

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

DECISION AND ORDER
09-CV-849S

ERIE COUNTY, NY,

CHRIS COLLINS,

County Executive,

ANTHONY BILLITTIER, IV, MD

County Health Commissioner,

TIMOTHY B. HOWARD,

Erie County Sheriff,

RICHARD T. DONOVAN,

Erie County Undersheriff,

ROBERT KOCH,

Superintendent Administrative Services Division,

Jail Management Division,

BARBARA LEARY,

First Deputy Superintendent,

Erie County Holding Center,

DONALD LIVINGSTON,

First Deputy Superintendent,

Erie County Correctional Facility,

Defendants.

I. INTRODUCTION

Presently before this Court is the Justice Department's Motion for Expedited Discovery pursuant to Rule 26(d)(1) of the Federal Rules of Civil Procedure.¹ The Justice Department seeks limited, expedited discovery to determine whether changes can be made at the Erie County Holding Center ("ECHC") that would decrease the likelihood of

¹Also pending is the Justice Department's March 4, 2010 Motion for Leave to File a Supplemental Declaration in further support of its Motion for Expedited Discovery. (Docket No. 41.) That motion, which includes a declaration advising this Court of the most recent suicide at the ECHC on March 3, 2010, will be granted. (Lopez Supplemental Declaration, Docket No. 41-2, ¶ 3.)

preventable suicides and suicide attempts. Briefing on the motion concluded on March 1, 2010. (Docket Nos. 27-30, 32-34, 36-40.)

Due to the Justice Department's demonstration of good cause and the recurring incidents of suicide and attempted suicide at the ECHC, this Court finds that the requested expedited discovery is both warranted and necessary. The request for expedited discovery will therefore be granted, and the defendants will be ordered to respond to the proffered discovery requests within **14 days** of service rather than within the 30 days sought by the Justice Department. The defendants will also be ordered to permit the Justice Department access to the ECHC on March 22 and 23, 2010.

II. BACKGROUND

In November 2007, the Civil Rights Division of the U.S. Department of Justice began investigating conditions at the ECHC and the Erie County Correctional Facility (collectively, "the facilities").

At the end of the two-year investigation, the Justice Department notified Erie County through a "Findings Letter" that, in its view, conditions of confinement at the facilities violated the federal constitutional rights of inmates incarcerated there. In particular, the Justice Department expressed its opinion that certain practices — including the failure to provide adequate suicide prevention, medical and mental health care, protection from harm, and safe and sanitary environmental conditions — resulted in Erie County failing to protect inmates from serious harm or the risk of serious harm.

Efforts at resolving the Justice Department's concerns short of litigation failed.

Consequently, on September 30, 2009, the Justice Department filed suit against Erie County and various county officials (collectively, “the County”) pursuant to the Civil Rights of Institutionalized Persons Act of 1980 (“CRIPA”), 42 U.S.C. § 1997, et seq.² The Justice Department seeks an Order enjoining the County from depriving incarcerated individuals of their constitutional rights, privileges, and immunities.

The County moved to dismiss the complaint. Briefing and oral argument on that motion is complete. For reasons that will be fully explained in a Decision and Order to follow forthwith, the County’s Motion to Dismiss will be denied. In short, this Court finds that the complaint adequately states a claim under the CRIPA and that the CRIPA is not unconstitutional as applied to the defendants.

In its complaint, the Justice Department alleges that the County repeatedly fails to provide adequate mental health and medical treatment to inmates with known or obvious mental health or medical needs. (Complaint, Docket No. 1, ¶ 23.) As it relates to this

²Forty-two U.S.C. § 1997a (a) provides as follows:

Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 1997 of this title, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this subchapter to persons residing in or confined to an institution as defined in section 1997(1)(B)(ii) of this title only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

motion, the Justice Department alleges that the County has inadequate suicide prevention methods, which have resulted in multiple suicides and attempted suicides between 2007 and 2008. (Complaint, ¶ 23(a).) For example, the County allegedly places inmates with known or obvious mental health needs, including suicidal inmates, in cells that contain multiple means for committing suicide. (Complaint, ¶ 23(a).) These allegations are further explained in the Findings Letter attached to the Complaint. (Complaint, Exhibit B.)

In the Justice Department's view, the ECHC's suicide prevention policies themselves appear sound. (Findings Letter, Docket No. 1, Exhibit B, p. 9.) But the investigation found that there are "serious problems" with how those policies are implemented and followed, and it concluded that the ECHC's suicide prevention practices do not comport with generally accepted standards of correctional mental health care. (Findings Letter, p. 9.) It also found that the cells at the ECHC are unsafe and present multiple means for inmates to commit or attempt suicide, including having steel beds, missing wall plates, accessible grab bars, and bars on the windows. (Findings Letter, p.10.) Finally, the Justice Department alleges that the County does not refer inmates who attempt suicide or demonstrate suicidal thoughts or ideation for mental health assessments or further suicide screening. (Findings Letter, p. 11.)

These conclusions are supported by episodic examples: between 2003 and 2009, at least 23 inmates either committed, or attempted to commit, suicide. (Findings Letter, p. 10.) In just one year (2007-2008), there were three suicides and at least ten attempted suicides. (Findings Letter, p. 10.) These incidents involved inmates hanging themselves with bed sheets from air vents, ingesting other inmates' medications, and jumping from a 15-foot railing in a common area. (Findings Letter, pp. 10-11.) According to the Justice

Department's expert witness, Lindsay M. Hayes, ECHC's suicide rate is nearly five times the national average as determined by U.S. Bureau of Justice Statistics.³ (Hayes Declaration, ¶ 8.)

The Justice Department alleges that these and similar incidents occur because the County is unable to supervise inmates, identify inmates at risk for suicide, correct deficiencies in cells that facilitate suicide, and prevent likely suicide attempts. (Findings Letter, p. 10.) Supporting this conclusion are allegations that some inmates make multiple suicide attempts, that at least one individual was able to commit suicide despite his family warning the ECHC that he could be suicidal, and that suicide attempts are made by inmates who are supposed to be under constant observation.⁴ (Findings Letter, p. 11.)

And just three days ago, on March 3, 2010, an inmate at the ECHC hanged himself with a bed sheet. (Lopez Supplemental Declaration, Docket No. 41-2, ¶ 3.) This individual reportedly exhibited suicidal tendencies, and the staff of the ECHC was allegedly advised of his past attempts at self-harm and suicide. (Lopez Supplemental Declaration, ¶ 4.)

In the present motion, the Justice Department seeks limited, expedited discovery related to suicide prevention at the ECHC to assess whether it should apply for a preliminary injunction. Specifically, the Justice Department seeks information concerning whether changes to the ECHC's policies, procedures, or practices would decrease the likelihood of preventable suicides and suicide attempts occurring at the ECHC. The

³Although the defendants and the County's attorneys disagree with the manner in which this statistic was arrived at, they have not submitted any contrary expert testimony.

⁴In November 2007, an inmate at the ECHC allegedly attempted suicide while under constant observation. (Findings Letter, p. 11.) Yet despite this attempt, ECHC officials allegedly released the inmate into the general population, where he again attempted suicide six days later. (Findings Letter, p. 11.)

request is prompted by there having been three reported suicides by hanging at the ECHC since oral argument on the County's Motion to Dismiss, with the most recent occurring on March 3, 2010, as described above. (Lopez Supplemental Declaration, ¶¶ 3, 5, 6, and Exhibits A – D.)

As more fully explained in the Declaration of Aaron S. Fleisher (Docket No. 27), the Justice Department seeks an Order requiring the defendants to respond within 30 days to the following discovery requests:

- (1) Interrogatories seeking information from January 2009 to present relating to suicide prevention staff, inmates who have attempted suicide or are deemed suicide risks, recent suicide policy and practice changes, suicide-safe cells, and suicide screening procedures;
- (2) Document requests that seek documents related to suicide prevention policy, mental health and suicide screening, suicide prevention training, suicide and suicide attempt investigations and other categories of documents related to suicides at the ECHC;
- (3) Request for Entry and Inspection pursuant to Rule 34 of the Federal Rules of Civil Procedure to allow mental health and suicide prevention consultants access to the ECHC on March 22 and 23, 2010, to (a) tour the relevant portions of the facility accompanied by ECHC staff, (b) inspect the records identified in the Document Requests, and (3) interview inmates outside the presence of ECHC staff.

The County opposes the Justice Department's motion on the basis that it seeks discovery and access to individuals that is not authorized by the Federal Rules of Civil Procedure or permitted under confidentiality laws. In addition, the County argues that there is no cause for expedited discovery and the Justice Department's requests are over-broad and unduly burdensome.

III. DISCUSSION

Parties are barred from seeking discovery in the absence of a Rule 26(f) conference, unless discovery is otherwise authorized by a federal rule, a stipulation between the parties, or a court order. See Fed. R. Civ. P. 26(d)(1); Local Rule 26(c) (“[A] party may not seek discovery, absent agreement of the parties or court order, from any source before the parties have met and conferred as required by Federal Rule of Civil Procedure 26(f).”).

In this circuit, leave to conduct expedited discovery is granted upon a finding of good cause and reasonableness.⁵ See Stern v. Cosby, 246 F.R.D. 453, 457 (S.D.N.Y. 2007); Ayyash v. Bank Al-Madina, 233 F.R.D. 325, 326 (S.D.N.Y. 2005). Courts generally assess “the potential prejudice which will be suffered by the defendant if discovery is permitted, and that which will be experienced by the plaintiff if denied the opportunity for discovery at this stage.” OMG Fidelity, Inc. v. Sirius TechTechs., Inc., 239 F.R.D. 300, 305 (N.D.N.Y. 2006). Within that inquiry, the burden of responding to the discovery requests and the likelihood that the proffered discovery will eventually take place must be considered. See OMG Fidelity, 239 F.R.D. at 304-05. Several courts have further found that where an expedited discovery request is made in contemplation of the filing of a motion for preliminary injunction, the denial of that request prejudices the moving party. See Standard Inv. Chartered, Inc. v. Nat’l Ass’n of Sec. Dealers, Inc., No. 07 Civ. 2014, 2007

⁵Defendants’ reliance on Notaro v. Koch for the proposition that the Justice Department must demonstrate irreparable harm to obtain expedited discovery is not persuasive. 95 F.R.D. 403, 405 (S.D.N.Y. 1982). The weight of authority in this circuit rejects the Notaro analysis in favor of the reasonableness or good cause standard, which provides more flexibility for the court to order expedited discovery. See, e.g., Stern, 246 F.R.D. at 457; OMG Fidelity, 239 F.R.D. at 303; Ayyash, 233 F.R.D. at 326-27.

WL 1121734, at *1 (S.D.N.Y. Apr. 11, 2007); OMG Fidelity, 239 F.R.D. at 305.

Given the circumstances of this case, this Court has little difficulty finding that the Justice Department has demonstrated that expedited discovery is warranted.

First, this Court finds that the increasing frequency of suicides and suicide attempts at the EHC, coupled with the historical allegations in the complaint, constitutes good cause for ordering expedited discovery.

Second, this Court finds that the Justice Department's discovery requests are narrowly tailored and reasonable. This Court is unpersuaded by the County's arguments that the discovery demands are over-broad or unduly burdensome. The discovery requested is directed at a limited issue — EHC's suicide policies, procedures, and practices — and encompasses just five categories of documents. And even then, the request is limited to only the discovery necessary for the Justice Department to determine whether it should seek a preliminary injunction to impose immediate remedial measures to decrease the number of preventable suicides. (Fleisher Declaration, ¶ 5.) Responding to these demands is not unduly burdensome and is something that the County will have to do shortly in this litigation in any event. Similarly, the Justice Department's access to the EHC is not unduly burdensome as County lawyers and representatives may accompany the Justice Department and will be present when County employees are questioned.

Moreover, this Court is unpersuaded by the County's contention that complying with the Justice Department's demands would run afoul of confidentiality laws, particularly New York Mental Hygiene Law 3313 and 3316 and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). These provisions do not preclude discovery. The

Justice Department's request fits the HIPAA exception allowing third-party disclosure set forth in 45 C.F.R. § 164.512(d) and the Justice Department's CRIPA claims preempt state confidentiality laws. See, e.g., United States v. Illinois, 148 F.R.D. 587, 591 (N.D. Ill. 1993) (state law preempted); United States v. County of Los Angeles, 635 F. Supp. 588, 594 (C.D. Cal. 1986) (similar).

Third, this Court finds that the balance of prejudice weighs in the Justice Department's favor. The potential prejudice to the County of having to engage in expedited discovery is low. This Court's impending denial of the County's Motion to Dismiss makes discovery in this case certain. Undoubtedly, the proffered discovery demands would be served later in the discovery process anyway, making the County's eventual obligation to respond to these demands unavoidable. This Court of course recognizes that responding to discovery demands on an expedited basis may require extra manpower and resources, but that is not uncommon when proceedings are expedited. To ease the burden on the defendants, the Justice Department has expressed its willingness to examine voluminous documents on site, and it will not seek materials in the course of discovery that have already been provided on an expedited basis, thereby eliminating any claimed prejudice from duplication. (Fleisher Declaration, ¶¶ 8, 9.)

On the other hand, the prejudice to the Justice Department if expedited discovery is not permitted is palpable and significant. Without this discovery, the Justice Department is unable to adequately assess whether changes can be made at the ECHC that would warrant a request for preliminary injunctive relief to implement those changes in an effort to decrease the likelihood of preventable suicides and suicide attempts. And given the results of the Justice Department's investigation and the recent and continuing incidents

of suicide and attempted suicide at the ECHC, there is a good faith basis for the Justice Department's contemplation of a motion for preliminary injunction. To deny the requested discovery at this stage would deny the Justice Department the benefit of early evidence to develop its motion for injunctive relief. This prejudice outweighs any prejudice the County may experience in having to produce the requested documents on an expedited basis.

IV. CONCLUSION

For the foregoing reasons, the Justice Department's Motion for Expedited Discovery will be granted.

V. ORDERS

IT HEREBY IS ORDERED, that the Justice Department's Motion for Expedited Discovery (Docket No. 29) is GRANTED.

FURTHER, that the defendants shall respond to the First Set of Interrogatories (Docket No. 27-2) within **14 days** of service.

FURTHER, that the defendants shall respond to the First Request for Production of Documents (Docket No. 27-3) within **14 days** of service.

FURTHER, that the defendants shall respond to the First Request for Entry and Inspection (Docket No. 27-4) within **14 days** of service.

FURTHER, that the defendants shall permit the Justice Department's attorneys and consultants to enter and inspect the ECHC on March 22 and 23, 2010, for the purposes stated in the First Request for Entry and Inspection (Docket No. 27-4).

FURTHER, that the Justice Department's Motion to File a Supplemental Declaration (Docket No. 41) is GRANTED.

SO ORDERED.

Dated: March 6, 2010
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court