The Honorable S. Kate Vaughan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON - TACOMA

FOUNDATION AGAINST INTOLERANCE AND RACISM, INC., dba FAIR FOR ALL, INC., and FAITH BOOHER-SMITH, Plaintiffs. vs. WASHINGTON DEPARTMENT OF CORRECTIONS, and TIM LANG, in his official capacity as Secretary of the Department of Corrections, Defendants.	NO. 3:26-cv-05448-RSL-SKV PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT ORAL ARGUMENT REQUESTED NOTED ON MOTION CALENDAR: NOVEMBER 23, 2026

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I. INTRODUCTION

Defendants' renewed motion asks the Court to hold that a woman who was beaten by a male inmate housed in Washington's only women's prison, and who must still eat, walk, and use the bathroom alongside other male inmates housed there because of Defendants' reckless and unlawful policy permitting males to house with female inmates, has suffered no injury traceable to that policy. It asks the Court to hold that Deputy Secretary Scott Russell, whom Defendants themselves identify as the final decisionmaker on every inmate transfer request under the policy, and Secretary Tim Lang, who can rescind the policy at will and decides appeals under it, have no connection to its enforcement. Neither position withstands the well-pleaded allegations in the Amended Complaint.

Plaintiff Faith Booher-Smith's injuries are concrete, ongoing, and caused by a policy that Defendants continue to administer. An injunction barring that policy's application to house men at the Washington Corrections Center for Women ("WCCW") would redress them. Russell and Lang are proper *Ex parte Young* defendants because they are the officials who are actively involved in the application of the policy and can change how the policy is applied. Additionally, the Amended Complaint plausibly alleges deliberate indifference and sex-based unequal treatment. Defendants' renewed motion therefore should be denied.

II. RELEVANT FACTS

By statute, "[a]ll female persons" sentenced to confinement in Washington "shall be committed to the Washington correctional institution for women." RCW 72.02.250; Dkt. 23 ("Am. Compl.") ¶ 27. No statute provides for committing men to WCCW. Defendants nonetheless administer Washington Department of Corrections ("WDOC") Policy 490.700 (the "Policy"), under which a biologically male inmate may request placement "in gender-affirming housing," in other words, the women-

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only prison. Am. Compl. ¶¶ 28-29. A multidisciplinary team ("MDT") reviews the male inmate's request and delivers a recommendation to the Deputy Secretary, after which "the final housing decision is made by the Deputy Secretary." Am. Compl. ¶¶ 23, 29; *see* Dkt. 35 ("Mot.") at 4. The Secretary decides appeals arising from this process and may amend or revoke the Policy at any time. Am. Compl. ¶ 22; Mot. at 4, 14. The Policy asks the male inmate whether he believes that he poses a risk to the women at WCCW; it gives the women housed there no voice. Am. Compl. ¶¶ 30-31. No procedure allows a female inmate to request housing only with other women. *Id.* ¶ 80.

Before Booher-Smith was attacked, Defendants were on notice of the danger posed by Christopher Williams. The Superintendent of the men's facility from which Williams sought transfer expressly recommended against it because Williams was a violent convict with a serious infraction record and a history of inflicting life-threatening injuries "to a female victim." Am. Compl. ¶¶ 8, 55. Defendants' decisionmakers transferred him anyway. *Id.* ¶¶ 24, 55-56. FAIR warned WDOC and Secretary Lang of the dangers of physical, emotional and sexual harm posed to the women housed at WCCW by the transfer of males into the facility. *Id.* ¶¶ 52-53. But Defendants simply disregarded that warning and the serious risks to the women housed at WCCW. Instead, WDOC has publicly dismissed the serious risk posed by dangerous male inmates to women as a "myth." *Id.* ¶ 37.

On August 7, 2025, after weeks of stalking her, Williams sat at Booher-Smith's cafeteria table, followed her out of the cafeteria, struck her twice in the face from behind, threw her to the floor by her hair, and kicked her repeatedly. *Id.* ¶¶ 57-60. While this violence occurred, the lone corrections officer in the room, an elderly female guard, screamed and froze. *Id.* ¶¶ 43, 61-62. Despite this incident, and others alleged in the Amended Complaint, at least five male inmates continue to be housed at WCCW under the Policy, exposing Plaintiff Booher-Smith and FAIR's other

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members to substantial risk of serious harm at the hands of male inmates and the deprivation of their equal protection rights. *Id.* ¶¶ 73-77.

III. LEGAL STANDARD

To defeat a motion to dismiss under Rule 12(b)(1), Plaintiffs are not obligated to plead "detailed factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor must Plaintiffs prove their entire case at the pleading stage. It is enough to plead facts that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). On a facial challenge, the Court accepts the complaint's allegations as true, draws all reasonable inferences in the plaintiff's favor, applying the same standard as under Rule 12(b)(6). *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). To defeat a motion to dismiss under Rule 12(b)(6), a complaint survives if it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft,* 556 U.S. at 678.

IV. ARGUMENT

A. This Court Has Jurisdiction Over This Matter.

Defendants contend that the Court lacks subject-matter jurisdiction because neither Plaintiff has standing and, alternatively, because the Eleventh Amendment bars the official-capacity claims. Neither contention is correct.

1. Plaintiff Booher-Smith has standing.

To satisfy Article III, a plaintiff must have suffered an injury in fact that is fairly traceable to the defendant's conduct and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). For prospective relief, the plaintiff must show that she "has suffered or likely will suffer" an injury that "likely was caused or will be caused by the defendant." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). Booher-Smith satisfies each requirement for each claim.

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a. Booher-Smith has suffered, and continues to suffer, injury in fact.

Defendants assume "for the sake of argument" that the assault and its aftermath are an injury in fact under the Eighth Amendment. Mot. at 7. They most certainly are. And Booher-Smith alleges more than a past injury. She continues to live in daily, unavoidable proximity to male inmates housed at WCCW under the same Policy. Am. Compl. ¶¶ 73-77. The Eighth Amendment protects against exposure to conditions that pose an unreasonable risk of serious future harm, and an inmate need not wait to be attacked before seeking relief. *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Farmer v. Brennan*, 511 U.S. 825, 845 (1994). Where, as here, the alleged harm "is directly traceable to a written policy… there is an implicit likelihood of its repetition in the immediate future." *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005).

Defendants incorrectly assert that Booher-Smith "has so little contact" with the men in her unit that "she has never even had to sit next to one of them to eat." Mot. at 8. The paragraphs Defendants cite allege the exact opposite, and that Booher-Smith is regularly "required to occupy the same physical spaces" as the male inmates. Am. Compl. ¶¶ 73-74. Since the assault, Booher-Smith has plead that she has been verbally assaulted by a different male inmate, followed into the women's restroom by another, and is forced to regularly encounter them in common spaces. *Id.* ¶¶ 74-77. On a facial challenge, the allegations in the complaint control. *Leite*, 749 F.3d at 1121.

Booher-Smith also alleges a distinct equal protection injury. Washington provides its male inmates a benefit that it denies its female inmates: confinement in a single-sex facility properly designed for their safe confinement with the attendant bodily privacy of single-sex areas such as cells and restrooms. Under the Policy, Washington's female inmates are denied this protection, and are forced to be housed

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alongside male inmates in cells, restrooms and showers in a facility not designed and staffed to house biological males. Am. Compl. ¶ 110. A State that confers a benefit on one sex while denying the other an alternative equal in substance violates the Equal Protection Clause absent an exceedingly persuasive justification. *See United States v. Virginia*, 518 U.S. 515, 533, 547-54 (1996). Unequal treatment is itself a cognizable injury for purposes of standing. *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). Booher-Smith and FAIR members are personally subjected to that unequal condition every day, Am. Compl. ¶¶ 73-77, and bear the sex-specific risks it creates, *id.* ¶¶ 49, 107.

Defendants fault Booher-Smith for not alleging that she has "requested transfer to another facility and been denied." Mot. at 9. Not so. Booher-Smith submitted multiple Resolution Requests seeking, in substance, the same benefit the Policy confers on trans-identifying male inmates but denies to women: safe confinement in a female-only facility. Am. Compl. ¶ 67, 69. Booher-Smith's requests were constructively denied. *Id.* ¶ 69, 71-72.

b. Booher-Smith's injuries are fairly traceable to the Policy and to Defendants.

Defendants invoke *Alliance for Hippocratic Medicine* for the proposition that a plaintiff challenging the government's regulation of "someone else" must show that independent third parties will react in predictable ways. Mot. at 5–7. That framework does not fit this case. *Alliance* involved unregulated doctors claiming injury as a result of the FDA's regulation of a drug used by other doctors' patients, a causal chain running through the independent medical and personal choices of people outside the government's control. 602 U.S. at 382–93. Here, the actors in Defendants' chain are Defendants' subordinates, applying Defendants' Policy, inside a prison Defendants run, regulating inmates under Defendants' control and supervision.

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A causal chain does not fail simply because it is long, provided each of the encompassed links is plausible. *Mendia v. Garcia*, 768 F.3d 1009, 1012-1013 (9th Cir. 2014) (quoting *Nat'l Audubon Soc'y, Inc. v. Davis,* 307 F.3d 835, 849 (9th Cir. 2002)). Not only were Booher-Smith's injuries at the hands of Christopher Williams entirely predictable, they were in fact predicted. Williams was transferred to WCCW despite the contrary recommendation of WDOC's own officer, Superintendent Eric Jackson, who specifically warned of his serious infraction record and history of violence towards women. Am. Compl. ¶¶ 8, 55-56.

Defendants' reliance on *Chandler v. Macomber*, No. 1:21-cv-01657 JLT HBK, 2026 WL 799916 (E.D. Cal. Mar. 23, 2026), fares no better. The court in *Chandler* ruled plaintiff's theory of harm too "speculative" as it relied on the future actions of inmates "l[ying] their way through a lengthy and thorough review process." *Id.* at 17. Not so here, where Booher-Smith pleads concrete injuries caused and continuing to be caused by Defendants' deliberate indifference. In any event, *Chandler* is a non-binding decision currently on appeal.

Similarly, Defendants cite to a footnote in *Clark v. Simons*, No. 3:24-cv-06058-TMC, 2026 WL 2730613 (W.D. Wash. Sept. 16, 2026), observing that an inmate's "gender identity alone" was immaterial to the plaintiff's Eighth Amendment claim. Mot. at 8. Plaintiffs agree as their claim rests not on any inmate's "gender identity," but on their sex. At issue here is the placement of male inmates, who retain male size and strength in a facility designed, staffed, and secured for a female population. Am. Compl. ¶¶ 32, 39-43, 46-49. The male inmates' "gender identity" is not relevant; their biological sex is.

c. Enjoining the Policy would redress Booher-Smith's injuries.

Defendants argue that enjoining the Policy "would not transfer away any transgender women already housed at WCCW," would not prevent larger women

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from being housed there, and would not stop anyone from sitting at Booher-Smith's table. Mot. at 8. The first point misrepresents the prayer for relief, which asks the Court to enjoin Defendants from "enforcing or applying" the Policy "in a manner that permits male inmates to be housed at WCCW." Am. Compl. ¶ 128(b). Washington law commits only women to WCCW; the Policy is the only basis on which men are housed there; and if its application is enjoined as unconstitutional, no authority remains for them to stay. *Id.* ¶¶ 27-29.

The remaining points misstate redressability. A plaintiff need only show that relief "will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *see Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). The injury alleged is not exposure to inmates who are taller than Booher-Smith; it is exposure to men in a facility designed for women, with the sex-specific risks of physical and sexual violence that exposure creates. Am. Compl. ¶¶ 39-50.

2. FAIR has associational standing.

FAIR satisfies each element of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). First, its members would have standing in their own right. Booher-Smith does, as pleaded in the Amended Complaint, for the reasons stated above. And every female FAIR member at WCCW suffers the same ongoing equal protection injury as Booher-Smith.

Second, the interests FAIR seeks to protect are germane to its purpose. The germaneness requirement is "undemanding" and requires only "mere pertinence" between the litigation and the organization's purpose. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (quoting *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)). FAIR exists to defend equal protection and equal rights. Am. Compl. ¶ 19. This lawsuit challenges a policy that deprives women of safe single-sex confinement and exposes them to the threat of male violence.

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Defendants argue that the Eighth Amendment claim is not germane, because FAIR's stated mission does not mention "punishment" or "conditions of confinement." Mot. at 10. That argument misreads the requirements of *Hunt*. Germaneness does not require that each legal theory invoked to protect those interests appear in the organization's charter, only that the interest itself is pertinent. *Presidio,* 155 F.3d at 1159. The interest FAIR seeks to protect here is the safety and equal treatment of its female members at WCCW; it therefore pleads an Eighth Amendment claim which arises from the same facts. Counts I and III are two constitutional theories directed at the same Policy, the same facts, and the same injury to the same members.

Nor is FAIR's engagement with this matter new. FAIR has been in contact with female inmates at WCCW since 2024, launched an advocacy campaign on this issue, and wrote to WDOC and to Secretary Lang warning of the danger posed by the Policy. Am. Compl. ¶ 51. FAIR, in its letter, specifically warned that the policy deprives female prisoners of "equal protection" and constitutes "cruel and unusual punishment under the 8th Amendment." *Id.* ¶¶ 51-53. Defendants' assertion that FAIR has "no involvement in prison advocacy beyond this case," Mot. at 11, is not only incorrect, but irrelevant. Germaneness is assessed in relation to the interest the litigation seeks to protect, not the particular type of defendant. *Hunt*, 432 U.S. at 343.

3. The Eleventh Amendment does not bar the official-capacity claims.

Ex parte Young, 209 U.S. 123 (1908), permits suits against state officials in their official capacities for prospective relief against ongoing violations of federal law. The inquiry is "straightforward": whether the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). The Amended Complaint alleges ongoing

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violations and seeks declaratory and prospective injunctive relief against Defendants Lang and Russell. Am. Compl. ¶¶ 96-99, 123-125.

The only remaining question is whether Lang and Russell have the requisite connection to the challenged conduct. The requirement is "modest." *Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir. 2022). In a suit for prospective relief challenging a prison policy, "a plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013); *accord Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014). Both Defendants satisfy that standard.

a. Secretary Lang is sufficiently connected to the Policy.

Secretary Lang has authority to amend or revoke the Policy at any time and decides appeals under the Policy as a final authority. Am. Compl. ¶ 22; Mot. at 4, 14. Therefore, he actively participates in the application of the Policy, and he is an official who "can appropriately respond to injunctive relief" directed at a department policy. *Hartmann*, 707 F.3d at 1127.

Defendants' reliance on *Forward Inc. v. Macomber*, 178 F.4th 470 (9th Cir. 2026), is misplaced. There, the plaintiffs relied strictly on the California corrections secretary's general statutory responsibility for supervising prisons without alleging any department policy or specific action taken in connection to the subject of the challenged conduct. 178 F.4th at 473–74. Here, Plaintiffs do not rely on general supervisory authority. Plaintiffs challenge a specific WDOC Policy that Lang actively participates in, and which he has decided to maintain despite repeated warnings of its damage to female inmates. Am. Compl. ¶¶ 52-53; Mot. at 4.

Rivera v. Sami, No. 25-2134, ___ F.4th ___, 2026 WL 2653094 (9th Cir. Sept. 9, 2026), confirms the point. In *Rivera*, the plaintiffs sued the Building Code Council even though the provisions they challenged were handed to independent local

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government to apply. *Id.* at 8. In that case, an injunction "[could not] provide the relief that Plaintiffs seek." *Id.* at 7, 17–20. The court was careful to note that "[a]n arm of the state can both promulgate and enforce regulations," *id.* at 16–17, and reaffirmed that an official who is responsible for "ensuring that his employees follow the challenged provision" is a proper defendant. *Id.* at 14.

Lang is such an official. The Policy is applied entirely within WDOC, by his subordinates, and subject to his review on appeal as a final authority. Mot. at 4. No one outside WDOC holds enforcement authority. In addition to this, the Policy is not legislation but an internal agency directive; therefore, the separation of powers concern in *Rivera* is not present here.

b. Deputy Secretary Russell is sufficiently connected to the Policy.

Russell is the state official who "makes the final decision on all requests for 'gender-affirming housing.'" Am. Compl. ¶ 23. Defendants concede the point. Mot. at 4 ("After the headquarters MDT makes a recommendation, the Deputy Secretary or their designee makes the final decision on housing."). No male inmate is housed at WCCW under the Policy unless Russell or his designee approves it. That is not a generalized duty; it is the direct exercise of the activity Plaintiffs challenge. If the Court enjoins the Policy's application to house men at WCCW, Russell is the official who must comply. It strains logic to contend that the final decisionmaker under the Policy's process has no connection to its enforcement.

Defendants respond that there is "nothing in the policy to enforce against the plaintiffs" because the Policy is "permissive and discretionary." Mot. at 13. That misstates the doctrine. *Ex parte Young* only requires "some connection" between the official and the challenged conduct, 209 U.S. at 157; it does not require that the official enforce a law against the plaintiff herself. Prisoners routinely obtain

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prospective relief against the officials who carry out the policies that govern their confinement. *See Hartmann*, 707 F.3d at 1127; *Colwell*, 763 F.3d at 1070.

B. The Amended Complaint Pleads Valid Claims for Relief.

1. Personal participation is not required for official-capacity claims seeking prospective relief.

Defendants' Rule 12(b)(6) arguments rest on the premise that Plaintiffs must allege Lang and Russell's personal discriminatory intent behind each constitutional violation. Mot. at 15–17. This is the standard for individual-capacity damages claims, but does not govern official-capacity claims for prospective relief, in which "[a] plaintiff seeking injunctive relief against the State is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation." *Hartmann*, 707 F.3d at 1127.

Defendants' citation to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for the rule against vicarious liability, Mot. at 15, does not help them. *Monell* recognized that liability attaches where "execution of a government's policy . . . inflicts the injury," 436 U.S. at 694, and that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 690 n.55. In this circumstance the controlling question is whether the entity's "policy or custom" played a part in the violation, not whether the named official personally participated in it. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *see Hartmann*, 707 F.3d at 1127. The question under Rule 12(b)(6) is therefore whether the Amended Complaint plausibly alleges violations of the Eighth and Fourteenth Amendments. It does.

2. Count I states an Eighth Amendment claim.

A failure-to-protect claim requires conditions posing a substantial risk of serious harm and deliberate indifference to that risk. *Farmer*, 511 U.S. at 834. The Amended Complaint pleads both.

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a. Substantial risk of serious harm.

The Amended Complaint alleges that WCCW was designed, staffed, and secured for a female population; that male inmates retain male size and strength; that a disproportionate share of male inmates seeking transfer to women's facilities have violent crime and/or sex-offense histories; and that a man housed at WCCW viciously attacked Booher-Smith while the facility's security was unable to appropriately respond. Am. Compl. ¶¶ 39-49, 61-63. Moreover, men housed under the Policy have sexually assaulted, beaten, stalked, and threatened women confined at WCCW. Am. Compl. ¶¶ 6-11, 73-76, 85-86. Defendants' reliance on cases rejecting "speculative and generalized fears" and "a mere suspicion that an attack will occur," Mot. at 16 (citing *Williams v. Wood*, 223 F. App'x 670 (9th Cir. 2007), and *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986)), ignores that the harm alleged here has already repeatedly occurred. A risk is not speculative once it has been realized.

b. Deliberate indifference.

Defendants' deliberate-indifference argument asks the wrong question. They argue that Lang and Russell did not know in advance that Williams posed a specific risk to Booher-Smith, and that she did not report his stalking before the assault. Mot. at 16. But Count I does not seek damages for the assault; it seeks prospective relief against an ongoing risk. In such a suit, deliberate indifference "should be determined in light of the prison authorities' current attitudes and conduct," meaning "their attitudes and conduct at the time suit is brought and persisting thereafter." *Farmer*, 511 U.S. at 845 (quoting *Helling*, 509 U.S. at 36). The Amended Complaint alleges that Defendants know of the risk from prior litigation, incident reports, inmate Resolution Requests, their own MDT deliberations, FAIR's direct warnings to Secretary Lang, and Booher-Smith's assault and follow-up complaints, and that they have maintained the Policy without change. Am. Compl. ¶¶ 6-11, 37, 52-55, 67-72, 95.

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Defendants' emphasis on the "sudden, random, and unprovoked" character of the assault, Mot. at 16, cuts against them. A plaintiff is not required to show that officials knew she would be attacked in particular: "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Farmer*, 511 U.S. at 843. Knowledge may be inferred "from the very fact that the risk was obvious." *Id.* at 842. WDOC's own employee, Superintendent Jackson, warned that Christopher Williams posed a danger to the women confined at WCCW. A warning Defendants ignored. Defendants therefore need not have known that Williams posed a danger to Booher-Smith in particular.

Defendants next argue that FAIR warned only of sexual violence and pregnancy, not "dayroom assaults." Mot. at 17. Not so. FAIR's letter expressly warned that women "are generally smaller and have less upper and lower body strength than males" and "are vulnerable to **physical** and emotional harm in ways males are not." Am. Compl. ¶ 52 (emphasis added). The Superintendent's warning about Williams also explicitly concerned physical violence. *Id.* ¶ 55. In any event, *Farmer* does not require notice of the precise manner in which harm will occur. 511 U.S. at 843.

Finally, Defendants argue that the Policy's requirement that safety be "consider[ed]" is a reasonable response under *Farmer*, 511 U.S. at 844. Mot. at 16–17. Whether a response was reasonable is a factual question that cannot be resolved against Plaintiffs on the pleadings. The Amended Complaint alleges that Defendants transferred Williams despite a written warning about his violence against women. Defendants continue to permit multiple male inmates to remain at WCCW, and male inmates continue to be transferred there, despite the established serious risk to the women confined at WCCW. Far from conducting a serious and measured

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consideration of the safety risks, WDOC instead casually dismisses that risk as a "myth." Am. Compl. ¶¶ 37, 55.

3. Count III states an equal protection claim.

Defendants assert that the Policy "plainly does not classify inmates on the basis of sex." Mot. at 17. They do this to invoke the 'because of' not merely 'in spite of' standard for discriminatory purpose established by *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). That premise is wrong, and Defendants' reliance on *Feeney* is misplaced. The Policy classifies by sex in allocating a benefit to certain male inmates while withdrawing that same protection from female inmates.

Feeney recognized that a sex-based classification may be "overt" or "covert." 442 U.S. at 274. The threshold question under *Feeney* is not whether the terms 'male' or 'female' are used, but "whether the statutory classification is indeed neutral in the sense that it is not gender-based." *Id.* Unlike the veterans' preference statute at issue in *Feeney*, where sex was merely incidental to the statute's effect, sex is central to how the Policy operates. The following points demonstrate this.

First, the Policy is not sex neutral, because it cannot be applied without classifying inmates by sex. Washington law states that prisoners are housed by sex: WCCW is designated for "[a]ll female persons." RCW 72.02.250; Am. Compl. ¶ 27. There is no statutory justification for committing male inmates to WCCW. The Policy operates as an exception to the statutory sex-based assignment, and its effect at WCCW is to authorize housing male inmates in the women's institution. Am. Compl. ¶¶ 28-29. By Defendants' own description, the Policy permits an inmate to request housing at a facility "whose designation as a **men's** prison or **women's** prison aligns with the individual's gender identity." Mot. at 3 (emphasis added). The Policy presupposes Washington's already sex-designated facilities, and selectively gives certain males access to the female facility. Am. Compl. ¶¶ 28-29.

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Second, the Policy exclusively benefits males and burdens females. Unlike in *Feeney*, where "[t]oo many men are affected… to permit the inference that the statute is a pretext for preferring men over women," 442 U.S. at 275, every inmate admitted to WCCW under the Policy is male. Am. Compl. 1. No men are disadvantaged by the Policy; male inmates continue to serve their sentences in facilities designed for their safe confinement. By contrast, female inmates housed at WCCW lose that benefit because they must now share housing, restrooms, and showers with male inmates at a facility intended by statute to house only females. RCW 72.02.250; Am. Compl. ¶¶ 32-34, 110.

Finally, even assuming *arguendo* the Policy were treated as facially neutral—which it is not—the Amended Complaint plausibly alleges discriminatory purpose. Purpose may be inferred from the totality of the circumstances. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). Although foreseeability of a disparate impact is not alone sufficient, "actions having foreseeable and anticipated disparate impact are relevant evidence" of purpose. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *see Feeney*, 442 U.S. at 279 n.25.

Here, the Policy's burdens fall exclusively on women. Am. Compl. ¶ 110. Defendants have been repeatedly put on notice through litigation, a senior official's own acknowledgment, FAIR's written notice to the Secretary, dozens of Resolution Requests, and Booher-Smith's assault, of the specific harms the Policy imposes on women. *Id.* ¶¶ 6-11, 52-53, 67-70. And at each juncture, Defendants "chose to continue allocating the Policy's benefits to male inmates and its burdens to female inmates." *Id.* ¶ 121. This reflects "a deliberate choice to shift risk and institutional burdens onto females in order to confer advantages on trans-identifying male inmates." *Id.* ¶ 120; *see id.* ¶¶ 105, 109.

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V. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss Amended Complaint.

I certify that this memorandum contains 4,759 words, in compliance with the Local Civil Rules.

SUBMITTED this 12th day of November, 2026.

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