

DISTRICT JUDGE BENJAMIN H. SETTLE
MAGISTRATE JUDGE J. RICHARD CREATURA

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATHAN ROBERT GONINAN,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

No. 3:17-cv-05714-BHS-JRC

PLAINTIFF’S MOTION FOR PARTIAL
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
MAY 11, 2018

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Washington Department of Corrections (“DOC” or “Department”) policy currently contains a blanket ban on gender affirming surgery for all transgender individuals. The policy does not create any exceptions for medical necessity, nor does it consider any individual circumstances. Instead, the DOC’s blanket ban disregards the medical needs of transgender individuals and turns a blind eye to consequences of withholding critical medical care for a class of persons.

Plaintiff Nonnie Marcella Lotusflower (a.k.a. Nathan Robert Goninan) (“Lotusflower”) is a transgender female inmate in DOC’s custody. The undisputed evidence shows Lotusflower has severe gender dysphoria, has lived as a woman for years, and seeks to be considered for

1 gender affirming surgery. However, because DOC's blanket ban prohibits access to this
 2 treatment, Lotusflower suffers intense and ongoing emotional pain without any hope of relief.
 3 Lotusflower's health has deteriorated so severely that she has attempted self-castration and even
 4 suicide to alleviate her pain. As long as the ban remains in place, Lotusflower will continue to
 5 live under torturous conditions. The same can be said about any number of transgender
 6 prisoners incarcerated by the DOC.

7 There is simply no question that a policy that bars medical treatment for non-medical
 8 reasons regardless of a prisoner's individual medical needs constitutes cruel and unusual
 9 punishment in violation of the Constitution. There is no gender dysphoria or transgender
 10 exception to this rule. The Eighth Amendment of the U.S. Constitution is intended to protect
 11 against just this kind of cruel and unusual punishment.

12 Because the DOC's blanket ban on gender affirming surgery violates the Eighth
 13 Amendment on its face, Plaintiff respectfully requests that the Court grant her Motion for
 14 Summary Judgment and declare that DOC's policy is unconstitutional.

15 **II. STATEMENT OF FACTS**

16 **A. Lotusflower Background**

17 Lotusflower is a transgender woman incarcerated in the Washington Corrections Center
 18 in Shelton, Washington. Lotusflower experienced confusion about her gender from an early
 19 age and has felt that her assigned gender was incorrect almost her entire life. Compl., Ex. 1 at
 20 1-2.¹ Lotusflower identified with stereotypical female toys and clothing as a child. *Id.* At
 21 around 14 to 15, Lotusflower believed she might be gay. *Id.* at 1. Beginning at age 17, she
 22 began cross-dressing. *Id.* Lotusflower then lived as a female until she was 21, at which time
 23

24 ¹ Although styled and effective as a Complaint, Ms. Lotusflower signed her pro se complaint under
 25 penalty of perjury—Compl. at 10—and thus is properly considered by this court as a declaration for the
 purposes of this partial summary judgment motion.

1 she was arrested and incarcerated. *Id.* at 3.

2 During her incarceration, Lotusflower has been diagnosed with gender dysphoria.
3 Compl., Ex. 6. Gender dysphoria is a serious medical condition recognized in the International
4 Classification of Diseases (10th revision; World Health Organization) and the American
5 Psychiatric Association’s Diagnostic and Statistical manual of Mental Disorders – 5th Edition
6 (DSM-V). *See* Declaration of Dr. Randi D. Ettner (“Ettner Decl.”) at ¶13. Gender dysphoria
7 is characterized by an incongruence between one’s experienced/expressed gender and assigned
8 sex at birth, and clinically significant distress or impairment of functioning as a result. *Id.* The
9 condition is associated with severe and unremitting emotional pain that, absent treatment, can
10 lead to anxiety, depression, suicidality, and other mental health issues, all of which Lotusflower
11 has experienced. *See* Ettner Decl. at ¶13, *with* Compl. Ex. 1 at 2. Transgender women without
12 access to appropriate care may resort to self-castration in order to alleviate their distress, which
13 Lotusflower has attempted on several occasions. *See* Ettner Decl. at ¶13; Compl. Ex. 1 at 2
14 (“I’ve thought about castration. I tried it before, but stopped because it hurt too much.”).

15 **B. WPATH Standards of Care for Trans-Nonconforming People**

16 The World Professional Association for Transgender Health (“WPATH”) has issued
17 Standards of Care for the health of Transsexual, Transgender, and Gender-Nonconforming
18 People. *See* Edwards Decl., Ex. A (“Standards of Care”). The Standards of Care are
19 authoritative standards of care recognized by the American Medical Association, the American
20 Psychiatric Association, and the American Psychological Association. Ettner Decl. at ¶15. The
21 Standards of Care outline appropriate treatment protocols for individuals with gender
22 dysphoria. Standards of Care at 5-8. Surgical treatment is medically necessary for some
23 individuals. *Id.* at 54; Ettner Decl. at ¶32 (“For many individuals with severe gender dysphoria,
24 however, hormone therapy alone is insufficient. Relief from their dysphoria cannot be achieved
25 without surgical intervention to modify primary sex characteristics, i.e. genital

1 reconstruction.”). This treatment has been shown to be safe and effective for individuals with
 2 gender dysphoria. *See* Standards of Care at 54 – 55; *see also* Ettner Decl. at ¶33 (“Decades of
 3 careful and methodologically sound scientific research have demonstrated that sex
 4 reassignment surgery is a safe and effective treatment for severe gender dysphoria and, indeed,
 5 for many people, it is the only effective treatment.”).

6 The Standards of Care identify eligibility criteria for gender affirming surgery for
 7 transgender women. They gauge the persistence of the gender dysphoria, the mental capacity
 8 of the patient, whether the patient is the age of majority, any significant medical or mental
 9 health concerns, a year of continuous hormone therapy, and a year of continuous living in the
 10 gender role that is congruent with the patient’s identity. *See* Standards of Care at 59, 60. The
 11 Standards of Care apply equally to incarcerated and non-incarcerated individuals. *Id.* at 43
 12 (“People should not be discriminated against in their access to appropriate health care based on
 13 where they live, including institutional environments such as prisons.”). While the Standards
 14 of Care recognize that some reasonable accommodations may be required to allow for care in
 15 an institutional environment, “[d]enial of needed changes in gender role or access to treatments,
 16 including sex reassignment surgery, on the basis of residence in an institution are not reasonable
 17 accommodations” *Id.* at 68. Likewise, the National Commission on Correctional
 18 Healthcare cites to the Standards of Care and instructs that “The management of medical or
 19 surgical transgender care should follow accepted standards developed by professionals with
 20 expertise in transgender health. Determination of treatment necessary for transgender patients
 21 should be on a case-by-case basis.” Edwards Decl., Ex. B

22 **C. The DOC Gender Dysphoria Policy Strictly Prohibits Any Gender Affirming**
 23 **Surgical Treatment**

24 The DOC provides health services to inmates according to the Offender Health Plan,
 25 which defines the services the Department considers “medically necessary.” Edwards Decl.,

1 Ex. C (“OHP”). The OHP recognizes gender dysphoria as a diagnosis qualifying an inmate for
 2 treatment and then incorporates by reference the DOC’s Gender Dysphoria Protocol for the
 3 purposes of that treatment. *Id.* at 43. The Gender Dysphoria Protocol (the “Policy”) provides
 4 that “the correctional environment is a relative contraindication to the indication of sexual
 5 reassignment treatment, as are self-inflicted genital or other forms of self-mutilation,” but
 6 certain limited treatments may be available under certain circumstances. Declaration of
 7 William Block (“Block Decl.”), Ex. A (“Gender Dysphoria Protocol”). Authorization of
 8 treatment for gender dysphoria is typically determined on a case-by-case basis by the Gender
 9 Dysphoria Care Review Committee (“GD CRC”), which reviews case summaries and votes on
 10 whether or not to authorize proposed care. A patient’s access to medical treatment is based on
 11 a majority vote of the committee. *Id.* However, the GD CRC is barred from authorizing gender
 12 affirming surgery under any circumstances.

13 The OHP includes a Level III classification for medical treatment that it deems “not
 14 medically necessary.” OHP at 7-8. Those services categorized as Level III “cannot be
 15 authorized by an individual provider or CRC” “even if medically appropriate.” *Id.* In particular
 16 to gender dysphoria, the Policy states:

17 **Offenders with [gender dysphoria] and [transgender] identification are**
 18 **NOT eligible for:**

19 Cosmetic or elective surgical procedures for the purpose of reassignment. Such
 interventions are considered Level III by the Offender Health Plan (OHP)

20 Gender Dysphoria Protocol at 2 (emphasis in original). Even though surgical treatment for
 21 gender dysphoria is neither cosmetic nor elective, *see* Ettner Decl. at ¶32, the DOC has applied
 22 this ban to all surgical treatment regardless of medical need. *See* Block Decl., Ex. C (email
 23 from Dr. Bruce Gage, Chief of Psychiatry for the DOC, confirming that since 2009 “sex
 24 reassignment surgery” has been a Level III service that “is not provided under the OHP”). This
 25 blanket ban deeming gender affirmation surgery as “not medically necessary” under any

1 circumstances is directly at odds with well-established medical principles and the
2 individualized evaluations provided by DOC staff which have repeatedly found gender
3 affirming surgery medically necessary for Lotusflower. *See, e.g.*, Edwards Decl., Ex. D at p. 3
4 (mental health update by DOC Dr. Patricia Zeisler finding that “[a]t this time corrective surgery
5 is medically necessary in order to completely eradicate the gender dysphoria”) & at p. 6
6 (primary encounter report signed by DOC Dr. Wendi Wachsmuth finding that Lotusflower
7 “needs gender confirming surgery to relieve her gender dysphoria”). To date, Lotusflower’s
8 requests for gender affirming surgery have been denied by DOC as Level III services according
9 to the Policy. *See* Block Decl., Ex. C.

10 **III. AUTHORITY AND ARGUMENT**

11 **A. Summary Judgment Standard**

12 Summary judgment is appropriate when “there is no genuine dispute as to any material
13 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “The
14 purpose of a motion for summary judgment pursuant to CR 56 is to examine the sufficiency of
15 the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials
16 where no genuine issue as to a material fact exists.” *Zobrist v. Culp*, 18 Wn. App. 622, 637,
17 570 P.2d 147 (1977). A genuine issue of material fact exists where reasonable minds could
18 differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce Cty.*, 164
19 Wn.2d 545, 552, 192 P.3d 886 (2008). To oppose summary judgment, the nonmoving party
20 must “set forth specific facts which sufficiently rebut the moving party’s contentions and
21 disclose the existence of a genuine issue as to a material fact . . . the nonmoving party may not
22 rely on speculation, or argumentative assertions that unresolved factual issues remain.” *Id.*
23 (citation omitted).

1 **B. DOC’s Blanket Ban on Gender Affirming Surgery Violates the Eighth**
 2 **Amendment on its Face**

3 “It is settled law that deliberate indifference to serious medical needs of prisoners
 4 violates the Eighth Amendment.” *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (*citing*
 5 *Estelle v. Gamble*, 429 U.S. 97 (1976)). “Prison officials are deliberately indifferent to a
 6 prisoner’s serious medical needs when they deny, delay, or intentionally interfere with medical
 7 treatment.” *Id.* (internal quotation marks and citations omitted). Eighth Amendment medical
 8 care claims include both an objective and a subjective component. The objective component
 9 requires proof that there exists a medical need for the treatment. *Clement v. Gomez*, 298 F.3d
 10 898, 904 (9th Cir. 2002). The subjective component requires proof that the prison officials
 11 acted with “deliberate indifference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The
 12 undisputed evidence in this case easily satisfies both elements regarding the unconstitutionality
 13 of the policy’s blanket ban on gender affirming surgery on its face.

14 **1. Gender Dysphoria is a Serious Medical Need**

15 In order to establish the objective component of the Eighth Amendment, a prisoner
 16 plaintiff must demonstrate that conditions of confinement are sufficiently serious. *Clement*,
 17 298 F.3d at 904. Demonstrating the existence of a “serious medical need” satisfies the objective
 18 component of an Eighth Amendment medical claim. *Id.* A substantial risk of future serious
 19 harm resulting from the action or inaction of prison officials also meets the objective
 20 requirement under this standard. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). “The existence
 21 of an injury that a reasonable doctor or patient would find important and worthy of comment or
 22 treatment; the presence of a medical condition that significantly affects an individual’s daily
 23 activities; or the existence of chronic and substantial pain are examples of indications that a
 24 prisoner has a “serious” need for medical treatment. *McGuckin v. Smith*, 974 F.2d 1050, 1059-
 25 60 (9th Cir. 1992), *overruled on other grounds by WMX Technologies, Inc. v. Miller*, 104 F.3d
 1133 (9th Cir. 1997) (internal quotation marks and citations omitted). The evidence shows that

1 untreated gender dysphoria creates substantial risk of future serious harm if medically necessary
2 treatment is withheld.

3 Courts have routinely held that gender dysphoria (previously referred to as gender
4 identity disorder or transsexualism) is a serious medical need for purposes of the Eighth
5 Amendment. *See e.g. Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995) (prison officials must
6 provide treatment to address the medical needs of prisoner with gender identity disorder);
7 *Qz'etax v. Ortiz*, 170 Fed. Appx. 551, 553 (10th Cir. 2006) (affirming the district court's finding
8 that the plaintiff had "sufficiently stated in her Complaint that gender identity disorder is an
9 objectively serious medical condition"); *Meriwether v. Faulkner*, 821 F.2d 408, 411 (7th Cir.
10 1987) (recognizing transsexualism as a serious medical need that should not be treated
11 differently than any other psychiatric disorder); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011)
12 (upholding district court decision recognizing gender identity disorder as a serious medical need
13 for purposes of the Eighth Amendment).

14 Further, the risk of engaging in self-harm in the absence of treatment constitutes an
15 independent serious medical need for purposes of the Eighth Amendment. *See, e.g., Compl.*
16 *Ex. 1 at 2; Ettner Decl. at ¶32.* The "need for protection against continued self-mutilation
17 constitutes a serious medical need to which prison officials may not be deliberately indifferent."
18 *De'lonta v. Angelone (De'lonta I)*, 330 F.3d 630, 634 (4th Cir. 2003); *see also Lee v. Downs*,
19 641 F.2d 1117, 1121 (4th Cir. 1981) ("[P]rison officials have a duty to protect prisoners from
20 self-destruction or self-injury."); *Soneeya v. Spencer*, 851 F.Supp.2d 228 (D. Mass. 2012)
21 (prisoner with gender identity disorder and history of suicide attempts and self-mutilation has
22 serious medical condition for which surgery must be considered); *Kosilek v. Maloney*, 221 F.
23 Supp. 2d 156, 184 (D. Mass 2002) (risk of engaging in self-harm by prisoner with gender
24 dysphoria constituted serious medical need).

1 **2. DOC’s Blanket Ban on Surgical Treatment for Gender Dysphoria is Per Se**
2 **Deliberate Indifference**

3 The subjective component of an Eighth Amendment claim requires a showing that
4 prison officials have acted with “deliberate indifference.” A prison official is liable under this
5 standard if “the official knows of and disregards an excessive risk to inmate health or safety.”
6 *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Refusal to treat a condition causing chronic and
7 substantial pain constitutes deliberate indifference. *See Norsworthy v. Beard*, 87 F. Supp. 3d
8 1164, 1190 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015)
9 (finding that defendants acted with deliberate indifference when they denied plaintiff’s access
10 to gender affirmation surgery and ignored the clear recommendations of the plaintiff’s mental
11 health provider, who concluded surgery was medical necessary); *see also Lavender v. Lampert*,
12 242 F. Supp. 2d 821, 842-43 (D. Or. 2002) (denying summary judgment for prison officials in
13 part because “although he was examined regularly by medical staff, there [was] an ongoing
14 pattern of ignoring, and failing to timely respond to or effectively manage, plaintiff’s chronic
15 pain”); *Brock v. Wright*, 315 F.3d 158, 163 (2nd Cir. 2003) (“We will no more tolerate prison
16 officials’ deliberate indifference to the chronic pain of an inmate than we would a sentence that
17 required the inmate to submit to such pain.”). “Deliberate indifference to serious medical needs
18 is shown when prison officials have prevented an inmate from receiving recommended
19 treatment or when an inmate is denied access to medical personnel capable of evaluating the
20 need for treatment.” *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted).

21 “Blanket categorical denial of medically indicated surgery solely on the basis of an
22 administrative policy . . . is the paradigm of deliberate indifference.” *Colwell v. Bannister*, 763
23 F.3d 1060, 1063 (9th Cir. 2014). Courts have routinely held prison policies that automatically
24 exclude certain forms of treatment for gender dysphoria violate the Eighth Amendment. In
25 *Rosati v. Igbinoso*, the Ninth Circuit applied this clear rule in the context of a motion to dismiss
 and held that a plaintiff can establish deliberate indifference with evidence of a blanket policy

1 against gender affirmation surgery. 791 F.3d 1037, 1039–40 (9th Cir. 2015). In *Fields v. Smith*,
2 the Seventh Circuit held that a state law barring hormone therapy and sex reassignment surgery
3 as possible treatments for prisoners with gender dysphoria facially violated the Eighth
4 Amendment. 653 F.3d 550 (7th Cir. 2011). Similarly, in *De'lonta I*, the Fourth Circuit held
5 that a prisoner with gender dysphoria stated a claim for deliberate indifference where the
6 Department of Corrections withheld hormone therapy pursuant to a policy against providing
7 such treatment and not the medical judgment of qualified providers. 330 F.3d 630; *see also*
8 *Allard v. Gomez*, 9 Fed. App'x. 793, 795 (9th Cir. 2001) (“[T]here are at least triable issues as
9 to whether hormone therapy was denied Allard on the basis of an individualized medical
10 evaluation or as a result of a blanket rule, the application of which constituted deliberate
11 indifference to Allard’s medical needs.”); *Soneeya*, 851 F. Supp. 2d at 249 (holding that a prison
12 policy that “removes the decision of whether sex reassignment surgery is medically indicated
13 for any individual inmate from the considered judgment of that inmate’s medical providers”
14 violated Eighth Amendment); *Houston v. Trella*, No. 04-1393, 2006 WL 2772748, at *8 (D.N.J.
15 Sept. 22, 2006) (claim that prison doctor’s decision not to provide hormone therapy to prisoner
16 with GID based not on medical reason but policy restricting provision of hormones stated viable
17 Eighth Amendment claim); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) (“A
18 blanket policy that prohibits a prison’s medical staff from making a medical determination of
19 an individual inmate’s medical needs [for treatment related to gender identity disorder] and
20 prescribing and providing adequate care to treat those needs violates the Eighth Amendment.”);
21 *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) (prison officials cannot deny inmates
22 medical treatment for gender dysphoria based on a policy of limiting such treatments to inmates
23 who were diagnosed prior to incarceration), *vacated in part on other grounds*, 289 F. Supp. 2d
24 286 (N.D.N.Y. 2003).

1 DOC's Policy is a blanket ban on gender affirming surgery, in no uncertain terms. In
2 fact, Dr. Gage, Chief of Psychiatry for the DOC, even confirmed that gender affirming surgery
3 has been deemed "not medically necessary" for all transgender individuals, without any case-
4 by-cases analysis, and is not provided under the OHP. The existence of the blanket ban in the
5 OHP and Gender Dysphoria Protocol satisfies the subjective component of the Eighth
6 Amendment. *Fields*, 653 F.3d at 557-58; *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 242 (D.
7 Mass. 2012) (explaining the Eighth Amendment requires that prisoners be provided with
8 adequate medical care "based on an individualized assessment of an inmate's medical needs in
9 light of relevant medical considerations.").

10 DOC's Policy is thus unconstitutional on its face. *See Doe v. Heck*, 327 F.3d 492, 528
11 (7th Cir.2003) (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). A facial challenge
12 to the constitutionality of a law succeeds where plaintiffs "establish that no set of
13 circumstances exists under which the Act would be valid." *Id.* "The proper focus of
14 constitutional inquiry is the group for whom the law is a restriction, not the group for whom the
15 law is irrelevant." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992). In this
16 case, for transgender inmates, there exist no circumstances under which DOC's Policy is
17 constitutional because: (1) gender affirming surgery is medically necessary for certain patients
18 with severe gender dysphoria, and (2) the Policy completely bans gender affirming surgery for
19 all transgender inmates, regardless of medical necessity. Thus, the policy violates the Eighth
20 Amendment and is unconstitutional on its face. *Fields*, 653 F.3d at 557-58.

21 **IV. CONCLUSION**

22 Because gender affirming surgery is medically necessary for certain individuals with
23 gender dysphoria, and because DOC's Policy bans gender affirming surgery for all inmates,
24 without regard to medical necessity, Plaintiff respectfully requests that the Court grant her
25

1 Motion for Partial Summary Judgment, declare that DOC's Policy violates the Eighth
2 Amendment, and direct the DOC to discontinue the use of the Policy.

3
4 DATED this 19th day of April, 2018.

5 CORR CRONIN MICHELSON
6 BAUMGARDNER FOGG & MOORE LLP

7 s/ Kristina Markosova

8 Kristina Markosova, WSBA No. 47924

9 David Edwards, WSBA No. 44680

10 1001 Fourth Avenue, Suite 3900

Seattle, Washington 98154-1051

Telephone: (206) 625-8600

11 Fax: (206) 625-0900

kmarkosova@corrchronin.com

dedwards@corrchronin.com

12
13
14 AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION

15 By: /s/Antoinette M. Davis

16 Antoinette M. Davis, WSBA No. 29821

17 901 Fifth Avenue, Suite 630

Seattle, Washington 98164

18 Telephone: (206) 624-2184

tdavis@aclu-wa.org

19 Attorneys for Plaintiff
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Antoinette Marie Davis
ACLU of Washington
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Phone: 206-624-2184
Email: tdavis@aclu-wa.org
Attorneys for Plaintiff

Candie M. Dibble
Attorney General's office (Spokane-
Corrections)
Corrections Division
1116 West Riverside Avenue
Spokane, WA 99201-1194
Phone: 509-456-3123
Email: CandieD@atg.wa.gov
Attorneys for Defendants

s/ Donna Patterson
Donna Patterson