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

ASHLEY DIAMOND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 5:15-cv-00050 (MTT)
	)	
BRIAN OWENS, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S CONSOLIDATED OPPOSITION TO DEFENDANTS' PRE-ANSWER MOTIONS TO DISMISS

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May 18, 2015

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TABLE OF ARGUMENTS AND DEFENSES ASSERTED BY DEFENDANTS

	DEFENSE	RELEVANT CLAIM		
		Failure to Provide Adequate Medical Care (Counts I & II)	**Failure to Protect (Count III)**	**Failure to Train (Count IV)**
COMMISSIONER	**Failure to State a Claim**	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)	Asserted (See No. 35-1 at 22-23)
	Failure to Exhaust	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)
	Qualified Immunity	Asserted (See No. 35-1 at 24-28)	Not asserted (See generally No. 35-1)	Asserted (See No. 35-1 at 25)
	Mootness	Asserted (See No. 38-1 at 28-30)	Asserted (See No. 38-1 at 28-30)	Not asserted (See generally No. 35-1)
LEWIS	**Failure to**			

SILVER	**Failure to State a Claim**	Asser[redacted] 13)			
	Failure to Exhaust	Not asserted (See generally No. 38-1)	N/A	N/A	
	Qualified Immunity	Not asserted (See generally No. 38-1) A(o.)]TJ 8	N/A		

INTRODUCTION

On February 19, 2015, Plaintiff Ashley Diamond ("Plaintiff") filed a four-count Complaint alleging that Defendants[1]—employees and contractors of the Georgia Department of Corrections ("GDC"), responsible for her treatment and care—violated the Eighth Amendment by denying her medically necessary care (Count I), maintaining an unconstitutional policy on the treatment of gender dysphoria[2] (Count II), failing to protect her from sexual assault (Count III), and failing to train and supervise GDC employees (Count IV). On April 10, 2015, two groups of defendants—one including the GDC Commissioner and prison officials, and one including mental health professionals—filed separate motions to dismiss in which they argue that *certain* of Plaintiff's claims should be dismissed against *certain* Defendants for failure to state a claim, failure to exhaust, or both.[3] These arguments uniformly fail.

First, certain Defendants assert that Plaintiff failed to state a claim under Rule 12(b)(6) by holding Plaintiff to a pleading standard that surpasses Iqbal and Twombly—and requires Plaintiff to affirmatively prove her case at the pleading stage—and by repeatedly mischaracterizing Plaintiff's lengthy factual assertions as "wholly conclusory" recitations of law. Even a cursory

[1]Plaintiff's verified complaint of February 19, 2015, No. 3 ("Complaint," "Compl.") named GDC Commissioner Brian Owens, Statewide Medical Director Sharon Lewis, Warden Shay Hatcher, Warden

I. Plaintiff's Complaint States Valid Claims Under the Eighth Amendment

When evaluating a motion to dismiss, courts accept all factual allegations in a complaint as true and construe them in the light most favorable to the plaintiff. See Saunders v. Duke, 766 F.3d 1262, 1266 (11th Cir. 2014). A complaint governed by Rule 8, such as the instant case, need only plead factual allegations that are plausible or "raise a [plaintiff's] right to relief above the speculative level in order to escape dismissal." Id. (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); accord

these facts when Plaintiff was transferred to Shelton's care (Compl. ¶¶ 73-76, 78); Plaintiff spoke to Shelton directly about her medical treatment needs and grieved the same, and Shelton communicated with Plaintiff on three distinct occasions, wherein she acknowledged that Plaintiff was suffering due to her denial of medical care, but refused her requests for treatment notwithstanding (Compl. ¶¶ 82-87).[7]

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Although Defendant Shelton suggests that Plaintiff's complaint is deficient to the extent it fails to plead that Shelton read all of Plaintiff's records and "understood the medical aspects and implications contained therein," No. 35-1 at 13, this seriously misstates the pleading standard articulated in Iqbal and Twombly, and concerns information that is peculiarly in the possession of Defendant Shelton, from whom Plaintiff has not had the opportunity to take discovery. Nor is Plaintiff required at this time to incontrovertibly "demonstrate [Shelton's] awareness . . . of Plaintiff'

Second, Defendants Silver and Thompson urge the court to look beyond the four corners of Plaintiff's complaint and conclude—based on a review of grievance records—that their conduct does not arise to deliberate indifference to the extent Plaintiff was receiving *some* form of treatment. No. 38-1 at 10-11. This argument violates the fundamental precept that Rule 12(b)(6) review generally "must be limited to the four corners of the complaint." Speaker, 623 F.3d at 1379 (citations omitted); accord Kothmann v. Rosario, 558 F. App'x 907, 911 (11th Cir. 2014). It also disregards the well-settled rule that prison officials cannot escape Eighth Amendment scrutiny by merely providing inmates "some" treatment, as the relevant inquiry is "whether the care provided is constitutionally adequate." No. 29, [illegible]

Plaintiff's allegations and misstates the relevant law. Plaintiff has alleged that Silver and Thompson refused to refer her for evaluation and treatment without citation to GDC policy, and callously informed her that she forfeited her right to receive hormone therapy when she became a prisoner, despite knowing that she required hormone therapy as treatment, and failing to properly treat gender dysphoria can lead to death or injury. (Compl. ¶¶ 28-34, 78-81, 125-26). These facts arise to deliberate indifference "[u]nder any rubric." No. 29, U.S. Stmt. of Interest at 10.

Even if Plaintiff sought to hold Defendants Silver and Thompson liable solely for following GDC policy—which she does not—the very fact that they implemented an unconstitutional policy is a proper basis for finding them deliberately indifferent to Plaintiff's serious medical needs. See, e.g., Mitchell v. Cate, No. 2:08-CV-01196, 2014 WL 546338, at *21 (E.D. Cal. Feb. 11, 2014) (a defendant "can be held liable for the implementation of a policy even though he had no decision making authority as to its implementation"); accord Fields v. Smith, 712 F. Supp. 2d 830, 863 (E.D. Wis. 2010), aff'd 653 F.3d 550 (7th Cir. 2011). In Fields, the district court found that the defendants' enforcement of a state law prohibiting hormone therapy without any individualized medical judgment constituted deliberate indifference to transgender 'inmates' serious medical needs. Id. To the extent that Silver and Thompson seek cover under GDC's "freeze-frame" policy, they likewise must fail in their endeavor. Any policy or practice of denying treatment without making a medical determination is unconstitutional under Estelle and its progeny. No. 29, U.S. Stmt. of Interest at 14-17 (collecting cases).

Moreover, as physicians employed by GDC to provide needed medical care to inmates, Defendants Silver and Thompson were required to exercise their professional judgme0 Td (-14.5)-5(e td (-

Defendants Silver and Thompson were obligated to do their job—*e.g.* exercise judgment in light of their medical expertise and experience, ensure that Plaintiff's condition was appropriately evaluated, and recommend that medically necessary treatment be provided. See id.; accord W. v. Atkins, 487 U.S. 42, 51 (1988) ("Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve.") (citation and marks omitted); Brooks v. Berg, 270 F. Supp. 2d 302, 310 (N.D.N.Y.), vacated in part on other grounds, 289 F. Supp. 2d 286 (N.D.N.Y. 2003) (defendants were deliberately indifferent to the transgender plaintiff's medical needs insofar as they failed to show their refusal to provide treatment was "based on sound medical judgment"). Here, Silver and Thompson *did nothing*, so they cannot hide behind policy to excuse their inaction.

control of a particular individual, and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority, then he cannot be said to have acted with callous indifference." Id. at 1387-88. Here, Defendants Silver and Thompson did not "accomplish what could be accomplished within the limits of [their] authority," id., like GDC mental health professionals Drs. Sloan, Moody, and Harrison, who each evaluated Plaintiff and attempted to refer her for ongoing medical care, including by speaking to Defendant Lewis, the Statewide Medical Director. (Compl. ¶¶ 74-76, 95-97). Instead, after learning of Plaintiff's serious medical needs, Defendants Silver and Thompson did nothing but coolly inform Plaintiff that she "forfeited her right to receive hormone therapy when she became a prisoner." (Compl. ¶ 81). Because doing nothing is not constitutionally sufficient under LaMarca, Williams, or any other Eleventh Circuit precedent, Plaintiff has stated a valid claim.

serious medical needs by, *inter alia*, denying her requests for medical treatment or a referral and

Defendants concede that Plaintiff stated a plausible claim for failure to protect against the Commissioner, see Table of Args., but question whether Plaintiff also stated a claim against Defendant Lewis. No. 35-1 at 18-21. The answer is yes. Plaintiff's complaint plausibly asserts that Defendant Lewis unreasonably disregarded Plaintiff's need for protection from sexual assault while having actual—not constructive—knowledge of the substantial risk she faced.

The Complaint alleges, *inter alia*, Lewis had special responsibilities regarding the housing placements of transgender inmates because their vulnerability to sexual assault in GDC custody is well known and obvious; under PREA, Lewis was likewise required to individually assess transgender inmate's' housing placements; Lewis knew that transgender women stood an even more particularized risk of harm in close-security facilities based on their gang presence

F.3d 290, 293-94 (6th Cir. 2004) (prison officials could be held liable where transgender inmate was assaulted after being housed with a high security inmate).[8]

2. Plaintiff Has Stated a Plausible Failure To Protect Claim Against Defendants Allen and McCracken

Defendants concede that Plaintiff states a plausible claim for failure to protect against Defendant Allen, see Table of Args., but assert that Plaintiff failed to plead knowledge and deliberate indifference on the part of Defendant McCracken. No. 38-1 at 16. This argument fails, however, because Plaintiff's complaint sets forth lengthy factual allegations to support her claim that McCracken disregardedaffAtaie0.0dt sgat106(n)2(g)12k10(g(e)6(ts) (a)6f(a)- -10)10w 0.310w 0 Td ieff

ongoing assaults, he continued to defer action until Plaintiff filed a *pro se* lawsuit. See (Compl. ¶¶ 62, 65-68, 92-94, 98-99, 102-03, 106, 114-17, 119, 146-49). These allegations plainly state a plausible Eighth Amendment claim. See Farmer, 511 U.S. at 842 (liability can be premised on knowledge and a failure to act).

C. Plaintiff Sufficiently Pled a Claim for Failure To Train Against Defendants Lewis and the Commissioner

Plaintiff has alleged sufficient facts to state a claim that Defendants Lewis and the Commissioner were aware of the rampant abuse amongst GDC personnel regarding the health and safety needs of transgender inmates, such that their failure to train or discipline staff "set[] the stage" for Plaintiff's constitutional injuries. Greason v. Kemp, 891 F.2d 829, 837 n.18 (11th Cir. 1990). See also City of Canton v. Harris, 489 U.S. 378, 388 (1989) (supervisor liable where failure to train "amounts to deliberate indifference to the rights of persons with whom [his subordinates] come into contact"); Rivas v. Freeman, 940 F.2d 1491, 1495 (11th Cir. 1991) (failure to train "may constitute a 'policy' giving rise to governmental liability"). While a "fact-sensitive inquiry," Greason, 891 F.2d at 837, Plaintiff, at the 12(b)(6) stage need only plead facts that "raise a reasonable expectation that discovery will reveal evidence" supporting her claims. Twombly, 550 U.S. at 555.

Plaintiff has met this burden. The complaint alleges that the Commissioner and Defendant Lewis failed to train GDC staff despite knowing of the "widespread" practice at GDC

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detailed allegations—*e.g.* that there were "widespread constitutional rights deprivations" at a jail; jail personnel had a custom and practice of denying care to inmates with drug and alcohol addiction, and one other inmate had been mistreated near in time to and in a similar fashion as the decedent. Id. at 1236-37.

Defendants appear to argue that because Plaintiff has alleged facts regarding "[her] own circumstances," the Complaint fails for not showing "repeated denials" of adequate care or a "pervasive" disregard of safety. No. 35-1 at 23. This characterization ignores that Plaintiff has alleged numerous instances of abuse and unconstitutional mistreatment, separated in time, involving distinct GDC officials and personnel at four different GDC facilities, all based on her status as a transgender woman. See generally Sections I.A-I.B. While these may be her circumstances, they nonetheless evince a pervasive and consistent practice throughout GDC of deliberate indifference to the health and well-being of transgender inmates. Nor should Plaintiff be penalized at the pleading stage for her lack of specific knowledge regarding GDC training

officials liable for damages in their individual capacity. See Bruce v. Beary, 498 F.3d 1232, 1249 n.33 (11th Cir. 2007). A motion to dismiss may be granted on qualified immunity grounds if a "complaint fails to allege the violation of a clearly established constitutional [or statutory] right." St. George v. Pinellas Cnty., 285 F.3d 1334, 1337 (11th Cir. 2002) (citation omitted). For qualified immunity purposes, the law is clearly established if it gave Defendants "fair warning that their [conduct] was unconstitutional." Hope v. Pelzer, 536 U.S. 730, 741 (2002). Defendants may be put on notice of the law through statutory or constitutional provisions or by means of decisional law, Goebert v. Lee Cnty., 510 F.3d 1312, 1330 (11th Cir. 2007), and "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" Hope, 536 U.S. at 741 (citation omitted).

A. Defendants' Qualified Immunity Arguments Fail, Where Asserted

As a preliminary matter, the Commissioner is not entitled to qualified immunity because he is only being sued for injunctive relief in his official capacity, see Beary, 498 F.3d at 1249 n.33, and Defendants McCracken, Silver and Thompson are not entitled to qualified immunity insofar as they are private contractors retained by GDC, Richardson v. McKnight, 521 U.S. 399, 412 (1997), and failed to raise the issue in their initial brief, thereby waiving it. See, e.g., Bogle, 332 F.3d at 1356 n.5; accord Collar v. Austin, — F.Supp. — , 2015 WL 505667, at *2 (S.D. Ala. Feb. 5, 2015) ("[A] defendant cannot receive the benefit of qualified immunity without asking for it, at the proper time and in the proper manner.").

1. Defendants Lewis, Hatcher, Shelton and Allen's Refusal To Provide Plaintiff Medically Necessary Care

The law had been clear for nearly four decades—through Estelle v. Gamble, 429 U.S. 97 (1976)—that "deliberate indifference to serious medical needs of p 18Tj ( )Tj -016-2.3 Td [

unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment." Id. at 104; see McElligott v. Foley, 182 F.3d 1248, 1254 (11th Cir. 1999) (describing law as "well settled"). A

provide hormone therapy alleged to be "accepted, medically necessary treatment" constitutes deliberate indifference. Id. at 912. Likewise in Lynch v. Lewis, concerning Defendant Lewis's failure to again provide a transgender inmate hormone therapy, the Middle District of Georgia rejected Lewis's effort to "narrow the focus of the qualified immunity analysis to . . . whether there is a clearly established right to receive hormone therapy." Lynch, 2015 WL 1296235, at *5. Instead, the court analyzed whether refusing inmates medically necessary care violates the Eighth Amendment and found "that principle to be well established in the Eleventh Circuit." Id.

Although Defendants cite Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) and Leslie v. Hancock County Board of Education, 720 F.3d 1338 (11th Cir. 2013) as support for their claim that Plaintiff must nonetheless provide decisional law matching "the specific context of the case," No. 35-1 at 24 (citation omitted), their reliance on these cases is misplaced. Vinyard and Leslie did not alter Hope to require cases with factual similarity as Defendants suggest; instead, Vinyard and Leslie acknowledge that there are "various ways" that defendants can have 9.64 43e-2(c)4(e)-10

are well-settled. See U.S. Stmt. of Interest at 8-18.

Even under Defendants' erroneous standard—requiring decisional law mirroring the specific circumstances of Plaintiff's condition—Defendants had fair notice that their conduct constituted deliberate indifference. It has long been clear in the Eleventh Circuit that prison officials act with deliberate indifference when they provide "grossly inadequate care," Greason, 891 F.2d at 835, or "take an easier but less efficacious course of treatment." McElligott, 182 F.3d at 1255. Both decisions bear on the circumstances presented here. In Greason, the Court denied qualified immunity to prison officials who discontinued an inmate's psychiatric medication in summary fashion, despite his mental health history and known risk of suicidality. Greason, 891 F.2d at 835-36. In McElligott, although the inmate lacked a formal diagnosis, prison officials were found deliberately indifferent where they knew of his physical suffering but provided treatment only in the form of pain medication. Id. at 1256-57.

Although Defendants suggest that an unpublished district court case, Barnhill v. Cherry, No. 8:06-CV-922-T-23TGW, 2008 WL 759322 (M.D. Fla. Mar. 20, 2008), compels a different conclusion, it is easily distinguished because the plaintiff in Barnhill had no history of suicide or self-castration attempts, while Plaintiff's is well-documented. Id. at *13. In addition, prison medical professionals who evaluated Barnhill voiced disagreement as to whether hormone treatment was needed. Id. Here, there is none: every GDC healthcare mot284 T284 T284ter eas4asndin t

110, 116-18). Because the controlling precedents apply with "obvious clarity" to Defendants' actions in denying Plaintiff medically necessary care, Vinyard, 311 F.3d at 1355, qualified immunity should be denied.

2. Defendant Lewis's Failure To Protect from Foreseeable Sexual Assault

Defendant Lewis alone asserts qualified immunity with respect to Plaintiff's failure to protect claim arising from her repeated sexual abuse, see Table of Args., but merely claims she is immune "*to the extent* Plaintiff seeks to hold [her] liable for a mere violation of policy, or to impose liability despite an absence of any showing of knowledge of a particularized threat of harm to Plaintiff or an alleged repeated disregard for the safety needs of transgender inmates." No. 35-1 at 25 (emphasis added).[10] However, Plaintiff has not pled that Lewis is liable for mere violation of a policy, nor does she allege that Lewis lacked knowledge of a particularized threat. Rather, Plaintiff avers that Lewis

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where defendants failed to assert it). Additionally, when prison administrators actually review or deny grievances on the merits, they cannot later assert that a claim should be dismissed on grounds that the grievances were late, or otherwise procedurally deficient. See, e.g., Hall v. Dunlap, No. 1:12-CV-

remaining arguments

because she did not use the words "punish and reprimand" to characterize Allen's actions as she does in her Complaint. See No. 35-1 at 7. But there is no PLRA requirement that grievances be artfully pled, or that inmates "present a specific legal theory or constitutionally grounded basis for [the] requested relief." Doe v. Wooten, No. 1:07-CV-2764-RWS, 2010 WL 2821795, at *2 (N.D. Ga. July 16, 2010). Rather, a "grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." Id. (citations omitted). Because the aforementioned grievances clearly achieve this goal, Plaintiff's claims against all the Defendants were properly exhausted with respect to Count I.

2. The Arguments Raised by Defendants Allen and McCracken regarding Count III Fail No1(t).60 Tw 13.8 0 Td .4

help regarding sexual abuse and sexual assault as documented in a YouTube video series—a video series that Valdosta officials instead investigated her for creating. Ezie Decl. Ex. C.

Although Defendants Allen and McCracken suggest otherwise, it is evident that Grievance No. 180025 was read and understood by GDC officials to concern Plaintiff's safety, as GDC officials summarize Plaintiff's submission as "grieving [her] personal safety while being housed at Valdosta,"

Decl. Exs. E-G. These grievances are not defective on timeliness grounds or otherwise,

F.3d at 125. Because Grievance Nos. 189277, 189275, and 189273 were accepted and reviewed by GDC officials on the merits—not denied as "filed outside the allocated time frame," see Ezie Decl. Ex. J (denying unrelated grievance on timeliness grounds)—Plaintiff properly exhausted

dated May 18, 2015 ("Second Ettner Decl.") ¶¶ 10-20, 28 (analyzing current medical care); Declaration of Ashley Diamond dated May 18, 2015 ("Diamond Decl.") ¶¶ 2-5, 12 (discussing prior treatment and ongoing impairment). Although Plaintiff has requested that a therapeutic amount of hormones be provided, her requests have so far been denied—plainly relevant to the issue of unambiguous termination.

GDC officials also continue to prohibit Plaintiff from expressing her female gender in any matter, see Diamond Decl. ¶¶ 6-11, even though GDC healthcare providers, medical experts, the applicable Standards of Care, and Plaintiff's continued battle with suicidality and self-harm all confirm that female gender expression is an integral, non-negotiable component of her medical treatment. See, e.g., id., Ezie Decl. Ex. K (Mental Health Progress Note of Dr. Stephen Sloan); No. 2-1, First Ettner Decl. ¶¶ 28, 48, 52, 62, 70, 72; Second Ettner Decl. ¶¶ 6-9, 21-27.

Nor does GDC's act of rescinding its freeze-frame policy moot Plaintiff's case, as circumstances strongly suggest that the change is merely "an attempt to manipulate jurisdiction." Rich, 716 F.3d at 532. Like in Rich, which rejected the argument that policy changes had mooted an inmate lawsuit, Defendants here rescinded GDC's freeze-frame policy not "before litigation was threatened, but [ ] late in the game," id., years after Plaintiff first alerted GDC officials to the fact she was being denied medical care, and after multiple lawsuits—including a prior *pro se* suit by Plaintiff—where GDC defended its refusal to provide transgender inmates medically necessary hormone treatment. As in Rich, GDC's policy change also occurred *after* the U.S. Department of Justice appeared in her case, and only days before Defendants appeared before the court for oral argument and submitted briefs in this case. Id. (discussing analogous conduct). Therefore, as in Rich, Defendants' mootness argument must be denied because their 11th hour policy change is not proof of unambiguous termination insomuch as it is a litigation tactic. Id.

This point is reinforced by the new GDC policy itself, which, upon review, is vague and standardless. No. 36-3. The policy does not confolf

(escorts available for inmates) with Diamond Decl. ¶¶ 24 (following court hearing, no officer stationed in dorm, no escorts provided, no grievances accepted by staff).[16] Accordingly, far from establishing that GDC has unambiguously terminated its practice of denying transgender inmates medically appropriate care, all available evidence suggests that GDC officials continue to do so, albeit under the cover of their vague standardless new policy.

Plaintiff's injunctive claims related to safety are likewise not moot because, like in Doe v. Wooten, a factually similar case, Plaintiff's recent transfer to Rutledge State Prison ("Rutledge") "does not show that [GDC] has unambiguously terminated its pattern of transferring [Plaintiff] to one high '- 4