IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

ASHLEY DIAMOND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 5:15-cv-00050 (MTT)
	)	
BRIAN OWENS, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S CONSOLIDATED OPPOSITION TO DEFENDANTS' PRE-ANSWER MOTIONS TO DISMISS

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May 18, 2015

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TABLE OF ARGUMENTS AND DEFENSES ASSERTED BY DEFENDANTS

	DEFENSE	RELEVANT CLAIM		
		Failure to Provide Adequate Medical Care (Counts I & II)	**Failure to Protect (Count III)**	**Failure to Train (Count IV)**
COMMISSIONER	**Failure to State a Claim**	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)	Asserted (See No. 35-1 at 22-23)
	Failure to Exhaust	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)
	Qualified Immunity	Asserted (See No. 35-1 at 24-28)	Not asserted (See generally No. 35-1)	Asserted (See No. 35-1 at 25)
	Mootness	Asserted (See No. 38-1 at 28-30)	Asserted (See No. 38-1 at 28-30)	Not asserted (See generally No. 35-1)
LEWIS	**Failure to State a Claim**	Not asserted (See generally No. 35-1)	Asserted (See No. 35-1 at 17-21)	Asserted (See No. 35-1 at 22-23
	Failure to Exhaust	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)	Not asserted (See generally No. 35-1)
	Qualified Immunity	Asserted (See No. 35-1 at 24-28)	Asserted (See No. 35-1 at 25)	Asserted (See No. 35-1 at 25)
	Mootness	Asserted (See No. 38-1 at 28-30)	Asserted (See No. 38-1 at 28-30)	Not asserted (See generally No. 35-1)
ALLEN	**Failure to State a Claim**	Asserted (See No. 35-1 at 13-17)	Not asserted (See generally No. 35-1)	N/A
	Failure to Exhaust	Asserted in part (See No. 35-1 at 6-8)	Asserted (See No. 35-1 at 9)	N/A
	Qualified Immunity	Asserted (See No. 35-1 at 24-28)	Not asserted (See generally No. 35-1)	N/A
	Mootness	Asserted (See No. 38-1 at 28-30)	Asserted (See No. 38-1 at 28-30)	N/A
MCCRACKEN	**Failure to State a Claim**	Asserted (See No. 38-1 at 13-16)	Asserted (See No. 38-1 at 13-16)	N/A
	Failure to Exhaust	Asserted (See No. 38-1 at 5-8)	Asserted (See No. 38-1 at 5-8)	N/A
	Qualified Immunity	Not asserted (See generally No. 38-1)	Not asserted (See generally No. 38-1)	N/A
	Mootness	Asserted (See No. 38-1 at 16-17)	Asserted (See No. 38-1 at 16-17)	N/A

SILVER	**Failure to State a Claim**	Asserted (See No. 38-1 at 9-13)	N/A	N/A
	Failure to Exhaust	Not asserted (See generally No. 38-1)	N/A	N/A
	Qualified Immunity	Not asserted (See generally No. 38-1)	N/A	N/A
	Mootness	Asserted (See No. 38-1 at 16-17)	N/A	N/A
SHELTON	**Failure to State a Claim**	Asserted (See No. 35-1 at 11-13)	N/A	N/A
	Failure to Exhaust	Not asserted (See generally No. 35-1)	N/A	N/A
	Qualified Immunity	Asserted (See No. 35-1 at 24-28)	N/A	N/A
	Mootness	Asserted (See No. 38-1 at 28-30)	N/A	N/A
THOMPSON	**Failure to State a Claim**	Asserted (See No. 38-1 at 9-13)	N/A	N/A
	Failure to Exhaust	Not asserted (See generally No. 38-1)	N/A	N/A
	Qualified Immunity	Not asserted (See generally No. 38-1)	N/A	N/A
	Mootness	Asserted (See No. 38-1 at 16-17)	N/A	N/A
HATCHER	**Failure to State a Claim**	Not asserted (See generally No. 35-1)	N/A	N/A
	Failure to Exhaust	Asserted in part (See No. 35-1 at 6)	N/A	N/A
	Qualified Immunity	Asserted (See No. 35-1 at 24-28)	N/A	N/A
	Mootness	Asserted (See No. 38-1 at 28-30)	N/A	N/A

INTRODUCTION

On February 19, 2015, Plaintiff Ashley Diamond ("Plaintiff") filed a four-count Complaint alleging that Defendants[1]—employees and contractors of the Georgia Department of Corrections ("GDC"), responsible for her treatment and care—violated the Eighth Amendment by denying her medically necessary care (Count I), maintaining an unconstitutional policy on the treatment of gender dysphoria[2] (Count II), failing to protect her from sexual assault (Count III), and failing to train and supervise GDC employees (Count IV). On April 10, 2015, two groups of defendants—one including the GDC Commissioner and prison officials, and one including mental health professionals—filed separate motions to dismiss in which they argue that *certain* of Plaintiff's claims should be dismissed against *certain* Defendants for failure to state a claim, failure to exhaust, or both.[3] These arguments uniformly fail.

First, certain Defendants assert that Plaintiff failed to state a claim under Rule 12(b)(6) by holding Plaintiff to a pleading standard that surpasses Iqbal and Twombly—and requires Plaintiff to affirmatively prove her case at the pleading stage—and by repeatedly mischaracterizing Plaintiff's lengthy factual assertions as "wholly conclusory" recitations of law. Even a cursory

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[1]Plaintiff's verified complaint of February 19, 2015, No. 3 ("Complaint," "Compl.") named GDC Commissioner Brian Owens, Statewide Medical Director Sharon Lewis, Warden Shay Hatcher, Warden Marty Allen, Warden of Care and Treatment Ruthie Shelton, Warden of Care and Treatment David McCracken, and doctors John Thompson and Donna Silver as defendants. However, Owens, sued in his official capacity, stepped down and is automatically substituted in this action by his successor, Homer Bryson, pursuant to Fed. R. Civ. P. 25(d)(1), and as previously acknowledged by Defendants. See No. 34, April 9, 2015 Min. Sheet of Ct. Proceedings. Owens and Byson are referred to herein by title as the "Commissioner."

[2]The terms "Gender Dysphoria," "Gender Identity Disorder," and "Transsexualism," are synonyms used interchangeably in GDC records and herein.

[3]See Nos. 35 through 35-3, Pre-Answer Motion to Dismiss of Defendants Owens, Lewis, Allen, Hatcher, and Shelton, and accompanying brief and exhibits, and Nos. 38 through 38-3, the Motions to Dismiss of Defendants McCracken, Thompson, and Silver. Attached hereto is a Table of Arguments listing the defenses and arguments that Defendants collectively assert.

review of Plaintiff's 38-page, 163-paragraph Complaint reveals that it is well-pled and states a plausible claim for relief, not "naked assertions devoid of further factual enhancement."

Second, certain Defendants claim they are entitled to qualified immunity by mischaracterizing Plaintiff's claims, ignoring settled precedent, and asserting that transgender healthcare cases are constitutionally "novel" even though identical arguments were rejected on their face by the Eleventh Circuit Court of Appeals and the Middle District of Georgia.

Third, certain Defendants claim that even though Plaintiff filed more than half a dozen grievances concerning her health and safety as a transgender inmate, she failed to exhaust certain of her claims to the extent that she did not file serial grievances on the same issue, her grievances were not artfully pled, or she completed grievances about one facility after being transferred to another. Here, Defendants ignore applicable law and policy—including the law on good cause waivers and deadlines for grievances alleging sexual assault—and urge this Court to disregard for alleged procedural defect grievances that GDC officials reviewed on the merits.

Finally, all of the Defendants assert that Plaintiff's injunctive claims are moot because they have made 11th hour changes to her housing and treatment plan. These arguments fail under well-settled law because Defendants have not unambiguously terminated the challenged conduct: (1) Plaintiff remains without medically adequate gender dysphonia care; (2) Defendants continue to deny hormone therapy to transgender inmates in need pursuant to their standardless new policy; (3) Defendants have not trained staff regarding their interactions with transgender inmates or disciplined serial offenders; and (4) Defendants have not agreed to end their practice of housing Plaintiff in close-security environments where she is a target for sexual abuse.

In summary, because Defendants' arguments lack merit and Plaintiff's complaint is well-pled, Defendants' motions to dismiss should be denied in full.

I. Plaintiff's Complaint States Valid Claims Under the Eighth Amendment

When evaluating a motion to dismiss, courts accept all factual allegations in a complaint as true and construe them in the light most favorable to the plaintiff. See Saunders v. Duke, 766 F.3d 1262, 1266 (11th Cir. 2014). A complaint governed by Rule 8, such as the instant case, need only plead factual allegations that are plausible or "raise a [plaintiff's] right to relief above the speculative level in order to escape dismissal." Id. (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); accord Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. Stated otherwise, while plaintiffs must provide more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," Iqbal, 556 U.S. at 681, plaintiffs need not make "detailed factual allegations." Id. at 678. A complaint withstands dismissal so long as it contains enough factual matter "to raise a reasonable expectation that discovery will reveal evidence" to support a plaintiff's claims. Twombly, 550 U.S. at 555.

Here, there can be no colorable dispute that Plaintiff's complaint—which spans 38 pages, and contains myriad factual allegations—is well-pled, and contains facts sufficient to "nudge[her] claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570.

A. Plaintiff Has Sufficiently Pled a Claim for Deliberate Indifference to Serious Medical Needs

Prison officials violate the Eighth Amendment's prohibition against cruel and unusual punishment when they show deliberate indifference to an inmate's serious medical needs, "whether the indifference is 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 treatment once proscribed." Brown v. Johnson, 387 F.3d 1344,

1351 (11th Cir. 2004) (citing Estelle v. Gamble, 429 U.S. 97, 104-05 (1976)). Prison officials also show deliberate indifference when they enforce or implement a policy of denying treatment on a blanket basis, without individualized determinations of an inmate's need for care. See No. 29, Statement of Interest of the United States ("U.S. Stmt. of Interest") at 17 (stating "freeze-frame policies are facially unconstitutional"); id. at 14-16 (and collecting cases); see also Lynch v. Lewis, No. 7:14-CV-24 (HL), 2014 WL 1813725, at *2-3 (M.D. Ga. May 7, 2014) (plaintiff stated claim that GDC officials violated the Eight Amendment to the extent officials denied gender dysphoria treatment to inmates because they were not receiving it prior to incarceration).

As discussed further below, Plaintiff's complaint as pled states a plausible claim that each of the Defendants violated the Eighth Amendment by showing deliberate indifference to Plaintiff's serious medical needs—e.g. her gender dysphoria,[4] attendant impulses to engage in self-harm, and her substantial risk of injury or death when appropriate medical care is withheld.

1. Plaintiff Has Stated a Plausible Medical Indifference Claim Against Defendants Lewis, Shelton, Hatcher, and the Commissioner

Defendants do not dispute that Plaintiff has stated a plausible claim of deliberate indifference against Defendant Lewis and the Commissioner under Counts I and II. Nor can any such argument be made, as arguments not raised in an initial brief are waived, In re Egidi, 571 F.3d 1156, 1163 (11th Cir. 2009), and Plaintiff's complaint unequivocally alleges that Lewis and the Commissioner "knew of and disregarded serious medical needs that created a risk to [her] health and safety," [5] No. 29, U.S. Stmt. of Interest at 9—including by maintaining a "facially

[4]Defendants do not contest, and every court to consider the issue has found that gender dysphoria constitutes a serious medical need. No. 29, U.S. Stmt. of Interest at 8 (collecting cases).

[5] Specifically, Plaintiff has pled that she is a transgender woman with gender dysphoria who, when left untreated, experiences suicidality, self-castration, and self-harm; Defendant Lewis and the Commissioner were repeatedly informed by Plaintiff and GDC medical professionals of Plaintiff's

unconstitutional" freeze-frame policy that limited gender dysphoria treatment without regard to medical need. Id. at 17.

Defendants likewise concede that Plaintiff has stated a claim against Defendant Hatcher,[6] see Table of Arguments and Defenses Asserted by Defendants ("Table of Args.") attached hereto, but attack Plaintiff's claim against Defendant Shelton on grounds that Plaintiff seeks to hold Shelton liable on a "constructive knowledge" theory contrary to Franklin v. Curry, 738 F.3d 1246 (11th Cir. 2013). See No. 35-1 at 12-13. This contention is contradicted by the Complaint which, unlike Franklin, does not fail to allege actual knowledge "even in the most conclusory fashion," Franklin, 738 F.3d at 1250, or assert that Shelton "knew or *should have known*" of Plaintiff's serious medical needs and risk of harm. Id. at 1251 (emphasis added).

Instead, Plaintiff alleges that Shelton had actual knowledge of her serious treatment needs because, *inter alia*, Shelton was familiar with the Standards of Care and GDC policy, which establish that gender dysphoria is a serious medical need and hormone therapy is appropriate care (Compl. ¶¶ 22, 27-35, 43-47, 126); GDC personnel confirmed Plaintiff's gender dysphoria diagnosis, her history of treatment, risk of suicidality and self-harm, and continued need for hormone therapy and female gender expression as treatment and provided records documenting

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diagnosis, her need for hormone therapy and female gender expression as medical treatment, and her history of suicidality and self-harm when denied gender dysphoria care; yet, despite knowing that gender dysphoria is a serious medical need, Defendants refused to authorize Plaintiff's medically necessary care, continued to enforce a policy of refusing to initiate gender dysphoria treatment, irrespective of medical need, and ratified the decisions of subordinates who denied Plaintiff care. (Compl. ¶¶ 1-3, 36, 43-47, 73-76, 90-91, 95-97, 100-01, 104, 107-09, 116-18, 124-29, 133-36).

[6] Nor can any argument be made that Plaintiff's claims against Defendant Hatcher are not well-pled: Plaintiff asserts that Defendant Hatcher threw her in solitary confinement for "pretending to be a woman" after she complained that she was not receiving medically necessary gender dysphoria care; refused to refer her for treatment after she warned him that she was suicidal based on her denial of care, and that she attempted suicide and self-castration thereafter and was hospitalized on an emergency basis. (Compl. ¶¶ 85-90).

these facts when Plaintiff was transferred to Shelton's care (Compl. ¶¶ 73-76, 78); Plaintiff spoke to Shelton directly about her medical treatment needs and grieved the same, and Shelton communicated with Plaintiff on three distinct occasions, wherein she acknowledged that Plaintiff was suffering due to her denial of medical care, but refused her requests for treatment notwithstanding (Compl. ¶¶ 82-87).[7]

Although Defendant Shelton suggests that Plaintiff's complaint is deficient to the extent it fails to plead that Shelton read all of Plaintiff's records and "understood the medical aspects and implications contained therein," No. 35-1 at 13, this seriously misstates the pleading standard articulated in Iqbal and Twombly, and concerns information that is peculiarly in the possession of Defendant Shelton, from whom Plaintiff has not had the opportunity to take discovery. Nor is Plaintiff required at this time to incontrovertibly "demonstrate [Shelton's] awareness . . . of Plaintiff's particular medical history and condition," No. 35-1 at 13, as this ignores the admonition that a plaintiff "need not prove his [or her] case on the pleadings." Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1386 (11th Cir. 2010). Rather, it is enough that, construing inferences in her favor, Plaintiff's allegations against Shelton set forth a plausible claim to relief. Id.

2. Plaintiff Has Stated a Plausible Medical Indifference Claim Against Defendants Silver and Thompson

Plaintiff has also stated a plausible claim against Defendants Silver and Thompson for

[7] Although Shelton does not assert that Plaintiff failed to plead the deliberate indifference and causation elements of her Eight Amendment claim—waiving any such argument—these claims are also well-pled. The Complaint alleges that Shelton repeatedly denied Plaintiff gender dysphoria treatment that her GDC healthcare providers deemed necessary, informed Plaintiff that GDC did "not offer therapy for this at this time," ratified the decisions of GDC personnel who denied gender dysphoria treatment to inmates in need, and told Plaintiff to "develop better coping mechanisms" when she learned that Plaintiff was suffering physical and mental injury as a result. (Compl. ¶ 82-86, 133, 137-39).

their failure to provide adequate medical care. See No. 29, U.S. Stmt. of Interest at 9 ("Ms. Diamond has shown that GDOC officials' conduct amounts to deliberate indifference."). Defendants advance only three arguments in rebuttal.

First, Defendants Silver and Thompson assert that Plaintiff makes only "general allegations of 'knowledge' in the absence of any specific facts demonstrating such knowledge." No. 38-1 at 12. This argument lacks merit, as Plaintiff has alleged ample facts showing that Defendants actually knew of her serious medical needs and the substantial risk of harm she faced if denied treatment. The Complaint alleges, *inter alia*, that Silver and Thompson were healthcare providers at GDC; GDC policy recognizes that gender dysphoria is a serious medical need and an identical consensus exists among competent medical professionals; Defendants were familiar with the WPATH Standards of Care ("SOC"), which are the generally accepted standards for the treatment of gender dysphoria and provide that hormone therapy can be medically necessary treatment, while discontinuing hormone therapy or attempting to treat gender dysphoria with mental health counseling and psychotropic medications can be catastrophic; Silver and Thompson received GDC records detailing Plaintiff's gender dysphoria diagnosis and history of hormone treatment, and Plaintiff personally informed them of her gender dysphoria, 17-year history of receiving hormone treatment, and that GDC healthcare professionals had determined that she still required hormone therapy as medically necessary treatment; and Plaintiff advised Silver and Thompson the continued denial of medical care was harming her physical and mental well-being, had led her to attempt suicide and self-castration, and she submitted a complaint regarding the same. (Compl. ¶ 27-35, 43-47, 75, 78-80, 87, 125-26). Not only do these allegations sufficiently state actual knowledge for purposes of a Rule 8 pleading, it is hard to conceive what if any other information Defendants Silver and Thompson would require.

Second, Defendants Silver and Thompson urge the court to look beyond the four corners of Plaintiff's complaint and conclude—based on a review of grievance records—that their conduct does not arise to deliberate indifference to the extent Plaintiff was receiving *some* form of treatment. No. 38-1 at 10-11. This argument violates the fundamental precept that Rule 12(b)(6) review generally "must be limited to the four corners of the complaint." Speaker, 623 F.3d at 1379 (citations omitted); accord Kothmann v. Rosario, 558 F. App'x 907, 911 (11th Cir. 2014). It also disregards the well-settled rule that prison officials cannot escape Eighth Amendment scrutiny by merely providing inmates "some" treatment, as the relevant inquiry is "whether the care provided is constitutionally adequate." No. 29, U.S. Stmt. of Interest at 10 (collecting authorities). Indeed, courts have held prison officials liable where, as here, they were aware that an inmate's medical condition required a specific form of care, but nonetheless chose "an easier but less efficacious course of treatment." McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999); see also Kothmann, 558 F. App'x at 910-11 (denying motion to dismiss despite allegations that a transgender inmate seeking hormone therapy was provided alternate treatment consisting of "anti-anxiety and anti-depression medications, mental health counseling, and psychotherapy"); De'lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013) ("[J]ust because [the defendants] have provided [the plaintiff] with *some* treatment consistent with the [WPATH] Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment.") (emphasis in original).

Third, Defendants Silver and Thompson argue that Plaintiff's complaint errs because it merely alleges that they denied Plaintiff care pursuant to GDC policy, without demonstrating their involvement in "developing [GDC] policies and procedures" or their "ability to order hormone therapy" for transgender inmates. No. 38-1 at 13. This argument mischaracterizes

Plaintiff's allegations and misstates the relevant law. Plaintiff has alleged that Silver and Thompson refused to refer her for evaluation and treatment without citation to GDC policy, and callously informed her that she forfeited her right to receive hormone therapy when she became a prisoner, despite knowing that she required hormone therapy as treatment, and failing to properly treat gender dysphoria can lead to death or injury. (Compl. ¶¶ 28-34, 78-81, 125-26). These facts arise to deliberate indifference "[u]nder any rubric." No. 29, U.S. Stmt. of Interest at 10.

Even if Plaintiff sought to hold Defendants Silver and Thompson liable solely for following GDC policy—which she does not—the very fact that they implemented an unconstitutional policy is a proper basis for finding them deliberately indifferent to Plaintiff's serious medical needs. See, e.g., Mitchell v. Cate, No. 2:08-CV-01196, 2014 WL 546338, at *21 (E.D. Cal. Feb. 11, 2014) (a defendant "can be held liable for the implementation of a policy even though he had no decision making authority as to its implementation"); accord Fields v. Smith, 712 F. Supp. 2d 830, 863 (E.D. Wis. 2010), aff'd 653 F.3d 550 (7th Cir. 2011). In Fields, the district court found that the defendants' enforcement of a state law prohibiting hormone therapy without any individualized medical judgment constituted deliberate indifference to transgender 'inmates' serious medical needs. Id. To the extent that Silver and Thompson seek cover under GDC's "freeze-frame" policy, they likewise must fail in their endeavor. Any policy or practice of denying treatment without making a medical determination is unconstitutional under Estelle and its progeny. No. 29, U.S. Stmt. of Interest at 14-17 (collecting cases).

Moreover, as physicians employed by GDC to provide needed medical care to inmates, Defendants Silver and Thompson were required to exercise their professional judgment, and had "an obligation to take action or to inform competent authorities . . . of a prisoner's need for medical or psychiatric care." Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989).

Defendants Silver and Thompson were obligated to do their job—*e.g.* exercise judgment in light of their medical expertise and experience, ensure that Plaintiff's condition was appropriately evaluated, and recommend that medically necessary treatment be provided. See id.; accord W. v. Atkins, 487 U.S. 42, 51 (1988) ("Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve.") (citation and marks omitted); Brooks v. Berg, 270 F. Supp. 2d 302, 310 (N.D.N.Y.), vacated in part on other grounds, 289 F. Supp. 2d 286 (N.D.N.Y. 2003) (defendants were deliberately indifferent to the transgender plaintiff's medical needs insofar as they failed to show their refusal to provide treatment was "based on sound medical judgment"). Here, Silver and Thompson *did nothing*, so they cannot hide behind policy to excuse their inaction.

Although Defendants cite two cases, LaMarca and Williams, to support their argument to the contrary, these cases merely stand for the proposition that a defendant who exhausts available means to remedy a constitutional harm is not deliberately indifferent under the Eighth Amendment. In LaMarca v. Turner, 995 F.2d 1526 (11th Cir. 1993), the Court explained that "if an official *attempts to remedy* a constitutionally deficient prison condition, but fails in that endeavor, he cannot be deliberately indifferent unless he knows of, but disregards, an appropriate and sufficient alternative." Id. at 1536 (emphasis added). Applying this standard, the Court found that despite the prison superintendent's efforts to improve dire prison conditions, he was still deliberately indifferent to the inmates' substantial risk of harm because he failed to take additional, known measures to address those conditions. Id. at 1536-38.

Similarly, in Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), the court held that while prison officials "*clearly* may not escape liability solely because of the legislature's failure to appropriate requested funds," id. at 1387 (emphasis added), "if full compliance is beyond the

control of a particular individual, and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority, then he cannot be said to have acted with callous indifference." Id. at 1387-88. Here, Defendants Silver and Thompson did not "accomplish what could be accomplished within the limits of [their] authority," id., like GDC mental health professionals Drs. Sloan, Moody, and Harrison, who each evaluated Plaintiff and attempted to refer her for ongoing medical care, including by speaking to Defendant Lewis, the Statewide Medical Director. (Compl. ¶¶ 74-76, 95-97). Instead, after learning of Plaintiff's serious medical needs, Defendants Silver and Thompson did nothing but coolly inform Plaintiff that she "forfeited her right to receive hormone therapy when she became a prisoner." (Compl. ¶ 81). Because doing nothing is not constitutionally sufficient under LaMarca, Williams, or any other Eleventh Circuit precedent, Plaintiff has stated a valid claim.

3. Plaintiff Has Stated a Plausible Medical Indifference Claim Against Defendants Allen and McCracken

Plaintiff has also pled sufficient facts to support her claim that Defendants Allen and McCracken acted with deliberate indifference and caused her physical harm while having actual—not constructive—knowledge of her serious medical treatment needs and risk of harm if denied care. Specifically, the Complaint alleges that Defendants Allen and McCracken exercised authority over the care and treatment of inmates at Valdosta State Prison ("Valdosta"), and were familiar with the SOC and GDC Policy, which confirmed that gender dysphoria is a serious medical need requiring continuity of treatment; Plaintiff contacted Allen and McCracken repeatedly about her need for medical care, and they received records from other GDC healthcare personnel corroborating Plaintiff's diagnosis, long treatment history, continued need for hormone therapy, and propensity to attempt suicide and self-harm when denied gender dysphoria care; notwithstanding their knowledge, Allen and McCracken disregarded Plaintiff's

serious medical needs by, *inter alia*, denying her requests for medical treatment or a referral and subjecting her to reprimand, leading her to attempt suicide and self-castration on more than one occasion. (Compl. ¶¶ 19-20, 28-35, 43-44, 92, 102-04, 110-12, 114-15, 117-19).

In arguing these allegations are insufficient to infer knowledge, Defendants Allen and McCracken seek to hold Plaintiff to a pleading standard—unknown to Iqbal and Twombly, and contrary to settled law—that would require Plaintiff to prove that all the information communicated to Allen and McCracken was also registered, digested, and believed. See Twombly, 550 U.S. at 570 (Rule 8 does "not require heightened fact pleading of specifics"). In addition, while McCracken suggests that he cannot be held liable because he was merely following GDC policy, this argument fails as a matter of fact and law—Plaintiff has not alleged that McCracken relied on GDC policy when denying her medical care, and Plaintiff has already shown why the legal argument fails. See supra, Section I.A.2.

B. Plaintiff Sufficiently Pled a Claim for Failure To Protect

Under the Eighth Amendment, "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners," including violence in the form of sexual assault. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (citations omitted). Prison officials violate this duty when they have subjective knowledge of an inmate's substantial risk of serious harm, but "disregard[] that known risk by failing to respond to it in an (objectively) reasonable manner." Rodriguez v. Sec'y for Dep't of Corr., 508 F.3d 611, 617 (11th Cir. 2007). Subjective knowledge is a question of fact that may be demonstrated "in the usual ways, including inference from circumstantial evidence." Farmer, 511 U.S. at 842. Moreover, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id.

1. Plaintiff Has Stated a Plausible Failure To Protect Claim Against Defendant Lewis and the Commissioner

Defendants concede that Plaintiff stated a plausible claim for failure to protect against the Commissioner, see Table of Args., but question whether Plaintiff also stated a claim against Defendant Lewis. No. 35-1 at 18-21. The answer is yes. Plaintiff's complaint plausibly asserts that Defendant Lewis unreasonably disregarded Plaintiff's need for protection from sexual assault while having actual—not constructive—knowledge of the substantial risk she faced.

The Complaint alleges, *inter alia*, Lewis had special responsibilities regarding the housing placements of transgender inmates because their vulnerability to sexual assault in GDC custody is well known and obvious; under PREA, Lewis was likewise required to individually assess transgender inmate's' housing placements; Lewis knew that transgender women stood an even more particularized risk of harm in close-security facilities based on their gang presence and dangerous inmate population; Lewis also knew that Plaintiff faced continued threats in close-security environments because she received a contemporaneous notification every time Plaintiff was sexually assaulted; notwithstanding her knowledge and her authority to revise Plaintiff's housing placements, Lewis failed to take any steps to protect Plaintiff from further harm; Lewis ratified the actions of staff who blamed transgender inmates like Plaintiff for their sexual assaults instead of coming to their aid; and as a direct and proximate result of Defendant Lewis's deliberate disregard to her safety needs, Plaintiff continued to be housed in a series of close-security prisons—inconsistent with her security classification—where she endured repeated sexual assaults and sexual abuse, and was diagnosed with Post-Traumatic Stress Disorder ("PTSD"). See (Compl. ¶¶ 8, 18, 52-72, 74, 92-94, 99, 106, 146-49, 151, 153).

These allegations are more than sufficient to state an Eighth Amendment claim. See, e.g., Farmer, 511 U.S. at 847 (prison officials could be held liable for transgender inmate's sexual assault where they failed to protect her from a known risk of assault); Greene v. Bowles, 361

F.3d 290, 293-94 (6th Cir. 2004) (prison officials could be held liable where transgender inmate was assaulted after being housed with a high security inmate).[8]

2. Plaintiff Has Stated a Plausible Failure To Protect Claim Against Defendants Allen and McCracken

Defendants concede that Plaintiff states a plausible claim for failure to protect against Defendant Allen, see Table of Args., but assert that Plaintiff failed to plead knowledge and deliberate indifference on the part of Defendant McCracken. No. 38-1 at 16. This argument fails, however, because Plaintiff's complaint sets forth lengthy factual allegations to support her claim that McCracken disregarded Plaintiff's safety while having actual knowledge of her substantial risk of harm, causing her injury. Plaintiff has alleged, *inter alia*, that as a transgender woman and non-violent offender, she had a known and particularized risk of sexual assault in close-security facilities like Valdosta which staff freely acknowledged; Plaintiff was sexually assaulted the day after she arrived at Valdosta, and McCracken was promptly informed but took no action; Plaintiff contacted McCracken multiple times to beg for safekeeping, and a GDC counselor notified McCracken of Plaintiff's ongoing risk of assault and need to be transferred for reasons of safety; McCracken failed to take steps to protect Plaintiff, notwithstanding his knowledge that she stood a high risk for sexual abuse; thereafter, Plaintiff was sexually assaulted three more times and her PTSD symptoms worsened, and although McCracken was notified of Plaintiff's

[8] Although Lewis suggests that her decision to ignore GDC policy and PREA provisions concerning transgender inmate health and safety is irrelevant to Eighth Amendment deliberate indifference analysis, the cases she cites do not support this view at all. See, e.g., Mathews v. Moss, 506 F. App'x 981, 984 (11th Cir. 2013) (per curiam) (analyzing inmates' 14th Amendment liberty interest in the prison grievance process); Knight v. Jacobson, 300 F.3d 1272, 1276 (11th Cir. 2002) (analyzing warrantless searches under the 4th Amendment); Foy v. Holston, 94 F.3d 1528, 1532 (11th Cir. 1996) (analyzing 14th Amendment due process claims and state law); Gaines v. Stenseng, 292 F.3d 1222, 1225 (10th Cir. 2002). Rather, as the courts found in Goebert v. Lee County, 510 F.3d 1312, 1329 (11th Cir. 2007) and Newsome v. Higham, No. 7:08-CV-8 (HL), 2010 WL 1258013, at *3-4 (M.D. Ga. Mar. 29, 2010), a prison official's knowing disregard of laws and policies designed to ensure an inmate's safekeeping is relevant when analyzing a deliberate indifference claim.

ongoing assaults, he continued to defer action until Plaintiff filed a *pro se* lawsuit. See (Compl. ¶¶ 62, 65-68, 92-94, 98-99, 102-03, 106, 114-17, 119, 146-49). These allegations plainly state a plausible Eighth Amendment claim. See Farmer, 511 U.S. at 842 (liability can be premised on knowledge and a failure to act).

C. Plaintiff Sufficiently Pled a Claim for Failure To Train Against Defendants Lewis and the Commissioner

Plaintiff has alleged sufficient facts to state a claim that Defendants Lewis and the Commissioner were aware of the rampant abuse amongst GDC personnel regarding the health and safety needs of transgender inmates, such that their failure to train or discipline staff "set[] the stage" for Plaintiff's constitutional injuries. Greason v. Kemp, 891 F.2d 829, 837 n.18 (11th Cir. 1990). See also City of Canton v. Harris, 489 U.S. 378, 388 (1989) (supervisor liable where failure to train "amounts to deliberate indifference to the rights of persons with whom [his subordinates] come into contact"); Rivas v. Freeman, 940 F.2d 1491, 1495 (11th Cir. 1991) (failure to train "may constitute a 'policy' giving rise to governmental liability"). While a "fact-sensitive inquiry," Greason, 891 F.2d at 837, Plaintiff, at the 12(b)(6) stage need only plead facts that "raise a reasonable expectation that discovery will reveal evidence" supporting her claims. Twombly, 550 U.S. at 555.

Plaintiff has met this burden. The complaint alleges that the Commissioner and Defendant Lewis failed to train GDC staff despite knowing of the "widespread" practice at GDC of denying medically necessary treatment to transgender inmates and failing to protect them from sexual assault. (Compl. ¶¶ 50-51, 62, 108-09, 111, 158-60). Moreover, these are not "formulaic" assertions as Defendants would suggest: Plaintiff has alleged detailed facts concerning her experiences across GDC facilities, and with numerous staff, that render her pattern and practice claims plausible. Plaintiff has alleged, for instance, that at intake GDC

officials who serve as the gatekeepers for gender dysphoria treatment ignored her medical needs—despite her self-identification as a transgender woman, pleas for treatment, and visible breasts—and the hormone therapy she received for 17 years was abruptly discontinued (Compl. ¶ 64); Plaintiff, a non-violent offender, was subsequently placed in a series of close-security prisons for male felons with assaultive histories, where she faced a known and particularized vulnerability to sexual assault (Compl. ¶¶ 64-65, 70, 92, 120, 146-48); when Plaintiff experienced brutal yet foreseeable sexual assaults, she was accused of inviting the abuse, told to "guard her booty," be less feminine, and prepare to fight by GDC personnel who otherwise took no action (Compl. ¶¶ 62, 71, 93); despite several gender dysphoria diagnoses by GDC mental health personnel at different facilities, Plaintiff has consistently been denied recommended and medically necessary treatment (Compl. ¶¶ 3, 45, 64, 76, 81, 97, 109, 117); GDC officials knew that their failure to provide Plaintiff necessary treatment had led her to attempt suicide and self-castration (Compl. ¶¶ 73, 90, 104); yet, instead they ridiculed Plaintiff, referred to her as a "he-she-thing," told her to "develop better coping mechanisms," and disciplined her for her feminine gender expression (Compl. ¶¶ 69-71, 73-76, 78-97, 99-100, 102-12, 114-17, 120-22); and that other transgender inmates experienced similar abuse, prompting them to file complaints and lawsuits (Compl. ¶¶ 50-51, 62-63).

These allegations are more than sufficient to withstand a motion to dismiss, as they strongly indicate that the consistent and pervasive practice at GDC was to deny transgender inmates constitutionally adequate housing and care, and that Defendant Lewis and the Commissioner were on notice that deficiencies in training had caused and would continue to cause the very injuries Plaintiff suffered. In Harper v. Lawrence County, Alabama, 592 F.3d 1227 (11th Cir. 2010) the Eleventh Circuit denied the defendants' motion to dismiss on less

detailed allegations—*e.g.* that there were "widespread constitutional rights deprivations" at a jail; jail personnel had a custom and practice of denying care to inmates with drug and alcohol addiction, and one other inmate had been mistreated near in time to and in a similar fashion as the decedent. Id. at 1236-37.

Defendants appear to argue that because Plaintiff has alleged facts regarding "[her] own circumstances," the Complaint fails for not showing "repeated denials" of adequate care or a "pervasive" disregard of safety. No. 35-1 at 23. This characterization ignores that Plaintiff has alleged numerous instances of abuse and unconstitutional mistreatment, separated in time, involving distinct GDC officials and personnel at four different GDC facilities, all based on her status as a transgender woman. See generally Sections I.A-I.B. While these may be her circumstances, they nonetheless evince a pervasive and consistent practice throughout GDC of deliberate indifference to the health and well-being of transgender inmates. Nor should Plaintiff be penalized at the pleading stage for her lack of specific knowledge regarding GDC training programs and practices: In Barnes v. Corizon Health, Inc., No. 2:13-CV-862-WKW [WO], 2014 WL 3767583 (M.D. Ala. July 31, 2014), the Court denied the defendants' motion to dismiss and acknowledged that the plaintiff had not yet conducted discovery, and as an inmate, he had no knowledge of the prison "command structure" or the "bounds of assigned responsibilities over the provision of prescription medicine"; therefore, defendants had "control of critical information" to his supervisory claim for deliberate indifference to a serious medical condition. Id. at *5-6. Accordingly, Plaintiff has met her burden and her failure to train claim against Defendant Lewis and the Commissioner should survive dismissal.

II. Defendants Are Not Entitled to Qualified Immunity

"Qualified immunity is an affirmative defense that may be waived," Bogle v. McClure, 332 F.3d 1347, 1356 n.5 (11th Cir. 2003), and applies only to claims seeking to hold government

officials liable for damages in their individual capacity. See Bruce v. Beary, 498 F.3d 1232, 1249 n.33 (11th Cir. 2007). A motion to dismiss may be granted on qualified immunity grounds if a "complaint fails to allege the violation of a clearly established constitutional [or statutory] right." St. George v. Pinellas Cnty., 285 F.3d 1334, 1337 (11th Cir. 2002) (citation omitted). For qualified immunity purposes, the law is clearly established if it gave Defendants "fair warning that their [conduct] was unconstitutional." Hope v. Pelzer, 536 U.S. 730, 741 (2002). Defendants may be put on notice of the law through statutory or constitutional provisions or by means of decisional law, Goebert v. Lee Cnty., 510 F.3d 1312, 1330 (11th Cir. 2007), and "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" Hope, 536 U.S. at 741 (citation omitted).

A. Defendants' Qualified Immunity Arguments Fail, Where Asserted

As a preliminary matter, the Commissioner is not entitled to qualified immunity because he is only being sued for injunctive relief in his official capacity, see Beary, 498 F.3d at 1249 n.33, and Defendants McCracken, Silver and Thompson are not entitled to qualified immunity insofar as they are private contractors retained by GDC, Richardson v. McKnight, 521 U.S. 399, 412 (1997), and failed to raise the issue in their initial brief, thereby waiving it. See, e.g., Bogle, 332 F.3d at 1356 n.5; accord Collar v. Austin, — F.Supp. — , 2015 WL 505667, at *2 (S.D. Ala. Feb. 5, 2015) ("[A] defendant cannot receive the benefit of qualified immunity without asking for it, at the proper time and in the proper manner.").

1. Defendants Lewis, Hatcher, Shelton and Allen's Refusal To Provide Plaintiff Medically Necessary Care

The law had been clear for nearly four decades—through Estelle v. Gamble, 429 U.S. 97 (1976)—that "deliberate indifference to serious medical needs of prisoners constitutes the

unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment." Id. at 104; see McElligott v. Foley, 182 F.3d 1248, 1254 (11th Cir. 1999) (describing law as "well settled"). A serious medical need under Estelle is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Farrow v. West, 320 F.3d 1235, 1243 (11th Cir. 2003) (citations omitted). Further, an inmate's right to adequate medical care "encompasses a right to psychiatric and mental health care, and a right to be protected from self-inflicted injuries, including suicide." Belcher v. City of Foley, Ala., 30 F.3d 1390, 1396 (11th Cir. 1994) (citations omitted).

Defendants are not entitled to qualified immunity because Plaintiff has sufficiently pled a violation of Estelle and its Eleventh Circuit progeny, insofar as she alleges that Defendants knew that (1) Plaintiff has been diagnosed with gender dysphoria, a serious medical need; (2) hormone therapy and female gender expression are the medically necessary treatment for Plaintiff's gender dysphoria, as confirmed by the diagnoses of her healthcare providers at GDC; (3) Plaintiff received these treatments for over 17 years prior to her incarceration; (4) discontinuing hormone therapy and attempting to treat gender dysphoria with counseling and psychotropic drugs is a gross departure from the medically accepted Standards of Care that puts patients at catastrophic risk of harm; (5) individuals with untreated gender dysphoria face a substantial risk of injury or death, and Plaintiff repeatedly attempted suicide and self-castration after her care was terminated; (6) Defendants refused to provide Plaintiff medically necessary care despite this knowledge. (See Compl. ¶¶ 28-47, 73-92, 102-04, 108-13, 114-18, 125-39). See, e.g., Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985) ("The knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference."); Greason, 891 F.2d at 834-36 (prison

officials had fair notice in 1990 that discontinuing medical treatment for an inmate with a documented suicide risk and mental health needs constitutes cruel and usual punishment).

In a futile attempt to escape liability for their unconstitutional actions, Defendants Lewis, Hatcher, Shelton and Allen argue that, despite settled law, they are entitled to qualified immunity because there are no published decisions in the Eleventh Circuit specifically addressing a prison official's refusal to provide gender dysphoria treatment where medically required. No. 35-1 at 26-27. However, Defendants' argument fails under the Supreme Court's decision in Hope v. Pelzer, 536 U.S. 730 (2002), which expressly overturned a line of Eleventh Circuit cases that required plaintiffs to identify cases with "fundamentally similar" facts to withstand qualified immunity. Id. at 741. Rejecting 'this attempt to apply a "rigid gloss on the qualified immunity standard," id. at 739, the Supreme Court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Id. at 741.

Tellingly, Defendants' precise qualified immunity argument was rejected by the Eleventh Circuit in Kothmann v. Rosario, 558 F. App'x 907, 912 (11th Cir. 2014), a case also concerning the denial of hormone therapy to a transgender inmate. After noting that, in the qualified immunity context, "there is no requirement that the act have been previously held unlawful," id. at 911, the Court found that allegations strikingly similar to Plaintiff's withstood dismissal.[9] Id. at 911-12. The Court held that the law was sufficiently clear that the failure of prison officials to

[9] Kothmann, 558 F. App'x at 911 (plaintiff averred that "hormone therapy is the medically recognized, accepted and appropriate treatment" for gender dysphoria, prison officials knew of plaintiff's "diagnosis, his hormone treatment history, and his medical need for continued hormone treatment," yet "knowingly refused to provide [plaintiff] with this medically necessary hormone treatment.").

Although Defendants attempt to distinguish Kothmann on grounds that Plaintiff lacks "a medical history as extensive as that of Kothmann," No. 35-1 at 27, this argument falls flat. Kothmann was diagnosed with gender dysphoria and received hormone therapy for *six* years prior to his incarceration, id., whereas Plaintiff was first diagnosed nearly twenty years ago by a provider and received hormone therapy for seventeen years. (Compl. ¶¶ 36-42).

provide hormone therapy alleged to be "accepted, medically necessary treatment" constitutes deliberate indifference. Id. at 912. Likewise in Lynch v. Lewis, concerning Defendant Lewis's failure to again provide a transgender inmate hormone therapy, the Middle District of Georgia rejected Lewis's effort to "narrow the focus of the qualified immunity analysis to . . . whether there is a clearly established right to receive hormone therapy." Lynch, 2015 WL 1296235, at *5. Instead, the court analyzed whether refusing inmates medically necessary care violates the Eighth Amendment and found "that principle to be well established in the Eleventh Circuit." Id.

Although Defendants cite Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) and Leslie v. Hancock County Board of Education, 720 F.3d 1338 (11th Cir. 2013) as support for their claim that Plaintiff must nonetheless provide decisional law matching "the specific context of the case," No. 35-1 at 24 (citation omitted), their reliance on these cases is misplaced. Vinyard and Leslie did not alter Hope to require cases with factual similarity as Defendants suggest; instead, Vinyard and Leslie acknowledge that there are "various ways" that defendants can have notice for purposes of qualified immunity, including "broad statements of principle in case law . . . not tied to particularized facts," which can suffice "to clearly establish law applicable in the future to different sets of detailed facts." Vinyard, 311 F.3d at 1351; accord Leslie, 720 F.3d at 1345-46. Indeed, novel factual circumstances did not prevent the court in Vinyard from denying qualified immunity to a government official. Vinyard, 311 F.3d at 1355 ("[N]o factually particularized, preexisting case law was necessary" to put a police officer on notice that his conduct violated an arrestee's Fourth Amendment right to be free from excessive force). Leslie, although granting qualified immunity, addressed a novel *legal* issue—how the interplay of relevant Supreme Court decisions applied to an employee's First Amendment free speech rights "as a matter of law when a policymaking employee speaks about policy." Leslie, 720 F.3d at 1347. Here the legal issues

are well-settled. See U.S. Stmt. of Interest at 8-18.

Even under Defendants' erroneous standard—requiring decisional law mirroring the specific circumstances of Plaintiff's condition—Defendants had fair notice that their conduct constituted deliberate indifference. It has long been clear in the Eleventh Circuit that prison officials act with deliberate indifference when they provide "grossly inadequate care," Greason, 891 F.2d at 835, or "take an easier but less efficacious course of treatment." McElligott, 182 F.3d at 1255. Both decisions bear on the circumstances presented here. In Greason, the Court denied qualified immunity to prison officials who discontinued an inmate's psychiatric medication in summary fashion, despite his mental health history and known risk of suicidality. Greason, 891 F.2d at 835-36. In McElligott, although the inmate lacked a formal diagnosis, prison officials were found deliberately indifferent where they knew of his physical suffering but provided treatment only in the form of pain medication. Id. at 1256-57.

Although Defendants suggest that an unpublished district court case, Barnhill v. Cherry, No. 8:06-CV-922-T-23TGW, 2008 WL 759322 (M.D. Fla. Mar. 20, 2008), compels a different conclusion, it is easily distinguished because the plaintiff in Barnhill had no history of suicide or self-castration attempts, while Plaintiff's is well-documented. Id. at *13. In addition, prison medical professionals who evaluated Barnhill voiced disagreement as to whether hormone treatment was needed. Id. Here, there is none: every GDC healthcare professional who has evaluated Plaintiff has determined that hormone therapy is a necessary form of care, crucial to preventing the suicidality, self-harm, and mental decompensation that Plaintiff has experienced in its absence. (Compl. ¶¶ 74-76, 95-97, 116-17). Plaintiff has also pled that Defendants Lewis, Hatcher, Shelton and Allen knew of her medical diagnosis, the necessity of treatment, and the substantial risk of suicide or self-injury she stood if denied care. (Compl. ¶¶ 73-80, 82-92, 95-98,

110, 116-18). Because the controlling precedents apply with "obvious clarity" to Defendants' actions in denying Plaintiff medically necessary care, Vinyard, 311 F.3d at 1355, qualified immunity should be denied.

2. Defendant Lewis's Failure To Protect from Foreseeable Sexual Assault

Defendant Lewis alone asserts qualified immunity with respect to Plaintiff's failure to protect claim arising from her repeated sexual abuse, see Table of Args., but merely claims she is immune "*to the extent* Plaintiff seeks to hold [her] liable for a mere violation of policy, or to impose liability despite an absence of any showing of knowledge of a particularized threat of harm to Plaintiff or an alleged repeated disregard for the safety needs of transgender inmates." No. 35-1 at 25 (emphasis added).[10] However, Plaintiff has not pled that Lewis is liable for mere violation of a policy, nor does she allege that Lewis lacked knowledge of a particularized threat. Rather, Plaintiff avers that Lewis violated the Eighth Amendment by virtue of knowing Plaintiff's repeated sexual assaults and ongoing risk of harm as a transgender woman and nonviolent offender housed alongside close-security felons, yet failing to take action to protect her despite having the authority to do so. See Section I.B.1, supra. Plaintiff easily withstands dismissal on her failure to protect claim at the pleading stage, where all inferences are to be drawn in her favor.

3. Defendant Lewis and the Commissioner's Failure To Train and Supervise

Finally, Defendant Lewis and the Commissioner assert that they are entitled to qualified immunity on Plaintiff's failure to train claim because there is no caselaw establishing that prison officials can be held liable "for a failure to train despite an absence of widespread abuse or

[10] Defendant Lewis cannot, and does not, dispute that the Supreme Court's 1994 decision in Farmer v. Brennan, 511 U.S. 825, 833-34 (1994) established that prison officials have a duty under the Constitution to protect transgender inmates facing a substantial risk of sexual assault.

repeated violations of which such defendants were aware." No. 35-1 at 25. The Commissioner cannot claim qualified immunity, as a preliminary matter, because he is sued only in his official capacity for injunctive relief. See, e.g., Beary, 498 F.3d at 1249 n.33 (sheriff sued in official capacity not entitled to "the individual capacity defense of qualified immunity"). Defendant Lewis's argument likewise fails because she once again relies on a mischaracterization of Plaintiff's complaint. The law has been clear for more than two decades that an official's failure to train subordinates may arise to deliberate indifference where the official failed to take action or "institute corrective procedures" following prior instances of abuse. Greason v. Kemp, 891 F.2d at 838; see also Rivas, 940 F.2d at 1491; City of Canton, 489 U.S. at 386-88. Indeed, in Greason, the Eleventh Circuit found that a plaintiff stated a valid failure to train claim where an inmate's psychiatric care was abruptly terminated by staff, and prison officials knew of one prior incident where staffers similarly denied an inmate appropriate care. Greason, 891 F.2d at 838-39.

In short, Plaintiff's complaint pleads a violation of clearly established law insofar as it plausibly asserts that there is a widespread and pervasive practice within GDC of denying medically necessary care to transgender inmates and disregarding their safety needs, and that despite knowing of these pervasive abuses—and the need to train and discipline staff—Defendant Lewis and the Commissioner simply did nothing. (See Compl. ¶¶ 71, 76, 90-91, 94, 97, 99, 106, 158-60); see also Section I.C, supra. Therefore, qualified immunity is improper.

III. Plaintiff Properly Exhausted Her Claims with Respect to All Defendants

Failure to exhaust under the Prison Litigation Reform Act ("PLRA") is an affirmative defense, not a jurisdictional matter, which defendants have the burden of proving. See, e.g., Woodford v. Ngo, 548 U.S. 81, 101 (2006); Jones v. Bock, 549 U.S. 199, 216 (2007). As an affirmative defense, exhaustion arguments are subject to waiver where not asserted. See, e.g., Johnson v. California, 543 U.S. 499 (2005) (treating the issue of PLRA exhaustion as waived

where defendants failed to assert it). Additionally, when prison administrators actually review or deny grievances on the merits, they cannot later assert that a claim should be dismissed on grounds that the grievances were late, or otherwise procedurally deficient. See, e.g., Hall v. Dunlap, No. 1:12-CV-183 WLS, 2014 WL 1315398, at *2 (M.D. Ga. Mar. 31, 2014) (a prisoner exhausts administrative remedies when the state fully reviews a grievance on the merits, even in the face of possible procedural objections); Hill v. Curcione, 657 F.3d 116, 125 (2d Cir. 2011) (overlooking procedural objections when prison officials review and decide a grievance on the merits); Reed-Bey v. Pramstaller, 603 F.3d 322, 325 (6th Cir. 2010) (same).

Because the "primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued," Jones v. Bock, 549 U.S. 199, 219 (2007) (citations omitted), "[a] prisoner need not name any particular defendant in a grievance in order to properly exhaust his claim." Parzyck v. Prison Health Services, Inc., 627 F.3d 1215, 1218 (11th Cir. 2010); accord Jones, 549 U.S. at 217 ("[N]othing in the [PLRA] imposes a 'name all defendants' requirement").

A. Defendants Assert Failure To Exhaust For Only a Subset of Plaintiff Claims

While certain Defendants argue that Plaintiff failed to grieve a subset of her claims, most—including Defendants Lewis, Shelton, Silver, Thompson, and the Commissioner—make no exhaustion arguments whatsoever. See Table of Args. Defendants Allen and Hatcher also concede that Plaintiff exhausted her medical indifference claim insofar as Plaintiff alleges that they refused to provide her medically necessary treatment for gender dysphoria, and Defendant Hatcher implemented and enforced an unconstitutional policy of denying transgender inmates medically adequate care. No. 35-1 at 6-7. Although Defendants question whether Plaintiff grieved claims regarding her most recent incarceration at Baldwin State Prison, id. at 9-10, no claims arising from the attendant grievances are asserted in the Complaint. Defendants'

remaining arguments—*e.g.*, that Plaintiff failed to grieve Count I with respect to McCracken, failed to grieve Count III with respect to Defendants Allen and McCracken, and failed to grieve aspects of Count I with respect to Defendants Allen and Hatcher, id. at 6-10—are easily dispatched here because Plaintiff properly exhausted all of her claims under the PLRA and GDC's Statewide Grievance Procedure.

1. The Arguments Raised by Defendants Hatcher, Allen, and McCracken regarding Count I Lack Merit

Plaintiff properly grieved her medical indifference claims with respect to each of the Defendants named when she submitted Grievance No. 163506 on November 26, 2013, in which she complained of her denial of gender dysphonia treatment by GDC staff and sought ongoing care, and completed a timely appeal. Ezie Decl. Ex. A.[11] In the Eleventh Circuit, the law is clear that a properly filed grievance exhausts a plaintiff's administrative remedies for any subsequent acts by prison officials that contribute to the issues raised therein. Parzyck, 627 F.3d at 1218-19. Pertinent here, inmates who grieve their health or safety are "not required to initiate another round of the administrative grievance process" every time they suffer a further sexual assault or prison officials commit a further act to deny them medical care. Id. at 1219 (citing Johnson v. Johnson, 385 F.3d 503, 521 (5th Cir. 2004)).

Likewise, inmates are not required to file new grievances when they are transferred, when new prison officials further the conduct alleged; or when they are denied care in a slightly different manner than last alleged. Id. at 1218-19 (single grievance proper as to multiple prison

[11] When evaluating exhaustion arguments, a judge may take evidence and consider matters outside of the pleadings. See Bryant v. Rich, 350 F.3d 1368, 1376 (11th Cir. 2008). Plaintiff attaches copies of her grievances, many of which were already submitted by Defendants, because the text at times was cut off.

officials); Johnson v. Fla. Dep't of Corr., 826 F. Supp. 2d 1319, 1322-24 (N.D. Fla. 2011) (inmates not required to file new grievances based on transfers or institutional differences).

Rejecting requests for a more stringent rule, the Parzyck court explained that filing a *single* grievance accomplishes the purpose of the PLRA, which is to "alert prison officials to a problem, not to provide personal notice" 627 F.3d at 1219 (citing Jones, 549 U.S. at 219). In contrast, a rule requiring the filing of multiple grievances would waste resources, create redundancy and the potential for abuse, see Johnson, 826 F. Supp. 2d at 1234, and oftentimes—including here—conflict with a prison's own rules. See No. 35-2 at 14, § 5(a) (GDC inmates prohibited from having more than two active grievances).

Because Grievance No. 163506—which was pursued through all the stages of GDC's grievance process, and personally reviewed by Defendant Lewis—raised the issue of staff indifference to her serious medical treatment needs, see Ezie Decl. Ex. A, it exhausted Plaintiff's administrative remedies with respect to continued occurrences—including Defendants Allen and McCracken's refusal to refer Plaintiff for gender dysphoria treatment and Defendant Hatcher's decision to punish Plaintiff for "pretending to be a woman" instead of helping her obtain medically necessary care.

Although Defendant Allen asserts without caselaw support that Plaintiff nonetheless failed to exhaust her claim that he disciplined Plaintiff for expressing her gender, this boils down to an argument that, despite the specificity of Grievance No. 173610—which complained of this very subject-matter on May 22, 2014,[12] see Ezie Decl. Ex. B —Plaintiff's grievance is defective

[12] Grievance No. 173610 and its appeal informed prison administrators that (1) Plaintiff is a transgender woman suffering from gender dysphoria, a serious medical condition, and that her gender identity is female, not male; (2) Plaintiff was confronted by Defendant Allen about her eyebrows during inspection and told she could not express her femininity because Valdosta is "a man's facility"; (3) female

because she did not use the words "punish and reprimand" to characterize Allen's actions as she does in her Complaint. See No. 35-1 at 7. But there is no PLRA requirement that grievances be artfully pled, or that inmates "present a specific legal theory or constitutionally grounded basis for [the] requested relief." Doe v. Wooten, No. 1:07-CV-2764-RWS, 2010 WL 2821795, at *2 (N.D. Ga. July 16, 2010). Rather, a "grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." Id. (citations omitted). Because the aforementioned grievances clearly achieve this goal, Plaintiff's claims against all the Defendants were properly exhausted with respect to Count I.

2. The Arguments Raised by Defendants Allen and McCracken regarding Count III Fail

Plaintiff has likewise exhausted her remedies under the PLRA with respect to Count III against Defendants Allen and McCracken regarding her personal safety. Prior to filing suit Plaintiff filed numerous grievances concerning her lack of safety within GDC and at Valdosta State Prison, and pursued them through every applicable step of the Statewide Grievance Process. See Ezie Decl. Exs. B-C, E-G.

In Grievance No. 173610, for example, Plaintiff expressly complained of her lack of safety as a transgender woman at Valdosta, and requested a transfer to a medium security facility where her health and safety needs could be appropriately handled. Ezie Decl. Ex. B. In Grievance No. 180025, Plaintiff again grieved her lack of personal safety at Valdosta, and requested that GDC's Internal Affairs Department investigate her and other inmates' pleas for

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gender expression and grooming are medically necessary treatments for Plaintiff's gender dysphoria, that she received for 17 years; (4) Valdosta staff were denying Plaintiff all treatment for her gender dysphoria, and failing to respond transgender inmate health and safety needs; (5) Plaintiff was requesting treatment for her gender dysphoria as well as placement at a facility equipped to handle transgender health and safety needs. Ezie Decl. Ex. B.

help regarding sexual abuse and sexual assault as documented in a YouTube video series—a video series that Valdosta officials instead investigated her for creating. Ezie Decl. Ex. C.

Although Defendants Allen and McCracken suggest otherwise, it is evident that Grievance No. 180025 was read and understood by GDC officials to concern Plaintiff's safety, as GDC officials summarize Plaintiff's submission as "grieving [her] personal safety while being housed at Valdosta," Ezie Decl. Ex. C at 7, point out that her "videos were placed on YouTube as a plea for help," id. at 1, and note that Plaintiff was "concerned about [her] safety and mental health *as well as retaliation.*" Id. (emphasis added). GDC records also noted Plaintiff's fear that there could "be fatal consequences for all involved" unless she was transferred and Internal Affairs conducted "a full investigation of [the inmates'] pleas for help." Id. at 7.[13]

Although Plaintiff had no obligation to file additional grievances concerning GDC officials' "continuing failure to protect [her] from sexual assault," Parzyck, 627 F.3d at 1219 (citing Johnson, 385 F.3d at 521), she did so nonetheless in Grievance Nos. 189277, 189275, and 189273,[14] describing in detail specific incidences of sexual assault that she endured. See Ezie

[13] In a footnote, Defendants suggest that to the extent Grievance No. 180025 raised a second issue—retaliation by staff for Plaintiff's preparation of the YouTube videos—the grievance's safety allegations should be disregarded. No. 35-1 at 8 n.5. However, GDC officials did not deny this grievance under GDC's multi-issue rule, despite knowing how to make such a denial. See Ezie Decl. Ex. D (denying unrelated grievance under the multi-issue rule); see also Curcione, 657 F.3d at 125; Pramstaller, 603 F.3d at 325-26; Rausch, 375 F.3d at 524. In any event, courts in the Eleventh Circuit have held that prisoners exhaust their remedies with respect to every claim they identify in a grievance or appeal, not merely the ones that are addressed by prison officials. See Pintado v. Dora, No. 09-23697-CIV-LENARD, 2011 WL 794607, *6 (S.D. Fla., Jan. 28, 2011) (where grievance response focused on medical complaints, but grievance and appeal mentioned prisoner was required to do work he was not trained for, latter issue was also exhausted), report and recommendation adopted, 2011 WL 777887 (S.D. Fla. Mar. 1, 2011).

[14] In Grievance No. 189277, Plaintiff described being sexually assaulted by an inmate on January 1, 2014, the day after her transfer to Valdosta, and notifying various GDC personnel. See Ezie Decl. Ex. E. In Grievance No. 189275, Plaintiff recounted being sexually assaulted at Valdosta on February 9, 2014, and contacting GDC officials and SART personnel regarding her safety and ongoing placement at Valdosta. See Ezie Decl. Ex. F. In Grievance No. 189273, Plaintiff described being sexually assaulted at

Decl. Exs. E-G. These grievances are not defective on timeliness grounds or otherwise, as Defendants Allen and McCracken suggest, because in Georgia there are no deadlines for grievances alleging sexual assault. See, e.g., Exhaustion of Administrative Remedies, 28 C.F.R. § 115.52(b)(1); Ezie Decl. Ex. H, Hr'g Tr. at 100:5-10 (GDC representative testifying "There's no deadline whatsoever" for grievances alleging sexual assault); Ezie Decl. Ex. I, Hr'g Tr. at 105:19-106:2 (GDC Sexual Assault Response Team leader, noting same).[15]

Moreover, Grievance Nos. 189277, 189275, and 189273 served to properly exhaust Plaintiff's claims because in each Plaintiff specifically requested a "good cause waiver" on grounds that she was suffering from PTSD due to her multiple sexual assaults. See Ezie Decl. Exs. E-G. The law is clear that GDC inmates properly exhaust their administrative remedies when they "meet the deadlines *or the good cause standard* of Georgia's administrative grievance procedures before filing a federal claim." Bryant, 530 F.3d at 1373 (emphasis added, citations omitted); accord No. 35-2 at 15 § 5(b)(2) ("The Grievance Coordinator may waive the time limit for good cause."). This rule extends to the precise circumstance presented here—e.g., where an inmate files a grievance concerning their treatment at one facility only upon transfer to another. Bryant, 530 F.3d at 1373 (discussing good cause procedure in the context of a transfer).

The law is likewise clear that timeliness and procedural objections are subject to waiver where, as here, prison officials accept a grievance for good cause shown—or otherwise—and review them on the merits. See, e.g., id.; Bugge, 430 F. App'x at 756; see also Curcione, 657

Valdosta in April 2014 over a period of two days, detailed her history of sexual assaults in close-security environments, and her attempts to obtain safe placements from GDC officials including the Commissioner. See Ezie Decl. Ex. G. In each grievance, Plaintiff also asked GDC officials to reevaluate her placement in close-security environments, take steps to protect her from harm, and conduct a confidential investigation into her sexual assault allegations. See Ezie Decl. Exs. E-G.

[15] Fed. R. Evid. 801(d)(2) (statements by party representatives constitute affirmative, non-hearsay evidence).

F.3d at 125. Because Grievance Nos. 189277, 189275, and 189273 were accepted and reviewed by GDC officials on the merits—not denied as "filed outside the allocated time frame," see Ezie Decl. Ex. J (denying unrelated grievance on timeliness grounds)—Plaintiff properly exhausted her administrative remedies under the PLRA with respect to Count III of her Complaint.

IV. Plaintiff's Request for Injunctive Relief Is Not Moot

Finally, although Defendants claim their recent actions have rendered Plaintiff's injunctive claims moot, this claim fails under settled law. It is well established that a decision by prison officials to end a challenged practice "does not necessarily deprive the tribunal of the power to hear and determine the case." Rich v. Sec'y, Florida Dep't of Corr., 716 F.3d 525, 531 (11th Cir. 2013). Rather, prison officials bear "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Doe v. Wooten, 747 F.3d 1317, 1322 (11th Cir. 2014). Here, courts look to (1) whether the challenged conduct was unambiguously terminated; (2) "whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply *an attempt to manipulate jurisdiction*;" and (3) "whether the government *has 'consistently applied' a new policy or adhered to a new course of conduct."* Id. (emphasis added, citation omitted). Because mootness relates to jurisdiction, courts can also consider testimony, affidavits, and information outside of the pleadings. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990).

Defendants' mootness arguments fail under each prong of the applicable test. First and foremost, Plaintiff remains without medically necessary care: Plaintiff to date has received only a token, non-therapeutic amount of hormone therapy—a fraction of the medically accepted treatment regimens—too low to lead to any clinical improvement in Plaintiff's physical or mental status. See No. 2-1, Declaration of Dr. Randi Ettner dated February 19, 2015 ("First Ettner Decl.") ¶ 69 (discussing hormone treatment regimens); Declaration of Dr. Randi Ettner

dated May 18, 2015 ("Second Ettner Decl.") ¶¶ 10-20, 28 (analyzing current medical care); Declaration of Ashley Diamond dated May 18, 2015 ("Diamond Decl.") ¶¶ 2-5, 12 (discussing prior treatment and ongoing impairment). Although Plaintiff has requested that a therapeutic amount of hormones be provided, her requests have so far been denied—plainly relevant to the issue of unambiguous termination.

GDC officials also continue to prohibit Plaintiff from expressing her female gender in any matter, see Diamond Decl. ¶¶ 6-11, even though GDC healthcare providers, medical experts, the applicable Standards of Care, and Plaintiff's continued battle with suicidality and self-harm all confirm that female gender expression is an integral, non-negotiable component of her medical treatment. See, e.g., id., Ezie Decl. Ex. K (Mental Health Progress Note of Dr. Stephen Sloan); No. 2-1, First Ettner Decl. ¶¶ 28, 48, 52, 62, 70, 72; Second Ettner Decl. ¶¶ 6-9, 21-27.

Nor does GDC's act of rescinding its freeze-frame policy moot Plaintiff's case, as circumstances strongly suggest that the change is merely "an attempt to manipulate jurisdiction." Rich, 716 F.3d at 532. Like in Rich, which rejected the argument that policy changes had mooted an inmate lawsuit, Defendants here rescinded GDC's freeze-frame policy not "before litigation was threatened, but [ ] late in the game," id., years after Plaintiff first alerted GDC officials to the fact she was being denied medical care, and after multiple lawsuits—including a prior *pro se* suit by Plaintiff—where GDC defended its refusal to provide transgender inmates medically necessary hormone treatment. As in Rich, GDC's policy change also occurred *after* the U.S. Department of Justice appeared in her case, and only days before Defendants appeared before the court for oral argument and submitted briefs in this case. Id. (discussing analogous conduct). Therefore, as in Rich, Defendants' mootness argument must be denied because their 11th hour policy change is not proof of unambiguous termination insomuch as it is a litigation tactic. Id.

This point is reinforced by the new GDC policy itself, which, upon review, is vague and standardless. No. 36-3. The policy does not confirm what, if any, treatments are available to transgender inmates. Id. The policy does not even state that GDC will follow accepted medical treatment norms—it merely states that "accepted standards of care will be used as a reference." Id. It does not outline a mechanism for inmates to seek review of their treatment plans, or create any external accountability measures to ensure the care received by inmates is actually medical adequate. Id. And while courts look to prison officials for evidence of how policies are being implemented when policy change is claimed as the basis of a mootness defense, Rich, 716 F.3d at 531-32; Wooten, 747 F.3d at 1323-24, here Defendants have provided none.

Instead, all available evidence suggests that GDC's policy change exists in name only: in recent weeks, Plaintiff and Plaintiff's counsel have received complaints from a number transgender inmates at GDC who continue to be denied gender dysphoria treatment, including five transgender women at Plaintiff's current facility who have each requested but been denied medical care from GDC and Defendants Hatcher, Silver and Thompson. See Ezie Decl. ¶ 4; Diamond Decl. ¶¶ 14-20. Another transgender inmate, Christopher "Christina" Lynch, has a lawsuit regarding her continued denial of gender dysphoria treatment by GDC and Defendant Lewis still pending in the Middle District of Georgia. See Lynch v. Lewis, No. 7:14-CV-24 (HL) (M.D. Ga.).

Although Defendants' claim they are entitled to a "presumption that the objectionable behavior will not recur," No. 35-1 at 29, no such presumption is warranted here, because Defendants have a track-record of telling the Court one thing, while in actuality doing another. Ezie Decl. Ex. H, Hr'g Tr. at 87:2-13; 145:23-146:4 (officer stationed in D West 1 "24/7"); 92:1-93:7, 94:17-23 (counselors available to take grievances); Ezie Decl. Ex. I. Hr'g at 84:2-17

(escorts available for inmates) with Diamond Decl. ¶¶ 24 (following court hearing, no officer stationed in dorm, no escorts provided, no grievances accepted by staff).[16] Accordingly, far from establishing that GDC has unambiguously terminated its practice of denying transgender inmates medically appropriate care, all available evidence suggests that GDC officials continue to do so, albeit under the cover of their vague standardless new policy.

Plaintiff's injunctive claims related to safety are likewise not moot because, like in Doe v. Wooten, a factually similar case, Plaintiff's recent transfer to Rutledge State Prison ("Rutledge") "does not show that [GDC] has unambiguously terminated its pattern of transferring [Plaintiff] to one high-security prison after another." Wooten, 747 F.3d at 1324 (rejecting mootness claims). Here, it is Defendants' burden to prove that Plaintiff will not be transferred again; Plaintiff is not obligated to show that she will. Id. Yet, Plaintiff has been given no such guarantee, and in fact, GDC personnel at Rutledge have made numerous comments implying that Plaintiff's placement at the medium security prison is only temporary. Diamond Decl. ¶ 25. The fact that Plaintiff "has been transferred repeatedly over a period of years"—eight times in all—also "supports a finding of likely recurrence." Wooten, 747 F.3d at 1324. Indeed, three months after Plaintiff's last placement at Rutledge, she was transferred back to close-security prison where she repeatedly fell victim to sexual assault.

Finally, Plaintiff's failure to train and supervise claims are self-evidently not moot because GDC employees still lack training on transgender health and safety issues. See, e.g., Ezie Decl. Ex. I, Hr'g Tr. at 58:7-17, 60:10-14, 76:1-78:3 (evincing lack of training regarding transgender inmates); Ezie Decl. Ex. H, Hr'g Tr. at 100:11-101:23 (same); Diamond Decl. ¶¶ 15-

[16] See also Ezie Decl. Ex. H. Hr'g at 112:21-115:7 (discussing discrepant testimony at hearing); 146:13-15 (Court noting it was unable to "tell precisely where the truth lies").

23. This includes prison wardens charged with the care and treatment of transgender inmates—some of whom have expressed both their ignorance and their desire to and become better educated on transgender inmate needs. Ezie Decl. Ex. I, Hr'g Tr. at 82:22-93:2; Ezie Decl. Ex. H, Hr'g Tr. at 106:11-18. Defendants have also failed to take steps to discipline any staff involved in Plaintiff's constitutional violations, including Defendants Hatcher, Thompson, and Silver, who continue to deny transgender inmates medically necessary care and medical referrals, and treat them with contempt for expressing their female gender. See Diamond Decl. ¶¶ 14-20.

CONCLUSION

Because Plaintiff's claims are properly exhausted, her injunctive claims are not moot, and her complaint sets forth a plausible claim against each of the Defendants under clearly-established law, Plaintiff respectfully requests that the Court deny Defendants' motions to dismiss in full.

Dated: May 18, 2015

Respectfully submitted,

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