

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Sofia Cano,)	Case No. 9:22-cv-04247-DCC
)	
Plaintiff,)	
)	
v.)	ORDER
)	
South Carolina Department of)	
Corrections, Bryan P. Stirling, Dr.)	
Chris Kunkle, Esther Labrador, and)	
Dr. Andrew W. Hedgepath, in their)	
individual and official capacities; Dr.)	
John Taylor, William Langdon,)	
McKendley Newton, Terrie Wallace,)	
Salley Elliott, Kenneth L. James,)	
Netra Adams, Pamela Derrick, Dr.)	
Robert Ellis, Dr. Jennifer Block, Timothy)	
Green, Chelsea Johnson, Yvonne)	
Wilkins-Smith, Shawanda Washington,)	
and Does 1–5, in their individual)	
capacities,)	
)	
Defendants.)	
_____)	

This matter is before the Court upon Plaintiff’s Motion for Preliminary Injunction. ECF No. 6. In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.), this matter was referred to United States Magistrate Judge Molly H. Cherry for pre-trial proceedings and a Report and Recommendation (“Report”). On July 31, 2023, the Magistrate Judge issued a Report recommending that the Motion be granted in part

and denied in part. ECF No. 41. Defendants¹ and Plaintiff filed objections and replies. ECF Nos. 42, 43, 44, 45.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. See *Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a de novo determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. See 28 U.S.C. § 636(b). The Court will review the Report only for clear error in the absence of an objection. See *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that “in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” (citation omitted)).

DISCUSSION

As an initial matter, the Magistrate Judge provides a thorough recitation of the relevant facts and the applicable law, which the Court incorporates by reference. For purposes of the requested preliminary injunction, Plaintiff argues that she is likely to succeed on the merits of her claims pursuant to the Eighth Amendment and the

¹ Within this Order, “Defendants” will refer to all Defendants except John Does 1–5.

Americans with Disabilities Act (“ADA”). ECF No. 6. She requests a preliminary injunction directing Defendants to: (1) provide Plaintiff with medically necessary gender-affirming care for her gender dysphoria, including hormone therapy; (2) provide ongoing access to effective hair removal products; and (3) ensure full use of Plaintiff’s legal, female name by all South Carolina Department of Corrections (“SCDC”) personnel and systems. The Magistrate Judge recommends that the Motion be granted as to her requests for medically necessary care and denied as to the remaining requests. Upon de novo review and for the reasons discussed below, the Court agrees with the Magistrate Judge’s recommendation.

Likelihood of Success on the Merits

Eighth Amendment Claims

Hormone Therapy

Plaintiff alleges that Defendants have been deliberately indifferent to her serious medical needs. As explained in more detail by the Magistrate Judge, Plaintiff has demonstrated that she is likely to succeed on the merits of her Eighth Amendment deliberate indifference to serious medical needs claim.

As an initial matter, Plaintiff has been diagnosed with gender dysphoria, which is a serious medical condition.² Moreover, Plaintiff has demonstrated, at this stage of the proceedings, that SCDC officials knew of and disregarded the substantial risk of harm arising from her medical condition. Here, the allegations rise beyond mere disagreement

² In their objections, Defendants do not concede that Plaintiff suffers from gender dysphoria. This issue is addressed below.

between an inmate and staff regarding the choice of care. Defendants' refusal to provide hormone therapy despite Plaintiff's diagnosis and resulting symptoms, including self-harm and ongoing distress, rises to the level of a constitutional deprivation.

Defendants argue that the South Carolina Budget Proviso 65.28 ("the Budget Proviso") prohibits SCDC officials from using state funds to start Plaintiff on hormone therapy; therefore, Plaintiff cannot "clearly show" that the individually named Defendants were deliberately indifferent to her serious medical needs because they were complying with state law. In their objections and reply, Defendants argue the meaning of the Budget Proviso at length. The Court need not repeat all the arguments here because the meaning of the Budget Proviso was also the subject of Defendants' Motion to Dismiss, which has previously been ruled upon by this Court. Briefly, the Court agrees with the recommendation of the Magistrate Judge in the Report on the Motion to Dismiss and again here.³ The Budget Proviso does not prohibit the use of state funds to begin hormone therapy for Plaintiff. Rather than reiterate what has been decided already by the Court, the Court refers the parties to its Order on the Motion to Dismiss for a further discussion of the Budget Proviso.

³ The Court notes again, as it did in its ruling on the Motion to Dismiss, that Plaintiff acknowledged her argument that the language of the Budget Proviso had changed was misplaced. The Court modifies the recommendation of the Magistrate Judge to the extent it credits this argument but finds that it does not impact the ultimate conclusion reached herein.

Use of Legal Name

The Magistrate Judge recommends finding that, at this early stage, Plaintiff has not demonstrated a likelihood of success on the merits. Upon review, the Court agrees.

As noted by the Magistrate Judge, Plaintiff has not identified which individuals continue to call her by her birth name and has not presented any evidence that the individuals know that the use of her birth name causes her distress and persist in using it. Moreover, her legal name does appear on her nametag in smaller font. The Court shares and reiterates the Magistrate Judge's concern that, apparently, some individuals continue to use her birth name. Nevertheless, the Court finds that, at this time, Plaintiff has not demonstrated a likelihood of success on the merits as to this claim.

Access to Hair Removal Products

The Magistrate Judge also recommends finding that Plaintiff has not demonstrated a likelihood of success on the merits as to Plaintiff's claim that Defendants have unconstitutionally denied her access to hair removal products. Upon de novo review, the Court agrees.

The Magistrate Judge's recommendation is based upon the speculative nature of Plaintiff's claim. Plaintiff has access to razors at this point in time. Her request is that she be permitted access to razors in the event that she is in quarantine or lockdown where they are presently prohibited. In her objections, Plaintiff argues that lockdowns are not speculative but likely under current conditions at SCDC facilities. The Court does not find her argument compelling. Indeed, as stated by the Magistrate Judge, Plaintiff has not presented sufficient evidence that future quarantines or lockdowns are more than

speculative or infrequent. Given the applicable law on Eighth Amendment violations and preliminary injunctions, the Court finds that Plaintiff has not demonstrated a likelihood of success on the merits of this claim.

ADA Claims

Hormone Therapy

The Magistrate Judge recommends finding that Plaintiff has established that she is likely to succeed on the merits of her claim pursuant to Title II of the ADA. Upon de novo review, the Court agrees.

Defendants argue that Plaintiff has not sufficiently established that she suffers from gender dysphoria, that hormone therapy is appropriate treatment, or that SCDC denied her hormone therapy on the basis of her disability. The first two objections can be quickly addressed and discarded. The Magistrate Judge has provided a thorough discussion of Plaintiff's diagnosis of gender dysphoria. However, even if that were not the case, the Report provides for evaluation of Plaintiff by SCDC medical professionals to assess her need for constitutionally appropriate medical care. This provision also takes care of the second objection. The Report does not dictate the medical care to be administered by SCDC, instead it recommends a mechanism to ensure Plaintiff receives proper care.

Turning to the third objection, as discussed by the Magistrate Judge, Plaintiff has produced sufficient evidence to support her claim under Title II, including that she has been denied care on the basis of her disability. Defendants contend that the denial of hormone therapy is based upon their interpretation of the Budget Proviso. The Court disagrees. As explained in more detail by the Magistrate Judge, the evidence in the

record indicates that Plaintiff has been denied access to hormone therapy not because a medical provider has determined that it is not medically necessary but because she was not taking hormones before she was incarcerated and cannot afford them on her own. Accordingly, this policy would appear to create an additional requirement to receive necessary medical care which discriminates against Plaintiff on the basis of her diagnosis. Therefore, Plaintiff has established that she is likely to succeed on the merits of her Title II of the ADA claim with respect to the denial of hormone therapy.

The Court has reviewed all elements required to state a claim for discrimination under Title II of the ADA de novo and, upon such review, agrees with the recommendation of the Magistrate Judge.⁴

Use of Legal Name and Access to Hair Removal Products

The Magistrate Judge found that Plaintiff has not raised these claims under the ADA. Plaintiff objects and argues that these claims are included in the “medical care” sought in the Motion. Upon de novo review, the Court is of the opinion that the Magistrate Judge reasonably construed Plaintiff’s filings. Nevertheless, the Court finds that there is a sufficient basis in the record to decide these claims now. Moreover, the Court finds that a ruling now is in the interest of conservation of judicial resources and with a view to the significance of the issues being discussed in this matter. The Court reminds Plaintiff that

⁴ Defendants briefly mention their qualified immunity arguments raised in the partial Motion to Dismiss. The Court agrees with Defendants that the qualified immunity analysis is not directly related to the merits of Plaintiff’s cause of action; moreover, in its ruling on that Motion, the Court determined Defendants were not entitled to qualified immunity.

she is represented by counsel and, therefore, her filings are not entitled to liberal construction. While her counsel may believe that these claims were clearly raised in the Motion, they were not. In the future, the Court would encourage all parties to this action to ensure that their arguments and claims are clearly stated to allow for full evaluation by the Magistrate Judge and the undersigned.

Upon de novo review of the parties' briefing and the record in this case, the Court finds that Plaintiff has not established that she is likely to succeed on the merits of these claims for the same reasons previously articulated by this Court and the Magistrate Judge in discussing these claims under the Eighth Amendment. Plaintiff's claim that denial of access to hair removal products in the event of a lockdown is too speculative. Plaintiff's claim that unspecified SCDC staff fail to use her legal name and appropriate pronouns lacks sufficient factual support at this time.⁵ Accordingly, Plaintiff has failed to meet the requirements for entry of a preliminary injunction as to these claims under Title II of the ADA.

Likelihood of Irreparable Harm

The Magistrate Judge determined that Plaintiff has sufficiently shown that she is likely to suffer irreparable harm without the entry of a preliminary injunction. Defendants object and argue that it is too speculative to find that the relief requested in the Motion will alleviate Plaintiff's symptoms of distress and that SCDC records do not support

⁵ The Court reiterates its expectation that the SCDC staff will make a good faith effort to use Plaintiff's legal name.

Plaintiff's complaints of severe distress. Upon review, the Court agrees with the recommendation of the Magistrate Judge.

The Court finds, as did the Magistrate Judge, that the risk of harm to Plaintiff is not too speculative such that relief should be foreclosed. There is evidence in the record that people with gender dysphoria may face psychological distress, depression, self-mutilation, self-castration, and suicidality without proper treatment. There is further evidence that these experiences may intensify if left untreated over time. Moreover, there is evidence that Plaintiff has been exhibiting relevant symptoms of distress, including: persistent depression, increasing anxiety, suicidal ideation, suicide attempts, and attempted self-castration. There is further evidence in Plaintiff's medical records that her distress is related to her gender dysphoria and the administrative barriers to her receipt of appropriate medical care. Plaintiff has sufficiently established that she will continue to suffer from severe emotional distress and is at substantial risk for self-harm, which will worsen if she continues to be denied medically necessary care. Accordingly, Plaintiff has sufficiently established that irreparable injury will result if the injunction is not entered.

The Balance of the Equities

The Magistrate Judge found that the balance of the equities favored granting the preliminary injunction with respect to Plaintiff's request for hormone therapy under the Eighth Amendment and Title II of the ADA. Defendants object and argue that granting the preliminary injunction would suggest that the Budget Proviso is unconstitutional prematurely, that such a ruling would open the floodgates of other inmates claiming a need for hormone therapy, that such a ruling would suggest that an inmate's preferred

treatment trumps the constitutionally adequate care provided by SCDC, and that the feminizing of an inmate's body raises additional security concerns for SCDC. Upon review, the Court agrees with the recommendation of the Magistrate Judge.

With respect to their arguments that granting the preliminary injunction will open the floodgates of litigation and that the feminizing of an inmate's body causes security concerns,⁶ these generalized arguments are unsupported by specific arguments or facts in support. Turning to the Budget Proviso argument, the Court has previously addressed that its interpretation of the Budget Proviso does not imply that it is unconstitutional. Finally, granting the preliminary injunction does not imply that inmates are entitled to their choice of care. The issue here is whether Plaintiff has been provided with constitutionally adequate care, not her choice of care. As explained above and by the Magistrate Judge, Plaintiff has established, at this stage of the proceedings, that she is likely to succeed on the merits of her Eighth Amendment and Title II claims for hormone therapy; accordingly, Defendants' objection misses the mark. Thus, upon review, the Court agrees with the Magistrate Judge that the balance of equities favors granting the preliminary injunction with respect to Plaintiff's request for hormone therapy under the Eighth Amendment and Title II of the ADA.

⁶ Defendants also do not explain why the feminizing of an inmate's body who was receiving hormone therapy prior to incarceration or inmates who can pay for hormone therapy while in SCDC do not pose similar security concerns.

Whether an Injunction Is in the Public Interest

The Magistrate Judge determined that enforcing an inmate's constitutional rights to adequate medical care is clearly in the public's interest. Defendants object and argue that Plaintiff has not shown a constitutional violation, the public's interest has been protected by their elected representatives who wrote and passed the Budget Proviso prohibiting the requested relief, and the injunction seeks to disrupt the status quo, which is not in the best interest of the public. Upon review, the Court agrees with the recommendation of the Magistrate Judge.

Defendants' first two objections have been discussed at length by this Court and the Magistrate Judge; they are overruled without further comment. Defendants have argued that granting the preliminary injunction would disrupt the status quo at various points in their objections, and the Court will address this argument here. Defendants assert that Plaintiff has never been on hormone therapy; therefore, starting such treatment would alter the status quo. They further argue that abruptly stopping hormone therapy can be very detrimental to a person's health; accordingly, the Court should not direct that Plaintiff begin receiving hormone therapy when she can lose at trial, at which time treatment would be stopped.

As recognized by the Magistrate Judge, the preliminary injunction requested in this action is a mandatory preliminary injunction, which compels action by the opposing party. This type of preliminary injunction is contemplated by law and, therefore, an argument that its enforcement would disrupt the status quo without more is insufficient. The applicable law does not require the continuation of the status quo at all costs. *In re*

Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003), *abrogated on other grounds by eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) (“Mandatory preliminary injunctions [generally] do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief.” (quoting *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir.1980))). Here, Plaintiff has demonstrated a likelihood of success on the merits of her claims related to hormone therapy, and the Court is of the strong opinion that access to constitutionally adequate medical care is in the public interest. With respect to Defendants’ arguments that Plaintiff may not ultimately prevail in her claims related to hormone therapy and would then be forced to stop treatment to her detriment, Plaintiff and the Magistrate Judge have each discussed in prior filings that there is guidance for the discontinuation of hormone therapy should it come to that. Accordingly, the Court finds that the final *Winter*⁷ factor weighs in favor of granting the preliminary injunction as to Plaintiff’s claims for hormone therapy.

Plaintiff’s Additional Objections

The Court will briefly address Plaintiff’s objections to the recommended course of action in implementing the preliminary injunction. The Magistrate Judge recommends granting the injunction as outlined above and allowing 30 days for SCDC medical professionals to evaluate Plaintiff to determine whether hormone therapy is medically necessary to treat Plaintiff’s gender dysphoria. If the medical professionals determine that hormone therapy is medically necessary, treatment should then be started. Plaintiff

⁷ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

objects and argues that the undersigned should instead order that SCDC provide her with hormone therapy, not an evaluation. Alternatively, Plaintiff asserts that the Court should order evaluation by a specialist in treating gender dysphoria. The Court finds that both of these requests are unnecessary and exceed the necessary scope of a preliminary injunction at this stage.

The Court recognizes Plaintiff's argument that she has been denied appropriate treatment and suffers every day that it is not provided. However, the Court agrees with Defendants' point that ordering the immediate provision of hormone therapy is inappropriate without an evaluation period to determine its medical necessity and any associated risks to Plaintiff. The Court further finds that Plaintiff has not demonstrated the necessity of a specialist at this time. Her argument has been that SCDC staff would not consider hormone therapy; however, with the issuance of this Order, they are being directed to specifically consider whether hormone therapy is required to treat her gender dysphoria without regard to any previously perceived legal impediment. In short, Plaintiff has not demonstrated that SCDC medical professionals are unable or unwilling, in light of the entry of a preliminary injunction in this action, to provide constitutionally adequate care. In the event that Plaintiff believes, upon evaluation by SCDC medical staff, that she is not receiving constitutionally adequate care, she can file an appropriate motion with the Court.

Based on the foregoing, the Court adopts the Report of the Magistrate Judge except where specifically modified. The Motion for Preliminary Injunction is granted in part and denied in part as set out. Defendants are directed to provide Plaintiff with medically

necessary gender-affirming care for her gender dysphoria. They are directed to have Plaintiff evaluated by SCDC medical professionals within 30 days of today's date to determine whether hormone therapy is medically necessary to treat Plaintiff's gender dysphoria.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

January 30, 2024
Spartanburg, South Carolina