

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT  
N.D. OF N.Y.  
FILED

JUL 25 2007

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ROBERT HILTON and LOUIS VASQUEZ,  
on behalf of themselves and all others  
similarly situated,

LAWRENCE K. BAERMAN, Clerk  
UTICA

Plaintiffs,

-----  
-against-

**INTERIM SETTLEMENT  
AGREEMENT**

LESTER N. WRIGHT, M.D., M.P.H.,  
Associate Commissioner/ Chief Medical Officer, for the  
New York State Department of Correctional Services;  
and the NEW YORK STATE DEPARTMENT OF  
CORRECTIONAL SERVICES,

05 Civ. 1038 (DNH) (DEP)

Defendants.  
-----X

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

WHEREAS plaintiff Robert Hilton commenced this action on August 17, 2005, on behalf of himself and a class of others similarly situated to challenge defendants' alleged policy and practice of refusing to provide adequate medical care to New York State prisoners with Hepatitis C, alleging that defendants' conduct violated the Eighth and Fourteenth Amendments, the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12131, and Section 504 of the Rehabilitation Act 29 U.S.C. § 794 ("Section 504"); and

WHEREAS plaintiff Robert Hilton amended his complaint on September 2, 2005, to add plaintiff Louis Vasquez as a named plaintiff; and

WHEREAS plaintiffs alleged that defendants violated the Eighth and Fourteenth Amendments, the ADA, and/or Section 504 by requiring all prisoners with a past history of drug and/or alcohol use and/or abuse to participate in facility based substance abuse counseling programs as a condition of receiving antiviral therapy; and

WHEREAS the defendants have answered the amended complaint and denied that they have violated the Eighth and Fourteenth Amendments, the ADA and/or Section 504; and

WHEREAS the Court certified the plaintiff class by Decision and Order dated February 27, 2006; and

WHEREAS on October 13, 2005, defendants announced the rescission of the aforementioned prior requirement of substance abuse treatment as a condition for receipt of antiviral therapy in certain circumstances, and the parties being in agreement that upon such rescission an inmate's participation in ASAT/RSAT is and will be irrelevant in determining whether that inmate should receive antiviral therapy for Hepatitis C, or for making any other determination regarding the treatment or screening of an inmate for Hepatitis C treatment; and

WHEREAS counsel for the plaintiffs and the defendants, without conceding any infirmity in their claims or defenses, have subsequently engaged in negotiations to resolve plaintiffs' claims for equitable relief; and

WHEREAS counsel for both parties have agreed to seek the Court's approval of the interim settlement of this case, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure, and to file this Interim Settlement Agreement with the Court as the statement identifying the interim 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. The within Interim Settlement Agreement ("Agreement") is intended to implement the

parties' joint agreement as to the resolution of the injunctive and equitable claims at issue in the within case.

2. The following definitions apply to the within Agreement:

- a. "DOCS": The New York State Department of Correctional Services, including its employees.
- b. "ASAT/RSAT": The facility-based drug and alcohol counseling program offered throughout DOCS facilities, whether as a residential program ("RSAT") or as a non-residential program ("ASAT").
- c. "Hepatitis C Protocol": A treatment protocol developed and implemented by DOCS to guide correctional facility physicians in the treatment of prisoners with Hepatitis C.
- d. "ASAT requirement": That element of the Hepatitis C Protocol which required that prisoners with a history of substance abuse participate in ASAT/RSAT programs to obtain antiviral therapy for Hepatitis C, most recently expressed in paragraph 11 of the Hepatitis C Protocol dated July 20, 2004.
- e. "Class": Prisoners with Hepatitis C who were subjected to DOCS' previous ASAT/RSAT requirements, and, but for the policy, would have obtained standard combination therapy for Hepatitis C.
- f. "Class Counsel": Koob & Magoolaghan

3. The parties agree that the following steps will be taken by DOCS to eliminate the ASAT requirement:

- a. All facility physicians will again be informed by DOCS that the ASAT

requirement was rescinded in October, 2005 and a prisoner's participation in ASAT/RSAT is irrelevant in and may no longer be used as a criteria for determining whether that prisoner may receive antiviral therapy for Hepatitis C, or for making any other determination regarding the treatment or screening of a prisoner for Hepatitis C treatment.

b. Paragraph 11 of the Hepatitis C Protocol will be revised to read as follows:

No evidence of active substance abuse (alcohol, heroin, cocaine, methamphetamine) during the past 6 months. Inmates with active substance use will be required to submit drug test samples routinely at least monthly (at random intervals) until they have been free of identified substance use for 6 months. The demonstrable 6 month period of abstinence is deemed to commence on the day following the last incident of substance use.

If you have an inmate/patient who might otherwise qualify for Hepatitis C treatment except for a drug or alcohol-related incident in the past 6 months, please submit the Approval for Treatment form as you would for anyone without such incident. The details of the incident and the urgency of treatment will be evaluated individually to determine whether or not the incident results in temporary disqualification for treatment.

c. The revised Hepatitis C Protocol will be distributed by defendants to all DOCS health care providers (physicians, physician assistants, and nurse practitioners) with a cover memo reiterating that participation in RSAT or ASAT is not to be considered when evaluating an individual patient for standard combination therapy.

d. All DOCS prisoners identified by DOCS as testing positive for Hepatitis C will be informed that the ASAT requirement is no longer in effect, by being personally provided with the Notice to Class.

4. The parties agree that the following steps will be taken to reevaluate any prisoner who was denied treatment for Hepatitis C because of the ASAT requirement:

a. The notification referred to in Paragraph 3(d) shall take place as described in the Stipulation Regarding Notice to the Plaintiff Class and Scheduling of Fairness Hearing (Stipulation).

b. DOCS shall reevaluate any prisoner who was denied treatment for Hepatitis C because of the ASAT requirement within sixty ("60") days of the earlier of the following events: (i) a prisoner is identified by DOCS as an individual who was previously denied Hepatitis C treatment because of the ASAT requirement; or (ii) a prisoner requests reevaluation, personally or through class counsel, and it is confirmed that the prisoner at the last evaluation has previously been denied treatment because of the ASAT requirement.

c. If DOCS is unable to reevaluate the prisoner within the period specified in Paragraph 4(b) of the Agreement, upon DOCS' receipt of a proper authorization for release of medical information, Class Counsel shall have the right to request an explanation as to why the reevaluation did not take place within the specified time. The prisoner and Class Counsel shall have the right to seek the Court's intervention to require a reevaluation in a timely manner. Prior to seeking such intervention, the prisoner and Class Counsel have an obligation to confer with DOCS' counsel to seek an informal resolution of any dispute.

d. Should DOCS determine, after conducting any reevaluation contemplated by Paragraphs 4(b) and (c), that it is not medically appropriate to institute treatment

for a member of the class, DOCS shall provide a written explanation to the inmate and Class Counsel upon receipt by DOCS of a properly executed authorization for release of medical information. The prisoner and Class Counsel shall have the right to seek the Court's intervention to determine whether the decision not to treat is based upon a prisoner's participation or non-participation in ASAT/RSAT. Prior to seeking such intervention, the prisoner and Class Counsel have an obligation to confer with DOCS' counsel to seek an informal resolution of any dispute.

5. The parties agree that Class Counsel will be apprised of DOCS' compliance with paragraphs 3 and 4 of this Agreement through the use of a questionnaire found in the Notice to Class as described in the Stipulation.

Upon receipt of questionnaires from prisoners, Class Counsel will arrange for it to be tabulated and will provide a summary of the information to DOCS' counsel, including information sufficient for DOCS to conclude whether the prisoner is actually a member of the certified class and whether individual DOCS' facilities are in compliance with the time deadlines detailed in paragraph 4(b).

6. Class Counsel will be reimbursed \$38,000 in attorneys' fees and \$2,413.06 in costs in full satisfaction of the hours and costs incurred to date in this litigation. Class Counsel will further be paid at a rate of \$160 an hour for attorney time and \$80 an hour for paralegal time for hours incurred during the two year monitoring period described herein. Fees for the herein described monitoring period will capped at \$20,000. Class Counsel reserves the right to seek Court intervention to enlarge this limit upon a showing that such enlargement is reasonable to

enforce the terms of this Agreement. The parties further reserve the right to seek Court intervention to modify the aforementioned rate in regard to the time expended in an individual matter arising during the monitoring period that requires motion practice before the Court. Fees will only be assessed in regard to hours incurred on behalf of inmates determined to be members of the class.

7. The parties agree that, absent mutual consent, this Agreement will be in effect for two years from the date this it is executed by the parties. If this Agreement is not so ordered by the Court, the Agreement will be null and void. After two years from the date that this Agreement is executed by the parties, the terms and conditions of this Agreement shall expire and all equitable claims on behalf of plaintiffs discontinued and dismissed with prejudice unless the parties either agree to voluntarily extend this Agreement or if extension is ordered by the Court. Such an extension shall only be ordered by the Court upon a showing that defendants have not been in substantial compliance with the terms of this Agreement meaning that any alleged omissions or failures were not minimal or isolated but were substantial and frequent enough to warrant continued jurisdiction and oversight under prevailing federal law. The parties agree to confer prior to seeking a Court order regarding extension of this agreement and seek a conference with the Court pursuant to the Local Rules of the Northern District of New York prior to filing any motion.

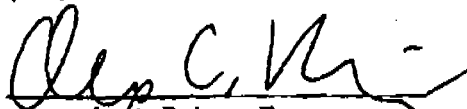
8. This Agreement constitutes a final determination of the claims on behalf of the class and all claims for equitable relief contained in the Complaint and will bind class members, DOCS, and their successors, agents, employees, assigns and those acting in concert with them. This Agreement will not restrict or affect the claims or defenses of the parties in the named class representatives' actions for non-equitable relief nor will it restrict or have any affect upon the

representatives' actions for non-equitable relief nor will it restrict or have any effect upon the claims or defenses of any party to actions involving claims for non-equitable relief brought by class members either pending or subsequently filed. To the extent the parties have any dispute regarding the applicability, enforcement, or interpretation of this agreement, they are obliged to seek an informal resolution prior to seeking any Court intervention. No party waives its right to seek Court assistance in resolving any dispute regarding the applicability, enforcement, or interpretation of this agreement.

Dated: New York, New York  
July 19, 2007

KOOB & MAGOOLAGHAN  
Attorneys for Plaintiffs  
19 Fulton Street, Suite 408  
New York, NY 10038  
(212) 406-3095


By:

  
Alexander A. Reinert, Esq.  
Bar Roll No. 512945  
aar@kmlaw-ny.com


Dated: Albany, New York  
July 19, 2007

ANDREW M. CUOMO  
Attorney General of the State of New York  
Attorney for Defendants  
Office of the Attorney General  
The Capitol  
Albany, NY 12224

By:

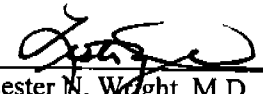
  
Belinda A. Wagner  
Assistant Attorney General, of Counsel  
Bar Roll No. 103901  
(518) 474-8158  
Belinda.Wagner@oag.state.ny.us



  
ROSEMARIE POSTIGLIONE  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01PO6156266  
Qualified in Columbia County  
My Commission Expires November 27, 2010

Dated: Albany, NY

July 19<sup>th</sup>, 2007:

  
Lester N. Wight, M.D., M.P.H.  
Deputy Commissioner/ Chief Medical Officer  
New York State Department of Correctional  
Services  
State Office Campus, Bldg. 2  
Albany, NY 12226-2050

SO ORDERED:

Dated: Utica, NY

\_\_\_\_\_, 2007

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HONORABLE DAVID N. HURD  
United States District Court