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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

ADREE EDMO (a/k/a MASON EDMO),

Plaintiff,

v.

IDAHO DEPARTMENT OF
CORRECTION; HENRY ATENCIO, in his
official capacity; JEFF ZMUDA, in his
official capacity; HOWARD KEITH
YORDY, in his official and individual
capacities; CORIZON, INC.; SCOTT
ELIASON; MURRAY YOUNG; RICHARD
CRAIG; RONA SIEGERT; CATHERINE
WHINNERY; and DOES 1-15;

Defendants.

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

PLAINTIFF'S POST-HEARING BRIEF

Complaint Filed:	April 6, 2017
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Motion Cut-Off:	None Set
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INTRODUCTION

Dignity is “[t]he basic concept underlying the Eighth Amendment. . . [T]he words of the Amendment are not precise and [] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). It is irrelevant whether one person or one hundred have previously been provided gender confirmation surgery in prison: in 2018, as in 2016, as in 2014, when Ms. Edmo first requested it, gender confirmation surgery remains the well-established treatment meeting the medical standard of care for a patient with severe gender dysphoria for whom other treatments have been insufficient. Indeed, Ms. Edmo continues to experience such profound distress even after receiving cross-sex hormone therapy that she attempted—twice—to castrate herself. A prison that fails to provide a human being within its custody and care the medical treatment they need “is incompatible with the concept of human dignity and has no place in a civilized society.” *Brown v. Plata*, 563 U.S. 493, 510-11 (2011). If a prison and its medical contractor turn their backs on a person they know to be in need of medical treatment in violation of established medical standards, and when such treatment is safe, effective, and available, “the courts have a responsibility to remedy the resulting Eighth Amendment violation.” *Plata*, 563 U.S. at 511.

Ms. Edmo has established that she has a serious medical need that is being inadequately treated: the evidence is undisputed that she continues to experience the clinically significant distress that defines the medical condition of gender dysphoria, even after six years of cross-sex hormone therapy. The severity of this distress has twice resulted in her cutting her own testicles with a razor in an attempt to remove them, and, more recently, cutting her arm to try to distract herself enough to avoid another attempt. Ms. Edmo has also conclusively established that there is an available medical treatment—gender confirmation surgery—to alleviate her gender dysphoria, and that this surgery is safe, effective, and regularly provided to patients in accordance with the medical standard of care.

Defendants IDOC and Corizon have not challenged Ms. Edmo’s medical condition—

indeed, they diagnosed her with gender dysphoria. They also do not challenge that gender confirmation surgery would be appropriate for an incarcerated person who required such treatment, claiming they would willingly provide such treatment to the “right patient” in their prison. Defendants’ deliberate indifference in this case is their refusal to apply the medical standard of care in the face of Ms. Edmo’s ongoing suffering. Instead, Defendants attempt to distort the definition of “right patient” with ever-shifting qualifiers and “litigation diagnoses” to deny gender confirmation surgery to Ms. Edmo, and create a *de facto* ban of such surgery to people in IDOC custody.

I. DEFENDANTS’ SHIFTING RATIONALES FOR DENYING MS. EDMO GENDER CONFIRMATION SURGERY

Throughout this case, Defendants have offered a continually shifting set of rationales for denying Ms. Edmo gender confirmation surgery:

- In April 2016, Corizon psychiatrist Dr. Eliason evaluated Ms. Edmo for gender confirmation surgery and concluded surgery was not appropriate for her based on his own formulation of medical necessity, and criteria for surgery, that are untethered to the WPATH Standards of Care and the medical consensus on this issue. PI Hr’g Tr. (“Tr.”) 261:15-263:3, 470:18-20, 470:24-471:2. He did this because, in his words, the “inmate population is a very different population and it’s a very strange environment.” Tr. 428:19-20. Dr. Eliason documented three examples he believed might require gender confirmation surgery—which he admitted were not the WPATH criteria, but, rather, examples he made up—and concluded that Ms. Edmo did not meet these three criteria. Tr.470:18-20, 470:24-471:2; Exh. 1 at 538. Dr. Eliason did not base this assessment of surgery on Ms. Edmo’s criminal record, disciplinary record, or any review of her presentence investigation reports. Tr. 468:4-18. Dr. Eliason did not document any consideration of mental health concerns he felt rendered Ms. Edmo unfit for the surgery. Tr. 462:3-463:10; Exh. 1 at 538. Dr. Eliason also did not document any concern that Ms. Edmo failed to present in a

female gender role in prison or over the prior twelve months.¹ Exh. 1 at 538. In fact, he repeatedly documented her feminine presentation between 2012 to 2016. *Id.* at 321, 347, 425, 452, 538.

• In September 2018, IDOC and Corizon filed briefs in opposition to Plaintiff's motion for a preliminary injunction, in which they set forth a host of reasons why gender confirmation surgery was purportedly inappropriate for Ms. Edmo, which they lumped together as "uncontrolled mental health concerns":

- Ms. Edmo's history of being a victim of prior sexual abuse, emotional abuse, and domestic violence (ECF No. 99 at 3, 8);
- suicide attempts more than six years prior (*id.*);
- "maladaptive behaviors" such as "cutting, co-dependency, disobedient behaviors, and sexually acting-out" (*id.* at 3, 9, 10);
- Failure to complete mandated sex offender treatment programming (*id.* at 3);
- PTSD and borderline personality disorder (*id.* at 9);
- Poor self-worth, poor self-esteem, dependency issues, sexually-charged behaviors, and unhealthy relationships (*id.*).
- In addition to these "uncontrolled mental health concerns," Corizon's brief also identified its expert Dr. Garvey's opinion that Ms. Edmo did not have persistent well-documented gender dysphoria and had not presented in a gender role congruent with her gender identity for twelve months (ECF No. 100 at 13).

Dr. Eliason did not identify a single one of these rationales when he denied Ms. Edmo surgery in April 2016. *See* Exh. 1 at 538. Indeed, not a single IDOC or Corizon treater has diagnosed Ms. Edmo with border personality disorder, nor identified borderline personality traits as a serious concern in the entire time she has been in IDOC custody. Tr. 361:18-362:3, 470:4-6. Defendants' allegation now that Ms. Edmo has borderline personality disorder or displays various "traits"

¹ Dr. Eliason confirmed all of this information at his deposition in August 2018. Tr. 462:3-463:10.

thereof is a pretextual litigation diagnosis created post hoc to justify Defendants' denial of surgery.

Defendants also claimed that Ms. Edmo needs to "develop healthy tools" and "coping strategies" to manage depression, anxiety, and gender dysphoria that do not involve "maladaptive behaviors" such as cutting. ECF No. 99 at 10. But Ms. Edmo's own treaters admit the ineffectiveness of such "tools" and "coping strategies." For example, her clinician, Ms. Stewart, responded to Ms. Edmo's report in November 2016 that she was "struggling with attempts/desire to self-castrate on average four days per week," by providing the "goal" in a treatment plan that "Edmo will report a decrease in average frequency of thoughts of self-castration from four days per week to three days per week," to be achieved by "identify[ing] four warning signs of depression/dysphoria that lead to the desire to self-castrate," "attend[ing] mental health groups per client's request as scheduled," and continuing to take her psychiatric medication. Deposition of Krina Stewart ("Stewart Dep.") 57:4-59:6; Exh. 1 at 584-85. In deposition, Ms. Stewart admitted that none of these "coping" interventions would be able to alleviate Ms. Edmo's gender dysphoria or desire to self-castrate. Stewart Dep 59:7-16. When Ms. Edmo subsequently attempted to castrate herself on December 31, 2016, and Ms. Stewart met with her two days later, on January 2, 2017, Ms. Stewart made no changes to Ms. Edmo's treatment plan. Stewart Dep. 65:18-25; Exh. 1 at 597.

- In the October 2018 evidentiary hearing, IDOC clinician Jeremy Clark testified that he believed surgery was not appropriate in 2016 because he and the Management and Treatment Committee ("MTC") applied WPATH criteria to Dr. Eliason's decision denying Ms. Edmo gender confirmation surgery, even though not a single clinician or the MTC documented doing so. Tr. 340:24-342:5, 358:8-361:4; Exh. 7 at 78-80, 86. Nevertheless, two years later, Clark testified that he determined Ms. Edmo's mental health concerns were not well controlled because she had depression, anxiety, borderline personality traits, antisocial traits, DORs for various infractions, had engaged in self-harming behaviors, and was not attending therapy groups consistently.² Tr.

² Under the IDOC policy regarding gender dysphoria operative until October 5, 2018, IDOC did

356:11-13. However, Clark did agree that, other than these purported “uncontrolled mental health concerns,” Ms. Edmo presently meets the WPATH criteria for genital reconstruction surgery. Tr. 386:19-24.

- In the October 2018 hearing, Dr. Eliason testified for the first time that he concluded that Ms. Edmo did not meet the criteria for medical necessity for surgery in April 2016. Tr. 430:19-23. His new rationales included: (1) her mental health concerns were not fully in adequate control, and (2) he did not feel like it was doing Ms. Edmo any service to rush her through getting gender reassignment surgery in her current social situation, which he then claimed meant that she had not fulfilled the sixth WPATH criterion of living in her identified gender role. Tr. 430:24-431:0. Dr. Eliason never documented these reasons in his April 2016 progress note or at any other time, nor did he mention them during his August 2018 deposition in this case. Tr. 462:3-463:10. In fact, as of April 2016, Dr. Eliason had documented Ms. Edmo’s presentation for years as feminine in demeanor, appearance, and interaction style. Tr. 463:11-464:20; Exh. 1 at 321, 347, 425, 452, 538.

II. DEFENDANTS’ STRATEGIC CONTORTION OF WPATH STANDARDS

In concert with their shifting rationales for denying Ms. Edmo surgery, Defendants have also presented a moving target on their position as to whether they actually used the WPATH standards to assess Ms. Edmo’s need for gender confirmation surgery, and whether the WPATH criteria should even be used at all:

- Dr. Eliason’s April 2016 progress note evaluating Ms. Edmo for gender confirmation surgery did not analyze the WPATH criteria, and specifically stated that “Medical Necessity for Sexual Reassignment Surgery is not very well defined and is constantly shifting,” before describing his own fabricated and medically unsupported examples of situations that “could meet medical necessity.” Exh. 1 at 538.

- After Dr. Levine’s 2016 training to IDOC and Corizon staff, Dr. Eliason conducted

not consider Mr. Clark qualified to assess the medical necessity of gender confirmation surgery. Tr. 391:1-6; Exh. 8 at 3.

his own training that incorporated Levine's slides undermining the WPATH Standards of Care. Tr. 473:8-475:7; Exh. 20 at 1, 27-29.

- In September 2017, IDOC clinician Clark trained other IDOC providers that the WPATH Standards of Care, "which claims to be a scientific and minority rights document, ignores the profound differences between science and advocacy." Tr. 369:25-370:16; Exh. 1025 at 5.

- In September 2018, IDOC Defendants explicitly stated in their opposition to Plaintiff's motion for preliminary injunction that "IDOC Defendants do not acknowledge that WPATH is the legal standard of care for the treatment of GD offenders, nor is WPATH the only reference which provides guidance regarding the treatment of GD inmates." ECF No. 99 at 7 n.2.

- In September 2018, Corizon Defendants explicitly stated in their opposition to Plaintiff's motion for preliminary injunction that "WPATH does not establish the applicable standard of care. Indeed, some providers consult with WPATH guidelines and others have created their own criteria and requirements for surgery, which they think are best suited for patients." ECF No. 100 at 12.

- In the October 2018 hearing, Mr. Clark and Dr. Eliason claimed for the first time to have applied the WPATH criteria to assess medical necessity of surgery for Ms. Edmo in 2016. Tr. 354:20-355:2, 430:22-432:11.

- Also in the October 2018 hearing, Defendants' expert Dr. Garvey admitted that the WPATH Standards of Care are the only accepted medical standard of care for treatment of gender dysphoria. Tr. 572:2-9. Drs. Garvey and Eliason acknowledged that the National Commission on Correctional Health Care ("NCCHC"), through which they obtained certifications as "Correctional Health Care Providers," expressly endorses the WPATH Standards of Care for the treatment of transgender people in prisons. Exh. 1041 at 2, 4; Tr. 477:14-478:22, 571:4-10.

In short, despite previously disclaiming the WPATH Standards of Care, Defendants now contend that they actually affirmatively applied those standards. This is not credible. Defendants' ever-shifting positions are a Hail Mary in the midst of litigation to establish they were not deliberately indifferent, despite their refusal to properly apply the appropriate standard of care for

treating gender dysphoria. Even during the hearing, Defendants repeatedly distorted the WPATH Standards of Care such that no patient would ever qualify for surgery. For example, Defendants and their experts would subject Ms. Edmo to a catch-22 where she must somehow eliminate or cope with her symptoms of gender dysphoria (without surgical intervention) in order to qualify for the surgery that will actually alleviate these symptoms. Similarly, Dr. Eliason and Defendants' experts testified that prisoners cannot meet the WPATH's sixth criterion of social transition unless they are serving life without parole, despite also professing to agree, in accordance with WPATH, that an incarcerated person can meet this sixth criterion, regardless of their sentence or being housed in a prison. Tr. 465:25-466:22, 529:17-530:6, 584:16-25.

III. DEFENDANTS' REFUSAL TO PROVIDE GENDER CONFIRMATION SURGERY

The clear evidence in this case and Defendants' strategy for litigating it show that, by training and practice, Defendants refuse to provide gender confirmation surgery:

- In 2016, Defendants hired Dr. Levine to train their providers on gender dysphoria. At that time, Defendants knew that he was the consultant working with another correctional system that had been sued by prisoners seeking gender confirmation surgery. Tr. 433:23-434:4; Exh. 16.
- After Dr. Levine's training, IDOC and Corizon providers chose to adopt Dr. Levine's training materials when providing their own trainings on gender dysphoria. Those trainings taught that gender confirmation surgery is a cosmetic procedure akin to elective breast augmentation; that prisoners are in prison to be punished and not to receive gender confirmation surgery at taxpayers' expense, and that the WPATH Standards of Care are advocacy tools rather than evidence-based medical standards. Exh. 17 at 1, 43; Tr. 473:8-475:7; Exh. 20 at 1, 27-29; Tr. 369:25-370:16; Exh. 1025 at 5.
- Defendants chose to hire *both* of their experts in this case from within Dr. Levine's inner circle. Drs. Garvey and Andrade worked with Dr. Levine in the Massachusetts Department of Corrections, comprising the majority of that correctional system's gender dysphoria treatment committee. Tr. 560:7-562:17, 563:8-24, 644:16-645:18. Drs. Garvey and Andrade worked closely

together, and regularly present together at correctional conferences, presenting the same viewpoint as Dr. Levine that gender confirmation surgery should be discouraged for incarcerated persons and the WPATH Standards of Care should not be utilized in correctional systems. Tr. 562:13-563-7, 564:25-566:15; Exh. 1029 at 2; Exh. 1030.

- Although IDOC has, at present, approximately 30 patients with gender dysphoria, none of those patients have been approved for or provided gender confirmation surgery. Tr. 322:21-323:3. IDOC has never recommended gender confirmation surgery for a patient within its custody. Tr. 376:23-377:4.

- Although Corizon is the medical contractor for prison and jails systems through the United States, Corizon has never referred an incarcerated patient for gender confirmation surgery. Tr. 489:20-23.

Defendants knew in April 2016, as they know today, that Ms. Edmo is acutely suffering from severe gender dysphoria. They knew in 2016, after her first self-castration attempt, that, in Dr. Eliason's words, her gender dysphoria had risen to a new level. Tr. 471:7-10. Despite this knowledge, Defendants hired experts who are wholly unqualified to opine on these issues, and have adopted the same biases towards prisoners and WPATH as Dr. Levine. Defendants have repeatedly demonstrated that, unless ordered to do so, they will continue to deny all prisoners, including Ms. Edmo, access to gender confirmation surgery.

IV. DEFENDANTS' DISCRIMINATORY TREATMENT OF GENDER DYSPHORIA AND GENDER IDENTITY

Defendants' refusal to provide Ms. Edmo gender confirmation surgery violates the Eighth Amendment, and it is driven by a violation of the Fourteenth Amendment: Defendants treat the diagnosis of gender dysphoria and assessment of medically necessary treatment for gender dysphoria differently than they treat any other medical diagnosis and treatment. Defendants have pointed to no other medical treatment that they deny based on "maladaptive behaviors" such as sexual activity or disciplinary record, refusal to attend groups, or "poor coping mechanisms." Refusing medical treatment to a prisoner who broke their arm in a fight, or who contracted HIV

through having sex with another prisoner, would be unthinkable. So, too, would withholding insulin from a diabetic and then refusing to provide further treatment because she is not adequately controlling her sugar levels. Yet, this is the precise logic Defendants use to deny Ms. Edmo medically necessary and life-saving treatment. The reason they do so is evident from Ms. Edmo's disciplinary record and the ways Defendants have referred to such discipline in this litigation.

Defendants' discipline of Ms. Edmo includes numerous offenses called "disobedience to orders," in which the underlying offense was, for example, wearing a "feminine hair style," having her hair "in a high pony tail and styled in a feminine fashion," not changing her hair "to a style that appeared less feminine gender specific," having her hair "in a bun that was above ear line," "wearing makeup," and having "eyeliner on." Exh. 5 at 8, 21, 25, 27, 41-42. Warden Yordy testified in his deposition that these disciplinary actions were based on IDOC policy in effect until April 2018 prohibiting feminine or effeminate appearance in male prisons. Deposition of Keith Yordy ("Yordy Dep.") 20:17-21:25, 28:10-15, 42:14-43:2, 48:2-5; Exh. 12 at 6. He testified that any hairstyle that was a "woman's style" was prohibited under this policy. Yordy Dep. 28:10-15. Female underwear was also prohibited in male prisons, as was makeup.³ Exh. 12 at 6.

However—just as their rationales for denying surgery have changed during the course of litigation—Defendants argued during this motion that Ms. Edmo was not disciplined for feminine appearance, but, rather, for "sexualizing" her appearance, or appearing "sexually provocative" or "sexually charged." ECF No. 99 at 12-13. Defendants' punishment of Ms. Edmo for having a "woman's hairstyle," and then equating that hairstyle with being sexually provocative, stems from Defendants' sex-based stereotypes that people assigned male at birth should act and appear as men, doing otherwise transgresses acceptable behavior and is "sexually deviant," or that people should not transition. Defendants have identified no penological interest in regulating the height of Ms. Edmo's ponytail or her wearing of makeup. Indeed, the only security concern Warden Yordy mentioned during his deposition regarding Ms. Edmo's requests for feminine hygiene products,

³ There were and are no similar restrictions on hairstyles or makeup for the IDOC women's prison. Yordy Dep. 101:18-102:2.

cosmetics, or women's underwear was a concern that if a prisoner went into the dayroom wearing *only* women's underwear (i.e. without clothes over them), that would be a security risk. He testified that they could handle anything else. Yordy Dep. 69:22-73:4.

Defendants' refusal to treat Ms. Edmo's gender presentation as a way to alleviate her gender dysphoria, and repeated insistence that she alter her appearance to be less "feminine" by, for example, taking her hair out of a ponytail or not wearing makeup, constitutes impermissible sex discrimination and sex stereotyping. Defendants treat Ms. Edmo's medical condition differently from other medical conditions because gender dysphoria itself transgresses traditional notions of sex and gender. This violates the Fourteenth Amendment's prohibition on sex discrimination, as well as the Section 1557 of the Affordable Care Act.

CONCLUSION

Ms. Edmo has established all the legal elements for the Court to issue a mandatory injunction:

- She has a serious medical condition that, if inadequately treated, results in pain and suffering and puts her at serious risk of substantial harm, including self-surgery and suicide.
- The medical standard of care sets forth gender confirmation surgery as the medically necessary and appropriate treatment for Ms. Edmo.
- Defendants have been and continue to be aware of Ms. Edmo's serious medical need and the established and widely accepted medical standard of care,
- Defendants have not provided Ms. Edmo with any medically reasonable and effective treatment alternative, nor does one exist.
- Defendants' treatment of Ms. Edmo's medical condition as different from other medical conditions, and corollary discipline of her for her gender presentation, constitutes impermissible discrimination based on sex and gender identity.
- Without gender confirmation surgery, Ms. Edmo will continue to suffer needlessly and grievously, including being at risk for life-threatening harm;
- There is no public nor penological interest in denying Ms. Edmo necessary medical

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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