

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

SANDY JO BATTISTA,	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	05-11456-DPW
	)	
KATHLEEN M. DENNEHY, ET AL.,	)	
Defendants.	)	

MEMORANDUM

December 9, 2008

WOODLOCK, D.J.

I. INTRODUCTION

On October 15, 2008, I held a hearing in connection with plaintiff Sandy Battista's Motion for a Preliminary Injunction, at which time for the reasons stated at the conclusion of the hearing and reflected in the notes of the Court Reporter, I DENIED the motion to the extent that it requested an Order compelling the defendants (hereinafter "DOC") to provide hormone treatment immediately to Battista, but GRANTED the motion to incorporate the DOC's proposed GID Treatment Plan in a Court Order. I directed the parties to confer and jointly submit a proposed form of order for the DOC's GID Treatment Plan that included specific treatment provisions which would be readily enforced should there be non-compliance by the DOC.

Counsel for the parties conferred but were unable to reach an agreement on a proposed plan. As a result, both Battista and the DOC submitted separate proposals and supporting submissions.

II. DISCUSSION

I have reviewed each of the GID Treatment Plans proposed by

the parties, and, while overlapping in substance in most areas, they differ in certain critical areas. In general, I find a number of Battista's proposals to be overly broad in scope and not tailored to the limited injunction I informed counsel I would enter on the current record. On the other hand, I find that, although the DOC's proposal strays slightly from the initial proposal they presented to me in connection with the preliminary injunction hearing, the DOC's proposal provides an adequate basis for a manageable interlocutory treatment plan. In this Memorandum I outline my resolution of certain issues.

A. Reference to Battista Using Female Pronoun and Non-Harassment by Prison Staff

I decline to grant Battista's request to order the DOC or its prison staff to refer to her as a woman, using the female pronoun, and to treat her as a woman without harassment. While I have made efforts in these proceedings to honor Battista's request to refer to her using the female pronoun, and have instructed counsel to do the same for purposes of this litigation, I find that such an order directed to the DOC or its prison staff has not been shown to be necessary, particularly where the record on preliminary injunction essentially is devoid of any indication that prison staff have or will harass Battista once a GID Treatment Plan is put into effect. Indeed, Battista, in opposing the DOC's claim that she would be at risk of assault if hormone or other feminization therapy were provided, has

claimed that staff and inmates already view her as a woman. Moreover, prison staff already are required to behave toward all inmates in a professional, harassment-free manner. An Order compelling the prison staff to do what they are already obligated to do, without any credible evidence that the staff otherwise would not behave properly, is an overbroad use of the injunctive powers of the Court.

B. Therapist for Battista

I decline to grant Battista's request for an Order compelling Dr. Zakai himself to be her therapist, or designating some other therapist for Battista other than Dr. Ruth Khowais. As the DOC correctly point out, such an intrusion into the decision-making by MHM, as the contractual mental health services provider for the DOC inmates, is, on this record, beyond the scope of my remedial authority, just as it is contractually beyond the scope of the DOC's authority to designate the clinician. Battista has no constitutional right to the therapist of her choice, and absent some evidence that MHM's choice of Dr. Ruth Khowais as Battista's therapist is unreasonable (which I cannot find on this record, even given her past experience with Battista), I will take no action to require another therapist to be designated in her stead.

C. Frequency and Length of Therapy

While one may question the efficacy of therapy on a bi-

weekly or monthly basis as the DOC proposes (rather than on a weekly basis), I decline to grant Battista's request that I order that therapy occur at least once per week. I will direct that the frequency of the therapy be provided on a not less than a bi-weekly basis, on the grounds that the initial GID Treatment Plan submitted by the DOC contemplated that therapy was to be made on at least a monthly basis but not more than a weekly basis. I note that Battista's Reply brief departs from her original proposal and indicates that therapy on a biweekly basis is acceptable.

With respect to the amount of time which must be spent in each therapy session, I will not order the length of therapy to be at least 60 minutes, as Battista requests, but will require that each therapy session last a minimum of 45 minutes, as the DOC has proposed. I also note that Battista's Reply brief departs from her original proposal in this regard, indicating that therapy sessions lasting 45-60 minutes is acceptable to her.

D. Documentation of Communications between DOC and Health Care Providers

I decline to Order, as Battista requests, that every communication between the DOC or any of its prison staff and MHM staff be documented in writing and provided to Battista's counsel for review.

Even given my prior findings of deliberate indifference to Battista's serious medical needs, which I dictated on the record

in open court on October 15, 2008, I find this proposed requirement to be an overly broad and cumbersome remedy to prevent future attempts to influence MHM clinicians's decisions with respect to Battista's GID Treatment Plan. Such a requirement would undoubtedly and unnecessarily bog down proper prison administration and/or health care treatment. I will, however, prohibit the DOC and their agents, servants or employees, from taking any actions, directly or indirectly, to coerce or otherwise improperly influence recommendations or conclusions of medical or mental health care providers concerning any aspect of Battista's GID Treatment. Further, in order to ensure that the medical and mental health care providers are aware of this restriction, the DOC shall notify the medical and mental health care providers of this Order, and shall advise these providers that any behavior which they deem to be in violation of this Order should be documented in writing and reported to this Court forthwith.

E. Confidentiality of Therapy Records

I will DENY Battista's request for an Order requiring that her therapy records be kept confidential and separate and apart from any information with respect to legal proceedings on her sexual dangerousness, determinations relevant to release from the Treatment Center, and any future disciplinary proceedings pending specific order of this court. I credit Battista's argument that

she will be less open to full participation in therapy, and thus the goals of therapy will be undermined if there is disclosure of her GID therapy records. Nevertheless, I am not prepared at this juncture to guarantee perpetual confidentiality of these materials. Battista will have to make her own choices regarding the extent of her participation in therapy, even though such choices raise the potential of use in or impact on these other areas.

F. The DOC's Treatment Proposal

1. Feminization Matters

With respect to the DOC's GID Treatment Plan proposal, I note that, in light of its current position that Battista would be permitted to purchase certain feminine products, the DOC appears to be receding from its initial position that any feminization efforts which would give Battista a female appearance would pose a security risk. The DOC has now agreed that Battista would be permitted to purchase women's jeans, women's dress pants, women's dress shirts, women's sneakers, women's briefs, Mennen Dry Shower Lady Speed Stick Deodorant, emery boards, ponytail holders, Centrum women's vitamins, and foam rollers (large). This list does not, as Battista requests, include a bra, nor does it include permitting hair removal.

I will adopt the DOC's proposal with respect to the feminine items over which no objection is raised, but decline to compel

the DOC to provide other feminine items, or to permit hair removal treatment immediately. These additional feminization efforts are matters to be addressed in the course of therapy, to determine whether these additional items are recommended by mental health professionals. I will direct that Dr. Zakai and Dr. Levine provide a report to the Court after conducting the supervisory review as set forth in the Preliminary Injunction Order, which addresses these additional feminization matters.

2. Supervision by Dr. Levine

Of great significance is the DOC's material alteration of the GID Treatment Plan proposed in opposition to Battista's motion for preliminary injunction, as it relates to the supervisory review to be conducted by Dr. Levine. Initially, the DOC's GID Treatment Plan called for monthly supervision by Dr. Zakai and Dr. Levine (albeit it indicated "if available"), rather than quarterly supervision as is now proposed. In lieu of Dr. Levine, the DOC now proposes that the supervision be done by Dr. Zakai and "other clinicians involved in the clinical management of GID."

In denying Battista's motion for injunctive relief with respect to the immediate institution of hormone therapy, I relied in substantial part on the opinion of Dr. Levine with respect to GID treatment for Battista, and on the fact that Dr. Levine, an acknowledged expert in the treatment of GID, was retained by MHM

to act as a consultant in this matter and in formulating GID treatment for DOC inmates in general. I consider that without Dr. Levine's active participation and hands-on input with respect to Battista's continuing treatment and the possibility for modifications of her treatment plan during the course of therapy, the DOC may continue its deliberate indifference to Battista's serious medical needs, and not provide the minimally necessary GID treatment that is constitutionally mandated. Thus, I will not adopt the DOC's revision to their initial proposal that Dr. Levine provide supervision only on a quarterly basis. Rather, I will require that Dr. Levine provide monthly supervision and sign monthly reports with respect to Battista's therapy and recommendations for modifications to her treatment plan. In Battista's Reply, it appears the parties are now in agreement on this point.

A separate Preliminary Injunction Order will be issued in conjunction with this Memorandum.

/s/ Douglas P. Woodlock  
DOUGLAS P. WOODLOCK  
UNITED STATES DISTRICT JUDGE