHINNERY; and DOES 1-15;

Defendants.

Case No.: 1:17-cv-00151-BLW

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION [DKT. 62]

Complaint Filed:	April 6, 2017
Discovery Cut-Off:	None Set
Motion Cut-Off:	None Set
Trial Date:	None Set

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INTRODUCTION

All parties to this litigation agree that Plaintiff Adree Edmo has gender dysphoria, a medical condition constituting a serious medical need under the Eighth Amendment. By definition, gender dysphoria is characterized by clinically significant distress and/or impairment of functioning. Yet, Defendants refuse to provide Ms. Edmo available and well-established treatment demonstrated to alleviate "the severe and unremitting pain" associated with the medical condition of gender dysphoria. Ettner Decl. ¶ 35 (ECF 62-1). Denial of necessary treatment for a serious medical condition is cruel and unusual punishment violating the Eighth Amendment. Defendants' arguments for denying Ms. Edmo the recognized treatment for her condition are based on contrived and post-hoc justifications that are, at their core, based on outdated stereotypes and prejudices that the mainstream medical community has repeatedly rejected. Defendants also substantially mischaracterize the factual record in this case—particularly regarding their own policies and discipline of Ms. Edmo—to attempt to minimize the harm they have inflicted upon her. As Plaintiff will demonstrate during the evidentiary hearing, Defendants have deliberately refused to provide her appropriate and necessary medical treatment, have compounded her distress by punishing her for behaviors related to gender dysphoria and expressing her gender identity, and continue to subject her to needless pain and suffering by failing to treat her serious medical condition.

STATEMENT OF FACTS

Defendants' Refusal To Provide Necessary Treatment to Ms. Edmo

Defendants diagnosed Ms. Edmo with gender dysphoria in July 2012, and, in September 2012, began providing her with cross-sex hormone therapy, one of the medically recognized treatments for gender dysphoria. Edmo Decl. ¶ 12 (ECF 62-2); Exhibit ("Exh.") 2.[1] While hormone therapy was a partial treatment for Ms. Edmo's gender dysphoria, she continued to experience clinically significant distress as a result of severe gender dysphoria, and, particularly, related to her male genitalia.[2] Ettner

[1] Unless otherwise noted, all exhibit references are to exhibits attached to the Declaration of Lori Rifkin in Support of Plaintiff's Reply, filed herewith.

[2] Plaintiff also claims that Defendants were deliberately indifferent to her serious medical needs by providing inadequate hormone therapy, but that claim is not the focus of her motion for preliminary injunction, which seeks access to surgery.

Decl. ¶ 61 (ECF 62-1). As early as February 2014, Ms. Edmo requested sex reassignment surgery to treat her ongoing medical need, but this request—as with each of her subsequent requests for surgery—was denied. Exh. 3. On September 29, 2015, Ms. Edmo attempted self-castration for the first time. Exh. 4; Edmo Decl. ¶ 31 (ECF 62-2). In response, Defendants placed her on suicide watch, and instructed her to "use coping skills to manage distress related to dysphoria" and "work on improving self-esteem." Exh. 5.

Ms. Edmo's medical records for April 20, 2016 reflect Defendants' first and only consideration of sex reassignment surgery for her since she entered IDOC custody in 2012. Exh. 6 at 1. Corizon psychiatrist Dr. Eliason completed this two-paragraph "assessment," concluding Ms. Edmo "does not meet criteria for medical necessity for sex reassignment surgery" and "the combination of hormonal treatment and supportive counseling is sufficient for her gender dysphoria." *Id*. Dr. Eliason further noted three examples that

> [C]ould meet medical necessity: 1) Congenital malformations or ambiguous genitalia would likely require sexual reassignment or reparative surgery. 2) Severe and devastating dysphoria that is primarily due to genitals could potentially meet criteria for gender reassignment surgery as well. 3) Some type of medical problem in which endogenous sexual hormones were causing severe physiological damage.

Id. Dr. Eliason found Ms. Edmo "does not meet any of those above criteria." *Id.*

These examples provided by Dr. Eliason do not accord with any written standards of care for treatment of gender dysphoria, and, in deposition, Dr. Eliason could not recall the basis for his use of these examples. Eliason Dep. 118:8-119:23. Plaintiff's expert Dr. Gorton explained that "Dr. Eliason's examples of 'medical necessity' are far afield from the medical standards," and the "standard for surgery is not 'severe and devastating gender dysphoria that is primarily due to the genitals,' as Dr. Eliason contends . . . the standard is 'persistent, well documented gender dysphoria,' among other criteria." Gorton Decl. at ¶ 87 (ECF 62-1). Dr. Gorton concluded "Dr. Eliason's standard for surgery is wholly unsupported." *Id*. However, even under Dr. Eliason's gross misunderstanding of the medical criteria for surgery, Dr. Eliason admitted that attempted self-castration could meet the second scenario of "severe and devastating dysphoria," and was unable to provide any other examples of situations

meeting severe and devastating dysphoria. Eliason Dep. 119:8-120:2.

Despite Ms. Edmo's report of continuing severe distress resulting from gender dysphoria, and her attempt to auto-castrate, Dr. Eliason made no changes to Ms. Edmo's treatment plan. Exh. 6 at 1; Eliason Dep. 120:3-9. Subsequently, Dr. Eliason met with Ms. Edmo on May 18, 2016 "to explain that the decision regarding SRS has not yet been determined," and "it has been determined that we will form a committee of physicians to determine the medical necessity of SRS" that would occur within the next few weeks to months. Exh. 6 at 2. However, this committee never met, and Ms. Edmo's request for surgery was never re-visited after April 20, 2016. Eliason Dep. 122:4-25, 124:6-18.

Since Dr. Eliason's "assessment" of Ms. Edmo for surgery in April 2016, Ms. Edmo has continued to experience acute distress linked to gender dysphoria, resulting in another attempt to castrate herself nine months later, on December 31, 2016. Exh. 7. Even after Ms. Edmo's second attempt at self-surgery, Defendants refused to re-evaluate her for surgery, dismissing Ms. Edmo as being "confused about her gender . . . confusion happens a couple of times a year." Exh. 8. Until Ms. Edmo moved for a preliminary injunction, Defendants refused to provide her with any other evaluation for surgery to treat gender dysphoria.

Defendants' New Justifications For Refusing Surgery to Treat Ms. Edmo's Gender Dysphoria

Now, following Ms. Edmo's motion, Defendants have suddenly "discovered" a host of purported reasons that she cannot have surgery, none of which formed the basis of any of Defendants' treatment decisions for Ms. Edmo in the six years prior to her motion. Primarily, these newly-formed rationalizations for denying surgery imply that Ms. Edmo does not "deserve" surgery for a variety of reasons, including: 1) her attempts at self-surgery, and, more recently, cutting her arm in an attempt to avoid additional attempts to auto-castrate, demonstrate that she has not developed "appropriate coping mechanisms" for addressing the distress resulting from the severe gender dysphoria Defendants refuse to adequately treat; 2) Ms. Edmo has received various disciplinary violations, and therefore has not "appropriately adjusted" to incarceration; 3) Ms. Edmo has not "properly" engaged in psychotherapy treatment opportunities Defendants have purportedly provided to her, largely for diagnoses Defendants have never actually made for Ms. Edmo in the six years she has been in their care; and 4) although

there is no dispute that Ms. Edmo has persistently presented herself as feminine in her six years in IDOC custody, even despite repeated discipline, threats, and harassment for doing so, and all parties agree that Ms. Edmo authentically identifies as female, Defendants' experts "have questions" about her presentation of gender identity prior to incarceration.

These are not medically accepted criteria for withholding treatment for the medical condition of gender dysphoria. Defendants' experts acknowledge that there is no serious dispute that surgery is an effective treatment for gender dysphoria, and that surgery must be available to incarcerated persons for whom it is medically indicated. Just as chemotherapy to treat cancer, insulin to treat diabetes, or psychotropic medication to treat schizophrenia, cannot be withheld from a prisoner based on purported "maladaptive behaviors" such as "co-dependency, disobedient behaviors, and sexually acting-out," ECF 99 at 3, Defendants may not deny Ms. Edmo surgery to treat her medical condition based on the argument that she has not adequately conformed her behavior to their expectations or demands. Defendants' claims that Ms. Edmo "must develop healthy tools to manage her . . . GD" in the absence of surgery, *id.* at 10, are akin to demanding that cancer patients must stop their tumors from growing while denying them chemotherapy or radiation.

Furthermore, contrary to Defendants' representations, Ms. Edmo has regularly participated in medical and mental health treatment during her incarceration. She has been fully compliant with prescribed hormone treatment since 2012 as well as being fully compliant with prescribed medication for depression. Ms. Edmo attends the gender dysphoria treatment group and has generally done so since 2013, with lapses due to scheduling conflicts and disciplinary charges. Edmo Dep. 122:23-123:4. Ms. Edmo also accepted referrals for other recommended groups, including Depression, Anxiety, Mindfulness, PTSD, and Healthy Relationship groups, although she was on the waitlist for several of these groups for extended periods of time and was unable to attend others due to housing transfers.

Defendants' new claim that Ms. Edmo has "significant uncontrolled mental health concerns" including PTSD and borderline personality disorder that she must address prior to qualifying for surgery for gender dysphoria, is belied by the fact that, in the six years of Ms. Edmo's incarceration, neither IDOC nor Corizon providers have ever diagnosed her with PTSD or borderline personality

disorder, nor have they ever found her to be psychotic, unable to appreciate reality, or incapable of providing informed consent for medical treatment due to mental illness. Nor have Defendants offered any evidence to support such statements as "[t]hese underlying mental health issues have complicated Ms. Edmo's resolution of her GD." ECF 99 at 9. This statement in fact demonstrates Defendants' lack of understanding of the medical condition of gender dysphoria and the treatments for this medical condition; there is no evidence establishing that treatment of depression, anxiety, PTSD, or borderline personality disorder alleviates gender dysphoria, and, indeed, Ms. Edmo is already on the highest dose of antidepressants. The widely-accepted standard of care, set forth by the World Professional Association for Transgender Health (WPATH), is clear that psychotherapy is not a substitute for surgery to treat gender dysphoria. Ettner Decl. ¶ 44 (ECF 62-1). Defendants' suggestion that Ms. Edmo's gender dysphoria will be alleviated by something other than surgery (despite Defendants' simultaneous statement that IDOC has already provided her with the other types of treatment recommended by WPATH, ECF 99 at 7, is simply unsupported by medically accepted evidence. Further, Defendants' contention that Ms. Edmo has such significant uncontrolled mental health concerns that she cannot have surgery is directly contradicted by their simultaneous assertion that she is "functional and is not exhibiting symptoms of a person whose condition is so extreme that a mandatory injunction is required." ECF 99 at 17.

With respect to Defendants' claims that Ms. Edmo is somehow ineligible for surgery because her pre-incarceration medical records allegedly do not corroborate her statements that she presented as female prior to 2012, there is no evidence that Dr. Eliason or any other IDOC or Corizon treatment provider based denial of surgery on these records. *See* Eliason Dep. 110:8-15. Indeed, Defendants subpoenaed these records after Ms. Edmo moved for a preliminary injunction and there is no evidence that they ever requested or obtained them in the prior six years of treating Ms. Edmo.

Defendants' Refusal to Provide Surgery is Consistent with Their Training

In April 2016, around the same time he found surgery was not medically necessary for Ms. Edmo, Dr. Eliason organized a gender dysphoria training for IDOC and Corizon staff led by an outside consultant, Dr. Steven Levine. Eliason Dep. 35:24-36:12; Menard Dep. 56:22-57:8; Exhs. 9, 10. Dr.

Levine's training included information that has been repudiated by the professional medical community and contradicts the WPATH Standards of Care, as well as the positions of the American Medical Association, the American Psychiatric Association, the American Psychological Association, the World Health Organization, the Endocrine Society, the National Commission on Correctional Health Care, and other professional organizations endorsing these standards.[3] For example:

- SRS is not conceived as lifesaving as is repairing a potentially leaking aortic aneurysm but as life enhancing as is providing augmentation for women distressed about their small breasts.
- Most pre-operative trans females have learned to ignore their penis most of the time even though its functions remind them of their maleness.
- It is difficult to quantify or compare this type of pain. Is it exaggerated by lawyers? By inmates? Or by lawyers counseling their clients how to speak about it?
- To date, most GD inmates in American prisons have not had any major complications other than frustration and the sense that the DOC does not care about their suffering.

Exh. 10 at 43-45.

Corizon providers, including Dr. Eliason, then incorporated this information from Dr. Levine's presentation into internal Corizon training materials regarding gender dysphoria. Exh. 11 at 1-2, 28-29. Consistent with the approach espoused by this training—which contradicts the established standard of care and is not based on any peer-reviewed studies or evidence—neither Dr. Eliason nor any other health care provider has ever found surgery medically necessary to treat a patient with gender dysphoria in IDOC. Eliason Dep. 43:13-22; Dowell Dep. 59:20-60:9; Menard Dep. 39:7-15. Moreover, Corizon admits it has declined to adopt any written policy or guidelines governing the provision of surgery to treat gender dysphoria or the standards providers should apply in assessing the medical necessity of such surgery for a patient. ECF 100 at 14; Menard Dep. 79:8-23. In fact, the only guidelines issued by Corizon to assist its providers in treating gender dysphoria do not even mention surgery as a treatment option. Menard Dep. 38:10-39:6; Exh. 12.

[3] A federal court also afforded Dr. Levine's expert opinions regarding surgery as treatment for gender dysphoria "very little weight" after determining there were significant weaknesses in his expert report, including misrepresentations of the Standards of Care, overwhelming reliance on generalizations about gender dysphoric prisoners, and illogical inferences. *Norsworthy*, 87 F. Supp. 3d at 1188. The court also noted that it appeared to be Levine's "opinion that no inmate should ever receive SRS . . . ." *Id.*

Further, as Plaintiff will demonstrate during the evidentiary hearing, the "experts" Defendants have retained to opine that surgery is not medically necessary to treat Ms. Edmo's gender dysphoria are unqualified to provide expert opinions in this area. Neither have directly treated patients for gender dysphoria, and neither has ever treated or assessed a patient with gender dysphoria who has had sex reassignment surgery. Rather, both obtained their severely limited experience with gender dysphoria directly under the tutelage of Dr. Levine in the Massachusetts Department of Corrections. Like Dr. Levine, they are outliers in the professional treatment community, refusing to apply the internationally-accepted standards of care to the medical treatment of incarcerated persons.

By Policy and Practice, IDOC Defendants Punish Ms. Edmo for Feminizing in Accordance with Her Gender Identity

IDOC Defendants mislead this Court by making repeated references to an "updated" gender dysphoria policy, which they assert permits "inmates with GD to wear appropriate makeup, style their hair in traditionally female hairstyles, and present as female," as well as "access commissary items, such as bras, underwear, female makeup, and grooming items." ECF 99 at 13; *see also id.* at 3, 15. However, IDOC's *current* policy regarding treatment of inmates with gender dysphoria was adopted on October 31, 2002. Dowell Dep. 17:12-18:15; Exh. 13 at 1. IDOC's 30(b)(6) designee testified that the purported "updated" policy exists only in draft form, and has not been approved or implemented. Dowell Dep. 20:19-25, 92:10-20; Exh. 14 at 23-35; ECF 101-10, Exh. D at 25-33;

IDOC Defendants further claim that "IDOC's focus has not been with precluding Ms. Edmo from feminizing, but rather with her repeated attempts to sexualize her appearance in a male facility," ECF 99 at 12. Ms. Edmo's disciplinary record clearly shows that Defendants have applied IDOC policies to punish her for feminizing her appearance. IDOC Defendants have imposed eleven formal disciplinary offense reports ("DORs") on Ms. Edmo, as well as placing her in restraints and segregation, explicitly for wearing makeup, styling her hair in a traditionally feminine style, and altering her male-issued underwear to more closely resemble female panties. *See* Exh. 1. The written justifications for these DORs directly contradict IDOC's claim that she was disciplined for "provocative or sexually charged clothing and behavior," rather than her efforts to feminize. ECF 99

at 13; *see* Exh. 1. For example:

- "I reminded offender Edmo that if this hairstyle continues and previous warnings were going to be ignore [sic] to comply with direction and orders regarding the feminine hair styles, offender Edmo would be subjected to the disciplinary process." Exh. 15 at 1.
- "I asked Offender Edmo #94691 to remove Edmo's hairstyle to a style that appeared less feminine gender specific per section 4 of PREA policy 325.02.0 l .001." Exh. 15 at 5.
- "Offender Edmo 94691 was wearing makeup and his hair was in a high pony tail which violates policy 325.02.01.002 . . . . I then gave Edmo a direct order to fix the issue . . . . Edmo refused at which point Edmo was placed in restraints and taken to unit 8 [segregation]." Exh. 15 at 6.
- "Your condition does not allow you to wear makeup. Staff were within our policy to issue you a disciplinary infraction for violating this rule." Exh. 15 at 12.
- "The DOR is affirmed because you know you're not authorized to alter property regardless of the reasons." Exh. 15 at 24.

This violates the WPATH Standards of Care, which establish that the ability to feminize one's appearance is a "critical component of treatment" for gender dysphoria. Ettner Decl. ¶ 45 (ECF 62-1).

LEGAL ARGUMENT

Through the testimony of Plaintiff and her retained experts, Drs. Gorton and Ettner, as well as other evidence submitted during the hearing on Plaintiff's motion for preliminary injunction, Plaintiff will establish "that [s]he is likely to succeed on the merits, that [s]he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2009); *Pimentel v. Dreyfus*, 670 F. 3d 1096, 1105 (9th Cir. 2012).

I. Plaintiff Will Succeed on the Merits of her Claims

A. Eighth Amendment Claim

Defendants do not dispute that Ms. Edmo suffers from a serious medical condition, but make three arguments that their repeated denial of medically necessary treatment for Ms. Edmo is not deliberately indifferent: (1) Defendants' treatment decisions, including Dr. Eliason's April 2016 denial of surgery, were based on "professional judgment" and therefore cannot constitute deliberate indifference; (2) Defendants' treatment decisions are consistent with the opinions of Defendants' "experts" that surgery is not medically necessary for Ms. Edmo; and (3) Defendants have no "blanket policy" prohibiting surgery.

1. Defendants' choice of a medically unacceptable course of treatment constitutes deliberate indifference

Defendants' contention that their providers exercised "professional," or their "best medical judgment" in treating Ms. Edmo does not preclude a finding of deliberate indifference. ECF 99 at 7; ECF 100 at 15. While difference of opinion between two medically acceptable courses of treatment does not automatically constitute deliberate indifference, a provider's choice of a medically *unacceptable* course of treatment can be a basis for Eighth Amendment liability. *See, e.g.*, *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (summary judgment improper where jury could find course of treatment was medically unacceptable under the circumstances and was chosen in conscious disregard of excessive risk to plaintiff); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) ("By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took actions which may have amounted to the denial of medical treatment, and the 'unnecessary and wanton infliction of pain.'"), *overruled in part on other grounds as recognized in Colwell v. Bannister*, 763 F.3d 1060, 1069 (9th Cir. 2014). Plaintiff's experts have opined that Defendants failed to provide Ms. Edmo appropriate treatment and did not provide her access to medical professionals qualified to assess and treat her gender dysphoria, and thus have not exercised proper medical judgment.[4] ECF 62 at 5-6.

In *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015), a case brought by an incarcerated person with gender dysphoria seeking access to surgery, the court found the plaintiff likely to succeed on her Eighth Amendment claim in part because the prison's stated reasons for denying her surgery were pretextual. *Id.* at 1190. The *Norsworthy* Court reasoned that the psychologist's evaluation was "designed to support the denial of SRS" because it "omitted several important indicators of medical necessity," "reached conclusions that are at odds with the Standards of Care," and the psychologist "had attended a training at which [Dr. Steven] Levine instructed participants that SRS should never be provided to incarcerated patients." *Id.* at 1190; *see also Hicklin v. Precynthe*, 2018

[4] Defendants' reliance on *Mintun v. Corizon Med. Servs.*, 2018 U.S. Dist. LEXIS 29831 (D. Idaho Feb. 22, 2018), is misplaced. There, this Court found that the pro se plaintiff failed to establish his mental health condition presented a serious medical need and the only evidence of deliberate indifference was the plaintiff's own belief that he required further testing. *Id.* at *13-15.

U.S. Dist. LEXIS 21516, at *38 (E.D. Mo. Feb. 9, 2018) ("The denial of [treatment] based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment."). The *Norsworthy* Court also relied upon Dr. Ettner's expert declaration detailing the psychologist's misunderstanding of treatment for gender dysphoria. *Id.*

The facts here are strikingly similar. Plaintiff's experts have explained not only that Dr. Eliason lacked the requisite understanding and qualifications to treat gender dysphoria, but also, that Dr. Eliason's assessment that surgery was not medically necessary for Ms. Edmo was based on unsupported criteria lacking any connection to internationally-recognized standards of care. Ettner Decl. ¶ 64 (ECF 62-1); Gorton Decl. ¶¶ 85-87 (ECF 62-1). Just as in *Norsworthy*, Dr. Eliason was trained by Dr. Levine—attending Levine's training *the very same month* he denied surgery for Ms. Edmo. Moreover, while Dr. Eliason claimed that Ms. Edmo's request for surgery would be re-assessed by a committee, this never occurred. Eliason Dep. 122:4-25, 124:6-18. Rather, Dr. Eliason applied made-up criteria (which he admitted in deposition Ms. Edmo satisfied) in order to reach the conclusion that surgery was not medically necessary to treat Ms. Edmo's gender dysphoria, in direct contradiction to the accepted standard of care. This decision to follow a medically unacceptable course of treatment based on pretextual reasons constitutes deliberate indifference. *See Norsworthy*, 87 F. Supp. 3d at 1190.

Further, contrary to Defendants' contention, *see* ECF 99 at 7, their provision of some treatment for Ms. Edmo's gender dysphoria does not insulate them from Eighth Amendment liability for failing to provide medically necessary treatment. *See Hicklin v. Precynthe*, No. 4:16-cv-02357-NCC, ECF 176, at 6 (E.D. Mo. May 22, 2018) ("providing [only] counseling and/or psychotropic medication to a severely gender dysphoric patient whose condition warrants medical intervention is a departure from the [WPATH] standards of care . . . [and] puts a person at serious risk of psychological and physical harm"); *Norsworthy*, 87 F. Supp. 3d at 1187 ("Just because defendants have provided a prisoner with some treatment consistent with the Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment.") (internal alterations and quotations omitted).

2. Defendants' experts cannot cure their failure to provide treatment with post hoc justifications

Defendants next assert that they are not deliberately indifferent to Ms. Edmo's serious medical needs because Dr. Eliason's April 20, 2016 assessment is consistent with the current opinions of Ms. Edmo's treating clinicians, IDOC's Chief Psychologist, MTC members, and Defendants' retained experts, Drs. Garvey and Andrade, "all of whom agree that SRS is not appropriate for Ms. Edmo at this time, due to her significant uncontrolled mental health concerns." ECF 99 at 8-9. However, neither Dr. Eliason nor anyone else who treated Ms. Edmo cited these alleged concerns—which appear to encompass depression, anxiety, and so-called "maladaptive behaviors"—as a basis for denying Ms. Edmo surgery prior to her motion for a preliminary injunction. Indeed, in arriving at this newfound conclusion, Defendants' experts rely upon a variety of information Dr. Eliason never documented that he even considered at the time he assessed Ms. Edmo for surgery, such as Ms. Edmo's pre-incarceration medical records and her disciplinary history. Eliason Dep. 114:25-115:23. Additionally, IDOC Defendants now claim that surgery is not medically indicated for Ms. Edmo at this time because she exhibits symptoms of PTSD and borderline personality disorder—despite their own clinicians never having diagnosed Ms. Edmo with either of these conditions at any time in the past six years.

Not only are these post hoc rationalizations by Defendants' experts for the purposes of litigation unsupported by evidence and contradicted by the standards of care, but they also cannot be used retroactively to establish that Dr. Eliason's 2016 decision to deny Ms. Edmo surgery was not deliberately indifferent. *See Layton v. Bannister*, 2012 U.S. Dist. LEXIS 158359, at *6 (D. Nev. Nov. 5, 2012) (Eighth Amendment inadequate medical care claim is evaluated based on facts available to Defendant when he made the decision to deny surgery); *Funderburke v. Canfield*, 2016 U.S. Dist. LEXIS 25456, at *21 (W.D.N.Y. Feb. 29, 2016) ("[A]lthough Defendants now argue that Voltaren and Indocin were sufficient to treat Plaintiff's nerve pain, a reasonable jury could easily conclude that this argument is simply a post hoc rationalization . . . .").

3. Defendants have a *de facto* policy of refusing to provide surgery as treatment for gender dysphoria

While Defendants' written policies do not explicitly bar surgery as treatment for gender

dysphoria, Defendants' manner of implementing existing policies and training provided to staff constitutes a *de facto* ban of surgery as treatment for gender dysphoria. In *Norsworthy*, the court concluded that the prison had a blanket policy prohibiting surgery based on (1) evidence that the prison's guidelines for treating transgender inmates did not mention surgery as a treatment option, and (2) Dr. Levine's training to prison staff, which indicated that surgery should never be provided to incarcerated patients. 87 F. Supp. 3d at 1191. As in *Norsworthy*, the evidence here also suggests that Defendants have implemented a *de facto* ban. An internal IDOC policy analysis document acknowledged that IDOC's policy does not currently address surgery as a treatment intervention. Exh. 14 at 7 ("[O]ur current SOP only discusses one intervention: hormone replacement therapy. . . allowing for at least the possibility of surgical intervention would be in keeping with accepted practices."); Dowell Dep. 61:7-62:2. Dr. Levine's training, which was provided to Corizon and IDOC staff in April 2016 and then incorporated in Corizon's own training materials, in effect instructs Corizon and IDOC staff not to assess surgery as medically necessary for inmates with gender dysphoria. Exh. 10; Exh. 11 at 1-2, 28-29. Further, the Corizon gender dysphoria policy treatment does not include surgery as a treatment option, nor provide any guidelines for assessing a patient's medical necessity for surgery. Indeed, the practical effect of such policies and training is that no IDOC or Corizon employee has ever recommended that an IDOC prisoner receive surgery to treat gender dysphoria.

4. Defendants' Punish Ms. Edmo for Feminizing in Accordance with Her Gender Identity

While Ms. Edmo's ability to feminize her appearance through her manner of dress and grooming is a critical component of her treatment for gender dysphoria, IDOC Defendants have routinely stated that such conduct violates IDOC policy and disciplined her accordingly. Indeed, Ms. Edmo has been disciplined numerous times for feminizing her appearance.[5] Exh. 1. Moreover, although mental health staff could have recommended that disciplinary charges be reduced or dismissed because Ms. Edmo's conduct was directly related to gender dysphoria, no medical provider

[5] Defendants' characterization of Ms. Edmo's efforts to feminize her appearance as "repeated attempts to sexualize her appearance in a male facility," ECF 99 at 12, further illustrates their misunderstanding of and prejudices regarding gender dysphoria and its treatment.

did so. *See, e.g.*, Exh. 16 (clinician found Ms. Edmo's mental illness was not a mitigating factor in her July 26, 2016 DOR offense "destruction of property under $25" for altering underwear).

B. Fourteenth Amendment Claim

In response to Plaintiff's Fourteenth Amendment claim that Defendants' denial of treatment for gender dysphoria is discrimination based on sex, Defendants repeat the assertion that they do not have a policy prohibiting surgery, and claim that their denial of surgery to Ms. Edmo is based on legitimate penological interests.[6] These arguments ignore the basis for Plaintiffs' Fourteenth Amendment claim and apply the wrong legal standard. Plaintiff contends that Defendants' denial of medically necessary treatment is "based on their belief that a transgender person should not receive certain medical treatment such as sex reassignment surgery and access to traditionally female underwear, despite this treatment being the accepted standard of care for treating gender dysphoria." ECF 62 at 13. Defendants' post hoc attempt to impose requirements on Ms. Edmo that she behave "properly" in accordance with Defendants' "expectations" in order to receive necessary and accepted treatment for a medical condition constitutes the exact evidence that proves Ms. Edmo's Fourteenth Amendment claim.

Defendants have pointed to no other medical condition for which they deny medically necessary treatment on the basis that a patient exhibits "maladaptive behaviors." Similarly, Defendants' disciplining of Ms. Edmo for appearing feminine by wearing a ponytail or makeup that they now newly characterize as "appearing or acting sexual in prison" is further evidence that their treatment of Ms. Edmo is rooted in impermissible discrimination against transgender people, equating presenting as feminine in a male prison as creating a "sexually-charged environment."

As explained in Plaintiff's motion, heightened scrutiny is applied to her Fourteenth Amendment claim, requiring that Defendants show that their policy of denying surgery and other medically necessary treatment to transgender people is substantially related to an important government interest. *See, e.g., Martin v. Barron*, 286 F. Supp. 3d 1131, 1142 (D. Idaho 2018). The

[6] Defendants further cite their "updated GD policy," which has neither been approved nor implemented.

asserted governmental justification must be "exceedingly persuasive" and it must be "genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Defendants have made no showing to meet this burden.

C. Affordable Care Act Claim

Defendants incorrectly argue that Section 1557 of the ACA does not apply to IDOC by mis-quoting the definition of a "health program or activity" in the Department of Health and Human Services regulations. The regulations state, "[h]ealth program or activity means the provision or administration of health-related services, health-related insurance coverage, or other health-related coverage, and the provision of assistance to individuals in obtaining health-related services or health-related insurance coverage." 45 C.F.R. § 92.4 (2016). IDOC incorrectly asserts that "an entity qualifies as participating in a 'health program or activity' if it is principally engaged in the provision or administration of health-related services, health-related insurance coverage, or other health-related coverage." ECF 99 at 16. However, the regulation does not require an entity to be principally engaged in providing or administering health services to qualify as a health program or activity.

The ACA's anti-discrimination protection applies to Ms. Edmo because IDOC is a covered entity under the ACA. *See* 45 C.F.R. § 92.4 (covered entity is "[a]n entity that operates a health program or activity, any part of which receives Federal financial assistance").

II. Plaintiff Will Suffer Irreparable Harm Absent Relief

Defendants argue, without citing to any authority, that injunctive relief is not warranted because Ms. Edmo "is not exhibiting symptoms of a person whose condition is so extreme that a mandatory injunction is required." ECF 99 at 17. This argument is unsupported by evidence, and also misstates the law. Ms. Edmo can establish irreparable harm by virtue of the fact that her gender dysphoria has not been "properly treated over a period of years." *Norsworthy*, 87 F. Supp. 3d at 1193. Her need for surgery is "a matter of long-standing, not sudden, urgency. The continuation of this suffering constitutes irreparable injury, whether this is the first month she has suffered it or the hundredth." *Id.*; *see also McNearney v. Wash. Dep't of Corr.*, 2012 U.S. Dist. LEXIS 115802, at *14 (W.D. Wash. 2012). The suffering that Ms. Edmo continues to endure is not "speculative," but

well-documented in Ms. Edmo's medical record and the reports of Plaintiff's experts. Further, Defendants' attempts to discredit Ms. Edmo's extreme anguish, as well as risk of future self-castration or other self-harm, arising from their failure to provide her medically necessary treatment again demonstrates Defendants' refusal to view gender dysphoria as a legitimate and serious medical condition requiring medical treatment. Indeed, it is striking that Defendants appear to blame Ms. Edmo for her ongoing gender dysphoria, suggesting that if she developed better "coping tools" and participated in programming for other mental health conditions and even sex offender treatment, this would somehow relieve her gender dysphoria. ECF 99 at 18.

III. The Balance of Equities and the Public Interest Favor Granting Injunctive Relief

Defendants essentially argue that the public interest requires that they must be accorded deference to determine what treatment is medically necessary, or the needs of all inmates will be harmed. This is a nonsensical and illogical argument unsupported by any evidence. Requiring Defendants to provide medical treatment in accordance with widely-accepted standards of care does not injure other incarcerated persons, nor does it contravene the public interest. Rather, "the public has a strong interest in the provision of constitutionally adequate health care to prisoners." *McNearney.*, 2012 U.S . Dist. LEXIS 115802, at *44 (quoting *Flynn v. Doyle*, 630 F. Supp. 2d 987, 993 (E.D . Wis. 2009)); *see also Melendres v. Arpaio*, 695 F. 3d 990, 1002 (9t h Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court issue a preliminary injunction requiring Defendants to provide her necessary treatment, including surgery, to alleviate ongoing and needless pain and suffering from her serious, but treatable, medical condition of gender dysphoria.

Dated: September 28, 2018

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of September, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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