UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUCY AMADOR, ET AL., Plaintiffs, -against- SUPERINTENDENT OF THE DEPARTMENT OF CORRECTIONAL SERVICES ANGINELL ANDREWS, ET AL., Defendants.	03 Civ. 0650 (KTD)(GWG) **MEMORANDUM & ORDER**

KEVIN THOMAS DUFFY, U.S.D.J.:

Plaintiff Stephanie Dawson brings this suit on behalf of herself and all others similarly situated[1] ("Plaintiffs") against New York Department of Corrections and Community Supervision ("DOCCS") Acting Commissioner Anthony Annucci; DOCCS Inspector General Vernon Fonda; DOCCS Director of the Sex Crimes Unit of the Inspector General's Office Robert Adams; DOCCS Director of the Bureau of Labor Relations John Shipley; DOCCS Director of Personnel Daniel Martuscello; and Office of Mental Health Acting Commissioner Ann Marie Sullivan ("Supervisory Defendants").[2] Ms.

[1] Lucy Amador and Bette Jean McDonald's claims were transferred to the Western District of New York. The other originally named plaintiffs in this action have either settled their claims or had their claims dismissed. Plaintiffs' motion for class certification has not yet been decided.

[2] Supervisory Defendants Annucci, Shipley, and Sullivan are named here per Federal Rule of Civil Procedure 25(d).

Dawson also brings individual damages claims against DOCCS Correction Officer Frederick Brenyah (Supervisory Defendants and Defendant Brenyah referred to collectively as "Defendants"). Plaintiffs allege under 42 U.S.C. § 1983 that Supervisory Defendants violated their First, Fourth, Eighth, and Fourteenth Amendment rights by adopting and maintaining policies and practices that resulted and continue to result in DOCCS officers sexually assaulting and harassing DOCCS inmates.

Before me are Plaintiffs' motions to join as plaintiffs Frances Perez (Docket Entry 337), Ebony Hayes and Danielle Rogers (Docket Entry 369), LeeAnn Wimmers (Docket Entry 396), and Jasmine Valentin (Docket Entry 409) under Federal Rule of Civil Procedure ("Rule") 20. Plaintiffs also move to add Ms. Perez, Ms. Hayes and Ms. Rogers, Ms. Wimmers, and Ms. Valentin as plaintiffs under Rule 21, and request leave to amend and supplement the First Amended Complaint ("FAC") under Rule 15. (Docket Entries 369, 396, and 409.) Ms. Perez, Ms. Hayes and Ms. Rogers, Ms. Wimmers, and Ms. Valentin ("Intervenors") separately move to intervene as plaintiffs under Rule 24. (Docket Entries 336, 370, 397, and 408.) Defendants oppose Plaintiffs' and Intervenors' motions and Supervisory Defendants cross-move to dismiss Plaintiffs' action. (Docket Entry 343.) For the reasons that follow, I deny in-part and grant-in-part

Supervisory Defendants' motion to dismiss and deny Plaintiffs' Rule 15 and Rule 20 motions and Intervenors' Rule 24 motions.

I. BACKGROUND[3]

A. Parties, Movants, and Allegations

Plaintiff Dawson was an inmate in DOCCS custody and confined at the Taconic Correctional Facility. (FAC ¶ 44a.) Ms. Dawson alleges that Defendant Brenyah, the sole corrections officer assigned to her housing area, raped her on February 25,

[3] The following facts are drawn from the FAC (Docket Entry 72), any written instrument attached thereto or documents incorporated therein by reference, and matters of which judicial notice may be taken. See FED. R. CIV. P. 10(c); ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). The Court also considers the Declaration of Portia Pedro dated January 31, 2012; the Declaration of Daniel Schulze dated April 2, 2012 ("Schulze Decl."); the Reply Declaration of Daniel Schulze dated May 31, 2012 ("Schulze Reply Decl."); Plaintiffs' brief in support of Ms. Perez's and Plaintiffs' motions ("Pls.' Br."); Supervisory Defendants' brief in opposition to Ms. Perez's and Plaintiffs' motions and in support of Supervisory Defendants' cross-motion to dismiss ("Defs.' Br."); Defendant Brenyah's brief in opposition to Ms. Perez's and Plaintiffs' motions; Plaintiffs' reply brief in support of Ms. Perez's and Plaintiffs' motions (Pls.' Reply Br."); Plaintiffs' brief in opposition to Supervisory Defendants' cross-motion to dismiss; Supervisory Defendants' reply brief in support of their cross-motion to dismiss ("Defs.' Reply Br."); Plaintiffs' brief in support of Ms. Hayes's, Ms. Rogers's, and Plaintiffs' motions ("Hayes & Rogers Br.") and the supporting declarations of Svetlana Eisenberg dated November 1, 2012 and November 12, 2012; Plaintiffs' brief in support of Ms. Wimmers' and Plaintiffs' motions ("Wimmers Br.") and the supporting declaration of Terra L. Gearhart-Serna dated June 6, 2014; and Plaintiffs' brief in support of Ms. Valentin's and Plaintiffs' motions ("Valentin Br.") and the supporting declaration of Terra L. Gearhart-Serna dated November 17, 2014 ("Gearhart-Serna Decl. II").

2003. (Id.) Ms. Dawson was released from DOCCS custody on November 29, 2004. (Pls.' Br. 5. n.7.)

Plaintiffs allege that Supervisory Defendants' policies and practices fail to prevent DOCCS officers from sexually abusing female inmates in DOCCS custody. (FAC ¶ 21.) Specifically, Plaintiffs allege that Supervisory Defendants are "aware of the substantial risk of sexual misconduct by male staff upon women prisoners," (FAC ¶ 20), yet (1) "fail to screen [male] staff . . . for psychological tendencies to abuse women," (id. ¶ 22); (2) "allow male correctional staff to bid for (choose) their own assignments, without regard to the history or severity of allegations of sexual misconduct received against them," (id. ¶ 23d); (3) "permit officers and staff virtually unfettered access to private, unmonitored areas," (id. ¶ 25d); (4) "fail to increase the supervision of correctional staff about whom they have received complaints of sexual misconduct by women prisoners," (id. ¶ 25e); (5) fail to prevent incidents of sexual assault with the use of "lie detectors, surveillance cameras, electronic recording devices, exit interviews of prisoners on transfer and release, random interviews of staff, and frequent and unannounced rounds by supervisory officials," (id. ¶ 34); and (6) otherwise fail to "inform women prisoners of the

procedures for reporting sexual misconduct," (id. ¶ 29), or properly investigate reported sexual misconduct, (id. ¶ 35–39).

With respect to Intervenors' proposed claims, Ms. Perez states that she is an inmate currently in DOCCS custody[4] at the Bedford Hills Correctional Facility. (Pls.' Br. 9.) She asserts that Defendant Brenyah sexually assaulted her while she was incarcerated at the Taconic Correctional Facility on September 19, 2010.[5] (Id.)

Ms. Hayes and Ms. Rogers both state that they are inmates currently in DOCCS custody.[6] (Hayes & Rogers Br. 5–6.) Ms. Hayes asserts that, while incarcerated at the Bedford Hills Correctional Facility on February 19, 2010, she was sexually abused by Officer Rock. (Id. at 5.) Ms. Rogers states that she was also sexually assaulted while incarcerated at the Bedford Hills Correctional Facility; her assault involved Officer K. Fields and occurred on September 27, 2011. (Id. at 6.)

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[4] Plaintiffs' recent filings indicate that Ms. Perez was granted parole in October 2014, so she may no longer be in DOCCS custody.

[5] Defendant Brenyah was prosecuted for his conduct involving Ms. Perez and convicted of Attempted Rape in the Third Degree (NY PL 110-130.25(01)), Criminal Sexual Act in the Third Degree (NY PL 130.40(01)), and Official Misconduct (NY PL 195.00(01)). (Hayes & Rogers Br. 5).

[6] Plaintiffs' recent filings indicate that Ms. Rogers is no longer in DOCCS custody, but that Ms. Hayes remains incarcerated.

Ms. Wimmers states that she is an inmate currently in DOCCS custody. (Wimmers Br. 4.) Ms. Wimmers asserts that, while incarcerated at the Albion Correctional Facility in 2012 and 2013, she was sexually abused over a period of months by DOCCS Officer Patrick Ray. (Id. at 1, 4.)

Ms. Valentin states that she is an inmate currently in DOCCS custody. Ms. Valentin asserts that she was sexually abused – and raped - from September 2012 to December 2013 by multiple DOCCS officers at Bedford Hills Correctional Facility. (Valentin Br. 5.)

Intervenors seek to challenge the constitutionality of Supervisory Defendants' policies and practices. According to their submissions, they assert the same claims and seek the same relief as Plaintiffs. (Pls.' Br. 12; Hayes & Rogers Br. 6.; Wimmers Br. 2; Valentin Br. 2)

B. Prison Rape Elimination Act

During the pendency of Plaintiffs' claims, Congress enacted the Prison Rape Elimination Act of 2003 ("PREA"), 42 U.S.C. § 15601, et. seq., to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States," and to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." Id. § 15602(1), (3). PREA mandated the creation of a National Prison

Rape Elimination Commission (the "Commission") and tasked it with recommending national standards within a two-year period. Id. § 15606(d)(3)(A). The Commission provided its recommendations to the Department of Justice ("DOJ") in 2009. (See Schulze Decl. Exhibit A., Nat'l Prison Rape Elimination Comm'n Report (June 2009))

PREA also required DOJ to publish final rules within one year of receiving the Commission's report. 42 U.S.C. § 15607. DOJ approved the Final Prison Rape Elimination Act Rules on May 15, 2012 ("Final Rules"). See 28 C.F.R. Part 115 (2012); see also National Standards to Prevent, Detect, and Respond to Prison Rape, Department of Justice (2012), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

C. Procedural History

Due to the complexity of this case's decade-long procedural history, I recount only those events bearing on the motions before me.

With respect to the origins of this action, Plaintiffs filed a complaint on January 28, 2003. On July 17, 2003, Magistrate Judge Gorenstein entered a scheduling order pursuant to Rule 16. On October 14, 2003, Plaintiffs filed a FAC as of right pursuant to Rule 15. On October 31, 2003, Supervisory Defendants filed a motion to dismiss the FAC, which I converted

into a motion for summary judgment. Briefing continued into 2006. On December 4, 2007, I dismissed certain claims on a motion for summary judgment and dismissed the remaining claims as moot. Plaintiffs appealed the summary judgment order on April 23, 2008, and the Second Circuit Court of Appeals affirmed in part and reversed in part. Specifically, the Court of Appeals held that Plaintiffs' class claims were excepted from Article III mootness as capable of repetition, yet evading review. See Amador v. Andrews, 655 F.3d 89, 93 (2d Cir. 2011). On September 26, 2011, the appeals court remanded jurisdiction back to this Court.

On December 20, 2011, Judge Gorenstein set the briefing schedule for the instant motions before me. On January 31, 2012, Plaintiffs moved to join Ms. Perez as a potential class representative under Rules 20 and 21, and moved under Rule 15 for leave to amend the FAC. Ms. Perez also moved to intervene under Rule 24. On April 2, 2012, Supervisory Defendants submitted briefing opposing Ms. Perez's and Plaintiffs' motions, and cross-moved to dismiss Plaintiffs' claims. On April 5, 2012, Defendant Brenyah also submitted opposition to Ms. Perez's and Plaintiffs' motions.

On May 11, 2012, Plaintiffs separately filed a reply in further support of their and Ms. Perez's January 31, 2012

motions and a brief in opposition to Supervisory Defendants' cross-motion to dismiss. On June 1, 2012, Supervisory Defendants filed a reply memorandum in support of their cross-motion to dismiss. Plaintiffs subsequently filed a sur-reply to Supervisory Defendants' motion to dismiss dated June 13, 2012, to which Supervisory Defendants responded by filing a sur-reply dated July 3, 2012.

On October 31, 2012, Plaintiffs moved to join Ms. Hayes and Ms. Rogers as Plaintiffs under Rules 20 and 21, and again moved for leave to amend and supplement the FAC under Rule 15. The October 31, 2012 motion to amend the FAC superseded their original January 31, 2012 motion. Ms. Hayes and Ms. Rogers also moved to intervene under Rule 24.

On June 6, 2014, Plaintiffs moved to join Ms. Wimmers as a Plaintiff under Rules 20 and 21, and again moved for leave to amend and supplement the FAC under Rule 15. This June 6, 2014 motion to amend the FAC superseded their original January 31, 2012 motion and the subsequent October 31, 2012 motion. Ms. Wimmers also moved to intervene under Rule 24.

On November 17, 2014, Plaintiffs moved to join Ms. Valentin as a Plaintiff under Rules 20 and 21, and again moved for leave to amend and supplement the FAC under Rule 15. This November 17, 2014 motion to amend the FAC superseded their original

January 31, 2012 motion and the subsequent October 31, 2012 and June 6, 2014 motions. Ms. Valentin also moved to intervene under Rule 24.

II. DISCUSSION

I will address the pending motions as follows: (1) Intervenors' Rule 24 motions; (2) Plaintiffs' motions to join Ms. Perez, Ms. Hayes and Ms. Rogers, Ms. Wimmers, and Ms. Valentin under Rule 20 and 21; (3) Plaintiffs' motions to amend and supplement the FAC under Rule 15(a) and (d); and (4) Supervisory Defendants' Cross-Motion to Dismiss.

A. Intervenors' Rule 24 Motions for Permissive Intervention

I deny each Intervenor's motion for intervention under Rule 24. Rule 24(b)(3) cautions that "[i]n exercising its discretion [to permit intervention], the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P 24(b)(3). Here, Plaintiffs assert that additional discovery and burden on the Supervisory Defendants will necessarily be limited since Intervenors assert the same claims and seek the same relief as Plaintiffs. But the amount of discovery required on these claims is not necessarily limited by the fact that Intervenors seek the same relief. Significant additional discovery may be required because while the relief sought and type of claims

asserted may be similar, the circumstances regarding each Intervernors' claims are specific to each individual, requiring discovery as to each by Plaintiffs and Defendants.

Furthermore, Ms. Dawson's claims are nearly ready to be tried and if her suit is successful, whatever declaratory and injunctive relief that may be granted will most likely affect Intervenors through changes to DOCCS' policies and practices, so amendment to include Intervenors' claims would be unproductive. In the interests of fairness to Defendants and Plaintiffs who deserve to have their claims and defenses heard, to avoid undue prejudice to Defendants by re-opening discovery in order to join Intervenors claims over eleven years after the case was filed, and to facilitate the expeditious resolution of this case after over eleven years of litigation, I deny Intervenors' motions.

B. Plaintiffs' Rule 20 and 21 Motions to Join Additional Plaintiffs

I deny Plaintiffs' Rule 20 and 21 motions to join Intervenors for the same reasons I deny Intervenors' Rule 24 motions. According to the parties, over one-hundred depositions have already been taken in this matter. Adding parties that seek the same declaratory and injunctive relief against Supervisory Defendants will serve to extend discovery for these new Plaintiffs and further delay trial and disposition in this

matter. Despite Plaintiffs' assurances that additional discovery would be limited if Intervenors were added to the case, to so rule would "open[] up a 'Pandora's box' of discovery, further protracting an already unduly distended case" because Intervenors' allegations of abuse occurred at different times, in different places, by different DOCCS employees.[7] See Barr Rubber Prods. Co. v. Sun Rubber Co., 425 F.2d 1114, 1127 (2d Cir. 1970).

C. Plaintiffs' Motions to Amend and Supplement the First Amended Complaint Under Rule 15

As an initial matter, the parties dispute whether Plaintiffs' motion for leave to amend and supplement the FAC is governed by the lenient Rule 15 standard or the "good cause" standard under Rule 16. Compare Fed. R. Civ. P. 15(a)(2), with Parker v. Columbia Pictures Indus., 204 F.3d 326, 339–40 (2d Cir. 2000). Plaintiffs argue that Judge Gorenstein's order of December 11, 2011, establishing the schedule for Plaintiffs' motion to amend, shows that the motion was filed within the court-ordered deadline, and therefore should be reviewed under the more deferential Rule 15 standard. (Pls.' Reply Br. 2.) Supervisory Defendants urge me to apply the "good cause"

[7] I note the exception of Ms. Perez vis-a-vis Defendant Brenyah. See supra n.4.

standard under Rule 16 on the basis that Judge Gorenstein's original scheduling order of July 17, 2003 controls. (Defs.' Br. 22.)

Irrespective of the parties' dispute, the Second Circuit in "Parker did not mandate that the [Rule 16] 'good cause' standard automatically apply in every case, but rather, upheld a trial court's discretion to deny a late application for failing to meet the 'good cause' requirement." Bridgeport Music, Inc. v. Universal Music Grp., Inc., 248 F.R.D. 408, 412 (S.D.N.Y. 2008) (quoting Calabro v. Stone, No. CV 2003-4522, 2005 WL 327547, at *1 (E.D.N.Y. Jan. 27, 2005)). Even assuming the more lenient Rule 15 standard applies here, I deny Plaintiffs' motion to amend.

Under Rule 15(a), a plaintiff who has exhausted her right to amend a pleading may request leave of the court to amend, which "[t]he court should freely give . . . when justice so requires." FED. R. CIV. P. 15(a)(2). Similarly, Rule 15(d) permits the court, upon motion of a party, to allow the filing of a supplemental pleading "setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." FED. R. CIV. P. 15(d). In evaluating a motion to amend, the court should carefully consider whether the non-moving party will be prejudiced by such

amendment. According to the Second Circuit, a court must consider "whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993) (citations omitted).

Plaintiffs seek to amend and supplement allegations in the FAC to (1) include "information they did not know when they filed it but subsequently learned through depositions and other discovery," (Pls.' Br. 3); (2) incorporate facts concerning Intervenors' sexual assaults and reflect Intervenors' status as proposed class representatives, (Portia Decl. ¶ 10; Hayes & Rogers Br. 3; Wimmers Br. 2; Valentin Br. 2); and (3) "omit previously asserted claims under the First Amendment, of the right to privacy under the Fourth and Fourteenth Amendments, and of the right to equal protection of the laws under the Fourteenth Amendment," (Portia Decl. ¶ 10).

Even though some discovery for class certification is pending, and Plaintiffs' pending discovery requests stand regardless of the Court's ruling on Plaintiffs' Rule 15 motions, adding to the burden of discovery will only further delay this

case. Additional plaintiffs will surely require a dedication of additional resources toward discovery, and as Defendants point out, would serve to restart the litigation from scratch many years after the case was originally filed.

Plaintiffs' proposed amendments and supplemental allegations will significantly delay resolution of the dispute. While Plaintiffs do not seek to add new claims, the discovery required to litigate on behalf of the proposed Intervenors can only result in further delays to the case. Given that the parties have not been able to resolve the injunctive and declaratory claims over the eleven-year pendency of this case, further delay will only serve to prejudice the litigation of the individual claims and defenses of the original parties to this suit. Plaintiffs point out that intervention is one way to avoid mootness in inherently transitory class action claims. The Second Circuit's instruction to apply the "relation-back" doctrine, preserving class claims that would otherwise be moot as individual claims means that allowing intervention and amendment would unproductively delay the litigation of long-pending class claims that can otherwise be litigated by Ms. Dawson if I certify the class.

Because amending and supplementing the FAC will unduly prejudice Defendants and delay resolution of this case, the Court denies Plaintiffs' Rule 15 motion.

D. Supervisory Defendants' Cross-Motion to Dismiss

Supervisory Defendants move to dismiss Plaintiffs' claims as moot under Article III and the doctrine of prudential mootness. Alternatively, Supervisory Defendants argue that the Court should decline to exercise its jurisdiction over Plaintiffs' claims for declaratory relief and that Plaintiffs' claims alleging inadequate mental health care are not viable.

1. Article III Mootness

Plaintiffs' claims are not moot because the Final Rules are not binding on states and there is no indication of when, if ever, DOCCS will provide Plaintiffs with the effective relief they seek.

Article III limits the jurisdiction of federal courts to live cases or controversies. See U.S. CONST. art. III. "[A] case is moot if 'the parties lack a legally cognizable interest in the outcome' of the case." In re Zarnel, 619 F.3d 156, 162 (2d Cir. 2010) (quoting Fox v. Bd. of Trustees of State Univ. of N.Y., 42 F.3d 135, 140 (2d Cir. 1994)). In other words, "courts' subject matter jurisdiction ceases when 'an event occurs during the course of the proceedings or on appeal that

makes it impossible for the court to grant any effectual relief whatever to a prevailing party.'" Cnty. of Suffolk v. Sebelius, 605 F.3d 135, 140 (2d Cir. 2010) (quoting United States v. Quattrone, 402 F.3d 304, 308 (2d Cir. 2005)). "[Defendants'] burden of demonstrating mootness 'is a heavy one.'" See Cnty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)).

Supervisory Defendants argue that Plaintiffs' claims became moot when DOJ released the Final Rules because (a) "[t]he challenged DOCCS policies will be replaced or subsumed by the Final Rules," (Defs.' Br. 8); (b) the Final Rules "will prevent DOCCS from readopting the challenged policies," (id. at 13); (c) the Final Rules "effectively give [P]laintiffs the equitable relief they seek," (id. at 14); and (d) "Plaintiffs lack standing to challenge the PREA Rules themselves, or DOCCS'[s] implementation of them," (id.).

The Final Rules adopt national standards to prevent, detect, and respond to prison rape, pursuant to PREA. 42 U.S.C. § 15602(3). The Final Rules were immediately binding on the Federal Bureau of Prisons. Id. § 15607(b). States are not mandated to adopt the Final Rules; however, a state whose governor does not certify full compliance with the standards is subject to the loss of five percent of any DOJ grant program

that it would otherwise receive for prison purposes. Id. § 15607(e)(2). A state avoids penalty if its governor submits an assurance that such five percent will be used only for the purpose of enabling the state to achieve and certify full compliance with the Final Rules "in future years." Id. While section 15607 did not supply a date upon which a governor must submit certification or a statement of assurance, the five percent penalty is assessed on States whose governor failed to take such action beginning October 1, 2013. See id. § 15607(e)(7)(A).

Supervisory Defendants fail to meet their heavy burden of showing the absence of a "live case or controversy." First, the Final Rules are not binding on States, and Supervisory Defendants offer no proof suggesting that the governor of New York will certify full compliance with the Final Rules at any point in the future. Even if the governor of New York provided the written assurance required to protect New York's full allotment of DOJ grant funds, a State is only obligated to allocate five percent of those funds toward adopting and achieving full compliance. The statute does not indicate a time frame within which a State must achieve full compliance, but envisions only that a State will work toward certification "in future years." 42 U.S.C. § 15607(e)(2)(B).

Second, Supervisory Defendants insufficiently support their claim that the Final Rules will replace or subsume the DOCCS practices and policies challenged here. The only proof Supervisory Defendants offer is the declaration of a DOCCS Associate Counsel and state-wide PREA Coordinator. (Schulze Reply Decl., Ex. F.) The declaration states that "DOCCS is undertaking an extensive review of the final PREA Standards with a goal of identifying exactly what steps it must take to achieve compliance with the National Standards to Prevent, Detect, and Respond to Prison Rape, and it is continuing to modify its policies in an effort to comply with the PREA Standards." (Id. ¶ 8.) While this statement acknowledges that DOCCS is aware of the Final Rules, it does not substantiate a finding of when, if ever, New York will comply with them, or if DOCCS compliance with the Final Rules would otherwise remedy the constitutional deficiencies that Plaintiffs' allege in the FAC.

Finally, Supervisory Defendants' remaining arguments are without merit because the Final Rules cannot prevent DOCCS from readopting the allegedly constitutionally deficient policies currently in place, and Plaintiffs do not challenge the Final Rules here.

Based on the facts before me, it is not "impossible for the court to grant any effectual relief whatever to a prevailing party.'" Sebelius, 605 F.3d at 140.[8]

2. Prudential Mootness

Supervisory Defendants' prudential mootness argument fails because ambiguity surrounding New York State's adoption and compliance with the Final Rules counsels against dismissal.

Supervisory Defendants cite a host of out-of-circuit cases in support of their argument that the Court should dismiss Plaintiffs' claims as moot because DOCCS policies and practices are undergoing significant modification in response to the Final Rules' release. This jurisprudence recognizes that a case may be dismissed as moot, even when it has technically satisfied the Article III case or controversy requirement if "a controversy . . . is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." Chamber of Commerce, 627 F.2d at 291; see also Marcavage v. Nat'l Park Serv., 666 F.3d 856, 862 n.1 (3d Cir. 2012); S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 1997).

[8] Because I find sufficient ground for denying-in-part the motion to dismiss at this stage in the litigation, I do not consider whether New York's certification would effectively provide Plaintiffs with the relief they seek.

The Supreme Court discussed federal courts' discretion to exercise jurisdiction over matters where there is "no reasonable expectation that the wrong will be repeated" in United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953), and A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329-32 (1961).

In W. T. Grant, the Supreme Court considered whether a Clayton Act challenge to an individual's service as a director on several corporations' boards of directors was mooted when that individual resigned his directorships. W. T. Grant, 345 U.S. at 633. In affirming that the claim was moot, the Supreme Court noted that voluntary cessation of allegedly illegal conduct alone was not sufficient to moot a claim, id. at 632, but recognized the district court's broad discretion to consider the defendant's "expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations," id. at 633.

The Supreme Court also addressed mootness as applied to voluntary cessation in A. L. Mechling Barge Lines. There, plaintiffs challenged an order that the Interstate Commerce Commission ("ICC") issued without findings or a hearing, and sought a declaration that the ICC's practice was unconstitutional. A. L. Mechling, 368 U.S. at 326–27. The district court had dismissed the claim as moot because the ICC

withdrew the challenged order and the actions sanctioned by the order had ceased. Id. at 330-31. On appeal, the ICC conceded that it was required to make findings in support of its orders and that it had amended its practices accordingly. Id. at 330. The Supreme Court upheld dismissal on the ground that "sound discretion withholds the remedy where it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted." Id. at 331.

While the ultimate form of DOCCS's policies and practices are uncertain at this time, the facts presented in W. T. Grant and A. L. Mechling Barge Lines involve defendants who had effectively provided the remedy sought by plaintiffs. Here, despite the countless submissions, declarations, and exhibits offered by Supervisory Defendants, there is no reasonable basis for me to infer when, if ever, New York will adopt the policies and procedures that would presumptively provide Plaintiffs with the relief they seek. Further, in the cases relied upon by Supervisory Defendants, the defendants' compliance with the challenged conduct could be easily determined—i.e., Grant's service as a director on the boards of interlocking corporations, and the ICC's issuance of orders without findings. The challenged policies and practices in this case concern

substantial modifications to policies and protocol governing the hiring, training, investigation, and supervision of correctional officers at every state-operated prison facility for women in the State of New York. Furthermore, the Second Circuit expressly held that the class claims alleged here were of a kind capable of repetition, yet evading review. Amador v. Andrews, 655 F.3d 89, 93 (2d Cir. 2011).

I cannot decline jurisdiction over this case based solely on Supervisory Defendants' assurance that its policies and practices are no longer enabling the sexual assault of female inmates at DOCCS facilities. (Cf. Defs.' Br. 12–13; Defs.' Reply Br. 4.) Because there "exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive," W. T. Grant Co., 345 U.S. at 633, dismissal on mootness grounds is not proper.

3. Declaratory Relief

Plaintiffs' claims for declaratory relief survive this motion to dismiss for the same reasons articulated with respect to Supervisory Defendants' mootness arguments—namely, that Supervisory Defendants fail to show that the relief Plaintiffs seek has effectively been granted.

While courts have broad discretion to exercise jurisdiction over a declaratory judgment action, 28 U.S.C. § 2201(a) (2012), five factors should be considered before doing so:

> (i) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (ii) whether a judgment would finalize the controversy and offer relief from uncertainty; (iii) whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'; (iv) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (v) whether there is a better or more effective remedy.

N.Y. Times Co. v. Gonzales, 459 F.3d 160, 167 (2d Cir. 2006) (quoting Dow Jones & Co., Inc. v. Harrods Ltd., 346 F.3d 357, 359–60 (2d Cir. 2003)) (internal quotation marks omitted).

Plaintiffs allege constitutional and statutory violations resulting from specific policies and practices maintained by Supervisory Defendants. Supervisory Defendants offer no proof that they have eliminated and replaced the challenged policies and practices with the Final Rules, or of when they will accomplish such action. Additionally, there is no proof that DOCCS' adoption of policies and practices that comply with the Final Rules would remedy the constitutional violations that Plaintiffs allege. Given the uncertainty surrounding New York's adoption of practices and policies effectively granting the relief Plaintiffs seek, declaratory relief from the alleged injuries would prove useful in settling the relevant legal

issues and finalizing the present controversy. Supervisory Defendants do not argue that Plaintiffs seek declaratory relief for the purpose of "procedural fencing," nor do they assert how a declaratory judgment will encroach on state courts. Further, while Supervisory Defendants state that a "better" remedy available to Plaintiffs is a direct action for damages, (Defs.' Br. 20), Plaintiffs seek to prevent future constitutional violations. A remedy at law is no substitute for the equitable relief Plaintiffs seek here.

Based on the forgoing considerations, I maintain jurisdiction over Plaintiffs' declaratory judgment action.

4. Inadequate Mental Health Care

Supervisory Defendants also move to dismiss the portion of Plaintiffs' Eighth Amendment claim concerning Supervisory Defendants' failure to offer and provide adequate mental health treatment to women who report sexual harassment, abuse and trauma, under Federal Rule of Civil Procedure 12(b)(6), because Plaintiffs have not alleged sufficient facts to support a claim for medical indifference to Plaintiffs' mental health needs following complaints of sexual abuse. In order to survive a motion to dismiss,

> . . . a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content

> that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted).

The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Id.

A prisoner's medical indifference claim must meet two requirements: (1) the deprivation of treatment must be sufficiently serious, and (2) the charged official must act with a sufficiently culpable state of mind. Salahuddin v. Goord, 467 F.3d 263, 279-280 (2d Cir. 2006)(quotations and internal citations omitted). The "sufficiently serious" inquiry is an objective one that hinges on: (a) whether or not the inmate was actually deprived of adequate treatment (reasonable care satisfies the prison official's duty), and (b) whether the alleged inadequacy was serious. Id.

> In medical-treatment cases not arising from emergency situations, the official's state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health. Deliberate indifference is a mental state equivalent to subjective recklessness, as the term is used in criminal law. This mental state requires that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm will result.

Id., at 280 (internal citations omitted).

In order for Plaintiffs to prevail, they must show that "the risk of harm [was] substantial," and that Supervisory Defendants' actions were "more than merely negligent." Id. (citing Farmer v. Brennan, 511 U.S. 827, 835–37 (1994).

Even though I deny Plaintiffs' Rule 15 request for leave to amend the FAC, I address Supervisory Defendants' Rule 12(b)(6) motion in the context of both the FAC and the Proposed Second Amended Complaint ("PSAC"), because both parties' arguments are based on the claims included in the PSAC dated January 31, 2012.[9]

a. Assuming Facts in the FAC

The FAC does not allege any facts to support mental health treatment inadequacies with regard to Ms. Dawson. (FAC ¶ 44.) It does not allege that Ms. Dawson requested mental health treatment and was denied such treatment. The FAC does not allege facts to support a claim that Supervisory Defendants were aware or should have been aware of a medical need for mental

[9] To the extent that Plaintiffs' PSAC is relevant to the disposition of this motion to dissmiss discussed below, I refer to the PSAC dated November 17, 2014, attached (in redacted form) as Exhibit 1 to Gearhart-Serna Decl. II and filed under seal at Docket Entry 410. The PSAC dated November 17, 2014 replaced and superseded the PSAC dated January 31, 2012. (Gearhart-Serna Decl. II, at 2.)

health treatment and consciously disregarded such a need on the part of Ms. Dawson. Because the FAC does not allege even the bare elements of a medical indifference claim with regard to Ms. Dawson, much less any facts to support such a claim, I grant Supervisory Defendants' motion to dismiss the claim under the FAC.

b. Assuming Facts in the PSAC

Plaintiffs' PSAC alleges that DOCCS provided inadequate mental health treatment to Ms. Dawson following her rape by Defendant Brenyah.

Ms. Dawson does not allege any facts to support a claim that Supervisory Defendants were aware of her mental health needs and risks resulting from her rape and affirmatively disregarded those risks in denying her adequate mental health treatment.

While I accept Ms. Dawson's allegations as true, and draw any necessary inferences in her favor regarding the insufficiency of her treatment for the purposes of deciding this motion, there are no facts alleged to support the claim that Supervisory Defendants' were made aware or should have inferred a substantial risk, and disregarded that risk to Ms. Dawson's mental health. Many of Ms. Dawson's statements regarding the adequacy of her treatment are conclusory. Ms. Dawson alleges

that she received treatment but that it inadequately addressed her needs because it was not "trauma-focused treatment by mental health professionals with expertise in the treatment of trauma." (PSAC ¶¶ 52x–z.) Ms. Dawson was entitled to reasonably adequate care. But failure to provide the best treatment available does not amount to an Eighth Amendment claim. Barnes v. Ross, 926 F. Supp. 2d 499 (S.D.N.Y. 2013). Ms. Dawson does not allege that Supervisory Defendants were aware that her treatment was unreasonable or that Supervisory Defendants should have otherwise been aware that her mental health needs required additional treatment. The FAC and PSAC both state that Supervisory Defendants provide Plaintiffs access to "some degree of mental health services." (FAC ¶ 41c, PSAC ¶ 51d.) While not dispositive, the fact that Ms. Dawson received treatment for a period of time after she requested treatment does not support an inference that Ms. Dawson's needs were consciously disregarded. A prisoner's burden is heavy when alleging a constitutional violation stemming from medical treatment. "An inmate's disagreement with [her] treatment or a difference of opinion over the type or course of treatment do not support a claim of cruel and unusual punishment." Alston v. Bendheim, 672 F. Supp. 2d 378, 385 (S.D.N.Y. 2009) (citing Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998)). Ms. Dawson has failed to

plausibly allege that she received less than reasonable mental health care and that even if it was less than reasonable, that Supervisory Defendants were deliberately indifferent; the allegations amount to a claim that she did not receive the best available treatment. While the claim might meet the burden for medical malpractice, a constitutional claim requires more. Chance, 143 F.3d at 703 (citing Estelle v. Gamble, 429 U.S. 97, 105-06 (1976)). Even if I had granted Plaintiffs' Rule 15 motion to supplement the FAC, it would have been futile for the purposes of saving the mental health claims at issue here. [10]

[10] This rationale would extend to the claims asserted by Intervenors if the motions to join, intervene, and amend the complaint had been granted. To the extent that each Intervenor makes claims in the PSAC about the mental health treatment rendered by DOCCS, none has alleged facts that support deliberate indifference by the Supervisory Defendants. Ms. Perez alleges that she did not receive satisfactory treatment until four years after her rape, (PSAC ¶ 53j), but this does not support the string of inferences required for a claim of indifference. Ms. Hayes alleges that she was not offered mental health services immediately following her rape, (PSAC ¶ 54h), but there are no further facts to support a claim of indifference. Ms. Rogers' claim, (PSAC ¶ 55q), and Ms. Wimmers' claim, (PSAC ¶ 56l), are each similarly unsupported. Proposed Intervenor Ms. Valentin alleges the most detailed facts regarding serious mental health needs (PSAC ¶¶ 57q–r, v), but does not plausibly allege that her mental health treatment was unreasonable, or that her needs went otherwise undiagnosed or untreated as a result of deliberate indifference.

For these reasons, I grant Supervisory Defendant's motion to dismiss Plaintiffs' mental health claims.

III. CONCLUSION

For the foregoing reasons, I grant-in-part and deny-in-part Supervisory Defendants' cross-motion to dismiss, and deny Intervenors' Rule 24 motions and Plaintiffs' Rules 20, 21, and 15 motions to join new plaintiffs and supplement the FAC. Supervisory Defendants' letter motions at Docket Entry 403 and 417 are moot in light of decisions on the other motions.

The Clerk of the Court is respectfully directed to terminate the motions located at Docket Entries 336, 337, 343, 369, 370, 396, 397, 403, 408, 409, 417.

SO ORDERED:

Dated: New York, N.Y.
December 11, 2014

KEVIN THOMAS DUFFY, U.S.D.J