IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, et al., etc., Plaintiffs, v. GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc., Defendants.	CIVIL ACTION NO. 1:19-cv-03285-WMR

BRIEF BY DEFENDANTS OPPOSING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The Court should deny Plaintiffs' motion for the " 'drastic' remedy" of a preliminary injunction. Crochet v. Hous. Auth. of City of Tampa, 37 F.3d 607, 610 (11th Cir. 1994) (citation omitted). Plaintiffs cannot meet the strict legal requirements for a preliminary injunction, namely: " '(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest.' " Friedenberg v. Sch. Bd. of Palm Beach Cty., 911 F.3d 1084, 1090 (11th Cir. 2018) (citations omitted).

Unlike Plaintiffs' contentions, the Georgia Department of Community Supervision (DCS) has provided means for effective communication with each

Plaintiff in the course of his supervision by DCS. Plaintiffs cannot show that the Department or its Commissioner, Defendant Michael Nail, are engaged in ongoing violations of Plaintiffs' rights under Title II of the Americans with Disabilities Act, as amended, 42 U.S. Code § 12131, et seq., or Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§794, et seq. Further, any debatable actions of the Community Supervision Officers (CSO) who have supervised Plaintiffs do not warrant intrusive preliminary injunctive relief.

And Plaintiffs' long delay in seeking injunctive relief counts against their contention that they face irreparable harm. Benisek v. Lamone, 138 S. Ct. 1942, 1944 (2018) ("plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request").

II. FACTUAL BACKGROUND

Defendants file with this motion several declarations disputing Plaintiffs' factual allegations. Defendants intend also to show at the hearing scheduled by the Court on Plaintiffs' motion for preliminary injunction additional evidence refuting Plaintiffs' distorted representations.

The scope of the alleged "problem" in communicating with hearing impaired offenders is much smaller than Plaintiffs' attorneys seem to think. They guess that DCS supervises over 500 "deaf or hard of hearing people." (Doc. 1, ¶¶ 59, 61(a)).

But, of the more than 200,000 offenders supervised by DCS, only approximately 40 have been identified as hearing impaired. (Exhibit G (Driver Decl.), ¶¶ 4, 8).

It is also important that approximately 45,000 of the offenders under DCS jurisdiction are in "unsupervised status" and do not communicate with DCS at all. (Exhibit G, ¶ 6). In fact, Plaintiff Jerry Coen was placed in unsupervised status May 23, 2019 and has had no contact with DCS since then. (Exhibit B (Mays Decl.), ¶ 17). Thus, there is no need for communication accommodations with them.

Each Community Supervision Officer (CSO) who currently supervises a Plaintiff describes by his or her attached declaration the history of DCS in communicating with each Plaintiff. These declarations demonstrate several important facts.

Importantly, none of the Plaintiffs has any revocation proceedings pending or has been charged with a violation of probation or parole. (Exhibit A (Mitchell Decl., re Brandon Cobb), ¶ 16; Exhibit B (Mays Decl., re Jerry Coen), ¶ 5; Exhibit C (Franklin Decl., re Herrera), ¶ 16; Exhibit D (Worley Decl., re Nettles), ¶ 15; Exhibit E (Dowdell Decl., re Wilson), ¶ 16; Exhibit F (Branch Decl., re Woody), ¶ 16). As discussed below, this alone demonstrates the absence of any need for injunctive relief.

Further, the declarations of Plaintiffs' CSOs shows that no Plaintiff has been denied an interpreter or technology needed for effective communications. The declarations of Plaintiffs CSOs show:

1. Brandon Cobb, who is supervised by CSO Mariah Mitchell, has been provided American Sign Language (ASL) interpreters and Video Relay Services (VRS). VRS makes it possible for sign language users to communicate in their native language via video conferencing. (Exhibit A (Mitchell Decl.) ¶ 17; Exhibit H (Burroughs-Lee Decl.), ¶ 5(b)).
2. Jerry Coen, who has been supervised by CSO Richard Mays, was assigned to unsupervised status May 23, 2019. Since then, DCS has had no contact with him and there are no ongoing communications with Coen. While Coen was being supervised by CSOs, communication occurred by writing. For example, when Coen was notified by postcard of an appointment at DCS offices, he appeared as scheduled. According to the records of DCS, Coen has never asked for an interpreter. (Exhibit B (Mays Decl.) ¶ 17).
3. Carlos Herrrera, who is supervised by CSO Cody Franklin, has been provided Sorenson Video Relay Service (*see* https://www.sorensonvrs.com/svrs) to assist in communication. (Exhibit C (Franklin Decl.) ¶¶ 17-18). Also, on at least one occasion, according to Herrera's declaration, the offender was

provided with a qualified and certified interpreter at the Calhoun DCS Office. (Doc. 2-3, at 5)

4. Joseph Nettles, who is supervised by Caleb Worley, did not ask DCS for an interpreter until August 26, 2019, after this lawsuit was filed. On that date, Worley specifically asked Nettles in writing if he wanted an interpreter and Nettles responded in writing that he wanted an ASL interpreter. Previously, Worley communicated with Nettles in writing, by text message, and through family members. (Exhibit D (Worley Decl.) ¶ 16).

5. Ernest Wilson is supervised by Edward Dowdell, Sr. Wilson has not asked DCS for an interpreter. He says he cannot use ASL. (Doc. 1, ¶ 11(d)). Pen and paper have been used to communicate with Wilson. At the initial interview, Wilson was able to communicate by written means and was assisted by his daughter. (Exhibit E (Dowdell Decl.) ¶ 17).

6. Jeremy Woody is supervised by Shaconna Branch. VRS was used for all communications with Woody during 10/20/2017-07/11/2018. VRS was also used 12/17/2018, 12/19/2018, 02/08/2019, 02/11/2019, 02/28/2019, 03/21/2019, 03/23/2019. I addition, since Woody has been under the supervision of DCS, he has been provided with an interpreter on numerous occasions, including 09/08/2017, 09/21/2017, 10/3/2017, 10/5/2017, 10/12/2017, 06/27/18, 07/12/18, 12/17/18, 12/19/18, 02/08/2019, 02/11/2019,

02/28/109, 03/21/2019, 05/06/2019, 05/14/2019, 07/30/2019. (Exhibit F (Branch Decl.) ¶¶ 18-19).

Moreover, DCS has available numerous options, not just those mentioned in the CSO declarations, to assist in communications with Plaintiffs. It is generally in the discretion of the assigned CSO whether to engage these other options. Some of them may not have been used in the past because, as stated above, DCS has only 40 offenders with known serious hearing impairment. Going forward, assigned CSOs may decide, where appropriate, to use some of these options that have not been previously used.

The tools available to CSOs include numerous mechanisms through Georgia Relay, which is a free service available to all persons with hearing or speech problems. The services offered by Georgia Relay are described at https://georgiarelay.org/. It is available free 24/7 by calling 7-1-1.

Available mechanisms for assisting in effective communication with hearing impaired offenders include:

1. Engage an interpreter paid for by DCS who will personally provide American Sign Language (ASL) translation for communications.
2. Text Telephone or Text Typewriter (TTY), through Georgia Relay, which allows users to type messages make and forth on their phones.

3. Video Relay Services (VRS), through Georgia Relay, which provides text translation for telephone communications.
4. Voice Carry-Over (VC), through Georgia Relay, which uses either a TTY (text telephone) and standard telephone or a specially designed telephone that also has a text screen. A Georgia Relay Communications Assistant (CA) and the VCO user reads those words on the text screen of his or her phone.
5. Hearing Carry-Over (HCO), through Georgia Relay, which uses a TTY or similar device. The HCO user types his or her side of the conversation, and the CA voices the typed words to the other person. When the other person speaks, the HCO user listens directly to what is being said.
6. Speech-to-Speech (STS), through Georgia Relay, which requires only standard telephone equipment. STS service is for people who have mild-to-moderate speech difficulties but who can hear what is being said over the phone. As the STS user speaks, a CA listens to the words. The CA then revoices those words to the other person. When the other person speaks, the STS user listens directly to what is being said.
7. Video Remote Interpreting Services (VRI), which is separate from Georgia Relay. It allows communications with hearing impaired supervisees by using video monitors and devices over which ASL translation occurs using a live

ASL interpreter. The users of VRI can cover field interactions and it is not limited to telephone communications.

8. CapTel®, which is separate from George Relay. It uses current voice recognition software to display the words stated by callers.
9. Communication Access Real-Time Translation (CART), which is separate from George Relay. It provides typed transcriptions of spoken words.
10. Sorenson Video Relay Service (see https://www.sorensonvrs.com/svrs) is also available to assist in communicating with hearing impaired probationers and parolees. It is government-funded and provided under the Telecommunications Relay Service fund (see https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs).

(Exhibit H (Burroughs-Lee Decl.) ¶¶ 4-5).

Further, DCS has a formal written policy requiring reasonable accommodation for hearing impaired offenders. It specifically references interpreters and the Georgia Relay system. The policy has been conscientiously followed by DCS. (Exhibit G (Driver Decl.) ¶¶ 9-12, Attachment 2).

Also undermining their "emergency" request for a preliminary injunction, no Plaintiff has filed a grievance with DCS regarding lack of accommodation for hearing impairment. DCS has a robust grievance procedure for offenders with a complaint "about any condition, policy, procedure, action or lack thereof that affects

the offender personally." The policy even provides for "assistance [in] filling out a grievance form due to language barriers, illiteracy, or physical or mental disability." No Plaintiff has ever filed a grievance complaining of lack of communications assistance or accommodation for hearing impairment. (Exhibit G (Driver Decl.), ¶¶ 14-15, Attachment 3).

III. REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF

The prerequisites for preliminary injunctive relief are well-established. "A preliminary injunction may be entered when a plaintiff establishes four elements: '(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest.' " Friedenberg v. Sch. Bd. of Palm Beach Cty., 911 F.3d 1084, 1090 (11th Cir. 2018) (citations omitted). Even where the non-moving party has the ultimate burden of persuasion on an issue, the party moving for a preliminary injunction has the burden of production. CBS Broad., Inc. v. EchoStar Communications Corp., 265 F.3d 1193, 1202 (11th Cir. 2001). And here Plaintiffs have the burden of proof on all elements of their claims and also on the prerequisites for preliminary injunctive relief.

The requirement of a "substantial threat of irreparable injury" is critical for a plaintiff seeking a preliminary injunction. According to Wright & Miller, "Perhaps

the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.). The movant must show that something very bad will happen if the court does not issue the injunction before a decision on the merits. As noted earlier, a preliminary injunction is a " 'drastic' remedy." Crochet v. Hous. Auth. of City of Tampa, 37 F.3d 607, 610 (11th Cir. 1994) (citation omitted).

A fundamental rationale of a preliminary injunction is "to preserve the court's power to render a meaningful decision after a trial on the merits." Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1128 (11th Cir. 2005). In other words, a preliminary injunction is designed to maintain the status quo so that the court's later decision on the merits will still count. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (preliminary injunctions have the "limited purpose" of "merely preserv[ing] the relative positions of the parties until a trial on the merits can be held").

Our Plaintiffs cannot show any of the prerequisites to preliminary injunctive relief. And they must prove all of them.

IV. PLAINTIFFS HAVE NOT SHOWN LIKELIHOOD OF SUCCESS ON THE MERITS.

The requirements that Plaintiffs must meet in order to qualify for a preliminary injunction include a showing of "substantial likelihood of success on the merits." Friedenberg, 911 F.3d at 1090. They cannot not meet this hurdle.

Plaintiffs' legal claims are based primarily on the ADA and the Rehabilitation Act. (Doc. 1, Counts I, II). Plaintiffs also assert a violation of the Due Process Clause of the Fourteenth Amendment in their final count. (Doc. 1, Count III).

Defendants agree with Plaintiffs that the ADA and Rehabilitation Act impose the same standards on state actors providing public services. (Doc. 2-1, at 17-18 (ECF pagination)). In the Eleventh Circuit's words, "Discrimination claims under the ADA and the Rehabilitation Act are governed by the same standards, and the two claims are generally discussed together." J.S., III by & through J.S. Jr. v. Houston Cty. Bd. of Educ., 877 F.3d 979, 985 (11th Cir. 2017) (citation omitted).

To establish a claim under Title II of the ADA and Section 504 of the Rehabilitation Act, each Plaintiff must show: (1) that he is a ''qualified individual with a disability"; (2) that he was "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminated [against] by [] such entity"; (3) "by reason of such disability." 42 U.S.C. § 12132; Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1083 (11th Cir. 2007); Shotz v. Cates, 256 F.3d 1077, 1079 (11th Cir. 2001).

DOR concedes it is a "public entity" within the meaning of 42 U.S.C. § 12132. *See* 42 U.S.C. § 12131 (" 'public entity' means . . . any State or local government" or any "department" or "agency").

But Plaintiffs in the present case do not show "a substantial likelihood of success on the merits" of their claims under the ADA and Rehabilitation Act. Friedenberg, 911 F.3d at 1090. Assuming that Plaintiffs are "qualified individual[s]" with a disability due to their hearing impairment, they do not show a "substantial likelihood" that they were "excluded from" or "denied the benefits" of DCS services, or that they were "otherwise discriminated against" by DCS.

As discussed in Defendants' review of the factual background of this dispute, no Plaintiff has been revoked or charged with a violation of probation or parole. Had Plaintiffs systematically not understood the conditions of probation or parole due to poor communications, enforcement actions would have certainly have been taken against them for non-compliance. And no Plaintiff has filed a grievance against DCS for denial of communication accommodations.

Further, Defendants' evidence shows that no Plaintiff has been denied an interpreter or technology to assist in effective communications. On various occasions, communications with Plaintiffs have been facilitated by ASL interpreters, Video Relay Services (VRS), written messages, and text messaging. And, with an appropriate policy in place, DCS has numerous other options available through

Georgia Relay and Sorenson Video Relay Service. One might quibble over whether the CSOs assigned to Plaintiffs' cases have used the panoply of available mechanisms often enough, but Plaintiffs cannot credibly establish that they have been excluded from or denied DCS's services. If that were so, there would be a record of probation violations.

Plaintiffs' argument are also flawed because they assume that Plaintiffs have the legal right to choose their own accommodations. Some Plaintiffs want two live ASL interpreters for every communication with DCS, others want various forms of technology, and one appears to want only written communications. (Doc. 1, ¶¶ 23-28). But, the Supreme Court has ruled, the remedy chosen by Congress in the ADA is "a limited one." It requires only that "the States to take reasonable measures" to make public services available to persons with disabilities. The Court has emphasized, "Title II does not require States to employ any and all means" to provide accessibility and there often are "a number of ways" to satisfy the requirements of the law. Tennessee v. Lane, 541 U.S. 509, 531-32 (2004).

Our Plaintiffs cannot show that DCS's efforts to facilitate communications with them have been unreasonable or that the means available to DCS (whether they have been used with every Plaintiff) are also unreasonable. Moreover, they cannot establish, as they must, that there is a substantial likelihood that DCS in the future will deny them reasonable accommodations.

Plaintiffs have another protection against revocation or sanctions for probation or parole violations, which further dilutes their arguments for the heavy hand of a preliminary injunction. In order for a Plaintiff to be revoked, the state would be required to prove by a preponderance of the evidence that he violated a condition of his probation or parole. Lewis v. Sims, 277 Ga. 240, 241 (2003). And, Defendants contend, the state would have to show intent. *See* Klicka v. State, 315 Ga.App. 635, 637-38 (2012). This means that a Plaintiff could not be revoked if he truly did not understand, due to alleged poor communications, the terms of his probation.

In their due process claim, Plaintiffs recklessly allege that Defendants "are violating the procedural due process rights of Plaintiffs and those similarly situated to Plaintiffs guaranteed by the U.S. Constitution." They charge that Defendants are "failing to provide minimal due process before imposing severe punishments including re-incarceration and increased liberty restrictions." (Doc. 1, ¶¶ 14, 82-89). Yet, Plaintiffs have not alleged a single instance in which any Plaintiff or other hearing impaired offender has been revoked or sanctioned, much less one in which there was an alleged communication problem with respect to a revocation or sanction.

To Defendants' knowledge, no Plaintiff has been charged with a probation violation or failure to comply with the terms of probation. (Exhibit A (Mitchell

Decl., re Brandon Cobb), ¶ 16; Exhibit B (Mays Decl., re Jerry Coen), ¶ 5; Exhibit C (Franklin Decl., re Herrera), ¶ 16; Exhibit D (Worley Decl., re Nettles), ¶ 15; Exhibit E (Dowdell Decl., re Wilson), ¶ 16; Exhibit F (Branch Decl., re Woody), ¶ 16). And Plaintiffs do not allege otherwise; they allege only phantom threats.

Thus, Plaintiffs have not met their burden of showing a substantial likelihood of success on the merits of their disability or due process claims.

V. PLAINTIFFS HAVE NOT SHOWN THAT THEY ARE THREATENED WITH IRREPARABLE HARM.

Parrott-like, Plaintiffs repeat that they are subject to the "constant threat of incarceration" unless the Court intervenes. (Doc. 1, ¶¶ 1, 2, 7, 11, 33, 46, 47, 51, 57, 87, 88). This contention is hollow.

As stated earlier, Plaintiffs' long delay in seeking preliminary injunctive relief certainly debilitates the contention that they face irreparable harm. Benisek v. Lamone, 138 S. Ct. 1942, 1944 (2018) ("plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request"); Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm. A preliminary injunction requires showing 'imminent' irreparable harm.").

One Plaintiff has been supervised by DCS (or its predecessor agency) since 2011. Others have been supervised since 2017. (Doc. 1, ¶ 23-28). If Plaintiffs were

indeed threatened with irreparable harm due to violations of the ADA and Rehabilitation Act, they would have sued and sought injunctive relief before July 2019. They also would have filed grievances against DCS, which they have not done.

It is also significant that most offenders supervised by DCS are probationers, not parolees. Five of the six Plaintiffs in this case are on probation, not parole. Only Cobb is on parole. (Doc. 2-1, at 4-6).

When a criminal defendant is sentenced by the trial court, the conditions of probation are stated in the sentence and the defendant has the constitutional right to be present. United States v. Ferrario-Pozzi, 368 F.3d 5, 8 (1st Cir. 2004) ("The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the right to be present during sentencing."). Thus, all probationers are informed at the time of sentencing of the conditions of their probation. Some Plaintiffs were sentenced as long ago as 2011. (Doc. 1, ¶ 26).[1]

Hence, all Plaintiffs serving probation were informed by the sentencing courts of the conditions of probation. Apparently, they understood the conditions then. To Defendants' knowledge, no Plaintiff has challenged his sentence on the grounds that he did not understand its terms.

[1]Other Plaintiffs have been supervised by DCS since 2017. (Doc. 1, ¶¶ 23-28).

It is also significant that much of the allegedly poor communication described by Plaintiffs occurred while they were in the custody of the Georgia Department of Corrections (GDC) and while they interacted with local Georgia sheriffs' offices (particularly regarding sex offenders registration). Those agencies are not controlled by DCS and any communication failures by them cannot be attributed to DCS or ameliorated by an injunction against DCS.

Thus, it is apparent that Plaintiffs face no realistic threat of irreparable harm. They cannot meet this requirement for preliminary injunctive relief.

VI. PLAINTIFFS HAVE NOT SHOWN THAT THE BALANCE OF HARMS FAVORS PRELIMINARY INJUNCTIVE RELIEF AND THAT SUCH RELIEF WOULD SERVE THE PUBLIC INTEREST.

Plaintiffs also have not satisfied the balance of harms or public interest criteria. The four requirements that a party seeking a preliminary injunction must meet include showing "that the threatened injury to the plaintiff outweighs the potential harm to the defendant" and "that the injunction will not disserve the public interest." Friedenberg 911 F.3d at 1090. Defendants agree with Plaintiffs that these two elements in effect merge in this case. (Doc. 2-1, at 24 (ECF pagination)).

Burdensomeness to DCS as a state agency is an important factor. "The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.2 (3d ed.).

Courts generally do not favor injunctions that merely require government actors to comply with the law or a statute, which is the primary relief sought in Plaintiffs' motion. (Doc. 2, ¶ 4). *See* N.L.R.B. v. Express Pub. Co., 312 U.S. 426, 435-36 (1941) ("But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."). State agencies are already required to comply with law.

The record shows that no Plaintiff has been harmed by any alleged problem in communicating with his OCS. None has been charged with a violation of probation. Moreover, DCS has used multiple methods—including interpreters, VCS, and text-type devices —to facilitiate communications with Plaintiffs. And no Plaintiff has been sufficiently aggrieved to file a grievance with DCS. There is no basis, therefore to conclude that a Plaintiff has been harmed.

A preliminary injunction would necessarily harm the administration of services by DCS. It would disrupt the processes currently in place and inevitably divert resources from security and other important mandates of the agency. For example, if DCS has to allow each Plaintiff to choose his own preferred accommodation (in some instances two interpreters for every encounter) and is

required to take interpreters or use other auxiliary aids on every field visit, DCS will be required to reallocate resources from its other priorities.

On the facts before the Court, a preliminary injunction would harm and disserve the public interest. This forms an additional basis to deny Plaintiffs' request for a preliminary injunction.

VII. CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for preliminary injunction.[2]

Respectfully Submitted,

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[2]This document has been prepared in Times New Roman (14 pt.) font, which has been approved by the Local Rules of this Court.

ss/

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the BRIEF BY DEFENDANTS OPPOSING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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