IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

REIYN KEOHANE,

Plaintiff,

v.

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections, et al.,

Defendants.

CASE NO. 4:16-cv-511

FDOC'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants Julie Jones, in her official capacity as Secretary of the Florida Department of Corrections, and Francisco Acosta, in his official capacity as Warden of Everglades Correctional Institution (together, "FDOC"), respectfully submit this opposition to the motion for preliminary injunction filed by Plaintiff Reiyn Keohane (hereinafter, "Motion").

INTRODUCTION

Plaintiff's request for a preliminary injunction focuses almost entirely on the need for hormone therapy. Plaintiff's medical providers are now providing this hormone therapy, and will continue to do so as long as such therapy is deemed to be medically necessary.

Accordingly, all that is pending before the Court is Plaintiff's contention that FDOC's refusal to allow an exception to the male inmate hair length policy and further allow Plaintiff access to female clothing, *i.e.*, female inmate undergarments,[1] amounts to an Eighth Amendment violation. Nowhere in the Motion are these desires tied to serious medical need or any imminent risk of serious harm. Nor does Plaintiff direct the Court to even a single case holding that a prison's failure to meet a prisoner's hairstyle or clothing demands violates the Eighth Amendment. This alone compels the denial of Plaintiff's motion.

Further, FDOC's hair-length and clothing policies are supported by sound penological reasons. Uniformity in hair length and a refusal to make grooming and clothing exceptions are necessary for the safe and secure administration of prison facilities. Plaintiff has made no showing whatsoever that personal desires, unmoored to any risk of serious medical harm, should override FDOC's generally applicable policies.

The request for preliminary injunctive relief should be denied.

BACKGROUND

Plaintiff is a biologically male inmate in the custody of FDOC. *See* Mot. Ex. 1, ¶ 2. In September 2013, Plaintiff was charged with attempted murder for

[1] Because FDOC male and female inmate outerwear is all but identical, Plaintiff necessarily is requesting an exception to FDOC's male-issued underwear. *See also* Compl. ¶¶ 57 (quoting grievance in which Plaintiff was accustomed to wearing "padded bras"), 66 (quoting grievance in which Plaintiff is "not comfortable wearing male underwear").

stabbing Plaintiff's female roommate multiple times in the neck and stomach, causing "life threatening injuries." *See* Fort Meyers Police Department Probable Cause Statement (Sept. 23, 2013), attached as Exhibit "A." Plaintiff was apprehended after fleeing the crime scene on a moped—where Plaintiff was found "armed with two knives and a loaded AR15 magazine in his pocket." *Id.* Plaintiff pled guilty to the crime charged, and was sentenced to 15 years in prison, which Plaintiff began serving in July 2014. Mot. Ex. 1, ¶ 9.

On August 15, 2016, Plaintiff filed this lawsuit against FDOC and other defendants, alleging that Plaintiff suffered from Gender Dysphoria and that FDOC had violated the Eighth Amendment by failing to provide Plaintiff with hormone therapy, and by not permitting Plaintiff to wear "female underwear" and "grow[] her hair" in female styles. *See* Compl. [Rec. Doc. 1] ¶¶ 36, 66, 87–97. Gender Dysphoria is the "medical diagnosis for the incongruence between one's gender identity and one's sex assigned at birth." *Id.* ¶ 15. Thus, Plaintiff alleges, although Plaintiff's "external anatomy" is that of a male, Plaintiff's "internal sense" is that Plaintiff is a woman. *Id.* ¶¶ 11, 13. Along with the Complaint, Plaintiff filed the present Motion, asserting, among other things, that unless Plaintiff were immediately provided with hormone therapy, Plaintiff was at an increased risk of re-attempting suicide (which Plaintiff had attempted in October 2014) or auto-

castration (which Plaintiff had attempted in January 2015). *See* Mot. 29–32; *see also* Mot. Ex. 1 ¶¶ 17, 24.

In prison, Plaintiff's Gender Dysphoria has been treated with mental-health counseling. *See* Decl. of Marlene Hernandez, M.D., C.C.H.P., attached to the Oppo. to Pl.'s Mot. for Prelim. Inj. filed by Defs. Le and Dieguez, and incorporated in full herein (hereinafter, "Hernandez Decl."), ¶ 5; *see also* Compl. ¶ 35 (listing the "numerous DOC medical and mental-health officials" who have evaluated Plaintiff during imprisonment). Plaintiff has filed administrative grievances and appeals asserting that this mental-health care is insufficient treatment, and that instead hormone therapy is required. According to Plaintiff, "[t]o deny" hormone therapy "is to cause depression and suicidal tendencies, which [Plaintiff] must face on a daily basis." *Id.* ¶ 53. Plaintiff has also demanded to be able to wear "female underwear" and "grow[] her hair" in female styles. *Id.* ¶¶ 36, 66.

In the Complaint and Motion, Plaintiff asserts that the requests for hormone therapy were denied under FDOC's "freeze-frame policy," under which "[i]nmates who have undergone treatment for [Gender Dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department." *Id.* ¶¶ 55, 85; Mot. 18–19, 26–29. Following the filing of the lawsuit, however, Dr. Hernandez, the Regional Medical Director for Wexford Health Sources, Inc.,

which oversees the provision of medical care at Plaintiff's prison, recommended that Plaintiff be referred to an outside endocrinologist for treatment. *See* Hernandez Decl. ¶¶ 2, 4–5. The outside endocrinologist prescribed hormone therapy to Plaintiff on September 2, 2016, and Plaintiff is currently receiving the hormone therapy, along with continued "mental health and psychological counseling." *Id.* ¶ 5. Dr. Hernandez has confirmed that Plaintiff "will continue to be evaluated by" the prison's "clinical staff and by the endocrinologist as may be necessary," and that the hormone therapy and mental-health counseling "will continue to be provided so long as they are medically necessary." *Id.* ¶¶ 5–6.

As for Plaintiff's requests to wear female underwear and to be excepted from FDOC's hair length policy, FDOC has denied those requests. Plaintiff has submitted no medical evidence indicating that an exception to FDOC's grooming and clothing regulations is medically necessary. Nor has Plaintiff presented any evidence that, now that hormone therapy is being provided, Plaintiff is at a substantial risk of self-harm or severe psychological pain merely because Plaintiff lacks the ability to wear female underwear or grow hair longer than permitted under applicable hair-length regulations.

Further, FDOC's grooming and clothing policies are justified by important penological concerns. Fla. Admin. Code r. 33-602.101 provides that "[i]nmates shall at all times wear … regulation clothing," which for male inmates includes

"under shorts" and for female inmates includes "panties" and a "bra or athletic bra." 33-602.101(2). Rule 33-602.101 further provides that "[m]ale inmates shall have their hair cut short to medium uniform length at all times with no part of the ear or collar covered." *Id.* 33-602.101(4). According to FDOC's Bureau Chief of Security Operations, requiring prisoners to maintain hair above their ears and collar "serves several critical security interests": it (1) "prevents the use of a particular type of hairstyle ... as a mechanism for gang or associational identification"; (2) "helps to eliminate a potential for concealing of contraband," since "long and bushy hair provides a place for concealing weapons, drugs, or smaller escape paraphernalia"; and (3) "is paramount in both preventing escapes and recapturing escapees," since cutting long hair permits a prisoner to easily and quickly change his appearance. Aff. of Carl Wesley Kirkland Jr., attached as Exhibit "B" (hereinafter, "Kirkland Aff."), ¶¶ 2, 4–9.

Further, FDOC has a broader security concern in treating all inmates at a particular facility the same, since making exceptions to the prison's generally-applicable regulations "would amount to preferential treatment," which "causes discord in the inmate population and creates a hostile environment for staff and other inmates." *Id.* ¶¶ 10–11.

FDOC therefore filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) on September 9, 2016, asserting that, with the provision of

hormone therapy no longer disputed, Plaintiff's remaining requests—for entitlements to female underwear and for longer hair—do not state a plausible claim under the Eighth Amendment.[2] That motion is currently pending before the Court.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (internal quotation marks omitted); *accord Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). "In this Circuit," as elsewhere, the grant of a preliminary injunction "is the exception rather than the rule." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (internal quotation marks omitted).

[2] FDOC's motion to dismiss also pointed out that Warden Acosta is an improper defendant. Plaintiff makes no attempt to allege that Warden Acosta played or is playing any causal role in the alleged deprivations of Plaintiff's constitutional rights. *See Sealey v. Pastrana*, 399 F. App'x 548, 552 (11th Cir. 2010) (listing the proper defendants in an Eighth Amendment claim as being persons who (1) "personally participated in the alleged constitutional deprivation; (2) were "on notice of a history of widespread abuse of constitutional rights, but failed to take corrective action"; (3) "had a policy in place that condoned the alleged constitutional deprivation"; or (4) "directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so.").

This is not the exceptional case in which the "extraordinary and drastic remedy" of a preliminary injunction is available, as Plaintiff has made a "*clear showing*" of none of its elements. *Mazurek*, 520 U.S. at 972. First, Plaintiff is unlikely to succeed on the merits of the Eighth Amendment claim because (1) FDOC already has provided the sought-after hormone therapy, such that Plaintiff's request for an injunction requiring FDOC to provide that therapy is no longer at issue; and (2) the Eighth Amendment does not entitle Plaintiff to wear female inmate clothing and be excepted from FDOC's hair length policy, because, among other reasons, there is no evidence that these "treatments" are medically necessary to avoid a substantial risk of harm to Plaintiff, or that, even if they were, FDOC is subjectively aware that this is the case.

Second, Plaintiff will not suffer irreparable injury if no preliminary injunction is granted. There is no elevated risk that, now that Plaintiff is being provided hormone therapy, Plaintiff will attempt suicide or self-surgery merely because Plaintiff is unable to grow long hair or wear female undergarments. Indeed, Plaintiff's Motion ties these risks solely to the lack of hormone therapy.

Third, the balance of equities weighs against a preliminary injunction; again, Plaintiff will suffer little harm if the status quo is maintained during the pendency of the suit, but if an injunction is granted, FDOC will be forced to incur significant burdens and security risks. Finally, the public interest cuts against granting an

injunction, as the public has no interest in permitting prisoners to wear the clothing and hairstyles of their choice, while it has a substantial interest in secure, cost-efficient prisons.

LAW AND ARGUMENT

I. Plaintiff has not established a substantial likelihood of success on the merits.

The Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. Although "the primary concern of the [Eighth Amendment's] drafters was to proscribe tortures and other barbarous methods of punishment," the Supreme Court has explained that the Cruel and Unusual Punishments Clause more broadly prohibits "unnecessary and wanton infliction[s] of pain" by the government on "those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103–05 (1976) (internal quotation marks omitted). One way in which a prison official might inflict pain unnecessarily and wantonly, and therefore violate the Eighth Amendment, is through "deliberate indifference to serious medical needs of prisoners." *Id.* at 104.

"However, 'not every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment,'" *McElligott v. Foley*, 182 F.3d 1248, 1254 (11th Cir. 1999) (quoting *Estelle*, 429 U.S. at 105)). In other words, "[m]edical malpractice does not become a constitutional violation

merely because the victim is a prisoner." *Farrow v. West*, 320 F.3d 1235, 1242 (11th Cir. 2003). Instead,

> [t]o show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry. First, a plaintiff must set forth evidence of an objectively serious medical need. Second, a plaintiff must prove that the prison official acted with an attitude of "deliberate indifference" to that serious medical need.

Id. at 1243 (citations omitted; quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Here, Plaintiff has not shown that it is likely either that (1) Plaintiff will succeed on the claim that there is a "serious medical need" for Plaintiff to grow longer hair and wear female clothing; or (2) FDOC has been deliberately indifferent to Plaintiff's Gender Dysphoria. Accordingly, Plaintiff has failed to satisfy the first, necessary element for a preliminary injunction to issue.

A. Plaintiff already has been provided with hormone therapy, rendering unavailable that portion of the requested injunction.

Plaintiff's Motion seeks a preliminary injunction requiring FDOC to provide Plaintiff with two forms of "treatment" for Gender Dysphoria: (1) hormone therapy; and (2) "access to female clothing and grooming standards." *E.g.,* Mot. 34. An injunction requiring FDOC to provide Plaintiff with hormone therapy is no longer available, as Plaintiff has been provided with the requested hormone therapy following Plaintiff's appointment with the endocrinologist. Hernandez Decl. ¶ 5. Plaintiff will continue to be provided this therapy, along with

psychological counseling, so as long as FDOC's medical providers indicate that such therapy is medically necessary. *See id.* "The sole function of an action for injunction is to forestall future violations"; injunctions cannot be used to "punish[]" the defendant or compensate the plaintiff for past actions. *U.S. Army Corps of Eng'rs*, 424 F.3d at 1133. Thus, whether FDOC's initial refusal to provide Plaintiff with hormone therapy could have supported a preliminary injunction—which FDOC would dispute[3]—that issue is no longer before the Court. *Cf. Smith v. Sec'y, Dep't of Corr.*, 602 F. App'x 466, 471 (11th Cir. 2015) ("Smith's [Eighth Amendment] claim that he required placement of a crown on his molar was moot once the tooth was fixed.").

B. Refusing to permit Plaintiff access to female clothing and grooming standards does not violate the Eighth Amendment.

With hormone therapy off the table, Plaintiff must show a likelihood of success on the merits of the claim that FDOC's refusal to provide Plaintiff with the remainder of the requested "treatment"—female clothing and an exception from the otherwise applicable hair-length regulations—violates the Eighth Amendment.

[3] As FDOC pointed out in its motion to dismiss, at least four Circuits have held that hormone therapy is not constitutionally required to treat prisoners suffering from Gender Dysphoria, so long as the prison's medical staff believes that some other treatment, such as mental-health counseling, is constitutionally adequate. *See, e.g., Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1208–09 (5th Cir. 2015); *see also White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) ("[I]nmates do not have a constitutional right to hormone therapy."); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (prisoner with Gender Dysphoria "does not have a right to any particular type of treatment, such as estrogen therapy"); *Supre*, 792 F.2d at 963 ("The medical decision not to give plaintiff estrogen until further study does not represent cruel and unusual punishment.").

Plaintiff has not made this showing. Courts around the country agree that enforcing generally applicable hair-length and clothing policies is not the sort of objectively serious deprivation of life's basic necessities that can give rise to an Eighth Amendment violation. Further, Plaintiff has submitted no competent evidence indicating that an exception to FDOC's grooming and clothing regulations is medically necessary, nor has Plaintiff presented any evidence that, without the ability to wear female underwear and grow hair longer than permitted, Plaintiff is at a substantial risk of self-harm or severe psychological pain. Finally, Plaintiff cannot possibly show that FDOC has been deliberately indifferent to Plaintiff's Gender Dysphoria, given that FDOC has provided Plaintiff with hormone therapy and psychological counseling and is committed to continuing to provide all medically necessary services "for the treatment of Plaintiff's gender dysphoria." Hernandez Aff. ¶ 5. Accordingly, Plaintiff's request for a preliminary injunction fails on the first element.

i. FDOC has not been deliberately indifferent to Plaintiff's Gender Dysphoria.

"An official acts with deliberate indifference when he or she knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate." *Lancaster v. Monroe Cnty., Ala.*, 116 F.3d 1419, 1425 (11th Cir. 1997). But that a plaintiff is entitled to *some* treatment for his serious medical needs does not mean that he is "entitled to treatment of his choice," *Hood*

v. Dep't of Children & Families, No. 2:12-cv-637-FtM-29DNF, 2015 WL 686922, at *9 (M.D. Fla. Feb. 18, 2015); or even that the treatment must rise above a level that would constitute "medical malpractice" under state tort law. *E.g., Chatham v. Adcock*, 334 F. App'x 281, 287–88 (11th Cir. 2009).

To the contrary, if the prison's medical officials believe that the treatment rendered is "adequate as a medical matter," then there is no Eighth Amendment violation, because a prisoner "cannot establish deliberate indifference based solely on his desire to receive some other kind of care." *Turner v. Solorzano*, 228 F. App'x 922, 924 (11th Cir. 2007); *see also Loeber v. Andem*, 487 F. App'x 548, 549 (11th Cir. 2012) ("Plaintiff's disagreement with the course of treatment employed fails to support an inference that Defendants acted with [deliberate indifference … ."). In other words, "a simple difference in medical opinion between the prison's medical staff and the inmate as to the … course of treatment" simply cannot "support a claim of cruel and unusual punishment." *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (collecting cases); *accord Carter v. Broward Cnty. Sheriff's Dep't Med. Dep't*, 558 F. App'x 919, 22 (11th Cir. 2014); *Leonard v. Dep't of Corr. Fla.*, 232 F. App'x 892, 894–95 (11th Cir. 2007).

This principle—"that courts should not second-guess the judgment of [the prison's] medical professionals as to a particular treatment's propriety"—indisputably applies to cases involving Gender Dysphoria. *Kothmann v. Rosario*,

558 F. App'x 907, 910–11 (11th Cir. 2014); *see also Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (prison officials not required to provide hormone therapy to prisoner with Gender Dysphoria because they "made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff's medical needs"); *Meriwether v. Faulkner*, 821 F.2d 408, 414 (7th Cir. 1987) ("[G]iven the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment."). Thus, as the Middle District of Florida concluded in an opinion canvassing the caselaw on Eighth Amendment claims by prisoners with Gender Dysphoria, "the majority of appellate courts" have held that if an inmate with Gender Dysphoria "is being provided some form of treatment deemed adequate by a physician, federal courts should defer to the informed judgment of the prison officials." *Barnhill v. Cheery*, No. 8:06-cv-922-T-23TGW, 2008 WL 759322, at *12 (M.D. Fla. Mar. 20, 2008).

This principle is dispositive of Plaintiff's claim here. It is indisputable that Plaintiff is receiving medical care for Plaintiff's Gender Dysphoria. Plaintiff has been treated with psychological counseling since the start of Plaintiff's incarceration. Further, after it was determined that hormone therapy was medically necessary, Plaintiff has been provided with hormone therapy, and FDOC's medical

providers have attested that (1) these treatments will continue "so long as they are medically necessary" and (2) Plaintiff "will continue to be evaluated by the facility's clinical staff and by the endocrinologist as may be necessary." Hernandez Aff. ¶¶ 5–6. Thus, Plaintiff's Gender Dysphoria is being treated, and the fact that Plaintiff would prefer to *also* be permitted to wear female clothing and grow longer hair represents "a simple difference in medical opinion between the prison's medical staff and the inmate as to the … course of treatment," which, in this Circuit, cannot, *as a matter of law*, "support a claim of cruel and unusual punishment." *Harris*, 941 F.2d at 1505.

Nothing in Plaintiff's Motion contradicts this analysis—and indeed, the Eleventh Circuit case Plaintiff cites, *Kothman*, affirmatively supports *FDOC*. In *Kothmann*, the Eleventh Circuit held that the plaintiff, who suffered from Gender Dysphoria (or Gender Identity Disorder ("GID")) had stated an Eighth Amendment claim based on allegations that the defendant had "repeatedly denied his requests for hormone treatment." 558 F. App'x at 908. The defendant argued that the Eighth Amendment could not have been violated because the plaintiff had at least received *some* treatment—he had been "treated for 'depression, anxiety, and other mental and physical infirmities … with anti-anxiety and anti-depression medications, mental health counseling, and psychotherapy treatments.'" *Id.* at 910. The Eleventh Circuit rejected this argument, however, because none of the

treatments identified by the defendant were "*for [the plaintiff's] GID*," and indeed, the defendant had "vetoed" a recommendation by the prison's own doctor that the plaintiff be referred to an endocrinologist who could prescribe hormone treatment for that condition. *Id.* at 908, 910–11 (emphasis in original). In other words, because the plaintiff had been provided with medication and counseling for "depression" and "anxiety," but not for GID, the plaintiff's GID had effectively gone "completely untreated." *Id.* at 908. Had the prison actually treated the plaintiff's GID in a way that the prison's medical providers deemed medically adequate, however, the result would have been different: "courts," the Eleventh Circuit reiterated, "should not second-guess the judgment of medical professionals as to a particular treatment's propriety." *Id.* at 911.

The situation distinguished in *Kothmann* is exactly that presented here. Here, unlike in *Kothmann*, Plaintiff has been provided with hormone therapy and mental-health counseling specifically "for the treatment of Plaintiff's gender dysphoria." Hernandez Aff. ¶ 5. Further, no FDOC official is "veto[ing]" any medical recommendation by the prison's medical providers that Plaintiff receive any particular treatment, *Kothmann*, 558 F. App'x at 908. Indeed, while the *Kothmann* defendant prevented the plaintiff from seeing an endocrinologist capable of prescribing hormone therapy, FDOC has affirmatively arranged for Plaintiff to be evaluated by an outside endocrinologist and be placed on the

prescribed hormone therapy. Thus, unlike in *Kothmann,* Plaintiff cannot possibly allege (much less prove) that Plaintiff's Gender Dysphoria has gone "completely untreated." *Id.* Instead, Plaintiff seeks merely to "second-guess" the course of treatment recommended by FDOC's medical providers, which, as the *Kothmann* court recognized, is prohibited under the Eighth Amendment. *Id.* at 911.

The out-of-circuit cases relied on by Plaintiff are similarly unhelpful. In *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), for example, the Seventh Circuit held unconstitutional a Wisconsin statute that purported to eliminate the discretion of prison officials to provide hormone therapy to transgender prisoners, even when the prison's medical staff had concluded that hormone therapy was medically necessary. The Seventh Circuit explained that while "[f]or some number of patients" with Gender Dysphoria, measures short of hormone therapy "will be effective in controlling" the disorder, for other patients, hormone therapy is needed. *Id.* at 553–54. The statute was therefore unconstitutional, the Seventh Circuit reasoned, because it would have stopped hormone treatment from being provided even to those patients for whom "DOC doctors" determined that "the treatment [was] medically necessary." *Id.* at 557.

Fields is obviously inapposite because FDOC has not relied on any state statute to deny Plaintiff hormone therapy; instead, it has *actually provided* Plaintiff with the hormone therapy that its medical providers have determined is medically

necessary. *See* Hernandez Decl. ¶¶ 5–6. But more fundamentally, *Fields*'s reasoning self-evidently was based on the *primacy* of the prison's informed medical judgments, not on any notion that the Eighth Amendment empowers judges to second-guess those judgments and require treatments that the prison's medical providers deem unnecessary. *See also Delonta v. Johnson*, 708 F.3d 520, 525–26 & n.4 (4th Cir. 2013) (plaintiff stated a claim that the Eighth Amendment entitled her to sexual-reassignment surgery when the defendants had failed to permit the plaintiff to be evaluated for the surgery "in the first place"). Here, FDOC is providing the "medically necessary" treatment: the hormone therapy and psychological counseling that are indicated as necessary by virtue of Plaintiff's consultations with an outside endocrinologist and continued "evaluat[ions] by the facility's clinical staff." Hernandez Decl. ¶¶ 4–6.

Nor is it sufficient to trump FDOC's informed medical judgment that Plaintiff's preferred course of treatment is derived from the World Professional Association for Transgender Health's ("WPATH") Standards of Care. *See* Mot. 4–5. For one thing, the WPATH Standards of Care *themselves* do not purport to constitute universally-applicable, mandatory rules for properly treating Gender Dysphoria; instead, as both Plaintiff and other courts have recognized, the Standards provide that the "particular course of medical treatment" should "var[y] based on the individualized needs of the person." Compl. ¶ 24; *see also Druley v.*

Patton, 601 F. App'x 632, 635 (10th Cir. 2015) ("The [WPATH] Standards of Care are intended to provide *flexible directions for the treatment* of [Gender Dysphoria]"; *accord Kosilek v. Spencer*, 774 F.3d 63, 87 (1st Cir. 2014); *Arnold v. Wilson*, No. 1:13cv900 (LMB/TRJ), 2014 WL 7345755, at *9 (E.D. Va. Dec. 23, 2014) (prison officials not required to "rigidly follow WPATH standards").

But even if the Standards *did* purport to apply to every case of Gender Dysphoria, the prison's failure to provide the full panoply of treatments recommended in the Standards still would not constitute an Eighth Amendment violation. The test under the Eighth Amendment is not whether the treatment provided "deviated from established standards," *Howell v. Evans*, 922 F.2d 712, 722 (11th Cir. 1991), but whether the prison's failure to provide the particular medical treatment is done with subjective knowledge that that denial will cause the prisoner to incur a substantial risk of serious harm. Here, Plaintiff has submitted no evidence suggesting that, even now that Plaintiff is prescribed with hormone therapy, Plaintiff nonetheless is exposed to a substantial risk of serious harm. *See infra* Part II. To the contrary, Plaintiff has consistently tied the harm Plaintiff is exposed to—suicide and self-surgery attempts, as well as psychological harm—to the deprivation of the very hormone therapy that is now being provided.

FDOC recognizes that merely providing *some* treatment for Gender Dysphoria does not *per se* insulate a prison official from all Eighth Amendment

liability, if, for example, the treatment provided is so minimal as to be no treatment at all: prison officials cannot treat "cancer … with [only] therapy and pain killers" and expect to avoid an Eighth Amendment claim. *Fields*, 653 F.3d at 556; *see also De'lonta*, 708 F.3d at 526 (hypothesizing that "prescrib[ing] a painkiller to an inmate who has suffered a serious medical injury from a fall [that] by all objective measure, requires evaluation for surgery" would violate the Eighth Amendment). But that is not this case. FDOC is providing Plaintiff with mental-health counseling and hormone therapy—a treatment that, according to the Seventh Circuit case relied on heavily by Plaintiff, "often [is] sufficient to control the disorder." *Fields*, 653 F.3d at 554. In the face of this undisputed evidence, it cannot be said that unless hormone therapy and psychological treatment are paired with the ability to wear female undergarments and to grow hair longer than permitted by FDOC, then FDOC is effectively providing no treatment at all. Under well-established Eighth Amendment law, Plaintiff's Motion therefore must fail.

ii. Refusing to permit prisoners to wear the undergarments and hairstyle of their choice is not an objectively serious deprivation subject to Eighth Amendment scrutiny.

Plaintiff has not shown a likelihood of success on the merits for yet another reason: even if FDOC were not refusing to provide female clothing and an exception from the hair-length rule based on an informed medical judgment that the provision of hormone therapy and mental-health counseling is adequate (which

it is), depriving prisoners of the clothing and hairstyle of their choice is not an objectively serious deprivation potentially violative of the Eighth Amendment.

The Eighth Amendment "does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). To the contrary, "[i]f prison conditions are merely 'restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.'" *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004) (quoting *Rhodes*, 452 U.S. at 347).

This does not mean, of course, that prison conditions may "involve the wanton and unnecessary infliction of pain." *Rhodes*, 452 U.S. at 347. But because "[l]awful incarceration" by necessity "brings about the … withdrawal or limitation of many privileges and rights," the State is not required to make prisoners as comfortable as they would be outside prison. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (internal quotation marks omitted); *see also Harris*, 941 F.2d at 1511 n.24 ("[N]othing in the Eighth Amendment … requires that [prisoners] be housed in a manner most pleasing to them." Instead, "a prison official violates the Eighth Amendment only when," among other things, the alleged deprivation of the plaintiff's rights is "objectively, sufficiently serious" that it amounts to "the denial of the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (internal quotation marks omitted).

As with all elements of a preliminary injunction, it is Plaintiff's burden to make a "*clear showing*" that depriving Plaintiff of female clothing and long hair constitutes an objectively serious deprivation cognizable under the Eighth Amendment. *Mazurek*, 520 U.S. at 972. Yet, Plaintiff has marshaled no authority—none—indicating that a prisoner who is not permitted to wear his desired clothing or grow his hair to the desired length is being denied "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834. And indeed, as FDOC stressed in its motion to dismiss, courts have routinely held that a prison's regulation of its inmates' hair length and clothing does not violate the Eighth Amendment.

For instance, in *Hood*, the plaintiff, a transgender woman, alleged that she was constitutionally entitled to wear "female clothing" in accordance with the same WPATH Standards of Care relied on in Keohane's Complaint and Motion. 2014 WL 757914,. at *2; *see also* Compl. ¶¶ 19–24. The prison, citing its policy prohibiting residents from wearing female clothing, took the position that any such clothing found in the plaintiff's possession would be considered "contraband," and filed a motion to dismiss. *Hood*, 2014 WL 757914, at *1–2. The court granted the motion and dismissed the complaint, finding

> no … authority indicating that a transgender person has the right to choose the clothing worn while confined or that the facility is constitutionally obligated to purchase all the clothing and feminine products requested. In fact, generally, federal courts have held the

> opposite. *See, e.g., Murray v. United States Bureau of Prisons*, 106 F.3d 401 (6th Cir. 1997) (transsexual prisoner not entitled to wear clothing of his choice and prison officials do not violate the Constitution simply because the clothing is not aesthetically pleasing); *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993) (noting that provision of female clothing to transsexual prisoner would be unduly burdensome for prison official and would make little fiscal sense); *Jones v. Warden of Stateville Corr. Ctr.*, 918 F. Supp. 1142 (N.D. Ill. 1995) ("Neither the Equal Protection Clause nor the First Amendment arguably accord [Plaintiff] the right of access to women's clothing while confined in a state prison.").

Id. at *8. Other cases, even beyond those collected in *Hood*, are to the same effect. *See Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1208–09 (5th Cir. 2015) (rejecting prisoner's Eighth Amendment claim that he was entitled to an injunction instructing the defendant "to provide him with … brassieres"); *Smith v. Hayman*, Civil Action No. 09-2602 (FLW), 2010 WL 948822, at *13 (D.N.J. Feb. 19, 2010) ("Prison authorities must have the discretion to decide what clothing will be tolerated in a male prison and the denial of female clothing and cosmetics is not a constitutional violation." (internal quotation marks and alterations omitted)); *Long v. Nix*, 877 F. Supp. 1358, 1361, 1366 (S.D. Iowa 1995) (finding no Eighth Amendment violation where "[h]undreds of times, [the plaintiff] ha[d] asked for and prison officials had denied, permission to receive and wear women's clothing and make-up").

Likewise, the law is equally clear that the Eighth Amendment does not require that prisoners be permitted to wear any particular hairstyle. Courts around

the country and in this Circuit have held that "limits on hair length" do not constitute denials of "'the minimal civilized measures of life's necessities.'" *LaBranch v. Terhune*, 192 F. App'x 653, 653–54 (9th Cir. 2006) (quoting *Farmer*, 511 U.S. at 834); *see also DeBlasio v. Johnson*, 128 F. Supp. 2d 315, 325–26 (E.D. Va. 2000) (prison's hair restrictions were "part and parcel of" "the ordinary discomfort accompanying prison life," *aff'd*, 13 F. App'x 96 (4th Cir. 2001); *Larkin v. Reynolds*, 39 F.3d 1192, 1994 WL 624355, at *2 (10th Cir. 1994) (Table) ("forced compliance with the" prison's "grooming code" was not "unnecessary and wanton infliction of pain" illegal under the Eighth Amendment); *Blake v. Pryse*, 444 F.2d 218, 219 (8th Cir. 1971) (hair-length requirement, "however annoying it may be to petitioner personally, does not deprive him of any federal or civil constitutional right"); *Taylor v. Gandy*, Civil Action No. 11-00027-KD-B, 2012 WL 6062058, at *4 (S.D. Ala. Nov. 15, 2012) (a prisoner's "disagreement with the" prison's haircut policy "fails to demonstrate that Defendants acted with deliberate indifference"); *Casey v. Hall*, No. No. 2:11-cv-588-FtM-29SPC, 2011 WL 5583941, at *3 (M.D. Fla. Nov. 16, 2011) (requirement that plaintiff "shave his hair" "is not a 'serious' or 'extreme' condition, or one that violates 'contemporary standards of decency'").

And this holds true even as to transgender plaintiffs. In *Murray v. U.S. Bureau of Prisons*, the Sixth Circuit considered a claim by a transgender prisoner

that the prison's failure to continue to provide her "hair and skin products that she claim[ed were] necessary for her to maintain a feminine appearance" violated the Eighth Amendment. 106 F.3d 401 (Table), 1997 WL 34677, at *2 (6th Cir. 1997). The Sixth Circuit had little difficulty determining that the claim failed, explaining that "[c]osmetic products are not among the minimal civilized measure of life's necessities." *Id.*

All these cases are based on a straightforward rationale: "restrictions placed on [a prisoner's] choice of haircut," or her choice of undergarments, simply "do no present the type of deprivation of life's necessities that rise to an Eighth Amendment violation." *Casey*, 2011 WL 5583941, at *3 (citing *Chandler v. Crosby*, 379 F.3d 1278, 1298 (11th Cir. 2004)). Plaintiff is receiving the medically-necessary treatment: hormone therapy and mental-health counseling. Plaintiff has done nothing to demonstrate (in the face of the great weight of the caselaw) that a prisoner with Gender Dysphoria who is being provided with this treatment nonetheless has an Eighth Amendment right to her preferred clothing and hairstyle. Because that was Plaintiff's "burden of persuasion" to carry, *Mazurek*, 520 U.S. at 972, Plaintiff has not shown a likelihood of success on the merits, and the Motion should be denied.

II. Plaintiff will suffer no irreparable harm from not wearing female clothing or long hair during the pendency of this case.

"A showing of irreparable injury is the sine qua non of injunctive relief"; without it "preliminary injunctive relief [is] improper," "even if [the plaintiff] establish[es] a likelihood of success on the merits. *Siegel*, 234 F.3d at 1176 (internal quotation marks omitted). Only irreparable harm "which might occur in the interval between ruling on the preliminary injunction and trial on the merits" can justify a preliminary injunction. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1133–34 (11th Cir. 2005). Moreover, the plaintiff must show that that harm is both "irreparable," in the sense that it "cannot be undone through monetary remedies," and "actual and imminent" rather than "remote []or speculative." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (1990).

Plaintiff has made no such showing here. According to Plaintiff, irreparable harm will result absent a preliminary injunction because Plaintiff will (1) be at a high risk of committing suicide or auto-castration or suffering psychological pain if the Motion is denied, Mot. 29–30; and (2) "suffer irreparable harm in the deprivation of her constitutional rights." *Id.* at 31–32. In support of the second argument, Plaintiff cites cases from the Tenth Circuit, the D.C. Circuit, and the Western District of Michigan. *Id.*

Taking the second argument first, it is little wonder why Plaintiff relies solely on out-of-circuit cases to support the argument that the alleged deprivation

of a constitutional right, standing alone, constitutes irreparable harm justifying an injunction: that argument has been explicitly rejected by the en-banc Eleventh Circuit. *See Siegel*, 234 F.3d at 1177–78 ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction."). Instead, "[t]he only areas of constitutional jurisprudence where [the Eleventh Circuit] ha[s] said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." *Id.* at 1178. "This case involves neither a first amendment nor a right of privacy claim." *City of Jacksonville*, 896 F.2d at 1286. It is therefore inappropriate for Plaintiff to attempt to collapse the second element of a preliminary injunction into the first, making the circular argument that because there is (Plaintiff says) a likelihood of success on the merits, there also is irreparable harm.

Plaintiff's other argument—that without a preliminary injunction, Plaintiff is at an increased risk of self-harm and psychological pain—is equally unconvincing. Both in Plaintiff's grievances filed with FDOC and in the Motion itself, Plaintiff has repeatedly linked the alleged risk of self-harm and severe psychological pain to the lack of *hormone therapy*, not to the fact that Plaintiff was required to wear male clothing and maintain short hair. *See, e.g.,* Mot. 7 ("Plaintiff made clear that

she … was in fact receiving hormone therapy prior to her incarceration, that it is extremely important for her health to receive it, and that she considered 'self-harm and suicide every single day' without it [*i.e.*, hormone therapy]"; 10 ("Plaintiff … explain[ed] that *to deny her hormone therapy* 'is to cause depression and suicidal tendencies'" (first emphasis added)); 25 ("For many individuals with Gender Dysphoria, hormone therapy is an essential, medically indicated, and effective treatment to alleviate the distress of the condition."); 26 ("Plaintiff … is suffering significant harm due to the denial of hormone therapy.").

Nothing in the Motion even hints that even if FDOC were to provide hormone therapy, there still would be a high risk of self-harm or severe psychological pain based solely on clothing and hair regulations. Now that Plaintiff is being provided with hormone therapy, it would be entirely speculative to conclude that Plaintiff remains at a high risk of self-harm or severe psychological pain merely because Plaintiff is being required to wear the same clothing and maintain the same hair-length as every other inmate at the prison. *See, e.g., Windsor v. United States*, 379 F. App'x 912, 916 (11th Cir. 2010) (no preliminary injunction where plaintiff fails to show that irreparable harm is "actual and imminent" (citing *Siegel*, 234 F.3d at 1176)).

Plaintiff is not only merely being required to maintain the same hair length as the other prisoners at Plaintiff's facility—Plaintiff is merely being required to

maintain roughly the same hair length that *Plaintiff* seemingly had before incarceration. As shown by the photograph attached as Exhibit "C," at the time of Plaintiff's arrest, Plaintiff's hair length was basically in compliance with the hair-length policy Plaintiff currently challenges—even though Plaintiff was free, of course, to grow longer hair, and even though, according to the Motion, Plaintiff already was presenting as a woman. *See* Mot. 6 ("From age 14 on, … , Plaintiff always wore female-typical cosmetics, clothing, and hairstyles."). It cannot cause irreparable harm to require Plaintiff to maintain during the pendency of this suit a hair length similar to the length Plaintiff voluntarily maintained before incarceration just three years ago.[4] There is no reason for preliminary injunctive relief to be ordered.

III. FDOC's interests in security and uniformity outweigh Plaintiff's desire to wear female clothing and to grow longer hair.

Plaintiff's discussion of the third element necessary for preliminary injunctive relief focuses entirely on the harm associated with the lack of hormone therapy. Mot. 32–33. As stressed above, and as the Court is aware, hormone therapy is no longer an issue here. Accordingly, Plaintiff must show that the alleged injury of complying with FDOC's hair-length and clothing regulations

[4] FDOC notes that by referring to Plaintiff's pre-incarceration hair length, it is not asserting that Plaintiff's request for an exception to the hair-length regulations is barred under the "freeze-frame policy." Instead, FDOC is pointing out the implausibility of the notion that Plaintiff is suffering severe harm by being required to maintain compliance with the hair-length regulations during the pendency of this suit, given that Plaintiff did not even feel the need to grow Plaintiff's hair beyond the ears or collar when Plaintiff was perfectly free to do so.

outweighs the harm to FDOC if FDOC is required to change its policies for one prisoner. Plaintiff cannot satisfy this requirement.

FDOC's reasons for its hair-length policy are supported by the affidavit of Wes Kirkland, Bureau Chief of Security Operations. *See* Ex. B. Kirkland states, based on his 26 years with FDOC, that requiring prisoners to maintain hair above their ears and collar "serves several critical security interests," by reducing gang activity, eliminating "a potential for concealing of contraband"; and making it easier for FDOC to both prevent escapes and quickly recover escapees. Ex. B ¶¶ 4–9. Critically, it is imperative for FDOC to apply these policies to *every prisoner*. Allowing an exception "would amount to preferential treatment," which "causes discord in the inmate population and creates a hostile environment for staff and other inmates." *Id.* ¶ 10. This is true even when there is a strong reason (*e.g.*, the prisoner's religion) for permitting the exception, *id.* at ¶ 10, because "the legitimacy of the reason why some [inmates] may be treated differently makes no difference to" the others. *Id.* at ¶ 11. Quite simply, "[c]onsistency of expectations and enforcement is absolutely essential to maintaining order in a prison environment." *Id.*

Requiring FDOC to make an exception for Plaintiff during the pendency of this suit would have the negative effects of *requiring* the very "preferential treatment" that Kirkland's affidavit says it is "essential" to avoid. *Id.* Thus, it could

lead to discord in the prison population, potentially leading to increased risks of harm to both prison officials and prisoners themselves. *Id.* ¶ 10. The Supreme Court mandates that courts "accord[] wide-ranging deference" to prison administrators "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986); *see also Kosilek v. Spencer*, 774 F.3d 63, 92–93 (1st Cir. 2014) (holding that deference to the prison's security concerns should inform courts' evaluation of the treatment necessary for prisoners with Gender Dysphoria). In balancing the equities, then, this Court must give these security and uniformity interests significant weight.

Nothing in Plaintiff's Motion implicates or challenges these policy rationales, or even attempts to explain why FDOC's security policies should be overridden here. Again, Plaintiff has not shown that, unless a preliminary injunction is granted, there will be an increased risk of self-harm, and Plaintiff's focus on the hormone therapy, which is now being provided, suggests the opposite.

Thus, all Plaintiff is left with is the subjective discomfort of having to wear male underwear and comply with the hair regulations applicable to male prisoners during the pendency of this suit. But a prisoner's mere discomfort with some aspect of prison life, uncoupled with any risk of severe psychological or physical

harm, cannot outweigh the prison's interests in security and uniformity; otherwise prisons simply could not function.

Further, the intensity of the discomfort felt by Plaintiff at having to maintain hair above the ear and collar is itself subject to question, given that at the time Plaintiff was arrested, Plaintiff's hair appears to have been in compliance with the challenged hair-length policy. *See* Ex. C. It is implausible to conclude that, now that Plaintiff is incarcerated, Plaintiff's interest in growing hair longer than permitted by the hair-length policy has suddenly become of sufficient magnitude to outweigh FDOC's "critical security" and uniformity interests, Kirkland Aff. ¶ 4, 10–11—particularly given that, of course, prisoners have fewer freedoms, not more, when they go to prison. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

In short, Plaintiff fails to satisfy the burden of showing that the equities tip in favor of a preliminary injunction. Accordingly, a preliminary injunction should not issue.

IV. The public interest favors the maintenance of security and uniformity in Florida's prisons.

Plaintiff spends but one paragraph on this element necessary for preliminary injunctive relief. Mot. 34. Plaintiff simply assumes that there is a constitutional

violation here, so that there would be no public interest in enforcing a constitutional violation.

But as the Eleventh Circuit has recognized, the requirement that the Plaintiff show that the public interest supports a preliminary injunction is not the same as the requirement that there be a likelihood of success on the merits, so Plaintiff has erred in (once again) collapsing two separate elements of Plaintiff's required preliminary-injunction showing. *See Cunningham v. Adams*, 808 F.2d 815, 822 (11th Cir. 1987) (rejecting argument that the public-interest element was met because the public has an interest "in a constitutionally-run government for the duration of the litigation").

In any event, Plaintiff assumes too much. As extensively discussed above, Plaintiff has no likelihood of proving an Eighth Amendment violation. Accordingly, Plaintiff's cursory analysis of this requirement misses the mark and fails to demonstrate why the public interest renders this such an exceptional case that the extraordinary remedy of a preliminary injunction must be granted.

CONCLUSION

For at least the foregoing reasons, Plaintiff's motion should be denied.

Respectfully submitted this 26th day of September, 2016.

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CERTIFICATION OF COMPLIANCE PURSUANT TO LOCAL RULE 7.1

Pursuant to N.D. Fla. Local Rule 7.1, I hereby certify that this opposition to plaintiff's motion for preliminary injunction is in compliance with the Court's word limit. According to the word processing program used to prepare this pleading, the total number of words in the pleading, inclusive of headings, footnotes and quotations, and exclusive of the case style, signature block, and any certificate of service is 7,842.

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CERTIFICATE OF SERVICE

I certify that on September 26, 2016, I filed the foregoing using the CM/ECF system, which will send notification to all counsel of record.

/s/ Kirkland E. Reid

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