DISTRICT JUDGE BENJAMIN H. SETTLE
MAGISTRATE JUDGE J. RICHARD CREATURA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATHAN ROBERT GONINAN,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS, et al.,

Defendants.

No. 3:17-cv-05714-BHS-JRC

PLAINTIFF'S SUPPLEMENTAL REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. REPLY

In their supplemental Opposition to Plaintiff's Motion for Partial Summary Judgment ("Supplemental Opposition"), Defendants Nathaniel Burt, Ph.D, Karie Rainer, Ph.D, Eleanor Vernell, Wendi Wachsmuth, Daniel White and Washington Department of Corrections (collectively "DOC" or "Defendants") again fail to meet the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190 (2000). In fact, in their most recent filings, Defendants admit that they did not modify their blanket ban on gender reassignment surgery until five days *after* the Court ordered them to provide more information on their asserted policy change.

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Neither is that policy change sufficient to evade judicial review where, as here, Defendants continue to take evasive maneuvers to avoid compliance with the law. Nowhere in Defendants' filing do they provide any evidence that they have actually implemented the modified Gender Dysphoria Protocol ("GDP"). Nor could they. Defendants have failed to make their new policies available to inmates at Airway Heights and hired a "consultant" whose opinions at least one federal district court found illogical, unfounded, and overall inappropriate, in light of his blanket opposition to all gender reassignment surgery for the incarcerated. Not only have Defendants not offered any signs of repentance or reform that would indicate "absolute" or "permanent" changes, the record before this Court reflects a patent attempt to avoid the court ruling to which the Plaintiff is entitled.

Because Defendants' Supplemental Opposition and their decision to hire Dr. Levine show that they have no intention of ceasing their unconstitutional practices, Plaintiff Nonnie Marcella Lotusflower ("Lotusflower") respectfully requests that the Court grant her Motion for Partial Summary Judgment.

II. ARGUMENT

A. Defendants' Supplemental Briefing Reflects a Classic Case of Voluntary Cessation to Evade Judicial Review.

Defendants' latest filing makes more than clear that the voluntary cessation doctrine applies. *See Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013) (explaining that the doctrine of voluntary cessation is intended specifically to foreclose efforts by defendants to evade judicial review by temporarily and/or ineffectively modifying their behavior in the short term in an effort to moot ongoing litigation). Defendants can hardly argue that by modifying their unconstitutional policy five days *after* the Court ordered them to provide proof of its modification, they have somehow met the "formidable" burden of establishing that the change is "entrenched" and "permanent." That the change was calculated to evade judicial review is underscored by the fact that Plaintiff advised Defendants as early as April

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24, 2018 that the GDP directly conflicted with the very Offender Health Plan ("OHP") relied upon by DOC in their Opposition Motion. Dkt. ##52-53.1 & 55-56.1. Nine days after Plaintiff advised Defendants of the conflict between their OHP and GDP policies, Defendants filed their Opposition Motion without acknowledging the existence of the then-controlling GDP—even though Plaintiff's pleadings specifically addressed the GDP. Dkt. #52-53.1.

Furthermore, textual modification of a written policy absent actual implementation of the policy is insufficient to satisfy the requirement that policy change be "entrenched" and "permanent." *See Bell,* 709 F.3d at 900 (9th Cir. 2013). As of July 16, 2018, the prison library at Airway Heights does not have an updated version of OHP or the GDP[1]. Lotusflower Decl[2]. at ¶3. Instead, inmates can access only the 2016 OHP policy, which maintains the blanket ban referenced in Plaintiff's Motion. *Id.* at ¶4. Also noteworthy, the GDP is not available to inmates, although the OHP specifically refers to and incorporates it. *Id*. Plaintiff recently asked one of her mental health providers at Airway Heights about the purported changes to the GDP, who told her that she had not seen or heard of any updates to the GDP. *Id.* at ¶5. If neither the inmates nor the healthcare professionals at the prison are aware of the purported new GDP and OHP policies—and the policies have not been published, made available to affected people, or otherwise implemented—the "updated" policies are not actually in effect and cannot moot Plaintiff's motion or this litigation. All Defendants have proven is that they are willing to temporarily modify the text of the policy to evade judicial review.

"It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment [of an unconstitutional policy] seems timed to anticipate suit, and there is probability of resumption." *United States v.*

[1] The GDP is not available online. Lotusflower Decl. at ¶ 4.

[2] Plaintiff has reviewed and confirmed the truth and accuracy of her declaration. Plaintiff's counsel mailed a copy of her declaration to her and are awaiting a returned signed version, at which time they will supplement this filing with a signed version of her declaration. Markosova Decl. at ¶ 4.

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Oregon State Medical Society, 343 U.S. 326, 333 (1952). Defendants' "abandonment" of their unconstitutional policy was not in anticipation of this suit, but in direct response to it. Defendants offer neither repentance nor reform. On the contrary, they effectively admit that they had no intentions to change the GDP until *after* this Court ordered them to provide proof of such change. And even after the delayed "change," Defendants have yet to implement it.

Defendants have failed to meet their "formidable burden" of showing it is absolutely clear that they have changed their unconstitutional policy. Plaintiff respectfully requests that the Court find Defendants' blanket ban on gender reassignment surgery unconstitutional.

B. Defendants' Decision to Hire Dr. Levine to Evaluate Plaintiff's Need for Gender Reassignment Surgery Further Invalidates Their Argument.

In their Opposition to Plaintiff's Motion, Defendants claimed they were "finalizing a contract for an expert to perform a sex reassignment surgery readiness consultation on the Plaintiff." Dkt. #53 at ¶6. Since then, Defendants have retained Dr. Stephen Levine. Ex. A to Markosova Decl. In doing so, Defendants simply replaced one ban with another by hiring an "expert" who has concluded that gender reassignment surgery "is always an elective procedure." *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188 (N.D. Cal. 2015), appeal dismissed and remanded, 802 F.3d 1090 (9th Cir. 2015) (emphasis added).

In 2015, the Northern District of California found that it could give "very little weight" to Dr. Levine's expert opinions because his report "misrepresent[ed] the Standards of Care; overwhelmingly relie[d] on generalizations about gender dysphoric prisoners, rather than an individualized assessment. . .; contain[ed] illogical inferences; and admittedly include[ed] references to a fabricated anecdote." *Norsworthy*, 87 F. Supp. 3d at 1188 (N.D. Cal. 2015). In his report in *Norsworthy*, Levine asserted that "because incarcerated people do not have the 'opportunity to live in free society' in a gender role congruent with their gender identity; because they often have 'psychiatric co-morbidity' (i.e. other diagnoses relevant to their mental health); and because gender reassignment surgery might 'induce a different types

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[sic] of pain' by 'taking away a long term incarcerated inmate's life purpose, quest, hope for the future, and reason to live,' it would never be medically prudent to provide SRS to an inmate." *Id.* (emphasis added). The *Norsworthy* Court concluded, "To the extent that Levine's apparent opinion that no inmate should ever receive SRS predetermined his conclusion with respect to *Norsworthy*, his conclusions are unhelpful in assessing whether she has established a serious medical need for SRS." *Id.*

When Plaintiff's counsel learned that Defendants intended to hire Dr. Levine, they promptly notified Defendants' counsel of the *Norsworthy* decision, expressing concerns that Dr. Levine would be unable to provide a fair assessment. Ex. A to Davis Decl. Defendants dismissed these concerns, ignored the warning in *Norsworthy,* and hired Dr. Levine. *See id.*

The Court asked Defendants to explain "whether the OHP, despite removing surgery to address gender dysphoria from Level III, nonetheless continues to prohibit gender affirming surgery because it relies exclusively on the Gender Dysphoria Protocol for treatment of gender dysphoria." Dkt. #60. Now, instead of relying exclusively on the GDP for treatment of gender dysphoria, Defendants leave the question of treatment—and the decision of whether an inmate is ready for gender reassignment surgery—in the hands of a man who has openly declared that no inmate will ever be ready for surgery.

Even if Defendants had properly modified and implemented the OHP and the GDP (which they did not), they have simply replaced a written blanket ban with a de facto blanket ban. Plaintiff requests that the Court find that ban unconstitutional.

III. CONCLUSION

For these reasons and those stated in Lotusflower's Motion and the accompanying Reply, Lotusflower respectfully requests that the Court grant her Motion for Partial Summary Judgment against DOC, declare that Defendants' blanket ban on gender reassignment surgery violates the Eighth Amendment, and enjoin DOC from to continuing the use of the policy.

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DATED this 27th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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