

**SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES
AND THE STATE OF TENNESSEE**

I. INTRODUCTION

1. On February 12, 2007, the United States notified officials of the State of Tennessee ("State") of its intent to investigate conditions of resident care and treatment at the Tennessee State Veterans' Homes ("TSVHs") in Humboldt and Murfreesboro, Tennessee, pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997.

2. In April, May, and July 2007, and in October and November 2008, the Department of Justice ("DOJ") toured the TSVHs with consultants in the fields of geriatric health care, nursing home administration, and community placement.

3. Throughout the course of the investigation, the DOJ received complete cooperation and access to the TSVHs and documents from the State.

4. On February 8, 2008, the DOJ issued a Findings Letter pursuant to 42 U.S.C. § 1997(a)(1), which concluded that certain conditions at the TSVHs violated the constitutional and federal statutory rights of residents of the nursing homes.

5. This Settlement Agreement resolves all claims asserted in United States v. State of Tennessee, et al., Civil No. 09-1012 (W.D. Tenn), which relates to DOJ's investigation of conditions at the TSVHs.

6. The Parties to this Settlement Agreement are United States Department of Justice and the State of Tennessee. The State shall ensure that all State agencies take any action necessary to comply with the provisions of this Settlement Agreement.

7. This Settlement Agreement is not intended to have any preclusive effect except between the parties on this particular case. Should the issue of the preclusive effect of this Settlement Agreement be raised in any proceeding other than this civil action, the parties agree to certify that this Settlement Agreement was intended to have no such preclusive effect.

8. This Settlement Agreement is not intended to impair or expand the right of any person or organization to seek relief against the State, or its officials, employees, or agents for their conduct or the conduct of State employees; accordingly, this Settlement Agreement does not alter legal standards governing any such claims, including those under Tennessee law.

9. Nothing in this Settlement Agreement shall prevent the State from modifying or closing the TSVHs or from developing alternative community placements for the residents of the TSVHs.

10. This Settlement Agreement does not serve as an admission by the State that corrective measures are necessary to meet the constitutional and statutory rights of the residents of the TSVHs.

11. This Settlement Agreement represents a voluntary effort by the State to address concerns raised by the DOJ's investigation.

12. This Settlement Agreement is binding upon the parties, by and through their officials, agents, employees, and successors. No person or entity is intended to be a third party beneficiary of the provisions of this Settlement Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no person or entity may assert any claim or right as a beneficiary or protected class under this Settlement Agreement in any civil, criminal, or administrative action. Similarly, this Settlement Agreement does not authorize, nor shall it be construed to authorize, access to State documents by persons or entities not a party to this Settlement Agreement.

13. Since the DOJ initiated the investigation and issued the Findings Letter, the State has made significant progress in addressing many of the areas the DOJ identified in the Findings Letter. The parties agree that it is in their mutual interests to avoid litigation. The parties further agree that resolution of this matter pursuant to this Settlement Agreement is in the best interests of the parties and the residents of the TSVHs.

14. All parties shall bear their own costs, including attorneys' fees, in the proceeding referenced in Paragraph 5.

15. The signatures below of officials representing the DOJ and the State signify that these parties have given their final approval to this Settlement Agreement.

16. This Settlement Agreement shall take effect on the day the United States District Court for the Western District of Tennessee, Eastern Division at Jackson enters an Order granting the Joint Motion for Stipulated Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1).

II. DEFINITIONS

As used in this Settlement Agreement, the following definitions apply to the terms below.

17. "Adequate" or "appropriate" shall mean that level of service required for compliance with all applicable federal, state, and local laws, regulations, and codes, and with generally accepted professional standards; and also means that level of service required by a resident to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being possible, given the resident's functional status, as required by 42 C.F.R. § 483.25.

18. "Care Plan" shall mean a written plan of care that meets the requirements of 42 U.S.C. § 1395i-3(b)(2) and (3), 42 U.S.C. § 1396r(b)(2) and (3), and 42 C.F.R. § 483.20(k).

19. "Fall" shall mean an uncontrolled, unintentional, downward displacement of the body to the ground or other object.

20. "The TSVHs" shall mean the Tennessee State Veterans' Homes in Humboldt and Murfreesboro, Tennessee.

21. "Highest Practicable" shall mean the highest level of function and well-being possible consistent with generally accepted standards, limited only by the individual's presenting functional status and potential for improvement or reduced rate of functional decline.

22. "Incident" shall mean any unusual or unexplained occurrence that results in actual or potential physical harm, pain, or mental anguish to a resident; any known, alleged, or suspected event of abuse, neglect, or exploitation of a resident; or any unexpected death of a resident.

23. "Physician" shall mean a medical doctor lawfully entitled to practice medicine in the State of Tennessee.

24. "Psychotropic Medication" shall mean a controlled substance or dangerous drug that may not be dispensed or administered without a prescription and whose primary indication for use has been approved by the U.S. Food and Drug Administration for the treatment of mental disorders and is listed as a psychotherapeutic agent in drug facts and comparisons or in the American hospital formulary service.

25. "Qualified Professional or Qualified Staff" shall mean an individual who is competent, whether by education, training, or experience, to make the particular decision at issue.

26. "Resident" shall mean any person residing at the TSVHs during the operation of this Settlement Agreement.

27. "Substantial Compliance" shall mean a level of compliance that does not significantly deviate from the terms of this Settlement Agreement, provided that such deviation poses no significant risk to a resident's health or safety. Noncompliance with mere technicalities, or temporary failure to comply during a period of otherwise sustained compliance, shall not constitute failure to maintain substantial compliance. At the same time, temporary compliance during a period of otherwise sustained noncompliance shall not constitute substantial compliance.

III. SUBSTANTIVE REMEDIAL MEASURES

A. NUTRITION AND HYDRATION CARE AND ASPIRATION PREVENTION

28. Within six months from the effective date of this Settlement Agreement, the State shall review and implement the TSVHs' nutrition and hydration protocols to ensure that the protocols are adequate and appropriate.

29. The State shall assess the TSVHs' residents' nutrition and hydration needs as required by 42 C.F.R. § 483.20(b)(1)(xi) and review and update those assessments as required by 42 C.F.R. § 483.20(b)(2). Based upon these assessments, the State shall

develop and implement appropriate interventions in a care plan, as required by 42 C.F.R. § 483.20(k) and ensure that residents' diets meet their daily nutritional and special dietary needs as required by 42 C.F.R. § 483.25(i)-(j).

30. The State shall ensure that residents who need assistance in eating are assisted by adequately trained staff.

31. The State shall ensure that adequate fluids are available and accessible to residents at all times.

32. The State shall, within six months from the effective date of this Settlement Agreement:

a. Provide adequate care for residents at risk of aspirating, take any appropriate steps to ameliorate the individual's aspiration risk, and develop and implement an individualized feeding and positioning plan for each individual identified as at risk of aspirating;

b. Provide competency-based training to staff in how to properly implement the feeding and positioning plans, and develop and implement a system to regularly monitor the progress of residents who are at risk of aspirating to ensure that staffs are adequately taking the appropriate assessment, diagnostic, supervision, and treatment steps necessary to ameliorate the individual's risk;

c. Ensure that any change in a resident's nutritional or hydration status is identified and responded to adequately; and

d. Ensure that residents' medication regimens do not pose undue risk of aspiration.

B. USE OF PSYCHOTROPIC MEDICATION

33. Within six months from the effective date of this Settlement Agreement, the State shall provide adequate and appropriate psychiatric and psychosocial care to the residents of the TSVHs. The use of psychotropic medication shall comply with 42 C.F.R. § 483.25(1).

34. The TSVHs shall ensure that qualified professionals adequately oversee psychotropic medication practices at the TSVHs and ensure that TSVHs' residents receive psychiatric or pharmacy consults as needed.

35. The TSVHs shall ensure that psychotropic medications are not used solely to control residents' behavior, particularly dementia-related behavior, in the absence of less-intrusive treatment modalities.

C. PAIN MANAGEMENT AND END-OF-LIFE CARE

36. The State shall, immediately upon the effective date of this Settlement Agreement, ensure that the residents of the TSVHs receive adequate and appropriate pain and end-of-life care and do not experience unnecessary and undue pain.

D. FALL PREVENTION

37. Within six months from the effective date of this Settlement Agreement, the State shall ensure that residents are

provided adequate and appropriate fall prevention measures and are not exposed to unreasonable risks of harm associated with falling.

38. The TSVHs shall assess residents upon admission, and periodically thereafter, to determine whether residents are at risk for falls. Such assessments shall pay particular attention to the need for continence training or maintenance. For all residents who are identified to be at risk of falls, the State shall, at a minimum:

a. Develop and implement a proactive, individualized, fall prevention plan;

b. Provide residents with adequate supervision to prevent falls to the extent reasonably possible; and

c. Ensure that residents receive adequate and appropriate assistive devices to prevent falls.

39. Anytime a fall occurs, the State shall, in a timely manner:

a. Assess resident's health status, including performing neurological assessments, and take any measure necessary to ensure the health and well-being of the resident;

b. Complete an incident report and submit it to the Director of Nursing and/or her designee; and

c. Investigate the fall and determine the possible cause(s) of the fall, with particular emphasis on the potential effects of

any psychotropic medication, and identify and implement any appropriate measures to prevent similar falls from occurring in the future.

IV. IMPLEMENTATION OF THE SETTLEMENT AGREEMENT

40. Except where otherwise specifically indicated, the State shall achieve compliance with all of the provisions of this Settlement Agreement within six months from the effective date of this Settlement Agreement, and maintain compliance for six months.

41. Within one month of the effective date of this Settlement Agreement, the State shall communicate to the employees of the TSVHs and independent contractors involved in providing residents' care the requirements set forth in this Settlement Agreement that are applicable to their respective job duties.

42. The DOJ and its expert consultants and agents may, at their discretion, tour the TSVHs to assess compliance with this Settlement Agreement.

43. Prior to any tour, the DOJ shall provide reasonable notice to the State. Within a reasonable time in advance of the tour, the DOJ shall identify any expert consultants it plans to use on the tour.

44. The DOJ and its attorneys, expert consultants, and agents shall have reasonable access to the TSVHs' facilities,

records, documents, residents, and employees upon reasonable notice to the State for the purpose of ascertaining compliance with this Settlement Agreement. Such access shall continue until this Settlement Agreement is terminated.

45. The State shall respond to any written questions from the DOJ concerning the State's compliance with this Settlement Agreement within 30 days of receipt of such written questions.

46. The parties agree to defend the provisions of this Settlement Agreement. The parties shall notify each other of any court challenge to this Settlement Agreement. If any provision of this Settlement Agreement is challenged in any local or state court, removal to a federal court shall be sought.

47. If any provision of this Settlement Agreement is declared invalid for any reason by a court of competent jurisdiction, said finding shall not affect the remaining provisions of this Settlement Agreement.

48. Throughout the duration of this Settlement Agreement, the DOJ and its expert consultants and agents shall maintain the confidentiality of all information provided pursuant to this Settlement Agreement consistent with State and federal law and consistent with the law enforcement responsibilities of the DOJ, including the potential need to bring an enforcement action in this case. In addition, throughout the duration of this

Settlement Agreement, letters between counsel for the DOJ and counsel for the State shall be confidential.

49. Within a reasonable period of time after the conclusion of any tour, the DOJ shall make available to the State any post-tour reports prepared by its expert consultants.

V. COMPLIANCE AND TERMINATION

50. The purpose of this Settlement Agreement is that the State will achieve the outcomes set forth in the Settlement Agreement and provide the necessary protections, supports, and services to the residents of the TSVHs described herein.

51. This Settlement Agreement shall terminate eighteen months after the effective date of this Settlement Agreement. This Settlement Agreement may terminate prior to the eighteen month date if the parties agree that the State is in substantial compliance with each of the provisions of this Settlement Agreement and that substantial compliance has been maintained for a period of six months. The burden will be on the State to demonstrate substantial compliance.

VI. DISPUTE RESOLUTION

52. The Parties will work in good faith to meet the terms of this agreement and maintain goal of ensuring appropriate care for the residents of the TSVHs.

53. If the State fails to comply with this Settlement Agreement in whole or in part, the DOJ retains the right to re-

activate the lawsuit in federal court. Prior to seeking such relief, the DOJ will provide the State written notice of the breach. The DOJ may seek judicial relief if the State fails to cure such breach within 60 days from receipt of the written notice of the breach. However, in the case of an emergency posing an immediate threat to the health and safety of the residents of the TSVHs, the DOJ may omit the notice and cure requirements herein before seeking judicial action.

54. Nothing in this Settlement Agreement shall be construed to preclude the State from asserting any legal defense or theory in any lawsuit reactivated or subsequently brought by the DOJ.

55. Failure by any party to enforce this entire Settlement Agreement, or any provision thereof, with respect to any deadline or any other provision herein, shall not be construed as a waiver of its right to enforce other deadlines and provisions of this Settlement Agreement.

VII. MODIFICATION OF THE SETTLEMENT AGREEMENT

56. If, at any time, any party to this Settlement Agreement desires to modify it for any reason, that party will notify the other party in writing of the proposed modification and the reasons therefor. No modification will occur unless there is written agreement by the parties.

AGREED TO:

FOR THE UNITED STATES:

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