IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

M.C., *a minor by and through his parents Pamela and Mark Crawford*,	)	
Plaintiff,	)	No. 2:13-cv-01303-DCN
vs.	)	**ORDER**
Dr. Ian Aaronson, *et al.*,	)	
Defendants.	)	

This matter is before the court on motions to dismiss filed by defendants James Amrhein, Ian Aaronson, Yaw Appiagyei-Dankah, Kim Aydlette, Candace Davis, Mary Searcy, and Meredith Williams. Also ripe for the court's consideration is a motion for limited expedited discovery filed by plaintiff M.C. At a hearing held on August 22, 2013, the court denied all of the motions to dismiss and took under advisement the motion to expedite discovery. After the court denied the motions to dismiss, counsel for defendants stated that they may wish to interlocutorily appeal the court's ruling to the extent that the court rejected defendants' defense of qualified immunity. The court now issues this written order to provide a more complete record of the reasons why it denied the motions to dismiss insofar as defendants sought dismissal on the basis of qualified immunity.[1] By this order, the court also grants the motion to expedite discovery.

[1] Neither this written order nor the court's oral order denying the motions to dismiss should be interpreted as barring defendants from re-raising their qualified immunity arguments in motions for summary judgment.

I. BACKGROUND

A. Factual Allegations

The following facts are taken from the complaint. Plaintiff M.C. is an eight-year-old child who was born in Greenville, South Carolina on November 20, 2004. Compl. ¶¶ 2, 16. M.C. was born with a condition called ovotesticular difference/disorder of sex development ("ovotesticular DSD"). Id. ¶ 40. Also called "true hermaphroditism," ovotesticular DSD is characterized by the presence of both ovarian and testicular tissues. Id. Physicians who evaluated M.C. in the first months and years of his life determined that, with surgery, the child could be "raised, surgically reconstructed, and treated to be male or female." Id. ¶ 46.c.

M.C. was born prematurely, and remained in the hospital for approximately two and a half months due to complications resulting from his premature birth. Id. ¶¶ 34, 35. Shortly after his birth, the South Carolina Department of Social Services ("DSS") began investigating possible neglect by M.C.'s biological parents. Id. ¶ 36. M.C. was released from the hospital on February 8, 2005. Id. ¶ 37. One week later, M.C.'s biological parents notified DSS that they wished to relinquish their parental rights. Id. On February 16, 2005, a state court ordered that M.C. be removed from the custody of his biological parents and placed in DSS custody. Id. ¶ 38. On September 9, 2006, the state court terminated the parental rights of M.C.'s biological parents. Id.

M.C. lived with foster families from the time he was placed in DSS custody until he was placed with Pamela and John Mark Crawford ("the Crawfords"), the couple that ultimately adopted him. Id. ¶ 39. Pursuant to state law, DSS retained legal custody of M.C. throughout his time in foster care. Id.

While M.C. was in DSS custody, he was evaluated by defendant Amrhein, a pediatric endocrinologist employed by the Greenville Health System.[2] Id. ¶¶ 19, 69. Dr. Amrhein referred M.C. to defendant Aaronson, an urologist at MUSC, and defendant Appiagyei-Dankah, a pediatric endocrinologist also based at MUSC. Id. ¶¶ 45, 69. A team of physicians comprising Drs. Aaronson, Appiagyei-Dankah, and Amrhein evaluated plaintiff's condition and recommended to DSS officials that M.C. undergo sex assignment surgery in order to make his body appear female. Id. Defendants Aydlette, the former director of DSS, and DSS case workers Davis, Searcy, and Williams (collectively, "the DSS defendants"), made the decision to authorize M.C.'s sex assignment surgery. Id. ¶¶ 57, 61. "[DSS] officials made decisions whether to authorize medical treatment, including the sex assignment surgery, prepared paperwork necessary to implement the sex assignment treatment plan, and instructed the foster family at the time to deliver M.C. to the hospital at which the sex assignment surgery was performed." Id. ¶ 39. On April 18, 2006 at MUSC, Aaronson performed sex assignment surgery on M.C., removing M.C.'s phallus and testicular tissue and otherwise making M.C.'s body appear female. Id. ¶ 51.

In June 2006, two months after M.C. underwent sex assignment surgery, the Crawfords saw his profile on a state-run adoption website. Id. ¶ 64. The Crawfords gained custody of M.C. in August 2006, and legally adopted him on December 11, 2006. Id. The Crawfords initially raised M.C. as a female in accordance with his assigned gender of rearing. Id. ¶ 65. However, M.C.'s "interests, manner and play, and refusal to be identified as a girl indicate that [his] gender has developed as male. Indeed, M.C. is

[2] Greenville Health System was, from 1966 until early 2013, known as Greenville Hospital System.

[now] living as a boy with the support of his family, friends, school, religious leaders, and pediatrician." Id. ¶ 7.

B. Procedural History

On May 15, 2013, M.C., by and through the Crawfords, filed a complaint in federal district court against the physicians who recommended and performed M.C.'s sex assignment surgery and the DSS officials who authorized it. M.C. brings § 1983 claims against all defendants, alleging that they violated the substantive and procedural due process rights guaranteed to him by the Fourteenth Amendment. Count 1 of the complaint alleges that the defendants, while acting under the color of state law, violated M.C.'s "substantive due process rights to bodily integrity, privacy, procreation, and liberty." Compl. ¶¶ 71-77. Count 2 alleges that defendants, acting under color of state law, violated M.C.'s procedural due process rights to bodily integrity, privacy, procreation, and liberty by failing to furnish him with a pre-deprivation hearing. Id. ¶¶ 80-89.

Drs. Aaronson and Appiagyei-Dankah (collectively, "the MUSC defendants") moved to dismiss the complaint on June 7, 2013. MUSC Defs.' Mot. Dismiss, ECF No. 23. Dr. Amrhein filed a motion to dismiss on June 12, 2013. Amrhein Mot. Dismiss, ECF No. 28. The DSS defendants have also moved to dismiss M.C.'s complaint.[3] DSS Defs.' Mots. Dismiss, ECF Nos. 26, 47. These motions have all been fully briefed and the court had the benefit of the parties' oral argument at the August 22 hearing.

[3] Only Aydlette and Williams had filed motions to dismiss by August 22, 2013, the date the hearing was held. However, at the hearing, counsel for Aydlette and Williams represented that he also represented Searcy and Davis, who have only recently been served with M.C.'s complaint, and that Searcy and Davis adopted all of the arguments made in Aydlette's and Williams's briefs. In the interests of judicial efficiency, and without objection from M.C., the court agreed that it would construe Aydlette's and Williams's motions to dismiss as also representing the arguments of Searcy and Davis.

In addition, M.C. filed a motion to expedite discovery in this case on June 27, 2013. Pl.'s Mot. to Expedite Discovery, ECF No. 34. That motion has also been fully briefed.

II. STANDARDS

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss for "failure to state a claim upon which relief can be granted." When considering a Rule 12(b)(6) motion to dismiss, the court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in the plaintiff's favor. See E.I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435, 440 (4th Cir. 2011). But "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

"To state a claim for relief in an action brought under [42 U.S.C.] § 1983, [a plaintiff] must establish that [he was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999); see also Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 214 (4th Cir. 1993).

The court's denial of a motion to dismiss is not ordinarily appealable, but "[w]hen a district court denies a motion to dismiss that is based on qualified immunity, . . . the action is a final order reviewable by [the Fourth Circuit]." Jenkins v. Medford, 119 F.3d 1156, 1159 (4th Cir. 1997); Evans v. Chalmers, 703 F.3d 636, 646 (4th Cir. 2012);

Ridpath v. Bd. of Governors of Marshall Univ., 447 F.3d 292, 305 (4th Cir. 2006) (citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)).

B. Motion for Expedited Discovery

In relevant part, Rule 26 of the Federal Rules of Civil Procedure states that "[a] party may not seek discovery from any source" before the Rule 26(f) conference, unless "authorized by . . . court order." Fed. R. Civ. P. 26(d)(1). District courts have "wide latitude in controlling discovery and [their] rulings will not be overturned absent a showing of clear abuse of discretion." Ardrey v. United Parcel Serv., 798 F.2d 679, 683 (4th Cir. 1986); Middleton v. Nissan Motor Co., No. 10-2529, 2012 WL 3612572, at *2 (D.S.C. Aug. 21, 2012). The latitude given to district courts "extends as well to the manner in which [they] order[] the course and scope of discovery." Ardrey, 798 F.2d at 683.

III. DISCUSSION

The court confines its discussion to defendants' assertion of qualified immunity and to M.C.'s motion to expedite discovery.

A. Defendants' Assertions of Qualified Immunity

All defendants in this case, either by written motion or during oral argument, have asserted that the complaint must be dismissed against them on the basis of qualified immunity. The doctrine of qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests—the need to hold public officials accountable

when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009). The purpose of the qualified immunity defense is to "give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery, as inquiries of this kind can be peculiarly disruptive of effective government." Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (quotations omitted).

"To escape dismissal of a complaint on qualified immunity grounds, a plaintiff must (1) allege a violation of a right (2) that is clearly established at the time of the violation." Evans, 703 F.3d at 646 (citing Pearson, 555 U.S. at 231). The two prongs of the qualified immunity test may be applied in any order. Pearson, 555 U.S. at 236.

1. Whether M.C.'s Rights Were Clearly Established at the Time of Surgery

M.C. has identified the constitutional rights as issue as his rights to procreate and make his own procreative decisions, to bodily integrity, to privacy and self-determination in matters relating to adult sexual intimacy and expression, and to pre-deprivation notice and a hearing. Defendants argue that they are entitled to qualified immunity because the constitutional rights that M.C. alleges were violated were not "clearly established" in April 2006, at the time of M.C.'s surgery. They also argue that they violated no clearly established constitutional right because M.C.'s birth mother consented to the surgery. See, e.g., Aydlette Mot. Dismiss 9 ("Plaintiff's substantive due process rights in regards to the sex assignment surgery were rightfully exercised by the Plaintiff's birth mother who gave consent.")

To find that a government official is protected by qualified immunity,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted). Government officials "can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002).

As an initial matter, any arguments founded on M.C.'s birth mother's consent to the sex assignment surgery must fail at this juncture. The complaint contains no allegations that M.C.'s birth mother consented to – or was even aware of – M.C.'s sex assignment surgery. Nor do the parties' briefs include any attachments that demonstrate that M.C.'s birth mother consented to his sex assignment surgery. Because the court must, on these motions to dismiss, treat all of the complaint's allegations as true, the court cannot find that M.C.'s birth mother consented to the sex assignment surgery and therefore properly exercised M.C.'s constitutional rights on his behalf.

a. Count 1 – Substantive Due Process

"As a general matter, the . . . protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 510 U.S. 266, 271-72 (1994) (quotations omitted); see also Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("[I]n addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights . . . to have children[, and] to bodily integrity . . . .").

In addition to the rights to privacy and bodily integrity, M.C. alleges that defendants violated his constitutionally protected right to procreation. The Supreme

Court has held that "[t]he decision whether or not to beget or bear a child is at the very heart of [the] cluster" of choices protected by the Due Process clause. Carey v. Population Servs., Int'l, 431 U.S. 678, 684-85 (1977); see also Glucksberg, 521 U.S. at 720 ("The [Due Process] Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests[, including the right] . . . to have children . . . ."). A number of decisions issued by the Supreme Court and the Fourth Circuit have determined that forced sterilization, while not categorically unconstitutional, implicates significant due process concerns. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating, in the context of an equal protection analysis, that "[m]arriage and procreation are fundamental to the very existence and survival of the race. . . . [A person who undergoes forced sterilization] is forever deprived of a basic liberty"); Buck v. Bell, 274 U.S. 200, 206-07 (1927) (stating that forced sterilization does not categorically violate substantive due process rights and that significant pre-sterilization proceedings – which included a hearing in front of a hospital's board of directors, with possible appeals to state circuit and appellate courts – constitute sufficient procedural due process); Avery v. Burke Cnty., 660 F.2d 111, 115 (4th Cir. 1981) (stating, in a case in which a minor voluntarily underwent sterilization on the basis of incorrect medical advice, that "the right of procreation central to Avery's complaint is constitutionally protected by the due process and equal protection clauses of the fourteenth amendment"); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) (holding, where the state of North Carolina allegedly forced an 18-year-old girl to undergo sterilization, that plaintiff's "averments that the defendants permanently deprived her of the ability to bear children" properly formed the basis of a § 1983 claim).

M.C. alleges that defendants' actions "eliminated [his] potential to procreate as a male," "permanently impacted [his] potential to function sexually," "permanently destroyed [his] potential male reproductive function," and "removed his male reproductive ability." Compl. ¶¶ 5, 52, 73. M.C. alleges that the MUSC defendants and Dr. Amrhein made the joint decision to recommend that M.C. undergo sex assignment surgery, and that the surgery constituted an intentional and egregious invasion of M.C.'s right to procreation. Id. ¶ 70-72. M.C. also alleges that the DSS defendants' authorization of the surgery similarly violated his right to procreation. Id. ¶ 73-77. A physician's notes from October 11, 2005 state that M.C. has an "absent uterus." Compl. ¶ 44. If M.C. has no uterus, then it would be impossible for him to procreate as an adult female, even if he were to adopt his assigned gender of rearing. As the complaint also alleges that the sex assignment surgery "eliminated M.C.'s potential to procreate as a male," id. ¶ 5, the court must accept M.C.'s factual allegations as true and therefore must conclude that M.C. has no ability to procreate.

Mindful of the line of cases cited above and treating all of the complaint's allegations as true, the court finds that M.C. has articulated that defendants violated his clearly established constitutional right to procreation. As a result, defendants' assertion of qualified immunity must fail at this stage in the litigation.

Because the court finds that defendants are not entitled to qualified immunity with regard to at least one of the substantive due process rights articulated by M.C., the court need not consider M.C.'s arguments that defendants also violated his rights to privacy and bodily integrity.

b. Count 2 – Procedural Due Process

The second count of M.C.'s complaint alleges that defendants violated his Fourteenth Amendment procedural due process right to pre-deprivation notice and hearing. Defendants argue that they have not violated M.C.'s procedural due process rights because: (1) there was no substantive due process violation for which notice and a hearing were required, see, e.g., MUSC Defs.' Mot. Dismiss 16; (2) M.C.'s birth mother's consent constituted sufficient procedural due process, see, e.g., Aydlette's Mot. Dismiss 12; and (3) DSS's consent also constituted sufficient procedural due process, see, e.g., Aydlette's Mot. Dismiss 12.

Defendants' first argument fails because the court has already determined that M.C. has sufficiently alleged a violation of his clearly established constitutional right to procreation. Defendants' second argument fails because, as noted in Section III.A.1 above, the court cannot find, at the motion to dismiss stage, that M.C.'s birth mother consented to the surgery. All that remains is defendants' third argument, that the consent given by DSS constituted sufficient procedural due process.

The Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). When considering whether the administrative procedures provided

in a particular case meet the dictates of due process, a court generally must consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334.

The complaint alleges that Dr. Amrhein and the MUSC defendants chose "to perform the surgery and potential sterilization without requesting, initiating, or inquiring as to a pre-deprivation hearing," and that this decision "violated [M.C.'s] procedural due process rights to bodily integrity, privacy, procreation, and liberty." Compl. ¶ 82. The complaint further alleges that the DSS defendants knowingly permitted and authorized the medically unnecessary sex assignment surgery in violation of M.C.'s procedural due process rights. Id. ¶¶ 86, 88.

The complaint's allegations, taken as true, state a plausible claim that defendants violated M.C.'s procedural due process rights. Consideration of the three Mathews factors is an analysis far more appropriate for summary judgment, when the parties will have undoubtedly developed a full factual record in this case.

2. Whether the Facts Make Out a Violation of a Clearly Established Right

As the court has already found that M.C. has sufficiently pleaded that he had a clearly established constitutional right to procreation, the court also finds that M.C. has pleaded sufficient facts to allege that defendants violated this clearly established right. The complaint alleges that defendants recognized that M.C.'s sex assignment surgery would likely sterilize him, but proceeded with the surgery without regard to its

irreversible consequences and without providing M.C. with prior notice or a hearing. The complaint's allegations are sufficient to survive the court's scrutiny on these motions to dismiss, particularly with respect to defendants' assertions of qualified immunity.

For these reasons, the court denies defendants' motions to dismiss on the basis of qualified immunity.

B. M.C.'s Motion to Expedite Discovery

Finally, M.C. has filed a motion to expedite discovery pursuant to Rule 26(d)(1) of the Federal Rules of Civil Procedure. M.C. wants to take limited expedited discovery now, prior to the Rule 26(f) conference, in order to ascertain the identities of three DSS case workers who were present at several of his pre-surgery medical appointments and who "participated in making and carrying out the treatment plan that caused M.C.'s sex assignment surgery." Compl. ¶¶ 25-27. Those case workers are currently identified in the complaint as Does #1-3. M.C. wishes to have Does #1-3 identified through early discovery so that he can comply with Rule 4(m) of the Federal Rules, which states that "[i]f a defendant is not served within 120 days after the complaint is filed, the court . . . must dismiss the action without prejudice . . . or order that service be made within a specified time."

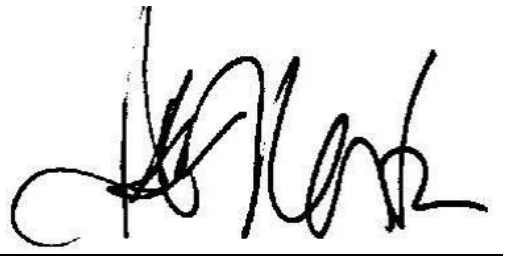
Because the court has denied defendants' motions to dismiss, and because the court has broad discretion in discovery matters, the court grants M.C.'s motion for expedited discovery. As this case will proceed beyond the dismissal phase, it is appropriate for defendants to provide M.C. with the information he seeks regarding the identities of Does #1-3.

IV. CONCLUSION

Underlying this case's complex legal questions is a series of medical and administrative decisions that had an enormous impact on one child's life. Details of how those decisions were made, when they were made, and by whom are as yet unknown to the court. Whether M.C.'s claims can withstand summary judgment challenges, or even the assertion of qualified immunity at the summary judgment stage, is not for the court to hazard a guess at this time. It is plain that M.C. has sufficiently alleged that defendants violated at least one clearly established constitutional right – the right to procreate – when they recommended, authorized, and/or performed the sex assignment surgery in April 2006.

For these reasons, the court **DENIES** defendants' motions to dismiss, ECF Nos. 23, 26, 28, & 47, on the basis of qualified immunity. The court also **GRANTS** M.C.'s motion to conduct expedited discovery, ECF No. 34. M.C. may issue limited discovery requests designed to ascertain the identities of Does #1-3 within seven (7) days of the date of this order. Defendants must respond to those discovery requests within twenty-one (21) days of the date the discovery requests are served on defendants. Finally, M.C. must effect service on Does #1-3 within sixty (60) days of the date on which Does #1-3 are identified.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

August 29, 2013
Charleston, South Carolina