IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	
	:	**Case No. 2:08-CV-00475**
Plaintiff,	:	
	:	**JUDGE ALGENON L. MARBLEY**
v.	:	
	:	**Magistrate Judge Abel**
THE STATE OF OHIO, *et al.*,	:	
	:	
Defendants.	:	

OPINION & ORDER

This matter is before the Court on Plaintiff United States of America's Motion for Leave to File Supplemental Complaint (Doc. 130). The United States seeks leave to supplement its Complaint in order to reassert its claims with regard to various Department of Youth Services Detention Facilities, based on newly-discovered evidence of wide-spread overuse of seclusion of youths with mental health needs. Defendants oppose (Doc. 134), on the grounds that the United States improperly seeks, effectively, to change the terms of the Consent Decree in this case, that the dismissal of the United States' previous claims was an adjudication on the merits, and that Defendants would be prejudiced by supplementation.

For the reasons set forth herein, the United States' Motion is hereby **GRANTED**.

I. BACKGROUND

The United States commenced this action against the State of Ohio, its Governor, its Department of Youth Services ("DYS"), and various DYS officials on May 16, 2008, alleging constitutional violations at eight juvenile correctional facilities in Ohio: Circleville, Cuyahoga Hills, Indian River, Marion, Mohican, Ohio River, Scioto, and the Freedom Center. (*Complaint*, Doc. 2, ¶ 1). In particular, the United States alleged a pattern or practice of failing to protect youths from harm and undue risk of harm, meet youth medical needs, provide adequate mental

health care, and offer adequate special education services, in violation of federal constitutional and statutory rights. (*Id.*, ¶¶ 22-32). Among the allegations in the original Complaint was the charge that Defendants failed adequately to protect youths at the Facilities from harm or risk of harm due to "unwarranted use of seclusion." (*Id.*, ¶ 22(b)).

On June 5, 2008, the Parties filed a Joint Motion for Entry of Stipulation and Conditional Dismissal of the Complaint, resolving the United States' claims as to the Scioto and Marion Facilities, and asking the Court conditionally to dismiss its claims as to the remaining six state-operated Facilities. (*Joint Motion for Stipulation*, Doc. 6). The Court entered the agreed Stipulation for Injunction Relief on June 24, 2008. As an integral part of the Stipulation was a provision that the State would development and implement policies, procedures, and practices to guide the use of seclusion (as defined in the Stipulation), including documentation and review of its use. (*Stipulation*, Doc. 8 at 5, 7). On December 15, 2009, in response to the closing of the Marion Facility, the Stipulation was amended to address only the Scioto Facility. (Doc. 27 at 1).

On May 20, 2011, the Parties again moved to amend the Stipulation (Doc. 80), which the Court granted on June 6, 2011 (Doc. 81), and which ultimately resulted in the Amended Stipulation for Injunctive Relief, entered June 28, 2011 (Doc. 85). This Amended Stipulation terminated 20 provisions under the Stipulation's "Substantive Remedial Provisions"; the provision regarding "seclusion" was not removed. (*See* Doc. 85 at 3-4, 7). The Stipulation also appointed a new Monitor, Dr. Kelly Dedel, and modified the monitoring process. (*Id.* at 18-22).

In December 2012, the United States initiated a dispute-resolution procedure, pursuant to the terms of the Amended Stipulation, with regard to the use of seclusion for youth on the "PROGRESS Unit" at the Scioto Facility. On December 19, 2012, it sought a Consent Order resolving this issue (Doc. 107), which the Court entered on January 18, 2013 (Doc. 109).

On November 21, 2013, in a letter from DYS Director Harvey Reed, DYS announced that it would close the Scioto Facility, and move any boys remaining at Scioto to other Facilities by May 2014. (Doc. 130-1 at 14).

On December 18, 2013, Defendants moved to terminate this case under Paragraph VII(E) of the Amended Stipulation, and pursuant to the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 *et seq.* ("PLRA") (Doc. 121). As a result of negotiations with all stakeholders held in the Court's chambers, however, Defendants withdrew their Motion on December 24, 2013 (Doc. 125). Further negotiations were held on January 29, 2014. (*See* Doc. 128).

According to the United States, "recent developments" since the events of late 2013 have revealed further allegedly unconstitutional conditions at the Scioto Facility, as well as other DYS Facilities. (Doc. 130 at 3). In particular, the United States alleges that it was discovered in November 2013 that Defendants were "excessively secluding youth at Scioto who have significant mental health needs." (*Id.* at 5). The United States also cites the planned closure of the Scioto Facility, and the aborted December PLRA Motion as other troubling recent developments. (*Id.* at 6-7). Furthermore, the United States alleges that records produced by Defendants on January 17, 2014, demonstrate that Ohio "is also excessively secluding youth with mental health needs at its other DYS facilities." (*Id.* at 3, 6).

The United States thus insists that, after the breakdown of negotiations in January 2014, and the failure of the Parties to reach any further agreement, it was compelled to file the Motion *sub judice*, as well as the companion motion seeking a temporary restraining order regarding the use of seclusion on youths with mental health needs at DYS facilities (Doc. 131).

II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 15(d), upon motion and "reasonable notice," the Court may permit a party to serve a supplemental pleading setting out "any transaction, occurrence, or event that

happened after the date of the pleading to be supplemented." When a party "assert[s] additional claims for relief," however, "[a] Rule 15(a) motion for leave to amend the complaint, not a Rule 15(d) motion to supplement the pleading, is the appropriate mechanism." *Michael v. Ghee*, 498 F.3d 372, 386 (6th Cir. 2007). Rule 15(a) permits a party to amend a pleading with the Court's leave, which should be "freely given[] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). The purpose of Rule 15 for amended and supplemental pleadings is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." *Roger v. Lehman Bros. Kuhn Loeb, Inc.*, 621 F. Supp. 114, 119 (S.D. Ohio 1985) (citing *McHenry v. Ford Motor Co.*, 269 F.2d 18 (6th Cir. 1959)).

The same standard of review and rationale apply under both Rules 15(a) and 15(d). *Spies v. Voinovich*, 48 F. App'x. 520, 527 (6th Cir. 2002) (citing *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996)); *Maclin v. Holden*, No. 12-CV-12480, 2013 WL 4521124, at *2 (E.D. Mich. Aug. 27, 2013). The grant or denial of a motion to supplement a pleading is left "to the discretion of the trial court." *Allen v. Reynolds*, 895 F.2d 1412, at *2 (6th Cir. Feb. 13, 1990). In exercising its discretion, the Court may consider such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In the absence of any such "apparent or declared reason," however, leave sought should be "freely given." *Id.* In determining prejudice to a party, the Court should take into account whether the assertion of the new claim or defense would "require the opponent to expend significant additional resources to conduct discovery and prepare for trial[,] significantly delay the resolution of the dispute[,] or prevent the plaintiff from bringing a timely action in another

jurisdiction." *Phelps v. McClellan*, 30 F.3d 658, 662-63 (6th Cir. 1994). In general, "[a] trial court does not abuse its discretion in refusing to allow supplementation of a complaint which would add extraneous matter late in the case." *Tesfa v. Am. Red Cross*, No. 2:12-CV-0397, 2013 WL 5722808, at *2 (S.D. Ohio Oct. 21, 2013); *see also McCormack v. Frank*, 34 F.3d 1068, at *5 (6th Cir. Aug. 10, 1994) (court did not abuse its discretion when it denied a motion to supplement, where granting would require re-opening discovery and further delay trial). Nor does a Court abuse its discretion by "deny[ing] a motion for leave to amend a complaint if such complaint, as amended, could not withstand a motion to dismiss." *Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23 (6th Cir.1980) (citation omitted).

III. ANALYSIS

The United States seeks leave to file its Proposed Supplemental Complaint, which, it argues, "including allegations concerning newly discovered events involving Defendants' pattern or practice of harming youth through unnecessary seclusion and denial of adequate mental health care and rehabilitative treatment." (Doc. 130 at 7). The United States asserts that its Proposed Supplemental Complaint details allegations of Ohio's closure of the Scioto Facility, its transfer of boys to other DYS Facilities where the same conditions exist, and its pattern or practice of harming youths through excessive seclusion and inadequate treatment at those other Facilities. (*Id.*). These new allegations, it explains, are based upon information revealed by the Monitor in this case, as well as the associated *S.H.* case.[1] (*Id.*).

In support of its Motion, the United States argues, first, that its conditional dismissal with regard to the DYS Facilities other than Scioto and Marion (*see* Doc. 6; Doc. 7) was without prejudice, and therefore does not bar its Proposed Supplemental Complaint. (Doc. 130 at 8). It further argues that leave to supplement should be freely granted, since its Supplemental

[1] *S.H. v. Reed*, No. 2:04-CV-1206 (S.D. Ohio).

Complaint properly concerns events that took place after the filing of the original Complaint, and moreover that supplementing the Complaint would avoid piecemeal litigation and allow for the complete and efficient adjudication of the entire controversy between the Parties. (*Id.* at 9-11).

The United States emphasizes its fear that Ohio could seek to "avoid its obligations in this suit to the Scioto youth simply by transferring them to other DYS facilities," and it should therefore be granted leave to prevent this end-run by the State. (*Id.* at 11). The United States additionally argues that Ohio would not be prejudiced by the new Complaint, since it has "received ample notice," because these claims were part of the original Complaint, and because the United States acted as soon as it was aware of the present conditions. (*Id.* at 11-12). The United States adds that supplementation will not cause delay, since there is presently no discovery schedule or trial date set. (*Id.* at 14-15). Finally, the United States insists that its new allegations are "related and substantially similar" to the original Complaint, since they "share core questions of law and fact," and are thus "not so different as to cause prejudice to the defendant." (*Id.* at 13-14) (quotation omitted).

Defendants oppose the United States' request on several grounds. First, Defendants argue that the January 18, 2013 Consent Order governs this case. (Doc. 134 at 2). Defendants maintain that the United States cannot unilaterally alter the Consent Order, absent an unanticipated change in fact or law, which, Defendants argue, has not occurred here, given that the closure of Scioto was anticipated well in advance, and follows in the wake of the closure of other DYS Facilities, such as Marion and Mohican. (Doc. 134 at 2). Defendants also argue that the current increase in seclusion hours is also not unanticipated, since "[s]eclusion hours go up and down," and Ohio has been in at least Partial Compliance in this regard. (*Id.* at 3).

Defendants further assert that because the United States' Complaint has been dismissed twice—first, by stipulation, on June 12, 2008 (Doc. 7), and again, by the Amended Stipulation, on June 28, 2011 (Doc. 85)—the second dismissal "operates as an adjudication on the merits." (Doc. 134 at 3) (citing Fed. R. Civ. P. 41(a)(1)(B)). Defendants add that the claims asserted by the United States are time-barred, since under any theory, the statute of limitations relevant to the claims is not more than two years, which elapsed at least by 2012. (Doc. 134 at 4-5).

Defendants also argue that they would be prejudiced by the United States' supplementation. Because the United States knew about the use of seclusion since at least 2008, Defendants insist, but has waited nearly six years and twice dismissed most of the DYS Facilities from the case, the delay should not be excused by granting leave to supplement. (*Id.* at 5-6). Defendants also point to the prejudice that would result if the United States were allowed to alter the burden of proof: Defendants oppose supplementation that would "hold all DYS facilities to the standard set out in the Consent Decree," which is limited by its terms to Scioto and which exceeds minimum constitutional guarantees. (*Id.* at 6). Thus, Defendants argue that the United States should instead file a new Complaint, as the original Complaint already address seclusion, and accordingly the Supplemental Complaint cannot meet Rule 15(d)'s standard of transactions or occurrences "that happened after the date" of the original Complaint. (*Id.* at 6-7).

A. Procedural Bars to Supplementation or Amendment

Defendants raise three procedural bars to the United States' Motion: (1) the January 18, 2013 Consent Order; (2) the "two dismissal rule" of Fed. R. Civ. P. 41(a)(1)(B); and (3) the statute of limitations. The Court considers each in turn.

1. The Consent Order

First, the January 18, 2013 Consent Order (Doc. 109) is inapplicable here. Indeed, neither the Consent Order, nor the Amended Stipulation (Doc. 85), address the allegations raised

by the United States in its Proposed Supplemental Complaint, both because those earlier Orders address different facilities, and because they address different substantive conduct. The Stipulation (Doc. 7) and Amended Stipulation concern the United States' original claims, with regard to the Scioto and Marion Facilities, not the Circleville, Cuyahoga Hills, and Indian River Facilities targeted here. Moreover, while the Proposed Supplemental Complaint undoubtedly contains some allegations touching on the Scioto Facility (*see* Doc. 1301-1, ¶¶ 19-21, 23), these new allegations specifically concern conduct occurring in 2013 and 2014.

The State's suggestion that the United States "now seeks to hold all DYS facilities to the standard set out in the Consent Decree" (Doc. 134 at 6) is difficult to reconcile with the actual language of the United States' Proposed Supplemental Complaint and Motion to Supplement. Nowhere does the Proposed Supplemental Complaint reference the Consent Order. Moreover, as it acknowledges, the United States retains the burden of "prov[ing] the allegations in the supplemental complaint." (Doc. 136 at 2).

2. Rule 41(a)

Defendants also mistakenly rely on Fed. R. Civ. P. 41(a). Rule 41(a)(1)(B) mandates that voluntary dismissal, by notice filed by a plaintiff before service of an answer or motion for summary judgment, or by a joint stipulation of dismissal, is generally without prejudice; except that a dismissal of a "previously dismissed . . . federal- or state-court action based on or including the same claim" has the effect of an adjudication on the merits. Fed. R. Civ. P. 41(a)(1)(A), (B). In this case, however, dismissal of the United States' claims relating to the other DYS Facilities was accomplished by Court Order. The Parties jointly moved the Court "to enter as its Order" the Stipulation resolving the United States' claims as to Scioto and Marion, "and, separately, to conditionally dismiss the United States' complaint" as to the other Facilities. (Doc. 6 at 1). On June 12, 2008, the Court so ordered. (Doc. 7 at 1). Thus, the relevant

provision of the Federal Rules is Rule 41(a)(2). Under this Rule, unless the Court's Order states otherwise, dismissal is without prejudice. The Court's Order here did not state otherwise.

Moreover, it is difficult to discern the "second" dismissal referenced by Defendants. Defendants suggest that the United States "again dismissed" its Complaint on June 28, 2011. (S*ee* Doc. 134 at 3). In fact, this Amended Stipulation had the effect of "terminat[ing] 20 provisions under section III [of the Stipulation]," appointing a new monitor, and modifying the monitoring process. (Doc. 85 at 4). As the original Stipulation that was modified by this amendment concerned only the Scioto Facility, no claims were "again dismissed" at this time with regard to the other facilities, and, even with regard to Scioto, the Amended Stipulation could not dismiss claims based on events which did not occur until 2013.

3. *Statute of Limitations*

Lastly, Defendants' reliance on the applicable statute of limitations for the claims referenced in the Proposed Supplemental Complaint is unavailing. The Court need not decide whether O.R.C. § 2305.19's limitations period governs, since the Proposed Supplemental Complaint alleges conduct which occurred since 2013, and is alleged to be ongoing. Moreover, it is axiomatic that when the United States sues in its own right on behalf of the public interest, it is not subject to state statutes of limitations. *Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355, 382 (1977); *E.I. DuPont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) ("An action by the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it."); *United States v. City of Columbus*, No. 2:99-CV-1097, 2000 WL 1133166, at *10 (S.D. Ohio Aug. 3, 2000).

B. Prejudice to Defendants

In assessing prejudice from a motion to supplement or to amend, the Court must assess whether granting the motion would cause undue delay, require the opponent to expend

significant additional resources to conduct discovery or prepare for trial, significantly delay final resolution, or prevent the plaintiff from bringing an action in another jurisdiction. *Phelps*, 30 F.3d at 662-63. Delay alone is not a ground for denying leave. *Dana Corp. v. Blue Cross & Blue Shield Mutual*, 900 F.2d 882, 883 (6th Cir. 1990). Rather, the opposing party "must demonstrate significant prejudice." *Brown v. Worthington Steel, Inc.*, 211 F.R.D. 320, 323 (S.D. Ohio 2002) (citing *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999); *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986)).

In general, the longer the period of unexplained delay, the lesser the burden of demonstrating prejudice. *Phelps*, 30 F.3d at 662-63. Courts have focused particularly, however, on the phase of litigation during which the motion was filed. Thus, courts have frequently found prejudice where the motion is filed after the discovery deadline has passed, *Duggins*, 195 F.3d at 843, or where only a month remained before trial, *United States v. Midwest Suspension and Brake*, 49 F.3d 1197, 1202 (6th Cir. 1995). Nevertheless, "even amendments made on the eve of trial are permissible when there is no demonstrable prejudice." *Brown*, 211 F.R.D. at 323 (citing *United States v. Wood*, 877 F.2d 453, 456–57 (6th Cir.1989)).

Defendants here have failed to demonstrate that they will be prejudiced if the United States is permitted to supplement its Complaint. Although Defendants argue, correctly, that the United States was aware of the use of seclusion at DYS Facilities since the start of this litigation, the Proposed Supplemental Complaint clearly alleges new and more serious violations of the constitutional rights of youth via the excessive use of seclusion and denial of adequate mental health treatment at DYS Facilities. (Doc. 130-1, at 5-7, ¶¶ 18-29).

Defendants also misconstrue the burden that the Supplemental Complaint will place upon the Parties. As explained above, the United States does not argue that the other DYS Facilities,

beyond only Scioto, should be governed by the Amended Stipulation or the Consent Decree. Indeed, the United States concedes that it will bear the burden of proof as all plaintiffs do, and it "intends to litigate its claims regarding the other Facilities to a final judgment." (Doc. 136 at 7).

Beyond this burden-shifting argument, Defendants do not explain how they would be prejudiced by the United States' Proposed Supplemental Complaint: they cannot point to any discovery deadlines that have lapsed, or any trial schedule that would be delayed; nor can they direct the Court to any additional, burdensome discovery they will be compelled to undertake that is not already a part of the ongoing monitoring process in this case. Instead, Defendants suggest that the United States ought to file a separate lawsuit to address the alleged ongoing violations. (Doc. 134 at 6). This is precisely the sort of piecemeal litigation and needless waste of judicial resources that Rule 15 was designed to avoid. In short, the Court cannot conclude that granting leave here, well before trial or close of discovery, would be the sort of supplementation that "would profoundly alter and expand the scope and nature of plaintiffs' claims" or "result in significant delay of th[e] litigation." *Marshall v. City of Columbus*, No. 2:05-CV-484, 2008 WL 4334616, at *2 (S.D. Ohio Sept. 17, 2008).

IV. CONCLUSION

The United States has succeeded in pleading further transactions, occurrences, and events taking place after the date of the original Complaint, and demonstrating good cause for leave to supplement under Fed. R. Civ. P. 15(d). Defendants have established no procedural bar, prejudice, or other reason to show why leave should not be freely given in accordance with the Rule. Accordingly, the United States' Motion (Doc. 130) is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: March 28, 2014