IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING, Plaintiff, v. ASHTON CARTER, *et al.*, Defendants.	)	Civil Action No. 1:14-cv-1609 (CKK) **REDACTED – ORIGINAL FILED UNDER SEAL**

DEFENDANTS'

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INTRODUCTION

Plaintiff Chelsea Manning is a transgender female currently confined at the United States Disciplinary Barracks (USDB), which is a maximum-security military prison for men, located in Fort Leavenworth, Kansas. Manning filed this lawsuit against Defendants—the Department of Defense (DOD) and several DOD/Army officials—originally alleging only a single claim for medical care under the Eighth Amendment, but now alleging a claim under the Fifth Amendment's guarantee of equal protection as well.

As described in Manning's Amended Complaint, Manning is currently receiving a significant amount of medical treatment for her gender dysphoria. *See* Am. Compl. (ECF No. 41) ¶¶ 72, 77, 93-98. Specifically, Manning is receiving weekly psychotherapy, including psychotherapy specific to gender dysphoria, the provision of female undergarments, permission to wear prescribed cosmetics in her daily life at the USDB, speech therapy, and cross-sex hormone therapy. *Id.* Notwithstanding all of these treatments, Manning claims that Defendants have violated the Eighth Amendment by not permitting her to wear a feminine hairstyle—*i.e.*, hair longer than two inches that may fall over her ears—which would be different from what is permitted for Manning's fellow inmates, but consistent with what is permitted for inmates at the military's female prison. Separately, Manning also claims that the USDB's enforcement of its hair restriction violates the Fifth Amendment's guarantee of equal protection, because inmates in the military's female prison are permitted to have longer hair.

The issue before this Court is thus quite narrow—whether the USDB, a military prison for men, is required to stop enforcing its military grooming standards and allow Manning, an incarcerated transgender female, to grow her hair longer than what is permitted for the rest of her fellow prisoners. This narrow issue is fundamentally intertwined, however, with preserving core prison-security and military values at the UDSB, such as uniform treatment and good order and

discipline. Manning asks this Court to second-guess the considered determinations of military and corrections professionals as to how best to protect those interests. Such judicial intervention is unwarranted here, and Manning's Amended Complaint should be dismissed for several independent reasons.

First, Manning's claims are procedurally improper. This Court must abstain from ruling on her Eighth Amendment claim because Manning is required to pursue that claim first before the military courts. Military courts, like state courts, are not subordinate to federal civilian courts, and the Supreme Court therefore has made clear that federal courts are largely precluded from intervening in pending military court proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738 (1975). Here, Manning is currently appealing her court-martial conviction, and she may raise Eighth Amendment conditions-of-confinement claims as part of that appeal. Thus, this Court may not intervene in that proceeding by deciding the Eighth Amendment issue now, without first allowing military courts the opportunity to apply their expertise and address Manning's claim.

Furthermore, both Manning's Eighth Amendment and equal protection claims are barred

"result[s] in the denial of the minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Yet Manning has not shown (and cannot show) that restricting her hair length comes even close to meeting this level of extreme deprivation required to state an Eighth Amendment violation.

As for the subjective requirement, Manning must show that the officials responsible for her deprivation "have a sufficiently culpable state of mind"—here, that they exhibit "deliberate indifference to [Manning's] serious medical needs[.]" *Id.* at 834-35. But Manning has not plausibly alleged that the Defendants are *actually aware* that Manning's treatment is inadequate, and yet are *deliberately indifferent* to that need. To the contrary, the significant amount of treatment provided to Manning for her gender dysphoria is the very opposite of deliberate indifference. Furthermore, Defendants' decision-making regarding Manning's treatment is motivated by significant and legitimate security, military, and penal concerns—which likewise preclude a finding of deliberate indifference.

Third, Manning's equal protection claim must also be dismissed. As a threshold matter, Manning is not similarly situated to the female military inmates to which Manning compares herself. *See* Am Compl. ¶ 130. Those female inmates are confined in different facilities with different grooming standards, whereas Manning is confined at the USDB, a military prison for men that has a uniform rule of no hair longer than two inches. Making an exception to the USDB's generally applicable hair restriction would pose a signi gend a28wocda tpon

thereby undermining the USDB's important interests in prison security and military discipline. For all of these reasons, Manning's Amended Complaint should be dismissed.

BACKGROUND

I. THE MILITARY AS DISTINCT FROM CIVILIAN SOCIETY

Courts have "long recognized that the military is, by necessity, a specialized society separate from civilian society."

Military Justice (UCMJ), along with special military courts to handle

One unique feature of the military judicial system is that a military court, when hearing the direct appeal of a criminal conviction, is also permitted to address any conditions-of-confinement claims—arising under the Eighth Amendment, or the military's equivalent codified in Article 55 of the UCMJ. *See, e.g.*, *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) ("We now expressly hold that we have jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55."); *see also* 10 U.S.C. § 855 (Article 55). Prospective relief is available through military courts' authority under the All Writs Act. *See United States v. Miller*, 46 M.J. 248, 251 (C.A.A.F. 1997); *see also Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999). And a successful Eighth Amendment claim on direct review can even lead to the reduction of a servicemember's term of confinement. *See, e.g.*, *United States v. Kinsch*, 54 M.J. 641, 649 (A. Ct. Crim. App. 2000) (granting servicemember "one month of confinement relief" based on post-conviction Eighth Amendment violation), abrogated on other grounds, *United States v. Bright*, 63 M.J. 683 (A. Ct. Crim. App. 2006).

2. Military Prisons

In addition to creating a separate judiciary, Congress has also authorized the Department of Defense to establish military correctional facilities to confine those who violate the UCMJ. *See* 10 U.S.C. § 951(a). Again, the purpose of the military corrections system is different from that of the civilian system: military corrections facilities must not only "provide for the education, training, rehabilitation, and welfare of offenders," *id.* § 951(b)(2), but must also be operated "with a viel0.o1(op(o tae)4(r)3er3(](1()10(, r)3)-2(us)-1(ot)-2(r)3itio2(on t)du(a)4(ty)90 Tw 5(o)ilus-1

Corrections System] is an integral part of the military justice system and assists commanders in the maintenance of discipline and law and order by providing a uniform system of incarceration and correctional services for those who have failed to adhere to legally established rules of

See id. ¶ 57; Exh. F at 4. Several weeks later, on January 21, 2014, Manning submitted a request to the Inspector General (IG),

See Am. Compl. ¶ 68; Exh. G (attached hereto). The IG responded on April 4, 2014,

Am. Compl. ¶ 70; Exh. G at 2.

Two days prior to the IG's response, Manning submitted another Form 510 to USDB officials—

See Am. Compl. ¶ 58; Exh. F at 5-9. Manning renewed that request on July 23, 2014. *See* Am. Compl. ¶ 59; Exh. F at 10. And on August 21, 2014, Manning submitted a Form 510

Am. Compl. ¶ 60; Exh. F at 11-13.

B. Manning's Receipt of Treatment

In March 2015, the parties filed a status report clarifying that Manning "does not dispute the adequacy of the following treatments (assuming that they continue): the provision of female undergarments, cosmetics, speech therapy, and cross-sex hormone therapy." ECF No. 37 at 1. But Manning continued to dispute, *inter alia*, "Defendants' failure to permit Manning to grow longer hair[.]" *Id.* Regarding the issue of hair length, the USDB determined that it would "re-evaluate whether Manning may be permitted to grow longer hair consistent with the USDB's safety and security concerns within seven months of the commencement of cross-sex hormone therapy." *Id.* at 2; *see also* Am. Compl. ¶ 97; Feb. 2015 Risk Assessment (Exh. K) ¶ 19.

The USDB completed its re-evaluation on September 18, 2015, when Col. Nelson, Commandant of the USDB, approved the recommendation contained in a memorandum to her from Deputy Commandant Thomas Schmitt. Am. Compl. ¶ 100 (quoting Memorandum for Record,

See id. ¶ 12(c).

Based on these factors, the Sept. 2015 Risk Assessment concluded that

Id. ¶¶ 14, 14(a). In addition:

Id. ¶ 14(b). Based upon this recommendation, and after "carefully considering the recommendation that the wear of a feminine hairstyle is medically appropriate, and weighing all associated safety and security risks presented," Col. Nelson determined that "[p]ermitting Inmate Manning to wear a feminine hairstyle is not supported by the risk assessment and potential risk mitigation measures at this time." *Id*. at pg. 1; *see also* Am. Compl. ¶ 100; ECF No. 39.

C. Filing of the Amended Complaint

Based on the USDB's decision not to permit Manning to wear a feminine hairstyle, the parties agreed that, given the factual developments since the filing of the original Complaint, this case should proceed by: (1) Manning withdrawing her motion for preliminary injunction; (2) Manning filing an Amended ComplaintCarer 61i3(e)32nninginine ha10(e)3.tmmpo9(a)4.7(7)5.tem. Compnded

care, *see id.* ¶¶ 85-100, Manning's Amended Complaint also added a new claim—alleging that "Defendants have engaged in impermissible sex discrimination in violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause," *id.* ¶ 133, based on Defendants' alleged "refus[al] to permit Plaintiff to follow the hair length and grooming standards followed by other female prisoners[.]" *Id.* ¶ 132.

Defendants now move to dismiss the Amended Complaint in its entirety.

STANDARD OF REVIEW

factual allegation[.]" *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

ARGUMENT

For several reasons, Manning's Amended Complaint should be dismissed. First, Manning's claims are procedurally improper. This Court must abstain from deciding the Eighth Amendment claim because Manning has not yet provided the military courts an opportunity to apply their special expertise to her claim. Furthermore, Manning failed to properly exhaust the military's administrative remedies available on both her Eighth Amendment and equal protection claims. The PLRA, therefore, requires that both claims be dismissed as unexhausted.

Second, Manning fails to state a cognizable Eighth Amendment claim. Manning has not established, and cannot establish, that the alleged wrongdoing here—enforcing the grooming standard that prevents Manning from growing her hair longer than two inches—constitutes "the denial of 'the minimal civilized measure of life's necessities[.]'" *Brennan*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).[2] Manning also has not plausibly alleged that the Defendants here are *actually aware* of an objectively serious inadequacy in her treatment, and yet are deliberately indifferent to that inadequacy. To the contrary, Manning's allegations establish that Defendants are acting appropriately—providing sufficient and appropriate medical treatment, while also ensuring that any treatment is provided safely and securely within the military correctional environment in which Manning lives.

[2] Restricting hair length to two inches is not the only applicable grooming standard contained within AR 670-1 and the USDB MGI. *See* Background, Section I.B. For ease of reference, however, Defendants refer to the length restriction as shorthand for all such standards.

the absence of exhaustion of available intraservice corrective measures." *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986) (modification omitted). Manning's claims here should be dismissed under all three doctrines.

A. Manning's Eighth Amendment Claim Must Be Dismissed Because This Court May Not Interfere With a Pending Military Proceeding

The Supreme Court has held unequivocally that, even if jurisdiction exists, civilian courts must abstain from interfering with a pending military proceeding. *Councilman*, 420 U.S. at 754-61. Military courts "are not subordinate to the federal courts," *Williams*, 787 F.2d at 561, and therefore the same considerations "barring intervention into pending state criminal proceedings" apply "in equal measure" with respect to intervention in pending court-martial proceedings. *Councilman*, 420 U.S. at 756.

The Court's decision in *Councilman* sets forth two rationales for why abstention is generally necessary. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006); *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997); *Hennis*, 666 F.3d at 276-77. First, "[t]he military is a specialized society separate from civilian society with laws and traditions of its own developed during its long history." *Councilman*, 420 U.S. at 757 (quoting *Parker*, 417 U.S. at 743, modifications omitted). Thus, military courts should be given an opportunity to address "matters as to which the[ir] expertise . . . is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts." *Councilman*, 420 U.S. at 760; *see also Hamdan*, 548 U.S. at 586. Second, "federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created an integrated system of military courts and review procedures," *Hamdan*, 548 U.S. at 586, particularly because "it must be assumed that the military court system will vindicate servicemen's constitutional rights." *Councilman*, 420 U.S. at 758.

Second, the resolution of Manning's Eighth Amendment claim could affect the ultimate length of her confinement. Military courts may reduce the length of an inmate's incarceration based on a post-conviction Eighth Amendment violation. *See, e.g.*, *Kinsch*, 54 M.J. at 649. Review of the length and manner of sentence is a fundamental duty of the military courts of appeals, *see* 10 U.S.C. § 866(c), and therefore a civilian court should be particularly loath to decide an issue that could affect a military tribunal's ongoing review of a term of confinement. Given the availability of review through the military courts, therefore, Manning's Eighth Amendment claim (Count I) must be dismissed as improperly before this Court.

B. Both of Manning's Claims Must Be Dismissed as Unexhausted

Independent of the abstention issue, both of Manning's claims must also be dismissed as improperly exhausted. Both parties agree that Manning's lawsuit is subject to the PLRA's exhaustion requirement. *See* ECF No. 15 at 7. And exhaustion of intra-military remedies would be required even absent the PLRA. *See Bois*, 801 F.2d at 468. Here, Manning did not complete all available remedies for an express request to wear a feminine hairstyle for medical reasons. And with respect to the equal protection claim, Manning has *never* raised that issue internally within the USDB or the Army. Thus, both claims should be dismissed.

1. The PLRA Requires Exhaustion on a Claim-By-Claim Basis

The PLRA provides that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is required for all "available" remedies; "those remedies need not meet federal standards, nor must they be plain, speedy, and effective." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Prisoners are required to exhaust their remedies before filing suit, even if the prisoner later files an Amended Complaint. *See Jackson v. Dist. of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001). If a

Complaint contains some exhausted claims and some non-exhausted claims, only the exhausted claims may proceed. *See Jones v. Bock*, 549 U.S. 199, 219-24 (2007).

The purpose of exhaustion is to "afford[] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter*, 534 U.S. at 525. The facility may take corrective action "thereby obviating the need for litigation," or at the very least the facility's response will create "an administrative record that clarifies the contours of the controversy." *Id.*

The adequate level of detail in a grievance "will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 218. "Even so, there is undoubtedly a threshold level of information an inmate must provide in the administrative process in order to meet the federal exhaustion requirement." *Goldsmith v. White*, 357 F. Supp. 2d 1336, 1339 (N.D. Fla. 2005). Thus, "a grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004); *see also Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004); *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002); *Smith-Bey v. CCA/CTF*, 703 F. Supp. 2d 1, 7 (D.D.C. 2010); *Goldsmith*, 357 F. Supp. 2d at 1339.

2. Manning Did Not Exhaust All Available Remedies Expressly Requesting a Feminine Hairstyle As Part of Her Medical Treatment

As discussed above, USDB inmates are required to submit their complaints or grievances through Form 510s. *See* USDB MGI (Exh. E), ch. 2-4;

PA/HIPAA

PA/HIPAA

PA/HIPAA Memorandum For Receptee Inmates, USDB, *Access to Medical Care/Inmate Grievance Procedure* (Feb. 1, 2013) (attached hereto as Exh. M) (signed by Manning upon her arrival); *see also* AR 190-47, ch. 10-14(a) ("Prisoners will be advised at the time of their incarceration of their rights to submit complaints and grievances to the facility commander or a designated representative and the inspector general under provisions of AR 20–1."); *cf.* Am. Compl. ¶¶ 68-69.

Here, Manning did not complete the grievance process for an explicit request to wear a feminine hairstyle as part of her medical treatment. Although Manning submitted both Form 510s and an IG request in January 2014, PA/HIPAA; IG

PA/HIPAA; IG *See, e.g.*, Exh. F at 1 (Aug. 28, 2013 Form 510, PA/HIPAA

PA/HIPAA

PA/HIPAA *id.* at 4 (Jan. 5, 2014 Form 510, PA/HIPAA

Manning's IG request PA/HIPAA; IG

PA/HIPAA; IG . *See* Exh. G at 1. Thus, these earlier grievance submissions did not exhaust any express request for permission to wear a feminine hairstyle as part of her medical treatment.

Manning later submitted Form 510s that PA/HIPAA

PA/HIPAA *See, e.g.*, Exh. F at 5-13 (Form 510s dated Apr. 2, 2014; July 23, 2014; and Aug. 21, 2014). But those Form 510s were submitted well after the January 2014 IG request, and PA/HIPAA; IG

never completed the exhaustion process for the particular Eighth Amendment claim she seeks to bring here—*i.e.*, an express request for a feminine hairstyle as part of her medical treatment. *See Woodford v. Ngo*, 548 U.S. 81, 100 (2006) (interpreting the PLRA as saying that "if the party

person's treatment does not conform to the required medical standards) is very different than a complaint about sex discrimination (*e.g.*, that a person is unfairly being treated differently than other similarly situated men/women). *Compare, e.g.*, Am. Compl. ¶

measure of life's necessities." *Brennan*, 511 U.S. at 834. For the subjective requirement, Manning must show that the officials responsible for her deprivation "have a sufficiently culpable state of mind"—*i.e.*, that they exhibit "deliberate indifference to [Manning's] serious medical needs[.]" *Id.* at 834-35.

Manning cannot make either showing here. First, Manning cannot establish that her alleged deprivation—the prohibition on growing longer hair—is objectively serious, equivalent to "the denial of the minimal civilized measure of life's necessities." *Brennan*, 511 U.S. at 834. Quite simply, the Eighth Amendment does not require that prisoners be permitted to grow hair longer than two inches, especially in a military setting. In light of all the other treatments she is currently receiving, Manning cannot establish an objectively serious deprivation as a matter of law, and the Amended Complaint does not sufficiently allege otherwise.

With respect to the subjective element, Manning has not plausibly alleged that the Defendants here are *actually aware* that Manning's treatment is inadequate, and yet are *deliberately indifferent* to that need. Manning's current treatment plan demonstrates careful attention to her medical needs, the very opposite of deliberate indifference. Indeed, with respect to hair specifically, Defendants have determined that security concerns prevent provision of that treatment, which is entirely appropriate (if not required). *See Kosilek v. Spencer*, 774 F.3d 63, 83 (1st Cir. 2014) (en banc). The Amended Complaint expressly acknowledges these security concerns, as it must. Am. Compl. ¶ 123. Thus, no Eighth Amendment claim exists here.

A. Manning Cannot Establish that the Failure to Permit Longer Hair Is an Objectively Serious Deprivation Under the Eighth Amendment

Defendants do not dispute that gender dysphoria, in many circumstances, amounts to an objectively serious medical condition that requires appropriate treatment under the Eighth Amendment. But Manning is receiving significant treatment for her gender dysphoria: regular

psychotherapy,

Finally, Manning's challenge to the enforcement of the hair restriction must be viewed in the appropriate context. Manning is in a posture notably distinct from that of a typical prisoner

sanctioned psychological harm" that would "reflect the deprivation of the minimal civilized measures of life's necessities"). With respect to potential future harm, the inmate must "show that he is incarcerated under conditions posing a substantial risk of serious harm." *Brennan*, 511 U.S. at 834. The inmate must demonstrate that he is currently facing the risk, and that "society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). "In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id.*

Here, Manning's allegations are insufficient to establish either harm as objectively serious under the Eighth Amendment. First, Manning alleges generally that "[e]very day that goes by without appropriate treatment, Plaintiff experiences anxiety, distress, and depression." Am. Compl. ¶ 106. Later in the Amended Complaint, when elaborating on the psychological effect of being unable to grow longer hair, Manning alleges that it "causes her to feel hurt and sick," Am. Compl. ¶ 107, and that she "feels like a freak and a weirdo – not because having short hair makes a person a less of a woman – but because for her, it [] undermines specifically recommended treatment and sends the message to everyone that she is not a 'real' woman." *Id.* ¶ 110. These allegations are far from the type of extreme psychological distress necessary to state an objectively serious Eighth Amendment claim. *See, e.g.*, *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (citing a case involving a "guard placing a revolver in inmate's mouth and threatening to blow prisoner's head off"); *Chandler v. D.C. Dep't of Corrs.*, 145 F.3d 1355, 1361 (D.C. Cir. 1998) (permitting Eighth Amendment claim for psychological harm to proceed based on allegations that "a guard threatened to have [the plaintiff] killed and

acknowledgement that many women wear short hair, *see* Am. Compl. ¶ 110, further highlights why permission to grow long hair does not constitute one of the "minimal civilized measures of life's necessities."

Furthermore, nowhere does Manning allege that she is currently facing a substantial risk of serious harm. At most, Manning alleges that she might face such a risk at some point in the future, perhaps within the next several years. *See* Am. Compl. ¶ 111 ("Plaintiff fears that . . . her anguish will only escalate and she will not be able to survive the 35 years of her sentence, let alone the next few years."). This vague allusion to a potential future risk of harm is insufficient to establish that Manning is currently suffering an obje4(tc)-2( )]T(ve)4(t)-2(y)20(e)4((e)4(r)3(i)-2(ous)-

present treatment; and on that issue, Manning's allegations are insufficient.[7] Even assuming that the hair restriction could constitute an objectively serious deprivation, therefore, Manning has not plausibly alleged as much here.

B. Manning Has Not Plausibly Alleged Deliberate Indifference

Manning's allegations also do not state a claim as to the subjective prong of the Eighth Amendment analysis. As discussed above, in addition to the objective component, the Eighth Amendment is violated only upon showing "a sufficiently culpable state of mind" by the offending official, *Wilson*, 501 U.S. at 298, which requires "obduracy and wantonness" not mere "inadvertence or error in good faith[.]" *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

In the medical context, "[i]t is well-established that mere disagreement over the proper treatment does not create a constitutional claim." *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998); *see also Banks v. York*, 515 F. Supp. 2d 89, 103 (D.D.C. 2007). Because "[p]risoners do not have a constitutional right to any particular type of treatment," there is no Eighth Amendment violation when prison officials "in the exercise of their professional judgment . . . refuse to implement a prisoner's requested courh [(B)1(ank)4/1t,tAn.(on w-2(r)31n w-nt)-."

drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Brennan*, 511 U.S. at 837. The "deliberate indifference" inquiry is "an appropriate vehicle to consider arguments regarding the realities of prison administration." *Helling*, 509 U.S. at 37.

As described in further detail below, the allegations of the Amended Complaint do not state a claim that any of the named Defendants has a sufficiently culpable state of mind as to the decision on Manning's hair length. On the contrary, Defendants already have provided significant treatment, while appropriately taking into account military and prison security concerns, as they must.

1. The Army's Actions Demonstrate Their Commitment to Providing Appropriate Treatment

The Amended Complaint does not allege, nor could it, that Defendants have ignored or denied their obligation to provide Manning with appropriate medical treatment for her gender dysphoria. On the contrary, Defendants affirmatively have committed to creating and implementing a treatment plan for this diagnosis. As Col. Nelson stated over a year ago in a letter to Manning: "The Army

that Defendants have not acted in good faith with regard to Manning's treatment, even though Manning complains about the pace of treatment. *See Scott v. Dist. of Columbia*, 139 F.3d 940, 944 (D.C. Cir. 1998) (good faith, but imperfect, effort to keep prison smoke free does not establish deliberate indifference); *Arnold v. Wilson*, No. 1:13-CV-900, 2014 WL 7345755, at *6 (E.D. Va. Dec. 23, 2014) (holding that "the two-year delay in prescribing plaintiff with hormones was not the result of deliberate indifference" because "defendants were aware of plaintiff's concerns, and were working, albeit slower than she liked, to help her").

The allegations of the Amended Complaint simply do not state a claim that Defendants are deliberately indifferent based solely on their decision not to allow Manning to grow longer hair. The history of careful consideration of Manning's treatment needs and risks within the USDB demonstrates that Manning's treatment decisions, including the decision on hair length, have been made thoughtfully and in good faith—the very opposite of the "obduracy and wantonness" characteristic of deliberate indifference. *Scott*, 139 F.3d at 944.

2. Manning Has Not Plausibly Alleged Deliberate Indifference By Any of the Defendants

The Amended Complaint should also be dismissed because it fails to adequately allege deliberate indifference as to any of the particular Defendants. As to the four individual Defendants, the Amended Complaint is devoid of specific factual allegations regarding the requisite mental state. Nor does suing the Department of Defense as an entity save the Amended Complaint from dismissal.

The Amended Complaint names four individual Defendants: Ashton Carter, the Secretary of Defense; Maj. Gen. David E. Quantock, the former Provost Marshal General of the United States Army (who was in charge of the Army Corrections Command); Col. Erica Nelson, the Commandant of the USDB; and Lt. Col. Nathan Keller, the Director of Treatment Programs at

matter) has a “sufficiently culpable state of mind.”

area." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). In particular, prison officials are entitled to deference about how to administer medical care in light of their legitimate security concerns. The First Circuit recently explained:

> When evaluating medical care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight. "Wide-ranging deference" is accorded to prison administrators "in the adoption and execution of policies and practices that in their judgement are needed to maintain institutional security." In consequence, even a denial of care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prisoner safety and institutional security.

Kosilek, 774 F.3d at 83 (quoting *Whitley*, 475 U.S. at 321-22) (internal modifications, citations omitted); *see also Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir. 2011) ("Medical 'need' in real life is an elastic term: security considerations also matter at prisons . . . and administrators have to balance conflicting demands."); *cf. Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (penological concerns may be considered in reviewing an Eighth Amendment claim); 18 U.S.C. § 3626(a)(1)(A) (PLRA provision requiring the Court to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief").

The deference to officials' decision-making about how to run a prison is even stronger in a military setting. The USDB has a unique, military mission, *see* 10 U.S.C. § 951, which makes it fundamentally different from civilian prisons. The USDB has a distinct inmate population, governed by distinct military norms, customs, and regulations. *See* Background, Section I. The Court therefore should evaluate the USDB's restriction on hair with appropriate deference to the USDB's military judgments, *see*

that these concerns were illegitimate or pretextual. In light of the deference appropriate here, the Amended Complaint should be dismissed on this ground alone. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 557-58 (7th Cir. 2011) (prison officials entitled to deference related to security concerns unless the actions are "taken in bad faith and for no legitimate purpose" (quoting *Whitley*

While Manning may disagree with the risk perceived by the USDB, the prison officials are entitled to deference in this decision-making, especially where, as here, there is no allegation of pretext. Further, even if Manning herself is unconcerned about this risk, her view does not

the USDB has a two-inch restriction on hair length, and any exception to that uniform restriction creates safety and security concerns. Thus, Manning cannot be similarly situated to female prisoners incarcerated in facilities without that same restriction—particularly given that Manning does not challenge her placement at the USDB. *See* ECF No. 15 at 21; note 3, *supra*.

As the D.C. Circuit has explained, the "similarly situated" inquiry is a threshold one that must be proven as part of any equal protection claim:

> The Fourteenth Amendment's Equal Protection Clause requires States to treat similarly situated persons alike. . . . The Constitution, however, does not require things which are different in fact or opinion to be treated in law as though they were the same. Thus, the dissimilar treatment of dissimilarly situated persons does not violate equal protection. The threshold inquiry in evaluating an equal protection claim is, therefore, to determine whether a person is similarly situated to those persons who allegedly received favorable treatment.

Women Prisoners of the D.C. Dep't of Corrs. v. Dist. of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996) (internal citations and quotations omitted). A distinction in treatment between or among different prison facilities does not itself create an equal protection claim. *See Koyce v. U.S. Bd. of Parole*, 306 F.2d 759, 762 (D.C. Cir. 1962) ("In determining whether [a prisoner] is being denied equal protection of the laws the class to which he belongs consists of the persons confined as he was confined, subject to the same conditions to which he was subject."). Indeed, courts often find that prisoners incarcerated in different facilities are not similarly situated for purposes of equal protection analysis. *See Noble v. United States Parole Comm'n*, 194 F.3d 152, 154-155 (D.C. Cir. 1999) (prisoners in the custody of different government agencies are not similarly situated); *see also, e.g.*, *Klinger v. Dep't of Corrs.*, 31 F.3d 727, 732 (8th Cir. 1994) (male and female prisoners housed at different prisons were not similarly situated for Equal Protection purposes, because the prisons were "different institutions with different inmates each operating with limited resources to fulfill different specific needs"); *Pargo v. Elliott*, 894 F. Supp. 1243,

1290 (S.D. Iowa), *aff'd*, 69 F.3d 208 (8th Cir. 1995); *Marshall v. Fed. Bureau of Prisons*, 518 F. Supp. 2d 190, 196 (D.D.C. 2007).

Here, Manning is not similarly situated because, unlike inmates housed at the military's female prison, Manning is housed in a military prison for men with grooming restrictions requiring short hair. *See* Am. Compl. ¶ 19. From the face of the Amended Complaint it is apparent that *unlike* female prisoners in a women's prison where female grooming standards are applied, if Manning were allowed to wear medium or long hair, she would stand out as unique from the rest of the USDB inmate population. Manning certainly has not pled any facts that would allow the Court to reach the opposite conclusion. Moreover, as the USDB's Risk Assessments have discussed,

See Section II.B.3, *supra*. This effect simply would not occur in an all-female prison where, as the Amended Complaint alleges, female prisoners are permitted additional grooming options. *See* Am. Compl. ¶ 19. Thus, contrary to Manning's allegations, she is not similarly situated to other female military prisoners in different facilities. *See Koyce*, 306 F.2d at 762 ("[T]he class to which [a prisoner] belongs consists of the persons confined as he was confined, subject to the same conditions to which he was subject.").[10]

[10] Furthermore, even if Manning could overcome this obvious distinction between the USDB and a military prison for women, the Amended Complaint still does not contain sufficient factual allegations to establish that Manning is "similarly situated" to other female military inmates. The Amended Complaint does not identify a specific military correctional facility for comparison, nor does it plead facts such as the prison's security level, size, and other relevant attributes about the prison or prisoners. *See Tanner v. Fed. Bureau of Prisons*, 433 F. Supp. 2d

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governmental interest. *See*

Moreover, the Sept. 2015 Risk Assessment

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Dated: November 10, 2015

Respectfully submitted,

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