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United States District Court, N.D. New York.

INMATES OF NEW YORK STATE WITH HUMAN IMMUNE DEFICIENCY VIRUS, for themselves and all others similarly situated, Plaintiffs,
v.
Mario M. CUOMO, Governor of the State of New York, Thomas A. Coughlin, III, Commissioner of the New York State Department of Correctional Services, et al., Defendants.

No. 90–CV–252. | Feb. 7, 1991.

Attorneys and Law Firms

The Legal Aid Society, Criminal Appeals Bureau, Prisoners' Rights Project, New York City, for plaintiffs; William J. Rold, John A. Beck, Michael Wiseman, of counsel.

Robert Abrams, Attorney General, State of New York Department of Law, Albany, N.Y., for defendants; Darren O'Connor, Michael Rhodes–Devey, of counsel.

Opinion

ORDER

MCAVOY, District Judge.

***1** Plaintiffs, all of whom are inmates infected with the Human Immunodeficiency Virus, have commenced the present civil rights action under 42 U.S.C. § 1983 challenging in rather broad terms defendants' delivery of medical, mental health, education and preventive services to thousands of prison inmates in over 60 prisons as violative of their rights under the 8th, 9th and 14th amendments to the Constitution; they seek declaratory and injunctive relief. (Initially, the court observes, there were ten named plaintiffs who were permitted to file this suit anonymously and who were issued a protective order barring disclosure of their identities; one of the original plaintiffs died soon after the suit was commenced.) On May 30, 1990, this court adopted the recommendation of Magistrate Smith that, upon plaintiffs' unopposed motion, this suit be certified as a class action under Rule 23(b)(1) and (b)(2). At that time, the court also upheld the magistrate's determination regarding notice to potential class members.

Briefly, by way of introduction to the parties' current dispute over one aspect of discovery, plaintiffs sought an order requiring that notice of the action be given to all members of the class by providing each with individual notice as well as by posting the notice in appropriate places within State penal institutions. Plaintiffs sought individual notice essentially to protect the privacy of those inmates actually infected with the virus; that is to say, in plaintiffs' view, restricting notice to posted copies would tend to identify those observed reading or copying information from the posted notices as persons infected with the virus, thereby potentially singling them out for discriminatory treatment. Defendants opposed any individual notice requirement as extremely burdensome, bolstering their position by noting that even by plaintiffs' own reckoning as many as 80 percent of the inmates currently incarcerated together with those expected to be received within the next 12 months are not infected and thus have no interest in the outcome of the suit. Upon careful consideration of the notice issue, Magistrate Smith determined that posting would be sufficient and that any individual notice requirement would be excessively burdensome. He thereupon denied plaintiffs' motion insofar as it sought individual notice to all current inmates and to all inmates who enter State penal institutions during the pendency of the lawsuit and ordered that notice be accomplished by posting. This court, although not expressly asked to pass upon the matter, agreed with the magistrate's ruling on the notice issue.

The parties are presently engaged in discovery. Before the court is a dispute regarding certain interrogatories and a request for the production of documents served on defendants. Essentially, plaintiffs seek to compel, pursuant to Rule 37(a), defendants to provide the names, identification numbers and current place of incarceration of all living inmates in the custody of the New York State Department of Correctional Services known to be infected with HIV (*see* Plaintiffs' Interrogatories Nos. 1 and 43), the names, identification numbers and medical records of all inmates in DOCS custody known to have died from AIDS-related causes since 1984 (*see* Plaintiff's Interrogatory No. 2; Plaintiffs' Memorandum of Law in Support of Motion to Compel at 3 n. 3 (amending request)), the names, identification numbers and current place of incarceration of living inmates in the custody of DOCS who are receiving Office of Mental Health services (*see* Plaintiffs' Interrogatory No. 44), the complete medical records of an inmate, whose identity is known to both plaintiffs and defendants but whose identity has not been furnished to the court in order to protect this individual's privacy, debilitated with HIV infection who died after allegedly being left unattended in a wheelchair in a shower in the AIDS Special Needs Unit at Fishkill Correctional Facility (*see* Plaintiffs' Interrogatory No. 32; Plaintiffs' Memorandum of Law at 4 n. 4), and documents relating to the medical treatment

of two specific AIDS patients that are responsive to plaintiffs' request for memoranda between or among any of the named defendants concerning HIV infection (*see* Plaintiffs' Interrogaotry No. 72). The motion to compel the foregoing information is accompanied by a motion for a protective order so as to ensure that these records remain confidential.

***2** Plaintiffs contend that they need such information about persons who are "absent"/"unnamed" class members but who, in plaintiffs' view, are "not parties to this action for purposes of Rules 23 and 26 of the Federal Rules of Civil Procedure," Plaintiffs' Responses to Defendants' First Set of Interrogatories at 5, ¶ 3; *see also* Plaintiffs' Reply Memorandum at 55, in order to prove their case based on the alleged systemic failure of defendants' operation of the health care delivery system within the DOCS: in plaintiffs' own words, "Proof of individual circumstances of individual patients is inextricably intertwined in the development of proof in any systemic prison health care case." Plaintiffs' Memorandum of Law at 9–10 and 9–17.

Defendants oppose disclosing this information which, according to them, "by definition, requires the disclosure of the HIV infected status of [non-present class members]," Defendants' Memorandum of Law in Opposition at 39, on the ground that the "HIV infected status of any individual is confidential under both federal and state law," *id.,* which confidence may not be infringed upon without the execution of a valid waiver; according to defendants, plaintiffs must not be permitted to waive the federal right of privacy in the confidentiality of medical records of persons who, at the very least, are non-present class members, that is, persons who had no choice in and who were unaware of the commencement of this action.

Plaintiffs' counsel, who are proceeding under the erroneous assumption that the unnamed/absent/non-present class members are "clients" in the traditional sense, *see Van Gemert v. Boeing Co.,* 590 F.2d 433, 440 n. 15 (2d Cir.1978) (absentee class members treated as parties, and therefore, as clients, for the purpose of assessing attorneys' fees), *aff'd,* 444 U.S. 473 (1980), argue essentially that regardless of the source of the right of privacy, whether it be State law (which they contend is inapplicable) or the federal Constitution, they have demonstrated a compelling need for disclosure of the information sought: to wit, permitting them to pursue this "important litigation," Plaintiffs' Memorandum at 20, and to "effectively [ ] litigate this case," *id.* at 21. Plaintiffs assert that "defendants cite no authority holding that constitutional privacy (which plaintiffs endorse and seek to vindicate in this action) justifies withholding patient information about class members from their own attorneys, particularly when redisclosure is restricted by issuance of a protective order." Plaintiffs' Reply Memorandum at 6. In plaintiffs' view, defendants' privacy objections "must yield to paramount federal interests in this civil rights case," Plaintiffs' Memorandum at 17; yet what these "paramount federal interests" are is never squarely defined. Nevertheless, the court, upon reflection giving this admittedly difficult and troubling matter careful consideration, orders limited disclosure as set forth below, coupled with an extension of the existing protective order.

***3** As a threshold matter, the court accepts, and does not understand the parties to disagree with, the proposition that the federal Constitution protects against the unwarranted and indiscriminate disclosure of the identity of HIV-infected individuals and of their medical records; that is to say, the court accepts, for the purpose of resolving the present discovery dispute, the proposition that the constitutional right of privacy extends to such matters, and that prisoners enjoy such a privacy right, *see, e.g., Doe v. Borough of Barrington,* 729 F.Supp. 376 (D.N.J.1990); *Doe v. Coughlin,* 697 F.Supp. 1234 (N.D.N.Y.1988); *Woods v. White,* 689 F.Supp. 874 (W.D.Wis.1988), *aff'd,* 899 F.2d 17 (7th Cir.1990), but recognizes, as it and the parties must, that privacy rights, like other constitutional rights, are not absolute (as is also true of State law-based privileges), a proposition for which no citation to authority is needed. The parties' dispute centers on the latter, that is, on the proper scope or extent of that right and the circumstances under which the information sought by the named plaintiffs and their attorneys, or a portion of that information, can and must be divulged by the State.

Without engaging in extended discussion, insofar as Plaintiffs' Interrogatories Nos. 1, 2, 32, 43, 44 and 72 are concerned, interrogatories defendants refuse to answer solely on the ground that disclosure would violate the inmates' right of privacy, the court, recognizing the federal interest attending the just resolution of a broadly-based assault on the State's prison health care system, and having taken into consideration the factors identified by the magistrate in *Doe v. Meachum,* 126 F.R.D. 444, 449 (D.Conn.1989) (magistrate's ruling on plaintiffs' motion to compel in a case substantially similar to the one at bar accepted and adopted by the district court given absence of objection), and by the court in *Lora v. Board of Education of City of New York,* 74 F.R.D. 565, 579–583 (E.D.N.Y.1977), directs the defendants to abide by the following.

In satisfaction of Plaintiffs' Interrogatories Nos. 1, 43 and 44, defendants are directed to compile and to turn over to plaintiffs statistics detailing the number of all living inmates in or committed to the custody of the DOCS known to be infected with HIV for each facility at which such inmates are located. Regardless of the theory upon which plaintiffs rely in their attempt to prove deliberate indifference to the health needs of inmates infected with

HIV, *see Wellman v. Faulkner,* 715 F.2d 269, 272 (7th Cir.1983), *cert. denied,* 468 U.S. 1217 (1984); *Ramos v. Lamm,* 639 F.2d 559, 575 (10th Cir.1980), *cert. denied,* 450 U.S. 1041 (1981); *Todaro v. Ward,* 565 F.2d 48, 52 (2d Cir.1977) *aff'g* 431 F.Supp. 1129 (S.D.N.Y.1977); *Cruz v. Ward,* 558 F.2d 658, 662 (2d Cir.1977), *cert. denied,* 434 U.S. 1018 (1978), in the court's view, plaintiffs simply do not need to know the names or identification numbers of living inmates known to be infected with HIV to litigate their case. The court points out that notice of this class action has, pursuant to court order, been sent to, and been posted in, all the State's penal institutions; if individual inmates are interested in becoming an active part of this lawsuit, they certainly have the opportunity to do so and to contact plaintiffs' counsel. Insofar as Plaintiffs' Interrogatory No.72 is concerned, defendants are directed to produce such memoranda, redacted to delete any references to the names or identification numbers of HIV-infected inmates living or dead. As for Plaintiffs' Interrogatories Nos. 2 and 32, the defendants are directed to produce the information requested therein, redacted to delete any references to the names and identification numbers of deceased inmates. (Plaintiffs are directed to delete the inmate's name and identification number in interrogatory no. 32.) In the court's view, the information contained in the materials requested in Plaintiffs' Interrogatories Nos. 2, 32 and 72 may very well be germane to plaintiffs' case. Inmate names and identification numbers are not germane, and redaction will not unduly hinder plaintiffs' ability to marshall evidence in their attempt to prove their case.

***4** The information directed to be disclosed, even in a redacted form, will be governed by a protective order, the terms of which shall include the following: no confidential material ordered disclosed shall be revealed except to the parties' attorneys and their staff, the parties' expert witnesses, and then only so that they may prepare to testify at trial, and the court and its staff; all confidential material shall be segregated from other evidentiary material, identified as confidential, and be kept under seal when filed with the court. The parties are directed to submit to the court a jointly-drafted protective order which includes the terms stated above within 20 days of the date this order is filed. Defendants are not to disclose any documents or other material until the court approves and signs the protective order.