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 MOTION FOR RECONSIDERATION NOTE ON MOTION CALENDAR: AUGUST 24, 2018

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Nonnie Marcella Lotusflower (a.k.a. Nathan Robert Goninan) ("Lotusflower") respectfully submits that the Court committed manifest error by failing to consider the standard for voluntary cessation and by focusing on a question not presently before the Court when it issued its August 15, 2017 Report and Recommendation. Dkt. No. 71 ("Report"). Specifically, the Court ignored the undisputed evidence showing that the DOC's purported policy change is nothing more than an attempt to evade judicial review. Therefore, Lotusflower hereby moves for reconsideration of the Report.

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II. ARGUMENT

A. The Report Does Not Address the Issue Before the Court

When Lotusflower initially filed her Motion for Partial Summary Judgment, the issue before the Court was whether the DOC's Policy banning gender affirming surgery for all inmates violates the Eighth Amendment of the United States Constitution. *See* dkt. #48. In response, DOC argued that it no longer maintained the blanket ban but failed to provide any evidence supporting the alleged policy change. *See* dkt. #52. The Court ordered supplemental briefing from the DOC, specifically asking for evidence that the policy had changed. Dkt. #60. The DOC then filed a supplemental response, which included a modified policy that was drafted only days *after* the Court's Order. *See* dkt. #61.

The main issue in the parties' supplemental briefing then became whether DOC's purported policy change amounted to anything more than voluntary cessation. In its Report, the Court brushed this question aside, concluding that the "amended language in the protocol now provides" the possibility of gender confirmation surgery, and that "defendants have provided unequivocal proof that the protocol has been updated to explicitly provide for gender confirmation surgery." In doing so, however, the Court failed to consider the very purpose of the voluntary cessation doctrine, which is to "foreclose efforts by defendants to evade judicial review by temporary and/or ineffectively modifying their behavior in the short term in an effort to moot ongoing litigation." *See Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013).

Just this week, the Northern District of Florida addressed a similar fact pattern in *Keohane v. Jones*. Order on the Merits, *Keohane v. Jones*, No. 4:16-cv-00511-MW-CAS (N.D. Fla. August 22, 2018), ECF No. 171. In that case, Keohane, a transgender female inmate,

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challenged the Department of Corrections' policy banning hormone therapy for inmates. Defendant argued that the case was moot because they permitted the plaintiff to begin hormone therapy (after she filed her Complaint and a preliminary injunction was entered). The Court in that case provided an exhaustive analysis of the voluntary cessation doctrine, ultimately finding that "Defendant's actions are too little too late to moot Ms. Keohane's claims." *Id.* at 18. The Court specifically noted that Defendant failed to provide "*any* explanation for the swift course correction," and failed to "provide an explanation as to why it took Defendant *more than eighteen months* to reach this point." *Id.* at 19 (emphasis in original). Ultimately, the Court held,

> Given that Defendant's "freeze-frame" policy and denial of Ms. Keohane's hormone therapy constituted a deliberate practice during her first two years in Defendant's custody, the late-in-the-game timing and content of Defendant's decision to amend its policy and provide for hormone treatment, the lack of any evidence of "substantial deliberation" giving rise to the policy amendment, and at least one instance of inconsistent application of the new policy, this Court finds Defendant has failed to establish an "unambiguous termination" of the challenged "freeze-frame" policy and the denial of hormone treatment.

Id. at 20.

In the present case, Defendants' actions were far more egregious than those of the Defendant in *Keohane*. Defendants refused to change their policy after Lotusflower filed her Complaint, and they refused to change their policy after Lotusflower filed for Summary Judgment. They even refused to change their policy when opposing the Motion for Summary Judgment and instead misled the Court to believe that the policy had in fact changed when in reality, it had not. It was not until *weeks after* the Court ordered Defendants to provide proof of the policy change that they actually changed the policy. Furthermore, with the policy change, Defendants have provided zero evidence of any "substantial deliberation" giving rise to the

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change, and therefore zero evidence that they have "unambiguously terminated" the challenged policy.

The Court explained that Lotusflower offered "nothing but speculation as to the DOC altering the policy back," but this conclusion ignores the following undisputed facts: (1) the DOC did not update its policy until after the Court ordered it to provide proof that the policy had changed, (2) the "updated policy" is not available to inmates, and (3) health care providers at the correction center are unaware of the policy changes. Thus, DOC's presentation that it has changed its policy does not amount to "unequivocal proof" of a change, particularly in the face of overwhelming evidence that this policy has not been implemented. *See* dkt. #66 at ¶ 3–4.

Moreover, the Court acknowledged an inmate needs to meet a variety of criteria to be deemed eligible, including "evaluation by an 'outside expert consultant'" but ignores that the fact the "outside expert" selected by DOC has an express belief that inmates, in custody, are never suitable candidates for gender confirmation surgery.

Rather than addressing the voluntary cessation evidence raised by Lotusflower, the Court turned instead to an "as applied" question, which had not been briefed and was not properly before the Court. On reconsideration, the Court should set aside its "as applied" recommendation, as it is not at issue at this time.

Because the Court failed to consider the standard for voluntary cessation and the totality of the circumstances surrounding the DOC's purported policy change, and because the undisputed evidence shows that Defendants have not changed their unconstitutional policy in any meaningful way, Plaintiff respectfully requests that the Court reconsider its Report,

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especially in light of the decision in *Keohane*, and find Defendants' blanket ban on gender reassignment surgery unconstitutional.

B. Newly Discovered Evidence Supports Reconsideration

Because the Court addressed the "as applied" issue, and discussed that "neither party has submitted evidence that plaintiff has completed her evaluation, much less provided evidence that plaintiff has been denied gender confirmation surgery by Dr. Levine," Lotusflower takes this opportunity to present the Court with new evidence that has been discovered since the parties' briefing. On July 5, 2018, Dr. Levine issued his report finding that Lotusflower is not ready for gender confirmation surgery. *See* dkt. #74 at ¶11. This admission is contained in the August 14, 2018 declaration of Dr. Karie Rainer, Director of Mental Health for the Washington State Department of Corrections. *Id*. Thus, it is undisputed that Dr. Levine's belief that no inmate is ever ready for gender confirmation surgery applies directly to this case, and Lotusflower is still unable to receive the necessary treatment under the DOC's "revised" policy.

Noteworthy, Dr. Rainer's recently filed declaration is oddly silent regarding medically necessary surgical treatment for people suffering with Gender Dysphoria. *See* dkt. #74. The declaration states:

> The Department provides medically necessary treatment for inmates diagnosed with Gender Dysphoria. This includes establishing treatment plans, evaluation and management for hormonal treatment when the patient has been fully assessed and determined that the treatment is medically indicated.

Id. at ¶4. The only mention in Dr. Rainer's declaration of "surgery" is in reference to "the Department contract[ing] to have a sex reassignment surgery readiness assessment performed on Ms. Goninan," and the conclusion that "[b]ased on the report, gender reassignment surgery

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is not medically necessary for Ms. Goninan." *See* dkt. ##6, 11. The omission of surgery as a medically necessary treatment for Gender Dysphoria only further affirms the fact that Defendants have no intention of lifting their blanket ban on gender confirmation surgery.

III. CONCLUSION

Because the Court failed to properly consider whether the DOC's policy change constitutes voluntary cessation, Plaintiff respectfully requests that the Court grant her Motion for Reconsideration, declare that DOC's Policy violates the Eighth Amendment, and direct the DOC to discontinue the use of the Policy.

DATED this 24th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed the foregoing and attached *Proposed Order* 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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