IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

KANAUTICA ZAYRE-BROWN, *Plaintiff*, v. THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, *et al.*, *Defendants*.	No. 3:22-cv-00191

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff is a transgender woman diagnosed with gender dysphoria, a serious medical condition. She alleges that over the last five years in Defendants' custody, she has repeatedly filed and exhausted administrative grievances about her need for gender-affirming surgery to treat her gender dysphoria. Plaintiff also alleges that without this treatment, her condition creates an ongoing substantial risk of serious harm, and that Defendants have known of that risk but continue to deny her care. She seeks relief under the Eighth Amendment; Article I, Section 27 of the North Carolina Constitution; the Americans with Disabilities Act (ADA); and the Rehabilitation Act (RA).

Defendants have moved to dismiss for failure to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA) and failure to state a claim. As explained below, Defendants' arguments are meritless.

FACTS

Plaintiff Kanautica Zayre-Brown is a transgender woman—an individual whose female gender identity differs from the male sex assigned at her birth. Doc. 1, Compl. ¶¶ 1, 30-33. Plaintiff has understood herself to be female and felt repelled by her genitalia from a young age. *Id.* ¶ 43. In 2010, Plaintiff began socially transitioning to live as the woman she has always known herself to be, and was formally diagnosed with, and began receiving treatment for, gender dysphoria. *Id.* ¶¶ 46-47.

Gender dysphoria is a serious medical condition which involves significant distress and impairment resulting from the incongruence between one's gender identity and one's sex assigned at birth. *Id.* ¶¶ 34-35. It is codified in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM-V") and the International Classification of Diseases-10. *Id.* There is broad agreement among healthcare professionals that treatment for gender dysphoria is medically necessary. *Id.* ¶ 40. Gender dysphoria can cause severe distress and substantial limitations on major life activities. *Id.* ¶¶ 2, 162, 172. Inadequately treated, gender dysphoria can result in self-harm, suicidal ideation, and suicide. *Id.* ¶ 36.

The internationally-accepted standards of care for treating gender dysphoria—Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People[1] ("SOC")—are published by the World Professional Association for Transgender Health ("WPATH"). *Id.* ¶¶ 37-38. The SOC apply in their

[1] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th Ed. 2012), https://www.wpath.org/publications/soc.

entirety in the prison setting and are recommended by the National Commission on Correctional Healthcare for the management of prisoners with gender dysphoria. Compl. ¶¶ 39, 41. The medical treatment indicated by the SOC—potentially including psychotherapy, gender-affirming hormone therapy, and gender-affirming surgical care—depends on the individualized needs of the person suffering. *Id.* ¶ 42.

Plaintiff's medical treatment for gender dysphoria began with psychotherapy. That alone proved insufficient, and in 2012 she began receiving gender-affirming hormone therapy and surgeries with the support of her therapist. *Id.* ¶¶ 47-48, 50. Because Plaintiff's external genitalia fill her with disgust and are a primary source of her severe gender dysphoria, full gender-affirming genital surgery was part of her treatment plan before incarceration. *Id.* ¶¶ 43, 52, 74. Without this treatment, Plaintiff's symptoms will persist and worsen. *Id.* ¶¶ 4-5, 74, 143. Thus, in 2017, Plaintiff underwent gender-affirming orchiectomy—removal of the testes—as a first step toward full genital gender-affirming surgery. *Id.* ¶ 52.

Plaintiff later entered Department of Public Safety ("DPS") custody on October 10, 2017, and immediately identified herself to prison officials as a transgender woman. *Id.* ¶ 64. Nevertheless, DPS housed Plaintiff in men's facilities for nearly two years.[2] *Id.* ¶ 67. Within two months, Plaintiff had her gender dysphoria diagnosis confirmed by two DPS medical providers who knew of her previous treatments, her need for hormone therapy, and her need for further surgery. *Id.* ¶¶ 64-65.

DPS's policy for the "evaluation and management of transgender offenders"

[2] Plaintiff was transferred to a women's facility, Anson CI, on August 15, 2019.

("Transgender Offenders Policy") requires that all "requests for accommodation" by a transgender prisoner like Plaintiff—including medical treatment—be considered and approved by committees.[3] *Id.* ¶¶ 55, 57. While "routine accommodations" may be approved at the facility level by a Facility Transgender Accommodation Review Committee ("FTARC"), "non-routine accommodations"—including initiation of hormone therapy and gender-affirming surgery—are considered by FTARC for recommendation only and referred to a Division Transgender Accommodation Review Committee ("DTARC") for further consideration. *Id.* ¶¶ 55-57.

Both FTARC and DTARC members–including Defendants Catlett, Peiper, Sheitman, Langley, Agarwal, Cobb, Panter, and Williams ("Defendant DTARC members")–must consider the requesting prisoner's medical and mental health history to make their recommendation or determination. *Id.* ¶¶ 20-28, 61; Doc. 10-1 at 5, 7. Requests for gender-affirming surgery must be referred by DTARC to the Assistant Commissioner of Prisons—Defendant Harris—and Director of Health and Wellness Services—Defendant Junker—for final determination.[4] Compl. ¶¶ 18-19, 59. Additionally, any surgical consultation or procedure must be approved by the Utilization Review ("UR") board, of which Defendant Amos is a member. *Id.* ¶ 29, 113. Approval by DTARC (in conjunction with Defendants Junker and Harris, where necessary), and by the UR Board is necessary for a prisoner to receive treatments such as hormone therapy or surgery, even if that treatment has already been

[3] A copy of the policy, which Plaintiff incorporated into her complaint by reference, *see Id.* ¶ 6 n.1, was also filed by Defendants at Doc. 10-1.
[4] The requirement for Defendants Junker and Harris to render final determination on requests for gender-affirming surgery went into effect August 22, 2019. *Id.* ¶ 53.

prescribed or requested by a medical provider. *Id.* ¶¶ 55-59, 113. Plaintiff alleges that DPS's Transgender Offenders Policy creates onerous and medically unjustifiable obstacles for transgender prisoners to receive accommodations and treatment for their gender dysphoria that do not exist for accommodating and treating other disabilities. *Id.* ¶¶ 71, 129, 139-41, 163-67, 173-76. Defendants Buffaloe and Ishee are responsible for the creation, maintenance, and administration of this and all other prison policies. *Id.* ¶¶ 16, 17.

Plaintiff requested that FTARC re-initiate hormone therapy on November 27, 2017, but she was not approved for treatment by DTARC and prescribed hormone therapy until eight months later. *Id.* ¶¶ 66, 75. Since resuming hormone therapy, Plaintiff has experienced several interruptions in the administration of her medication. *Id.* ¶¶ 79-89. She has also experienced extended periods of time in which the efficacy of her hormone therapy has gone unmonitored, after which it was discovered that her hormone therapy dosage was inadequate during the unmonitored periods. *Id*. During these periods, Plaintiff experienced unwanted hair growth, weight gain, and genital sensation which exacerbate her gender dysphoria, leading to attempts at genital self-mutilation and suicidal thoughts. *Id.* ¶ 78. The periods of interruption and inadequacy have been conveyed to her medical providers and documented in Plaintiff's medical records. *Id.* ¶¶ 79-82, 87-89.

Plaintiff also inquired about gender-affirming surgery from FTARC on November 27, 2017, but received no response. *Id.* ¶ 90. She followed up on this inquiry one year later, and on December 7, 2018, submitted a request for gender-affirming

surgery to the Harnett CI FTARC. *Id.* ¶¶ 91-92. In January 2019, Plaintiff was evaluated for gender-affirming surgery by a DPS doctor, who submitted a UR request for gender-affirming surgery after noting it was the next step in her pre-incarceration treatment plan based on the SOC. *Id.* ¶ 93. FTARC considered this information, but on January 11, 2019 still recommended against surgery to DTARC. *Id.* ¶ 94.

Plaintiff waited for a decision from DTARC on her December 7, 2018 request for more than eight months. *Id.* ¶ 103. While waiting for a decision from DTARC, Plaintiff repeatedly expressed extreme distress over the severity of her gender dysphoria and her critical need for gender-affirming surgery to her medical and mental health providers. *Id.* ¶¶ 96-97, 102. In early July, 2019, Plaintiff's endocrinologist informed DTARC that Plaintiff needed a consultation with an expert in gender-affirming surgery as soon as possible. *Id.* ¶¶ 100-01. On August 6, 2019, Plaintiff was placed on suicide watch because of her extreme distress related to her gender dysphoria and lack of surgical care. *Id.* ¶ 102. Two weeks later, DTARC denied Plaintiff's request for gender-affirming surgery, claiming it was elective, not medically necessary, and that DPS could not provide proper post-operative care. *Id.* ¶ 103.

After she was informed of this denial, Plaintiff filed a grievance to initiate the administrative remedy process on October 27, 2019. *Id.* ¶ 104. In her grievance, she noted that gender-affirming surgery is medically necessary to treat her gender dysphoria. *Id.* Plaintiff went through each step of the appeals process and fully exhausted her administrative remedies when the Inmate Grievance Resolution Board

upheld DTARC's denial of her request for gender-affirming surgery on January 2, 2020. *Id.* ¶¶ 104-109. After fully exhausting her administrative remedies, on January 15, 2020 Plaintiff submitted a request for reconsideration for gender-affirming surgery to FTARC hoping for a better outcome given that the new Transgender Offenders Policy now required Defendants Junker and Harris to make a final determination. *Id.* ¶¶ 109-10. FTARC referred this request to DTARC on February 7, 2020. *Id.* ¶ 111.

Plaintiff waited for a "final" decision on her renewed request for gender-affirming surgery from Defendants DTARC members, Junker, and Harris for more than two years. *See id.* ¶ 139. Defendant DTARC members repeatedly considered her request—and, as required by policy, reviewed her medical and mental health records—during that time. *See, e.g.*, *id.* ¶¶ 112 (May 21, 2020), 115-16 (Aug. 27, 2020; Nov. 12, 2020), 120 (Feb. 25, 2021). In May 2020, DTARC recommended, and Defendants Harris and Junker agreed, that a consultation with a surgeon experienced with gender-affirming surgery should take place for the purpose of determining medical necessity. *Id.* ¶ 112. Two months later, a UR request was submitted for DPS to schedule an in-person consultation with Dr. Bradley Figler, a urologist and director of the UNC Transgender Health Program, but another year passed before that consultation was scheduled. *Id.* ¶¶ 113, 124.

Plaintiff experienced severe emotional distress as a result of her gender dysphoria while waiting for Defendants DTARC members, Junker, and Harris to act on her request for gender affirming surgery. *Id.* ¶¶ 85, 117-18, 121. Plaintiff's distress

was compounded because, during much of this time, the efficacy of her hormone therapy went unmonitored. *Id.* ¶¶ 84-85, 87. Plaintiff repeatedly asked about the status of her requests and informed DPS medical officials about her increasing distress without adequate care. *Id.* ¶¶ 116-17. In December of 2020, she was admitted to an inpatient mental health facility after expressing urges to mutilate her genitals, suicidal ideation, and extreme hopelessness due to her persistent gender dysphoria. *Id.* ¶ 117.

In February 2021, Plaintiff submitted an emergency grievance to Defendant Ishee pleading for necessary treatment for her gender dysphoria—including hormone therapy maintenance and gender-affirming surgery—and noting that she was very concerned about her worsening mental health and desire to mutilate her genitals. *Id.* ¶ 118. Plaintiff's thoughts of self-harm became more frequent as she waited for her in-person consultation, as was communicated to her medical providers and to DPS general counsel in a demand letter from Plaintiff's counsel. *Id.* ¶¶ 86-88, 123.

When Plaintiff finally had an in-person consultation on July 12, 2021, Dr. Figler concluded that she met the WPATH criteria for gender-affirming surgery and recommended vulvoplasty, following some weight loss, to treat her gender dysphoria. *Id.* ¶¶ 124-26. Dr. Figler's assessments were communicated to DTARC. *Id.* ¶ 127. A UR request was submitted by a DPS medical provider when Plaintiff lost the recommended amount of weight in September of 2021, but Defendant Amos denied this request, stating, "ELECTIVE PROCEDURES NOT APPROVED." *Id.* ¶¶ 128-29. In October of 2021, two more of Plaintiff's medical providers informed DTARC that

in their professional opinions, gender-affirming vuvloplasty was medically necessary to treat Plaintiff's gender dysphoria. *Id.* ¶¶ 130-31.

On October 4, 2021, Plaintiff attempted to file a grievance seeking gender-affirming vulvoplasty, but the grievance was rejected for requesting a remedy "for more than one incident." *Id.* ¶¶ 132-33. She filed a substantially similar grievance on November 4, 2021, which was accepted. *Id.* ¶ 134. This grievance was fully exhausted on January 18, 2022 when the Inmate Grievance Resolution Board dismissed the final step of her grievance as resolved, claiming that DTARC would consider her request at a January DTARC meeting. *Id.* ¶¶ 135-37. As Secretary of DPS, Defendant Buffaloe was the final decision-maker regarding this grievance. *Id.* ¶ 16.

DTARC did not meet in January. *Id.* ¶ 138. On April 26, 2022—the day after she met with counsel to sign the verified complaint—Plaintiff was informed for the first time that in February of 2022, despite full awareness of her medical and mental health history, Defendant DTARC members had recommended her request for gender-affirming vulvoplasty be denied, and that Defendants Junker and Harris agreed. *Id.* ¶ 139 & n.16.

LEGAL STANDARDS

To withstand a motion to dismiss under Rule 12(b)(1), a plaintiff must allege facts that, taken as true, establish federal jurisdiction. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *De'lonta v. Johnson*, 708 F.3d 520, 524 (4th Cir. 2013) (cleaned up).

ARGUMENT

I. The face of the complaint does not show a failure to exhaust administrative remedies.

According to Defendants, the complaint shows that Plaintiff did not exhaust administrative remedies concerning the April 26, 2022 surgery denial, and so her complaint must be dismissed. Def. Br. 7. They are wrong. This case is not just about one decision to deny treatment, but a years-long pattern of denying treatment. And when a prisoner faces an ongoing risk of harm, or multiple instances of the same kind of harm, she need not exhaust multiple grievances before suing. Here, Plaintiff satisfied the PLRA by diligently exhausting grievances that sought gender-affirming surgery, including specific requests for a vulvoplasty.

The PLRA states: "No action shall be brought with respect to prison conditions" under federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e. Congress designed this provision to give "an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court," while also "preserving prisoners' capacity to file meritorious claims . . . ." *Woodford v. Ngo*, 548 U.S. 81, 89, 117 (2006).

A failure-to-exhaust argument under the PLRA is an affirmative defense—a defendant must prove that an administrative remedy was available and a plaintiff failed to exhaust it. *Jones v. Bock*, 549 U.S. 199, 212 (2007). Absent such evidence, dismissal is only appropriate "when the alleged facts in the complaint, taken as true, prove that the inmate failed to exhaust his administrative remedies." *Custis v. Davis*, 851 F.3d 358, 361 (4th Cir. 2017).

The Fourth Circuit has held that when prisoners face an ongoing risk of harm, or multiple instances of the same kind of harm, they are not required to exhaust multiple grievances. In *Wilcox v. Brown*, the plaintiff alleged an ongoing failure by prison officials to accommodate Rastafarian worship services. 877 F.3d 161, 165 (4th Cir. 2017). He fully exhausted the prison grievance procedure. *Id.* Afterwards, the prison system hired a new chaplain who decided to not continue Rastafarian services. *Id.* Prison officials argued—as Defendants argue here—that the plaintiff had to grieve that later decision before seeking relief in federal court. *Id.*

The Fourth Circuit disagreed: "[T]o exhaust their remedies, prisoners need not file multiple, successive grievances raising the same issue . . . if the objectionable condition is continuing. Thus, once a prison has received notice of, and an opportunity to correct, a problem, the prisoner has satisfied the purpose of the exhaustion requirement." *Id.* at 167 n.4. (quoting *Turley v. Rednour*, 729 F.3d 645, 650 (7th Cir. 2013)). Other courts have held the same. *E.g.*, *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 788 (5th Cir. 2012).

Here, with no cases in support, Defendants argue that "Plaintiff's claims are centered on [Defendants'] decision to not approve her request for surgery" on April 26, and so she "must have fully exhausted a grievance related to *that decision* prior to filing this action." Defs. Br. 7. That is wrong.

First, Defendants mischaracterize the complaint. This case is not just about the April 26 decision, but an ongoing denial of care that spans the last five years. Compl. ¶¶ 1-6. Plaintiff details four instances when she filed grievances requesting

gender-affirming care—three of which requested surgery, two of which specifically requested a vulvoplasty—that were denied. *Id.* ¶¶ 104-11, 118-19, 132-37. Defendants do not contend that Plaintiff failed to exhaust remedies for any of those denials except the one on April 26.

But Plaintiff had no obligation to exhaust yet another grievance for the April 26 denial. As in *Wilcox*, Plaintiff exhausted earlier grievances identifying the ongoing problem—lack of gender-affirming surgery—and specifically requested a vulvoplasty. *Id.* ¶¶ 104-09, 132-37. Simply because Defendants *again* denied surgery does not mean that Plaintiff must turn to the grievance process a fifth time, all the while suffering the painful effects of the same ongoing problem.

In sum, "no failure to exhaust [is] apparent from the face of the complaint." *Wilcox*, 877 F.3d at 168. Quite the opposite is true here—the allegations show how Plaintiff diligently exhausted the DPS grievance procedure several times and, as intended by the PLRA, gave Defendants fair notice of her injury and a chance to correct their mistakes.

II. Sovereign immunity does not bar Plaintiff's Eight Amendment claims.

Defendants next argue that sovereign immunity bars Eighth Amendment claims against DPS entirely and against official-capacity Defendants for damages. Def. Br. 7-8. But Plaintiff has not brought any such claims.

The complaint states: "DPS is sued under the ADA, Rehab Act, and Article I, Section 27 of the state Constitution"—not the Eighth Amendment. Compl. ¶ 15. Count I alleges Eighth Amendment violations by official-capacity Defendants (not

DPS) and only seeks declaratory and injunctive relief. *Id.* at 38. Accordingly, this argument provides no basis for dismissal of any claim or form of relief sought.

III. Plaintiff has stated an Eighth Amendment claim.

A state has a constitutional duty "to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To state an Eighth Amendment claim of constitutionally inadequate medical care, a plaintiff must (1) allege that she has "an objectively serious condition," and (2) allege "deliberate indifference" by prison officials, meaning they have subjective knowledge of the condition but failed to provide adequate treatment. *De'lonta*, 708 F.3d at 525-26. Plaintiff has sufficiently alleged both elements.

A. Plaintiff has alleged an objectively substantial risk of serious harm.

A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008) (quotation marks omitted). The Fourth Circuit and many other courts have held that gender dysphoria meets this standard. *See, e.g.*, *De'lonta* 708 F.3d at 525-26; *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (collecting cases).

Defendants do not contest that Plaintiff's gender dysphoria is a serious medical condition that has been diagnosed by a physician as requiring treatment. Instead, citing no authority, Defendants argue that the complaint lacks "any factual allegations which can support an inference that by not receiving the requested

surgery she will sustain some objectively sufficiently serious deprivation of rights." Def. Br. 12. This argument is unfounded.

Plaintiff alleges that, despite her current treatment, she continues to experience severe symptoms of gender dysphoria, Compl. ¶ 4; that these symptoms include extreme emotional and psychological distress, *id.* ¶¶ 74, 96, 102; that inconsistency and delays in her hormone therapy exacerbated these symptoms, *id.* ¶¶ 78, 117-18; that her symptoms led to a dangerous attempt at self-mutilation, suicidal ideations, and placement on suicide watch, *id.* ¶¶ 78, 102, 117, 121; that multiple medical providers found gender-affirming surgery medically necessary given Plaintiff's circumstances and the relevant standard of care, *id.* ¶¶ 93, 126-31; and that her symptoms will continue without the recommended surgery, *id.* ¶¶ 73-74.

Therefore, Plaintiff has plausibly alleged that, without gender-affirming surgery, she will continue to face a substantial risk of serious harm.

B. Plaintiff has adequately alleged deliberate indifference.

Deliberate indifference "lies somewhere between negligence and purpose or knowledge: namely, recklessness of the subjective type used in criminal law." *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (quotation marks omitted). A plaintiff may prove deliberate indifference by showing that prison officials have been "intentionally denying or delaying access to medical care, or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104-05 (footnotes omitted). "[D]elay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain." *Sharpe v. S.C. Dep't of Corr.*,

621 F. App'x 732, 734 (4th Cir. 2015) (quoting *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010)).

A plaintiff can also show that her medical treatment was "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990), *overruled in part on other grounds by Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "Accepted standards of care and practice within the medical community are highly relevant" to this inquiry. *Edmo*, 935 F.3d at 786.

Alternatively, a plaintiff can show that a substantial risk of serious harm "was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official . . . had been exposed to information concerning the risk and thus must have known about it[.]" *Scinto*, 841 F.3d at 226.

Importantly, prison officials cannot defeat an Eighth Amendment claim by showing they gave a patient *some* treatment. In the context of a transgender plaintiff seeking gender-affirming care, the Fourth Circuit has explained that "just because [prison officials] 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." *De'lonta*, 708 F.3d at 526. The court continued:

> By analogy, imagine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective

> measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.

Id.

Here, Defendants argue that Plaintiff has not adequately alleged Defendants' subjective knowledge of a risk of harm. Def. Br. 13. The complaint shows otherwise.

First, Plaintiff details "the persistence of her symptoms and the inefficacy of her existing treatment[.]" *De'lonta*, 708 F.3d at 525. Her medical records, grievances, and requests for accommodation document her gender dysphoria, associated risks, and need for gender-affirming surgery. Compl. ¶¶ 64-67, 93, 102, 104-139. Under DPS policy, Defendants Junker, Harris, Amos, and DTARC members are responsible for reviewing requests for gender-affirming surgery. *Id.* ¶¶ 18-29. They reviewed Plaintiff's requests and associated medical records, and had specialists in gender-affirming care determine that surgery was medically necessary. *Id.* ¶¶ 93-94, 101, 115, 120, 124-31.

As for Defendants Buffaloe and Ishee, they are responsible for the provision of healthcare throughout the prison system. *Id.* ¶¶ 16-17. Buffaloe was the final decision-maker on Plaintiff's grievance exhausted in January of 2022, and Plaintiff sent an emergency grievance directly to Ishee about inadequate treatment in February of 2021. *Id.* ¶¶ 16, 118. Further, Plaintiff's counsel sent a demand letter to the DPS general counsel last year concerning the need for adequate treatment, including gender-affirming surgery. *Id.* ¶ 86.

Therefore, Plaintiff plausibly alleges that "[e]ach of these Defendants have long known that failure to adequately treat [her] gender dysphoria has caused her serious harm and that there [remains] a substantial risk of further serious harm for as long as . . . gender-affirming surgery is delayed or denied." *Id.* ¶ 152. Defendants—who are fully responsible for Plaintiff's medical care and safety—cannot seriously argue that *none* of them actually knew of Plaintiff's circumstances. *See De'lonta*, 708 F.3d at 525 (high-ranking officials had subjective knowledge because, like Defendants here, they "provided [plaintiff] with hormone treatment, mental health consultations, and have allowed her to live and dress as a woman"); *Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015) ("Prison officials may not simply bury their heads in the sand and thereby skirt liability.").

Next, Defendants argue that Plaintiff has not alleged that any Defendant believed gender-affirming surgery was necessary. Def. Br. 15. An official believing a treatment is necessary, and then not providing it, is one way to show deliberate indifference. But as explained above, it is not the only way. Regardless, Plaintiff plausibly alleges that given the circumstances, Defendants *must* have known that surgery was indeed necessary, but refused to provide that care. Compl. ¶¶ 150-52.

Defendants also say that Plaintiff's claim must fail because she "was provided with numerous treatments and accommodations for gender dysphoria—just not the requested surgery." Def. Br. 14. That argument runs headlong into *De'lonta*: some treatment does not automatically mean constitutional treatment. 708 F.3d at 526. Defendants cite cases showing that a total denial of treatment may violate the Eighth

Amendment, but so too may a "fail[ure] to provide *necessary* treatment." *DePaola v. Clarke*, 884 F.3d 481, 488 (4th Cir. 2018) (emphasis added).

Finally, Defendants argue that the allegations merely present "a disagreement over the course of medical treatment." Def. Br. 17. But this case does not simply present a disagreement between patient and provider—rather, a core disagreement here is between prison administrators and their own subject-matter experts who found a treatment necessary for the patient under the authoritative standards of care. Compl. ¶¶ 125-31.

What's more, Defendants wrongly suggest that a prison official's mere disagreement over treatment automatically defeats a claim of inadequate care. Any disagreement must still come from a reasoned medical judgment. *See Gordon v. Schilling*, 937 F.3d 348, 361 (4th Cir. 2019) (holding that "the soundness of . . . reasons" given for treatment denial may support Eighth Amendment claim); *De'lonta*, 708 F.3d at 526 (grossly inadequate care may violate Eighth Amendment). Here, Plaintiff alleges that Defendants rejected the findings of Dr. Umesi, Dr. Figler, Dr. Caraccio, and MSW Dula for non-medical reasons. Compl. ¶¶ 90, 129, 139, 141.

C. Defendants rely on out-of-circuit cases that are either distinguishable from this case or incompatible with *De'lonta*.

With no support from the Fourth Circuit, Defendants look elsewhere. Def. Br. 19-23. But those non-binding cases offer little help.

The First Circuit has ruled against a transgender prisoner seeking gender-affirming surgery under the Eighth Amendment. *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) (en banc). That decision, however, followed a trial in which the district

court considered evidence of the defendants' "security concerns," as well as expert testimony explaining why surgery was not medically necessary for that individual. The First Circuit based its decision on those facts. *Id.* at 91-95.

Here, the complaint says nothing about Defendants having security concerns. Nor does it say anything about gender-affirming healthcare experts opining that surgery was not medically necessary—in fact, it alleges the exact opposite. Compl. ¶¶ 126, 130-31. Defendants Junker, Harris, Amos, and DTARC members—some of whom are not health care providers—said that surgery was not medically necessary, but never explained why. *See id.* ¶¶ 16-29, 103, 129, 139.

In *Lamb v. Norwood*, the Tenth Circuit relied on its own precedent to deny relief to a *pro se* plaintiff who was receiving some treatment for her gender dysphoria. 899 F.3d 1159, 1163 (10th Cir. 2018). However, that decision reviewed a grant of summary judgment where the district court had an evidentiary record to consider. *Id.* And unlike the facts here, *Lamb* did not suggest that the plaintiff continued to experience significant harm or risk of harm despite her treatment. Nor did that case involve the defendants' own medical providers saying that surgery was medically necessary. *See* Compl. ¶¶ 126, 130-31.

Defendants next point to *Gibson v. Collier*, another case where the plaintiff was *pro se* at the district court. 920 F.3d 212 (5th Cir. 2019). A divided panel held that disagreement in the medical community about treatment justified denial of gender-affirming surgery. *Id.* at 216. Curiously, the majority relied on the factual record from *Kosilek*—decided over four years prior—and so could not account for "any

developments in the medical community regarding treating gender dysphoria and determining the necessity for" gender-affirming surgery. *Id.* at 231 (Barksdale, J., dissenting). The Ninth Circuit has recognized this flaw: "*Gibson* relies on an incorrect, or at best outdated, premise: that there is no medical consensus that [gender-affirming surgery] is a necessary or even effective treatment for gender dysphoria." *Edmo*, 935 F.3d at 795 (cleaned up).

Gibson also conflicts with the Fourth Circuit's holding in *De'lonta* that gender-affirming surgery may be medically necessary given a patient's individual needs, and so denial of that treatment may violate the Eighth Amendment. *See* 708 F.3d at 523; *Edmo*, 935 F.3d at 794 (relying on *De'lonta* to hold that while "the treatment provided [plaintiff] was important, it stopped short of what was medically necessary" in violation of the Eighth Amendment).

Least relevant of all, Defendants cite *Campbell v. Kallas*, where a divided panel held that prison officials were entitled to qualified immunity on the plaintiff's Eighth Amendment damages claim. 936 F.3d 536, 537 (7th Cir. 2019). Plaintiff here has not brought such a claim, and the question of qualified immunity is not the same as whether a constitutional violation occurred. As the majority explained, "[d]enying a specific therapy in a particular case might amount to a constitutional violation, but qualified immunity applies absent reasonably specific notice to prison officials." *Id.* at 549 (italics omitted). *Campbell* is therefore entirely off-point.

Accordingly, Plaintiff has adequately alleged deliberate indifference.

IV. Plaintiff has stated a claim under Article I, Section 27 of the state Constitution and has no other adequate state law remedy.

Article I, Section 27 of the state Constitution prohibits "cruel or unusual punishments." This provides at least the same level of protection as the Eighth Amendment, and in some contexts may provide greater protection. *State v. Kelliher*, 2022-NCSC-77, ¶¶ 48, 51. North Carolina's appellate courts have not decided, however, whether a Section 27 challenge to prison conditions requires a showing of deliberate indifference. Until that question is answered, Plaintiff assumes that the deliberate indifference requirement applies.

Because Plaintiff has adequately alleged an Eighth Amendment claim for the reasons discussed above, she has also adequately alleged a Section 27 claim. Defendants argue further, however, that Plaintiff's Section 27 claim is barred because she has an "adequate state remedy" through a negligence claim brought in the North Carolina Industrial Commission, or a Section 1983 claim alleging Eighth Amendment violations brought in state court. Def. Br. 8-10. That is incorrect.

The North Carolina Supreme Court has held that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. UNC*, 413 S.E.2d 276, 289 (N.C. 1992). To be adequate, a state remedy must provide "the possibility of relief under the circumstances." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 678 S.E.2d 351, 355 (N.C. 2009). Without such a remedy, plaintiffs may bring a constitutional claim for both damages and equitable relief against official-capacity defendants. *Id.* at 355.

Under the State Tort Claims Act, prisoners may sue the State for ordinary negligence in the Industrial Commission. *See* N.C.G.S. § 143-291. But that tribunal lacks jurisdiction over "allegations of gross negligence and wanton, reckless and malicious conduct[.]" *Collins v. N.C. Parole Comm'n*, 456 S.E.2d 333, 336 (N.C. Ct. App. 1995). Here, Plaintiff has alleged constitutional violations involving deliberate indifference—a more demanding standard akin to recklessness. *Farmer*, 511 U.S. at 836. Therefore, a negligence suit in the Industrial Commission is not an "adequate state remedy" because there would be no jurisdiction over Plaintiff's claims—obtaining any relief would be impossible. *See Jarvis v. Joyner*, No. 1:14CV254, 2020 WL 956801, at *6 n.2 (M.D.N.C. Feb. 27, 2020) ("Plaintiff could not have asserted his § 1983 claims [of Eighth Amendment deliberate indifference] before the Industrial Commission."); *Taylor v. Wake Cnty.*, 811 S.E.2d 648, 656 (N.C. Ct. App. 2018) (a plaintiff may bring a direct constitutional claim if "her Industrial Commission claims are impossible").

Defendants next contend that a 42 U.S.C. § 1983 suit alleging Eighth Amendment violations, brought in state court, would be an adequate state remedy. Def. Br. 10. This argument confuses remedy with forum. Section 1983 is a federal law for vindicating federal rights. Bringing such a claim in state court does not change that; federal law still controls whom may be sued, how a plaintiff establishes liability, what she may recover, and so on. *See Corum*, 413 S.E.2d at 276. North Carolina's appellate courts have never held that federal law can provide an "adequate state remedy." And at least one federal court has rejected the argument that plaintiffs

cannot bring "direct claims under the North Carolina Constitution because they have asserted federal § 1983 claims" based on the same alleged injuries. *Allen v. City of Graham*, No. 1:20-CV-997, 2021 WL 2223772, at *6 (M.D.N.C. June 2, 2021).

For these reasons, Plaintiff has adequately alleged a Section 27 claim.

V. Plaintiff has stated claims under the ADA and RA.

To state a claim under the ADA and RA, a plaintiff must allege that (1) she has a disability; (2) she is otherwise qualified for a government benefit or service; and (3) she was excluded from the benefit or service on the basis of her disability. *Lewis v. N.C. Dep't of Pub. Safety*, No. 1:15-CV-284-FDW, 2018 WL 310142, at *11 (W.D.N.C. Jan. 4, 2018)

The question of whether gender dysphoria qualifies as a disability under the ADA is pending before the Fourth Circuit. *Williams v. Kincaid*, No. 21-2030. Numerous courts have held that gender dysphoria does qualify, at least for purposes of a motion to dismiss. *See Venson v. Gregson*, No. 3:18-CV-2185-MAB, 2021 WL 673371, at *2 n.2 (S.D. Ill. Feb. 22, 2021) (collecting cases). "Gender dysphoria would appear to fall squarely within the realm of limiting major bodily functions, and therefore arguably qualifies under the general definition of disability." *Iglesias v. True*, 403 F. Supp. 3d 680, 687 (S.D. Ill. 2019). The ADA and RA exclude "gender identity disorders not resulting from physical impairments," but the diagnosis of gender identity disorders has been removed from the DSM-V, which instead recognizes "gender dysphoria"—a condition that is *not* a gender identity disorder. *See Venson*, 2021 WL 673371, at *2. Thus, gender dysphoria falls outside the exclusions

of the ADA and RA. *See Doe v. Pa. Dep't of Corr.*, No. 120CV00023SPBRAL, 2021 WL 1583556, at *11 (W.D. Pa. Feb. 19, 2021), *report and recommendation adopted*, No. CV 20-23, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021).[5]

Here, Defendants do not argue otherwise. Def. Br. 23-24. And Plaintiff has alleged that her gender dysphoria *does* result from physical impairment, which causes "severe distress and substantial limitations on her major life activities of interacting with others, social functioning, thinking, caring for herself, and ensuring her safety." Compl. ¶¶ 2, 162, 172. Therefore, Plaintiff has adequately alleged that she has a disability protected against discrimination under the ADA and RA.

Plaintiff has also adequately alleged that she is qualified for a government service and was denied that service only because of her disability. Prison medical care is a government service. *Doe*, 2021 WL 1583556, at *12. And prison officials discriminate in violation of the ADA and RA when they deny a prisoner disability-related medical care, but provide care to other prisoners for other disabilities. *See United States v. Georgia*, 546 U.S. 151, 157 (2006) (observing that denial of "disability-related . . . medical care" may violate ADA); *Doe,* 2021 WL 1583556, at *13 (alleged denial of care for gender dysphoria stated plausible ADA and RA claims); *Lewis*, 2018 WL 310142, at *11 (same for denial of hepatitis C treatment).

[5] The Department of Justice has endorsed this position, especially where, as here, a plaintiff alleges that her gender dysphoria results from a physical impairment (and is therefore exempt from the ADA and RA's statutory exclusions even for "gender identity disorders"), given the constitutional problems implicated by any other construction. *See* Second Statement of Interest of United States, *Blatt v. Cabela's Retail, Inc.*, 5:14-cv-4822, https://www.glad.org/wp-content/uploads/2015/02/blatt-v-cabelas-doj-soi-11-16-15.pdf.

Here, Plaintiff alleges that she has been denied treatment and accommodations for her gender dysphoria while "DPS provides healthcare and accommodations to prisoners with disabilities other than gender dysphoria." Compl. ¶¶ 159-67, 175-76. Thus, as in the cases cited above, she plausibly alleges discrimination and denial of a government service or benefit because of her disability.

Defendants argue that Plaintiff "makes no factual allegations about when or how any such denial occurred," or "that any particular person acting on behalf of the Department, denied her access to some benefit or service because of animus against transgender persons." Def. Br. 24-25. But, as discussed above, the complaint details specific instances of Plaintiff being denied medical care for her gender dysphoria, which amount to a disability-based denial of a government service or benefit. Plaintiff has alleged when those denials occurred and the DPS officials responsible for them.

Moreover, ADA and RA claims do not require a showing of animus. *Smith v. N.C. Dep't of Pub. Safety*, 2021 WL 3809562, at *18 (M.D.N.C. 2021) (explaining that animus is not required for either damages or injunctive relief under the ADA and RA). At most, a plaintiff must allege deliberate indifference. *See id.* Plaintiff has done so here for the reasons discussed above.

Accordingly, Plaintiff has stated ADA and RA claims.

CONCLUSION

Defendants' motion to dismiss should be denied.

Respectfully submitted, this the 15th day of July, 2022.

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CERTIFICATE OF SERVICE

I certify that on July 15, 2022, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will effect service on all counsel of record.

/s/ Jaclyn A. Maffetore
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