THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
NO. 3:22-cv-191

KANAUTICA ZAYRE-BROWN, Plaintiff, v. NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, et al., Defendant.	)	**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS**

NATURE OF THE CASE

Plaintiff is presently incarcerated in the North Carolina state prison system. She alleges that the North Carolina Department of Public Safety ("the Department") and fourteen Department officials have violated her rights under the Eighth Amendment to the U.S. Constitution, Article I, Section 27 of the North Carolina Constitution, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act ("RA"). Plaintiff's allegations center on her diagnosis of gender dysphoria and the related provision of medical care. Specifically, her claims focus on the Department's decision to not approve her request for a vulvoplasty.

STATEMENT OF PLAINTIFF'S FACTUAL ALLEGATIONS

Background

Plaintiff is a transgender woman first diagnosed with gender dysphoria in 2010. DE-1 ¶¶ 1-2. In 2010, she began receiving psychotherapy for gender dysphoria. *Id*. ¶ 47. In 2012, Plaintiff began hormone therapy and had multiple surgeries in 2012 and 2013. *Id*. ¶¶ 48, 50. In 2017, just before her incarceration Plaintiff had an orchiectomy—surgical removal of the testes. *Id*. ¶ 52. On

October 10, 2017, upon her incarceration, Plaintiff advised correctional staff of her situation, and medical staff confirmed her diagnosis of gender dysphoria. *Id*. ¶¶ 64-5.

Plaintiff alleges that gender dysphoria is a serious medical condition, for which treatment is medically necessary. *Id*. ¶ 40. She also alleges that if untreated, gender dysphoria can lead to "clinically significant psychological distress, impairment of basic life activities, and debilitating depression," as well as higher risks of social harms, and for some, it may result in "self-harm, suicidal ideation, suicide, and death." *Id*. Plaintiff maintains that relevant standards of care are published by the World Professional Association for Transgender Health ("WPATH")." *Id*. ¶ 37.

The Department has a policy regarding the evaluation and management of transgender people, related to things such as, hormone therapy, housing considerations, surgery requests, and more. *Id*. ¶¶ 54-56; Ex. A[1], § 4307(a). Such requests are reviewed by the Facility Transgender Accommodation Review Committee ("FTARC") and the Department Transgender Accommodation Review Committee ("DTARC"). *Id*. ¶¶ 55, 57. The DTARC members are: Defendants Catlett, Peiper, Sheitman, Langley, Agarwal, Cobb, Panter, and Williams. *Id*. ¶¶ 21-28. Certain requests, including for surgery, must be reviewed by the DTARC, with their recommendation being submitted to Defendants Junker and Harris. *Id*. ¶¶ 56-59. The policy also addresses behavioral and mental health. Specifically, psychotherapy is available to address individually identified psychotherapy goals. Additionally, those requesting accommodations under the policy receive evaluations from medical and behavioral health providers. *Id*. 4303(j)(2). The FTARC also receives synopses of related behavioral health and psychiatric evaluations prior to review. *Id*. 4303(j)(2)(D)(iii). The behavioral health evaluations used by these committees summarize the person's mental health history. *Id*. 4303(a).

[1] The policy is accessible at https://www.ncdps.gov/media/5909/download.

Plaintiff's Allegations Concerning Inadequate Treatment

Plaintiff concedes that she received hormone therapy while incarcerated. However, she alleges there was an eight-month delay in starting her hormones upon her incarceration. *Id*. ¶ 75. Then, Plaintiff claims her hormone therapy was interrupted and inadequate. *Id*. ¶ 76. She also acknowledges that she has resided in a female-only facility since August 15, 2019. However, Plaintiff alleges the Department initially wrongfully housed her at a male facility. *Id*. ¶ 66.

Plaintiff contends she "needs gender-affirming surgery for the treatment of gender dysphoria[]" and has requested the same on numerous occasions. *Id*. ¶ 5. Plaintiff specifically requests a vulvoplasty. *Id*. ¶ 149. She claims repeated delays, deferrals and denials of her requests. *Id*. ¶ 90. In 2019, the FTARC concluded the surgery was not recommended and referred the request to the DTARC. *Id*. ¶ 94. In August 2019, the DTARC "deferred" the request. *Id*. ¶ 103. Plaintiff requested reconsideration in February 2020. *Id*. ¶ 111. In May 2020, the DTARC indicated a determination on the requested surgery should not be made until after an in-person consultation with a surgical specialist. *Id*. ¶ 112. Defendants Junker and Harris agreed. *Id*. In July 2020, requests for the consultation with Dr. Figler, a urologist from UNC, were entered. *Id*. ¶ 113. That same month, as required by the UNC Transgender Health Program before the consultation, Plaintiff had a telephone interview with staff at the program. *Id*. ¶ 114. In May 2021, as a final prerequisite for the consultation, Plaintiff met with other staff from the program. *Id*. ¶ 122. In July 2021, Plaintiff had an in-person consultation with Dr. Figler, who recommended that she receive a vulvoplasty, but also indicated that before he could proceed, Plaintiff needed to meet a weight-loss goal, which she did in September 2021. *Id*. ¶¶ 123, 125-27.

Thereafter, a Utilization Review request for the surgery was submitted, which Defendant Amos deferred – noting that "elective procedures not approved." *Id*. ¶ 129. On October 20, 2021,

a contract social worker entered a note in Plaintiff's chart which indicated her opinion that Plaintiff was an appropriate candidate for surgery. *Id*. ¶ 130. On October 21, 2021, a UNC endocrinologist noted his opinion that the requested surgery was medically necessary. *Id*. ¶ 131. Plaintiff then submitted multiple grievances concerning her request for the surgery. *Id*. ¶¶ 132-37. Ultimately, DTARC recommended against approving the surgery as not medically necessary, and Defendants Junker and Harris agreed. *Id*. ¶ 139. Plaintiff learned of this decision on April 26, 2022. *Id*. ¶ 139. Plaintiff filed this lawsuit two days later.

Plaintiff's Allegations of Harm

Plaintiff contends that, because of "interrupted and/or inadequate hormone therapy" she has "suffered physical and emotional distress from hair growth, weight gain, and genital sensation that exacerbated her gender dysphoria, causing depression, anxiety, suicidal thoughts, and a dangerous attempt and ongoing desire to self-mutilate her genitals." *Id*. ¶ 78. She also claims that previously being held "in a male facility exacerbated [her] gender dysphoria, caused her" distress, put her at "grave risk" of assault, and led to being placed on suicide-watch. *Id*. ¶ 67. Plaintiff contends that she has suffered, and will continue to suffer irreparable harm, including severe distress, anxiety, depression, suicidal ideation, and self-injury. *Id*. ¶¶ 102, 117-18, 143.

Allegations Concerning Individual Defendants-

Each of the individual Defendants are sued only in their "official capacity under § 1983 for violations of Plaintiff's Eighth Amendment rights and under Article I, Section 27 of the state Constitution." *Id*. ¶¶ 16-29. Plaintiff does not assert any claims against Defendants in their individual capacities. *See generally* DE-1.

Defendant Eddie Buffaloe, the Secretary of the Department, is the final reviewer and decisionmaker of grievances submitted pursuant to [the Department's] Administrative Remedy

Procedure[.]" *Id*. ¶ 16. Defendant Ishee, the Prisons Commissioner, "is responsible for the administration of North Carolina's prisons, including the creation and implementation of [Department] policies and procedures[.]" *Id*. ¶ 17. Plaintiff alleges that, sometime between fall 2020 and spring 2021, she sent an emergency grievance to Defendant Ishee concerning her situation. *Id*. ¶ 85. Plaintiff does not allege whether Defendant Ishee received this grievance, but she does allege that she never received a response. *Id*. ¶¶ 85, 118-119.

Defendant Junker, the Director of Health and Wellness, is responsible for planning and coordinating a Health and Wellness delivery system. *Id*. ¶ 18. Defendant Junker is one of the two final reviewers of requests for surgery. *Id*. Defendant Harris, the Assistant Commissioner of Prisons, is responsible for the overall custody and security operations[,]" and is the second final reviewer. *Id*. ¶ 19. Plaintiff maintains that Defendants Junker and Harris agreed with the DTARC's recommendation that surgery was not medically necessary, despite contrary determinations by other medical providers. *Id*. ¶ 139. Defendant Campbell, the Medical Director for the State prison system, is "responsible for oversight of the day-to-day operations of medical services[.]" *Id*. ¶ 20. Defendant Amos, is a member of the Utilization Review Board. *Id*. ¶ 29. Plaintiff alleges that, in September 2021, Defendant Amos deferred the Utilization Review surgery request. *Id*. ¶ 129.

ARGUMENT

I. Dismissal Standard

In the face of a subject-matter jurisdiction challenge, the plaintiff bears the burden of showing that federal jurisdiction exists. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). On a 12(b)(1) motion, "the district court is to regard the pleadings as mere evidence […], and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B. F. Perkins Co*., 166 F.3d 642, 647 (4th Cir. 1999) (citations omitted).

To survive a 12(b)(6) motion, a complaint must meet the pleading standards of Federal Rule of Civil Procedure 8. *See Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009). To avoid dismissal, the complaint must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A claim is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable" – a standard that requires more than facts "that are 'merely consistent with' a defendant's liability." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*, 556 U.S. at 678.

II. Plaintiff's Claims Are Barred For Failure To Exhaust Available Administrative Remedies.

Plaintiff's complaint should be dismissed for failure to exhaust administrative remedies prior to filing this action, as required by the Prison Litigation Reform Act (PLRA). The PLRA provides that "no action shall be brought with respect to prison conditions under [section] 1983 of [this title], or any other federal law […] until such administrative remedies as were available were exhausted." 42 U.S.C. § 1997e(a). The "exhaustion requirement applies to all inmate suits about prison life[.]." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

"There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007). Thus, the exhaustion requirement is a precondition to filing suit even if the relief sought in the suit cannot be granted by the administrative process. *Booth v. Churner*, 532 U.S. 731, 741 (2001). Proper exhaustion requires an incarcerated plaintiff to comply with the Department's Administrative Remedy Procedure ("ARP"), which is a three-step procedure which governs submission and review of inmate grievances. *See Woodford v. Ngo*, 548 U.S. 81, 88-91 (2006); *Moore v. Bennette*, 517 F.3d

717, 721 (4th Cir. 2008). As an incarcerated individual, Plaintiff was required to exhaust her administrative remedies with the Department in accordance with the ARP. *Id.*, 517 F.3d at 721. An incarcerated individual does not exhaust her administrative remedies until she completes all three steps of the ARP. *See Id*., at 721-22.

Here, Plaintiff's claims are centered on the Department's decision to not approve her request for surgery. Thus, for such claims to proceed, Plaintiff must have fully exhausted a grievance related to *that decision* prior to filing this action. But Plaintiff could not have and did not do so. Plaintiff alleges that she learned of the decision to not approve her requested surgery on April 26, 2022. DE-1 ¶ 139. Two days later, on April 28, 2022, Plaintiff filed this action. Despite alleging that she has exhausted all available administrative remedies (*id*. ¶ 13), this two-day period clearly demonstrates that she could not have completed the grievance process before filing.

III. Plaintiff's Federal Constitutional Claim (Count I) Is Barred By The Eleventh Amendment and Sovereign Immunity Such That No Claim May Be Asserted Against The Department And No Damages Claims May Be Asserted Against Individual Defendants.

The Eleventh Amendment provides that the judicial power of the United States does not extend to suits against the State. "Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." *Green v. Mansour,* 474 U.S. 64, 68 (1985). Eleventh Amendment immunity applies to agencies, instrumentalities, and arms of the State. *Regents of the Univ. of Cal. v. Doe,* 519 U.S. 425, 429 (1997); *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002).

The State of North Carolina has not waived sovereign immunity or in any way consented to being sued for alleged federal constitutional violations. *See, e.g., Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1139 (4th Cir. 1990). Moreover, in enacting Section 1983, Congress

did not abrogate North Carolina's Eleventh Amendment immunity. Specifically, Congress allowed only "persons" to be sued under Section 1983. *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 67 (1989). This constitutional guarantee of immunity applies not only to suits against the State itself but also to suits where "one of [the State's] agencies or departments is named as the defendant." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Accordingly, Eleventh Amendment immunity bars Plaintiff's federal constitutional claim against the Department. Thus, Count I against the Department must be dismissed.

Likewise, Count I's damages claims against the individually-named Defendants are barred because they are sued only in their official capacity. An official capacity claim is not a suit against the official but rather is a suit against the official's office, and thus is no different from a suit against the State itself. *Will*, 491 U.S. at 67. Claims for damages are not available against state officers. *See Lynn v. West*, 134 F.3d 582, 587 (4th Cir. 1998) (affirming dismissal of a claim for monetary damages against state officials pursuant to the Eleventh Amendment). Thus, Plaintiff's claims for damages against state officials must be dismissed.[2]

IV. Plaintiff's State Constitutional Claim (Count II) is Barred by Sovereign Immunity.

In *Corum v. University of North Carolina*, the North Carolina Supreme Court held that in very limited circumstances, a plaintiff may file a direct North Carolina constitutional claim against the state or its agents. 330 N.C. 761, 782-84, 413 S.E.2d 276, 289-91 (1992). To state a *Corum* claim, however, the plaintiff must have no "adequate state remedy." *See Davis v. Town of S. Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994)*; see also, Craig v. New Hanover Cnty Bd. of*

[2] Any individual capacity claims would be barred by qualified immunity. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735. As argued herein, the complaint fails to state a plausible claim and the right, upon which Plaintiff's claim rests, is not clearly established. While there is no Fourth Circuit or Supreme Court precedent on the issue of surgery and deliberate indifference, among the circuits that have examined this issue, there is a clear split of authority—with a greater number of circuits finding in favor of correctional systems. *See* Section (V)(C)(5) below.

Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355-56 (2009). Therefore, it is a well-established principle that the judiciary "must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power." *Corum*, 330 N.C. at 784, 413 S.E.2d at 291.

In determining whether a remedy is "adequate," the remedy must both address the constitutional injury and provide the plaintiff with an opportunity to "enter the courthouse doors." *See Taylor v. Wake Cnty*, 258 N.C. App. 178, 185, 811 S.E.2d 648, 654, 371 N.C. 569, 819 S.E.2d 394 (2018); *Craig*, 363 N.C. at 340, 678 S.E.2d at 355; *Wilcox v. City of Asheville*, 222 N.C. App. 285, 301-02, 730 S.E.2d 226, 239 (2012). Moreover, the ability to bring a civil lawsuit is not required for a remedy to be adequate – an administrative remedy can also satisfy that requirement. *See Copper v. Denlinger*, 363 N.C. 784, 688 S.E.2d 426 (2010) (holding that an administrative remedy can satisfy the requirement of an opportunity to enter the courthouse door).

In *Taylor*, the North Carolina Supreme Court held that "[t]he adequacy of a state remedy requires only the opportunity to be heard, and if successful to recover for the injuries alleged in the direct constitutional claim." *Id.* at 189, 811 S.E.2d at 656. Moreover, the question of adequacy of a remedy looks to a plaintiff's ability to recover for a particular harm and not the plaintiff's ability to recover against a particular defendant. *See, e.g., Wilcox*, 222 N.C. App. at 301-02, 730 S.E.2d at 238-39 (holding that suit against a defendant in his individual capacity is sufficient to preclude the plaintiff from asserting a *Corum* claim); *Phillips* v. *Gray*, 163 N.C. App. 52, 57-58, 592 S.E.2d 229, 233 (2004) (holding that a plaintiff's rights were adequately protected by a wrongful discharge claim against a sheriff in his individual capacity).

Here, there are two adequate state remedies available to Plaintiff. First, Plaintiff could have filed an action in the North Carolina Industrial Commission against the Department related to her

allegations of inadequate medical treatment or other acts of alleged negligence. *See* N.C.G.S. § 143-291. Second, in this action Plaintiff asserts Section 1983 claims, which she could have also asserted against individuals in state court. *See Martinez* v. *California*, 444 U.S. 277, (1980) (recognizing that it is well established that State courts have concurrent general subject matter jurisdiction to hear Section 1983 claims). Because Plaintiff had these alternative remedies, she has adequate state remedies available to her and cannot assert a direct constitutional claim under *Corum*. Therefore, no exception to Defendants' sovereign immunity is available, and Plaintiff's State Constitutional Claim (Count II) fails and should be dismissed.

V. Plaintiff Fails To State A Deliberate Indifference Claim Under Either The Federal Or State Constitution.

The thrust of Plaintiff's deliberate indifference claim is that by not approving her requested surgery, Defendants have violated her constitutional right to be free from cruel and/or unusual punishment. However, even taken as true, Plaintiff's factual allegations are insufficient to draw a reasonable inference that not receiving the requested surgery constitutes an objectively sufficiently serious harm or thatany Defendant was subjectively aware of an excessive risk to her health or safety, and nonetheless, consciously ignored that risk, by not authorizing the requested surgery. Thus, the complaint fails to state a claim of deliberate indifference against any of the Defendants.

A. The Deliberate Indifference Standard.

The deprivation of necessary medical care in prison, under certain circumstances, can form the basis of an Eighth Amendment violation. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "[A] prison official violates the Eighth Amendment only when two requirements are met[.]" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The first requirement is the deprivation of an objectively "sufficiently serious" basic human need. *Id*. A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay

person would easily recognize the necessity for a doctor's attention." *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008). "Only extreme deprivations are adequate to satisfy the objective component[,] […] a prisoner must allege a serious or significant physical or emotional injury." *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (internal quotations omitted).

The second requirement is a "sufficiently culpable state of mind" or stated differently, "deliberate indifference" to a substantial risk of serious harm to an inmate's health or safety. *Farmer*, 511 U.S. at 834, 838. Under the second requirement, "it is not enough that an official *should* have known of a risk; he or she must have had actual subjective knowledge of both the inmate's serious medical condition and the excessive risk posed by the official's action or inaction." *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014) (emphasis in original). Thus, "[a]n official is deliberately indifferent to an inmate's serious medical needs only when he or she subjectively 'knows of and disregards an excessive risk[.]'" *Id.* at 178 (quoting *Farmer*, 511 U.S. at 837. Accordingly, "[d]eliberate indifference entails something more than mere negligence . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. Moreover, "[d]isagreements between an inmate and a physician over the inmate's proper medical care do not state a § 1983 claim unless exceptional circumstances are alleged." *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985). Additionally, "[i]n order for an individual to be liable under § 1983, it must be affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights." *Id.* at 850. (internal quotations omitted).

B. The Deliberate Indifference Standard Applies To Plaintiff's State Constitutional Claim.

In a conditions-of-confinement case, Article I, Section 27 of the North Carolina Constitution and the Eighth Amendment should be interpreted the same. Article I, Section 27

provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel **or** unusual punishments inflicted." N.C. Const. art. I, § 27 (emphasis added). The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel **and** unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added). This slight textual difference should not have an impact on how the two phrases are interpreted or what analytical standards are applied to conditions of confinement cases. Historically, the North Carolina Supreme Court had "analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 3 48 N.C. 588, 603, 502 S.E.2d 819, 828 (1998). Recently, the North Carolina Supreme Court recognized that in the context of juvenile sentencing, that the two phrases can mean different things. *See State v. Kelliher,* No. 442PA20, 2022-NCSC-77 (June 17, 2022). However, *Kelliher* does not provide applicable guidance on how these two phrases can be interpreted differently in the context of a deliberate indifference claim. Thus, the federal deliberate indifference standard remains a workable standard.

C. Plaintiff Fails To Allege Facts That Support The Inferences Necessary To Support A Deliberate Indifference Claim.

Beyond Plaintiff's conclusory recital of the elements of a deliberate indifference claim (*see* DE-1 ¶¶ 150-154, 157), the complaint is devoid of any *factual allegations* which can support an inference that by not receiving the requested surgery she will sustain some objectively sufficiently serious deprivation of rights. Additionally, the alleged facts do not support an inference that Defendants were subjectively aware of a substantial risk of harm posed by the decision to maintain the current course of treatment and not approve the surgery. Moreover, as explained in Section (V)(C)(3) below, Plaintiff's general allegations of risks and the state of her mental distress (*see id.* ¶¶ 36, 67, 78, 102, 117-19, 118), are not sufficient to support an inference of subjective knowledge of a substantial risk, particularly since she does not allege that specific Defendants were

subjectively aware of these instances. The absence of such factual allegations is fatal to Plaintiff's attempt to state a claim that any Defendant inflicted cruel and/or unusual punishment on her.

1. No Allegations of Objectively Sufficiently Serious Harm.

With regard to the objective component, the issue is whether Plaintiff's factual allegations can support an inference that by not receiving the requested surgery during her remaining incarceration she will experience a deprivation of rights which is objectively sufficiently serious. The allegations do not support such an inference. Even taken as true, the allegations at most support an inference that by not receiving her requested surgery until after she is released from incarceration, Plaintiff's desire to complete her surgical transition will be delayed, which will cause her some distress. This is not sufficient to support an inference of an objectively sufficiently serious deprivation of rights.

2. Plaintiff's Does Not Allege Specific Subjective Knowledge Of Any Defendants.

Specific factual allegations of Defendants' subjective knowledge are hard to come by in the complaint. Plaintiff alleges that Defendants knew that she is a transgender female, who has been diagnosed with gender dysphoria, for which she has requested treatment and accommodation, including surgery. *Id*. ¶¶ 1-6. She further alleges that the previous treatments provided to her "have not adequately alleviated her gender dysphoria" and that she continues to suffer as a result. *Id*. ¶ 4. Moreover, Plaintiff alleges that she needs the requested surgery to treat her gender dysphoria and that certain medical providers agree that the surgery is medically necessary. *Id*. ¶ 5. Additionally, Plaintiff alleges that the Department knew that she was a transgender female, who had previously undergone hormone therapy and surgeries, but nonetheless housed her at a male facility for almost two years. *Id*. ¶ 67. She also alleges that Defendants know of and enforce relevant Department policy. *Id*. ¶ 146. As shown below, these factual allegations fall far short of

the sort of allegations which the Fourth Circuit has found sufficient to support a deliberate indifference claim in the context of medical care in prison.

a. Plaintiff Does Not Allege Knowledge A Substantial Risk Of Harm Coupled With A Denial Of Care.

Allegations that a defendant was on notice of a substantial risk of serious harm but nonetheless failed to provide any care in response can support a deliberate indifference claim. *See Depaola v. Clarke*, 884 F.3d 481 (4th Cir. 2018). In *Depaola*, the Court found that plaintiff had sufficiently pled a deliberate indifference claim as to certain defendants where he alleged that those defendants were on notice of his mental illness, his repeated requests for help, and his "extreme agitation, complete exhaustion, depression, hopelessness, [] trance-like states, [and more]" yet the defendants **denied him any treatment**. *Id*., at 487-88*; see also, Griffin v. Mortier*, 837 F. App'x 166, 171 (4th Cir. 2020) (plaintiff's complaint alleged that the defendant nurse did not exercise any medical judgement because she **did not provide any treatment** at all.); *Lowe v. Johnson,* 797 F. App'x 791, 793 (4th Cir. 2020) (allegation that provider-defendant discontinued one anti-seizure medication and **failed to prescribed** another for three weeks.); *Cosner v. Dodt*, 526 F. App'x 252, 254 (4th Cir. 2013) (allegation that provider-defendants **refused to obtain** more detailed imaging and instead relied on an X-Ray, which they knew would not be as effective at picking up the foreign object ingested by the plaintiff); *Hicks v. James*, 255 F. App'x 744, 749 (4th Cir. 2007) (allegations that plaintiff had mental health issues and was placed in isolation **without any further attention** to his mental health status).

There are no such allegations in the instant complaint. Indeed, Plaintiff concedes she was provided with numerous treatments and accommodations for gender dysphoria—just not the requested surgery.

b. Plaintiff Does Not Allege that Defendants Failed To Provide Care Which They Believed was Required.

The Fourth Circuit has also found that allegations that a provider-defendant failed to follow through with care which they believed medically necessary (as opposed to merely medically appropriate) can support a deliberate indifference claim. In *Jackson*, the Court reversed the dismissal of a complaint against a physician where the allegations indicated that the doctor failed to provide care which he believed was necessary. 775 F.3d at 179. Specifically, the Court found that an inference could be made that since the defendant-physician "prescribed a set of tests and treatments [….] he did so because he subjectively believed they were necessary, and therefore must have known that failing to provide [the prescribed tests] would pose an excessive risk[.]" *Id.* Thus, "a doctor's failure to provide care that he himself deems necessary to treat an inmate's serious medical condition may constitute deliberate indifference." *Id*. at 179*; see also, Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990) (finding that allegations that a physician "fail[ed] to provide the level of care that" they believed necessary may constitute deliberate indifference); *Pledger v. Lynch*, 5 F.4th 511, 524 (4th Cir. 2021) (same).

Here again, the Complaint lacks any such allegations. Plaintiff has not alleged that any of the Defendants believed the surgery was medically necessary but simply failed to approve it.

3. Plaintiff's Factual Allegations Do Not Support Inferences That Any Defendant Had Subjective Knowledge Of A Substantial Risk Of Harm.

Rather than factual allegations of notice of a substantial risk of harm and a denial of care in response, or failure to follow through with care which Defendants believed necessary, Plaintiff relies on general allegations of risks and references to episodes that are not tied to any particular Defendant. First, Plaintiff refers generally to possible risks to "some individuals, not receiving necessary treatment for gender dysphoria[.]" DE-1 ¶ 36. Then, she alleges that she experienced

distress and was at risk of assault while housed in a male facility and that this led to her being placed on suicide watch in August 2019. *Id*. ¶¶ 67, 102. Plaintiff also alleges that periods of "interrupted and/or inadequate hormone therapy" have caused her "physical and emotional distress from hair growth, weight gain, and genital sensation that exacerbate her gender dysphoria, causing depression, anxiety, suicidal thoughts, and a dangerous attempt and ongoing desire to self-mutilate her genitals." *Id*. ¶ 78. She also alleges being admitted to an inpatient mental health unit in December 2020 "after expressing an urge to self-mutilate her genitals, suicidal ideation, and extreme hopelessness due to her persistent gender dysphoria" and the Department's refusal to authorize her requested surgery. *Id*. ¶ 117. Plaintiff further alleges that she wrote a grievance in February 2021, addressed to Defendant Ishee, concerning her repeated requests for surgery, inconsistent hormone treatment, and her worsening mental health and urges to "self-mutilate her genitals." *Id*. ¶ 118. Notably, Plaintiff does not allege that Defendant Ishee actually received this grievance, but she does allege that she never received a response. *Id*. ¶ 119.

Critically absent from the complaint are allegations that any individual Defendant was subjectively aware of any of these instances, let alone that she faced some excessive risk of harm that was contingent on a particular course of action by Defendants. Plaintiff does not allege that any particular Defendant subjectively knew that she was harming herself, at risk of harming herself, experiencing suicidal ideation, or that she engaged in, or was at risk of engaging in any other self-injurious behavior, let alone that such risks were tied to some action or decision by any particular individual Defendant. Relatedly and importantly, Plaintiff fails to allege that despite notice of an excessive risk of harm, Defendants failed to provide any care in response. Thus, Plaintiff has not stated the sort of deliberate indifference claim presented in *Depaola* and the other cases noted in the section above.

Additionally, Plaintiff does not allege that any Defendant believed that more or different treatment of her gender dysphoria was required, and then failed to follow through on such treatment. Indeed, as will be discussed below, the heart of Plaintiff's contention is her disagreement with Defendants regarding what treatment options are proper at a given time—such a contention, as matter of law, cannot support a deliberate indifference claim. Accordingly, Plaintiff has not asserted factual allegations that can support an inference that any Defendant subjectively knew that she faced a substantial risk of serious harm.

4. Plaintiff's Disagreement About The Course Of Treatment Cannot Support Her Deliberate Indifference Claims.

Plaintiff's contention that Defendants have violated her rights by not approving her requested surgery amounts to a disagreement over the course of medical treatment, which, as a matter of law, is insufficient to support a deliberate indifference claim. State "prisoners do not have a constitutional right to the treatment of his or her choice[.]" *King v. United States*, 536 F. App'x 358, 363 (4th Cir. 2013) (cleaned up). Thus, "'[d]isagreements between an inmate and a physician over the inmate's proper medical care are not actionable absent exceptional circumstances." *Hixson v. Moran*, 1 F.4th 297, 302-03 (4th Cir. 2021) (quoting *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985). This has been reiterated by the Fourth Circuit on numerous occasions. *See, e.g., Lyles v. Stirling*, 844 F. App'x 651, 654 (4th Cir. 2021) ("an inmate's mere disagreement regarding the proper course of treatment provides no basis for relief"); *Overman v. Wang*, 801 F. App'x 109, 111 (4th Cir. 2020); *Germain v. Shearin*, 531 F. App'x 392, 395 (4th Cir. 2013); *Gregory v. Prison Health Servs.*, 247 F. App'x 433, 435 (4th Cir. 2007).

A few of these cases are particularly instructive. In *Jackson*, the Fourth Circuit affirmed dismissal a 12(b)(6) motion where the plaintiff's allegations against one particular provider-defendant amounted to "disagreement between an inmate and a physician over the inmate's proper

medical care[.]" *Jackson*, 775 F.3d at 178 (cleaned up). Specifically, the Court found that the allegations challenging the appropriateness of a diagnosis and subsequent decision to change medication prescribed by an earlier provider amounted to a mere disagreement over the proper provision of care, which could not, as a matter of law, support a deliberate indifference claim. *Id*.

In *King*, the plaintiff alleged that while "he received some treatment for the damaged tooth, including pain medication and antibiotics, prison officials still acted with deliberate indifference by failing to perform a root canal." *King*, 536 F. App'x at 362. The Fourth Circuit affirmed dismissal on a 12(b)(6) motion noting that after an erroneous drilling procedure, the plaintiff was monitored numerous times, provided medication, and other treatments. *Id*. The Court concluded that "even assuming that a root canal was a proper treatment … these facts alone do not state a claim of deliberate indifference." *Id*., 536 F. App'x at 363.

In *Hixson*, the Court affirmed summary judgment in favor of the provider-defendant, because evidence that the provider-defendant chose one course of treatment (monitoring blood sugar and diabetic diet rather than medication) over another, as a matter of law, is insufficient to support a deliberate indifference. *Hixson*, 1 F.4th at 303. This was true despite evidence from Plaintiff's expert that the provider-defendant's decision violated the standard of care. *Id*.

As in the cases discussed above, in the instant case, Plaintiff's contentions boil down to an assertion that by not approving a treatment plan that she and other medical personnel believe to be necessary (*see* DE-1 ¶¶ 4, 5, 75, 78, 126, 131, 139), Defendants are inflicting cruel and/or unusual punishment on her. At bottom, this contention is a disagreement as to the proper medical care. Such a disagreement cannot sustain a constitutional claim for relief.

5. The Complaint Also Lacks Allegations That Defendants Consciously Disregarded A Known Substantial Risk Of Harm.

Even assuming Plaintiff had alleged the requisite subjective knowledge, which Defendants contend she has not, her deliberate indifference claim is nonetheless subject to dismissal because she does not allege facts sufficient to support an inference that Defendants consciously disregarded a known substantial risk of serious harm. *See Farmer*, 511 U.S. at 837. In fact, the complaint reveals that rather than knowingly disregarding an excessive risk of harm posed by Plaintiff's gender dysphoria, Defendants took steps to treat and accommodate the same.

Plaintiff acknowledges that the Department has attended to her gender dysphoria with treatment and other accommodations, including hormone therapy, allowing use of her preferred pronouns, and transfer to a female facility. DE-1 ¶¶ 3-4, 68, 75-8. Moreover, the Department's policy provides for mental and behavioral health evaluations and treatment. *See Id*. ¶¶ 53-62, Ex. A §§ 4303, 4307. However, Plaintiff alleges that these treatments and accommodations have not been provided consistently and have "not adequately alleviated her gender dysphoria[.]" *Id*. ¶¶ 3-4, 75-8. Moreover, she alleges that other medical providers agree that the requested surgery is necessary. *Id*. ¶¶ 4, 5, 75, 78, 126, 131, 139. It is true that the provision of *some* treatment, does not automatically equate to constitutionally *adequate* treatment. *See De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013). However, in the context of a deliberate indifference claim premised on the decision to not approve surgery, multiple circuits have found that the provision of other treatment short of surgery is constitutionally adequate.

The First Circuit held that that the care provided to the plaintiff, which stopped short of surgery, did not violate the Eighth Amendment. *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) (*en banc*). In *Kosilek*, the evidence developed mirrors the allegations in the instant case. Namely, the plaintiff in *Kosilek* had received other ameliorative measures, including hormone therapy,

psychotherapy, medication, and more, and at issue was whether, in light of those other measures, the decision not to provide the requested surgery was sufficiently harmful. *Id*. at 89-90. The First Circuit held that state's decision to continue treating the plaintiff's gender dysphoria through these other treatments, rather than authorizing the surgery was a choice between two alternatives and thus cannot support a deliberate indifference claim. *Id*. at 90.

The Tenth Circuit reached the same conclusion four years later. In *Lamb v. Norwood*, 899 F.3d 1159 (10th Cir. 2018), the Tenth Circuit held that there was no error in granting summary judgment to prison officials on the claim of deliberate indifference for not approving surgery because the combination of existing treatment and the sparseness of the summary judgment record precluded an inference of deliberate indifference. Just as with the plaintiff in *Kosilek*, the plaintiff in *Lamb* was being treated with a number of other modalities short of surgery, including mental health treatment and hormone replacement therapy. *Lamb*, 899 F.3d at 1162. The Tenth Circuit noted that the only substantive issue was whether the existing treatment constitutes deliberate indifference to the plaintiff's gender dysphoria. *Id*. Moreover, the Tenth Circuit noted that the provision of some care, which is effective, even if subpar or different from what the plaintiff wants, precludes a finding of deliberate indifference. *Id*. at 1163. Additionally, just as in *Kosilek*, the Tenth Circuit noted that as a matter of law, a difference in opinion over a particular course of treatment, cannot support a claim of deliberate indifference. *Id*.

A year later, the Fifth Circuit again reached the same conclusion in *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019). In *Gibson*, the plaintiff was receiving hormone replacement therapy and mental health counseling. *Id*. at 217. The Fifth Circuit affirmed summary judgment because it was indisputable that the necessity and efficacy of surgery was a matter of significant disagreement

within the medical community, and it could not be cruel and/or unusual to deny treatment that no other prison had ever provided. *Id*. 920 at 223, 228.

And the Seventh Circuit in *Campbell v. Kallas*, 936 F.3d 536, 537 (7th Cir. 2019), reversed the district court's denial of qualified immunity because at the time of the inmate's request for surgery, no case clearly established a right to gender-dysphoria treatment beyond hormone therapy.

These cases support the principle that where a correctional system is providing other recognized accommodations and treatment for gender dysphoria, the decision to not approve a requested surgery cannot support a claim of deliberate indifference. Just as in *Kosilek, Lamb, Gibson,* and *Campbell*, Plaintiff's gender dysphoria has been and is being treated in other ways. And just as in *Kosilek, Lamb, Gibson,* and *Campbell*, Plaintiff's effort to mount a deliberate indifference claim on the back of her contention that the care provided has been inadequate and the disagreement over the most appropriate course of treatment must be rejected. Review of the only circuit case to find that surgery was constitutionally required makes this point clear.

In *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 610 (2020), the Ninth Circuit affirmed injunctive relief directing the state of Idaho to provide the plaintiff with surgery because the inmate established that such treatment was medically necessary and that in failing to provide the surgery, the correctional facility authorities were deliberately indifferent to her serious medical needs. *Id.* at 767. *Edmo* is distinguishable from the instant case.

As with all such cases, *Edmo* was decided on the specific facts before it, which are not alleged in the instant case. The district court's order, which the Ninth Circuit affirmed, was based on the "unique facts and circumstances presented" by the plaintiff. *Id.* at 783 (quoiting *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103, 1110 (D. Idaho 2018). Those unique facts including

evidence that the plaintiff had, on multiple occasions, harmed herself, include three efforts to self-castrate and that she alleviated her thoughts of self-castration by cutting her arms. *Edmo*, 935 F.3d at 772-74. The district court specifically referred to this evidence in finding that Idaho was deliberately indifferent. *See Edmo*, 358 F. Supp. 3d at 1126-27. Accordingly, the Ninth Circuit "emphasize[d] that the analysis [in *Edmo*] is individual to Edmo and rests on the record in th[at] case." *Edmo*, 935 F.3d at 767.

This point is underscored by the Ninth Circuit's explanation that it did not believe that *Kosilek* was wrongly decided, but instead that the same approach used in *Kosilek* warranted a different result. *See Edmo*, 935 F.3d at 794. Ultimately, the Ninth Circuit held that the care provided to the plaintiff was "medically unacceptable under the circumstances and chosen in conscious disregard of an excessive risk to [plaintiff's] health." *Id*. at 797.

In the instant case, the complaint lacks any allegations that the Defendants knew of actual severe self-harm (or risk thereof) like that present in *Edmo*. As discussed above, while Plaintiff alleges "a dangerous attempt and ongoing desire to self-mutilate her genitals[,]" distress which "led to [her] being placed on suicide-watch[,]" and "[more frequent] thoughts of self-harm more frequently" (see DE-1 ¶¶ 67, 78, 121), Plaintiff does not allege that any Defendant had subjective knowledge of the same. Thus, *Edmo* and the instant case are significantly distinguishable.

Taken as true, Plaintiff's allegations confirm that the Department has and is treating her gender dysphoria. However, Plaintiff alleges that because the ongoing treatment has not, in her view, adequately alleviated her gender dysphoria, and because other medical providers believe that the surgery is medically appropriate, the decision to not approve the requested surgery is unconstitutional. This contention amounts to a disagreement regarding the course of treatment for her gender dysphoria, which as a matter of law, cannot support a claim for deliberate indifference.

Moreover, these other circuit decisions support the conclusion that denying a request for surgery, while providing other accommodations and treatment cannot support a claim of deliberate indifference. Therefore, Plaintiff has failed to state a viable cause of action against Defendants, under either the U.S. Constitution or the North Carolina Constitution, and Counts I and II of the complaint must be dismissed with prejudice.

VI. Plaintiff's Disability Discrimination Claims (Counts III & IV) Should Be Dismissed.

Title II of the ADA provides "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To state a claim under Title II, a plaintiff must allege three elements: "(1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016). Section 504 of the Rehabilitation Act contains substantially similar language. *See* 29 U.S.C. § 794(a). Title II ADA claims and Section 504 RA claims "can be combined for analytical purposes because the analysis is substantially the same." *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012) (internal quotations omitted).

A. The Law is Currently Unsettled as to Whether Plaintiff Has Alleged a Disability.

Plaintiff alleges that her "gender dysphoria is a disability." *Id.* ¶¶ 2, 162, 172. However, the issue of whether gender dysphoria qualifies as a disability under the ADA/RA, or whether it is excluded under 42 U.S.C. §12211(b)(1) (2018) or 29 U.S.C. §705(20)(F), is presently pending

before the Fourth Circuit.[3] In that case, the district court held that gender dysphoria is excluded from the scope of the ADA and the RA. *Williams v. Kincaid*, Civil Action No. 1:20-cv-1397, 2021 U.S. Dist. LEXIS 106787, at *5 (E.D. Va. June 7, 2021). The Fourth Circuit's decision on this issue would not only be binding on this Court, but it would also appear to be the first Circuit to rule on the matter.[4] If the Fourth Circuit agrees with the district court and affirms the ruling that gender dysphoria is not a qualifying disability under the ADA/RA, Plaintiff's disability claims would necessarily fail as a matter of law.

B. The Complaint Lacks Factual Allegations to Support a Discrimination Claim.

Even assuming a sufficiently alleged disability, the *factual* allegations (as opposed to the conclusory assertions), even taken as true, cannot support a disability claim, under either a discrimination or accommodations theory. Rather than asserting factual allegations that can support necessary inferences, Plaintiff instead relies on conclusory statements that the Department has failed to provide her with "equal access to prison life, on the basis of her disability[,] [fails] to accommodate [her gender dysphoria][, and] "has discriminated against and continues to discriminate against [her] […] by maintaining policies, practices, and procedures that deny her access to treatment and support needed to treat and manage her disability, causing her ongoing harm solely because of her disability." DE-1 ¶¶ 164-65, 174-75.

These conclusory allegations are insufficient to support an inference that she was otherwise qualified to receive a particular benefit or service, let alone that she was denied access. She makes no factual allegations about when or how any such denial occurred. Moreover, she makes no

[3] The Court heard oral argument in *Williams v. Kincaid, et al.*, Case No. 21-2030 (4th Cir.) on March 11, 2022.

[4] As of February 2021, one district court noted that "no federal court of appeals or the Supreme Court has interpreted the constitutionality of the [] exclusion or addressed whether the exclusion applies to gender dysphoria." *Venson v. Gregson*, No. 3:18-CV-2185-MAB, 2021 WL 673371, at *2 (S.D. Ill. Feb. 22, 2021).

factual allegations of that any particular person acting on behalf of the Department, denied her access to some benefit or service because of animus against transgender persons. In fact, she concedes that she has received many considerations and treatments for her condition. DE-1 ¶¶ 3-4, 68, 75-8. Thus, she has not sufficiently pled facts to satisfy the second and third elements of her claim. *See Lamone*, 813 F.3d at 503. In short, based on the complaint it cannot be reasonably inferred that Plaintiff was denied any benefit or services that she was otherwise qualified to receive on the basis of her gender dysphoria. As such, her disability discrimination claims do not meet *Iqbal/Twombly* standards and must be dismissed pursuant to Rule 12(b)(6)

CONCLUSION

For the foregoing reasons, Defendants respectfully request that all claims against them be dismissed with prejudice.

Respectfully submitted this 24th day of June, 2022.

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