UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAWN GUTHRIE,	:	CIVIL NO.: 1:20-CV-02351
	:	
Plaintiff,	:	(Judge Mannion)
	:	
v.	:	(Magistrate Judge Schwab)
	:	
JOHN WETZEL, *et al*.,	:	
	:	
Defendants.	:	

REPORT AND RECOMMENDATION

I. Introduction.

The plaintiff, a transgender prisoner, contends that the defendants violated her constitutional rights by refusing to provide her with adequate care for her gender dysphoria, including gender affirming surgery. Currently pending is a motion to dismiss the plaintiff's complaint filed by all of the defendants. For the reasons that follow, we will recommend denying that motion.

II. Background and Procedural History.

On December 15, 2020, the plaintiff, Dawn Guthrie ("Guthrie"), began this action by filing a complaint. *Doc. 1*. In her complaint, Guthrie alleges that the defendants have deprived her of her Eighth Amendment right to be free from cruel

and unusual punishment. *Id.* at ¶ 109. Guthrie names John Wetzel[1] ("Wetzel"), the former Secretary of the Pennsylvania Department of Corrections ("DOC"), Dr. Paul Noel ("Noel"), the former Chief of Clinical Services at State Correctional Institutional at Mahanoy ("SCI-Mahanoy"), Dr. Arlene Seid ("Seid"), the Chief of Clinical Services at SCI-Mahanoy, and Dr. Palukuri Reddy ("Reddy"), the Chief of Psychiatric Services at SCI-Mahanoy as defendants (collectively "Defendants"). *Id*. at ¶¶ 5-8. Guthrie is suing Wetzel in his individual and official capacity, Noel in his individual capacity, Seid in her official capacity, and Reddy in his individual and official capacity. *Id*.

Guthrie has been incarcerated within the DOC since September 17, 2013. *Id.* at ¶ 9. Guthrie is currently incarcerated at SCI-Mahanoy, a men's prison. *Id*. at ¶ 10. Guthrie is a transgender woman who has lived fully as a woman since 2016. *Id*. at ¶ 13. Guthrie was diagnosed with gender dysphoria in 1998, and the DOC affirmed her diagnosis in February 2016. *Id*. at ¶¶ 14-15. As of December 1, 2017, the DOC recognizes Guthrie's gender as female *Id*. at ¶ 17. Guthrie was

[1] When this complaint was filed, Wetzel was the Secretary of the Pennsylvania Department of Corrections. George Little ("Little") is now the acting Secretary of the Pennsylvania Department of Corrections. Accordingly, we recommend that Wetzel, in his official capacity, be substituted for Little as a defendant in this action. *See* Fed. R. Civ. P. 25(d) (providing that when a public officer sued in his or her official capacity ceases to hold office while the action is pending, "[t]he officer's successor is automatically substituted as a party.").

incarcerated at State Correctional Institute Muncy ("SCI-Muncy"), a women's prison, from March 27, 2019, until August 2019, when she was transferred to SCI Mahanoy after receiving a misconduct. *Id*. at ¶ 18. Guthrie avers that her transfer out of SCI-Muncy was authorized by Wetzel and members of the Gender Review Committee ("GRC"). *Id*. at ¶ 19.

Due to her gender dysphoria, Guthrie alleges she has "a history of a suicide attempt, repeated suicidal ideation, depression, ideation about autocastration, physical and sexual assault, and persistent sexual harassment." *Id*. at ¶ 29. Guthrie claims that DOC Policy Statement 13.2.1, Section 19 ("Section 19"), which addresses the treatment of gender dysphoria, is constitutionally inadequate and discriminatory. *Id*. at ¶¶ 47-71. Guthrie avers that Noel and Seid have the overall responsibility for the medical treatment of inmates diagnosed with gender dysphoria and that Reddy has the overall responsibility for the mental health diagnosis and treatment of inmates diagnosed with gender dysphoria. *Id*. at ¶¶ 51-52. Guthrie alleges that, pursuant to Section 19, medical and mental health vendors must provide training to their practitioners on evaluation, treatment, and management of patients with gender dysphoria with annual refresher training and that Noel, Seid, and Reddy must pre-approve this training. *Id*. at ¶¶ 53-54.

Per Guthrie, Section 19 establishes a gender dysphoria Treatment Review Committee ("TRC"), which "establishes DOC policies, reviews and approves every individual treatment plan, and reviews all requests for gender affirming surgery." *Id*. at ¶ 55. Guthrie further asserts the gender dysphoria Treatment Review Committee is "made up of at least six people, none of whom are medical professionals involved in the direct care of gender dysphoria identified persons. Further, upon information and belief, none specialize in in transgender issues or treatment." *Id*. at ¶ 56. Guthrie states that Noel, Seid, and Reddy are members of this committee. *Id*. at ¶ 57. Guthrie also asserts that the psychology staff and prison psychiatrist develop a gender dysphoria "individual recovery plan" ("IRP") for each inmate with gender dysphoria and that the Treatment Review Committee must unanimously approve any treatment beyond the initial IRP. *Id*. at ¶¶ 58-59. Guthrie avers that if an outside specialist recommends gender affirming surgery, then the case is referred to the Gender Review Committee ("GRC"), which includes non-medical staff and does not include medical and mental health staff who provided direct care to the individual. *Id*. at ¶¶ 61-66. Guthrie asserts that Wetzel has the ability to implement changes and revisions to this policy. *Id*. at ¶ 70.

Guthrie claims that she has a long history of suicidal ideation, including at least one suicide attempt prior to her incarceration and that the DOC staff is aware of her depression and suicidal ideation. *Id*. at ¶¶ 73-74. Guthrie also states that the DOC staff are not fully familiar with the World Professional Association for Transgender Health ("WPATH") Standards of Care, that she has lacked access to transgender specialists while in prison, and that she has not been allowed to meet with an outside transgender specialist while incarcerated. *Id*. at ¶¶ 74-76. For three years, Guthrie has undergone hormone replacement therapy. *Id*. at ¶ 81. Based on the support of her mental health providers, Guthrie requested gender affirming surgery on January 18, 2018; however, her request was denied on June 10, 2019, and Guthrie claims she was not provided any rationale for the denial. *Id*. at ¶¶ 82, 97. Additionally, Guthrie claims that she has been denied laser hair removal, female commissary items, and permanent access to a razor. *Id*. at ¶¶ 85, 87, 91.

Guthrie claims that as a result, her gender dysphoria and suicidal ideation have worsened, with Guthrie being put on "Constant Watch, the closest level of monitoring for DOC inmates experiencing acute suicidal ideation." *Id*. at ¶¶ 100-104. Guthrie claims that Defendants are aware of Guthrie's psychological distress and that she is at risk of serious injury or death as a result of her gender dysphoria.

Id. at ¶ 106. According to Guthrie, all of the Defendants violated her Eighth Amendment right to be free from cruel and unusual punishment "through their deliberate indifference to her serious medical needs, including but not limited to their failure to provide her access to a transgender health specialist, gender affirming surgery and other necessary medical care." *Id*. at ¶ 109. Additionally, Guthrie claims that all of the Defendants have violated her Eighth Amendment rights "through their deliberate indifference to her serious medical needs by their interference with her attempt to socially transition including but not limited to denial of access to female commissary items and transferring her out of a women's prison." *Id*. at ¶ 110.

For relief, Guthrie requests a declaratory judgment that Defendants violated her Eighth Amendment rights. *Id*. at 20. Guthrie also requests injunctive relief allowing her access to an outside transgender healthcare specialist, medical care for her gender dysphoria, including but not limited to laser hair removal and gender affirming surgery. *Id*. Guthrie also seeks injunctive relief granting her access to female commissary items and wishes to be transferred to a women's prison. *Id*. Additionally, Guthrie requests injunctive relief that Defendants provide "adequate training on the Standards of Care to all staff providing medical or mental health treatment to transgender individuals." *Id*. For further injunctive

relief, Guthrie also requests that Wetzel, Seid, and Reddy "enact and enforce more appropriate policies to utilize direct care providers and specialists in transgender healthcare in assessing a gender dysphoria identified person's treatment plan, including but not limited to access to gender affirming surgery." *Id*. Guthrie also seeks unspecified compensatory and punitive damages against the Defendants and attorney's fees and costs. *Id*. at 20-21.

Currently pending is the Defendants' motion to dismiss the complaint against all defendants. *Doc*. *6*. That motion has been fully briefed. *Doc*. *7*. For the reasons discussed below, we will recommend that the Defendants' motion be denied.

III. Pleading and Motion-to-Dismiss Standards.

In accordance with Fed. R. Civ. P. 12(b)(6), the court may dismiss a complaint for "failure to state a claim upon which relief can be granted." When reviewing a motion to dismiss under Rule 12(b)(6), "[w]e must accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine whether plaintiff may be entitled to relief under any reasonable reading of the complaint." *Mayer v. Belichick*, 605 F.3d 223, 229 (3d Cir. 2010). In making that determination, we "consider only the

complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the [plaintiff's] claims are based upon these documents." *Id.* at 230.

"A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a)." *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 769–70 (M.D. Pa. 2012). "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). The statement required by Rule 8(a)(2) must give the defendant fair notice of the nature of the plaintiff's claim and of the grounds upon which the claim rests. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Detailed factual allegations are not required, but more is required than "labels," "conclusions," or "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). "A complaint has to 'show' such an entitlement with its facts." *Id.*

In considering whether a complaint fails to state a claim upon which relief can be granted, the court "'must accept all facts alleged in the complaint as true

and construe the complaint in the light most favorable to the nonmoving party.'" *Krieger v. Bank of Am., N.A.*, 890 F.3d 429, 437 (3d Cir. 2018) (quoting *Flora v. Cty. of Luzerne*, 776 F.3d 169, 175 (3d Cir. 2015)). But a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). A court also need not "assume that a . . . plaintiff can prove facts that the . . . plaintiff has not alleged." *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Following *Twombly* and *Iqbal*, a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, it must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (footnote and citations omitted) (quoting *Iqbal*, 556 U.S. at 675, 679).

IV. Discussion.

Defendants Wetzel, Noel, Seid, and Reddy argue that the claims against them should be dismissed because the complaint fails to show a violation of the Eighth Amendment for deliberate medical indifference. Specifically, they argue that Guthrie's claims are premised upon a disagreement with a course of treatment, and that the DOC already provided her all of her requested relief. Additionally, Defendants contend that Wetzel should be removed from this action because he is a non-medical defendant, and Guthrie cannot impute him with Eighth Amendment liability for deliberate medical indifference. Defendants also argue that Guthrie's complaint should be dismissed against all Defendants because they are entitled to qualified immunity because gender affirmation surgery or the evaluation of an outside physician who might recommend such surgery is not an established right.

A. Official Capacities Claims.

Before we address the Defendants' arguments, we *sua sponte* address whether Guthrie's claims against the Defendants in their official capacities are barred by the Eleventh Amendment. The Eleventh Amendment implicates the court's subject-matter jurisdiction. *See Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 318 (3d Cir. 2013) ("Therefore,

unless Congress has 'specifically abrogated' the states' sovereign immunity or a state has unequivocally consented to suit in federal court, we lack jurisdiction to grant relief in such cases."); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693, n.2 (3d Cir. 1996) (noting that "the Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction"); *but see Lombardo v. Pennsylvania, Dep't of Pub. Welfare*, 540 F.3d 190, 197 (3d Cir. 2008) (noting that "the Supreme Court's jurisprudence has not been entirely consistent in the view that the Eleventh Amendment restricts subject matter jurisdiction"). Thus, '[t]he court may consider Eleventh Amendment issues *sua sponte*, but is not required to do so." *Zulueta v. Chuckas*, No. 1:18-CV-356, 2018 WL 5814689, at *2 (M.D. Pa. Nov. 6, 2018).

The Eleventh Amendment bars suits against a state in federal court. *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 83 (3d Cir. 2016). A state, however, may waive its Eleventh Amendment immunity by consenting to suit, and Congress may abrogate states' Eleventh Amendment immunity when it unequivocally intends to do so and it acts pursuant to a valid grant of constitutional authority. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). The Commonwealth of Pennsylvania has not waived its Eleventh Amendment immunity, *see* 42 P.C.S.A. § 8521(b), and 42

U.S.C. § 1983 does not override a state's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979). And since official-capacity suits are "only another way of pleading an action against an entity of which an officer is an agent," *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978), claims against state officials in their official capacities for damages are treated as suits against the state and are barred by the Eleventh Amendment, *Christ the King Manor, Inc.*, 730 F.3d at 318. Thus, the Eleventh Amendment bars Guthrie's claims for damages under 42 U.S.C. § 1983 against Wetzel, Reddy, and Seid in their official capacities. The Eleventh Amendment, however, does not bar Guthrie's claims against the Defendants in their official capacities for prospective injunctive relief. *See Ex parte Young*, 209 U.S. 123 (1908). Additionally, Guthrie's claims against Defendants in their individual or personal capacities are also not barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991).

B. 42 U.S.C. § 1983.

Guthrie brings her claims under 42 U.S.C. § 1983. "Section 1983 imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States." *Shuman v. Penn Manor School Dist.*,

422 F.3d 141, 146 (3d Cir. 2005). Section 1983 "does not create any new substantive rights but instead provides a remedy for the violation of a federal constitutional or statutory right." *Id.* To establish a claim under § 1983, the plaintiff must establish a deprivation of a federally protected right and that this deprivation was committed by a person acting under color of state law. *Woloszyn v. County of Lawrence*, 396 F.3d 314, 319 (3d Cir. 2005).

C. Guthrie has stated an Eighth Amendment claim.

"The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of 'cruel and unusual punishments.'" *Glossip v. Gross*, 576 U.S. 863, 876 (2015). "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). In order for a plaintiff to allege a viable Eighth Amendment medical claim, he must allege facts from which it can reasonably be inferred that the defendant acted with deliberate indifference to his serious medical needs. *Id.* at 104; *see also Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) ("Failure to provide medical care to a person in custody can rise to the level of a constitutional violation under § 1983 only if that failure rises to the level of deliberate indifference to that

person's serious medical needs."). This is a two-part inquiry: "a plaintiff must make (1) a subjective showing that 'the defendants were deliberately indifferent to [his or her] medical needs' and (2) an objective showing that 'those needs were serious.'" *Pearson v. Prison Health Serv.*, 850 F.3d 526, 534 (3d Cir. 2017) (quoting *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999)).

A medical need is serious if it "has been diagnosed by a physician as requiring treatment" or if it "is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (quoting *Pace v. Fauver*, 479 F. Supp. 456, 458 (D.N.J. 1979), *aff'd,* 649 F.2d 860 (3d Cir. 1981) (table)). Additionally, "if 'unnecessary and wanton infliction of pain' results as a consequence of denial or delay in the provision of adequate medical care, the medical need is of the serious nature contemplated by the eighth amendment." *Id.* (quoting *Estelle*, 429 U.S. at 103). Further, "where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious." *Id.*

Deliberate indifference is a subjective standard. *Farmer v. Brennan*, 511 U.S. 825, 840 (1994). "To act with deliberate indifference to serious medical needs is to recklessly disregard a substantial risk of serious harm." *Giles v.*

Kearney, 571 F.3d 318, 330 (3d Cir. 2009). To act with deliberate indifference, the prison official must have known of the substantial risk of serious harm and must have disregarded that risk by failing to take reasonable measures to abate it. *Farmer*, 511 U.S. at 837. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

The mere misdiagnosis of a condition or medical need, or negligent treatment provided for a condition, is not actionable as a constitutional claim because medical malpractice is not a constitutional violation. *See Farmer*, 511 U.S. at 835 (holding that "deliberate indifference describes a state of mind more blameworthy than negligence")*; Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) ("Allegations of medical malpractice are not sufficient to establish a Constitutional violation."); *Singletary v. Pa. Dep't of Corr.,* 266 F.3d 186, 192 n. 2 (3d Cir. 2002) (claims of medical malpractice, absent evidence of a culpable state of mind, do not constitute deliberate indifference under the Eighth Amendment). Instead, deliberate indifference represents a much higher standard, one that requires "obduracy and wantonness, which has been likened to conduct that includes recklessness or a conscious disregard of a serious risk." *Rouse,* 182 F.3d at 197 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

"Indeed, prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners." *Durmer v. O'Carroll,* 991 F.2d 64, 67 (3d Cir. 1993) (citations omitted). And courts will "disavow any attempt to second guess the propriety or adequacy of a particular course of treatment . . . [which] remains a question of sound professional judgment." *Palakovic v. Wetzel*, 854 F.3d 209, 228 (3d Cir. 2017) (quoting *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979)). "Mere disagreement as to the proper medical treatment does not support an Eighth Amendment claim." *Caldwell v. Luzerne Cnty. Corr. Facility Mgmt. Employees*, 732 F. Supp. 2d 458, 472 (M.D. Pa. 2010).

Thus, "[w]here a prisoner has received some amount of medical treatment, it is difficult to establish deliberate indifference, because prison officials are afforded considerable latitude in the diagnosis and treatment of prisoners." *Palakovic*, 854 F.3d at 227. "Nonetheless, there are circumstances in which some care is provided yet it is insufficient to satisfy constitutional requirements." *Id*.

The Third Circuit has found deliberate indifference where a prison official: "(1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from receiving needed or recommended medical treatment." *Rouse*, 182 F.3d at 197. The Third Circuit has also held that

"[n]eedless suffering resulting from the denial of simple medical care, which does not serve any penological purpose, . . . violates the Eighth Amendment." *Atkinson v. Taylor*, 316 F.3d 257, 266 (3d Cir. 2003). "For instance, prison officials may not, with deliberate indifference to the serious medical needs of the inmate, opt for 'an easier and less efficacious treatment' of the inmate's condition." *Palakovic*, 854 F.3d at 228 (quoting *West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978)). "Nor may 'prison authorities deny reasonable requests for medical treatment . . . [when] such denial exposes the inmate to undue suffering or the threat of tangible residual injury.'" *Id*. (quoting *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987)). Thus, "[a] 'failure to provide adequate care . . . [that] was deliberate, and motivated by non-medical factors' is actionable under the Eighth Amendment, but 'inadequate care [that] was a result of an error in medical judgment' is not." *Parkell v. Danberg*, 833 F.3d 313, 337 (3d Cir. 2016) (quoting *Durmer*, 991 F.2d at 69).

"[T]here is a critical distinction 'between cases where the complaint alleges a complete denial of medical care and those alleging inadequate medical treatment.'" *Pearson*, 850 F.3d at 535 (quoting *United States ex. rel. Walker v. Fayette Cty.*, 599 F.2d 573, 575 n.2 (3d Cir. 1979)). "Because 'mere disagreement as to the proper medical treatment' does not 'support a claim of an

eighth amendment violation,' when medical care is provided, we presume that the treatment of a prisoner is proper absent evidence that it violates professional standards of care." *Id*. (quoting *Monmouth Cty. Corr. Inst.*, 834 F.2d at 346). And "there are two very distinct subcomponents to the deliberate indifference prong of an adequacy of care claim." *Id*. at 536. "The first is the adequacy of the medical care—an objective inquiry where expert testimony could be helpful to the jury." *Id*. "The second is the individual defendant's state of mind—a subjective inquiry that can be proven circumstantially without expert testimony." *Id*. But a claim that medical care was delayed or denied completely "must be approached differently than an adequacy of care claim." *Id*. at 537. "Unlike the deliberate indifference prong of an adequacy of care claim (which involves both an objective and subjective inquiry), the deliberate indifference prong of a delay or denial of medical treatment claim involves only one subjective inquiry—since there is no presumption that the defendant acted properly, it lacks the objective, propriety of medical treatment, prong of an adequacy of care claim." *Id*. "All that is needed is for the surrounding circumstances to be sufficient to permit a reasonable jury to find that the delay or denial was motivated by non-medical factors." *Id*.

Further, a nonmedical prison official is not deliberately indifferent simply because he or she failed to respond to a prisoner's medical complaints when the

prisoner was already being treated by a prison doctor. *Durmer*, 991 F.2d at 69. "Absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official . . . will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference." *Spruill*, 372 F.3d at 236. "[T]he same division of labor concerns that underlie that rule apply when a nurse knows that a prisoner is under a physician's care and has no reason to believe that the doctor is mistreating the prisoner." *Pearson*, 850 F.3d at 540 n.4. "Given that it is the physician with the ultimate authority to diagnose and prescribe treatment for the prisoner, a nurse who knows that the prisoner is under a physician's care is certainly 'justified in believing that the prisoner is in capable hands,' *id*. so long as the nurse has no discernable basis to question the physician's medical judgment." *Id*. (quoting *Spruill*, 372 F.3d at 236).

Here, Guthrie asserts that her gender dysphoria constitutes a serious medical need. In her complaint, Guthrie alleges that her gender dysphoria has resulted in a history of a suicide attempt, repeated suicidal ideation, depression, ideation about autocastration, physical and sexual assault, and persistent sexual harassment. *Doc. 1* at ¶ 29. Courts have found gender dysphoria qualifies as a serious medical need. *See Doe v. Pa. Dep't of Corr*., No. 1:20-CV-00023, 2021 WL 1583556, at *22

(W.D. Pa. Feb. 19, 2021) (finding that a prisoner's gender dysphoria satisfies the serious medical need element of an Eighth Amendment claim.); *see Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) ("The State does not dispute that Edmo's gender dysphoria is a sufficiently serious medical need to trigger the State's obligations under the Eighth Amendment. Nor could it."); *see Soneeya v. Spencer*, 851 F. Supp. 2d 228, 244 (D. Mass. 2012) (finding "it is well established that [gender identity disorder] may constitute a serious medical need."). Indeed, based on Defendants' brief in support of their motion to dismiss, Defendants do not seem to dispute that Guthrie's gender dysphoria is a serious medical need. Thus, Guthrie's gender dysphoria satisfies the first prong, and we now turn our discussion towards the second prong, the Defendants' deliberate indifference to her serious medical need.

In Guthrie's complaint, she alleges that Defendants have demonstrated deliberate indifference to her serious medical need. *Doc. 1* at 14. Specifically, Guthrie claims that the DOC staff is aware of her history of depression, suicidal ideation, and the severe psychological distress caused by her gender dysphoria. *Id.* at ¶¶ 74, 106. Yet, Guthrie alleges that Defendants have denied her requests for access to a gender specialist, hair removal, female commissary items, gender affirming surgery, and transfer to a women's prison. *Id.* at ¶¶ 107, 109.

Defendants argue that there is no deliberate indifference because Guthrie has been offered at least some medical care for her gender dysphoria, and that Guthrie's complaint "reflects a disagreement with the course and scope of the treatment she has received, but significantly does not suggest a total lack of adequate care." *Doc. 7* at 7, 11.

Defendants argue that Guthrie has received adequate medical care and that "any attempt to second-guess the propriety or adequacy of a particular course of treatment is disavowed by courts since such determinations remain a question of sound professional judgment." *Id*. at 9 (citing *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979)). While this notion is generally true, the Court of Appeals for the Third Circuit has also stated:

> [T]here are circumstances in which some care is provided yet it is insufficient to satisfy constitutional requirements. For instance, prison officials may not, with deliberate indifference to the serious medical needs of the inmate, opt for "an easier and less efficacious treatment" of the inmate's condition. *West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978) (quoting *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974)). Nor may "prison authorities deny reasonable requests for medical treatment ... [when] such denial exposes the inmate 'to undue suffering or the threat of tangible residual injury.'" *Monmouth County Corr. Inst. Inmates*, 834 F.2d at 346 (*quoting Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976)).

Palakovic v. Wetzel, 854 F.3d 209, 228 (3d Cir. 2017).

We conclude that the facts alleged here, when construed in the light most favorable to Guthrie, as we are required to do at this point, are sufficient to state an Eighth Amendment claim against Defendants. Guthrie's complaint alleges that Defendants were aware of her serious medical need yet denied her requests for access to a gender specialist, hair removal, gender affirming surgery, female commissary items, and a transfer to a women's prison. *Doc. 1* at ¶¶ 107, 109. Guthrie further avers that Defendants provided no rationale for such denial and that they are aware of Guthrie's intense suffering resulting from the denial, including placing her on the highest level of suicide watch. *Id*. at ¶¶ 98, 99, 104.

Defendants' denial of reasonable requests for medical treatment, such as access to a transgender healthcare specialist or gender affirming surgery, can establish an Eighth Amendment violation. *Doe*, 2021 WL 1583556, at *23. Guthrie's complaint alleges that Defendants routinely refused to provide the treatments that Guthrie contends were mandated by WPATH. Additionally, Guthrie alleges that Defendants were aware of the substantial risk of harm caused by the denial of necessary care because Guthrie has been placed on Constant Watch for her suicidal ideation. *Doc. 1* at ¶¶ 104-106. Thus, Guthrie's complaint alleges that Defendants routinely denied her medical treatment and knew she was a substantial risk to harm herself. As the court in *Doe* held, "[t]his conclusion is

consistent with the well-established principle that persistence in a course of treatment 'in the face of resultant pain and risk of permanent injury' constitutes deliberate indifference." *Doe*, 2021 WL 1583556, at *23 (citing *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999) (quoting *White v. Napoleon*, 897 F.2d 103, 109 (3d Cir. 1990))).

Construing these facts in the light most favorable to Guthrie, these factual allegations are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 556; *see also Doe*, 2021 WL 1583556, at *24 (denying the motion to dismiss because the denial of gender affirming surgery can meet the deliberate indifference standard.). Accordingly, we recommend that Guthrie has stated an Eighth Amendment claim against Defendants; therefore, we recommend denying the motion to dismiss.

C. Guthrie has alleged sufficient facts to name Wetzel as a defendant.

Wetzel further argues that the court should dismiss the claims against him because he is a non-medical defendant, and Guthrie cannot impute him with Eighth Amendment liability for deliberate medical indifference. In her complaint, Guthrie alleges that the DOC's Section 19 policy is unconstitutional because it enables administrative bodies to make medical decisions regarding incarcerated

people with gender dysphoria. *Doc. 1* at ¶ 67. Per Wetzel, he cannot be considered deliberately indifferent to Guthrie's serious medical needs because he is a non-physician and Guthrie has received treatment by the prison's medical staff. *Doc. 7* at 5. Wetzel also argues that Guthrie fails to contend that he is involved in the medical treatment of any prisoner. *Doc. 7* at 6.

"[Section] 1983 liability may result if a supervising defendant caused a subordinate to violate another's constitutional rights through the execution of an official policy or settled informal custom." *Wyatt v. Malisko*, No. 3:16-CV-01438, 2020 WL 3001936, at *10 (M.D. Pa. Mar. 19, 2020) (citing *Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989)). To hold a supervisor liable because his or her policies or practices led to a constitutional violation, the plaintiff must identify a specific policy or practice that the supervisor failed to employ and must allege facts from which it can reasonably be inferred that: (1) the existing policy or practice created an unreasonable risk of constitutional injury; (2) the supervisor was aware of that risk; (3) the supervisor was deliberately indifferent to that risk; and (4) constitutional injury resulted from the policy or practice. *Beers–Capitol v. Whetzel*, 256 F.3d 120, 134 (3d Cir. 2001).

Here, Guthrie's complaint alleges that the Section 19 policy only subjects inmates with gender dysphoria to an extensive committee review to determine

medical issues by non-medical individuals. *Doc. 1* at ¶¶ 67-68. Guthrie alleges that Wetzel reviews and approves all DOC policies, including Section 19, and was involved in developing and implementing the DOC's transgender policies. *Id*. at ¶¶ 69-71. Guthrie further alleges that Wetzel was deliberately indifferent to the risks of the Section 19 policy by allowing the administrative committees to overrule the decisions of Guthrie's direct care providers. *Id*. at ¶¶ 60-62, 77, 82-83, 96-98. For the final prong, Guthrie claims that she has experienced intense pain and suffering due to the committee's denial of her physician-recommended plan. *Id*. at ¶ 106. When construed in the light most favorable to Guthrie, these facts satisfy the four prongs of the *Beers-Capitol* test and are enough to name Wetzel as a proper defendant in this action.

Defendants attempt to rely on *Durmer*, where the Third Circuit found that a nonmedical defendant could not be considered deliberately indifferent when he failed to respond to an inmate's medical complaints while the inmate was receiving medical treatment by the prison's medical staff. *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993). Defendants argue that because Wetzel is a nonmedical defendant and Guthrie received some medical treatment for her gender dysphoria, Wetzel cannot be found liable for deliberate indifference because he relied on medical opinions. But Guthrie's complaint alleges that the implementation of

Section 19 relies on the opinions of administrative personnel as opposed to medical personnel. Id. at ¶ 67. "At the time of the relevant events, it was clearly established that denying particular treatment to an inmate who indisputably warranted that treatment for nonmedical reasons would violate the Eighth Amendment." *Abu-Jamal v. Kerestes*, 779 Fed. Appx. 893, 900 (3d Cir. 2019) (citing *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346-347 (3d Cir. 1987). Because Guthrie alleges that the DOC policy allows medical determinations, on behalf of Guthrie, based on the decisions of administrative personnel, Wetzel is a properly named defendant in this action. We, therefore, recommend that Wetzel's motion to dismiss on this basis be denied.

D. Defendants claim they are entitled to qualified immunity because the right to gender affirmation surgery or other treatment measures is not clearly established.

Despite their participation in constitutionally impermissible conduct, government officials "may nevertheless be shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity operates to ensure that, before they are subjected to

suit, officers are on notice that their conduct is unlawful. *Id.* "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818–19.

The qualified immunity analysis has two prongs. *Pearson*, 555 U.S. at 232. One prong of the analysis is whether the facts that the plaintiff has alleged or shown make out a violation of a constitutional right. *Id.* The other prong of the analysis is whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589. In other words, "[t]he rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust 'consensus of cases of persuasive authority.'" *Id*. at 589–90 (internal citations omitted). "It is not enough that the rule is suggested by then-existing precedent." *Id*. at 590. Rather, "[t]he precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the

plaintiff seeks to apply." *Id*. Still, "the facts of the existing precedent need not perfectly match the circumstances of the dispute in which the question arises." *Williams v. Secretary PA Dept. of Corrections*, 848 F.3d 549, 570 (3d Cir. 2017). But if the law did not put the officer on notice that his conduct would be clearly unlawful, qualified immunity is appropriate. *Bayer v. Monroe County Children & Youth Services*, 577 F.3d 186, 193 (3d Cir. 2009). "In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *al-Kidd*, 563 U.S. at 743).

The court is permitted to exercise its discretion in deciding which of the two prongs of the qualified-immunity analysis should be addressed first in light of the circumstances of the particular case. *Pearson*, 555 U.S. at 236. Thus, the court may forego difficult constitutional issues and award qualified immunity to a defendant if it is apparent that the defendant did not violate rights that were clearly established at the time the defendant acted. *Id.* In fact, the Supreme Court has

stressed "that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim." *D.C. v. Wesby*, 138 S. Ct. 577, 589 n.7 (2018) (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011)).

"While it is true that qualified immunity should be resolved at the earliest possible stage of litigation, *see Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), at the motion to dismiss stage, 'qualified immunity will be found only when the immunity is established on the face of the complaint.'" *O'Donnell v. Cumberland Cty.*, 195 F. Supp. 3d 724, 734–35 (M.D. Pa. 2016) (quoting *Schor v. North Braddock Borough*, 801 F.Supp.2d 369, 378–79 (W.D.Pa.2011) (citing *Thomas v. Independence Twp.*, 463 F.3d 285, 291 (3d Cir.2006)). "Thus, only where a plaintiff 'fails to state a claim of a violation of a clearly established law, [is] a defendant pleading qualified immunity . . . entitled to dismissal before the commencement of discovery.'" *Id.* (quoting *Schor*, 801 F.Supp.2d at 379). Additionally, the Third Circuit has stated, "it is generally unwise to venture into a qualified immunity analysis at the pleading stage as it is necessary to develop the factual record in the vast majority of cases." *Newland v. Reehorst*, 328 Fed. App'x 788, 791 n.3 (3d Cir. 2009) (per curiam).

Here, Defendants argue that qualified immunity applies to all Defendants because there is no established right to gender affirmation surgery, or other treatment measures. *Doc. 7* at 13. Defendants correctly assert that no authority within this District or this Circuit establishes a constitutional right to gender affirmation surgery, or the evaluation of an outside physician who could recommend such surgery. But Guthrie's complaint does not claim an unfettered constitutional right to gender affirming surgery or access to the evaluation of an outside physician who could recommend such surgery. Instead, Guthrie's complaint, *inter alia*, alleges that Defendants were deliberately indifferent to her serious medical condition of gender dysphoria by alleging several grievances against all Defendants, thereby alleging a pattern of refusal to treat her serious medical condition.

Guthrie's complaint, among many things, alleges that Defendants were deliberately indifferent to her serious medical needs by failing to provide her access to feminine commissary items, access to a gender specialist, hair removal, gender affirming surgery, and failing to transfer her to a female prison. *Doc*. *1* at ¶¶ 107, 110. Additionally, Guthrie alleges that the denial of her requested medical treatment was based on non-medical reasons. *Id*. at ¶ 67. Accepting all of these factual allegations as true, Guthrie's complaint alleges a pattern of refusal on the

part of all the defendants to provide individualized medical treatment for Guthrie's gender dysphoria. As the court in *Doe* held,

> More importantly, the basis for Doe's Eighth Amendment claim is not limited to the denial of gender affirming surgery. Far from it. As noted, Doe's claim is premised on allegations that the Defendants engaged in a long-standing refusal to provide a multitude of treatments and therapies that Doe contends were mandated by accepted standards of care and necessary to prevent serious psychological and physical injuries. The question on a motion to dismiss is not whether the plaintiff will ultimately prevail on his or her claim but "whether the plaintiff is entitled to offer evidence in support of his or her claims." *Swope v. City of Pittsburgh*, 90 F. Supp. 3d 400, 405 (W.D. Pa. 2014) (citing *Oatway v. Am. Int'l Grp., Inc*., 325 F.3d 184, 187 (3d Cir. 2003)). Determinations regarding whether any action or decision regarding Doe's care evinces or was the product of deliberate indifference must await a more developed record.

Doe, 2021 WL 1583556, at *24.

At this early stage, we find that Guthrie's complaint sufficiently alleges a pattern on the part of Defendants to deny Guthrie medical treatment that is mandated by accepted standards of care and necessary to prevent serious psychological and physical injuries. Thus, Guthrie's complaint alleges enough to show that Defendants should have known they were violating her Eighth Amendment constitutional rights.

Guthrie also alleges that her gender dysphoria caused her to be suicidal and required her to be placed under "Constant Watch, the closest level of monitoring

for DOC inmates experiencing suicidal ideation." *Doc. 1* at ¶¶ 100-104. Thus, Guthrie's complaint alleges that her serious medical condition caused her to be suicidal and that Defendants were aware of her suicidal ideation by placing her under Constant Watch. Courts in various Circuits have held that qualified immunity should be denied if the prison officials were or should have been aware that the prisoner presented a substantial risk of suicide. *See Estate of Clark v Walker*, 865 F.3d 544, 553 (7th Cir. 2017) ("For purposes of qualified immunity, that legal duty need not be litigated and then established disease by disease or injury by injury. Risk of suicide is a serious medical need, of course."); *see Elliott v. Cheshire County*, 940 F.2d 7, 11. N.3 (1st Cir. 1991) ("Qualified immunity should be denied if the officials were or should have been aware that the prisoner presented a substantial risk of suicide").

Additionally, Guthrie's complaint alleges that the denial of her necessary medical treatment is based on nonmedical decisions, but rather, based on decisions of an administrative body. *Doc. 1* at ¶¶ 66-67. Accepting these allegations as true, Guthrie's complaint has sufficiently alleged that the treatment for her serious medical need was denied for nonmedical reasons. *See Abu-Jamal*, 779 F. Appx. at 900. (finding that denying an inmate treatment for his serious medical need based on nonmedical reasons violates the Eighth Amendment and precludes a qualified

immunity defense at the motion to dismiss stage. Accordingly, considering the aforementioned reasons, we recommend that Defendants are not entitled to qualified immunity and that the motion to dismiss be denied.

V. Recommendations.

Based on the foregoing, we will recommend denying the motion (*doc. 6*) to dismiss Guthrie's complaint.

> The Parties are further placed on notice that pursuant to Local Rule 72.3: Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 13th day of December, 2021.

S/Susan E. Schwab
Susan E. Schwab
United States Magistrate Judge