UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

P.G.,

Plaintiff,

v.

JEFFERSON COUNTY, NEW YORK; COLLEEN M. O'NEILL, as Sheriff of Jefferson County, New York; BRIAN R. McDERMOTT, as the Undersheriff of Jefferson County; and MARK WILSON, as the Facility Administrator of Jefferson County Correctional Facility,

Defendants.

Civil Action No.:
5:21-CV-388 (DNH/ML)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

BARCLAY DAMON LLP
Attorneys for Defendants
Teresa M. Bennett, Esq.
125 East Jefferson Street
Syracuse, New York 13202-2020
Telephone: (315) 413-7111
Facsimile: (315) 703-7344

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendants Jefferson County, Colleen M. O'Neill, as Sheriff of Jefferson County, New York, Brian R. McDermott, as the Undersheriff of Jefferson County, and Mark Wilson, as the Facility Administrator of Jefferson County Correctional Facility (the "County Defendants") submit this Memorandum of Law in opposition to Plaintiff's motion for a preliminary injunction, (1) enjoining Defendant from interrupting or otherwise denying Plaintiff access to methadone treatment while he is in the custody of the Jefferson County Jail, and (2) "enjoining Defendants, while Plaintiff is detained in their custody, to ensure the provision of such treatment to Plaintiff." For the reasons set forth below and in the accompanying Affidavits of Teresa M. Bennett, Esq. and David J. Paulsen, Esq., Plaintiff's motion should be denied.

INTRODUCTION

Plaintiff's motion for preliminary injunctive relief should be denied for many reasons, not the least of which is the fact that it is premised on a false assertion—that the County of Jefferson maintains a blanket ban on methadone treatment. It does not (*see* Paulsen Aff. ¶ 4). In fact, in an effort to provide the accommodation requested by Plaintiff, the County Defendants agreed to transport Plaintiff to Credo Community Center for the Treatment of Addictions, Inc. ("Credo") every day to obtain his methadone treatment. From Credo's letter dated March 18, 2021, the County Defendants thought that is what was being proposed. However, Plaintiff denied this accommodation, stating that Credo is not open on Sunday, and insisting that the staff of the Jefferson County Jail be compelled to dispense methadone to Plaintiff at the Jefferson County Jail.

Like many small correctional facilities, the Jefferson County Jail does not maintain an accredited or certified Opioid Treatment Program ("OTP"), and does not employ staff that would otherwise be permitted to administer or dispense methadone, a Schedule II narcotic, to the Plaintiff. Thus, under Federal law and regulations, the methadone treatment cannot be dispensed by an

employee of the Jefferson County Jail. Plaintiff seeks to avoid this requirement by claiming that what he proposes the County Defendants do, that is, physically hand the methadone treatment to Plaintiff for "self-administration," is not an act that is covered under Federal regulation. On the contrary, Federal regulation prohibits not only administering, but also dispensing, methadone, and defines "dispense" as "to deliver a controlled substance to an ultimate user by, or pursuant to, the lawful order of a practitioner, including the prescribing and administering of a controlled substance." 42 C.F.R. § 8.02.

What Plaintiff asks this Court to compel the County Defendants to do is illegal. The illegality is further exacerbated by the fact that the Plaintiff is insisting that the County Defendants be compelled to do so without even the benefit of a medical examination, claiming that the County Defendants should be compelled to do so on the medical opinion (that has not been provided to the County Defendants) of a Credo physician. They are being asked to do so notwithstanding Plaintiff's admission that he has engaged in illegal drug use within the last year on at least a few occasions (*see* Pl.'s Aff. ¶ 19), which, if he is under the influence of illicit drugs (or alcohol or other prescription medications) at the time he receives the methadone treatment, could cause his death (*see* Paulsen Aff. ¶ 11).

It is the County Defendants' position that the Plaintiff's methadone treatment is the responsibility of Credo, and it is further Credo's responsibility to see to it that the methadone is administered and dispensed by a licensed practitioner. *See* 42 C.F.R. § 8.12(b); 42 C.F.R. § 8.12(h)(1). Credo assumed that responsibility when it admitted Plaintiff into its OTP. It does not simply get to delegate that responsibility to the staff of the Jefferson County Jail when it is inconvenient for it to administer or dispense the methadone while Plaintiff is incarcerated. If Credo is closed on Sunday and the Plaintiff cannot self-administer the take-*home* dose at his home, it is

Credo's responsibility to engage another OTP to provide a "guest dose" to the Plaintiff. The County Defendants have stated that they are willing to transport the Plaintiff to that OTP, even if it is out of the City of Watertown and/or the County of Jefferson, but it is Credo's responsibility as the admitting OTP to facilitate the same. The County Defendants cannot assist in that process.

To be clear, the County Defendants have not and will not refuse to permit Plaintiff to continue his methadone treatment *if he* is committed to the Jefferson County Jail. That raises another point of contention. It is unknown at this time whether the Plaintiff will be committed to the custody of the Jefferson County Jail. He alleges that his incarceration is imminent, but that is based solely upon an unidentified probation officer's alleged assessment of the Jefferson County criminal justice courts. In a letter dated April 7, 2021, the County Attorney asked whether the Plaintiff intended to turn himself in. The response, of course, was no. Thus, it is respectfully submitted that this matter is not ripe for adjudication.

For these and the reasons set forth below, and in the accompanying Affidavits of Teresa M. Bennett, Esq. and David J. Paulsen, Esq., Plaintiff's motion for a preliminary injunction should be denied.

ARGUMENT

POINT I

THE PRELIMINARY INJUNCTIVE RELIEF REQUESTED WOULD VIOLATE FEDERAL AND STATE REGULATIONS

Methadone is a Schedule II drug under the Controlled Substances Act. *See* 21 U.S.C. § 812. Thus, in order to administer or dispense methadone for the treatment of opioid addiction, the Jefferson County Jail must achieve accreditation status and receive SAMHSA certification (*see* 42 C.F.R. part 8), and maintain an annual registration from the Drug Enforcement Administration ("DEA") (*see* 21 U.S.C. § 823). In the absence of the same, methadone may only be administered

and dispensed by a "qualified practitioner" or "qualifying other practitioner" who obtains a waiver and conducts himself under the supervision of an OTP. As set forth in the accompanying Affidavit of David J. Pauslen, Esq., the County Defendants cannot legally dispense methadone to Plaintiff under any circumstance. The points set forth therein are briefly summarized herein.

Plaintiff claims that the County Defendants should be compelled to violate Federal law without even the benefit of a medical evaluation of the Plaintiff, and that the County Defendants should be compelled to accept the medical opinion of a physician at Credo. Under Federal regulations, "a complete, fully documented physical evaluation by a program physician or a primary care physician, or an authorized healthcare professional under the supervision of a program physician," is required before admission to the OTP. 42 C.F.R. § 8.12(f)(2). While "guest dosing" is purportedly permitted (although not by any actual Federal law or regulation that the County Defendants are aware of), the SAMHSA guidelines would require Credo to "forward relevant medical records to the receiving treatment program" (which they have not done), and to "ensure[] that the patient makes a smooth transition . . . to avoid breaks in treatment that could lead to relapse." *See* Paulsen Aff. Ex. A, at 19. Plaintiff has failed and/or refused to deliver any medical records to the County Defendants to date.

Plaintiff asserts that Credo is authorized to administer "a single take-home dose for a day that the clinic is closed for business" (42 C.F.R. § 8.12(i)(1)), but that is not what Plaintiff and Credo propose to do. Plaintiff is not taking home his one day dose of methadone. He is demanding that the County Defendants pick up and store his one day dose of methadone at the Jefferson County Jail (a serious safety concern) and compel the staff of the Jefferson County Jail to dispense that methadone to him for "self-administration." This conduct fits within the unambiguous definition of "dispense," conduct that *is* prohibited under Federal law and regulations. *See* Paulsen

Aff. ¶ 12. To be sure, 42 C.F.R. § 8.12(i)(2) provides for "unsupervised use beyond that set forth in paragraph (i)(1)," which would be the case here. In all other circumstances, the medical director "shall consider" certain criteria in permitting such other uses, including "[a]bsence of recent abuse of drugs" (Plaintiff admits to using drugs while on methadone treatment within the past year), "[a]bsence of known recent criminal activity" (Plaintiff claims he is about to be incarcerated and, in fact, has multiple warrants outstanding) and "[a]ssurance that take-home medication can be safely stored within the patient's home[.]" 42 C.F.R. § 8.12(i)(2). None of these considerations have been met.

Federal regulations also provide other express exceptions where certification is not required, particularly "for the maintenance or detoxification treatment of a patient who is admitted to a hospital or long-term care facility for the treatment of medical conditions other than opioid use disorder and who requires maintenance or detoxification treatment during the period of his or her stay in that hospital or long-term care facility." 42 C.F.R. § 8.11(i)(2). However, the Jefferson County Jail is not a hospital or long-term care facility for the treatment of medical conditions, and this provision is not intended to relieve such "facilities from the obligation to obtain registration from the Attorney General, as appropriate, under section 303(g) of the Controlled Substances Act." *Id.* If correctional facilities were exempt from the accreditation and certification requirements of 42 C.F.R. Part 8, the regulations could have easily provided for the same. They have not.

Respectfully, the County Defendants submit that the relief sought by Plaintiff is prohibited by Federal law and regulations. Plaintiff's motion must be denied.

POINT II

PLAINTIFF DOES NOT HAVE A LEGAL RIGHT TO METHADONE TREATMENT DURING HIS INCARCERATION

Given that Plaintiff has failed to produce a viable legal option to permit the County Defendants to continue his methadone treatment, it is respectfully submitted that Plaintiff's withdraw symptoms can be controlled by other drugs that the staff of the Jefferson County Jail are authorized to prescribe, administer and dispense. It has long been held that there is no constitutional right to receive methadone treatment at a correctional facility.

> "There is no constitutional right to methadone and the County is under no duty to provide it. Methadone is a carefully controlled substance and may be dispensed to qualifying recipients only by approved facilities. Although Pennsylvania law requires that addicts receive 'medical detoxification' if incarcerated, it does not require the establishment of methadone maintenance facilities at correctional institutions. No prisoner, pretrial detainee or citizen can compel the state to provide him with the drug."

Norris v. Frame, 585 F.3d 1183, 1188 (3d Cir. 1978). The mere fact that Plaintiff desires to be treated with methadone, so as to "live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'" *Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

In fact, there are many cases in which summary relief was awarded to defendants who have denied methadone treatment on facts similar to those here. For example, where a pre-trial detainee was examined within two days of his admission and was prescribed Mylanta and Vistaril within one day of exhibiting signs of withdrawal, summary relief was granted. *See Holly v. Rapone*, 476 F. Supp. 226 (E.D. Pa. 1979). In *Boyett v. Cty of Washington*, summary relief was granted where an inmate died after he was prescribed Clonidine to treat methadone withdrawal, stating:

> "There is no evidence negating the appropriateness of prescribing substitute medications to mimic Methadone's effect on the body. . . . [A]t the low levels of Methadone [the inmate] was receiving, withdrawal was not a major concern. In

> this case, the court finds [the inmate] had no constitutional right to Methadone treatment."

2006 U.S. Dist. LEXIS 86910 (D. Utah Nov. 28, 2006), *affd.* 282 Fed. Appx. 667 (10th Cir. 2008). In *McNamara v. Lantz*, the substitution of Vistaril and Clonodine was deemed appropriate, and the court held that the denial of methadone treatment was insufficient to support a finding of deliberate indifference, warranting summary judgment in favor of the defendants. 2008 U.S. Dist. LEXIS 111834, at *40-44 (D. Conn. Aug. 5, 2008) (noting that the only facility licensed to use methadone was the York facility for women).

Here, Plaintiff claims that methadone treatment is the only effective means to keep him from relapsing. However, Plaintiff admits to having relapsed on "several occasions" prior to December of 2020 (*see* Pl.'s Aff. ¶ 19), apparently before he was incarcerated in Onondaga County from October to December of 2020 and was receiving methadone treatement (*id.* at ¶ 24). Plaintiff further admits that the dosage of methadone received while incarcerated in Onondaga County was reduced to 30mg, and that he has voluntarily elected to continue to receive a limited dosage to avoid withdrawal symptoms upon further incarceration (*id.* at ¶ 26). At such a low dose, it is reasonable under the circumstances that Plaintiff can be given other medications designed to alleviate Plaintiff's withdraw symptoms *if he is committed* to the custody of the Jefferson County Jail. He simply desires to compel the County Defendants to give him methadone, and fails to provide the County Defendants with legal means to do so. Plaintiff has no legal right to receive methadone treatment while incarcerated, and he certainly cannot compel the County Defendants to violate the law in order to provide it to him.

POINT III

THIS ACTION IS NOT RIPE FOR ADJUDICATION, AS PLAINTIFF HAS NOT EVEN BEEN ARRESTED AND THERE IS NO

"To be justiciable, a cause of action must be ripe—it must present a real, substantial controversy, not a hypothetical question." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013). "A claim is not ripe if it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.*

This matter is not ripe for adjudication because the County Defendants have *not* denied Plaintiff the right to continue to receive methadone treatment. On the contrary, the County Defendants have attempted to make the accommodation requested by Plaintiff, that is, that Plaintiff continue his methadone treatment with Credo *if he is* committed to the custody of the Jefferson County Jail. Unlike the various cases finding that a claim such as this is ripe for adjudication, here, there is nothing indicating that Plaintiff will even be committed to the custody of the Jefferson County Jail. He simply fears that he will be as a result of a probation violation, and fears that he will be forced to miss a dose of methadone *if he is in custody on a Sunday*. There has been no adjudication of the probation violation and no custody or commitment order. There are simply warrants for the Plaintiff's arrest in both Jefferson and Onondaga counties.

Plaintiff's claims "hinge on whether []he receives methadone in the future." *Finnigan v. Mendrick*, 2021 U.S. Dist. LEXIS 34863, at *2 (N.D. Ill. Feb. 24, 2021) (where the plaintiff was to be committed to the jail the following day). The medical decision of whether to permit Plaintiff to continue methadone treatment *if he is committed to the custody of the Jefferson County Jail* (to the extent that the County Defendants have not already made that determination in favor of continued treatment) "is a decision for a later day, after []he is incarcerated." *Id.* The County Defendants certainly have the right to examine the Plaintiff before they can form an opinion as to

what treatment they will provide. Plaintiff seeks to deny the County Defendants that right, claiming they should rely upon undisclosed medical opinions of other doctors. There is no basis in the law for such a conclusion. Only after the Plaintiff is committed to the custody of the Jefferson County Jail, and the County Defendants have had the opportunity to examine the Plaintiff and determine a course of treatment, can the Court determine whether the alternative treatment proposed by the County Defendants meets Constitutional muster and complies with the ADA. *Id.*

As such, it is respectfully submitted that Plaintiff's claims and request for preliminary injunctive relief are not ripe for adjudication.

CONCLUSION

By reason of the foregoing, the County Defendants respectfully request that Plaintiff's motion for a preliminary injunction be denied in its entirety. The County Defendants respectfully request such other and further relief as the Court deems just and proper.

Dated: May 20, 2021

BARCLAY DAMON LLP
Attorneys for Defendants

By: /s/*Teresa M. Bennett*
Teresa M. Bennett, Esq.
tbennett@barclaydamon.com
125 E Jefferson St,
Syracuse, New York 13202
Telephone: (315) 413-7111