

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

IDAHO STATE BOARD OF
CORRECTIONS; IDAHO
DEPARTMENT OF CORRECTIONS;
CORIZON INC.; KEVIN KEMPF;
RICHARD CRAIG; RONA SIEGERT;
AARON HOFER; HOWARD KEITH
YORDY; SCOTT ELIASON;
MURRAY YOUNG; and CATHERINE
WHINNERY,

Defendants.

Case No. 1:17-cv-00151-REB

INITIAL REVIEW ORDER

The Clerk of Court conditionally filed Plaintiff Adree Edmo's Complaint as a result of Plaintiff's status as an inmate and in forma pauperis request. The Court now reviews the Complaint to determine whether it or any of the claims contained therein should be summarily dismissed under 28 U.S.C. §§ 1915 and 1915A. Having reviewed the record, and otherwise being fully informed, the Court enters the following Order.

REVIEW OF COMPLAINT

1. Factual Allegations

Plaintiff is a male-to-female transgender prisoner, in the custody of the Idaho Department of Correction (“IDOC”), who has been diagnosed with Gender Dysphoria (“GD”). Although Plaintiff remains anatomically male, she identifies herself as female. As a result of the IDOC’s policy of assigning an inmate to a men’s or a women’s facility in accordance with the inmate’s primary sexual characteristics, Plaintiff is confined in a men’s prison and is currently incarcerated at Idaho State Correctional Institution (“ISCI”). (Compl. at 1, 11-12.)

According to Plaintiff, there are four standard types of GD treatment: (1) hormonal therapy; (2) the “‘real-life’ experience of living full-time within the desired gender”; (3) sex reassignment surgery (“SRS”); and (4) psychotherapy. (*Id.* at 2, 5.) Treatment must be individualized, and what works for one person with GD might not work for another. (*Id.* at 16.)

Plaintiff’s GD treatment during incarceration has been determined by a Management and Treatment Committee (“MTC”) consisting of the following prison officials and medical providers: Defendants Kempf, Craig, Siegert, Whinnery, Young, and Eliason. (*Id.* at 30.) Defendant Yordy is the warden of ISCI, and Defendant Corizon is the private company providing medical care to Idaho state inmates under contract with the IDOC.

Plaintiff receives hormonal therapy for her GD, but asserts that it is not adequately treating her symptoms. Plaintiff claims that the MTC has denied her requests for any GD

treatment other than hormonal therapy, and that these denials were not based on an individualized treatment plan. Instead, they were allegedly based on blanket policies or customs established by IDOC and Corizon. (*Id.* at 29.) Plaintiff claims that the MTC did not even convene to discuss any GD treatment for Plaintiff other than hormonal therapy. (*Id.*)

Further, with respect to her hormonal therapy, Plaintiff alleges that the IDOC or Corizon has a policy that inmates with GD who receive hormonal therapy must continue to receive the same dosage throughout their incarceration—regardless of whether a provider might determine that a dosage change was appropriate. According to Plaintiff, she was denied a dosage change not because her treating provider determined within his or her medical judgment that a change was not medically necessary, but rather because of this blanket policy. (*Id.* at 10.)

According to Plaintiff, none of the Defendants is qualified to treat individuals with GD. (*Id.* at 29-30.) Further, Defendants have never referred Plaintiff, or any other inmate with GD for that matter, to a GD specialist. (*Id.* at 30.) Plaintiff's mental health has declined, allegedly because of the lack of adequate treatment for her GD, and she has attempted to castrate herself at least twice, the most recent time being in December 2016. (*Id.* at 4-5.)

Plaintiff brings claims for declaratory and injunctive relief against numerous Defendants. (*Id.* at 38-40.) Although Plaintiff does not include a request for monetary damages in her prayer for relief, other statements in the Complaint suggest that Plaintiff

is seeking such damages. (*See* Compl. at 30-31, 34 & 37 (discussing “economic” damages).) Thus, the Court construes the Complaint as also asserting claims for monetary relief.¹

2. Standard of Law for Summary Dismissal

The Court is required to review complaints filed in forma pauperis, or complaints filed by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity, to determine whether summary dismissal is appropriate. The Court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2) & 1915A(b).

A complaint fails to state a claim for relief under Rule 8 of the Federal Rules of Civil Procedure if the factual assertions in the complaint, taken as true, are insufficient for the reviewing court plausibly “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* In other words, although Rule 8 “does not require detailed factual allegations, . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (internal quotation marks omitted). If the facts pleaded are

¹ Plaintiff should be aware that, even if she establishes a constitutional violation, Defendants could still avoid liability for monetary damages based on the doctrine of qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *modified by Pearson v. Callahan*, 555 U.S. 223 (2009). However, the Court concludes that, under the facts as alleged in the Complaint, considering qualified immunity at the initial screening stage, in this case, is inappropriate.

“merely consistent with a defendant’s liability,” the complaint has not stated a claim for relief that is plausible on its face. *Id.* (internal quotation marks omitted).

Plaintiff brings claims under 42 U.S.C. § 1983, the civil rights statute. To state a valid claim under § 1983, a plaintiff must allege a violation of rights protected by the Constitution or created by federal statute proximately caused by the conduct of a person acting under color of state law. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

Prison officials generally are not liable for damages in their individual capacities under § 1983 unless they personally participated in the alleged constitutional violations. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *see also Iqbal*, 556 U.S. at 677 (“[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.”). However, “[a] defendant may be held liable *as a supervisor* under § 1983 ‘if there exists . . . a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.’” *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)) (emphasis added).

A plaintiff can establish this causal connection by alleging that a defendant (1) “set[] in motion a series of acts by others”; (2) “knowingly refus[ed] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury”; (3) failed to act or improperly acted in the “training, supervision, or control of his subordinates”; (4) “acquiesc[ed] in the constitutional deprivation”; or (5) engag[ed] in “conduct that showed a reckless or callous indifference to the rights of others.” *Id.* at 1205-09. A plaintiff cannot simply restate these

standards of law in a complaint; instead, a plaintiff must provide specific facts supporting the elements of such a claim, and she must allege facts showing a causal link between each defendant and Plaintiff's injury or damage. Alleging "the mere possibility of misconduct" is not enough. *Iqbal*, 556 U.S. at 679. A plaintiff may also seek injunctive relief from officials who have direct responsibility in the area in which the plaintiff seeks relief. *See Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1036 (9th Cir. 1999).

To bring a § 1983 claim against private entity performing a government function (such as Corizon), a plaintiff must plausibly allege that the execution of an official policy or an unofficial custom inflicted the injury of which the plaintiff complains, as required by *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). *See also Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (applying *Monell*, which dealt with § 1983 liability of municipalities, to private entities performing state functions).

Under *Monell*, the requisite elements of a § 1983 claim against a private entity performing a government function are the following: (1) the plaintiff was deprived of a constitutional right; (2) the entity had a policy or custom; (3) the policy or custom amounted to deliberate indifference to the plaintiff's constitutional right; and (4) the policy or custom was the moving force behind the constitutional violation. *Mabe v. San Bernardino Cnty.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001). Further, a municipality or private entity performing a state function "may be held liable under § 1983 when the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action

and the basis for it.” *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010).

An unwritten policy or custom must be so “persistent and widespread” that it constitutes a “permanent and well settled” practice. *Monell*, 436 U.S. at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)). “Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

3. Defendants Who Are Immune from Suit or Unidentified in the Complaint

The Eleventh Amendment prohibits a federal court from entertaining a suit brought by a citizen against a state. *Hans v. Louisiana*, 134 U.S. 1, 16-18 (1890). The Supreme Court has consistently applied the Eleventh Amendment’s jurisdictional bar to states and state entities “regardless of the nature of the relief sought.” *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Therefore, Plaintiff may not proceed against either the IDOC or the Idaho Board of Correction. Moreover, Plaintiff may not proceed on any claim seeking a judgment “against state officers declaring that they violated federal law in the past.” *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

It also appears that Plaintiff intends to name Defendants whose identity is currently unknown. (*See* Compl. at 6-7.) Although the use of “Doe” to identify a defendant is not favored, flexibility is allowed in some cases where the identity of the

parties will not be known prior to filing a complaint but can subsequently be determined through discovery. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

Service of process cannot be effected upon unidentified parties. If the true identity of any of the Doe Defendants comes to light during discovery, Plaintiff may move to amend the Complaint to assert claims against those Defendants. Plaintiff is advised, however, that any claims included in the initial Complaint, but not asserted in an amended complaint, are considered waived. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) (“[An] amended complaint supersedes the original, the latter being treated thereafter as non-existent.”), *overruled in part on other grounds by Lacey v. Maricopa County*, 693 F.3d 896, (9th Cir. 2012) (en banc); *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1990) (holding that the district court erred by entering judgment against a party named in the initial complaint, but not in the amended complaint).

4. Defendant Hofer

Plaintiff’s Complaint names Aaron Hofer, the Health Service Administrator at ISCI, as a Defendant. (Compl. at 1, 8.) However, Hofer is not listed as a member of the MTC, and Plaintiff has included no allegations against Hofer other than that Hofer provided Plaintiff with “cross-sex hormonal therapy.” (*Id.* at 28.) This is insufficient for the Court to reasonably infer that Hofer had anything to do with Plaintiff’s medical care other than the initial provision of hormone treatment; Plaintiff does not identify Hofer as an individual who refused to alter the hormone dosage. Therefore, Plaintiff may not proceed against Defendant Hofer.

5. Claims against the Remaining Defendants: Corizon, Kempf, Craig, Siegert, Yordy, Eliason, Young, and Whinnery

A. Eighth Amendment Medical Treatment Claims

The Eighth Amendment to the United States Constitution protects prisoners against cruel and unusual punishment. To state a claim under the Eighth Amendment, a prisoner must show that she is “incarcerated under conditions posing a substantial risk of serious harm,” or that she has been deprived of “the minimal civilized measure of life’s necessities” as a result of Defendants’ actions. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted). An Eighth Amendment claim requires a plaintiff to satisfy “both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), *overruled in part on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc). The Eighth Amendment includes the right to adequate medical care in prison, and prison officials or prison medical providers can be held liable if their “acts or omissions [were] sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

Regarding the objective standard for prisoners’ medical care claims, the Supreme Court of the United States has explained that “[b]ecause society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’”

Hudson v. McMillian, 503 U.S. 1, 9 (1992). The Ninth Circuit has defined a “serious medical need” in the following ways:

failure to treat a prisoner’s condition [that] could result in further significant injury or the unnecessary and wanton infliction of pain[;] . . . [t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain

McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (internal citations omitted), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc).

As to the subjective standard, “deliberate 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. A prison official or prison medical provider acts with “deliberate indifference . . . only if the [prison official] knows of and disregards an excessive risk to inmate health and safety.” *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (citation and internal quotation marks omitted). “Under this standard, the prison official must not only ‘be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but that person ‘must also draw the inference.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Farmer*, 511 U.S. at 837).

“If a [prison official or medical provider] should have been aware of the risk, but was not, then [that person] has not violated the Eighth Amendment, no matter how severe

the risk.” *Gibson*, 290 F.3d at 1188. However, “[w]hether a [defendant] had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a [defendant] knew of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842; *see also Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003) (“[D]eliberate indifference to medical needs may be shown by circumstantial evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of harm.”).

In the medical context, a conclusion that a defendant acted with deliberate indifference requires that the plaintiff show “a purposeful act or failure to respond to a prisoner’s pain or possible medical need and . . . harm caused by the indifference.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). Deliberate indifference can be “manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Estelle*, 429 U.S. at 104-05 (footnotes omitted).

Non-medical prison personnel generally are entitled to rely on the opinions of medical professionals with respect to the medical treatment of an inmate. However, if “a reasonable person would likely determine [the medical treatment] to be inferior,” the fact that an official is not medically trained will not shield that official from liability for deliberate indifference. *Snow*, 681 F.3d at 986 (internal quotation marks omitted); *see also McGee v. Adams*, 721 F.3d 474, 483 (7th Cir. 2013) (stating that non-medical

personnel may rely on medical opinions of health care professionals unless “they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner”) (internal quotation marks omitted).

Differences in judgment between an inmate and prison medical providers regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). “[T]o prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the chosen course of treatment ‘was medically unacceptable under the circumstances,’ and was chosen ‘in conscious disregard of an excessive risk’ to the prisoner’s health.” *Toguchi*, 391 F.3d at 1058 (alteration omitted) (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).

Mere indifference, medical malpractice, or negligence will not support a cause of action under the Eighth Amendment. *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam). A delay in treatment does not constitute a violation of the Eighth Amendment unless the delay causes further harm. *McGuckin*, 974 F.2d at 1060. If medical personnel have been “consistently responsive to [the inmate’s] medical needs,” and there has been no showing that the medical personnel had “subjective knowledge and conscious disregard of a substantial risk of serious injury,” there has been no Eighth Amendment violation. *Toguchi*, 391 F.3d at 1061.

Plaintiff’s Complaint contains plausible Eighth Amendment claims under § 1983. Plaintiff asserts that one or more of the following treatments are generally considered

acceptable in the treatment of individuals with GD: (1) hormone therapy, (2) “real-life” experience, (3) SRS, and (4) psychological counseling. (Compl. at 2, 5.) She also asserts that her current dosage of hormone therapy is not effectively treating her GD and that the hormone therapy is insufficient, by itself, to constitute appropriate treatment for her GD. Although not necessarily dispositive of the proposition, the fact that Plaintiff has attempted self-castration more than once supports a reasonable inference that her GD is not under control with the treatment she is currently receiving.

Plaintiff states that Defendants have refused to provide her with alternate GD therapies based on general, “blanket,” policies of the IDOC and Corizon—policies she says do not allow prison medical providers (1) to alter the dosage of hormones received by inmates with GD, or (2) provide a GD inmate with SRS—rather than on individualized medical judgment. The failure to consider Plaintiff’s individual medical needs could constitute deliberate indifference to a serious medical need. Therefore, Plaintiff has stated a plausible claim that Defendants’ refusal to provide her with different hormone therapy or with SRS violates the Eighth Amendment.

Plaintiff also contends that Defendants’ refusal to allow Plaintiff the “real-life” experience of living as a female—wearing feminine clothes, makeup, and hairstyles, for example—constitutes cruel and unusual punishment. According to the Complaint, this refusal appears to be based on the IDOC’s policy, promulgated pursuant to the Prison Rape Elimination Act, that inmates in a men’s prison are prohibited from openly appearing more feminine than absolutely necessary. (Compl. at 8.) Further, Defendant

Craig refused to transfer Plaintiff to a women's prison based on the IDOC's policy of assigning inmates to gender-specific facilities based on their primary sexual characteristics rather than their asserted gender identity.

Taken by themselves, neither of these policies—either that regarding an inmate's feminine appearance or that regarding anatomically-based housing—amounts to deliberate indifference to Plaintiff's serious medical needs. Indeed, these policies appear to be based on the IDOC Defendants' belief that such policies are necessary to secure the physical safety of Idaho inmates—in which case the subjective prong of the Eighth Amendment analysis would not be met. As this Court noted in a previous case, the policy “requiring anatomically male inmates to refrain from using makeup or otherwise appearing more feminine” is “based on the laudable goal of reducing inmate-on-inmate sexual violence” in a men's prison. *Stover v. CCA*, No. 1:12-cv-00393, Dkt. 16 at 17 (D. Idaho March 15, 2013). Additionally, the IDOC's policy of housing anatomically male inmates in a men's prison regardless of their asserted gender identity appears to be based on the IDOC's important interest in ensuring the safety of female prisoners by housing them separately from anatomically male inmates.

However, the constitutional problem arises when these two policies are considered in conjunction with the alleged policy that SRS is never provided as a treatment for GD. If a male-to-female transgender prisoner like Plaintiff were provided with SRS, then she would no longer be anatomically male and would, presumably, be transferred to a women's prison. If transferred to a women's prison, that inmate could, in fact, have a

real-life experience as a female—another standard treatment for GD that is not provided in the men’s prison pursuant to the feminine-appearance policy.

Therefore, as a result of the IDOC’s and Corizon’s blanket policies and without consideration of Plaintiff’s unique medical treatment requirements, Defendants are allegedly refusing Plaintiff the one treatment that would render her capable of being housed in a women’s prison and to have a real-life experience as a woman in a way that would not implicate the safety and security concerns behind the IDOC’s feminine-appearance and anatomically-based housing policies. For these reasons, the Court concludes that Plaintiff has stated plausible Eighth Amendment medical care claims, regarding her treatment for GD, against Corizon and the members of Plaintiff’s MTC—Defendants Kempf, Craig, Siegert, Eliason, Young, and Whinnery. Because Defendant Yordy is the warden of the prison in which Plaintiff is currently confined, Plaintiff may also proceed on her injunctive relief claims against him.² *See Rounds*, 166 F.3d at 1036.

That Plaintiff might not yet have a recommendation of a medical provider that she should be allowed to live in prison as a female, receive SRS, or receive a different hormone dosage, the lack of such a recommendation is not fatal to her claims at this early stage of litigation. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (holding that a complaint stated a plausible claim even though the plaintiff “lack[ed] a medical opinion recommending SRS,” because the plaintiff “plausibly allege[d] that this is

² However, Plaintiff may not proceed on her damages claims against Yordy, as the Complaint does not plausibly allege that Yordy was on the MTC or was otherwise directly involved in any decisions regarding Plaintiff’s medical treatment.

because the state has failed to provide her access to a physician competent to evaluate her”).

B. Equal Protection Claims

The Fourteenth Amendment guarantees every person equal protection of the law. “[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal citation and quotation marks omitted). Under the Equal Protection Clause, “all persons similarly circumstanced shall be treated alike” by governmental entities. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). However, “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

Equal protection claims alleging disparate treatment or classifications are subject to a heightened standard of scrutiny if they involve a “suspect” or “quasi-suspect” class, such as race, national origin, or sex, or when they involve a burden on the exercise of fundamental personal rights protected by the Constitution. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Otherwise, equal protection claims are subject to a rational basis inquiry. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

In a rational basis analysis, the relevant inquiry is whether Defendants’ action is “patently arbitrary and bears no rational relationship to a legitimate governmental

interest.” *Vermouth v. Corrothers*, 827 F.2d 599, 602 (9th Cir. 1987) (quotation omitted). Under this rational basis test, Plaintiff can prevail only if she is similarly situated with persons who are treated differently by Defendants, and if Defendants have no rational basis for the disparate treatment. Stated another way, prison officials need show only a rational basis for dissimilar treatment in order to defeat the merits of Plaintiff’s claim. *Id.*, 984 F.2d at 271.

Classifications based on sexual orientation are generally subjected to heightened scrutiny under the Fourteenth Amendment. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014). Following the rationale set forth in *SmithKline*, discrimination based on a person’s gender identity might also be subject to heightened scrutiny outside prison walls. However, in the prison context, equal protection claims are generally subject to a deferential reasonableness analysis—“specifically, whether the actions of prison officials are ‘reasonably related to legitimate penological interests.’” *Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

Plaintiff contends that inmates with mental illnesses other than GD are provided with treatment that is appropriate to their individual medical requirements, but that inmates with GD are subjected to the blanket policies or customs identified above. Plaintiff’s allegations support a reasonable inference that Defendants do, in fact, treat inmates differently depending on whether they have GD or some other mental health issue. At this early stage of the proceedings, this is sufficient to state a plausible equal

protection claim against Defendants Corizon, Kempf, Craig, Siegert, Yordy, Eliason, Young, and Whinnery.

C. State Law Claims

Plaintiff also asserts medical malpractice claims (against the medical provider defendants) and negligence claims (against the non-medical provider defendants), both which arise under Idaho law. (Compl. at 37.) A district court may exercise supplemental jurisdiction over state law claims when they are “so related” to the federal claims “that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). In other words, the supplemental jurisdiction power extends to all state and federal claims which one would ordinarily expect to be tried in one judicial proceeding. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Because the allegations here all involve a “common nucleus of operative fact,” *id.*, the Court will exercise its supplemental jurisdiction over Plaintiff’s state law claims.

“In a negligence action the plaintiff must establish the following elements: ‘(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant’s conduct and the resulting injuries; and (4) actual loss or damage.’” *Jones v. Starnes*, 245 P.3d 1009, 1012 (Idaho 2011) (quoting *Hansen v. City of Pocatello*, 184 P.3d 206, 208 (Idaho 2008)). Negligence claims against a political subdivision or an employee of a political subdivision must be dismissed unless the plaintiff has complied with the Idaho Tort Claims Act. *See* Idaho Code §§ 6-901 *et seq.*

Additionally, to succeed on a medical malpractice claim against a medical provider, a plaintiff must “affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence” that the defendant medical provider “negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided.” Idaho Code § 6-1012. A plaintiff asserting a medical malpractice claim must first submit the claim to a prelitigation screening panel in accordance with Idaho Code § 6-1001.

Plaintiff has stated plausible state-law claims—for negligence or medical malpractice—against Defendants Corizon, Kempf, Craig, Siegert, Yordy, Eliason, Young, and Whinnery. She will be allowed to proceed on those claims.

6. Statute of Limitations Issue

Some of the allegations described in the Complaint occurred more than two years prior to the filing of that Complaint.³ (*See* Compl. at 9-11.) Plaintiff should be aware that any such claims appear to be barred by Idaho’s two-year statute of limitation, though the Court will not summarily dismiss them at this stage. *See* Idaho Code § 5-219 (two-year statute of limitations for personal injury actions); *see also* *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (state statute of limitation for personal injury actions governs § 1983 actions), *abrogated on other grounds by Jones v. R.R. Donnelley & Sons Co.*, 541 U.S.

³ Prisoners are usually entitled to the benefit of the “mailbox rule,” which provides that a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail, rather than the date it is actually filed with the clerk of court. *See Houston v. Lack*, 487 U.S. 266, 270-71 (1988); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) (applying the mailbox rule to civil rights actions).

369 (2004); *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005) (statute of limitations is tolled while inmate exhausts administrative grievance procedures pursuant to the Prison Litigation Reform Act).

MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff also seeks appointment of counsel. (Dkt. 5.) Unlike criminal defendants, prisoners and indigents in civil actions have no constitutional right to counsel unless their physical liberty is at stake. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981).

Whether a court appoints counsel for indigent litigants is within the court's discretion. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

In civil cases, counsel should be appointed only in "exceptional circumstances." *Id.* To determine whether exceptional circumstances exist, the court should evaluate two factors: (1) the likelihood of success on the merits of the case, and (2) the ability of the plaintiff to articulate the claims pro se in light of the complexity of legal issues involved. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). Neither factor is dispositive, and both must be evaluated together. *Id.*

The Court concludes that Plaintiff has demonstrated some likelihood of success in this litigation and that the complexity and novelty of the issues would support the appointment of pro bono counsel. Good cause appearing, the Court will grant in part Plaintiff's Motion for Appointment of Counsel and instruct court staff to begin a search for pro bono counsel for Plaintiff.

Plaintiff should be aware that the federal court has no authority to require attorneys to represent indigent litigants in civil cases under 28 U.S.C. § 1915(d). *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 298 (1989). Rather, when a Court “appoints” an attorney, it can only do so if the attorney voluntarily accepts the assignment. *Id.* The Court has no funds to pay for attorney’s fees in civil matters, such as this one, and it is often difficult to find attorneys willing to work on a case without payment. For these reasons, Plaintiff should continue to attempt to obtain her own counsel on a contingency or other basis, if at all possible. If the Court is unable to locate pro bono counsel, and if Plaintiff is unable to find her own counsel, then Plaintiff will have to continue to litigate this case pro se.

Furthermore, until the Court succeeds in finding an attorney willing to represent Plaintiff and appoints that attorney, Plaintiff must (unless she finds her own attorney) continue to litigate this case by herself, and she must continue to meet required deadlines and otherwise comply with the Court’s procedural rules. If counsel is later appointed to represent Plaintiff, the Court will consider reopening briefing periods or discovery, and may take any other action the Court deems necessary, to allow counsel to submit new briefing or other evidence as the case requires.

CONCLUSION

Plaintiff may proceed as outlined above. This Order does not guarantee that any of Plaintiff’s claims will be successful; it merely finds that some are colorable, meaning that

the claims will not be summarily dismissed at this stage. This Order is not intended to be a final or a comprehensive analysis of Plaintiff's claims.

Defendants may file a motion for dismissal on any basis other than failure to state a claim.⁴ Because (1) prisoner filings must be afforded a liberal construction, (2) prison officials often possess the evidence prisoners need to support their claims, and (3) many defenses are supported by incarceration records, an early motion for summary judgment—rather than a motion to dismiss—is often a more appropriate vehicle for asserting defenses such as entitlement to qualified immunity or the statute of limitations. In such instances, the parties may be required to exchange limited information and documents directly relevant to the defense at issue.

ORDER

IT IS ORDERED:

1. Plaintiff may proceed on (1) her Eighth Amendment medical treatment claims, (2) her related negligence or medical malpractice claims, and (3) her equal protection claims, against Defendants Corizon, Kempf, Craig, Siegert, Yordy, Eliason, Young, and Whinnery, as set forth above. Plaintiff may not proceed on any other claims against any other Defendants at this time. If Plaintiff later discovers facts sufficient to support a claim upon which Plaintiff has not yet been allowed to proceed, she may move to amend her complaint to assert such claims.

⁴ The standards for a motion to dismiss for failure to state a claim under Rule 12(b)(6) are the same standards that the Court has used to screen the Complaint under §§ 1915 and 1915A.

2. Plaintiff's Motion for Appointment of Counsel (Dkt. 5) is GRANTED IN PART, to the extent that court staff shall begin a search for pro bono counsel for Plaintiff. If the Court is able to find counsel willing to represent Plaintiff, it will issue an appropriate order. Unless and until the Court issues such an order—or Plaintiff retains her own attorney—Plaintiff must continue to litigate this case pro se. Deadlines and other procedural requirements will not be excused simply because the Court has not found pro bono counsel for Plaintiff.
3. Defendants Corizon, Kempf, Craig, Siegert, Yordy, Eliason, Young, and Whinnery shall be allowed to waive service of summons by executing, or having their counsel execute, the Waiver of Service of Summons as provided by Fed. R. Civ. P. 4(d) and returning it to the Court within **30 days**. If Defendants choose to return the Waiver of Service of Summons, the answer or pre-answer motion shall be due in accordance with Rule 12(a)(1)(A)(ii). Accordingly, the Clerk of Court shall forward a copy of the Complaint (Dkt. 3), a copy of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction Order (Dkt. 7), a copy of this Order, and a Waiver of Service of Summons to the following counsel:
 - a. **Mark Kubinski**, Deputy Attorney General for the State of Idaho, Idaho Department of Corrections, 1299 North Orchard, Ste. 110, Boise, Idaho 83706, on behalf of the IDOC Defendants.

- b. **Kevin West and Dylan Eaton**, Parsons Behle & Latimer, 800 W. Main Street, Suite 1300, Boise, Idaho, 83702, on behalf of the Corizon Defendants.
4. Because the Court will allow Defendants an opportunity to waive service of process, Plaintiff's Motion for Service by a U.S. Marshal (Dkt. 6) is MOOT.
5. Should any entity determine that the individuals for whom counsel for the entity was served with a waiver are not, in fact, its employees or former employees, or that its attorney will not be appearing for the entity or for particular former employees, it should file a notice within the CM/ECF system, with a copy mailed to Plaintiff, indicating which individuals for whom service will not be waived.
6. If Plaintiff receives a notice from Defendants indicating that service will not be waived for an entity or for certain individuals, Plaintiff shall have an additional **90 days** from the date of such notice to file a notice of physical service addresses of the remaining Defendants, or claims against them may be dismissed without prejudice without further notice.
7. The parties shall not engage in any discovery until an answer has been filed. Within 30 days after an answer has been filed, the parties shall provide each other with the following initial disclosures: all relevant information pertaining to the claims and defenses in this case, including the

names of individuals likely to have discoverable information, along with the subject of the information, as well as any relevant documents in their possession, in a redacted form if necessary for security or privilege purposes; and, if necessary, they shall provide a security/privilege log sufficiently describing any undisclosed relevant documents which are alleged to be subject to nondisclosure. Any party may request that the Court conduct an in camera review of withheld documents or information.

8. If, instead of filing an answer, Defendant files a motion to dismiss under Federal Rule of Civil Procedure 12(b) or a motion for summary judgment under Rule 56 that addresses preliminary procedural issues rather than the merits, then disclosures and discovery shall be automatically stayed with the exception that Defendant shall submit with any exhaustion-of-administrative-remedies motion a copy of all grievance-related forms and correspondence, including a copy of original handwritten forms submitted by Plaintiff that either fall within the relevant time period or that otherwise relate to the subject matter of a claim. **Submission of an earlier motion for summary judgment addressing procedural or preliminary issues (such as exhaustion and early assertion of immunity defenses) does not foreclose any party from later filing a motion for summary judgment on the merits or to assert immunity or other defenses after full discovery.**

9. Each party shall ensure that all documents filed with the Court are simultaneously served upon the opposing party (through counsel if the party has counsel) by first-class mail or via the CM/ECF system, pursuant to Federal Rule of Civil Procedure 5. Each party shall sign and attach a proper mailing certificate to each document filed with the court, showing the manner of service, date of service, address of service, and name of person upon whom service was made.
10. The Court will not consider *ex parte* requests unless a motion may be heard *ex parte* according to the rules and the motion is clearly identified as requesting an *ex parte* order, pursuant to Local Rules of Civil Practice before the United States District Court for the District of Idaho 7.2. (“*Ex parte*” means that a party has provided a document to the court, but that the party did not provide a copy of the document to the other party to the litigation.)
11. All Court filings requesting relief or requesting that the Court make a ruling or take an action of any kind must be in the form of a pleading or motion, with an appropriate caption designating the name of the pleading or motion, served on all parties to the litigation, pursuant to Federal Rule of Civil Procedure 7, 10 and 11, and Local Rules of Civil Practice before the United States District Court for the District of Idaho 5.1 and 7.1. The Court will not consider requests made in the form of letters.

12. Discovery shall not be filed with the Clerk of Court, but shall be exchanged between parties, only, as provided for in the Federal Rules of Civil Procedure. Motions to compel discovery must not be filed unless the parties have first attempted to work out their disagreements between themselves.
13. No party may have more than three pending motions before the Court at one time, and no party may file a motion on a particular subject matter if that party has another motion on the same subject matter then pending before the Court. Motions submitted in violation of this Order may be stricken, summarily denied, or returned to the moving party unfiled.
14. Plaintiff must notify the Court immediately if Plaintiff's address changes. Failure to do so may be cause for dismissal of this case without further notice.



DATED: April 14, 2017

A handwritten signature in black ink, appearing to read "Ronald E. Bush".

Honorable Ronald E. Bush
United States Magistrate Judge