

OCT 17 2014

ERIE COUNTY
CLERK'S OFFICE

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

In the Matter of PAUL COOKHORNE,

Petitioner-Plaintiff,

SETTLEMENT
AGREEMENT

– against –

Index No. 2012-1791

BRIAN FISCHER, Commissioner, New York State
Department of Corrections and Community Supervision,

Respondent-Defendant.

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

WHEREAS, Plaintiff Paul Cookhorne, an inmate in custody of the New York State Department of Corrections and Community Supervision (DOCCS), filed a hybrid Article 78/Request for Declaratory Judgment action challenging Plaintiff's Tier III hearing disposition of February 1, 2012;

WHEREAS, this action also requested a judgment declaring that DOCCS' regulation 7 NYCRR §254.6 is unconstitutional as applied to 16 and 17 year old inmates because their age is not required to be a *per se* mitigating factor in all disciplinary proceedings;

WHEREAS, since 2007, inmates who are subject to SHU sanctions in excess of thirty (30) days and who are classified as seriously mentally ill have, absent exceptional circumstances, been diverted from SHU to alternative programs;

WHEREAS, DOCCS recently entered into a Stipulation For A Stay With Conditions in the case of *Peoples v. Fischer*, 11-CV-2696 (S.D.N.Y.), wherein DOCCS agreed to, *inter alia*, take steps to provide alternatives to SHU for juveniles, pregnant women and special needs inmates and to implement revised disciplinary guidelines;

WHEREAS, the parties agree that for the purpose of this agreement, "juveniles" are defined as sixteen (16) and seventeen (17) year old inmates in DOCCS custody and "former juveniles" are defined as inmates who were sixteen (16) and seventeen (17) years old when they were placed in SHU, have continuously remained in SHU and are still in SHU on the effective date of this Settlement Agreement;

WHEREAS, the parties in good faith have negotiated the terms of this Settlement Agreement providing for a two (2) year reporting period from the Effective Date, as defined in Section X of this Settlement Agreement; and

WHEREAS, the parties state that the goals of the Settlement Agreement are: (i) consistent with the safety and security of the system, the transition of appropriate juveniles who are in SHU to general population; (ii) the amendment of DOCCS' regulations to provide for the consideration of a juvenile inmate's age when determining a disciplinary sanction; (iii) the implementation of improved conditions for juveniles in a separation unit; and (iv) an improvement in system-wide oversight to promote consistent prison disciplinary practices regarding juveniles that are appropriate and necessary to protect the safety of both staff and inmates.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED:

SECTION I. ONE-TIME REVIEW OF ALL JUVENILES IN SHU.

- A. A multi-disciplinary committee consisting of the Assistant Commissioner for Special Housing Units, who shall chair the committee, the Deputy Commissioner and Chief Medical Officer (or his/her designee), and the Deputy Commissioner for Program Services (or his/her designee) shall review the disciplinary sanctions of the following inmates to determine if a modification is appropriate: (a) juveniles currently being held in SHU on the effective date of this Settlement Agreement, who have at least sixty (60) days or more of disciplinary confinement remaining, and (b) former juveniles currently being held in SHU on the effective date of this Settlement Agreement, who have at least sixty (60) days or more of disciplinary confinement remaining. Each inmate subject to the one-time review shall undergo a clinical evaluation performed by DOCCS medical staff who shall make a report on every juvenile or former juvenile reviewed. In addition, the facility Senior Offender Rehabilitation Coordinator will review each such juvenile's institutional record and make a report of all program and educational achievements and goals. All such reports shall be sent to the Assistant Commissioner for SHU, who shall make them available to the committee for review in conjunction with the juvenile's disciplinary record to determine if such inmate's disciplinary sanction should be modified. This process shall be completed within ninety (90) days of the "Effective Date" of this Settlement Agreement, as it is defined in Section X herein.
- B. DOCCS shall assess every juvenile currently being held in SHU and every former juvenile who is still under the age of twenty-one and has been continuously held in SHU, to determine whether the juvenile or former juvenile is in need of an Individual Education Plan (IEP), except in such cases where DOCCS has previously assessed the juvenile or former juvenile. This process shall be completed within ninety (90) days of the Effective Date of this Settlement Agreement, as it is defined in Section X herein.

SECTION II. CONDITIONS FOR JUVENILES WITH DISCIPLINARY SANCTIONS.

- A. Pursuant to the terms of Peoples v. Fischer, 11-cv-2696, Section 2A, DOCCS will establish a program to separately house medium security juveniles at Woodbourne and Greene Correctional Facilities, and maximum security juveniles at Coxsackie Correctional Facility. If a disciplinary confinement sanction of 30 days or less is imposed, the inmates will remain in the medium facilities in either their cells at Woodbourne Correctional Facility or in the 8 bed juvenile separation unit ("JSU") at Greene Correctional Facility. If a SHU disciplinary

confinement sanction in excess of 30 days is imposed, the inmate will be placed at a 22 bed JSU at Coxsackie Correctional Facility. When an inmate is placed in a JSU or in-cell confinement for disciplinary purposes, the inmate shall be offered four (4) hours of out-of-cell programming five (5) days per week, and two (2) hours of out-of-cell recreation seven (7) days per week, except in exceptional circumstances.

- B. DOCCS shall hire three licensed master social workers (“LMSW”) to provide care to all juveniles in DOCCS custody at Woodbourne, Greene and Coxsackie Correctional Facilities, including the juveniles housed in the JSUs. The LMSW shall have a children and youth paranthetic.
- C. In the event a female inmate age 16 or 17 receives a disciplinary sanction for keeplock or placement in a special housing unit for any length of time, Central Office shall be immediately notified. The notification will contain relevant information pertaining to the inmate’s educational and programming needs; institutional disciplinary record; known medical needs and the current details of the disciplinary event. This notification will be sent to the Assistant Commissioner for Special Housing/Inmate Disciplinary Programs , who shall review the material, consult with the Assistant Commissioner for Classification and Movement, the Associate Commissioner for PREA, the Deputy Commissioner and Chief Medical Officer (or his/her designee), and the Deputy Commissioner for Program Services (or his/her designee) to determine the appropriate placement for the inmate, so as to provide, to the extent practicable, every opportunity to allow the female inmate to receive a similar type of out-of-cell programming four (4) hours a day as will be provided to male inmates at Woodbourne, Greene and Coxsackie Correctional Facilities.

Consistent with the terms of Peoples v. Fischer, DOCCS shall have an implementation goal of ten (10) months from the Effective Date of this Agreement, with respect to the provisions of this Section II.

SECTION III. AMENDMENT OF TITLE 7 NYCRR.

- A. DOCCS shall enact new regulations or amend all applicable sections of Title 7 NYCRR within ten (10) months of the Effective Date of this Agreement to:
 - 1. Provide that age is a mitigating factor in disciplinary proceedings where a juvenile has been accused of misconduct. The hearing officer conducting a Tier III hearing shall include in the written record a statement of how the age affected the disposition (*e.g.*, the use of non-confinement or the lowest sanction).
- B. DOCCS shall enact new regulations or amend all applicable sections of Title 7 NYCRR within ten (10) months of the Effective Date of this Agreement to:
 - 1. Mandate that disciplinary confinement for juveniles be defined as confinement for no more than eighteen (18) hours per day, five (5) days per week (excluding holidays), with six (6) hours of out-of-cell time consisting of a minimum of four (4) hours of out-of-cell programming for education, or other appropriate out-of-cell programming, with the goal of expediting the transition of the juvenile into

general population and encouraging interaction with others, and two (2) hour out-of-cell outdoor activities (weather permitting) seven (7) days a week

2. This programming will be available to all juveniles in a JSU, unless the juvenile presents an imminent risk of danger either to him/herself or to others as determined by the Commissioner or his/her designee.

SECTION IV. JSU PROGRAMMING AND TRANSITIONAL PLANNING.

A. DOCCS will implement positive adolescent-appropriate programs for the treatment and management of juveniles at Woodbourne, Greene and Coxsackie Correctional Facilities, as well as for the juveniles held in the JSUs. The programming in the JSUs will include a plan to transition the juvenile back to general confinement via the Program Committee. DOCCS will establish at the JSU at Coxsackie Correctional Facility, a three (3) level incentive based system, akin to the PIMS system, which rewards positive behavior and appropriate program participation with increased conditions through one or more of the following incentives:

1. commissary buys,
2. visits,
3. phone calls;
4. showers; and
5. access to additional property

Consistent with the terms of Peoples v. Fischer, DOCCS shall have an implementation goal of ten (10) months from the Effective Date of this Agreement, with respect to the provisions of this Section IV.

SECTION V. DISCIPLINARY CONFINEMENT SANCTIONS: POLICIES AND TRAINING.

- A. DOCCS shall develop training materials for hearing officers focusing on disciplinary hearings for 16 and 17 year old inmates. Through such training materials, DOCCS will emphasize the requirement that the age of 16 or 17 year old inmates must be considered as a mitigating factor all disciplinary proceedings. The materials shall be developed within ten (10) months of the Effective Date of this Agreement.
- B. Within six (6) months of the Effective Date of this Agreement, DOCCS shall implement a written policy by means of memorandum issued by the Deputy Commissioner for Correctional Facilities establishing that any keeplock sanction imposed on an inmate age 16 or 17 years old must be reviewed by the Superintendent, regardless of the length of the sanction or if it was suspended. The memorandum will also establish that any SHU sanction imposed on an inmate age 16 or 17 years old must be reviewed by the Assistant Commissioner for Special Housing/Inmate Disciplinary Programs, regardless of the length of the sanction imposed or if it was suspended.

SECTION VI. DOCCS STAFF TRAINING.

- A. DOCCS shall develop training materials for all staff who are regularly assigned to work with juveniles. The materials shall be developed within ten (10) months of the Effective Date of this Agreement.
- B. When the training materials are finalized, DOCCS shall provide a final version to Plaintiff's counsel. The provision of the finalized training material shall be covered by the December 18, 2013 Confidentiality Agreement.

SECTION VII. REPORTING AND ENFORCEMENT PERIOD.

- A. The parties agree that there will be a two (2) year implementation and reporting period with respect to the progress of implementation and compliance with this Settlement Agreement.
- B. Data & Reports: During the Reporting Period, which term shall commence on the Effective date and end twenty-four (24) months later, DOCCS shall provide the Plaintiff's counsel with reports and data concerning the implementation and impact of the actions described in SECTIONS I through VI above. All such reports and information shall be covered by the Confidentiality Agreement. The periodic reports and data provided shall include the following:
 - 1. Monthly Data Production: Beginning December 1, 2014, DOCCS shall provide data on the first of each month sufficient to evaluate the following:
 - a. Identification of Juveniles: age, race, gender, ethnicity, the facility each juvenile in any kind of JSU is located, JSU/Keeplock end date.
 - b. Housing of Juveniles: The facility and housing location of all juveniles in disciplinary, administrative segregation, and protective custody in a SHU cell and the reason for such placement, the length of the disciplinary disposition, and total continuous disciplinary confinement time served; provided, however, any information regarding youthful offenders will be removed.
 - c. Deprivation Orders: the frequency, length and rationale for any deprivation orders issued to a juvenile, absent any inmates who are also youthful offenders, including demographic information (name, DIN, age, race, gender, facility, OMH level and facility).
 - 2. Non-Periodic Reporting. DOCCS shall keep Plaintiff's counsel promptly informed as to any material developments bearing on the timely implementation of the provisions in SECTION I through VI, including without limitation the successful completion of relevant benchmarks.
- C. Facility Tours, Central Office Meetings, and Requests for Additional Information.

1. During the Monitoring Period, the Plaintiff's counsel may conduct a one day tour at each of the three facilities that house 16 and 17 year old inmates – Greene, Woodbourne, and Coxsackie Correctional Facilities – for each of the two (2) years that settlement agreement is in effect. Each tour will involve visiting one facility for one day.
2. Plaintiff's counsel will submit the names of the facilities and dates that they want to tour to the DOCCS Deputy Commissioner and Counsel and such request will be reviewed.
3. Plaintiff's counsel may combine tours with meetings with DOCCS' Central Office officials and staff (Central Office Meetings).
4. At the request of the Plaintiff's counsel, the facility tours may include JSU, and locations where juveniles are housed and provided programming.
5. Tours shall be conducted on a mutually agreed upon schedule. Thirty (30) days in advance of the tour, DOCCS shall provide to Plaintiff's counsel, documents, including inmates currently housed in JSU and the current disciplinary hearing information relevant to the juveniles in the JSU, protective custody recommendations, and administrative segregation determinations for juveniles in the JSU at the facility to be toured.
6. All communication between Plaintiff's counsel and staff or juveniles during the course of such tours and the Central Office meetings shall be covered by the terms of the Confidentiality Agreement. Nothing shall preclude Plaintiff's counsel from making additional reasonable requests for documents and information, which DOCCS may make available, if not unduly burdensome. All such documents, reports and information provided under this section shall be subject to the Confidentiality Agreement.

SECTION VIII. ENFORCEMENT POWERS.

- A. A motion to vacate the Settlement Agreement and return the case to the Court's active calendar shall be Plaintiff's sole and exclusive remedy and recourse for actions or inactions that Plaintiff perceives not to be in conformity with the provisions of the Settlement Agreement. Plaintiff may not seek an award of damages, injunctive relief or a finding of contempt based on the alleged non-performance by DOCCS of any provision or term contained in the Settlement Agreement. The provisions of the Confidentiality Agreement shall remain in effect during the pendency of any motion to vacate the Settlement Agreement, and shall survive any order vacating the Agreement and returning this case to the Court's active calendar.
- B. Good cause shall exist for vacating the Settlement Agreement and returning the case to the Court's active calendar if DOCCS is not acting in substantial conformity with the terms of the Settlement Agreement.

C. The parties shall meet and confer before any motion to vacate the Settlement Agreement is filed. Where good cause for vacating the Settlement Agreement and returning this case to the Court's active calendar is alleged, Plaintiff may not file a motion to vacate the Agreement and return the case to the Court's active calendar until the following conditions are also satisfied:

1. At least six (6) months have passed since the Effective Date;
2. Plaintiff's attorneys have provided Defendants' attorneys with a written notice setting forth with specificity the facts that support Plaintiff's belief that DOCCS is not acting in substantial conformity with the terms of this Settlement Agreement, and thereafter afford DOCCS thirty (30) days to confer, respond to and/or remedy the alleged nonconformance; and
3. Following such thirty (30) day period for DOCCS to respond and/or remedy the alleged nonconformance, in the event that Plaintiff's attorneys believe that substantial nonconformance exists and/or persists, Plaintiff's attorneys may thereafter move the Court upon twenty (20) days written notice of motion, for an order vacating the Settlement Agreement and returning the case to the Court's active calendar.

SECTION IX. NO ADMISSIONS AND OTHER RESERVATIONS.

This Settlement and its contents do not constitute (i) an admission by the Respondent or DOCCS of any constitutional violation or other violation of law or wrongdoing; (ii) an admission by the Respondent or DOCCS that any action, policy, practice or procedure challenged in this action violates or fails to comply with any constitutional requirement or any other applicable law, rule or regulation; or (iii) an admission by the Plaintiff that any action, policy, practice or procedure challenged in this action is constitutional.

SECTION X. EFFECTIVE DATE.

This Settlement shall be submitted to the Court by counsel to the parties and shall be effective on the date when the so-ordered Settlement is entered by the Court. Without further action by the parties or the Court, this agreement shall expire twenty-four (24) months after it becomes effective and the parties shall simultaneously execute and deliver a Stipulation of Dismissal with respect to the captioned Action. After its expiration, the Settlement Agreement shall cease to bind DOCCS and the Respondent; provided, however, it is DOCCS' intention to continue to adhere to the principles agreed to in this Settlement Agreement.

SECTION XI. EXECUTION OF THE SETTLEMENT AGREEMENT.

This Settlement may be executed in multiple counterparts, and faxed and/or emailed signatures will be valid and enforceable, each of which shall be deemed an original, and all of which shall constitute one and the same instrument.

Dated: October 16, 2014
Buffalo, New York

PRISONERS' LEGAL SERVICES OF NEW YORK

By: Maria E. Pagano
Maria E. Pagano
Karen L. Murtagh
Counsel for Petitioner-Plaintiff

Dated: October 16, 2014
Buffalo, New York

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: Kim Murphy
Kim Murphy
Assistant Attorney General
Counsel for Respondent-Defendant

Dated: October 14, 2014
Albany, New York

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION


By: Maureen E. Boll
Maureen E. Boll
Deputy Commissioner and Counsel

COOKHORNE
VS
FISCHER

2002-1791

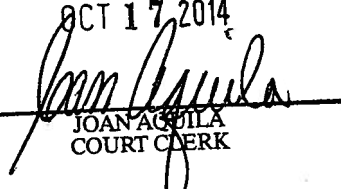
Dated: October __, 2014
Buffalo, New York

SO ORDERED:



Hon. Donna Siwek
Justice of the New York State Supreme Court

GRANTED

OCT 17 2014
BY 

JOAN ACQUILA
COURT CLERK