UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
--X
ROBERT HILTON and LOUIS VASQUEZ, on behalf of themselves and all others similarly situated,

Plaintiffs,

–against–

Case No. 05 Civ. 1038 (DNH) (DEP)

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,

Defendants.
--X

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS AND IN FURTHER SUPPORT OF MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

This brief is submitted in opposition to defendants' cross-motion to dismiss plaintiffs' claims for injunctive relief and in further support of plaintiffs' motion for class certification.[1] Defendants argue that, because they recently modified the Hepatitis C Protocol challenged by plaintiffs Robert Hilton and Louis Vasquez, plaintiffs' injunctive and declaratory relief claims are moot. Defendants' argument both misconstrues the nature of the relief sought by plaintiffs on behalf of themselves and the class, and mischaracterizes the change in policy purported to moot plaintiffs' claims for equitable relief. Accordingly, plaintiffs' motion for class certification should be granted and defendants' motion to dismiss should be denied.

ARGUMENT

Defendants' sole argument in opposition to plaintiffs' motion for class certification is that plaintiffs' equitable claims have been mooted by an announcement transmitted on October 18, 2005 by defendant Wright concerning the New York State Department of Correctional Services' ("DOCS") Hepatitis C protocol.[2] Defendants' argument should be rejected for at least two reasons. First, defendants incorrectly assume that the only injunctive relief sought by plaintiffs on behalf of the class is the elimination of the longstanding requirement that prisoners participate in prison-run substance abuse counseling programs as a condition of receiving Hepatitis C

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[1]Pursuant to Local Rule 7.1(c), plaintiffs submit this brief in opposition to defendants' cross-motion to dismiss and in reply to defendants' opposition to plaintiffs' motion for class certification.

[2]Defendants rebut none of plaintiffs' arguments regarding the propriety of class certification in this action. By their omission, defendants concede that all the requirements enumerated by Fed. R. Civ. P. 23 have been met by plaintiffs.

treatment (referred to herein as the "ASAT/RSAT requirement"). In fact, plaintiffs' First Amended Class Action Complaint demands "injunctive relief, including that defendants Wright and DOCS treat plaintiffs with pegylated interferon and ribavirin," as well as a judgment declaring unconstitutional defendants' conduct in denying treatment to the plaintiff class. (First Amend. Compl. ("Compl."), "Wherefore Clause"). Second, even if plaintiffs only sought a change in policy to conform defendants' Hepatitis C Protocol to accepted medical judgment, defendants' recent announcement, assuming it instantiates a real change in practice, would not moot plaintiffs' request for injunctive relief on behalf of the class. Defendants face a "heavy burden" of demonstrating that the recent change should moot the class's request for injunctive relief, Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 59 (2d Cir. 1991), a burden that they cannot meet given their prior conduct and the context in which the October 18 announcement was made. Moreover, defendants' announcement itself does not clarify the illegality of the Hepatitis C Protocol, and does nothing to assure plaintiffs that class members will receive appropriate medical care for Hepatitis C.

I. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF HAVE NOT BEEN MOOTED

The heart of defendants' argument is that the only equitable relief sought by plaintiffs is the elimination of defendants' practice of conditioning Hepatitis C treatment on participation in prison-run substance abuse programs. (Mem. Of Law in Support of Defendants' Cross-Motion to Dismiss and in Opposition to Plaintiffs' Motion for Class Certification ("Defs.' Mem.") at 1.) According to defendants, because they have announced that they will no longer predicate eligibility for Hepatitis C treatment on enrollment in substance abuse programming, they have

satisfied this request for equitable relief and mooted plaintiffs' injunctive claims. This is a crabbed reading of plaintiffs' First Amended Complaint, however. On behalf of the class, plaintiffs seek "appropriate injunctive relief," including treatment with pegylated interferon and ribavirin (Compl. "Wherefore Clause" ¶ (D)), and a declaration that defendants' prior Hepatitis C Protocol was unconstitutional (Compl. "Wherefore Clause" ¶ (F).) Plaintiffs do not purport to limit their request for equitable relief only to a change in policy, much less an announcement that policy has been changed.[3] Instead, plaintiffs have stated their goals more broadly, as a "mandate that defendants adequately treat Hepatitis-C infected prisoners." (Pls.' Mem. of Law in Support of Mot. for Class Certification 17.)

With this understanding of the equitable relief sought by plaintiffs, it is clear that defendants' October 18 announcement does not moot these claims. The test for mootness is succinctly stated as whether events have occurred which "make[] it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." Church of Scientology v. United States, 506 U.S. 9, 12 (1992). Defendants' announcement does not exhaust the universe of injunctive relief available to the class, and leaves many questions unanswered. For instance, while Dr. Wright has asked medical personnel to reevaluate prisoners for treatment under the new policy (Declaration of Lester Wright dated October 18, 2005 ("Wright Decl.") ¶ 10 and Ex. C), he has imposed no deadlines for when this review is to take place, how this review is to take

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[3]As defendants concede, even if the named plaintiffs' equitable claims have been fully satisfied, this would not moot the putative class's claims for the same injunctive relief. County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991) (class claims not moot even though class was not certified until after named plaintiffs' claims were mooted); Krimstock v. Kelly, 306 F.3d 40, 70 n.34 (2d Cir. 2002) (reviewing cases). Therefore, for the purposes of this motion, plaintiffs do not distinguish between the injunctive and equitable relief which remains to be granted to the class, and that which remains to be granted to the plaintiffs.

place, and whether prisoners will be notified of the review and be permitted to challenge any decision not to institute treatment. There are thus many possible remedial measures by which the Court might enforce the injunctive relief sought, including ordering treatment of all prisoners who have been denied Hepatitis C treatment because of the ASAT/RSAT requirement, imposing deadlines for reviewing the files of prisoners who previously have been denied treatment, establishing a process for outside review of decisions by DOCS personnel to deny treatment under the terms of the October 18 announcement, or notifying prisoners with Hepatitis C of their entitlement to the care previously denied. All of these issues, among others, would be appropriate subjects for resolution in a class action. See, e.g., Cronin v. Browner, 90 F. Supp. 2d 364, 377 (S.D.N.Y. 2000) (describing possible court-ordered relief to coordinate compliance with consent decree); Najera-Borja v. McElroy, No. 89 Civ. 2320, 1995 WL 151775, *6 (E.D.N.Y. March 29, 1995) (modifying previous court-ordered injunctive relief to account for problems with defendants' compliance). Thus, even where a government agency announces a change in policy, if the adequacy of relief provided to individual class members remains "an unresolved issue," the government's mootness argument should be rejected. Etuk v. Slattery, 936 F.2d 1433, 1442–43 (2d Cir. 1991).

Moreover, defendants' October 17 announcement does not explicitly repudiate the prior ASAT/RSAT requirement, and instead continues to attest that ASAT/RSAT participation is "an essential part" of Hepatitis C treatment. (See Ex. B to Wright decl. Dated October 18, 2005.) The plaintiff class is entitled to have class counsel and the Court oversee the application of Hepatitis C protocols to ensure that the prior de jure restrictions do not continue de facto. See Dodge v. County of Orange, 208 F.R.D. 79, 85 (S.D.N.Y. 2002) (defendants' strong mootness argument was defeated because plaintiff asserted that even if formal written policy had changed,

practice had not). Plaintiffs also share an interest with the public in "having the legality of the practices settled." United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953), quoted in Etuk, 936 F.2d at 1443.

Defendants' change in policy also does not satisfy plaintiffs' request for a declaration that the ASAT/RSAT requirement violated and/or violates the constitution. Indeed, defendants clearly continue to believe that the policy of linking substance abuse treatment with Hepatitis C treatment is appropriate and even "essential" to proper medical care. Even if the October 18 announcement brings about a sufficient alteration of past practices to satisfy the plaintiff class's requests for injunctive relief, defendants cannot seriously claim that the announcement is equivalent to a clear declaration of illegality of the ASAT/RSAT requirement alleged by plaintiffs' complaint. See Ford v. Reynolds, 316 F.3d 351, 356 n.3 (2d Cir. 2003) (finding claims for injunctive relief moot but remanding for decision on claims for declaratory relief). As the Supreme Court has made clear, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

Defendants seek to evade court oversight of its Hepatitis C Protocol by attesting to a change in policy that does not encompass all of the injunctive and declaratory relief which the plaintiff class seeks. Defendants therefore simply have not met their burden of showing that the October 18 announcement "makes it impossible for the court to grant 'any effectual relief whatever'" to the plaintiff class. Church of Scientology, 506 U.S. at 12.

II. DEFENDANTS' AMENDED POLICY DOES NOT MEET THEIR BURDEN OF ESTABLISHING MOOTNESS

Even were the Court to agree with defendants that plaintiffs have not stated a claim for any relief beyond a de jure elimination of the absolute ASAT/RSAT requirement, defendants' mootness argument should be rejected. As defendants recognize, to moot this case as a result of their unilateral conduct, they bear a "heavy burden." Harrison, 981 F.2d at 59. A "voluntary cessation of the challenged conduct" by defendants is only "one factor that a court should consider in determining whether to adjudicate the controversy before it." Ahrens v. Bowen, 852 F.2d 49, 52 (2d Cir. 1998). Defendants must also show both that "no reasonable expectation remains that the policy will be reinstituted," United States v. New York City Transit Authority, 97 F.3d 672, 676 (2d Cir. 1996), and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), quoted in New York State Nat. Organization for Women v. Terry, 159 F.3d 86, 91 (2d Cir. 1998). Defendants have not met either requirement.

A. Defendants Have Not Shown That No Reasonable Expectation Remains That the ASAT/RSAT Requirement Will Be Reinstated

To moot a case based on voluntary cessation of challenged conduct, a defendant must show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Ahrens, 852 F.2d at 52 (internal quotation marks omitted). Both the history of the defendants' actions with respect to the Hepatitis C policy and the context of the October 18 announcement counsel caution before accepting defendants' statement that there is no possibility of resumption of the challenged ASAT/RSAT requirement.

The history of defendants' reliance on the Hepatitis C Protocol to irrationally restrict

access to Hepatitis C treatment is particularly troubling. Since the adoption of defendants' first Hepatitis C Protocol in 1999, there has been no medical support for defendants' conscious decision to deny necessary medical treatment to prisoners with Hepatitis C solely because of their failure to participate in ASAT or RSAT. (Supplemental Affirmation of Alexander A. Reinert dated October 28, 2005 ("Reinert Supp. Aff.") ¶ 32.) Indeed, even after 2002, when the National Institutes of Health recommended that active injection drug users be treated for Hepatitis C, defendants continued to deny needed Hepatitis C treatment to past substance users who had abstained from drug use for several years. (Id.) As plaintiffs allege in their complaint, Compl. ¶ 124, this policy was driven more by fiscal concerns than by medical judgment.

Moreover, it is class counsel's experience that only the threat or reality of litigation has caused defendants to agree, after years of intransigence, to treat prisoners regardless of their ASAT/RSAT participation. One need not look very far to see evidence of this conduct. For instance, as late as July 28, 2005, defendants continued to deny Hepatitis C treatment to plaintiff Robert Hilton despite the fact that it was defendants themselves who had made it impossible for him to even satisfy the ASAT requirement. (Compl. ¶¶ 75–77; Affirmation of Alexander A. Reinert dated August 17, 2005, ¶¶ 26–29.) And plaintiff Louis Vasquez was not provided with treatment for his Hepatitis C, despite having completed a prison-approved drug treatment program more than 10 years ago, until this action was filed and Mr. Vasquez was represented by counsel. (Reinert Supp. Aff. ¶ 21.) Before this action was instituted plaintiffs had brought their complaints regarding the lack of treatment to defendants' attention through every level of internal prison grievance procedures. (Compl. ¶¶ 71–75, 91–97.) Only in response to litigation did defendants reverse course and provide Hepatitis C treatment to the named plaintiffs.

Even where prisoners have been represented by counsel and obtained direct court orders

for Hepatitis C treatment, defendants have resisted providing medically approved medication. Defendants' litigation conduct in Domenech v. Goord, 797 N.Y.S.2d 313 (2d Dept. 2005), affirming 766 N.Y.S.2d 287 (Sup. Ct. 2003), is reflective of this pattern. In Domenech, defendants had applied the ASAT/RSAT requirement to deny treatment to a prisoner, Angel Domenech, who had not used drugs for more than 30 years. Mr. Domenech filed an Article 78 petition pro se, and defendants' conduct was declared unconstitutional by a New York State trial court in May 2003. Rather than treat Mr. Domenech at that time, defendants obtained a stay of the order while appealing the decision to the Second Department. (Reinert Supp. Aff. ¶ 8.) Even after Koob & Magoolaghan appeared on Mr. Domenech's behalf and moved to vacate the stay so that he could obtain treatment in early 2005, defendants resisted the application and argued that the ASAT/RSAT requirement was too important to abandon. (Reinert Supp. Aff. ¶ 9.) And even after the Second Department rejected defendants' arguments and affirmed the trial court's decision that defendants had unconstitutionally denied treatment to Mr. Domenech, defendants stated to Koob & Magoolaghan that they were providing Hepatitis C treatment "solely to comply with the court decision and order, and not because DOCS believes it is medically appropriate." (Letter of Assistant Solicitor General David Lawrence III, dated July 27, 2005, attached as Ex. B to Reinert Supp. Aff.)

More recently, DOCS' conduct in the case of Nelson Rodriguez raises questions about defendants' readiness to review past denials of treatment and render appropriate medical care without regard for a prisoner's ASAT/RSAT participation. Mr. Rodriguez, like Mr. Domenech, had prevailed while proceeding pro se in an Article 78 proceeding challenging defendants' Hepatitis C policies. (Reinert Supp. Aff. ¶ 13.) Defendants again obtained a stay of the proceedings when they filed a notice of appeal. (Id.) After Koob & Magoolaghan appeared on

Mr. Rodriguez's behalf and requested that he receive treatment for his Hepatitis C, defendants stated through counsel that they would review his treatment without regard for his ASAT/RSAT participation. (Reinert Supp. Aff. ¶ 14.) Upon completing that review, defendants determined, contrary to the 2002 recommendations of a DOCS specialist, that Mr. Rodriguez is not a medically appropriate candidate for Hepatitis C treatment. (Reinert Supp. Aff. ¶¶ 15–16.) By Notice of Motion dated October 25, 2005, defendants have now requested relief from the original judgment in Albany Supreme Court, requesting that the Court's original order be modified to omit an order that Mr. Rodriguez receive antiviral therapy.

This history suggests that Dr. Wright's October 18 announcement is rooted more in litigation strategy than in sincere reappraisal of defendants' position.[4] Moreover, the mere fact that defendants made the announcement on the eve of filing an opposition to plaintiffs' motion for class certification counsels against finding the matter mooted. New York City Transit Authority, 97 F.3d at 676 ("We also think it is significant that the change of policy was instituted on the eve of the lawsuit."); Yassky v. Kings County Democratic County Committee, 259 F. Supp. 2d 210, 215 (E.D.N.Y. 2003) (expressing suspicion of change in rule "only hours before the court was scheduled to hold a preliminary injunction hearing"); Maneely v. City of Newburgh, 208 F.R.D. 69, 73 (S.D.N.Y. 2002) (finding no mootness despite defendants' change of policy, in part because defendants changed their policy after being notified of plaintiff's intention to file suit). A defendant's change of heart shortly before a significant motion suggests

[4]Defendants suggest that, because the new policy alters two other aspects of the Hepatitis C protocol – those dealing with the Continuity Program and the treatment of active drug users – the Court should infer that they are not merely responding to litigation pressure. But these two aspects of the protocol are also the subject of recent federal court decisions that defendants have lost. See Johnson v. Wright, 412 F.3d 398 (2d Cir. 2005); McKenna v. Wright, 386 F.3d 432 (2d Cir. 2004).

a strategic maneuver to manufacture a mootness argument and avoid judicial review of an issue. Ahrens, 852 F.2d at 53; Santiago v. Miles, 774 F. Supp. 775, 793 (W.D.N.Y. 1991) (finding no mootness where "[m]any of the changes in policy occurred subsequent to commencement of this lawsuit" and "some of the changes were implemented solely because of the pendency of this action").

Defendants' statement, shortly after the Second Department announced its decision in Domenech, that the only reason they were providing Hepatitis C treatment was because of the pending court order, and not because of their belief in the medical appropriateness of the treatment, strongly suggests that the October 18 announcement is motivated solely by litigation concerns. Defendants have admitted as much, by stating that the October 18 announcement was motivated by the court decisions in Johnson, McKenna, and Domenech. (Wright Decl. dated October 18, 2005, ¶ 8.) Defendants have yet to concede that the October 18 announcement is the product of a sincere reappraisal of the relevant medical literature.

Creating more concern that the professed change in policy may be superficial is the fact that DOCS has not repudiated its policy of requiring ASAT or RSAT as a condition of receiving treatment. Monroe v. Bombard, 422 F. Supp. 211, 215 n.5 (S.D.N.Y. 1976) (rejecting mootness argument despite change in policy where defendants "have not admitted that the challenged activity is illegal"). Indeed, the October 18 announcement hews closely to the philosophy embraced by the ASAT/RSAT requirement as described in plaintiffs' complaint: while Dr. Wright has announced that ASAT/RSAT participation is no longer required, it is "strongly encouraged" and considered "essential" to the proper treatment of Hepatitis C.[5] (See Ex. B to

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[5]Moroever, defendants argue that the new policy is "consistent" with standards developed by the American Association for the Study of Liver Diseases ("AASLD"), (Defs.' Mem. 2 n.2)

Wright Decl. Dated October 18, 2005.) Defendants' failure to explicitly repudiate their former policy is noteworthy because plaintiffs' counsel explicitly requested such a repudiation when first contacted regarding the policy change. (Reinert Supp. Aff. ¶ 24.) Plaintiffs' counsel requested that Dr. Wright make it clear that failure to participate in ASAT or RSAT could not be a justification for denying treatment and that there be adequate assurance that prisoners denied treatment in the past would now be provided with treatment (not mere reevaluation), but these suggestions were not adopted by defendants. (Id.).

Plaintiffs' concern that the ASAT/RSAT requirement will continue to lurk as a condition for receiving treatment is not hypothetical. For example, the newly announced protocol continues to require that prisoners be "highly motivated" in order to receive combination antiviral therapy. (See Ex. A to Wright Decl. dated October 18, 2005.) In the past, Dr. Wright has argued that, even if the ASAT/RSAT requirement is not medically necessary as an absolute precondition to treatment, prisoners who will not voluntarily participate in substance abuse treatment programs are by definition not "highly motivated" and therefore are less likely to "strictly adhere to a long and complicated treatment regimen with potentially serious side effects." (See Reinert Supp. Aff. ¶ 28 & Ex. E.) Because Dr. Wright continues to refer to ASAT/RSAT participation as "essential" to proper Hepatitis C treatment, there is no barrier to DOCS medical personnel imposing the requirement de facto on the ground that only participation in substance abuse counseling demonstrates the requisite motivation for undertaking antiviral

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but this is far from true. The AASLD Hepatitis C Practice Guidelines offers no support for defendants' position that substance abuse treatment programming is "essential" for individuals who are not actively using injection drugs. (Reinert Supp. Aff. ¶ 31.) Moreover, as to active users of drugs by means other than injection, the AASLD suggests that they be evaluated for treatment like anyone else. (Id.) Defendants' new policy, however, categorizes all drug and alcohol users together, without regard for the distinctions present in the AASLD policy.

therapy. See Dodge, 208 F.R.D. at 85 (defendants' mootness argument based on change in policy before plaintiffs brought lawsuit was rejected on basis that practice had not been altered by announcement of formal change in written policy).

The fact that the plaintiff class is comprised of prisoners also strongly counsels against accepting defendants' mootness argument. Santiago, 774 F. Supp. at 793 ("In cases involving challenges to prison practices, federal courts in this Circuit have not been reluctant to issue injunctive relief in spite of substantial voluntary improvements by prison officials."); see also Eng v. Smith, 849 F.2d 80, 83 (2d Cir. 1988) (rejecting mootness argument in prison case where "defendants claim to have voluntarily implemented all of the ordered relief," but where "without a preliminary injunction there is nothing to prevent defendants from abandoning procedures which the court determined to be necessary to protect plaintiffs' constitutional rights"); Fisher v. Koehler, 692 F. Supp. 1519, 1566 (S.D.N.Y. 1988) (no mootness where reforms were adopted during litigation, absent "assurance" that the changes had "significantly reduced" the complained of problems). As the Fisher Court pointed out, despite the commitment of prison administrators to particular changes, "the depressing reality is that while commissioners come and go, problems linger on, and present and future inmates are entitled to the assurance that these problems will be, and remain, redressed."[6] Id.

None of the cases cited by defendants supports a different outcome. In Armstrong v. Ward, 529 F.2d 1132 (2d Cir. 1976), the case was found to be moot because the change in policy accomplished all of the relief sought by the plaintiff class, and because the Court found that the

[6]Notwithstanding Dr. Wright's assurance that he has no intention of reverting to the former ASAT/RSAT requirement, he cannot bind future commissioners. Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, 574 (2d Cir. 2003) (rejecting mootness argument where future State Fire Marshal could change policy).

possibility that the State would reverse course was too speculative to defeat the mootness argument. Id. at 1135–36. Here defendants have not provided all of the injunctive relief to which the class is entitled, and there is more than a speculative possibility that ASAT/RSAT participation will continue to influence the provision of Hepatitis C treatment to the plaintiff class.[7]

Defendants' reliance on Lillbask v. State of Conn. Dept. Of Education, 397 F.3d 77 (2d Cir. 2005), is also inapposite for numerous reasons. First, the court's analysis in that case was focused on whether the plaintiff had satisfied the "capable of repetition yet evading review" exception to the mootness doctrine. Id. at 84–88. Second, the conduct challenged in Lillbask – implementation of an educational plan for a student with a disability – had only been proposed, and never even implemented.[8] Id. at 88. And finally, the defendants in Lillbask frankly admitted that their original proposed plan was wrong and that the plaintiff had "flourished" without imposition of the challenged plan. Id. This is in contrast to the instant case, where defendants have only recently announced an intended change in policy after several years of resistance and where defendants have not come close to conceding the illegality of the challenged policy.[9]

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[7]This same fact distinguishes Tawwab v. Metz, 554 F.2d 22 (2d Cir. 1977), in which a new policy provided all of the injunctive relief sought by the plaintiffs. Id. at 23–24.

[8]For this reason, the Court had no need to consider whether the State had demonstrated that the adverse effects of the challenged conduct had been entirely eradicated. 397 F.3d at 88.

[9]Defendants rely on the Second Circuit's decision in Lamar Advertising of Penn, LLC v. Town of Orchard Park, 356 F.3d 365 (2d Cir. 2004), for the proposition that deference to state defendants is the "rule, not the exception." (Defs.' Mem. 6.) This overstates Lamar's holding, which stated that, where a legislature repeals an existing law, "deference to the legislative body's decision to amend is the rule, not the exception." 356 F.3d at 377. This deference, the Second Circuit held, is only appropriate where the legislative amendments explicitly reject the challenged law and do not suffer from "similar infirmities" as the original law. Id. at 378. Therefore, even if prison officials may be entitled to the deference described in Lamar,

Indeed, this case presents facts much more analogous to Tsombanidis v. West Haven Fire Dept., 352 F.3d 565 (2d Cir. 2003). There, a Fire Department's mootness argument was rejected because, despite testimony that the fire marshal had changed his interpretation of a code, that interpretation "might change again--for example, upon a change in the State Fire Marshal's administration." Id. at 574.

And in Allstate Ins. Co. v. Serio, No. 97 Civ. 670, 2003 WL 21418198 (S.D.N.Y. May 7, 2003), the State had explicitly repealed the policy challenged by the plaintiffs, and the New York Court of Appeals had ruled that the State did not have legal authority to issue the challenged policy. Id. at *5. This repeal allowed the plaintiffs to "resume the actions for which they originally sought protection," thereby providing all of the injunctive relief they sought. Id. at *5. As demonstrated above, defendants' October 18 announcement, even assuming it is fully operationalized in practice, has not provided all of the injunctive relief sought by the plaintiffs here. Nor does a proper application of the five factors listed in Allstate suggest that defendants are unlikely to revisit their ASAT/RSAT requirement. While defendants have distributed an official document announcing a change in policy, the newly announced protocol has not "sufficiently altered" the challenged policy, and the defendants' insistence that ASAT/RSAT is "essential" to Hepatitis C treatment indicates a continued belief in the "validity of the challenged [Protocol]." Id. Moreover, the newly announced protocol does not provide any safeguards against its "highly selective" application. Id.

In this case, where defendants have only announced a change in policy on the eve of

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defendants cannot rely on that deference having, to this day, shown resistance to abandoning the ASAT/RSAT requirement.

filing their opposition to a class certification motion, have not acknowledged the illegality of the challenged policy, have formerly expressed vigorous resistance to the proposition that their challenged policy is unconstitutional, and where defendants' announcement reflects the same erroneous medical judgment as the challenged policy, defendants simply have not met their high burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Ahrens, 852 F.2d at 52 (internal quotation marks omitted). For this reason, defendants' mootness argument should be rejected.

B. Defendants Have Not Made Any Attempt to Show That the October 18 Announcement Resulted in a Complete Eradication of the Effects of the ASAT/RSAT Requirement

Even if the Court is convinced that there is no reasonable possibility that defendants will revert to their former practices after the termination of litigation, defendants have not made any attempt to show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Davis, 440 U.S. at 631. Defendants have only stated that medical personnel at all facilities within DOCS have been asked to "review the records of their patients suffering from Hepatitis C and to resubmit any requests for treatment denied or not submitted as a result of the former requirement." (Defs.' Mem. 3.) Defendants have not stated how this review will be accomplished, whether Dr. Wright has ordered personnel to complete the review by a date certain, and whether there will be any review process to ensure that all appropriate requests for treatment have been submitted.

This omission is notable because, for the past several years, defendants have applied an unconstitutional and illegal policy to thousands of prisoners with Hepatitis C. The plaintiff class is entitled to have class counsel represent their interests as defendants determine how to eradicate

the effects of the violation. Without accepting some monitoring of how the October 18 announcement is applied, defendants should not be permitted to evade further judicial review of their conduct.

CONCLUSION

For the foregoing reasons, defendants' cross motion to dismiss should be denied and plaintiffs' motion for class certification should be granted.

Dated: New York, New York
October 28, 2005

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United States District Court, E.D. New York.
Pablo Antonio NAJERA-BORJA, et al., Plaintiffs,
v.
Edward McELROY, et al., Defendants.
No. 89 CV 2320.

March 29, 1995.

American Civil Liberties Union, Immigrants' Rights Project, New York City (Lucas Guttentag, Judy Rabinovitz, Lee Gelernt, Thomas E. Fox, Ann Parrent, of counsel), Central American Refugee Center, Hempstead, NY (Patrick Young, of counsel), Lawyers Committee for Human Rights (John Asadi, of counsel), and Whitman Breed Abbott & Morgan, New York City (Lisa M. Gomberg, of counsel), for Lawyers Committee for Human Rights.

New York Civil Liberties Union, New York City, (Arthur Eisenberg, of counsel), for plaintiffs.

Zachary W. Carter, U.S. Atty., Brooklyn, NY (Scott Dunn, of counsel), Dept. of Justice, Washington, DC (William J. Howard, of counsel), for defendants.

MEMORANDUM AND ORDER

NICKERSON, District Judge:

***1** Plaintiffs, applicants for political asylum in the United States, bring this action against defendants--the Immigration and Naturalization Service, its officials, and the Attorney General of the United States (collectively "INS")-- for declaratory and injunctive relief alleging that INS has improperly delayed or denied plaintiffs' requests for work authorization in violation of federal laws and regulations and the United States Constitution.

By Memorandum and Order dated August 23, 1993, familiarity with which is assumed, this court granted plaintiffs' motion for class certification and a preliminary injunction. *Najera-Borja v. Slattery,* No. 89 CV 2320 (E.D.N.Y. Aug. 23, 1993) (*"Najera-Boria I"*) The pertinent facts are recited in that opinion. *Id.* at 2-6.

Plaintiffs now move for an order of civil contempt, monetary sanctions, appointment of a special master, and additional injunctive relief to protect class members' rights.

I.

In *Najera-Borja I,* this court certified as a class:

> [a]ll persons applying for work authorization based on a pending application for political asylum whose 1) renewal work authorization requests are denied because INS cannot locate their records, 2) initial work request is not adjudicated within 90 days because they fail or failed to appear at an interview of which they had no notice, or 3) work authorization request is denied and who receive inadequate notice of the reasons for the denial.

Id. at 28.

The court also granted plaintiffs' motion for a preliminary injunction. First, with respect to those class members requesting work authorization renewal whose records do not appear on INS' asylum computer system ("no-record class members"), the court ordered that:

> INS shall promptly perform a thorough search of all its computer and paper files. If the records cannot be found, INS shall inform the applicant, within five days of the renewal request, that it cannot locate his or her records and that he or she must submit a new asylum application within 30 days of receipt of INS's response. INS shall then determine work authorization within 60 days from the date of the initial renewal request. If INS fails timely to adjudicate such request then it shall issue interim work authorization pursuant to 8 C.F.R. § 274a.13(d). INS shall inform applicants and their attorneys how and where to request such interim authorization.

Id. at 17. The court also said "[p]laintiffs may request further relief should the above prove inadequate or if INS fails to correct inaccuracies in its asylum computer system revealed by the audit." *Id.*

Second, with respect to those class members whose initial work authorization requests are not adjudicated because they fail to appear at an interview of which they had no notice ("missed-interview class members"), the court ordered INS to implement the following procedure:

> when it learns that an applicant has failed to appear at an interview because he or she failed to receive notice despite having provided INS with a correct

address and 90 days has not already passed since work authorization was requested, INS shall immediately schedule an interview and adjudicate the work authorization request within that 90 days. If the 90 days has already passed or will pass before the application may be adjudicated, INS shall immediately grant interim work authorization, at least until the request is adjudicated.

***2** *Id.* at 23-24.

Finally, with respect to those class members whose work authorization requests are denied ("denied class members"), the court ordered that:

INS is enjoined from issuing denial notices that fail to provide the specific reason for the denial and directed to issue notices that conform to [INS' internal memorandum requiring that specific reasons be given and INS's recommended denial form, which lists three grounds for denial], with one modification--if INS denies work authorization because it cannot locate the asylum file it must so unambiguously state.

Id. at 27-28.

II

Plaintiffs say INS has made "only minimal efforts" to comply with the terms of the injunction, specifically alleging that INS: has not adequately instructed its employees on procedures for compliance; has not maintained adequate records or accurate logs of asylum applications and work authorization requests; has failed to notify class members of procedures available to obtain relief; has not provided a meaningful procedure for resolving individual cases of noncompliance; and has not cooperated with plaintiffs' efforts to ensure compliance.

Plaintiffs offer affidavits from more than twenty immigration attorneys who represent named plaintiffs and other class members and supporting documents. These show that INS has violated the injunction by failing in some cases: (1) to adjudicate class members' work authorization requests within the time periods required by the injunction or to issue interim authorization; (2) to inform class members how to obtain interim work authorization; (3) to notify class members within five days when a record of an asylum application could not be located; (4) to conduct a thorough search for missing asylum applications; and (5) in at least one case, to issue a proper denial notice. *See* Pls.' Mem. of P. & A. at 4-13, Ex. A-M; and Pls.' Reply Mem. of Law at 1-7, Ex. N-Z, Ex. 1-6, Ex. AA.

Plaintiffs also say that numerous class members who are unrepresented in their individual asylum and work authorization applications are similarly deprived of their rights under the terms of the injunction, but that exact numbers are difficult to determine, largely because INS has failed to consider the needs of unrepresented class members in implementing the injunction.

INS has submitted several affidavits from those responsible for implementing the injunction and various exhibits to show that it has "expended considerable energy and expense to comply[,] ... established a comprehensive program [,] ... provide[d] extensive training to INS personnel," and is, "at the very least, in substantial compliance with the injunction."

The relevant evidence offered by INS can be summarized as follows. In May 1993 an internal audit revealed all asylum applications in the Newark Asylum Office ("the Newark Office") with no record in the Refugee Asylum and Parole System ("RAPS") computer database. All "no-record" files were then entered into RAPS. Audits of RAPS are regularly conducted.

***3** Shortly after the court issued the preliminary injunction, representatives from INS offices affected by the injunction--the Eastern Service Center ("the Eastern Center"), the Newark Office, and the New York INS District Office ("the New York Office")--met with representatives from the Central Office in Washington, D.C. to discuss implementation of the injunction.

As a result, the Eastern Center established a system to separate asylum-based work authorization requests from others and to further separate out no-record cases. A "review desk" was created at the Eastern Center's Lemnah Drive office solely to deal with asylum-based work authorization requests. Under this system, the Eastern Center would ask the Newark Office to search its computer and paper files for records of asylum applicants not entered in RAPS. These requests first were made by federal express and later by facsimile. The new system required INS personnel to send a "no-record notice" to the applicant within five days, and to send the entire file to a "Central Coordination Unit" for a "30-day call-up." A flowchart was produced and sent to personnel involved in the new system. *See* Yates Decl. at ¶ 3 and Exh. 1.

In September 1993 the Eastern Center allocated more employees to the Lemnah Drive office to facilitate compliance and designated 22 specially trained officers to work on the project. *See* Yates Decl. at ¶ 4, 5.

In February 1994 the Newark Office initiated a tracking and monitoring system, put three employees on no-record requests, and started a log-in system, which included a record of the date a no-record request was received from the Eastern Center and the date the Newark Office responded. The Director of the Newark Office, Joseph Langlois, also asked the Eastern Center to use a form for no-record requests that would allow the Newark Office to annotate it and fax it back. *See* Jan. 31, 1993 Mem. from J. Langlois to Richard Crandlemire, Yates Decl., Exh. 13.

At a meeting held on March 9, 1994 to address compliance concerns, INS decided to create a more specific form for no-record requests. On March 31, 1994 this form was circulated to INS personnel involved in overseeing compliance. *See* March 31, 1994 Mem. from J. Langlois to R. Crandlemire, Langlois Decl., Exh. 1. The form requires Eastern Center personnel to mark the date an application is received by the Eastern Center and the date some "final action"--either sending a no-record notice or adjudicating the request--is taken. The form also employs nine codes to indicate the results of each no-record search. INS immediately began to use the updated form and continues to do so.

The current process for no-record cases is as follows. The Eastern Center sends a list of no-record requests by fax to the Newark Office, where personnel search computer and paper files, record the results of the search, and return the annotated fax to the Eastern Center with the date of response noted.

***4** If the Newark Office determines that a file may be found in the New York Office the fax is also sent there. Upon receipt of the fax, the New York Office searches its files and the files of the Executive Office of Immigration Review ("the Executive Office"), where an asylum application may be pending before an Immigration Judge or the Board of Immigration Appeals. The New York Office then forwards the search results to the Eastern Center, also via fax. *See* Berryman Decl., at ¶ 4.

Because the New York Office observed that a high percentage of no-record cases were asylum applications that had been filed before an Immigration Judge or the Board of Immigration Appeals, both part of the Executive Office, INS instituted a policy whereby an alien with an asylum claim before the Executive Office would be directed to file his or her work authorization request with the New York Office. *See* Yates Decl. at ¶ 13, Exh. 10. INS provided notice of this policy to applicants on an instruction sheet issued to work authorization applicants, *see* Berryman Decl. Exh. 3, and to immigration lawyers and volunteer agencies.

In a letter dated February 3, 1995, INS' counsel informed the court that the Eastern Center recently obtained direct access to the filing system of the Executive Office for Immigration Review in order to further streamline the no-record search process.

INS says the entire process of searching for no-record cases is completed within one day and that a log is kept of all faxes.

With respect to missed-interview cases, since August 1993 the Newark Office has "encouraged" missed-interview applicants to come in to reopen their cases. This apparently is done by communicating directly to applicants who show up at the Newark office and through bi-monthly meetings with volunteer agencies, plaintiffs' counsel and immigration attorneys. INS also alerts work authorization applicants if their cases have been administratively closed and tells them to contact the Newark Office to reopen their cases. *See* December 1, 1993 Mem. from James Puleo, Yates Decl. at ¶ 13 and Exh. 10; *see also,* "(C) (8) I-765's and Administratively Closed I-589's" Mem., Langlois Decl., Exh. 2.

INS assures the court that if any missed-interview applicants "come to the attention" of an INS office their cases are reopened. Since February 1994 the Newark Office says it also has not administratively closed any case where an alien failed to appear at an interview, *see* Langlois Decl., at ¶ 10, has improved its system for maintaining records on missed-interview cases, *see* Langlois Decl. Exh. 3, and has issued written instructions to employees, *see* Langlois Decl., Exh. 4.

More generally, INS says it has provided instructions to employees on implementing the injunction, *see* Yates Decl., Exh. 6, 9, 11, 16; Langlois Decl., Exh. 4, and has provided notices to class members in compliance with the terms of the injunction, *see* Yates Decl., Exh. 5 (no-record notice), Berryman Decl., Exh. 3 (supplemental instructions for work authorization applicants).

***5** Plaintiffs say that the experiences of class members, submitted through numerous affidavits, plainly show that INS' efforts are deficient, that INS has made most changes only in response to the constant pressure of plaintiffs' counsel, and that plaintiffs' counsel is not responsible for helping INS to comply with the injunction.

II

A party may be held in civil contempt for failure to comply with an order of the court if (1) the order being enforced is clear and unambiguous, (2) proof of noncompliance is clear and convincing, and (3) the party has not been reasonably diligent and energetic in attempting to accomplish what was ordered. *See EEOC v. Local 638 ... Local 28 of Sheet Metal Workers' International Ass'n,* 753 F.2d 1172, 1178 (2d Cir.1985) (citations omitted).

INS does not contest that the court's August 23, 1993 preliminary injunction order is clear and unambiguous, and the court concludes that plaintiffs have presented enough examples of noncompliance to satisfy the clear and convincing standard.

The court does not believe, and plaintiffs do not suggest, that INS has acted in bad faith or has been wilfully disobedient. But "[i]t is not necessary to show that [INS] disobeyed the district court's orders wilfully" in order to find INS in contempt. *Local 638,* at 1178. The main question before the court with respect to the contempt motion is whether INS has been reasonably diligent in its compliance efforts.

In assessing reasonable diligence, the court looks at whether a defendant has "marshal[led] its own resources, ... assert[ed] its own authority, ... demand [ed] needed results from subordinate individuals and agencies acted in the defendant's actions[,] and whether the defendant has 'displayed an evident sense of nonurgency bordering on indifference.' " *Schmitz v. St. Regis Paper Co.,* 758 F.Supp. 922, 927 (S.D.N.Y.1991) (quoting *Aspira of New York, Inc. v. Board of Education of the City of New York,* 423 F.Supp. 647, 654 (S.D.N.Y.1976)).

Contempt may be avoided if a party's good faith efforts result in substantial, though not complete, compliance. *See Aspira,* at 649; *Langston v. Johnston,* 928 F.2d 1206, 1220 (1st Cir.1991); *Balla v. Idaho State Bd. of Corrections,* 869 F.2d 461, 466 (9th Cir.1989).

Upon review of the numerous affidavits and exhibits submitted by plaintiffs and INS, the court concludes that INS' efforts to comply with the preliminary injunction order, while not complete, are sufficient to escape a contempt order. Some of these efforts were not communicated to plaintiffs until after plaintiffs filed this motion. Moreover, there is much to be done to improve compliance. But the court is reluctant to impose the harsh remedy of contempt in the face of INS' efforts to date.

The court concludes that a contempt order and monetary sanctions are not appropriate at this point.

III

An order of contempt is not a prerequisite to further equitable relief. "Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt." *Berger v. Heckler,* 771 F.2d 1556, 1569 (2d Cir.1985); *see also, Dunn v. New York State Dep't of Labor,* 1994 WL 48799, at *3 (S.D.N.Y.1994).

***6** Plaintiffs seek appointment of a special master. Under Fed.R.Civ.P. 53 the court has the authority to appoint a "special master" in any pending action. But appointment of a special master should be the exception, not the rule, and in non-jury actions Rule 53(b) provides that "a reference shall be made only upon a showing that some exceptional condition requires it." *Id.* The court concludes that plaintiffs have not established that such an "exceptional condition" exists at this stage in the litigation.

Noncompliance with a court order may be sufficient grounds for appointment of a special master. *See New York State Ass'n for Retarded Children v. Carey,* 706 F.2d 956 (2d Cir.1983), *cert. denied,* 464 U.S. 915 (defendants' noncompliance with consent judgment warranted a special master). Moreover, the complicated task of monitoring compliance is made more difficult in this case by INS' failure to timely and regularly supply plaintiffs with evidence of its efforts.

But the court concludes that INS' substantial efforts thus far and the burdens, financial and otherwise, that such an appointment would impose on INS at this early stage of the litigation, militate against appointing a special master. The court retains the discretion to revisit this issue if, at a later stage, plaintiffs are able to establish that INS' compliance efforts have not improved.

IV

As discussed earlier, the court has the power to grant further equitable relief to plaintiffs to ensure compliance with the letter and spirit of the preliminary injunction despite the court's decision not to hold INS in contempt. *See Berger,* at 1569 (2d Cir.1985); *Dunn* at *3. Plaintiffs have demonstrated the following continuing problems with INS' implementation of the injunction: (1) INS has not adequately instructed its employees on procedures for compliance; (2) INS has not adequately notified class members of procedures available to obtain relief; (3) INS needs a consistent and clear procedure for resolving individual cases of noncompliance; and (4)

INS has failed to take proper account of those class members who, though represented by counsel in this class action, are unrepresented in their individual asylum and work authorization applications.

The court concludes that, despite INS' efforts to comply with the terms of the preliminary injunction, the court should supplement its preliminary injunction order with further directions. Specifically, INS shall, within 30 days of the date of this order:

(1) Revise its "no-record" notices to include (a) the date an applicant's work authorization request was received; (b) a full explanation of the rights of no-record class members under the terms of the injunction; (c) the specific requirements for submitting new asylum applications; (d) how and where to request interim work authorization; and (e) the names, phone numbers and addresses of an INS contact person and plaintiffs' counsel.

(2) Revise its "missed interview" notices to include (a) an explanation of an applicant's right to reopen her case if she never received notice of the interview despite having provided INS with the correct address; (b) the procedure for reopening such cases; and (c) the names, addresses and phone numbers of an INS contact and plaintiffs' counsel.

***7** (3) Issue written instructions to all INS employees involved in implementing the court's orders setting forth the proper procedures for handling class members' applications, including but not limited to: (a) a description of the computer and paper files to be searched at each INS office when an application does not appear in RAPS, including the files of the Executive Office of Immigration Appeals and other district offices; and (b) procedures for logging in asylum and work authorization requests and complying with time frames and other directions set forth in the court's orders.

(4) Provide the Magistrate Judge assigned to this case and plaintiffs' counsel with copies of all INS memoranda, instructions, and other documents relating to INS' implementation of the court's orders.

(5) Provide the Magistrate Judge and plaintiffs' counsel with monthly reports setting forth sufficient data to assess compliance progress.

The court also directs INS to reimburse plaintiffs for reasonable attorneys' fees and costs incurred in bringing this motion to secure INS' compliance with the preliminary injunction order. *See, e.g., Harrison Baking v. Bakery & Confectionery Workers, Local No. 3,* 777 F.Supp. 306, 311 (S.D.N.Y.1991) ("Even where contempt is not appropriate courts have awarded the expense incurred ... to secure compliance"); *Littlejohn v. BIC Corp.,* 697 F.Supp. 192, 194 (E.D.Pa.1988).

As a final matter, the court addresses the question of whether the class certified by the court includes individuals whose asylum applications are before the Executive Office for Immigration Review ("Executive Office") because they are in deportation proceedings.

According to INS, asylum applications pending before an Immigration Judge or the Board of Immigration Appeals are not reflected in INS' RAPS system because they were filed with the Executive Office. INS says that because the Executive Office is an agency separate and distinct from INS, 8 C.F.R. § 3.1, these individuals are not class members and as such their work authorization requests do not fall within the terms of the court's order.

But the court certified as the "no-record" class "[a]ll persons applying for work authorization based on a pending application for political asylum whose ... renewal work authorization requests are denied because INS cannot locate their records," and by using that language the court intended to include those individuals who filed their asylum applications in immigration court. In order to avoid any further confusion, the court amends its class certification to read as follows:

> All persons applying for work authorization based on a pending application for political asylum--whether that application is pending before INS or the Executive Office of Immigration Review--whose 1) renewal work authorization requests are denied because INS cannot locate their records, 2) initial work request is not adjudicated within 90 days because they fail or failed to appear at an interview of which they had no notice, or 3) work authorization request is denied and who receive inadequate notice of the reasons for the denial.

V

***8** Plaintiffs' motion for an order of contempt, monetary sanctions, and appointment of a special master is denied. Plaintiffs' motion for further injunctive relief is granted to the extent stated above.

So Ordered.

Not Reported in F.Supp., 1995 WL 151775 (E.D.N.Y.)

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