UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELVIN SUAREZ, Mr. Suarez, -against- ANTHONY J. ANNUCCI, et al., Defendants.	:	Case No. 7:20-cv-7133-VB

PLAINTIFF ELVIN SUAREZ'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants failed to provide Elvin Suarez with minimally adequate treatment for the entirety of his incarceration even though they were aware of his serious mental illness. When Mr. Suarez predictably decompensated after weeks without treatment, Defendants charged him with disciplinary infractions and caged him in isolation, despite knowing the risks to his mental health. Defendants then released Mr. Suarez to his mother's care, where, in active psychosis, he repeatedly stabbed her—a tragic but foreseeable consequence of Defendants' failures.

Defendants contend that Mr. Suarez refused medication and did not meet the criteria for medication over objection. Mr. Suarez does not argue that he should have been medicated over objection; rather, he needed—and Defendants' policies required—individual therapy and medication education, which Defendants did not provide. Defendants also cannot shift blame for their violations of Mr. Suarez's Eighth Amendment rights. The record shows that *all* Defendants had authority to seek mental health treatment for Mr. Suarez and to initiate Mr. Suarez's diversion or removal from segregated confinement and knew the risks of failing to do so. Lastly, Defendants have no basis for ignoring the plain language of the SHU Exclusion Law and its application to these facts.

In short, the record supports the conclusion that Defendants' conduct violated the Eighth Amendment and the SHU Exclusion Law. At the very least, genuine issues of material fact preclude summary judgment on that conclusion in Defendants' favor.

STATEMENT OF FACTS

A. Mr. Suarez's History of Serious Mental Illness Before His Incarceration

A decade ago, Elvin Suarez was diagnosed with Bipolar Disorder, Episodic Mood Disorder, Drug-Induced Psychotic Disorder with Delusions, and Psychosis. Ex. 4 at D-001053, Ex. 2 at P-001637. Starting around 2014, Mr. Suarez began seeking in-patient psychiatric

treatment for paranoia and hallucinations telling him to harm himself. *Id.* Mr. Suarez was prescribed various anti-psychotic medications, including Zyprexa, which were effective in treating his symptoms. Ex. 4 at D-001052. But Mr. Suarez repeatedly stopped taking medication when out of in-patient treatment and would quickly decompensate as a result. Ex. 2 at P-001638-001639.

In 2016, Mr. Suarez was arrested for reportedly vandalizing parked cars. Ex. 23 at P-000055-000056. While under arrest, he allegedly struck a police officer. Ex. 2 at P-001641. He was found unfit to stand trial and committed to Kirby Forensic Psychiatric Center ("Kirby") operated by the Office of Mental Health or ("OMH") for restoration to fitness. Ex. 24 at D-001632. When OMH discharged Mr. Suarez from Kirby on March 16, 2017, the Discharge Summary noted that Mr. Suarez "arrived from Riker's [sic] Correctional Facility reporting poor compliance with his prescribed medication." Ex. 87 at D-000636. Under the heading "**ALERTS,**" it instructed: "accepting facility to encourage medication compliance as patient will decompensate if non-compliant." *Id.*

Mr. Suarez subsequently pleaded guilty to assault and was sentenced to two years in prison. Ex. 27 at P-000117. On June 22, 2017, Mr. Suarez arrived at Downstate Correctional Facility ("Downstate") operated by the Department of Corrections and Community Supervision ("DOCCS"). Ex. 28 at D-000367. Based on jail time credit, he was eligible for a conditional release date of September 5, 2017. Ex. 29; Ex. 30 at 86:18-20. His maximum expiration date was December 19, 2017. Ex. 29; Ex. 30 at 87:22.

B. Defendants' Inadequate Treatment of Mr. Suarez's Serious Mental Illness at Downstate Before His Confinement in SHU

1. Defendants Designated Mr. Suarez As Seriously Mentally Ill, But Discontinued His Medication.

Defendant Unit Chief Ryan Lahey was the senior OMH official at Downstate and was ultimately responsible for Mr. Suarez's mental health care. Ex. 35 at 16:13-20, 251:5-9. OMH clinician Defendant Samantha Kulick[1] was Mr. Suarez's assigned primary clinician upon his admission to Downstate. Ex. 32 at 216:11-19.

Defendant Kulick conducted an intake screening for Mr. Suarez on June 23, 2017, the day after he arrived at Downstate. Ex. 56 at D-000275. Mr. Suarez reported to Defendant Kulick his history of mental health treatment and suicidality, bipolar diagnosis, and inpatient treatment. *Id.* Defendant Kulick noted that Mr. Suarez came to Downstate "with an active medication order for Zyprexa," an anti-psychotic medication, and that Mr. Suarez "endorses compliance with his medication and believes same are effective in treating his psychiatric symptoms." Ex. 57 at D-000307. She recommended that OMH admit Mr. Suarez and provide "individual therapy" and "medication." *Id.* at D-000309-000310. Defendant Kulick assigned Mr. Suarez a mental health service level ("MHSL") 1-S designation—OMH's designation for patients with the most serious mental health needs and diagnoses. Ex. 58 at D-000280; Ex. 59 at D-000282-000283.

On June 30, 2017, Mr. Suarez met for the first time with his assigned psychiatrist, Defendant Abdul Qayyum, for an initial evaluation. Ex. 60 at D-000301. Defendant Qayyum's Progress Note for the interview reflects that Mr. Suarez reported his history of auditory hallucinations but that Mr. Suarez stated that he "didn't need meds." *Id.* Based on Mr. Suarez's statement, Defendant Qayyum discontinued his Zyprexa prescription. *Id.* at D-000302. Although

[1] Defendant Kulick is now (and was at the time of her depositions) known as Samantha Guth. Because she was known as Samantha Kulick during Mr. Suarez's time at Downstate and the relevant records refer to her by that name, however, we generally refer to her as Ms. Kulick in this Opposition.

OMH policy required that clinicians "[d]ocument the discussion of the risks and benefits of medication (medication education) with the patient, and the patient's response to the discussion and apparent level of understanding" in Progress Notes, there is no such documentation in Defendant Qayyum's Progress Note. Qayyum Exhibit 1. Defendant Qayyum recommended a follow-up appointment for two weeks later. Ex. 60 at D-000302.

On July 19, 2017, Defendant Kulick met with Mr. Suarez again and learned for the first time that his prescription had been discontinued several weeks prior. Ex. 32 at 112:16-113:8. Defendant Kulick's Progress Note from this meeting does not reflect any medication education. *Id.* Defendant Qayyum met again with Mr. Suarez on July 21, 2017. Ex. 64 at D-000303-000304. There is no evidence that Defendant Qayyum discussed medication education with Mr. Suarez during this meeting either. *Id.*

C. Defendants Confined Mr. Suarez to Special Housing Unit.

On the morning of August 8, 2017, Mr. Suarez allegedly became combative with officers during mealtime, kicking an officer and threatening him. Ex. 84 at D-01868. After a "violent struggle," Mr. Suarez was taken to the infirmary. Ex. 85 at D-0000335. There, Mr. Suarez "began spitting at staff," and officers placed a spit mask on him. *Id.* The evaluating DOCCS nurse reported that he was lethargic and "off by 2 days with current date." Ex. 79 at D-000392.

The incident was a sign Mr. Suarez had decompensated. Ex. 18 at ¶¶ 106-7. DOCCS staff made a phone referral to Defendant Lahey for immediate mental healthcare. *Id.* Defendant Kulick met with Mr. Suarez to follow up on the referral but made no effort to learn more about Mr. Suarez's conduct with the officers. Ex. 65 at D-000318-000319; Ex. 32 at 167:9-168:13.

Shortly thereafter, Defendants placed Mr. Suarez in the Special Housing Unit ("SHU"). Ex. 66 at D-000320. Defendant Maura DiNardo, an OMH clinician and the designated SHU coordinator at Downstate, became Mr. Suarez's primary clinician upon his admission to SHU on

August 8, 2017 through the remainder of his time at Downstate. D-000083; Ex. 67 at 19:13-18, 23:13-15. Defendant DiNardo conducted an interview of Mr. Suarez when he arrived in SHU. Ex. 66 at D-000320; Ex. 67 at 19:13-18, 23:13-15.

While confined in SHU, Mr. Suarez was housed in a small cell with only a small window into the prison, and a small window looking out on the recreation yard. Mr. Suarez had no writing implement and no reading material while in SHU. Ex. 18 at ¶ 50. Though individuals in SHU were generally permitted to have one hour per day of out-of-cell recreation and to receive visitors, Mr. Suarez was confined in SHU from August 8 through August 15 subject to an order depriving him of all out-of-cell activity, including calls and meetings with visitors. Ex. 50 at DOCCS D-0000482-0000484; Ex. 30 at 182:10-12. Defendant Robert Morton, superintendent of Downstate, signed the deprivation order; its reported justification was Mr. Suarez's "continue[d] negative behavior." *Id.* at DOCCS D-0000484. Thus, Mr. Suarez was confined in his small SHU cell for over 150 straight hours with no meaningful human interaction or contact with the outside world. *Id.* at 54:13-17. Predictably, Mr. Suarez began "hearing voices again, they came and went" telling him "[w]hen you get out of here you have to protect yourself" and having "anxiety attacks because [he] couldn't leave [his] cell." Ex. 3 at 70:6-18.

1. Defendants Acknowledged Mr. Suarez's Need for Treatment but Failed to Divert Him from SHU.

While Mr. Suarez was in SHU, Defendants discussed his need for an assisted outpatient treatment ("AOT") plan ahead of his anticipated release, scheduled for September 5, 2017. On August 11, 2017, Defendants Lahey, Qayyum and Chesney Baker (a prerelease coordinator) received an email from an AOT Coordinator noting that Mr. Suarez "meets criteria [for AOT] as evidenced by hospitalizations following noncompliance with treatment." Ex. 68 at D-000634.

The email also attached Mr. Suarez's March 2017 Discharge Summary, which stated "accepting facility to encourage medication compliance as patient will decompensate if non-compliant." *Id.*

Defendant Lahey was the co-chair of the Joint Case Management Committee ("JCMC") which was responsible for reviewing, monitoring, and coordinating the treatment plans of any inmate placed in SHU and assigned to OMH's caseload. Ex. 48 at 49:7-18; Ex. 36 at 24:24-25:2, 25:11-18, 29:18-20; Ex. 41 at 53:14-21; Ex. 35 at Lahey Tr. 26:2-27:5, 91:6-8, 153:7-17; Ex. 48 at. 52:16-53:19; Ex. 39 at 51:1-52:8; Ex. 40. As co-chair, "within 14 days of [Mr. Suarez's] placement in segregated confinement," Defendant Lahey was required to either "divert [Mr. Suarez] or make a written determination" not to divert him. Ex. 35 at 140:16-142:9. Despite reviewing Mr. Suarez's file, Defendant Lahey and the JCMC failed to divert Mr. Suarez or make the required written determination during the meeting that took place during Mr. Suarez's confinement in SHU. *Id.* at 90:1-11, 322:3-11.

On August 16, 2017, Defendant Chesney Baker met with Mr. Suarez in SHU to review his post-discharge plans and noted that he presented with poor insight and judgment. Ex. 46 at D-000322. The next day, Defendant Brandon Reynolds, an OMH psychiatrist, met with Mr. Suarez for an initial clinical evaluation for AOT. Defendant Reynolds concluded that Mr. Suarez presented with a "mildly elevated" affect, "with frequent and inappropriate smiling and laughter," and met the criteria for an AOT. Ex. 72 at D-000324-000325.

2. Defendants Confirmed that Mr. Suarez Was "Not Suitable for Confinement in SHU," But Imposed a "Sanction Over the Guidelines."

Under DOCCS regulations, Mr. Suarez's disciplinary hearing was required to start within seven days of his placement in SHU. Ex. 52 at 57:18-58:17. But Defendant Peter Horan, the hearing officer, obtained an extension to begin Mr. Suarez's hearing on August 15, his eighth

day in SHU. *Id*. at 141:1-10. He did so despite his awareness that Mr. Suarez had "a serious and persistent mental illness." Ex. 51 at 243:11-244:3, 283:11-16.

Once Defendant Horan finally began the disciplinary hearing, he personally observed Mr. Suarez's declining mental state. Although he is not a mental health clinician, Defendant Horan later reported to Defendant DiNardo that during the initial hearing, Mr. Suarez exhibited a "lack of connection" and exhibited "signs of mental illness." Ex. 74 at 2:19-23. After receiving Mr. Suarez's plea, Defendant Horan adjourned in order to take confidential testimony from OMH, as required in disciplinary hearings involving 1-S patients. Ex. 89 at D-000169-000170.

On August 21, Defendant DiNardo testified at Mr. Suarez's disciplinary hearing that Suarez should not have been confined in disciplinary housing:

> "[I]t appears that the conduct related to the disciplinary hearing is related to the inmate patient's mental health symptoms. Based on my review of available mental health records, it is my opinion that mitigating factors were not only present but should be given consideration by DOCCS in disposition of this matter. . . . [I]t is my clinical opinion that the inmate patient is not suitable for confinement in disciplinary housing due to the mental illness." Ex. 74 at 5:2-15.

Two weeks after Mr. Suarez was first confined in SHU, on August 22, 2017, Defendant Horan completed Mr. Suarez's disciplinary hearing, sentencing him to the two weeks already served in SHU and additional 60 days in keeplock, with 30 of those days suspended for 180 days. Ex. 90 at D-000171. Mr. Suarez thus may have served the remainder of his sentence at Downstate in keeplock, confined 23 hours a day in a small individual cell, with one hour a day of outdoor exercise. It is unclear, however, whether Mr. Suarez was in fact transferred to keeplock. While DOCCS's documentation reflects a transfer, OMH documentation shows that Mr. Suarez was never transferred out of SHU, and thus remained there for the balance of his incarceration. Ex. 56 at D-000271; Ex. 41 at Kemmery Tr. 256:24-257:9.

Because Mr. Suarez's confinement—whether it was in keeplock or in SHU—exceeded DOCCS's guidelines, Defendant Morton was required to review and approve it. Ex. 30 at 171:9-172:2; Ex. 29. Defendant Morton thus read the "hearing packet" for Mr. Suarez's disciplinary infraction, including the misbehavior report, hearing testimony (stating that Mr. Suarez was Level 1-S), and the report documenting Mr. Suarez's struggle with officers. *Id.* at 62:1-63:19.

3. Defendants Continued to Observe Mr. Suarez Decompensating Before Releasing Him to His Mother.

Defendant Qayyum met with Mr. Suarez for the third and final time on August 24, 2017 and observed Mr. Suarez laughing inappropriately. Ex. 80 at D-000305-000306. Mr. Suarez met with Defendant Reynolds the following day on August 25 for his AOT examination. Ex. 81 at D-000331-000332. Defendant Reynolds reported that Mr. Suarez continued to present a "mildly elevated" affect "with inappropriate smiling and laughter" and poor insight. *Id.*

On August 31, OMH obtained a court order requiring Mr. Suarez to undergo a one-year treatment plan prepared by Defendant Reynolds. Ex. 82 at D-000523-000543. The plan called for Mr. Suarez to receive several services, including taking Zyprexa daily and ongoing psychiatric treatment in a clinical setting. *Id.* at D-000539, D-000543. As justification for the court order, Defendant Reynolds noted in his affirmation Mr. Suarez's two prior hospitalizations at Kirby that each took place during periods when Mr. Suarez was not medication compliant. *Id.* at D-000535. He also cited Mr. Suarez's alleged disruption on August 8, commenting that the incident took place when Mr. Suarez had not been medication compliant for five weeks. *Id.* at D-000536.

Defendant Morton also signed and submitted a petition in support of the court order on August 21, 2017, in which he swore that an AOT order was warranted because of Mr. Suarez's "history of lack of compliance with treatment for mental illness that . . . has prior to the filing of this petition, resulted in one or more acts of serious violent behavior . . . ." Ex. 83.

Mr. Suarez's mother and sister visited him at Downstate on September 2, 2017. Ex. 1 at 66:9-10; Ex. 10 at D-000155. Mr. Suarez's sister observed him talking to himself and noted that he did not make eye contact during this visit. Ex. 11 at Tr. 27:19-28:2; *see also* Ex. 1 at 67:13-16. At one point during the visit, Mr. Suarez excused himself and could be heard vomiting in the bathroom. Ex. 11 at Tr. 28:12-18.

On September 5, Mr. Suarez was transferred from Downstate to a Staten Island parole office to meet with his parole officer and his post-release mental health care coordinator. Ex. 86 at D-000126. They both reported that Mr. Suarez was smiling and laughing to himself inappropriately during this meeting. *Id.*

D. Mr. Suarez's Release from Downstate and Attack on His Mother

Later on September 5, 2017, Mr. Suarez was released into his mother's care. Throughout the next day, Mr. Suarez was observed behaving strangely and reported that he "heard voices saying, '[y]ou're going to get in trouble . . . Mom's going to hurt you.'" Ex. 2 at P-001645; Ex. 92 at D-000125. That evening, after Mr. Suarez and his mother returned home, Mr. Suarez attacked his mother with a kitchen knife, stabbing her multiple times in the chest, face and arms. Ex. 91 at D-000124. Mr. Suarez was arrested 10 blocks away from the family home shortly thereafter. Ex. 2 at P-001646. Following his arrest, he was charged with attempted murder and held in a Mental Observation unit at Rikers Island for a higher level of psychiatric care. Ex. 26 at P-001597-001599; Ex. 2 at P-001646.

On November 22, 2019, Mr. Suarez pleaded not guilty by reason of mental disease or defect. Ex. 16 at P-001685. Mr. Suarez was committed to Kirby on February 19, 2020, where he remains today.

LEGAL STANDARDS

Summary judgment is proper only when, "construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F. 3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). "It is the moving party's burden to establish the absence of any genuine issue of material fact." *Garcia v. Fischer*, No. 13 CV 8196 (VB), 2019 WL 4256386, at *6 (S.D.N.Y. Sept. 9, 2019). A fact is material when it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO MR. SUAREZ'S EIGHTH AMENDMENT CLAIMS.

An Eighth Amendment conditions claim has two elements: (i) the challenged conditions posed an unreasonable risk of damage to the plaintiff's health and safety; and (ii) defendant-officials know of and disregard this risk. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Defendants do not dispute the evidence establishing the first, objective prong of deliberate indifference and contend only that Mr. Suarez cannot prove the second, subjective component. MSJ at 7. The second prong requires an allegation that the prison official was deliberately indifferent, or "aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and the official drew that inference." *Farmer*, 511 US at 837. Prison officials may not impose conditions that create the "unnecessary and wanton infliction of pain," *Whitley v. Albers,* 475 U.S. 312, 319 (1986), including conditions that are "totally without penological justification," *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). To assess the subjective prong, "courts ask whether the defendant acted or failed to act

while aware of "a substantial risk that serious inmate harm [would] result." *Randle v. Alexander*, 170 F. Supp. 3d 580, 593 (S.D.N.Y. 2016).

Defendants were aware of and responsible for Mr. Suarez's serious mental health needs but allowed him to languish for months without adequate treatment and confined him to SHU where he predictably decompensated. A reasonable jury could conclude that Defendants failed to address Mr. Suarez's mental health needs while aware that harm would likely result.[2] Defendants are not entitled to summary judgment on Mr. Suarez's Eighth Amendment claims.

A. The OMH Defendants had the Authority to Initiate Mr. Suarez's Removal from Segregated Confinement.

As an initial matter, the record undermines Defendants and OMH employees Lahey, Kulick, DiNardo, Baker, Qayyum and Reynolds' argument that Mr. Suarez cannot prove his "condition-of-confinement" claim because "OMH staff has no role in the decision to house an incarcerated individual, whether designated as seriously mentally ill or not, in SHU." MSJ at 8.

Defendant DiNardo confirmed that "OMH professionals had the ability or authority to remove someone from SHU." Ex. 37 at 47:3-7. And Defendant Horan testified that "if OMH felt that an inmate was inappropriately in any place in the facility, they could enact procedures to get that person the proper treatment in the setting that they think would be the most appropriate for that person." Ex. 52 at 112:12-16. Defendant Lahey additionally averred that he wished the OMH Defendants used their ability to release patients from SHU in Mr. Suarez's case. Ex. 35 at

[2] Defendants' argument that a violation of state law does not, on its own, give rise to a constitutional violation is a straw man. MSJ at 7. As other courts have found, agency guidelines intended to track constitutional norms are relevant for courts to determine the lawfulness of officer conduct, even if not dispositive. *See Brown v. City of New York*, 798 F. 3d 94, 101 n.11 (2d Cir. 2015); *see also Cagle v. Sutherland*, 334 F. 3d 980, 986 (11th Cir. 2003) (violation of a prison consent decree is relevant but not disposition of the constitutional inquiry*). Stella v. Davis Cnty.*, No. 1:18-CV-002, 2019 WL 4601611, at *5 (D. Utah Sept. 23, 2019) ("the standard of medical care, whether defined in the Utah Nurse Practice Act or based upon general nursing standards, is relevant to the elements of a deliberate indifference claim."). That is exactly what Mr. Suarez has alleged.

360:17-20. A reasonable jury could find that the OMH Defendants had authority to initiate Mr. Suarez's removal from SHU, creating a triable issue of fact precluding summary judgment.

B. Individual Defendants

1. Qayyum

Defendant Qayyum argues that he is entitled to summary judgment on Mr. Suarez's claim for inadequate medical treatment because he "discussed medication with Mr. Suarez." MSJ at 17. To be clear, Mr. Suarez does not contend that Defendants needed to seek a court order to medicate him over objection to provide adequate treatment. But simply purporting to "discuss[ ] medication" during irregular, cursory meetings was not sufficient. Ex. 18 at ¶¶ 92-115.

As Mr. Suarez's assigned psychiatrist, Defendant Qayyum was the most senior clinician involved in Mr. Suarez's care at Downstate. Defendant Qayyum nevertheless only saw Mr. Suarez three times throughout his incarceration and, during their first meeting a week after Mr. Suarez arrived, immediately discontinued his anti-psychotic medication. Ex. 39 at 92:2-6; Ex. 60 at D-000301. Defendant Qayyum contends that he did so based on Mr. Suarez's unreliable assurances that, although he had experienced psychotic symptoms in the past, he was free of them. *Id.* But Qayyum had access to Mr. Suarez's records showing that Mr. Suarez "lack[ed] the capacity to make treatment decisions regarding medications for manic psychosis . . . " Ex. 93 at D-001651; Ex. 18 at ¶ 95.

After discontinuing his medication, Defendant Qayyum did not check on Mr. Suarez until almost three weeks later, on July 21, 2017. Ex. 9 at 193:11–194:3; Ex. 64 atD-000303-000304. In the interim, Defendant Qayyum neglected to discuss Mr. Suarez's treatment with any of the other clinicians tasked with his care. Ex. 32 at 112:16-21. Qayyum also testified that he never "took the time" to read any notes that other OMH staff wrote. Ex. 39 at 132:4-8. He confirmed that a patient "acting out" was a sign of decompensation. *Id.* at 80:10-13. But when Mr. Suarez

"acted out" on August 8, 2017, Defendant Qayyum ignored the issue and did not meet with Mr. Suarez at all during his time in solitary confinement. *Id.* at Qayyum Tr. 107:7-19. Moreover, on August 11, 2017, just three days after Mr. Suarez's altercation with officers, Defendant Qayyum received a copy of a discharge summary from Kirby Psychiatric Hospital that highlighted an "**ALERT**[]. . . Accepting facility to encourage medication compliance as patient will decompensate if non-compliant." Ex. 68 at D-000634. Qayyum read the email and attachments, but never tried to meet Mr. Suarez to provide medication education or to divert him from SHU. *Id.* at 151:23-153:14. During their third and final meeting on August 24, 2017, Defendant Qayyum observed Mr. Suarez laughing inappropriately. Ex. 80 at D-000306. Nevertheless, he failed to document any discussion with Mr. Suarez of the benefits of medication. *Id.* Thus, assuming Defendant Qayyum simply "discussed medication with Mr. Suarez" a few times on a sporadic basis, a reasonable juror could find that this "treatment" was deliberately indifferent to Mr. Suarez's needs.

Moreover, a reasonable juror could conclude that Defendant Qayyum did even less than that. The OMH policy required Defendant Qayyum to both provide medication education and to document the discussion: "The Psychiatric Progress Notes are an extremely important part of the patient's record. They must . . . document the discussion of the risks and benefits of medication (medication education) with the patient, and patient's response to the discussion and apparent level of understanding." *Id.* at ¶ 400. But during each of Defendant Qayyum's meetings with Mr. Suarez, he simply checked off a box on the Progress Note form indicating that he had provided "medication education," without including anything in the narrative of the note to indicate that he actually did so. *Id.* at ¶ 398. Even if simply "discuss[ing]" medication with Mr. Suarez was adequate (and it was not), a reasonable juror could find that Defendant Qayyum failed to do so.

2. Kulick

The record refutes Defendant Kulick's argument that she did not show deliberate indifference because she "discuss[ed] medication with Mr. Suarez, who chose not to take any medication[,]" and "there were no facts from which defendant . . . could draw an inference that [Mr. Suarez] was in need of additional mental health treatment[.]" MSJ at 19-20.

Defendant Kulick was assigned as Mr. Suarez's primary clinician when he arrived at Downstate. Ex. 32 at 216:11-19. The next day, on June 23, 2017, Defendant Kulick first met Mr. Suarez and learned of his bipolar diagnosis and history of hallucinations. Ex. 94 at OMH00732. She also learned he had received inpatient treatment. *Id.* She noted that Mr. Suarez came to Downstate "with an active medication order for Zyprexa," and that Mr. Suarez believed it was effective. *Id.* Defendant assigned Mr. Suarez an MHSL 1-S and recommended that Mr. Suarez be admitted to OMH treatment and receive "individual therapy" and "medication." Ex. 95 at OMH D-0034; Ex. 9 at 51:18–52:18, 151:22–152:6; Ex. 32 at 87:10-20, 89:12–19; Ex. 58 at D-000280; Ex. 59 at D-000282-000283.

Despite these recommendations, Defendant Kulick did not see Mr. Suarez again until almost a month later on July 19, 2017 and did not inquire about his medication compliance or come to learn that his medication was discontinued until almost three weeks after the fact. Ex. 12 at OMH D-0036–40. Even then, Defendant Kulick's Progress Note from this meeting does not suggest that she provided any medication education. *Id*. Defendant Kulick's third and final meeting with Mr. Suarez took place immediately following the altercation that resulted in him being placed in SHU on August 8, 2017. Ex. 65 at D-000318-000319. Her Progress Note from this meeting shows that she again neglected to provide any medication education. *Id.*

Further, during the August 8th meeting, Defendant Kulick was aware that the altercation had resulted in officers' use of force against Mr. Suarez and that he had reportedly engaged in

behavior leading to the placement of a spit mask and a mental health referral from DOCCS medical staff. Ex. 65 at D-000318-000319; Ex. 32 at 167:9-168:13. Nonetheless, Kulick made no effort to obtain Mr. Suarez's disciplinary report, to speak with the officers or medical staff involved, or to otherwise learn the underlying facts. *Id*. Additionally, Mr. Suarez's medical records reflected earlier psychotic episodes in which Mr. Suarez assaulted corrections officers during periods in which he had stopped taking his medication. Ex. 18 at ¶ 106. Defendant Kulick had access to these records and had reviewed them by that time. Ex. 32 at 69:6-72:1.

Thus, Defendant Kulick's assertion "there were no facts from which [she] could draw an inference that Mr. Suarez was in need of additional mental health treatment" is contradicted by the record. A reasonable jury could conclude that Defendant Kulick had enough information to determine that Mr. Suarez needed mental health treatment and to be diverted from SHU.

3. DiNardo

Defendant DiNardo seeks summary judgment as to both of Mr. Suarez's Eighth Amendment claims, arguing that it was appropriate for her to allow Mr. Suarez to be housed in SHU and that her treatment of him was adequate. MSJ at 21-22. DiNardo incorrectly contends that Mr. Suarez was stable at each of their encounters. But there remain disputes of material fact as to her subjective awareness of Mr. Suarez's condition and as to whether she actually provided Mr. Suarez *any* treatment based on that awareness.

As an initial matter, Defendant DiNardo's testimony during Mr. Suarez's Tier III hearing dispels any notion that she thought he was "stable." DiNardo testified that, "[u]pon review of [Mr. Suarez's] mental health records, it appears that the conduct related to the disciplinary hearing is related to the inmate patient's mental health symptoms." Ex. 74 at 5:2-6.

Knowing this testimony precludes summary judgment, DiNardo goes to great lengths to minimize it, suggesting that her recommendation that Mr. Suarez be removed from SHU had

nothing to do with Mr. Suarez's specific case. MSJ at 21-22. Rather, she argues, her recommendation was only the result of "an abundance of caution" given that "segregated confinement can have a negative effect on some individuals." *Id*. That was not Defendant DiNardo's testimony. She unequivocally testified that "[u]pon review of [Mr. Suarez's] mental health records, it [was her] clinical opinion that the inmate patient is not suitable for confinement in disciplinary housing due to the mental illness." Ex. 74 at 5:11-15. Having personally evaluated Mr. Suarez upon his placement in SHU, and having reviewed Mr. Suarez's medical history, Defendant DiNardo determined that Mr. Suarez had decompensated just before his placement in SHU and that he was not fit for confinement in disciplinary housing. *Id*.

Further, there is evidence that Mr. Suarez's physical altercation with a corrections officer on August 8 *was itself* a sign of decompensation, and that clinicians could have confirmed this by reviewing his mental health records. Ex. 18 at ¶ 106; Ex. 39 at 79:12-14. And following his placement in SHU, Mr. Suarez was subject to a deprivation order and denied all out of cell activity for seven days for alleged "ongoing negative behavior." Ex. 37 at 162:2-19. Defendant Morton described the type of behavior that results in such an order as "throwing feces at people, . . . continu[ing] to kick the window and the doors, . . . set[ting] fires, [and] assault[ing] people." Ex. 30 at 186:14-22. As he testified, DiNardo would have received a copy of this deprivation order, and it was publicly posted in the SHU where Defendant DiNardo saw Mr. Suarez. Ex. 30 at 180:14-20, 192:22-193:7.

With knowledge of Mr. Suarez's condition, Defendant DiNardo did nothing to divert him from SHU or to provide him with any treatment. Aside from her preliminary interview of Mr. Suarez and check-in 14-days later, Defendant DiNardo's only interactions with Mr. Suarez, if any, took place in her daily "rounds" of SHU. Ex. 35 at 371:19:372-7. Defendant DiNardo

testified that these cell-side visits consisted of a greeting and a follow-up question, but she could not say whether they lasted more than a few minutes. Ex. 37 at 184:3-7, 185:17-19. And no documentation exists to corroborate Defendant DiNardo's testimony that they ever occurred. Ex. 35 at 111:8-12. These perfunctory visits, if they took place at all, fall short of the requirement to provide a "heightened level of care." *See infra* p. 30. Indeed, Defendant DiNardo's supervisor, Defendant Lahey conceded that these visits constituted only an "attempt to treat." Ex. 35 at 371:10-18.

4. Lahey

Defendant Unit Chief Ryan Lahey argues that he is entitled to summary judgment because he claims that the provision requiring him, as co-chair of the JCMC to consider whether there were exceptional circumstances in Mr. Suarez's case did not apply and that there is not a triable issue of fact as to Defendant's inadequate treatment. He is wrong on both accounts.

As discussed further below, a reasonable jury could conclude that Defendant Lahey and the JCMC were required to discuss whether there were exceptional circumstances militating against Mr. Suarez's segregated confinement placement that had the potential to last longer than 30 days. *See infra* p. 20. Even without the SHU Exclusion Law, the Eighth Amendment itself required Defendant Lahey to release Mr. Suarez from the SHU earlier. Lahey was the highest ranking OMH official at Downstate and admits he was ultimately responsible for Mr. Suarez's mental healthcare. Ex. 35 at 16:13-20, 251:5-9. Like Defendant DiNardo, Lahey witnessed signs that Mr. Suarez had decompensated and was not fit for SHU. After Mr. Suarez's "violent struggle" with officers, DOCCS called Defendant Lahey to request that OMH see Mr. Suarez. Ex. 79 at D-000392. Lahey also had access to the deprivation order that reported that during his first week in solitary, Mr. Suarez continued to behave aggressively. Ex. 30 at 180:14-20, 192:22-193:7. Moreover, Defendant Lahey testified that he reviewed Mr. Suarez's chart weekly, and the

JCMC met and discussed Mr. Suarez's case on August 17. Ex. 35 at 90:1-11; 350:15-21. Defendant Lahey even confirmed that OMH staff should have considered Mr. Suarez's condition and released him sooner. *Id.* 360:17-20.

Defendant Lahey contends that his treatment of Mr. Suarez was adequate because he saw Mr. Suarez during rounds. But Lahey admits that there is no evidence that these rounds occurred. MSJ at 24. Even if they did, a reasonable jury could find that these cursory rounds were inadequate to treat Mr. Suarez's serious medical needs. Ex. 18 at ¶ 115. Lahey was one of the OMH Defendants who, on August 11, 2017, received Mr. Suarez's March 2017 Discharge Plan from Kirby highlighting an "**ALERT**[ ] [instructing] . . . Accepting facility to encourage medication compliance as patient will decompensate if non-compliant." Ex. 68 at D-000634. Lahey was thus aware that OMH professionals had urged him to "encourage medication compliance." And yet Defendant Lahey and his staff had let Mr. Suarez cease taking medication and did not provide any medication education. At the very time Lahey received that "**ALERT**," Lahey knew Mr. Suarez was caged in solitary confinement and did nothing about it. As Judge Garaufis explained, because Defendant Lahey was "a seasoned leader[ ], [he] had all the more reason to know this course of action was improper." *Idiakheua v. New York State Dep't of Corr. & Cmty. Supervision*, No. 20-CV-4169 (NGG) (SJB), 2022 WL 10604355, at *12 (EDNY Oct. 18, 2022).

These facts are sufficient to create triable issues as to Mr. Suarez's Eighth Amendment claims against Defendant Lahey.

5. Horan

Defendant Horan argues that Mr. Suarez cannot satisfy the subjective component of the deliberate indifference claim because (i) "[Horan] did not have the authority to divert Mr. Suarez

to a RMHTU under the SHU Exclusion Law" and (ii) Mr. Suarez's disciplinary sanction was "a relatively minor penalty." MSJ at 9. Defendant's arguments are at odds with the record.

First, Defendant Horan wrongly asserts that he did not have the authority to initiate Mr. Suarez's removal from SHU to an RMHTU. MSJ at 23. Not so. Ex. 31 at 43:12–44:6, 48:9–23. Horan understood that he could make referrals to OMH in his capacity as a hearing officer and testified that he had done so on prior occasions. Ex. 52 at 100:19–101:13.

Second, Defendant Horan failed to initiate Mr. Suarez's removal from SHU despite knowing from the instant he first encountered him that Mr. Suarez was designated as requiring OMH's highest level of need and had "a serious and persistent mental illness." Ex. 52 at 161:3-10. Moreover, though Mr. Suarez was entitled to have his Tier III hearing start within seven days of the associated altercation, Defendant Horan got an extension to complete the hearing later. Ex. 52 at 141:1-4. Contemporaneous records reflect "hearing officer unavailable" as the noted reason for the extension, and Horan testified that such unavailability could be due to long weekends or vacation. *Id.* at 64:11-65:6. Meanwhile, Mr. Suarez was deteriorating, hearing voices telling him "[w]hen you get out of here you have to protect yourself." Ex. 3 at 70:6-18.

Even after Defendant Horan himself witnessed the severity of Mr. Suarez's condition, he allowed Mr. Suarez to remain in SHU and further delayed the hearing. During Mr. Suarez's Tier III hearing, on August 15, Defendant Horan recognized that Mr. Suarez was not "completely free of signs of mental illness" and suffered "a lack of connection," Ex. 52 at 174:12–175:9, and that "[t]his was a very unique case with a guy with a serious mental illness" who appeared to be "off the rails." Ex. 51 at 243:14-19, 282:23-283:16. Even so, Horan did not seek OMH's confidential testimony for another six days and did not reconvene the hearing until the day thereafter. Ex. 52 at 168:13-17, 170:17–171:1.

Third, Defendant Horan's sanction of Mr. Suarez was not a "minor penalty." Defendant Horan sentenced Mr. Suarez to 14 days of time served in SHU in addition to 60 days of keeplock with 30 days suspended—meaning that barring a time cut, Mr. Suarez would spend the remainder of his incarceration locked in his cell for 23 hours per day immediately before his release. Ex. 52 at 171:8-14. Though Defendant Horan testified that his decision to move Mr. Suarez from SHU to keeplock was consistent with OMH's recommendation that Mr. Suarez was unfit for "disciplinary housing," this belief is at odds with DOCCS policy at the time, which viewed any form of keeplock as a form of disciplinary housing. Ex. 51 at 63:5–24. The sanction was also above DOCCS disciplinary guidelines, which at the time called for a penalty of no more than 30 days of confinement, inclusive of keeplock and any suspended days. Ex. 30 at 171:9-172:2. Defendant Horan knew these guidelines and chose to ignore them. Ex. 51 at 87:6-12, 269:21–270:2. A reasonable juror could find that Defendant Horan's acts of delaying Mr. Suarez's hearing, continuing his confinement in SHU, and imposing an above-guidelines sanction reflected deliberate indifference to Mr. Suarez's serious medical needs. *See Idiakheua*, 2022 WL 10604355, at *10 (noting evidence that "Defendant Horan did not merely withhold Mr. Suarez's needed medical care; he placed Mr. Suarez into a context that predictably worsened Mr. Suarez's psychosis").

6. Morton

Defendant Morton argues that he was not deliberately indifferent t because OMH, and not Morton, was responsible for Mr. Suarez's mental healthcare. MSJ at 13-14. But Defendant Morton confirmed that as the superintendent, he was "responsible for the entire operation of Downstate Correctional Facility," including "ensur[ing] that all areas of Downstate, including the SHU, were complying with applicable laws." Ex. 30 at 20:7-10. Defendant Morton also

admitted that if he learned that an inmate's placement in SHU was somehow illegal, he could and would "correct that and have the inmate released from SHU." *Id.* at 73:6-11.

Like Defendant Horan, Defendant Morton confirmed that DOCCS could make referrals for OMH treatment. *Id.* at 121:13-22:14. He personally observed Mr. Suarez at least once while Mr. Suarez was confined in SHU. *Id.* at 22:15-20. Defendant Morton additionally signed Mr. Suarez's AOT petition in which he swore that as of August 21, 2017, he understood that Mr. Suarez had a history of lack of compliance with treatment that resulted in acts of serious violent behavior. *Id.* at 11-14. Defendant Morton signed a deprivation order everyday of Mr. Suarez's first week in SHU that stated that Mr. Suarez continued to exhibit "ongoing negative behavior," which Defendant Morton compared to "throwing feces at people, . . . continu[ing] to kick the window and the doors, . . . set[ting] fires, [and] assault[ing] people." *Id.* at 186:14-22. A reasonable juror could conclude based on these facts that Defendant Morton should have referred Mr. Suarez for mental health treatment.

Defendant Morton was also directly involved in Mr. Suarez's confinement in SHU. Defendant Morton signed the deprivation order that confined Mr. Suarez in SHU for a week without any activity or any meaningful contact with the outside world. Ex. 50 at DOCCS D-0000484. Morton also reviewed the "hearing packet" for Mr. Suarez's disciplinary infraction, including the misbehavior report, hearing testimony (stating that Mr. Suarez was Level 1-S), and the unusual incident report. Ex. 30 at 62:1-63:19. As superintendent, Defendant Morton reviewed and approved Mr. Suarez's confinement in solitary confinement and keeplock since it was over the DOCCS confinement sanction guidelines. *Id.* 171:9-172:2; Ex. 29. Morton had the authority to release Mr. Suarez from SHU immediately, but chose not to do so. Ex. 30 at 66:8-67:2.

These facts are sufficient for a reasonable jury to conclude that Defendant Morton was deliberately indifferent. *See Idiakheua*, 2022 WL 10604355, at *11 (in denying summary judgment, noting that "Defendant Morton's affirmative conduct was also allegedly a but-for cause of the egregious, conscience-shocking treatment of Mr. Suarez that led to a deprivation of Plaintiff's constitutional rights, much like Defendant Horan").

7. Reynolds

Defendant Reynolds' failure to intervene when he was cognizant of Mr. Suarez's mental health disposition in SHU creates, at minimum, a dispute of material fact as to his deliberate indifference. Defendant Reynolds argues that he "was not [Mr. Suarez's] treating physician," and that "at the times he met with [Mr. Suarez] he was able to survive safely in the community and he did not pose a threat of danger to himself or others." MSJ at 26-27. Those arguments, however, are at disproven by the record.

First, though Mr. Reynolds may not work at Downstate, he was one of the clinicians tasked with Mr. Suarez's treatment." Ex. 35 at 430:7-19; *see also id* at 431:12-14. Defendant Reynolds reviewed Mr. Suarez's records and met with Mr. Suarez while he was in SHU on August 17 and August 22, 2017 to evaluate whether he qualified for AOT. Ex. 88 at D-01332; Ex. 54 at 38:6-21, 45:2-14. And as a member of the treatment team at Downstate, Defendant Reynolds spoke with OMH staff about patient care. *Id.* 431:4-7.

Second, there is evidence refuting Defendant's claim that he did not find that Mr. Suarez presented a threat to himself or others. During his meetings with Mr. Suarez, Defendant Reynolds noted that Mr. Suarez's "affect [was] mildly elevated with frequent and inappropriate smiling and laughter" and that Mr. Suarez's insight was poor." Ex. 88 at D-001332, Reynolds Ex. 8. Following those meetings, Defendant Reynolds sought an AOT Order for Mr. Suarez because "it was his belief that without supervision, [Mr. Suarez] would be at risk of harm to

himself or to others during a psychiatric relapse." MSJ at 26. Cognizant of Mr. Suarez's need for supervision and medical treatment, Defendant Reynolds failed to take *any* steps to ensure that Mr. Suarez received *any* care while he was still at Downstate. Ex. 54 at 131:18-20. A reasonable juror could conclude that Defendant Reynolds' inaction despite his knowledge of these facts was deliberately indifferent.

8. Baker

Defendant Baker seeks summary judgment by arguing that (i) Mr. Suarez presented as stable during her meetings with him, and (ii) she did not have the authority to remove him from SHU. MSJ at 24-25. Defendant Baker is not entitled to summary judgment given the material disputes of fact as to each of these points.

Mr. Suarez did not present as stable during all of his meetings with Defendant Baker. When Defendant Baker saw Mr. Suarez on August 16, after eight days in SHU with a deprivation order in place, he presented with "poor" insight and judgment. Ex. 46 at D-000323. As Defendant Baker testified, individuals with "poor" insight and judgment do not "have an awareness of what's going on" or any insight into their mental health. Ex. 42 at Tr. 116:8-117:7, 237:2-8. She was also aware that Mr. Suarez's condition could deteriorate further, as she knew of his history of decompensation while unmedicated and that he had been unmedicated for almost all of his time at Downstate. Indeed, Defendant Baker testified that Mr. Suarez's history of decompensation during periods of medication noncompliance was *the reason* OMH pursued an AOT as to his case. Ex. 47 at 244:6-245:5.

Even so, Defendant Baker allowed Mr. Suarez to remain in segregation. She had the authority to initiate his removal from segregated confinement. *See supra* pp. 11-12. Her choice not to use it, despite her awareness of Mr. Suarez's deteriorating condition while he remained there, presents a material question of fact as to her deliberate indifference.

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Because myriad disputes of material fact remain, none of the Defendants are entitled to qualified immunity. *See Harrison v. Barkley*, 219 F. 3d 132, 140 (2d Cir. 2000).

Under the doctrine of qualified immunity, officials must have "fair warning that their conduct violated the Constitution" before liability can be imposed under Section 1983. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Although a Supreme Court case with identical facts can provide fair warning, other forms of notification are more common. For instance, a general constitutional rule can apply with clear relevance to the specific conduct in question, even if the specific conduct has not been previously deemed unlawful. *See Matzell v. Annucci*, 64 F. 4th 425, 439 (2d Cir. 2023) (citing *Hope*, 536 U.S. at 741); *see also Brandon v. Royce*, No. 16-CV-5552 (VB), 2019 WL 1227804, at *10 (S.D.N.Y. Mar. 15, 2019) (finding that "lower court cases in this circuit and cases from other circuits" clearly established the illegality of constant illumination of a cell, which caused severe insomnia) (cleaned up); *Monroe v. Gould*, 372 F. Supp. 3d 197, 204-205 (S.D.N.Y. 2019) (relying on a combination of federal and state appellate cases, none of which presented identical facts, to clearly establish the illegality of a manual cavity search absent reasonable suspicion).

First, an official's conduct may be so obviously illegal that no "body of relevant case law" is necessary, such that there is no need to identify a previous case with identical facts. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citing *Hope*, 536 U.S. at 738). *See Matzell, supra*. Therefore, even if the specific action has not been previously declared unlawful, officials who engage in egregious misconduct are not entitled to qualified immunity. *U.S. v. Lanier*, 520 U.S. 259, 270-271 (1997). Both the Supreme Court and the Second Circuit have reaffirmed this principle in recent years. *See Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Edrei v. Maguire*, 892 F. 3d 525 (2d Cir. 2018).

Second, public officials can be provided "fair warning" of the illegality of their conduct through the state law and regulations that govern it. *See Groh v. Ramirez*, 540 U.S. 551, 564 (2004) (in denying qualified immunity, noting "the guidelines of [the officer's] own department placed him on notice that he might be liable for executing a manifestly invalid warrant"); *Hope*, 536 U.S. at 744 (regulations governing officers' conduct provide "strong support for the conclusion that [the officers] were fully aware of the wrongful character of their conduct"). The Second Circuit has therefore denied qualified immunity to prison officials who refused to enroll an incarcerated person in Shock Incarceration despite the clear command of state law to do so, *see Matzell*, 64 F. 4th at 438-440, and to prison officials who violated constitutional protections embedded in state regulations, *see Wright v. Smith*, 21 F. 3d 496, 500 (2d Cir. 1994).

As to Plaintiff's mental health care claim, a reasonable jury could conclude that Defendants Lahey, DiNardo, Qayyum, Baker, Kulick, and Reynolds had could have and should have provide dMr. Suarez with treatment, yet chose not to provide any care. *See supra* pp. 11-12. The Court should deny them qualified immunity because it has been clearly established for decades that the Eighth Amendment requires jailers to provide minimally sufficient mental health care. *See Langley v. Coughlin*, 888 F. 2d 252, 253 (2d. Cir. 1989).

A jury could reasonably conclude that Defendants Lahey, DiNardo, Qayyum, Baker, Kulick, and Reynolds provided Plaintiff with no treatment at all, not even the medication education that Plaintiff required to make informed medical decisions. No reasonable official could believe they "were compelled by necessity" to deny Plaintiff treatment and medication education. *Taylor*, 141 S. Ct. at 54; *cf. Randle v. Alexander*, 170 F. Supp. 3d 580, 596-597 (S.D.N.Y. 2016) (denying qualified immunity to officials who ignored history of suicidal tendencies).

As to Plaintiff's conditions claim, the Defendants who took actions that foreseeably relegated Plaintiff to isolation, took further steps to deprive him of recreation and family visits while he descended into psychosis in plain sight, and nevertheless kept him in isolation—namely, Defendants Morton, Horan, DiNardo, Kulick—do not deserve qualified immunity. There is nothing objectively reasonable about torturing a person in isolation instead of moving him to a more therapeutic, less brutal environment consistent with his mental health needs.

Long before Mr. Suarez entered state prison, it was clearly established that jailers may not impose conditions that are "totally without penological justification." *Hope*, 536 U.S. at 737 (cleaned up). And courts have long recognized the obvious harms from solitary confinement, particularly for those with mental illness. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, ECF No. 80, at 13-14. No reasonable officials could believe they were "compelled by necessity" to impose deplorable conditions on his confinement "could not have been mitigated, either in degree or duration." *Taylor*, 141 S.Ct. at 54. In *Idiakheua*, Judge Garuafis denied qualified immunity to several of the Defendants in this action, finding that a reasonable jury could find them liable for their "egregious" conduct. 2022 WL 10604355, at *10-12. The same result is appropriate as to all Defendants here.

III. DEFENDANTS LAHEY AND GUTH ARE NOT ENTITLED TO SUMMARY JUDGMENT ON MR. SUAREZ'S SHU EXCLUSION LAW CLAIM.

A. The SHU Exclusion Law Plainly Required Defendants to Divert Mr. Suarez from Segregated Confinement When He Received his Misbehavior Report

The SHU Exclusion Law's diversion-and-removal provision required DOCCS and Defendants Lahey, Guth, and DiNardo[3] to divert Mr. Suarez from SHU upon his receipt of a

[3] Defendants have not moved for summary judgment on Mr. Suarez's SHU Exclusion Law claim as to Defendant DiNardo.

misbehavior report that exposed him to a potential of more than 30 days in segregated confinement.[4] They did not do so. Thus, they are not entitled to a judgment as a matter of law.

The meaning of the diversion-and-removal provision is unambiguous.[5] In 2017, it read, "[DOCCS], in consultation with mental health clinicians, shall divert or remove incarcerated individuals with serious mental illness . . . from segregated confinement . . . ***where such confinement could potentially be for a period in excess of thirty days***[.]" N.Y. Correct. Law § 137(6)(d)(i) (McKinney's 2017) (emphasis added).

At the time of his placement in SHU, Mr. Suarez had serious mental illness, and Defendants Lahey, Kulick, and DiNardo were primarily responsible for his mental health treatment. *See supra* pp. 12-14. He also faced the potential of more than 30 days in segregated confinement for two separate reasons. First, Mr. Suarez was placed in SHU pending a disciplinary hearing, Ex. 66 at D-000320, and applicable rules permitted Defendant Annucci or his designee to indefinitely extend disciplinary hearings, thus indefinitely prolonging an incarcerated person's confinement in SHU pending a hearing. 7 NYCRR 251-5.1(b) (McKinney's 1983), superseded by amendment, May 31, 2022. This rule placed no burden to justify such extensions and courts have blessed extensions for all manner of reasons. *See Lull v. Coombe*, 238 A.D. 2d 761, 762 (3d Dept. 1997) (collecting cases). Indeed, Mr. Suarez's hearing was delayed at least once pursuant to this rule. Ex. 52 at 141:5-13.

Second, the infractions with which Mr. Suarez's was charged rendered him eligible for 120 days in SHU and 60 days in Keeplock. 7 NYCRR 254.7; DOCCS Confinement Sanction

[4] Although DOCCS and its employees—in addition to the OMH Defendants—were also required to divert Mr. Suarez from segregation, DOCCS employees are immune for their violations of state law, including the SHU Exclusion Law. *See* N.Y. Correct. Law § 24(1) (McKinney's 2017).

[5] "Statutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." *Dobrova v. Holder*, 607 F. 3d 297, 301 (2d Cir. 2010) (cleaned up). *See also People v. Pabon*, 28 N.Y. 3d 147, 152 (N.Y. 2016) (articulating the same principle of statutory analysis, but with respect to New York State Statutes).

Guidelines for Incidents Occurring on or After 4/1/2017.[6] Because SHU constituted "segregated confinement" in 2017, N.Y. Correct. Law § 2(23) (McKinney's 2017), Mr. Suarez faced the potential of at least 120 days in segregated confinement at the time he received his misbehavior report.[7] Mr. Suarez's misbehavior report also rendered him eligible for a loss of good time, which would have delayed his conditional release—scheduled for September 5, 2017, or 29 days after his initial placement in SHU—by as many as 103 days. Ex. 49 at D-000162, Ex. 34 at D-000883-000884; Ex. 52 at 88-90. So, because of the penalties associated with the disciplinary offenses at issue—including over 100 days in segregated confinement and up to 103 days of additional incarceration—Mr. Suarez obviously faced the potential of well over 30 days in segregated confinement. It is that potential that triggered Defendants' diversion-and-removal responsibilities. There is no other rational reading of the statute.

Defendants argue that the diversion-and-removal provision applies only where an incarcerated person "[has] *received* a sentence to segregated confinement of more than 30 days." MSJ at 27 (emphasis added). But this standard appears nowhere in the statute, nor does it appear in any regulation, case law, or other source of law. Defendants have simply made it up. They also point to the provision of the SHU Exclusion Law that permits DOCCS to "proceed in accordance with [its] rules and regulations for disciplinary hearings." MSJ at 9 (citing N.Y. Correct. Law § 137(6)(d)(1)). But this provision has no bearing upon the diversion-and-removal provision because the Department's rules and regulations for disciplinary hearings do not conflict with the diversion-and-removal provision. Those rules simply prescribe certain

[6] Mr. Suarez was charged with the following offenses, which rendered him eligible for the following disciplinary confinement sanctions: Assault on Staff, 100.11 (60 days SHU); Threats, 102.10 (30 days SHU); Creating a Disturbance, 104.13 (30 days Keeplock), Disobeying a Direct Order, 106.10 (30 days SHU) and Harassment, 107.11 (30 days keeplock).

[7] Furthermore, because DOCCS was permitted to hold Mr. Suarez in a "separate keeplock unit" to serve keeplock sanctions, and because "separate keeplock units" also constituted "segregated confinement" in 2017, *id.*, Mr. Suarez faced the potential of serving 60 days of keeplock in "segregated confinement." Thus, Mr. Suarez faced the potential of a total of 180 days in segregated confinement.

procedures. When read together with the diversion-and-removal provision, the provision Defendants cite simply permits DOCCS to move forward with adjudicating an incarcerated person's disciplinary infraction despite the diversion or removal of that person from segregated confinement prior to the completion of the hearing.

Defendants' construction of the diversion-and-removal provision asks the Court to functionally omit from the statute the words "could potentially be." But it is not the province of the courts to omit language from statutes. *See U.S. v. Davis*, 961 F. 3d 181, 188 (2d Cir. 2020). Furthermore, the construction that Defendants advance would sanction absurd results, such as DOCCS's ability to hold a person with serious mental illness in segregated confinement indefinitely, so long as the Commissioner or his designee extends the relevant disciplinary hearing. This would undercut the purpose of the diversion-and-removal provision.

B. It is Irrelevant that Mr. Suarez was not Ultimately Sanctioned with Segregated Confinement Time at his Disciplinary Hearing

Defendants attempt to distract the Court with the fact that Mr. Suarez was not ultimately sanctioned with segregated confinement time at his disciplinary hearing. MSJ at 9, 28. But Mr. Suarez's sanction has no bearing on the dispositive fact that for at least fourteen days, he remained in SHU facing potentially far more than 30 days in segregated confinement. Per the plain language of the statute, that potentiality triggered Defendants' diversion-and-removal responsibilities, not the ultimate disposition of Mr. Suarez's disciplinary hearing. Defendants were required to divert Mr. Suarez in the period during which he faced that potentiality.

C. The SHU Exclusion Law Plainly Required Defendants to Afford Mr. Suarez a Heightened Level of Care While He Was in SHU

At the time of Mr. Suarez's incarceration, the heightened-level-of-care provision of the SHU Exclusion Law read, "incarcerated individuals with serious mental illness who are not diverted or removed from segregated confinement shall be offered a heightened level of mental

health care, involving a minimum of two hours daily of out-of-cell therapeutic treatment and programming." N.Y. Correct. Law § 137(6)(d)(iii) (McKinney's 2017). Mr. Suarez had serious mental illness. He was not diverted or removed from segregated confinement. And it is undisputed that he was not offered two hours daily out-of-cell therapeutic treatment and programming during his time in segregated confinement at Downstate. Defendants Lahey, Kulick, and DiNardo were required to provide him with a heightened level of care and did not do so. They are therefore not entitled to a judgment as a matter of law.

Defendants argue that "a heightened level of care applies to those incarcerated individuals who are housed in an RMHTU after being sentenced to more than 30 days in SHU and being diverted to an RMHTU." MSJ at 10. But this is not what the statute says. Defendants further argue that "a heightened level of care is also provided if DOCCS determines, based on safety and security, that an incarcerated individual who has been designated seriously mentally ill and receives a sentence of more than 30 days cannot be transferred to special program." *Id.* The heightened level of care requirement is not pegged to whether an incarcerated person has received a sentence of more than 30 days, however. The provision does not even reference the disciplinary process. Again, Defendants have pulled an atextual interpretation from thin air.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion for Summary Judgment.

Dated: June 9, 2023
New York, New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELVIN SUAREZ,

Plaintiff,

v.

ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision, in his individual capacity; ANN MARIE T. SULLIVAN, Commissioner, New York State Office of Mental Health, in her individual capacity; ROBERT MORTON, Superintendent, Downstate Correctional Facility, in his individual capacity; RYAN LAHEY, Office of Mental Health Unit Chief, Downstate Correctional Facility, in his individual capacity; ABADUL QAYYUM, Psychiatrist, Downstate Correctional Facility, in his individual capacity; PETER M. HORAN, Supervising Offender Rehabilitation Coordinator, Downstate Correctional Facility, in his individual capacity; SAMANTHA L. KULICK, Psychology Assistant 3/Supervisor, New York State Office of Mental Health, in her individual capacity; MAURA L. DINARDO, Clinician, New York State Office of Mental Health, in her individual capacity; BRANDON N. REYNOLDS, Psychiatrist, New York State Office of Mental Health, in his individual capacity; CHESNEY J. BAKER, Licensed Master Social Worker 2/Supervisor, New York State Office of Mental Health, in his individual capacity; NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION; and NEW YORK STATE OFFICE OF MENTAL HEALTH.

Defendants.

Case No. 7:20-cv-7133-VB

STATEMENT REGARDING DELAYED FILING

Counsel for Plaintiff, Elvin Suarez submits this statement pursuant to Rule 23.6(c) of the Electronic Case Filing Rules & Procedures for the Southern District of New York, to explain a missed deadline due to a technical failure of the Court's Electronic Filing system.

Friday, June 9, 2023, was the deadline for the response to Defendant's Motion for Summary Judgment. Prior to the expiration of the deadline the Courts Electronic Case Filing system was unavailable due to scheduled maintenance.

SDNY ECF Service Interruption Notice
Friday, June 9, 2023, at 3:00 PM to Sunday, June 11, 2023, at 8:00 PM

Please be advised the Courts Electronic Case Filing (ECF) system will be unavailable to all users beginning
Friday, June 9, 2023, at 3:00 PM. to **Sunday, June 11, 2023, by 8:00 PM.**

This interruption in service is necessary to upgrade the courts ECF system to ECF NextGen version 1.7.
During this time users will be unable to file or view documents on the ECF system or through the PACER electronic public access service.

Plaintiff was prepared to file prior to the expiration of the deadline. Plaintiff served his opposition to Defendants' motion for summary judgment on defense counsel over email Friday evening and defense counsel confirmed receipt this morning. Accordingly, Plaintiff requests that the Court excuse the missed deadline because Plaintiff was unable to timely file his responsive papers due to a technical failure.

Dated: June 12, 2023

Respectfully submitted,

By: */s/ Zachary S. Newman*
Zachary S. Newman

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