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U.S. DISTRICT COURT  
FILED  
SEP 29 2006  
W.P.  
S.D. OF N.Y.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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:  
CARLOS ROSARIO, et al., :  
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Plaintiffs, :  
:  
vs. :  
:  
NEW YORK STATE DEPARTMENT OF :  
CORRECTIONAL SERVICES, et al. :  
:  
Defendants. :  
:  
-----X

RULE 41 VOLUNTARY  
STIPULATION OF DISMISSAL  
SUBJECT TO CONDITIONS  
*ORDER*

03 Civ. 0859 (CLB)(LMS)

The parties, by their attorneys, hereby stipulate and agree as follows:

WHEREAS Plaintiffs commenced this action on February 6, 2003 on behalf of themselves and a class of others similarly situated to challenge Defendants' alleged policy and practice of refusing to provide adequate programs to prisoners housed in the Department of Correctional Services' ("DOCS") Regional Medical Units. Plaintiffs alleged that the challenged policies and practices violate the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12131 and Section 504 of the Rehabilitation Act 29 U.S.C. § 794; and

WHEREAS the Defendants have answered the Complaint and denied that they have violated the ADA and/or Section 504; and

WHEREAS the plaintiff class of all qualified individuals with disabilities who are now or will in the future be housed in the Fishkill Regional Medical Unit ("RMU") was certified by the Court on September 15, 2005; and

WHEREAS the parties are in agreement that "qualified individuals" with "disabilities," as those terms are defined in the ADA, housed in the Fishkill RMU (herein "inmates" or "prisoners" or "inmate-class member(s)") should be provided, to the extent practical, with opportunities for meaningful program activities, including those programs that may assist them in earning credits that may enhance their suitability for release on parole or their eligibility for Presumptive Release, Merit Time and Earned Eligibility, with the understanding that their medical treatment must always remain the highest priority; and

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WHEREAS counsel for the Plaintiffs and the Defendants, without conceding any infirmity in their claims or defenses, have subsequently engaged in negotiations to resolve the Plaintiffs' claims; and

WHEREAS counsel for both parties have agreed to seek the Court's approval of the settlement of this case, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure, and to file this Voluntary Stipulation of Dismissal Subject to Conditions (herein "Voluntary Stipulation" or "Voluntary Stipulation of Dismissal") with the Court as the statement identifying the agreement made between the parties in connection with the proposed settlement pursuant to FRCP Rule 23(e)(2);

It is STIPULATED AND AGREED by and between the parties and their respective counsel as follows;

1. DOCS will conduct an individualized assessment of each inmate-class member's programming needs and capabilities for each inmate-class member currently housed in the RMU and for each inmate-class member who is admitted to the RMU during the term of this agreement as follows:
  - a. For each inmate-class member currently housed in the RMU, an individualized assessment will be completed within 60 days of the signing of this document. For all inmate-class members admitted to the long term care unit of the RMU after the signing of the agreement, individualized assessments shall take place within 30 days of their placement in the RMU. For all inmate-class members admitted to the infirmary of the RMU after the signing of the agreement, individualized assessments shall take place within 90 days of their placement in the RMU.
  - b. These assessments will be conducted by an interdisciplinary committee consisting of staff members who are familiar with the inmate-class member's condition, medical needs, security classification and program plan ("Committee"). The Committee's assessments will take each inmate-class member's condition, medical needs, security classification and program plan into account when making its assessment. At least one medical clinician (doctor, physician's assistant, or nurse practitioner) or registered nurse and one member of the counseling staff familiar with the inmate-class member's needs shall take part in the assessment.
  - c. The inmate-class member shall be afforded the opportunity to have input in the individualized assessment process as it pertains to the inmate-class member himself, including the opportunity to appear personally before the Committee to express his views about whether he can or cannot attend programs.

- d. DOCS shall maintain a policy concerning the individualized assessment of inmate-class members in the RMU that is consistent with this agreement. Attached to that policy shall be a form that is used by the Committee, which must call for the Committee's assessments and include the reasons supporting the assessment and procedures for contesting the assessment.
- e. An inmate-class member or DOCS staff member may request that the Committee reevaluate the inmate-class member's assessment because he or she believes that the inmate-class member's medical condition has changed; provided, however, that an inmate-class member may not request any more than three (3) such reevaluations per year. Inmate-class members and DOCS staff may make such a request at the time of the inmate-class member's quarterly review. Upon such a request, the Committee will review its prior assessment in light of the alleged changes in the inmate-class member's condition; provided, however, that the Committee is not bound to consider any more than three (3) such requests per year from any individual inmate-class member.
- f. Committee members will share information concerning inmate-class members' health in accordance with the provisions of the Health Information Portability and Accountability Act (HIPAA).

2. An inmate-class member will be informed of the Committee's assessment described in Paragraph one and will have the opportunity to contest it. Each inmate-class member will receive a copy of the assessment form stating the Committee's assessment, the reasons supporting it, and the procedures for contesting the assessment.

3. The Alcohol and Substance Abuse Treatment program (ASAT) will be available on site in the RMU provided there are inmate-class members in the Fishkill RMU who meet the eligibility requirements of that program and those inmate-class members have been or are expected to be housed in the Fishkill RMU for 90 days or longer. The ASAT program in the Fishkill RMU will meet on days and for time periods generally comparable to the days and times the ASAT program meets at Fishkill for general population inmates, provided however that DOCS may alter the days and times an individual inmate-class member attends ASAT to account for the inmate-class member's needs, abilities and medical condition.

4. Successful completion of the ASAT program in the RMU shall be equivalent to completion of this program in general population for purposes of Merit Time, Earned Eligibility, Presumptive Release, satisfying an inmate-class member's program plan and for any other purpose served by completing ASAT. Inmate-class members in the RMU who successfully complete the ASAT program are also entitled to the same certificate of completion that prisoners housed in the general population receive upon successful completion of ASAT.

5. The Aggression Replacement Treatment program (ART) will be available on site in the RMU provided there are inmate-class members in the Fishkill RMU who meet the eligibility requirements of that program and those inmate-class members have been or are expected to be housed in the Fishkill RMU for 90 days or longer. The ART program in the Fishkill RMU will meet on days and for time periods generally comparable to the days and times the ART program meets at Fishkill for general population inmates, provided however that DOCS may alter the days and times an individual inmate-class member attends ART to account for the inmate-class member's needs, abilities and medical condition.

6. Successful completion of the ART program in the RMU shall be equivalent to completion of this program in general population for all purposes. Inmate-class members in the RMU who successfully complete the ART program are also entitled to the same certificate of completion that prisoners housed in the general population receive upon successful completion of ART.

7. Two vocational programs known as "General Business" and "Computer Operator" will be available on site in the RMU provided there are inmate-class members in the Fishkill RMU who meet the eligibility requirements of either of these programs and those inmate-class members have been or are expected to be housed in the Fishkill RMU for 90 days or longer. Vocational programs in the Fishkill RMU will meet on days and for time periods generally comparable to the days and times these programs meet at Fishkill for general population inmates, provided however that DOCS may alter the days and times an individual inmate-class member attends one of these vocational programs to account for the inmate-class member's needs, abilities and medical condition. A vocational instructor who meets DOCS' qualification standards will teach these programs.

8. Successful completion of an on-site vocational program in the RMU shall be equivalent to completion of the equivalent program in general population for purposes of Merit Time, Earned Eligibility, Presumptive Release, satisfying an inmate-class member's program plan and for any other purpose served by completing the particular vocational program. Inmate-class members in the RMU who successfully complete a vocational program are also entitled to the same certificate of completion that prisoners housed in the general population receive upon successful completion of that program.

9. Adult Basic Education and preparation for the General Equivalency Diploma ("GED") test will continue to be available on site in the Fishkill RMU provided there are inmate-class members in the Fishkill RMU who meet the eligibility requirements of either of these programs and those inmate-class members have been or are expected to be housed in the RMU for 90 days or longer. These academic programs in the Fishkill RMU will be available to inmate-class members for time periods generally comparable to the time periods these programs are available to general population inmates, provided however that DOCS may alter the days and times to account for an inmate-class member's needs, abilities and medical condition. A certified educator who meets DOCS' qualification standards will be available to inmate-class members on

a basis generally comparable to a certified educator's availability to general population inmates enrolled in similar academic programs.

10. DOCS will provide qualified inmates with disabilities housed in the Fishkill RMU with reasonable accommodations within the meaning of the ADA that are necessary to enable those inmate-class members to participate in the programs offered in the Fishkill RMU.

11. With respect to the programs referenced in Paragraphs three through nine, DOCS will not be required to provide any one of these programs in the RMU during any time period when there is no inmate-class member who has met the eligibility requirements of the program and who wishes to participate in the program.

12. With respect to ASAT, ART and the academic programs leading to the GED, DOCS will not be required to provide these programs in the RMU if it ceases to provide them to the general population at Fishkill Correctional Facility. If DOCS eliminates all vocational programming for the general population at Fishkill, DOCS will not be required to provide vocational programs in the RMU.

13. Inmate-class members in the RMU may be eligible to participate in programs located in Fishkill's general population areas consistent with their disability, medical condition, security level and program needs. An inmate-class member's eligibility to participate in programs located in the general population will be determined by the Committee consistent with the policy referenced in Paragraph one above.

14. If cleared by a physician to do so, inmate-class members in the RMU will be provided with daily access to the RMU outdoor yard. Drinking water will be made available to inmate-class members, who will be permitted to bring to the outdoor RMU yard items such as games, books, and water consistent with what general population inmates can bring to the yard, so long as the items are not inconsistent with the health of the RMU inmates. For example, no cigarettes or matches will be allowed in the RMU yard. DOCS will provide some recreational equipment in the RMU yard. Once in the yard, inmate-class members will be permitted to leave the yard to use the restroom and then to return to the yard provided the yard is still open at that time. Inmate-class members will be provided with an accessible toilet stall in accordance with the ADA Accessibility Guidelines for buildings and facilities (ADAAG) if necessary. During the warmer months, DOCS will make an effort to hold RMU outdoor yard time when the building provides natural shade.

15. Plaintiffs' counsel will be provided with all grievances and requests for accommodation filed by inmate-class members housed in the RMU that concern an inmate-class member's program or use of the outdoor yard. Plaintiffs' counsel will also be provided with all responses to these grievances and requests for accommodation.

16. Plaintiffs' counsel will be provided with a copy of all final determinations made by the Committee with respect to inmate-class members. This includes all initial determinations and subsequent determinations.

17. All documents that this Voluntary Stipulation of Dismissal requires Defendants to produce shall be produced on a quarterly basis for a period of three (3) years, which time period will commence on the date this Voluntary Stipulation of Dismissal is signed by the parties. During this same three (3) year period, Plaintiffs' counsel shall be permitted, at six (6) month intervals and upon at least two weeks advance written notice to Defendants' counsel, to tour the Fishkill RMU program areas and its outdoor yard. Each tour will take place at such time that is mutually agreeable to the parties and shall be subject to any time limitations and restrictions imposed by the operation of the Fishkill Correctional Facility. During any such tour(s), Plaintiffs' counsel may, at DOCS' option, be accompanied by Defendants' counsel, DOCS counsel, and such other DOCS staff as DOCS deems appropriate. Plaintiffs' counsel will not be permitted to interview any inmate-class member(s) or any other inmate (s) during any tour(s). On the same day(s) that any tour is conducted, Plaintiffs' counsel shall be given the opportunity to meet with the Fishkill Superintendent or a Deputy Superintendent for the purpose of discussing the implementation of the programs being offered to inmate-class members pursuant to this agreement. Defendants' counsel, DOCS counsel, and such other DOCS staff as DOCS deems appropriate may, at DOCS' option, be present and participate in any and all such meetings. The parties agree that any information discussed on any tour and at any meeting shall be deemed confidential and privileged, shall not be admissible, and shall not be used by Plaintiffs' counsel in this or any subsequent litigation or for any purpose other than one concerning the implementation of programs and services for inmate-class members under this agreement and/or the reporting requirements pursuant to this agreement.

18. For a period of three (3) years from the time this Voluntary Stipulation of Dismissal is signed by the parties, if Plaintiffs' counsel believes that the Defendants are not in "substantial compliance," as defined in Paragraph 21, with the terms of this Voluntary Stipulation of Dismissal, Plaintiffs' counsel may request a meeting with counsel for Defendants and DOCS counsel at a mutually agreeable time and place to discuss and attempt to resolve the dispute(s). Any such request made by Plaintiffs' counsel shall be made in writing. The parties will use their best efforts to schedule and attend such meeting(s) within thirty (30) days of Defendants' receipt of Plaintiffs' written request for a meeting pursuant to this Paragraph. Nothing said by either party or counsel for either party during those meetings may be used by the opposing party in any subsequent litigation in this or any other lawsuit or for any purpose other than implementing programs and services for inmate-class members and reporting requirements pursuant to this agreement. Plaintiffs' counsel will request a meeting(s) pursuant to this Paragraph only upon Plaintiffs' counsel's belief that there is a failure on the part of Defendants to comply with the terms of this Voluntary Stipulation that is more substantial and pervasive than a disagreement with the exercise of professional judgment regarding a particular inmate(s)-class member's (s') ability to program.

19. If, after thirty (30) days following any meeting held pursuant to Paragraph 18 above, Plaintiffs' counsel believes that Defendants are not in "substantial compliance" as defined in Paragraph 21 with the terms of this Voluntary Stipulation, Plaintiffs' counsel may request a meeting with all parties before the Honorable Charles L. Brieant, United States District Court for the Southern District of New York, or another Judge of said Court if Judge Brieant is unavailable, to discuss the possible filing of a motion to reinstate this lawsuit, as provided in Paragraph 21 below. Plaintiffs' counsel may request such a meeting with the Court no earlier than three (3) months from the date this Voluntary Stipulation of Dismissal is signed by the parties.

20. Upon the signing of this Voluntary Stipulation of Dismissal, the parties will jointly move the Court for entry of an Order dismissing this action pursuant to Fed. R. Civ. P. 23(e) and 41 (a)(2) and will attach a copy of this Voluntary Stipulation of Dismissal to such motion. This dismissal shall be without prejudice to Plaintiffs' right to move to reinstate the action pursuant to Paragraph 21 below within three (3) years from the date this Voluntary Stipulation of Dismissal is signed by the parties. Should the Court deny the parties' motion for dismissal as provided herein, this Voluntary Stipulation of Dismissal shall become null and void.

21. Following any meeting with the Court as set forth in Paragraph 19 above, Plaintiffs' counsel may file a motion with the Court for an Order reinstating this lawsuit. Plaintiffs may not file such a motion without first requesting a pre-motion meeting with the Defendants and the Court as provided in Paragraph 19 above and, if granted by the Court, participating in such meeting. The lawsuit shall not be reinstated unless the Court finds by a preponderance of the evidence that Defendants are not in 'substantial compliance' with the terms of this Voluntary Stipulation of Dismissal, meaning Defendants' failures or omissions to meet the terms of this Stipulation were not minimal or isolated but were substantially and sufficiently frequent and widespread so as to be systemic. Upon reinstatement, the Court may take such action as the record, the law, and this Voluntary Stipulation warrant.

22. The terms of this Voluntary Stipulation of Dismissal shall remain in effect for a period of three (3) years from the date this Voluntary Stipulation of Dismissal is signed by the parties and shall be binding on the parties, their successors, agents, employees and all persons acting in concert with them. After the three (3) year term, the terms and conditions of this Voluntary Stipulation of Dismissal shall automatically cease to bind the parties, as well as their successors, agents, employees, assigns and those acting in concert with them; all claims on behalf of the plaintiffs are discontinued and dismissed with prejudice; and the jurisdiction of the Court over the issues in this action shall automatically end.

23. This Voluntary Stipulation of Dismissal is a "private settlement agreement" as that term is used in the Prison Litigation Reform Act (PLRA), 18 USCA 3626(c) and, as such, is a contract which shall be enforceable in any State court of competent jurisdiction. If any provision of this Voluntary Stipulation of Dismissal is declared invalid, illegal or unenforceable in any respect, the remaining provisions shall remain in full force and effect, unaffected and unimpaired.

24. This Voluntary Stipulation of Dismissal shall resolve all claims or potential claims for injunctive relief identified in the Complaint and that could arise from the allegations contained in the Complaint. This Voluntary Stipulation is not intended to restrict any defenses that may be available to Defendants to any future claims, or the legal requirements, procedures, or standards to be employed in determining any such future claims.

25. Defendants agree to reimburse Plaintiffs' counsel the sum of One Hundred Thirty Five and 00/100 Dollars (\$135,000.00) in attorney's fees and the amount of Four Thousand Three Hundred Twenty Nine and 70/100 Dollars (\$4,329.70) in disbursements for a grand total of One Hundred Thirty Nine Three Hundred Twenty Nine and 70/100 Dollars (\$139,329.70) which shall be payable out of the fund established pursuant to Section 17 of the NYS Public Officer's Law. Payment of this amount is subject to the approval of all appropriate New York State officials in accordance with the provisions for indemnification under New York Public Officers Law, Section 17, subdivision 3(a). Should such approval be denied, this Voluntary Stipulation of Dismissal shall become null and void. In the event payment of these sums is not made within ninety (90) days after the receipt by Defendants' counsel from Plaintiffs' counsel of a copy of this Voluntary Stipulation of Dismissal, fully executed and "So Ordered" as entered by the Court, interest shall accrue on the outstanding principal balance at the rate set forth in 28 U.S.C. sec. 1961, beginning on the one hundred twenty-first day after said receipt by Defendants' counsel of the fully executed "So Ordered" Voluntary Stipulation of Dismissal and continuing until payment is made. Plaintiffs agree to waive any rights or claims to attorney's fees, court costs, or disbursements incurred during the three (3) year period this Voluntary Stipulation of Dismissal is in effect. In the event that Plaintiffs' counsel successfully moves to reinstate this lawsuit as provided in Paragraph 21 above, Plaintiffs' counsel is not precluded from making a motion to the Court, consistent with and subject to all applicable law, for attorney's fees, court costs, and disbursements directly and reasonably incurred in relation to their motion to reinstate the lawsuit, as well as for attorney's fees, court costs, and disbursements directly and reasonably incurred in relation to the successful prosecution of the lawsuit. Nothing in this Voluntary Stipulation of Dismissal shall be construed to either provide for or preclude Plaintiffs' counsel from recovering attorney's fees, court costs, or disbursements in the event a state court action is brought to enforce a term or condition of this Voluntary Stipulation of Dismissal.

26. This Voluntary Stipulation of Dismissal does not constitute (a) an admission of liability by any Defendant of any violation of law or wrongdoing; (b) an admission by any Defendant that any standard, policy, practice, or procedure addressed in this action violated or failed to comply with either the language or the intent of any applicable law, rule or regulation; or (c) an admission by any Defendant that its position in this litigation was not substantially justified. This agreement and its terms shall have no preclusive effect except between the parties to the agreement.

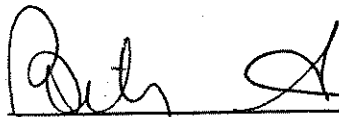


27. This Voluntary Stipulation of Dismissal may not be used for any purpose other than enforcement of the provisions of this Voluntary Stipulation and shall not in any way be construed as precedent for any other present or future litigation.

28. This Voluntary Stipulation of Dismissal contains the entire agreement of the parties in this matter and no oral agreement entered into at any time, nor any written agreement entered into prior to the execution of this Voluntary Stipulation of Dismissal regarding the subject matter of the instant proceedings, shall be deemed to exist or to bind the parties hereto or to vary the terms and conditions contained herein.

Dated: New York, New York

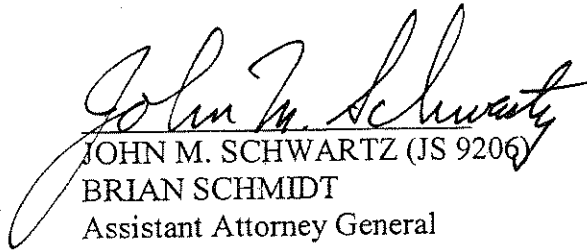
July 21, 2006



BETSY GINSBERG (BG 9890)  
JOHN BOSTON  
STEVEN BANKS  
Prisoners' Rights Project  
Legal Aid Society  
199 Water Street  
New York, New York 100038  
(212) 577-3530

Dated: New York, New York

July 21, 2006



JOHN M. SCHWARTZ (JS 9206)  
BRIAN SCHMIDT  
Assistant Attorney General  
120 Broadway  
New York, New York 10271  
(212) 416-8559

SO ORDERED: September 29, 2006  
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Charles Bryant  
U.S.D.J.