

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA**

ASHLEY DIAMOND,

Plaintiff,

v.

Case No. 5:15-cv-50-MTT-CHW

BRIAN OWENS, et al.,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES

Failure to provide individualized and appropriate medical care for inmates suffering from gender dysphoria¹ violates the Eighth Amendment’s prohibition on cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Kothmann v. Rosario*, 558 F. App’x 907, 910 (11th Cir. 2014); *Fields v. Smith*, 653 F.3d 550, 554-55 (7th Cir. 2011); *Lynch v. Lewis*, No. 7:14-CV-24, 2014 WL 1813725, at *2 (M.D. Ga. May 7, 2014). In her first Motion for Preliminary Injunction (ECF No. 1), Plaintiff Ashley Diamond alleges that the Georgia Department of Corrections (“GDOC”) violated the Eighth Amendment by withholding treatment for Ms. Diamond’s gender dysphoria against the advice and recommendations of her treating clinicians.

Ms. Diamond alleges that GDOC withheld this care pursuant to an unconstitutional “freeze-frame” policy. A “freeze-frame” policy impermissibly prohibits individualized

¹ The terms “gender dysphoria,” “gender identity disorder,” and “transsexualism” are used interchangeably in the case law and the record in this case. The United States uses the term “gender dysphoria” in this Statement of Interest except when quoting case law or other parts of the record.

assessment and treatment of individuals with gender dysphoria. Instead, prisoners may only receive the same level of care they received in the community. Under GDOC's policy, if an inmate is not identified as transgender and referred for treatment at intake, he or she may receive no treatment at all. According to Ms. Diamond, because GDOC did not identify her as transgender at intake and refer her for additional evaluation, GDOC officials continue to deny Ms. Diamond treatment pursuant to GDOC's freeze-frame policy.

Without taking a position on the factual accuracy of Plaintiff's claims, the United States files this Statement of Interest to assist the Court in evaluating Ms. Diamond's Motion. In particular, the United States files this Statement to bring the Court's attention to the standards used to evaluate appropriate medical care for gender dysphoria under the Eighth Amendment and the unconstitutionality of freeze-frame policies that may prevent such treatment. In cases like Ms. Diamond's, gm e si tte

Title IX of the Education Amendments of 1972; and discrimination against transgender individuals in violation of the Fair Housing Act.⁴

FACTUAL BACKGROUND

Ms. Diamond's Complaint (ECF No. 3) and the supporting materials for her Motion for Preliminary Injunction (ECF No. 2) detail the factual background concerning Ms. Diamond's medical history and treatment while incarcerated in the GDOC. Rather than repeat these allegations in full, the United States summarizes the general factual allegations upon which this Statement of Interest relies.⁵

Ms. Diamond suffers from gender dysphoria. Gender dysphoria is listed in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-V) as a major mental illness and characterized by a marked incongruence between one's experienced/expressed gender and assigned gender at birth. Gender dysphoria involves a persistent physical and emotional discomfort with one's biological sex. Left untreated, that discomfort can become so painful that individuals consider or attempt suicide, self-castration, or self-mutilation. The accepted course of treatment to alleviate these symptoms often involves allowing the individual to live as his or her chosen gender, through one or more of the following treatments: changes in gender expression

⁴ See, e.g., Statement of Interest of the United States, *Jamal v. SAKS & Co.*, No. 4:14-CV-2782 (S.D. Tex. 2015), ECF No. 1, available at <http://www.justice.gov/crt/about/emp/documents/jamalsoi.pdf> (Title VII's prohibition of discrimination on the basis of sex proscribes discrimination because of transgender status); Statement of Interest of the United States, *Tooley v. Van Buren Pub.*

and role; dressing, grooming, and otherwise outwardly presenting in a manner consistent with one's gender identity; hormone therapy; and, in some cases, surgery to change primary and/or secondary sex characteristics.⁶

Ms. Diamond states that she was first diagnosed with gender dysphoria when she was a teenager, nearly twenty years ago.⁷ Ms. Diamond also states that she lived as a female in the community prior to incarceration, and took feminizing hormones for seventeen years, which caused her to develop female secondary sex characteristics such as breasts and soft skin.⁸ When GDOC processed Ms. Diamond through intake, she presented as female; identified as transgender; and discussed her medical history, including her diagnosis of gender dysphoria and hormone therapy.⁹ However, for reasons not explained in the current pleadings, GDOC did not refer Ms. Diamond for additional evaluation or treatment. Instead, GDOC terminated Ms. Diamond's hormone therapy and confiscated her female clothing and undergarments before placing her in a male facility.¹⁰ This had a profound physical and emotional impact on Ms.

⁶ Compl. ¶¶ 28-31 (discussing the World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 9-10 (7th ed. 2011), available at http://admin.associationonline.com/uploaded_files/140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf).

⁷ Compl. ¶¶ 38-39.

⁸ Compl. ¶ 40.

⁹ Compl. ¶ 44.

¹⁰ See Compl. ¶¶ 45, 64. Ms. Diamond's complaint and recently-filed Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (ECF No. 25) raise additional allegations concerning her placement in a maximum security male facility and GDOC's failure to protect her from sexual abuse and harassment. Because those issues were not covered in Ms. Diamond's Motion for Preliminary Injunction (ECF No. 1), the United States does not address them in this Statement of Interest. The United States may choose to weigh in on the constitutionality of GDOC's conduct on those issues at a later date. The United States has previously investigated jurisdictions pursuant to CRIPA for failure to protect prisoners from sexual abuse. See generally Letter from Jocelyn Samuels, Acting Assistant Att'y Gen. of the United States, U.S. Dep't of Justice, to Robert Bentley, Governor, State of Ala. (Jan. 17, 2014), available at http://www.justice.gov/crt/about/spl/documents/tutwiler_findings_1-17-14.pdf (concluding that administrators at the Julia T

Diamond. Terminating her hormone therapy created painful side effects, including chest pains, heart palpitations, clinically significant depression, and increased thoughts of suicide, hopelessness and anxiety.¹¹ According to Ms. Diamond, her gender dysphoria is so severe that she has attempted suicide and self-

she received, and the constitutionality of the GDOC policy that she believes prevented her treatment. Accordingly, Ms. Diamond is currently seeking two preliminary injunctions: one directing Defendants to provide her with medically necessary treatment for her gender dysphoria, including hormone therapy and allowing her to express her female gender through grooming, pronouns, and dress, and the second enjoining Defendants from enforcing their freeze-frame policy, which Ms. Diamond

I. GDOC Violates the Eighth Amendment by Failing to Provide Ms. Diamond with Adequate Medical Treatment for her Serious Medical Needs

Ms. Diamond must meet two elements to prevail on an Eighth Amendment claim for inadequate medical care. First, Ms. Diamond must show that she has an objectively serious medical need. *See Estelle*, 429 U.S. at 104. Second, Ms. Diamond must show that prison officials were “deliberately indifferent” to that need, meaning they knew there was a substantial risk of harm to Ms. Diamond if the need was not met, yet they disr

during her first few years of incarceration. Those with training on gender dysphoria recommended hormone therapy and allowing Ms. Diamond to express her female gender identity. Ms. Diamond's gender dysphoria therefore constitutes a serious medical need deserving of adequate treatment under the Eighth Amendment.

Further, Ms. Diamond has a documented risk of engaging in self-harm, which may constitute a serious medical need separate from the underlying gender dysphoria deserving of treatment under the Eighth Amendment. *See De'lonta v. Angelone (De'lonta I)*, 330 F.3d 630, 634 (4th Cir. 2003) ("De'lonta's need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent.") (citing *Lee v. Downs*, 641 F.2d 1117, 1121 (4th Cir. 1981) (explaining that "prison officials have a duty to protect prisoners from self-destruction or self-injury")). Ms. Diamond's extensive history of attempting suicide and self-castration demonstrate that she has a second serious medical need, distinct from her diagnosis of gender dysphoria – the need to be kept safe from self-harm.

b. *GDOC knew of Ms. Diamond's serious medical needs and the risk they posed to*

dysphoria, past suicide attempts, self-mutilation, and attempts at self-castration. The issue then becomes whether GDOC officials impermissibly disregarded Ms. Diamond's medical needs and the risks they posed.

Under any rubric, GDOC did not provide Ms. Diamond with adequate care. Although prisoners do not have the right to the medical treatment of their choice, the important consideration under the Eighth Amendment is not whether *any* care was provided, but rather whether the level of care provided was constitutionally adequate. *See Estelle*, 429 U.S. at 103-06; *Kothmann*, 558 F. App'x at 910; *De'lonta v. Johnson (De'lonta II)*, 708 F.3d 520, 526 (4th Cir. 2013) (holding that "just because [Defendants] have provided [Plaintiff] with *some* treatment consistent with the [WPATH Standards of Care], it does not follow that they have necessarily provided her with constitutionally adequate treatment.") (emphasis in original); *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007) ("plaintiff's receipt of *some* medical care does not automatically defeat a claim of deliberate indifference"). Indifference to a serious medical need can occur in many forms, "whether . . . manifested by prison doctors in response to the prisoner's nif

“evolving standards of decency that mark the progress of a maturing society.”); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (the Eighth Amendment requires medical care “at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.”) (cited with approval in *Fernandez v. United States*, 941 F.2d 1488, 1493-4 (11th Cir. 1991); see also *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 180 (D. Mass. 2002); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) (“‘Adequate medical care’ requires treatment by qualified medical personnel who provide services that are of a quality acceptable when measured by prudent professional standards in the community, tailored to an inmate's particular medical needs, and that are based on medical considerations.”).²⁰

Two things are clear from the record in this case: one, the generally accepted standards for treatment of gender dysphoria require treatment decisions be individualized; and two, Ms. Diamond did not receive individualized care. As other courts have recognized, the World

for the treatment of gender dysphoria and the research supporting those recommendations.²¹ The Standards, which were most recently updated in 2011, make clear that a variety of therapeutic interventions may be appropriate, and that the necessary course of treatment must be determined on an individual basis.²² Importantly, however, the Standards of Care recognize that the appropriate course of treatment should be decided after evaluation by a qualified medical professional who has specific knowledge of and training in the diagnosis and treatment of gender dysphoria.²³ Here, GDOC displayed deliberate indi

²¹ World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed. 2011), available at http://admin.associationonline.com/uploaded_files/140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf.

Indeed, Ms. Diamond's assertion that she was on feminizing hormones in the community for seventeen years and that GDOC abruptly discontinued this treatment upon intake is especially troubling in the Eighth Amendment context. As noted by WPATH, grave consequences are associated with a sudden withdrawal of hormones, including

Based on the facts alleged in the Complaint, GDOC did not provide Ms. Diamond with constitutionally adequate treatment for her gender dysphoria. Ignoring Ms. Diamond's need for such treatment and her history of self-harm and multiple suicide attempts, GDOC made no efforts to provide Ms. Diamond with anything beyond general counseling and antipsychotic medication – therapies that were well below the level of treatment that was medically indicated and recommended by the qualified GDOC medical personnel who evaluated Ms. Diamond. For these reasons, GDOC was and remains deliberately indifferent to Ms. Diamond's serious medical needs.

II. “Freeze-

Under this policy, prisoners must be identified as transgender at intake and referred for further evaluation in order to receive *any* treatment, and the treatment they may receive is decidedly limited.²⁸

Such a policy cannot stand under the Eighth Amendment. Courts have continuously struck down similar policies that place a blanket prohibition on certain kinds of medical care. In *Fields v. Smith*, 653 F.3d 550, 557-58 (7th Cir. 2011), the Seventh Circuit considered a Wisconsin state statute that prohibited the Wisconsin Department of Corrections from providing hormone therapy or sexual reassignment surgery to prisoners. The district court found the statute to be facially unconstitutional because “[t]he statute applies irrespective of an inmate’s serious medical need or the DOC’s clinical judgment.” *Id.* at 559 (citing *Fields v. Smith*, 712 F. Supp. 2d 830, 867 (E.D. Wisc. 2010)). In upholding the district court’s determination, the Circuit noted that “[j]ust as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like [gender dysphoria.” *Id.* at 557. Other courts to consider similar blanket prohibitions on treatment for gender dysphoria have reached the same (haD6.07[(a)4(t)]-2(iJ)4(t)- ITT0 1 Tf 0 Tc 02.3 T(, 712 F)ou3303

violation); *Allard*, 9 F. App'x at 795 (denial of hormone therapy based on blanket rule rather than individualized medical evaluation constitutes deliberate indifference).

Blanket prohibitions on all gender dysphoria treatment are identical to freeze-frame policies for the purposes of the Eighth Amendment; both types of policies strike an arbitrary line that preclude individualized medical evaluations and proscribe physician's ability to provide appropriate care. *Soneeya*, 851 F. Supp. 2d at 243-44; *Kosilek*, 221 F. Supp. 2d at 193 (presumptive freeze-frame policies are constitutionally permissible *only* if exceptions are made when necessary, as determined by sound medical judgment and adherence to prudent professional standards); *Barrett*, 292 F. Supp. at 286 ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment.").

For example, in *Brooks v. Berg*, a district court considered the constitutionality of the New York Department of Correctional Services' (NYDOCS) freeze-frame policy. *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) *vacated in part on other grounds*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003). Under that policy, NYDOCS provided treatment for gender dysphoria only to those prisoners who could prove they received such treatment prior to incarceration. *Id.* at 305. There was no dispute that the plaintiff in *Brooks* was denied treatment for her GID; rather, defendants claimed qualified immunity on the grounds that they were following NYDOCS policy. *Id.* at 312. The district court rejected the defendants' immunity argument and held that NYDOCS' freeze-

that are first diagnosed in prison.” *Id.* This Court should reach a similar conclusion in the instant case.

Recognizing the need to treat prisoners according to their needs, rather than blanket rigid policies, the Federal Bureau of Prisons

and other policies that apply blanket prohibitions to such treatment are facially unconstitutional because they fail to provide individualized assessment and treatment of a serious medical need. Accordingly, the United States urges the Court to (1) find that Ms. Diamond has a substantial likelihood of success on the merits of her claims, (2) declare that GDOC's freeze-frame policy is facially unconstitutional under the Eighth Amendment, and (3) issue appropriate injunctive relief.

Respectfully submitted,

MICHAEL J. MOORE
United States Attorney
Middle District of Georgia

VANITA GUPTA
Acting Assistant Attorney General
Civil Rights Division
United States Department of Justice

BERNARD SNELL (GA 665692)
Assistant United States Attorney
Middle District of Georgia
300 Mulberry Street, Suite 400
Macon, GA 31201
(478) 752-3511

MARK KAPPELHOFF
Deputy Assistant Attorney General
Civil Rights Division

JUDY PRESTON
Acting Chief
Civil Rights Division
Special Litigation Section

JULIE ABBATE
Deputy Section Chief
Civil Rights Division
Special Litigation Section

/s _____
SHARON BRETT (NY 5090279)
Trial Attorney
Civil Rights Division
Special Litigation Section
Telephone: (202) 353-1091
Sharon.Brett@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE