UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

SCOTT LYNN GIBSON, **aka VANESSA LYNN,** **TDCJ # 699888,** *Plaintiff,*	§ § § §	**CIVIL ACTION NO. W-15-CA-190**
V.	§ §	
BRAD LIVINGSTON, et al., *Defendants.*	§	

ORDER

Before the Court are the following Motions: 1) Defendant Livingston's Motion for Summary Judgment (Doc. 50); 2) Plaintiff's Motion Requesting the Court Consider the Court's Holding in *Praylor v. TDCJ* (Doc. 60); 3) Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. 62); 4) Plaintiff's Motion to Compel Dr. Greene to Respond to Plaintiff's § 1983 Complaint (Doc. 66); and 5) Plaintiff's Motion to Allow Plaintiff to Use TDCJ Spokesman Jason Clark's Statement as Proof to Support her Lawsuit (Doc. 67).

Plaintiff Vanessa Lynn Gibson[1] ("Plaintiff") is an inmate in the custody of the Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ"). She is presently confined at the Alfred Hughes Unit in Gatesville, Texas. Plaintiff is proceeding *pro se* and *in forma pauperis* in this action pursuant to 42 U.S.C. § 1983.

I. Factual Background As Alleged By Plaintiff

According to her original Complaint filed on June 8, 2015, Plaintiff is 37-year-old male-to-female preoperative transsexual. (Doc. 1, Memo. at 2). She has lived as a female since the age

[1] The Court will refer to Plaintiff in this Order as her preferred gender of female, using feminine pronouns. Such use, however, is not to be taken as a factual or legal finding.

of 15. *Id.* She was diagnosed with Gender Dysphoria (GD)[2] by TDCJ doctors at the Skyview psychiatric facility. *Id.* Plaintiff believes she is a female trapped in a male's body, which causes her to have realistic thoughts of committing suicide and of self-castration. *Id.* Plaintiff alleges she has, in fact, attempted suicide on three occasions and has made attempts to destroy her testicles. *Id.* When Plaintiff first entered TDCJ in 1995, she verbally requested treatment for her gender disorder but TDCJ denied her request. *Id.* at 3. Her depression and suicidal thoughts became more prevalent over the years, and in 2014, Plaintiff learned that TDCJ amended its policy, which had previously prohibited transgender inmates who were not diagnosed with Gender Identity Disorder (GID) prior to incarceration from receiving treatment. *Id.* After expressing the desire to castrate herself, Plaintiff was sent to the TDCJ's Skyview psychiatric facility where a psychiatrist diagnosed Plaintiff with GD and recommended hormone therapy. *Id.*

Dr. Kevin McKinney subsequently placed Plaintiff on estrogen and spironolactone. *Id.* Plaintiff explained to Dr. McKinney that she could not live in a male's body because it caused

---

[2] Plaintiff has been diagnosed with "Gender Identity Disorder" and "Gender Dysphoria." The TDCJ G-51.11 Policy, the policy at issue in this case, does not appear to distinguish between the two diagnoses for the purposes of treatment. For the sake of ease and clarity, the Court will refer to Plaintiff's disorder as "GID/GD," except in instances where the Plaintiff or a medical provider indicates an individual diagnosis of GID or GD.

The TDCJ policy uses the definitions set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. (Def.'s Mot., Ex. C at 1).

Gender Identity Disorder (GID) - A strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is of the other sex. This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex (Criteria B). The diagnosis is not made if the individual has a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia) (Criteria C). To make the diagnosis, there must be evidence of clinically significant distress or impairment in social occupational, or other important areas of functioning (Criteria D). [Diagnostic and Statistical Manual of Mental Disorders, fourth edition text revision (DSM-IV-TR), p. 576].

Gender Dysphoria (GD) – refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender. This term replaces GID and has the following criteria: Marked incongruence between one's experienced/expressed gender and assigned gender for a specified time and associated clinically significant distress or impairment. The diagnosis can be made with a concurrent disorder of sex development. [Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5) p. 451-453].

her to hate herself and gave her thoughts of committing suicide. *Id.* Dr. McKinney told Plaintiff he could only treat her with female hormones because TDCJ policy bans sex reassignment surgery ("SRS"). *Id.* Plaintiff also requested Dr. McKinney issue her a pass that would allow her to "live as a female." *Id.* at 4. Plaintiff has also made requests to TDCJ to have her genitals removed, but the Defendants have ignored her or told her no. *Id.* Finally, Plaintiff asked Defendants if, in light of the "ban" on SRS, she could have a pass to live and dress as a female and keep her hair at least seven inches long, but her request was denied. *Id.*

Plaintiff alleges the TDCJ's "blanket ban" on SRS is unconstitutional both facially and as-applied because it deprives inmates with GID/GD of their right to medical care under the Eighth Amendment. *Id.* at 5. Plaintiff argues the Eighth Amendment requires Defendants to provide adequate medical care of quality acceptable when measured by prudent professional standards of the community, tailored to an inmate's specific medical needs. *Id.* at 6, citing *Barrett v. Coplan*,[3] 292 F. Supp. 2d 281 (D.N.H. 2003). According to Plaintiff, the TDCJ policy is at odds with the World Professional Association for Transgender Health's (WPATH) standard for the treatment of transgender individuals, which states that SRS is necessary to treat "some people adequately." *Id.* at 6.

Plaintiff alleges the TDCJ's policy is unconstitutional on its face because it prohibits transgender inmates with severe GID/GD from being referred to a specialist to determine whether SRS is necessary to adequately treat their disorder on an individual basis, and further, it indiscriminately and arbitrarily denies transgender inmates SRS, even when medically necessary. *Id.* at 5. As applied to Plaintiff, the current policy only offers treatment that "reduce[s] the pain [her disorder] causes," but it denies her SRS, which would also treat her serious medical

[3] Plaintiff cites to "*Burrett v. Loplen*" however the case-style associated with 292 F. Supp 2d 281 is "*Barrett v. Coplan.*"

condition. *Id.* at 5. In Plaintiff's case, the policy allows Defendants to "ignore her serious medical needs" and results in a substantial risk of serious harm because Plaintiff's illness causes her to have realistic thoughts of suicide and self-castration. *Id.* Plaintiff alleges Defendants are aware of this risk because she has put Defendants on notice that she has thoughts of suicide and self-castration and that the TDCJ's policy is unconstitutional. *Id.* at 7.

Plaintiff seeks (1) a declaration that the ban is unconstitutional (2) a permanent injunction ordering Defendants to rescind the ban on SRS and add SRS to the TDCJ's health care policy, (3) judicial notice of the WPATH's statements that SRS is medically necessary treatment, and (4) costs and attorneys' fees. (Doc. 1 at 4).

In her original Complaint, Plaintiff names three Defendants: TDCJ Executive Director Brad Livingston, an unknown policymaker at the University of Texas Medical Branch (UTMB) "who created and enforc[es] the ban," and the municipality of Gatesville, Texas. (Doc. 1 at 3). On November 17, 2015, the Court granted Defendant Gatesville's Motion to Dismiss, and the municipality of Gatesville was terminated from this lawsuit. (Doc. 41).

On December 21, 2015, Plaintiff sought leave to amend her Complaint. (Doc. 48). In her Amended Complaint, which the Court construes as a supplemental complaint, Plaintiff asserts claims against "Dr. Greene" for denying her the treatment her doctor at UTMB prescribed her to treat her GID/GD. (Doc. 55). Plaintiff alleges that on July 28, 2015, Dr. McKinney from UTMB prescribed estrogen-premarin, spirolactone [sic], and finastreride [sic] to treat Plaintiff's GID/GD. (*Id.* at 1). Plaintiff asserts Dr. McKinney also prescribed "the real-life experience" and ordered that Plaintiff be provided the items necessary to freely live as a female. *Id.* Plaintiff admits Dr. McKinney's order did not specify what items Plaintiff should be allowed to have. *Id.* However, Plaintiff alleges that the WPATH standard of care recommends the "triadic therapy,"

which includes hormone therapy, "real-life experiences," and sex reassignment surgery for treating GID/GD. *Id.* at 2.

Plaintiff alleges Dr. Greene, a medical doctor who is not a GD specialist, refused Dr. McKinney's orders, citing the TDCJ policy, which does not provide transgender inmates the real-life experience, nor does the TDCJ allow transgender inmates to live as females or express their gender. *Id.* Plaintiff alleges Dr. Greene is violating her Eighth Amendment rights by denying the treatment prescribed by Dr. McKinney. *Id.* at 1. Plaintiff seeks a declaration that Dr. Greene's acts violate Plaintiff's constitutional rights and an injunction granting Plaintiff the treatment prescribed by Dr. McKinney. *Id.* at 4. The Court ordered service on Dr. Greene on March 1, 2016. (Doc. 54). A return receipt shows Dr. Greene was served by certified mail return receipt on March 21, 2016. (Doc. 65). However, as of the date of entry of this Order, Dr. Greene has not filed an Answer or otherwise responded to Plaintiff's Supplemental Complaint.

II. Livingston's Motion for Summary Judgment

Defendant Livingston filed a Motion for Summary Judgment along with Plaintiff's grievance records, Plaintiff's medical records from January 2014-August 17, 2015, and TDCJ Policy No. G-51.11. (*See* Docs. 50 & 52). Livingston argues he is entitled to qualified immunity for claims against him in his individual capacity, and Plaintiff's claims against him in his official capacity are barred by the Eleventh Amendment. (Doc. 50). Plaintiff filed a Response (Doc. 58), along with an affidavit, her psychiatric records from Skyview (Ex. A2), literature on the subject of health care and transgender individuals, including excerpts from a report detailing the WPATH Standard of Care (Exs. 3 & 4), a copy of the TDCJ's policy on surgical castration for sex offenders (Ex. 5), copies of correspondence sent to Plaintiff from TDCJ Correctional Managed Health Care (Ex. 6), and relevant TDCJ grievance records (Exs. 7-9).

III. Relevant Summary Judgment Evidence

A. Medical and Grievance Records

Medical records show medical staff first saw Plaintiff regarding her GID/GD on February 20, 2014 after she submitted a sick call request asking for treatment for GID. (Def.'s Mot., Doc. 52, Ex. B at 10). She reported emotional and physical distress because she feels she is a girl and the officers and inmates teased her. *Id.* She reported a long history of mental health and behavioral issues, including one overdose attempt in 2005 or 2006 and a hanging attempt that was never reported. *Id.* She claimed she was threatened "with cases" because she likes to wear makeup and style her hair. *Id.* She reported she is often depressed because of frequent requests of a sexual nature from other inmates. *Id.* She claimed she has been living as a girl for over 20 years. *Id.* She denied any thoughts of harming herself or others. *Id.*

In March and April of 2014, Plaintiff submitted sick calls stating she is a transsexual and a woman in a man's body, but when mental health services responded, she told mental health services her sick call was meant to go to medical. *Id.* In May of 2014, mental health services saw her again after she requested counseling for GID. *Id.* On May 14, 2014, Plaintiff was diagnosed with GID. *Id.* at 10. She reported depression related to her gender and indicated that she wanted hormone treatment and surgical treatment. *Id.* She reported hatred of her testicles but denied thoughts of self-mutilation. *Id.* Mental health services saw Plaintiff on June 6, 2014, and she reported she had thoughts of cutting off her testicles and that she had, in the past, tied a string around her testicles with the hope of cutting off circulation to them. *Id.* At that time she denied current thoughts of self-harm. *Id.* Medical staff saw Plaintiff again on July 14, 2014, and Plaintiff stated she felt she was a woman in a man's body and expressed distress about not being able to shave her legs and having to touch her penis to go to the bathroom. *Id.* Plaintiff was transferred

to the Skyview psychiatric facility on July 22, 2014. *Id.* at 11. Plaintiff denied she was suicidal and reported "psych" (presumably at her unit) was not taking her seriously. *Id.* She stated she would not do anything to hurt herself. *Id.* When seen again by "D&E" staff at Skyview, she continued to report thoughts of castrating herself and reported some depression." *Id.* The following day, Plaintiff was diagnosed with "Intermittent Explosive Disorder and Personality Disorder NOS." *Id.* at 15.

At a follow-up appointment at Skyview on July 31, 2014, a provider determined Plaintiff meets the requirements for a diagnosis of "Gender Dysphoria in Adolescents and Adults" under "DSM-5" criteria. (Pl.'s Resp., Doc. 58, Ex. A2). Plaintiff was discharged from Skyview on August 5, 2014. (Def.'s Mot., Doc 52, Ex. B at 72). In the discharge notes, the provider noted Plaintiff denied plans to harm herself and explained that her previous threats were made primarily in an attempt to more clearly get her point across and to express the seriousness of the situation. *Id.* at 71. Plaintiff reported she was treated unfairly by TDCJ medical staff. *Id.* She denied suicidal ideations. *Id.*

On August 25, 2014, Dr. Greene referred Plaintiff to endocrinology for an evaluation regarding hormone therapy. *Id.* at 17. Dr. Greene informed Plaintiff she must continue psychiatric therapy. *Id.* On September 24, 2014, Plaintiff was prescribed spironolactone by Dr. Michael Aterno for "antiandrogen" effects. *Id.* at 18.

On October 28, 2014, Plaintiff submitted a sick call to mental health services requesting a pass from medical to purchase make-up and earrings from commissary. *Id.* at 23-25. Mental health services reviewed the relevant Correctional Managed Health Care and TDCJ policies and found nothing in the policy indicating Plaintiff is allowed to live as a female and make those purchases. *Id.* at 25. On December 17, 2014, medical staff saw Plaintiff again regarding

treatment for her GID/GD. *Id.* at 26. Medical staff determined Plaintiff could not begin estrogen treatments until her testosterone levels were suppressed. *Id.*

On January 2, 2015, medical staff saw Plaintiff again cell-side. *Id.* at 29. Plaintiff asked mental health services to provide an approval to the warden to allow Plaintiff to wear full makeup, but medical staff informed Plaintiff security would not provide a pass to allow Plaintiff to carry herself in any manner that would be disruptive to her environment. *Id.* On February 3, 2015, Plaintiff made a sick call requesting a bra and a pass to wear it. *Id.* at 32-33. On February 13, 2015, Plaintiff made another sick call stating she was mistreated by the medical department. *Id.* at 35. She stated she was denied a sports bra, and that medical staff made fun of her and did not treat her seriously. *Id.* Mental health services told Plaintiff the responses from medical would be reviewed and she was encouraged to contact the mental health department in the future. *Id.* at 36. Plaintiff denied suicidal ideations or thoughts of hurting others. *Id.*

On March 19, 2015, mental health services saw Plaintiff again. *Id.* at 41. She informed mental health she was going to UTMB hospital for hormone treatment the following week. *Id.* She denied suicidal or homicidal ideations. *Id.* On April 1, 2015, Dr. McKinney at UTMB saw Plaintiff. *Id.* at 82. Dr. McKinney noted he was unable to start Plaintiff on estrogen therapy until her testosterone is suppressed due to threat of blood clot. (Def.'s Mot., Ex. A at 21). Mental health services saw Plaintiff again on April 8, 2015 for individual therapy. (Def.'s Mot., Ex. B at 46). She reported she felt stressed and angry due to not being able to live like a woman. *Id.* Plaintiff stated her hormone treatment was increased during her last visit at UTMB, but she was not able to receive a pass to live as a woman. *Id.* Plaintiff denied suicidal or homicidal ideations. *Id.*

Dr. Greene saw Plaintiff on June 18, 2015. *Id.* Plaintiff requested to live as a female and requested the necessary passes to do so. *Id.* at 49. Dr. Greene ordered Plaintiff to be scheduled with the unit medical department for evaluation for referral for a sex change operation and evaluation for a medical pass for her GID. *Id.* at 50. On July 1, 2015, Plaintiff asked mental health personnel to approve Plaintiff to have her testicles removed and to write her a pass to live as a woman. *Id.* at 52. Plaintiff did not report suicidal or homicidal ideations. *Id.* However, mental health explained that under the policy it could only help Plaintiff with adjustment, anxiety, or depressive symptoms and could not provide such a pass. *Id.* at 52. Plaintiff was seen a second time on July 1, requesting to speak to a supervisor regarding counseling for her GID/GD. *Id.* at 56. Plaintiff did not express thoughts of harming herself or others. *Id.* Plaintiff was referred to a supervisor. *Id.* Mental health services saw Plaintiff again the following day. *Id.* at 59. On July 11, 2015, Plaintiff requested to see a provider concerning her request for a sex change. *Id.* at 61. A mental health therapist saw Plaintiff again regarding her GID/GD on July 15, 2015. *Id.* at 64. Plaintiff requested a jock strap and laser hair removal. *Id.* The therapist told Plaintiff she would refer Plaintiff to the psychiatrist. *Id.* Plaintiff denied thoughts of harm to herself or others. *Id.*

On July 17, 2015, a mental health therapist saw Plaintiff again for a mental status check. *Id.* at 67. After reviewing Plaintiff's chart, the therapist determined Plaintiff already had a diagnosis of GID and did not need to be referred to a psychiatrist. *Id.* The therapist told Plaintiff that she and other mental health staff follow the rules under the TDCJ. *Id.* Plaintiff denied thoughts of harm to self or others. *Id.* Plaintiff was seen again on August 7, 2015 after asking for estrogen. *Id.* at 90. Medical staff noted an endocrinology specialist saw Plaintiff on July 28, 2015 and ordered no change in medication. *Id.* The record reflects Plaintiff was later placed on

estrogen. In her Response to Defendant's Motion for Summary Judgment, Plaintiff states her new doctor, Dr. Wayers, placed her on a high level of estrogen to "basically cause chemical castration." (Pl.'s Resp., Doc. 58 at 10). In an affidavit filed along with her Response, Plaintiff states if she cannot get a sex change or have her penis and testicles removed, she is either going to cut them off or commit suicide. *Id.* (*See* Pl.'s Affidavit at 1).

The record further reflects Plaintiff filed numerous grievances with TDCJ asking for treatment for her GID/GD. The grievance record shows Plaintiff's requests to see a "GID specialist," receive a sex change, and to be issued a pass to live as a female were denied by TDCJ Health Services. (Def.'s Mot, Doc. 52, Ex. A (Grievance Nos. 2015059692, 2015122077, and 2015125706); Pl.'s Resp., Doc. 58, Ex. 6-7 (Grievances Nos. 2015096265 & 2015088363)). Plaintiff was told she was being treated in accordance with Policy G-51.11, which does not designate SRS as part of the treatment protocol for GID/GD. *See id.* The record reflects Plaintiff sent a letter to the TDCJ Health Services Division requesting a bra and a pass to live as a female and express her gender freely. (Pl.'s Resp., Doc. 58, Ex. 6 at 2). Plaintiff's letter was returned, and the TDCJ Health Services Division directed her to pursue the unit's informal complaint process. *Id.* at 3.

B. TDCJ Policy

Livingston submitted as summary judgment evidence Correctional Managed Health Care Policy G-51.11, the TDCJ's policy on the "Treatment of Offenders with Intersex Conditions, Gender Disorder or Gender Dysphoria." It provides in relevant part:

> II. An offender with documented or claimed Gender Identity Disorder (GID) or Gender Dysphoria (GD) will receive thorough medical and mental health evaluations.
>
> A. The offender will be continued on the same hormone regimen, if any, upon arrival to TDCJ.
>
> B. A concerted effort will be made to expeditiously obtain the offender's prior medical and psychological records.

C. Medical evaluation will include a thorough history and complete physical examination.
D. Mental Health evaluation will be conducted by a qualified mental health professional (QMHP). If conducted by a non-psychiatrist, the evaluation and any supporting information must be reviewed by a psychiatrist. Only a licensed psychiatrist may make the diagnosis of GID or GD within TDCJ.

III. When a diagnosis of Gender Identity Disorder or Gender Dysphoria is made –
A. Mental health counseling will be offered.
B. Current, accepted standards of care and the offender's physical and mental health will determine if advancement of therapy is indicated.
1. If hormone therapy is indicated, the offender will be referred to a medical provider competent to prescribe hormone therapy.
2. Hormone therapy will be requested through the non-formulary process.
3. Documentation of patient education and written consent are required prior to submission of the non-formulary request (see Attachments A-1 and A-2).
4. If hormone therapy is prescribed, the offender will also be followed in chronic care clinic with regular assessments for potential complications of hormone therapy (e.g. hypertension, liver disease, heart disease, breast cancer, etc.).

(Def.'s Mot., Doc. 52, Ex. C).

C. WPATH Standard of Care

Plaintiff's Response includes portions of the 2012 "Standards of Care for the Health of Transsexual, Transgender and Gender-Noncomforming People" published by the WPATH. (Pl.'s Resp., Doc. 58, Ex. 4). The excerpts provide in relevant part:

> **Gender Nonconformity is Not the Same as Gender Dysphoria**
> What helps one person alleviate gender dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications. Medical treatment options include, for example, feminization or masculinization of the body through hormone therapy and/or surgery, which are effective in alleviating gender dysphoria and are medically necessary for many people. Gender identities and expressions are diverse, and hormones and surgery are just two of many options available to assist people with achieving comfort with self and identity. Report Pg. 5.
>
> **Sex Reassignment Surgery is Effective and Medically Necessary**
> Surgery--particularly genital surgery—is often the last and the most considered step in the treatment process for gender dysphoria. While many transsexual, transgender, and gender-nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria (Hage & Karim. 2000). Report Pg. 54.

(Pl.'s Resp., Doc. 58, Ex. 4). The report also suggests access to "these medically necessary treatments should not be denied on the basis of institutionalization or housing arrangements." *Id.* at Report Pg. 67.[4]

IV. Summary Judgment Standard

This Court may grant summary judgment on a claim if the record shows that there is no genuine dispute of any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A party who moves for summary judgment has the burden of identifying the parts of the pleadings and discovery on file that, together with any affidavits, show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the movant carries this burden, then the burden shifts to the nonmovant to show that the Court should not grant summary judgment. *Id.* at 324–325. The nonmovant must set forth specific facts that show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmovant cannot rely on conclusory allegations, improbable inferences, and unsupported speculation. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993). The Court must review the facts and draw all inferences most favorable to the nonmovant. *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

V. 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the

[4] Plaintiff also submitted a brief report from Lambda Legal aggregating the position statements of various health organizations with respect to transgender care. *See* Ex. 4.

> United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . .

42 U.S.C. § 1983. Section 1983 was promulgated to prevent ". . .[a government official's] [m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986); *Whitley v. Albers*, 475 U.S. 312 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986), *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 does not create substantive rights; rather, it merely provides a remedy for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). To bring an action within the purview of Section 1983, a claimant must first identify a protected life, liberty, or property interest, and then prove that government action resulted in a deprivation of that interest. *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Mahone v. Addicks Utility Dist.*, 836 F.2d 921 (5th Cir. 1988); *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir. 1984).

Only two allegations are required in order to state a cause of action under § 1983. "First, the Plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988). Allegations of a prisoner's complaint, "'however inartfully pleaded,' are held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). It is also clear that civil rights complaints must be pleaded with specific facts, not merely conclusory allegations. *Thompson v. City of Starkville, Mississippi*, 901 F.2d 456, 469 n. 13 (5th Cir. 1990); *Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).

VI. Deliberate Indifference Claim

The Cruel and Unusual Punishment Clause allows an inmate to obtain relief after being denied medical care if he proves that there was a "deliberate indifference to [his] serious medical needs." *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Deliberate indifference requires a showing that the Defendant (1) was "aware of facts from which an inference of excessive risk to the prisoner's health or safety could be drawn," and (2) that he "actually drew an inference that such potential for harm existed." *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001). In *Domino v. Texas Dep't of Criminal Justice*, the Fifth Circuit discussed the high standard involved in showing deliberate indifference as follows:

> Deliberate indifference is an extremely high standard to meet. It is indisputable that an incorrect diagnosis by medical personnel does not suffice to state a claim for deliberate indifference. Rather, the plaintiff must show that the officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Id.* Furthermore the decision whether to provide additional treatment "is a classic example of a matter for medical judgment." And, the "failure to alleviate a significant risk that [the official] should have perceived, but did not" is insufficient to show deliberate indifference.

239 F.3d 752, 756 (5th Cir. 2001) (citations omitted). A disagreement with the treatment provided by a doctor does not rise to the level of a constitutional violation. *See Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

VII. Livingston's Motion for Summary Judgment

Livingston alleges he is entitled to qualified immunity to the extent Plaintiff asserts claims against him in his individual capacity. Government officials sued in their individual capacities for *money damages* are entitled to qualified immunity from liability insofar as their

conduct does not violate a clearly-established constitutional right of which a reasonable person would have been aware. *See Mangaroo v. Nelson*, 864 F.2d 1202, 1206 (5th Cir. 1989) (emphasis supplied). The Plaintiff in this case, however, seeks injunctive relief, not money damages. Thus, Livingston's qualified immunity defense is not relevant. The relief sought by Plaintiff can only be provided by the individual defendant in his official capacity. Accordingly, what remains is Plaintiff's claim against Livingston in his official capacity as Executive Director.

To that end, Defendant asserts Plaintiff's claim against him in his official capacity is barred by the Eleventh Amendment. However, as mentioned previously, Plaintiff seeks prospective injunctive relief, not money damages and "the Eleventh Amendment does not bar claims for prospective relief against state officials acting in their official capacity." *See Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Ex Parte Young*, 209 U.S. 123 (1908); *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 321–22 (5th Cir. 2008). Thus, Plaintiff's claim is not barred by the Eleventh Amendment. Plaintiff cannot prevail against Livingston, however, because Plaintiff cannot demonstrate a violation of her Eighth Amendment rights.

Livingston does not argue that GID/GD is not a serious medical condition for Eighth Amendment purposes. *See* Def.'s Mot. at 7 ("based upon the existence of policy G-51.11, TDCJ appears to recognize gender disorder as a serious medical need"). The Fifth Circuit has not addressed the issue of whether an inmate is entitled to SRS as a treatment for GID/GD. The magistrate judge in this division previously addressed the issue of whether a TDCJ inmate is entitled to hormone therapy as a treatment for GID/GD in *Praylor v. TDCJ*, Civil No. W-04-CA-058. In *Praylor*, the Magistrate concluded that hormone therapy was not constitutionally required for the Plaintiff, based in part upon testimony developed at a *Spears* hearing that the Plaintiff had not initiated the process for an operative sex change and did not qualify under the then-existing

policy for treatment. Further, the magistrate found that Plaintiff[']s disagreement with the non-hormonal treatment pursued by prison medical staff did not constitute a viable claim for deliberate indifference to serious medical needs under the Eighth Amendment.

The plaintiff in *Praylor* appealed the magistrate's decision to the Fifth Circuit who issued a decision at 423 F.3d 524 (5th Cir. 2005) ("*Praylor I*") which was later withdrawn and substituted for the decision in *Praylor v. TDCJ*, 430 F.3d 1208 (5th Cir. 2005) ("*Praylor II*"). Initially, the Fifth Circuit decided to follow those circuits that determined transsexualism to be a serious medical need raising Eighth Amendment considerations, but held that such inmates do not have a constitutional right to hormone therapy. *Praylor*, 423 F.3d at 525–26. In affirming the magistrate's decision, the Fifth Circuit concluded that "the prison facility must afford the transsexual inmate some form of treatment based upon the specific circumstances of each case." *Id.* at 526. Shortly after their initial decision, the Fifth Circuit withdrew its decision in *Praylor I* and held "[a]ssuming, without deciding, that transsexualism does present a serious medical need, we hold that, on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference." *Praylor*, 430 F.3d at 1209.

The magistrate addressed the issue again in *Young v. Adams*, 693 F. Supp. 2d 635 (W.D. Tex. 2010). In that case, the magistrate determined the Plaintiff's claims were barred by the statute of limitations, however the magistrate went on to hold that in any event the Plaintiff failed to show evidence of a violation of his federal civil rights because he was not entitled to receive hormone therapy under the facts as alleged and developed at the *Spears* hearing. *Id.* at 639. The Magistrate again recognized that, under *Praylor II*, there currently is no controlling precedent in the Fifth Circuit as to whether refusing hormone therapy to a person diagnosed with gender dysphoria violates the Eighth Amendment prohibition against cruel and unusual punishment.

However, the Magistrate recognized the Fifth Circuit's implication that under certain facts the refusal to provide hormone therapy will not constitute deliberate indifference. *Id.*

The version of G–51.11 in force at the time *Young* was decided provided hormone therapy in circumstances in which the inmate is close to release and committed to proceeding with a sex change operation immediately upon discharge. *Id.* at 641. The magistrate determined Young did not meet the requirements to receive hormone treatment. *Id.* The Magistrate found that the policy was "reasonable and supports legitimate penological interests such as maintaining order and discipline within the prison unit." *Id.* The magistrate concluded that the existence of policy G–51.11, coupled with adherence to the same in the case of the Plaintiff, is also evidence in and of itself that the defendants were not deliberately indifferent to Plaintiffs serious medical needs under the Eighth Amendment. *Id.*

This case presents a different issue and an issue of first impression in this Circuit. Plaintiff here concedes she has received hormone therapy and instead argues the TDCJ policy is unconstitutional because it does not provide for inmates diagnosed with GID/GD to be evaluated by a specialist to determine if SRS is necessary, nor does it provide for SRS if deemed necessary. Plaintiff recognizes there is no Fifth Circuit precedent holding that denying an inmate SRS to treat GID/GD amounts to an Eighth Amendment violation, however Plaintiff argues there is a consensus of persuasive authority from other circuits demonstrating it is unconstitutional to deny Plaintiff medical care based on a blanket policy, especially when a Plaintiff's medical condition has not be fully assessed. (Doc. 58 at 13, citing, e.g., *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (affirming district court's invalidation on Eighth Amendment grounds of a Wisconsin state statute prohibiting the Wisconsin Department of Corrections ("DOC") from providing transgender inmates with hormonal therapy and sexual reassignment surgery); *Kosilek v.*

Spencer, 740 F.3d 733 (1st Cir. 2014) (affirming district court's injunction requiring the Massachusetts Department of Corrections to provide SRS to inmate suffering from severe gender dysphoria), rev'd en banc, 774 F.3d 63 (1st Cir. 2014) (holding care provided to inmate by the Massachusetts Department of Corrections does not violate the Eighth Amendment); *De'Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (reversing and remanding district court's dismissal of Eighth Amendment Claim based on denial of consideration for sex reassignment surgery)).

It is worth noting that the TDCJ's policy does not include an outright ban on SRS. However, at present, the policy does not go beyond providing mental health services and hormone therapy for inmates with GID/GD. Based on the current state of the law in this Circuit regarding the medical treatment of prisoners with GID/GD and the record in this case, this Court declines to hold that the TDCJ's policy is unconstitutional either on its face or as applied to Plaintiff. After *Praylor II*, there is still no controlling precedent in the Fifth Circuit as to whether refusing hormone therapy to a person diagnosed with GID/GD violates the Eighth Amendment prohibition against cruel and unusual punishment, although the Fifth Circuit does appear to imply that under certain facts the refusal to provide hormone therapy will not constitute deliberate indifference. The Fifth Circuit has yet to recognize unequivocally that transsexualism presents a serious medical need. The Fifth Circuit substituted its initial decision in *Praylor I* where it stated that "[a]lthough this circuit has not addressed the issue of providing hormone treatment to transsexual inmates, we will follow those circuits that have determined transsexualism to be a serious medical need raising Eighth Amendment considerations" with its decision in *Praylor II*, where it stated "assuming, without deciding, that transsexualism does present a serious medical need, we hold that, on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference." *See Praylor I*, 423 F.3d at 526;

Praylor II, 430 F.3d at 1209. With this precedent, the Court cannot make the leap to hold that a policy that does not provide surgery to treat GID/GD necessarily constitutes deliberate indifference.[5]

Further, Plaintiff's argument rests in part on the premise that the TDCJ's policy is unconstitutional because it does not comply with the treatment standard set forth by the WPATH. The Court does not dismiss Plaintiff's argument that the WPATH's standard of care has gained wide acceptance. However, Plaintiff provides as summary judgment evidence only portions of the WPATH report, and no witness testimony or evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of SRS is so universally accepted, that to provide some but not all of the WPATH-recommended treatment amounts to deliberate indifference. More importantly, the record contains no evidence addressing the security issues associated with adopting in full the WPATH standards in an institutional setting. As such, Plaintiff fails to meet her burden in demonstrating sufficient evidence exists from which a reasonable trier of fact could conclude the TDCJ's failure to offer SRS amounts to deliberate indifference.

Assuming arguendo the standard of care for GID/GD does mandate SRS as a treatment option for inmates, Plaintiff fails to show Livingston's official conduct amounts to deliberate indifference. In order to show deliberate indifference, a public official must have been personally aware of facts indicating a substantial risk of serious harm, and the official must have actually recognized the existence of such a risk. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). Thus Plaintiff must demonstrate Livingston, as TDCJ policymaker, was and is aware that the

[5] Plaintiff also names as a Defendant an unknown policymaker at UTMB "who created and enforc[es] the ban." Plaintiff's claim against this policymaker in his or her official capacity is a claim against the state. For the reasons discussed, Plaintiff cannot demonstrate the TDCJ's policy is unconstitutional under Fifth Circuit law. Plaintiff cannot, therefore, prevail against this Defendant. Additionally, as of the date of entry of this Order, Plaintiff has failed to name, serve, or request service upon this Defendant. Accordingly, dismissal of this Defendant is proper.

appropriate standard of care for inmates with GID/GD requires an assessment for SRS, and, if warranted, SRS, and further, that the treatment set forth in the TDCJ's policy does not provide a suitable alternative. Plaintiff must further demonstrate Livingston had and has knowledge of the substantial risk of serious harm posed to GID/GD inmates by not providing for surgical treatment, and deliberately set forth and persists in enforcing a policy to deny such treatment, despite the known or obvious consequence that constitutional violations will result. Plaintiff does not demonstrate sufficient evidence from which a reasonable factfinder could conclude that Livingston was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that Livingston actually drew that inference.

Finally, after reviewing Plaintiff's submissions, she does not present a policy or scenario that fails to provide constitutionally adequate treatment. In contrast, the summary judgment evidence demonstrates the TDCJ policy provides mental health counseling and hormone therapy when appropriate to inmates with GID/GD. Plaintiff, per TDCJ policy, has received extensive and ongoing mental health care as well as hormone therapy to treat her GID/GD since 2014. Of course, Plaintiff would prefer a policy that provides SRS. However, a Plaintiff's disagreement with the diagnostic decisions of medical professionals does not provide the basis for a civil rights lawsuit. Accordingly, Plaintiff fails to establish there is a genuine issue of material fact as to whether the policy is unconstitutional on its face or as applied to Plaintiff.

VIII. Plaintiff's Claim Against Dr. Greene

In her Supplemental Complaint, Plaintiff states Dr. McKinney from UTMB prescribed her Estrogen-permarin, spirolactone [sic], and finastreride [sic] to treat her GID/GD. (Pl.'s Suppl. Compl., Doc. 55 at 1). She alleges that on July 28, 2015, Dr. McKinney prescribed Plaintiff "the real-life experience" and ordered that Plaintiff be provided the items necessary to

freely live as a female. *Id.* Plaintiff admits Dr. McKinney's order did not specify what items Plaintiff should be allowed to have. *Id.* However, Plaintiff alleges that the WPATH standard of care recommends the "triadic therapy," which includes hormone therapy, "real-life experiences," and sex reassignment surgery for treating GID/GD. *Id.* at 2. Plaintiff alleges she explained to Dr. Greene that the "real-life experience" is a serious part of her treatment, but Dr. Greene, a TDCJ medical doctor who is not a GD specialist, refused Dr. McKinney's orders, citing the TDCJ policy. *Id.* Plaintiff alleges she explained to Dr. Greene that he was violating clearly established law and professional standards of care, but Dr. Greene said he would not comply until TDCJ's policy clearly provides such treatment. *Id.* at 2-3. Plaintiff alleges Dr. Greene is violating her Eighth Amendment rights by denying the treatment prescribed by Dr. McKinney. *Id.* at 1. Plaintiff seeks a declaration that Dr. Greene's acts violate Plaintiff's constitutional rights and an injunction granting Plaintiff the treatment prescribed by Dr. McKinney. *Id.* at 4.

Because Plaintiff is proceeding *in forma pauperis* in this action, her Supplemental Complaint is subject to *sua sponte* dismissal under 28 U.S.C. § 1915(e)(2), which mandates dismissal "at any time" if the court determines that the action "fails to state a claim on which relief may be granted" or "is frivolous or malicious." *See also Neitzke v. Williams*, 490 U.S. 319, 328 (1989) (A complaint filed *in forma pauperis* that lacks an arguable basis in law should be dismissed under 28 U.S.C. § 1915).

Plaintiff's allegations against Dr. Greene fail to amount to a constitutional violation. As an initial matter, Plaintiff admits Dr. McKinney did not specify what items Plaintiff should be permitted to have to enjoy the "real life experience." It is Plaintiff's conclusion that Dr. McKinney intended to prescribe SRS. However, even assuming Dr. McKinney intended to prescribe Plaintiff SRS, Plaintiff cannot state a claim for deliberate indifference based on Dr.

Greene's refusal to provide Plaintiff with SRS in accordance with TDCJ policy. The Court holds in this Order that the TDCJ's policy does not violate the Eighth Amendment. Moreover, Plaintiff never alleges Dr. Greene "refused to treat [her], ignored [her] complaints, intentionally treated [her] incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino*, 239 F.3d at 756. Plaintiff states in her Complaint that she is receiving mental health services and hormone therapy. Plaintiff's disagreement with Dr. Greene's treatment does not amount to an Eighth Amendment violation. Thus, Plaintiff fails to state a claim upon which relief may be granted, and her claim against Dr. Greene is dismissed as a matter of law.

IX. Conclusion

It is **ORDERED** that Defendant Livingston's Motion for Summary Judgment is **GRANTED** as to all claims. It is further

ORDERED that Plaintiff's claim against Dr. Greene is **DISMISSED** for failure to state a claim upon which relief can be granted and Plaintiff's Motion to Compel Dr. Greene to respond to Plaintiff's 1983 Complaint is **DENIED** (Doc. 66). The dismissal of this case for failure to state a claim will count as a "strike" for the purpose of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 385-87 (5th Cir. 1996). Plaintiff is admonished that if she accumulates three "strikes" pursuant to § 1915(g), she may not proceed in forma pauperis in any civil action or appeal filed while she is incarcerated or detained in any facility unless she is under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g). It is further

ORDERED that any and all motions not previously ruled upon by the Court are hereby **DENIED**. It is further

ORDERED that the Clerk of the Court is directed to e-mail copies of this Order and the Judgment to the TDCJ—Office of the General Counsel and the Pro Se Clerk for the United States District Court for the Eastern District of Texas.

SIGNED this 31st day of August, 2016.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE