UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF LOUISIANA; Murphy J. Foster, Jr., Governor of the State of Louisiana; David Hood, Secretary, Department of Health and Hospitals; Raymond Jetson, Assistant Secretary, Office for Citizens with Developmental Disabilities; Edwin M. Wright, Superintendent, Pinecrest Developmental Center; Peter J. Calamari, III, Superintendent, Hammond Developmental Center, Defendants.	)	Civ. No. 04-15-D-M2

SETTLEMENT AGREEMENT

I. LEGAL FRAMEWORK

The United States and the State of Louisiana agree to settle this matter on the terms and conditions set forth below in this Settlement Agreement.

A. This case was instituted by the United States pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997.

B. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345.

C. Venue is appropriate pursuant to 28 U.S.C. § 1391(b).

D. The United States is authorized to institute this civil action by 42 U.S.C. § 1997a and has met all prerequisites for the institution of this civil action prescribed by the statute, provided, however, that if this agreement is never finalized, the State reserves the right to challenge the United States' authorization to institute this action.

E. The Defendants are the State of Louisiana; the Honorable Murphy J. Foster, Jr., Governor of the State of Louisiana; David Hood, Secretary, Department of Health and Hospitals; Raymond Jetson, Assistant Secretary, Office for Citizens with Developmental Disabilities; Edwin M. Wright, Superintendent, Pinecrest Developmental Center ("Pinecrest"); and Peter J. Calamari III, Superintendent, Hammond Developmental Center ("Hammond"). All individual Defendants are officers of the Executive Branch of the State of Louisiana and are sued in their official capacities. The collective Defendants shall hereinafter in the Settlement Agreement and Plan be referred to as "the State." The collective residents of both the Hammond and Pinecrest Developmental Centers ("facilities") will hereinafter in the Settlement Agreement and Plan be referred to as "residents."

F. Pinecrest and Hammond are institutions covered by CRIPA and operated by Louisiana to provide habilitation and other protections, supports and services to persons with mental retardation and other developmental disabilities. The State has authority and responsibility for the operation of Pinecrest and Hammond and is responsible for the implementation of this Settlement Agreement.

G. On October 12, 1994, the Attorney General of the United States, by and through the Assistant Attorney General, Civil Rights Division, notified the Governor of the State of Louisiana, the Attorney General of the State of Louisiana, the Secretary of the Louisiana Department of Health and Hospitals and the Superintendent of Pinecrest, of her intention to investigate allegations of unconstitutional and unlawful conditions at Pinecrest pursuant to CRIPA.

H. Following an investigation, on June 29, 1995, and again on October 15, 1997, the Attorney General of the United States, by and through the Assistant Attorney General, Civil Rights Division, informed the Governor of the State of Louisiana, the General Counsel for the Louisiana Department of Health and Hospitals and the Superintendent of Pinecrest that the Attorney General had reasonable cause to believe that persons residing in or confined to Pinecrest were being subjected to conditions that deprived them of their legal rights and of their rights, privileges, and immunities secured by the Constitution of the United States.

J. On December 20, 1996, the Attorney General of the United States, by and through the Assistant Attorney General, Civil Rights Division, notified the Governor of the State of

Louisiana, the Attorney General of the State of Louisiana, the Secretary of the Louisiana Department of Health and Hospitals and the Superintendent of Hammond, of her intention to investigate allegations of unconstitutional and unlawful conditions at Hammond pursuant to CRIPA.

K. Following an investigation, on October 15, 1997, the Attorney General of the United States, by and through the Assistant Attorney General, Civil Rights Division, informed the Governor of the State of Louisiana, the General Counsel for the Louisiana Department of Health and Hospitals and the Superintendent of Hammond that the Attorney General had reasonable cause to believe that persons residing in or confined to Hammond were being subjected to conditions that deprived them of their legal rights and of their rights, privileges, and immunities secured by the Constitution of the United States.

L. After notification of the initial investigation in 1994, and continuing from time to time thereafter, Louisiana voluntarily undertook initiatives to address outstanding concerns with regard to the protections, services and supports provided at Pinecrest and Hammond.

M. Louisiana has at all times denied that conditions at Pinecrest and Hammond violate the constitutional or federal statutory rights of residents at Pinecrest and Hammond. Louisiana further maintains that it currently is adhering to many of the policies and practices set forth in this Settlement Agreement and Plan, and Louisiana maintains that the fact that a particular policy or practice is included in this Settlement Agreement and Plan is not to be construed as evidence by any person or party that Louisiana is not following that policy or practice.

N. Louisiana maintains that as a matter of State policy, Louisiana has at all times aspired to provide a level of care to Pinecrest and Hammond residents in excess of what it regards as a minimal level of care required by the Constitution and federal law.

O. The parties agree that the care, conditions of confinement, and training of Pinecrest and Hammond residents ("residents") implicate rights that are secured and protected by the Constitution and laws of the United States. The parties entering into this Settlement Agreement recognize these constitutional and legal interests, and for the purpose of avoiding protracted and adversarial litigation, agree to the provisions set forth herein.

P. In entering into this Settlement Agreement, State officials do not admit any violation of the Constitution or of any law and this Settlement Agreement and Plan may not be used as evidence of liability in any other civil or criminal proceeding.

Q. The provisions of this Settlement Agreement are a lawful, fair and appropriate resolution of this case.

R. This Settlement Agreement, voluntarily entered into, shall be entered by the United States District Court for the Middle District of Louisiana.

S. This Settlement Agreement shall be applicable to and binding upon all of the parties, their officers, agents, employees, assigns, and successors.

T. The parties jointly have agreed upon a plan, (hereinafter called the "Plan"), to address outstanding concerns that impact or have impacted residents. The Plan shall be interpreted and reviewed consistent with professional judgment exercised by qualified professional(s) pursuant to the following definition of "professional judgment": a decision by a qualified professional

that is not such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such accepted professional judgment. The provisions of this Plan, as filed with and signed by the Court, are incorporated into this Settlement Agreement.

U. The Independent Expert (as selected and discussed below), the United States and their agents shall have reasonable access to persons, employees, residences, facilities, buildings, programs, services, documents, records and materials that are necessary to assess the State's compliance and/or implementation efforts with this Settlement Agreement and Plan. Such access shall include departmental and/or individual resident medical and other records, but shall be limited to those which are relevant to issues agreed upon in the Settlement Agreement and Plan. The State shall provide the Independent Expert with documents and information upon request that are necessary to assess the State's compliance and/or implementation efforts with this Settlement Agreement and Plan. Relevant documents and/or information may include data or written reports related to the State's compliance or implementation efforts with the Settlement Agreement and Plan that may need to be created upon request of the Independent Expert. The Independent Expert, the United States and their agents shall have the right to request, inspect, and review facility records, resident charts and other documents, conduct interviews with residents outside the presence of staff consistent with this Settlement Agreement (unless the resident requests otherwise), and observe activities normally associated with providing protections, services and supports to residents that are necessary to assess the State's compliance and/or implementation efforts with this Settlement Agreement and Plan. The Independent Expert and the United States will submit requests for documents in writing at or near the time of the request. The Independent Expert, the United States and their agents may obtain copies of all documents, records, and materials relevant to compliance and/or implementation of the Settlement Agreement and Plan. The State need not necessarily provide copies to the United States of all documents, records and materials it provides to the Independent Expert. If needed, the United States will request documents, records and materials separately. The United States has the right to obtain copies of any such documents, records and materials from the Independent Expert. The State shall provide any requested documents, records and materials to the Independent Expert and the United States as soon as possible, but no later than within 15 business days of the request. At the discretion of the employee, any staff member may request that an attorney be present during an interview with a United States representative and/or agent. The Independent Expert shall coordinate and collaborate with the facility director or designee with regard to conducting tours and ensuring that appropriate State personnel are present during interviews with staff or other State employees or consultants. However, the parties recognize that there may be circumstances when it will be appropriate for the Independent Expert to have contact with State employees or consultants outside this context. The Independent Expert and/or the United States may receive unsolicited calls or contacts from State personnel outside the presence of State representatives. The State may develop and implement internal policies requiring any State employees or contractors to notify the facility director with regard to any private contact with the Independent Expert. The United States shall endeavor to interview employees onsite at the facility only after it provides reasonable notice to the State. However, nothing in this Settlement Agreement and Plan shall abridge the whistleblower rights of State employees or contractors under law or limit the ability of the United States to participate in related interactions with State employees or contractors. The Independent Expert and the United States agree to provide the State with reasonable notice of any visit or inspection, although the parties agree that no notice shall be required in an emergency situation where the life, immediate health or immediate safety of resident(s) is at issue. Such access shall continue until this action is dismissed.

V. The parties envision that the United States and the Independent Expert shall conduct a "base-line" evaluation of the State's compliance with the terms of this Settlement Agreement and Plan within the first 60 days after the filing of this Settlement Agreement and Plan. This initial "base-line" evaluation is intended to inform the parties and the Independent Expert of the status of compliance with this Settlement Agreement and the incorporated Plan. The Independent Expert shall produce a written report to the parties with regard to the State's compliance with particular provisions of the Settlement Agreement and Plan as soon as possible, but at least within 60 days of the visit. The parties envision that the Independent Expert will provide specific recommendations to the State with regard to steps to be taken to come into compliance with the Settlement Agreement and Plan. The State retains the discretion to achieve compliance by any legal means available to it, and may choose to utilize methods other than those that may be proposed by the Independent Expert or the United States. Unless there is an emergency situation where the life, immediate health or immediate safety of resident(s) is at issue, the United States agrees not to bring an action against the State before or as a result of the findings of the "base-line" tour.

W. The Independent Expert shall conduct subsequent tours of each facility in order to fulfill his or her obligations pursuant to this Settlement Agreement and Plan and these tours shall occur at least every quarter. At the "base-line" evaluation, the parties and the Independent Expert shall attempt to agree upon a schedule of visits and reports for the upcoming year, to be repeated annually thereafter. The Independent Expert shall provide the parties with a written report as soon as possible, but at least within 60 days of each tour and shall detail with as much specificity as possible areas how the State is or is not in compliance with particular provisions of the Settlement Agreement and Plan. The parties envision that the Independent Expert will also provide specific recommendations to the State with regard to steps to be taken to come into compliance with the Settlement Agreement and Plan.

X. Except where there is an emergency situation where the life, immediate health or immediate safety of resident(s) is at issue, if the United States maintains that the State has failed to carry out the requirements of this Settlement Agreement and Plan, the United States shall notify the State with specificity of any instance in which it maintains that the State has failed to carry out the requirements of this Settlement Agreement and/or Plan. With the exception of conditions or practices that pose an immediate and serious threat to the life, health or safety of resident(s), the State shall have 30 days from the date of a deficiency notice from the United States to cure the claim of non-compliance before the United States may file any compliance motion with the Court. During this period, the parties shall coordinate with the Independent Expert and shall discuss areas of disagreement and attempt to resolve outstanding differences. If the parties reach an agreement that varies from the Plan, the new agreement shall be reduced to writing, signed, and filed with the Court for approval. If the parties fail to reach an agreement, the United States may seek specific performance of that portion of the Settlement Agreement and/or Plan in dispute. The United States agrees to seek specific performance of the Settlement Agreement and/or Plan in the first instance, however, if a Court Order for specific performance is issued, nothing shall limit the ability of the United States to seek other enforcement remedies in subsequent court submissions with regard to the Court's Order for specific performance. The United States agrees that in this case it will not seek a finding of, or sanction for, contempt against either the State of Louisiana or any State officials unless an order for specific performance has been entered and is thereafter violated in such a manner as to make such a finding or sanctions appropriate.

Y. The purpose of the Settlement Agreement and the incorporated Plan is that the State will be able to achieve desired outcomes for and provide the necessary protections, supports and

services to the residents of Pinecrest and Hammond. Consistent with ¶ I.DD., the parties agree that the Settlement Agreement and Plan will be terminated and the case dismissed when the State has achieved substantial compliance with each section of the Settlement Agreement and Plan. The State shall demonstrate that any area of noncompliance has been addressed timely by effective corrective action.

Z. In any compliance or other adversarial hearing prior to final dismissal of this action, the burden of proof will be on the party moving the Court.

AA. All provisions of the Settlement Agreement and Plan shall have ongoing effect until the final dismissal of this action. The Court shall retain jurisdiction of this action for all purposes under this Settlement Agreement until the State shall have implemented all provisions of the Settlement Agreement and demonstrated their ability to maintain such implementation and until this action is dismissed. If the United States and the State agree that either facility has achieved substantial compliance with each section of the Settlement Agreement and Plan, the parties shall file a joint motion to terminate this Settlement Agreement and Plan with respect to the facility that has achieved substantial compliance.

BB. On or after the date on which the State shall have implemented and maintained all provisions of this Settlement Agreement, the parties may submit a joint motion and proposed Order to dismiss the case with prejudice without need for further judicial intervention, or the State may move that the case be dismissed on the grounds that the State has implemented and maintained all provisions of this Settlement Agreement.

CC. Dismissal shall be granted unless, within 90 days after receipt of the State's motion, the United States objects to the motion. If the United States makes such an objection, the Court shall hold a hearing on the motion and the burden shall be on the movant, the State, to demonstrate that it has implemented and maintained such implementation of all provisions of this Settlement Agreement and Plan.

DD. The parties anticipate that the State will achieve substantial compliance with each section of this Settlement Agreement and Plan within three years of its filing with the Court. In order to set a clear deadline by which substantial compliance should have been achieved, the parties have agreed, if necessary, to jointly ask the Court for a hearing on the status of compliance with this Settlement Agreement and Plan to be set for October 16, 2006. If the case has not yet been dismissed, the parties expect at that hearing to be able to report that the State has achieved substantial compliance with all provisions of the Settlement Agreement and Plan and move that this case should be dismissed. In order to assist this process, by September 15, 2006, the Independent Expert will issue to the parties and the Court a comprehensive report that outlines whether or not the State has achieved substantial compliance with the provisions of the Settlement Agreement and Plan. If the Independent Expert has concluded in his report that the State has complied with all provisions of the Settlement Agreement and Plan, the parties will jointly move that the case be dismissed, unless the United States disputes this conclusion in whole or in part. If the United States disputes the Independent Expert's compliance conclusion in whole or in part, at the status hearing on October 16, 2006, the United States shall demonstrate to the Court that there is an issue with regard to compliance and that there is a need for an evidentiary hearing. If the parties agree that there is noncompliance or if there is a dispute with regard to compliance, the parties will so inform the Court and the Court shall set additional hearing dates and discovery and/or briefing schedules as appropriate. The parties may agree jointly at any time to allow for additional time to resolve compliance issues. Consistent with the rest of this Settlement Agreement and Plan, the burden of proof in any adversarial hearing shall

be on the movant. In order to prepare the Court for this hearing, the parties agree to jointly ask the Court for a non-evidentiary status hearing three months and six months prior to the date of the October 16, 2006 hearing.

EE. The parties reserve the right to withdraw consent to this Settlement Agreement in the event that this Settlement Agreement is not approved by the Court in its entirety.

FF. There shall be no *ex parte* communications by either party with the Court. There shall be no *ex parte* communications by either party with the employees, experts, agents, or assigns of the other party that is inconsistent with this Settlement Agreement and Plan. The parties may have *ex parte* communication at any time with the Independent Expert.

GG. The parties and the Independent Expert agree that any records produced pursuant to this Settlement Agreement and/or Plan may be shared only with the following: (1) the Court, including public submissions and filings; (2) any expert(s) or consultant(s) selected or retained by the parties pursuant to this Settlement Agreement and Plan; (3) all counsel of record in this matter; (4) staff and clerical personnel involved in the preparation and review of the submissions and reports for counsel of record; and (5) United States and other governmental officials, as necessary, in order to carry out law enforcement responsibilities. All parties and the Independent Expert shall be responsible for maintaining the confidentiality of records in their possession. Submissions to the Court that contain identifying information of residents (such as their full name, address, or social security number) shall be filed with the Court using pseudonyms or the residents' initials.

HH. All parties shall bear their own costs, including attorney fees.

JJ. It is intended that the parties and the Independent Expert will pursue a problem-solving approach so that litigation and disagreements can be minimized and the energies of the Independent Expert and the parties can be focused on the task of meeting the needs of the residents and achieving the outcomes set forth in this Settlement Agreement. In conducting inspections, the Independent Expert shall work cooperatively with the State and, to the extent possible, notify the State of its observations and conclusions as reviews take place. The parties shall encourage the Independent Expert to provide his observations and conclusions as these reviews take place with as much specificity as possible. The State shall ensure that deficiencies associated with these observations and conclusions are remedied. If disputes arise as to the scope, findings, or recommendations of the Independent Expert's reports, the parties shall make every effort to resolve these disputes informally. Absent an emergency condition, the United States agrees to attempt to confer with the State, including the Independent Expert where possible, in a good faith effort to attempt to reach agreement regarding remedy of the alleged deficiencies. If the parties are not able to reach agreement, the United States may seek enforcement of this Settlement Agreement and Plan from the Court consistent with this Settlement Agreement.

II. **OFFICE OF THE INDEPENDENT EXPERT**

A. <u>Selection of the Independent Expert</u>

The parties have jointly agreed to appoint Nirbhay N. Singh, Ph.D., as the Independent Expert. As set forth below, the Independent Expert shall have full authority to independently assess, review and report on the State's implementation of and compliance with the provisions of this Settlement Agreement and Plan. The State is aware that the United States has retained Dr.

Singh as a consultant in matters pending in other jurisdictions, and does not object to his simultaneous service as Independent Expert in this case and as consultant for the United States in other jurisdictions. In the event that Dr. Singh is unable to serve or continue serving as the Independent Expert, or in the event that the parties for any reason jointly agree to discontinue the use of Dr. Singh, the parties shall meet or otherwise confer within 30 days of being notified of the incapacity or the decision to discontinue use of Dr. Singh to agree upon an alternative person to fulfill the duties of the Independent Expert. The parties shall jointly select an alternate expert. If the parties are unable to agree within 30 days of their first meeting or conference as to this selection, they shall immediately and jointly petition the Court to make the selection. In this petition, each party will be permitted to propose the names of three alternate candidates for the position, from which the Court shall select the new Independent Expert. The parties shall submit the candidates' *curricula vitae,* along with other pertinent information regarding the proposed candidates at the time of the submission of the names of the candidates. The procedure described in this paragraph shall apply to the selection of all successor Independent Experts. The parties further agree that Dr. Singh may use consultants to assist Dr. Singh in his duties as Independent Expert. These consultants shall be paid for time, services and expenses pursuant to the attached budget of the Independent Expert. In collaboration with the Independent Expert, the parties shall meet or otherwise confer whenever necessary to agree upon which particular consultant(s) Dr. Singh shall use to assist him in his duties as Independent Expert.

B. Budget of the Independent Expert

The parties and Dr. Singh have agreed upon the annual budget for Dr. Singh's work as Independent Expert. The agreed-upon budget is attached.

C. Reimbursement and Payment Provisions

1. The cost of the Independent Expert, including the cost of any consultant to assist the Independent Expert, shall be borne by the State in this action. All reasonable expenses incurred by the Independent Expert or any consultant, in the course of the performance of the duties of the Independent Expert, pursuant to the attached budget of the Independent Expert, shall be reimbursed by the State. The State shall provide the office of the Independent Expert with access to clerical assistance, office space, and office supplies as necessary. The United States will bear its own expenses in this matter.

2. The Independent Expert shall submit monthly invoices to the State, with a copy to the United States, detailing all expenses the Independent Expert incurred during the prior month. These invoices shall include daily records of time spent and expenses incurred, and shall include copies of any supporting documentation, including receipts. The State agrees to pay each month's invoice in full from the Independent Expert within ten days of receipt of the monthly invoice from the Independent Expert. If the State disputes all or part of the invoice, the State shall notify in writing the Independent Expert and the United States within ten days of receipt of the Independent Expert's monthly invoice. The Independent Expert, the State and the United States will endeavor to resolve any invoice disputes promptly and in good faith. Where the Independent Expert and the parties are unable to resolve any invoice dispute, the Independent Expert and/or the parties may petition the Court to resolve the dispute.

D. Responsibilities and Powers of the Independent Expert

1. The overall duties of the Independent Expert shall be to observe, review, report findings, and make recommendations to the parties and the Court, where appropriate, with regard to the

implementation of the Settlement Agreement and Plan. The Independent Expert shall regularly review the protections, services and supports provided to residents in their residential settings and day programs or other programs to determine the State's implementation of and compliance with this Settlement Agreement and Plan. The Independent Expert shall devote such time as is necessary to fulfill the purposes of the duties and responsibilities of the Independent Expert pursuant to this Settlement Agreement and Plan. Pursuant to ¶ I.W. above, the Independent Expert shall conduct onsite inspections at least every quarter in order to fulfill his or her obligations pursuant to this Settlement Agreement and Plan. The Independent Expert shall consult with the parties and shall submit a written plan with regard to the methodologies to be used by the Independent Expert to assess the State's compliance with and implementation of the Settlement Agreement and Plan. The Independent Expert's evaluation shall include: regular on-site inspection of the residences and day programs of residents, interviews with administrators, professional and direct care staff, contractors, and residents, and detailed review of pertinent documents and resident records.

2. Consistent with ¶ I.JJ. above, the Independent Expert shall confer regularly and informally with the State on matters relating to compliance. The Independent Expert shall not be empowered to direct the State or any of its subordinates to take or to refrain from taking any specific action to achieve compliance with the Settlement Agreement and Plan.

3. The Independent Expert shall submit a draft written report with regard to the State's implementation efforts and compliance with the Settlement Agreement and Plan in this case to the parties for comment at least every quarter. The parties shall have 20 days to submit a response to the report to the Independent Expert. The Independent Expert shall consider the parties' comments and within ten days of receipt of the comments shall submit a final report to the parties, making whatever modifications he deems appropriate in light of the parties' comments. While the parties are reviewing the draft report and submitting comments, the State will take timely action to remedy any deficiencies cited by the Independent Expert. Only where conditions or practices pose an immediate and serious threat to the life, health or safety of a resident or residents, may the United States use the Independent Expert's draft report in a compliance action before the Court prior to the completion of the review and submission period set forth above.

4. Access for the Independent Expert is set forth above in ¶ I.U.

5. The State shall notify the Independent Expert immediately upon the death of any resident. The State shall also provide the Independent Expert with prompt notice of pending and ongoing investigations involving residents of Pinecrest and Hammond. The State shall forward to the Independent Expert copies of any completed incident reports related to deaths, autopsies and/or death summaries of residents, as well as all final reports of investigations that involve residents.

III. PLACEMENT IN THE MOST INTEGRATED SETTING

In accordance with Title II of the ADA, 42 U.S.C. § 12132, and implementing regulation 28 C.F.R. § 35.130(d), the State shall ensure that each Pinecrest and Hammond resident is served in the most integrated setting appropriate to meet the residents' individualized needs.

A. Governing Principles

The parties agree to the governing legal principles set forth below:

With the passage of the Americans with Disabilities Act ("ADA"), Congress intended to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).[1] In Title II of the ADA, Congress set forth specific prohibitions against discrimination in public services furnished by governmental entities such as those provided at Pinecrest and Hammond.[2] Specifically, the ADA provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The regulations promulgated pursuant to the ADA further implementation efforts. One such regulation – the "integration regulation" – provides: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).[3] States are only required to make reasonable modifications that do not constitute a fundamental alteration. 28 C.F.R. § 35.130(b)(7).

In construing the anti-discrimination provision contained within the public services portion (Title II) of the ADA, the Supreme Court held that "[u]njustified [institutional] isolation ... is properly regarded as discrimination based on disability." Olmstead v. L.C., 527 U.S. 581, 597, 600 (1999). The Court explained that institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Id. at 600. The Court added that confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. Id. at 601. Specifically, the Court established that States are required to provide community-based treatment for persons with developmental disabilities when the State's treatment professionals have determined that community placement is appropriate provided the transfer is not opposed by the affected individual. Id. at 602.

Nonetheless, the Court held that there is no federal requirement that community-based treatment be imposed on persons who do not desire it. Id. at 602. The Court added that nothing in the ADA or its implementing regulations condones termination of institutional settings for

---

[1] Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem ... discrimination against individuals with disabilities persists in such critical areas as institutionalization ... individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion ... failure to make modifications to existing facilities and practices ... [and] segregation." 42 U.S.C. §§ 12101(a)(2), (3), (5).

[2] Pursuant to Title II of the ADA, a "public entity" includes any "State or local government," and "any department, agency [or] special purpose district." 42 U.S.C. §§ 12131(1)(A) and (B).

[3] The preamble to the regulations defines "the most integrated setting" to mean a setting "that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. A at 450.

persons unable to handle or benefit from community settings. Id. at 601-02. The Court also determined that a fundamental alteration exists when, for example, "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." Id. at 604.

B. Standard for Placement in the Most Integrated Community Setting

The State shall provide community-based treatment for Pinecrest and Hammond residents when:

(1) the State's treatment professionals have determined that community placement is appropriate; the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community-based program;

(2) the transfer from institutional care to a less restrictive setting is not opposed by the affected individual; and

(3) the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

C. Notice of Proposed Placements

Upon request, the State shall provide the Independent Expert and the United States with adequate advance notice and a copy of any transition plan for its review and comment prior to discharging any resident. If the Independent Expert or the United States has any concern about the discharge plan or the alternative placement and so notifies the State, the Independent Expert and the parties shall meet or confer in an effort to resolve the concern prior to discharge so long as the meeting can be timely convened in a manner to facilitate the placement to a more integrated setting.

THE 2003 PLAN

I. **INTRODUCTION**

A. The State shall provide ongoing competency-based training to all appropriate staff on how to effectively implement all plans and any other requirements of this Plan.

B. The State shall ensure that the facilities establish and maintain an adequate, unified record for each resident that includes current information with respect to the resident's care, treatment, training, protection, services, and supports. The State shall ensure that staff utilize such records in making ongoing decisions for each resident.

C. The State shall maintain a sufficient number of qualified and trained professional and non-professional staff, including outside consultants, to meet the needs of the residents. In particular, if not specified in other parts of the Plan, the State shall maintain the following staffing levels: physicians 1:100; nurses 1:25 for the first two shifts, 1:50 for the night shift; Ph.D. psychologists 1:100; and Master's-level psychology staff 1:25. The State shall also provide an adequate number of dieticians, physical therapists, physical therapy aides, occupational therapists, occupational therapy aides, and other therapists as needed to meet the individualized needs of the

residents. The State shall employ a sufficient number of qualified board certified or board eligible psychiatrists and provide a sufficient number of psychiatry hours to meet the mental health needs of the residents, a minimum of 34 hours for Hammond, and a minimum of 40 hours for Pinecrest. The State shall employ a sufficient number of qualified neurologists and provide a sufficient number of neurology hours to meet the seizure management needs of the residents with at least an annual neurology review, a minimum of 28 hours per week at Hammond and a minimum of 80 hours per week at Pinecrest. The professional staff ratios may be obtained through contract consultants or employment of professional staff provided the consultant or professional staff have direct resident contact. The State shall employ a sufficient number of qualified and trained investigators so as to enable the conduct and completion of thorough, accurate and timely investigations. Any of the ratios may be obtained by hiring additional staff or by reducing the population of the facilities.

D. The State shall implement and maintain a peer review system for medical, psychology, nursing and nutritional and physical supports, including occupational and physical therapy. The State shall develop and implement any measures necessary to address issues that arise in the peer review process.

E. The United States does not concede that the words "maintain" or "continue to" in this Settlement Agreement and Plan imply that the State has already been meeting residents' needs in each area.

F. In implementing the Plan, the State will take all actions in a timely manner to meet residents' needs.

II. PROTECTION FROM HARM, BASIC CARE, PROTECTION OF POSSESSIONS

A. The State shall meet the basic care needs of the residents, which includes providing adequate bathing, grooming and cleaning (especially after incidents of incontinence or vomiting), adequate oral hygiene, and nourishing meals according to their plan of care.

B. The State shall safeguard all residents' personal possessions, especially their clothing, from loss or theft.

C. The State shall provide a safe and humane environment for all residents and shall commit to zero tolerance for abuse or neglect of residents, continually striving to ensure that residents are free from abuse (including physical, sexual, emotional or psychological abuse), including from other residents, and neglect.

D. Before permitting any staff person to work with residents, the State shall investigate the criminal history and other relevant background factors of that staff person, whether full-time, part-time, temporary, or permanent, including regularly scheduled volunteer staff with direct resident contact. The State shall screen and take appropriate action to protect residents if the investigation indicates that the person would pose a risk of harm to the residents.

E. All resident incidents and injuries shall be thoroughly documented. Documentation of each injury shall be kept in the resident's file and in a central location, and all incidents and injuries shall be entered into a central database which is capable of capturing, the following information: the type of incident, the time the incident occurred, the location of the incident, the resident(s) and/or staff involved in the incident, and the nature and severity of the injury, if any.

F. The State shall develop and implement a comprehensive quality assurance program which tracks and analyzes patterns and trends of incidents and injuries, status and length of time taken to complete investigations, and staff training on incident management policies and procedures. The State shall identify individuals who are at higher risk of harm, defined by State policy, and develop and implement interventions to eliminate risk factors. The State shall place an emphasis on identifying and analyzing resident-to-resident interactions that create risk of harm or actual harm and develop and implement strategies to eliminate these risk factors. The State shall, on a quarterly basis, produce a written report which analyzes individuals who are at risk of harm, resident-to-resident issues, as well as the patterns and trends of incidents and injuries for the past quarter and provides recommendations for reducing incidents and injuries in the future. The State shall implement remedial measures to address recommendations contained within these reports. The State shall ensure that each facility's incident management committee, in conjunction with the facility administrator or designee, shall conduct a review, at least weekly, of all incidents including incidents of unknown or undetermined origin, and take appropriate steps to address their occurrence in the future.

G. The State shall report, investigate, and provide administrative and clinical review and follow-up of all "significant" incidents and injuries to address and remedy the individual and systemic issues raised by the incident and/or injury. The State shall document and track such remedial efforts on an ongoing basis to ensure that the appropriate outcome is achieved. "Significant" incidents shall include all instances of alleged, suspected or substantiated abuse and neglect, serious injury, elopement from the facility, exploitation, and death occurring at the facility.

H. The State shall develop and implement policies and procedures requiring that significant incidents are reported, thoroughly investigated by qualified and trained investigator(s), and, if abuse or neglect is substantiated, there is an imposition of adequate and appropriate disciplinary and/or corrective personnel action against any responsible staff including suspension or termination where appropriate. To that end, the State shall undertake the following measures:

1. The State shall develop and implement policies that require any staff member who has knowledge of a significant incident to immediately report such knowledge according to policy requirements. The State immediately shall take appropriate measures to protect the safety and well-being of the resident(s) involved, including procuring any necessary basic care or health care treatment.

2. The State shall implement and maintain policies to ensure that staff, including supervisory personnel, safeguard evidence of the significant incident prior to the initiation of an investigation.

3. A qualified and trained investigator shall conduct a timely, complete, and independent investigation of each reported significant incident. Investigations are to commence at least by the next working day of the incident being reported and shall be concluded as soon as is practicable so as to eliminate any undue delay. Each investigator shall conduct all necessary witness interviews in a timely manner. Each such investigation shall be documented in a written report that describes the evidence the investigator reviewed and collected, the witnesses the investigator interviewed, the summary of facts of the investigator, and the basis for the investigator's report. Each report shall be issued at least to the facility administrator and to the Bureau of Protective Services.

4. Each facility shall continue its practice of immediately removing any staff member suspected of staff-on-resident abuse or neglect from direct resident contact until the conclusion of the investigation and submission of the report.

5. The State shall develop and implement a policy to ensure that appropriate disciplinary and/or corrective personnel action is taken against any staff member who fails to report a significant incident to supervisory or other appropriate personnel in a timely or accurate manner.

6. The State shall ensure that any staff member or resident who reports a significant incident is not subject to retaliatory action.

J. 1. The State shall provide adequate competency-based training to investigators, and any personnel who participate in the investigative process and have direct contact with residents on policies and procedures for investigating significant incidents as well as other issues associated with providing care for persons with disabilities including: residents' rights and behavior support; such training shall include ways to more effectively communicate with and interview residents who may not be easy to understand; and

2. The State shall provide adequate competency-based training to staff on recognizing and reporting potential signs and symptoms of abuse and/or neglect, and the prevention of abuse and neglect of residents by staff. Training shall include providing staff with an explanation of the definitions of resident abuse and neglect, explaining to staff that abuse and neglect are prohibited, explaining to staff the requirement to report any suspected abuse or neglect, and advising staff of the potential consequences if they commit abuse or neglect or fail to report witnessed or suspected abuse or neglect.

III. PSYCHOLOGICAL SERVICES

A. The State shall provide adequate psychological and behavioral services, including skills training and positive behavioral support programs, to meet the individualized needs of each resident, especially those with challenging behaviors. These services shall be developed to ensure and protect residents' right to training sufficient to provide each resident a reasonable opportunity to enhance functioning, to grow and develop, to attain self-help and social skills needed to exercise as much autonomy or independence as possible, to prevent or decelerate both physical and psychological regression, loss of skills and functional status, and to ensure their reasonable safety, security and freedom from undue bodily restraint.

B. The State shall undertake the following measures:

1. The State shall conduct an interdisciplinary evaluation of each resident to determine the specific areas in which each resident needs training.

a. These interdisciplinary evaluations shall be repeated for all residents at annual intervals, unless required more frequently by each resident's needs.

b. For all residents with challenging behaviors, including those residents who have had a planned or unplanned mechanical, physical or chemical restraint, this interdisciplinary evaluation shall include adequate behavioral assessments (including an individualized, formal functional analysis whenever appropriate)

based on the input from the psychologists and an interdisciplinary team. A functional analysis is an assessment of an individual's behavior that includes: (1) a description of the behaviors(s); (2) the collection of empirical data; (3) an assessment of the behavioral intensity, frequency, topography, duration, and severity; (4) an evaluation of the antecedents, consequences and function of the behavior(s); (5) an assessment of any medical, nursing, mental health or other conditions related to the behavior(s) so as to determine the medical, behavioral, mental health, environmental and/or other factors that may be causing each resident's challenging behaviors; and (6) the development of skills training and behavior support procedures based upon the analysis.

c. Identify each resident who sustains or causes frequent injuries or is at risk of serious harm due to his or her behaviors. Prioritize these residents for intensive intervention, where appropriate, through skills training, positive behavioral supports, and other treatment modalities.

2. Within 30 days of the completion of each resident's interdisciplinary evaluation described above, develop and implement a professionally-based, individualized skills training and support program for each resident and provide each resident with a minimum of four hours per day of off-residence skills training, where appropriate, derived from the resident's skills training treatment plan to meet the individualized needs of each resident. Ensure that skills training and support programs include real-life variables with outcome measures that will be meaningful to residents with an emphasis on providing training in functional contexts. Residents' needs for meaningful training shall be continually met.

a. For those residents identified above as exhibiting challenging behaviors, the skills training and support plan shall include the following positive behavioral support procedures: (1) detailed definition and identification of the specific, measurable, and objective behavior(s) to increase and decrease; (2) a description and incorporation of the individualized functional analysis; (3) a comprehensive discussion of how medical and/or psychiatric disorders impact behavioral problems; (4) the procedures for staff to follow to decrease the occurrence of the problem behaviors; (5) the skills and positive, adaptive behaviors (to include replacement behaviors) that will be taught; (6) environmental changes to promote the development of positive, adaptive behaviors; (7) individualized reinforcers and/or preferences as determined in accordance with the needs of each resident; (8) an individualized schedule of active treatment activities as documented in the resident's Life Plan that corresponds to the resident's treatment needs; and (9) an adequate data collection system that includes appropriate data collection procedures which, for residents with behavior support plans, shall measure information about maladaptive and adaptive behaviors and the conditions under which they occur, including, where appropriate, the frequency, intensity, severity, and duration of the behaviors. The psychologists shall adequately document their clinical findings and treatment hypotheses to be tested and set forth how treatments are derived. The psychologists shall document their rationale for using specific behavioral interventions.

i. The State shall endeavor to write positive behavioral support plans or strategies at a level that can be easily understood and implemented by direct care staff.

ii. The State shall provide necessary resources, including reinforcers, to be used in positive behavior support plans.

b. Behavior support planning shall be aligned with the Positive Behavior Supports approach to behavioral interventions. Plans shall be developed and implemented with a focus on proactive skills building and environmental design and an emphasis on reducing the use of restrictive interventions.

3. Consistent with this section, implement the skill training and behavior support plans as specified in each resident's treatment plan.

4. Behavioral supports shall be implemented as part of a resident's Life Plan. There shall be integration of services and treatment modalities, including psychology, psychiatry, neurology, nursing, medical and health care, and other ancillary services.

5. Consistent with this section, develop and implement an adequate system to regularly monitor each resident's skills training and positive behavior support plan. The monitoring of the skill training and support plans shall ensure that: (a) the direct care staff are effectively implementing the skills training and behavior support plans, (b) the skills training and behavior support plans are effective and producing training and treatment outcomes specified in each resident's treatment plan, and (c) where the residents are not making progress, the skills training and behavior support plans are modified appropriately, and implemented.

6. Maintain an adequate Behavior Intervention Committee review process for the development and implementation of skills training and positive behavior support plans and strategies, with an emphasis on review and approval of restrictive interventions.

7. Develop an adequate system to track the use of restrictive procedures, the use of emergency procedures, and the implementation and monitoring of behavior plans.

C. The State shall provide residents with the skills training, day programming, employment and/or vocational services that meet their individualized needs. Such programming or services shall be in the most integrated setting appropriate for each individual resident as determined by each resident's interdisciplinary team and set forth in each resident's Life Plan..

IV. **RESTRAINTS**

A. The State shall ensure that residents are free from undue bodily restraint. The State shall ensure that restraints are not used as punishment, in lieu of habilitation, skills training and behavior support plans, or for the convenience of staff. Restraints shall not be a part of any positive behavior support plans and restraints shall not be used as a learning-based contingency to reduce the frequency of a behavior. Restraints may only be used for medical reasons or when there is immediate risk of harm to self or others (*i.e.*, to interrupt or terminate a seriously dangerous situation where injury could result).

B. The State shall undertake the following measures:

1. The State shall prohibit the use of all prone restraints, including all four- and five-point prone restraints and prone containment. Where there is an immediate risk of harm to self or others, the State shall strongly discourage the use of four- and five-point

restraints (with the exception of one Hammond resident with Lesch-Nyhan syndrome for whom four-point restraints may be used for safety reasons).

2. Staff shall provide adequate supervision to any resident in restraints.

3. Within 60 days of filing this Settlement Agreement and Plan, identify each resident who has had a planned or unplanned mechanical, physical, or chemical restraint, identifying the date of restraint, type of restraint, and duration of restraint, and develop and implement appropriate protections, services and supports consistent with this Plan and that meet the resident's individualized needs. Ensure that the staff are implementing all aspects of the skills training and positive behavior support plan adequately and appropriately, the staff are monitoring the behavior plan to ensure that the behavior plan is effective, and where modifications are needed to address the resident's individualized needs, modifications are developed and implemented.

4. Provide competency-based training to direct care and supervisory staff on how to properly redirect behaviors generally and pursuant to each person's behavior plan, without resorting to undue use of unplanned mechanical, physical, or chemical restraints.

5. The resident's psychologist shall begin the regular practice of reviewing each use of unplanned mechanical, physical, or chemical restraint and ascertain the circumstances under which such restraint was used. The review shall take place the next working day by the resident's psychologist.

6. Any use of restraint shall require the following:

a. immediate notification of an on-site supervisor upon the use of any restraints;

b. notification of and approval by a psychologist and/or nurse if any restraint is applied for longer than one hour and upon each hour thereafter;

c. timely assessment by a nurse to ensure the restraint is being safely applied and is reasonably tailored to the resident's behavior;

d. continuous monitoring of the resident while restrained to ensure safety; monitoring and documentation by a nurse or senior supervisor of vital signs, respiration, circulation and mental status of the resident every hour the resident is restrained; every restrained limb shall be released from restraint, examining it for bruising and skin tears, and exercising at least ten minutes every hour; the restrained resident shall be provided an opportunity to eat, drink fluids and toilet as needed; provide every resident in restraint with continuous one-to-one supervision;

e. a resident in restraints shall be released from restraint as soon as the resident is determined not to pose an immediate danger to the physical safety of self or others;

f. review of the application of any restraint by a psychologist within 24 hours of the application of the restraint; and

g. comprehensive review by the resident's treatment team, including a psychologist, if a resident receives three or more restraints within a 30 day period. This meeting shall take place on the first working day following the third restraint. The team shall make specific, written recommendations and shall document these recommendations in the resident's record, and shall make changes in the resident's skills training and support plan, as indicated. The team need not meet if it has met pursuant to this section within the previous 30 days.

7. Continue to prohibit the use of standing PRN orders for chemical restraints.

8. Ensure chemical restraints meet appropriate levels of approval and oversight by a psychologist and physician prior to their administration. Staff shall collect adequate data on the effects as well as adverse side effects of each individual administration of such medications. The psychologist and physician shall consider the data collected when making future clinical intervention decisions.

9. Implement and maintain policy provisions regarding restraints that are utilized solely for medical, not behavioral, purposes.

10. Document each use of mechanical, physical, and/or chemical restraint, including the exact type of restraint or procedure used, as well as the length of time it was used. Documentation of each use of restraint shall be kept in the resident's file and in a central location.

V. PSYCHIATRIC CARE

A. The State shall provide adequate and appropriate routine and emergency psychiatric and mental health services to meet the individualized needs of each resident. These services shall be developed to ensure and protect residents' rights.

B. The State shall undertake the following measures:

1. Annually, or more often as needed, conduct a comprehensive assessment of each resident receiving psychotropic medication and each resident who has or may have diagnosis of mental illness. The assessments shall be sufficient to reach a reliable DSM-IV-TR diagnosis, if applicable, for each resident assessed.

2. Thereafter, for each resident assessed as having mental illness, document a clinically justifiable, differential diagnosis consistent with DSM-IV-TR criteria. No resident shall have a current mental health diagnosis that is not clinically justified in the record.

3. Within 30 days of the formulation of a mental health diagnosis, develop and implement an overall treatment plan for each resident with a diagnosis of mental illness, and provide ongoing monitoring and revision of the treatment plan.

a. Prior to developing and implementing an appropriate treatment plan, the psychiatrist shall review the current medication regimen of each resident to determine whether the type and dosage of the medication is appropriate and necessary, and may recommend any changes in the medication regimen.

b. The psychiatrist shall consult with the assigned psychologist and interdisciplinary team to determine whether the existing skills training and behavior support plan is appropriate and whether different programs or interventions should be developed to address the resident's target/index behaviors and symptoms so as to reduce or eliminate the need for psychotropic medications.

c. The psychiatrist shall consult with the resident's primary care physician, nurse, or other appropriate members of the resident's interdisciplinary team, to determine whether the harmful effects of the resident's mental illness clearly outweigh the possible harmful side effects of the psychotropic medication and whether reasonable alternate treatment strategies are likely to be less effective or potentially more dangerous than the medication.

4. There shall be integration of psychiatric services with other services and treatment modalities, including psychology, neurology, nursing, medical and health care, and other ancillary services.

5. Develop and implement an adequate system to regularly monitor the residents with mental illness and make changes, when warranted, in the residents' treatment plans.

a. For those residents who receive psychotropic medication, this monitoring shall be face-to-face, and shall be conducted quarterly by a psychiatrist, or more often as necessary based on the residents' current status and/or changing mental health needs.

b. The monitoring review shall include a review of any current psychotropic medication provided, as well as a review of the pertinent behavioral and other data.

c. Whenever necessary, the psychiatrist shall provide a psychiatric re-assessment and revision to the treatment plan, as appropriate, for each resident who:

i) presents a significant adverse change in symptoms/index behavior or an increase in significant injuries or incidents related to symptoms/index behaviors; ii) is subjected to an increase in repeated restraint due to a significant adverse change in symptoms/index behaviors.

6. Develop and implement an adequate system for detecting, reporting, responding to, and documenting any drug-induced side effects of psychotropic medication.

7. The use of polypharmacy for any resident shall be justified in that resident's treatment plan.

8. Psychotropic medication shall only be used as an integral part of the resident's individualized skills training and support plan.

9. Consistent with the restraint section, when psychotropic medication is used on an emergency basis, a supervisor shall be notified immediately, there shall be continuous monitoring of the resident after administration of the medication, and a physician shall observe the effect of the medication by personally visiting the resident or directing supervision by a registered nurse. A psychiatrist shall review the use within 24 hours of

the order being written if there are multiple administrations of the medication or if more than one order is written for different medications.

VI. MEDICAL AND DENTAL CARE

A. The State shall provide residents with adequate, appropriate and timely preventive, routine, acute, and emergency health care, including neurological care, and dental care to meet the individualized needs of the residents.

B. The State shall undertake the following measures:

1. Implement and maintain policies to guide the delivery of general and preventative medical and dental care to meet the needs of the residents.

2. Implement and maintain policies that require appropriate physician participation in the interdisciplinary provision of services and the creation of residents' individual habilitation plans.

3. Have a physician conduct comprehensive health care evaluations of all residents, and repeat at annual intervals unless required more frequently by each resident's condition. The assessments shall be sufficient to enable the physician to reach a reliable diagnosis, if applicable, for each resident.

a. Identify all residents currently receiving anticonvulsant medication, residents with an existing diagnosis of epilepsy, and residents who have had at least one seizure in the past two years, and provide them with a comprehensive evaluation using a detailed diagnostic work-up with a variety of different methods of testing conducted by a neurologist at least annually or more frequently as required by each resident's condition.

b. Provide comprehensive assessments of residents with seizure disorders, at risk of constipation and impactions, aspiration, and skin breakdown. Implement and maintain a policy to address other risk factors and provide comprehensive assessments of residents with these other risk factors.

4. Thereafter, for each resident assessed as having health care concerns, document clinically justifiable health care diagnoses of the resident's conditions.

a. Document the rationale and need for anticonvulsant medication in all cases, with a special emphasis on those residents receiving anticonvulsant polypharmacy and document whether the potential harmful effects of the anticonvulsant medication on a resident's quality of life outweigh the potential benefits of the use of the medication.

5. Determine what specialized health care services, including neurological services, are required for each resident and provide those specialized health care services on a timely basis whenever necessary to evaluate or treat each resident's health care problems.

a. Ensure that those residents with refractory seizures, *i.e.*, those having more than 10 seizures in one year receive appropriate, aggressive neurological interventions by a qualified neurologist.

b. Ensure that each resident who has remained seizure-free for two years is evaluated by a qualified neurologist to determine the continued appropriateness of any anticonvulsant medication treatment.

c. Ensure that for each resident receiving medications for both seizures and a mental health disorder, the psychiatrist, neurologist and interdisciplinary team shall coordinate the use of such medications.

6. Consistent with the interdisciplinary team process and the development of each resident's Life Plan, develop and implement for each resident, based on the comprehensive medical assessment, an integrated health care plan to address any ongoing health care problem revealed through the assessment process.

a. Implement and maintain integrated health care plans for residents with seizure disorders, at risk of constipation and impactions, aspiration, skin breakdown and other at-risk factors. Implement and maintain a policy to address other risk factors and implement integrated health care plans for residents with these other risk factors.

7. Implement and maintain an adequate system to regularly monitor each resident's health status and progress and develop and implement changes, whenever warranted, in each resident's health care plan.

a. Establish a health care quality assurance program that actively collects data relating to the quality of health care services, assesses these data for trends, initiates inquiries regarding problematic trends and individual issues, identifies and triggers corrective action, and provides ongoing monitoring to ensure that appropriate remedies are achieved.

b. Develop and implement a quarterly side-effects monitoring system, to be implemented more often as needed, with a rating scale specifically for anticonvulsant medication.

8. Develop and implement a system to ensure that referrals and testing procedures are completed and results are placed in the residents' medical record in a timely manner.

9. Design and implement a system that ensures the accurate and timely recording of seizures for each resident including the following information: the date and time of the onset of the seizure; the duration of the seizure; a description of the seizure; an indication as to whether or not the resident is conscious or unconscious; if unconscious, the onset of the unconsciousness and the duration of the period(s) of unconsciousness; any medical or other steps taken to control the seizure; and the resident's response to the intervention. All staff, including nursing and direct care staff, shall be provided with competency-based training in recognizing a seizure, describing the seizure and length of time it lasts, and recording that information in the resident's record.

10. Develop and implement an emergency protocol for the proper treatment of status epilepticus and provide competency-based training to the staff on how to implement it.

11. Consistent with this section, ensure that all residents have adequate and appropriate preventive and general dental care with timely dental assessments, properly implemented

oral hygiene plans of care, and ongoing monitoring to meet each resident's individualized dental needs. Residents shall be given a dental evaluation at least once every nine months, or more frequently as needed by the resident's condition.

a. When it is appropriate, develop and implement desensitization programs for residents who are sensitive to medical and dental procedures to decrease the use of pre-sedation and restraint.

12. Develop and implement a formal system for the pharmacist to document alerts to the physicians regarding information about any resident's medication issues.

13. A mortality review committee shall meet after each resident death to address individual and systemic issues related to the death. The committee shall recommend, and the facility shall ensure the implementation of, all of the committee's recommendations from this initial review. Within 45 days of the death, the committee shall meet to discuss the death in greater depth and shall review and discuss any necessary supporting documentation related to the death, including: the death report, the death summary, any autopsies that may have been performed, and reviews from all pertinent disciplines. The committee shall make written recommendations for remedial action, whenever appropriate, with regard to individual and systemic issues related to the death. An independent, external review of the death shall also occur after each resident death and the external reviewer(s) shall issue recommendations for remedial action whenever appropriate. The mortality review committee shall continue to monitor all recommendations for remedial action until they are implemented.

VII. **NURSING CARE**

A. The State shall provide residents with adequate, appropriate and timely nursing care to meet the individualized needs of the residents. Nurses shall perform their responsibilities by adequately identifying and assessing health care problems, developing and implementing appropriate interventions, monitoring and intervening to ameliorate such problems, evaluating the appropriate outcome for the problems, and keeping appropriate records of residents' health care status.

B. The State shall undertake the following measures:

1. Implement and maintain policies to guide the delivery of nursing care to meet the residents' needs with regard to conducting assessments, frequency of follow-up, and documentation for changes in residents' health status.

a. Implement and maintain a system with regard to appropriate documentation of and the description of a resident's status when the resident leaves the facility and upon the resident's return.

b. Develop and implement a protocol to ensure that services from community health care providers are provided to the facilities in a timely manner.

2. Implement and maintain policies that require nursing participation in the interdisciplinary provision of services and the creation of individualized nursing care plans as part of residents' Life Plans. Nurses shall participate as core members of the interdisciplinary team. These policies shall address the following: (a) a formal

communication system to alert all team members and health care providers to changes in a resident's health status, and (b) documentation of reasons for discontinuation of any team recommendations.

3. Nursing assessments shall be conducted on a quarterly basis and more frequently as needed based on the residents' individualized needs. Components of the assessment process may include: an ongoing assessment, and ongoing monitoring of serious health care conditions and basic health care indicators, such as respiration, lung sounds, bowel sounds, oxygen saturation levels and vital signs.

4. Nursing shall utilize a nursing diagnosis, where applicable, and develop and implement adequate comprehensive nursing care plans to monitor health care outcomes as they relate to the plan of care. Develop and implement a strategy to ensure that nurses properly implement any health care plans developed for the residents.

5. Nursing interventions shall be developed and implemented whenever needed, and especially for the following situations: (a) when a resident sustains an injury; (b) when a resident is restrained; (c) when medications are administered; (d) for the ongoing care of a resident's tracheotomy tube; (e) when a resident has a skin care and/or positioning and/or nutritional and physical management plan; (f) when a resident has or is at risk of developing a decubitus ulcer; (g) when a resident is at risk of constipation and/or impaction; (h) when a resident presents any risk factor as set forth in State policy; (i) when a resident suffers a significant weight loss/gain or is at risk of significant weight loss/gain; and (j) when a resident is enterally fed.

6. Maintain a system to regularly monitor the residents' health care outcomes and make and implement changes in the residents' nursing care plans and interventions whenever warranted given the residents' needs.

7. Develop and implement a nursing performance improvement process to monitor nursing assessments and documentation. Where problematic trends are identified, timely develop, implement and monitor a corrective action plan given the residents' needs.

8. Administer medications to residents safely and effectively. When a medication error occurs, investigate the error, document it and take appropriate corrective action including supervision and training.

9. Implement and maintain a protocol on the proper procedure for emergency tracheotomy care and replacement that includes competency-based staff training. Provide an adequate and appropriate replacement tube of correct size and length which is easily accessible to each resident with a tracheotomy.

10. Implement and maintain a policy for documentation of caloric, protein, water and/or fluid intake requirements to ensure that residents, including those who are enterally fed, are receiving the prescribed nutrition and fluid intake to meet their individualized needs.

11. Continue a system for completing referrals and testing procedures and placing documentation in the resident's record.

12. Provide nursing staff with ongoing competency-based training with regard to the following: (a) appropriate documentation and description of a resident's status when the

resident leaves the facility and upon the resident's return; (b) role of the nurse in the interdisciplinary team process; (c) functional programming and active treatment; (d) the nursing care plans; (e) documentation of decubitus ulcers including the description and the stage of the ulcer; and (f) proper documentation of significant events.

VIII. NUTRITIONAL AND PHYSICAL SUPPORTS/ THERAPEUTIC INTERVENTIONS

A. The State shall provide each resident with adequate, appropriate and timely nutritional support to meet the individualized health care needs of the residents.

B. The State shall undertake the following measures:

1. Ensure that an interdisciplinary team qualified to address nutritional and physical support issues addresses residents' global nutritional and physical support needs. Ensure that the team shall meet on a regular basis, and shall include representation from various disciplines as required to meet the individualized needs of the residents including, nursing, a physician, nutrition, psychology, occupational therapy, speech therapy including a specialist in dysphagia, respiratory therapy, and physical therapy, as well as certain direct care workers from the particular resident's unit, and any other necessary specialists.

2. Continue to identify each resident who has a nutritional and physical support need, or nutritional support problem, including all residents who are at risk of choking and/or aspirating, have dysphagia, difficulty swallowing, chewing, or retaining, food or liquids, have had aspiration pneumonia or other recurrent pneumonias, all residents who cannot feed themselves, any resident who currently receives or is a candidate to receive a feeding tube, and any resident with other medical or health care problems related to nutritional and physical support.

3. After the team members contribute comprehensive assessment(s) of the resident's individualized needs to identify the causes for the nutritional and physical support problem(s), the team shall provide an analysis of the assessment(s) in a written comprehensive, coordinated nutritional and physical support action plan (hereinafter called "action plan") to meet the individualized needs of the residents and that adequately addresses the resident's positioning and nutritional support needs throughout the day. The analysis and action plan shall describe antecedents and interrelationships of the occurrence of physical and nutritional health risk indicators. The action plan shall be implemented for each resident and shall address proper mealtime/eating techniques and positioning of the residents during meals (including snacks), drinking, tooth brushing, dental exams, medication administration, bathing, nighttime/bedtime, and other routine activities that are likely to provoke nutritional and physical support problems. The plan shall include support strategies to anticipate, minimize or remediate these concerns with written documentation of measurable, functional outcomes to be achieved.

4. Implement and maintain criteria by which residents at the highest nutritional and physical risk are identified and assessed by the interdisciplinary nutritional and physical support team with regard to nutritional and physical support needs on an ongoing basis.

5. Implement each resident's plan(s).

6. Implement and maintain a system to ensure that staff do not engage residents in any mealtime/eating practice that poses an undue risk of harm to any resident, including assisting a resident to eat or drink who is improperly positioned or aligned, assisting a resident to eat or drink while the resident is coughing or exhibiting distress, assisting a resident to eat or drink with bites that are too large and/or faster than he or she can safely chew or swallow food and/or liquids. Ensure that non-ambulatory residents shall be kept in proper alignment and shall not be laid flat on their backs during or after a meal until sufficient time has passed to allow digestion of food and/or liquids.

7. Systematically and routinely monitor the implementation of the plans to ensure that the direct care staff safely and appropriately assist residents to eat and position the residents, especially for those residents who are at risk of aspirating, and to ensure that residents' nutritional and physical support plans are working effectively to meet the individualized needs of the residents to ameliorate the residents' physical and nutritional difficulties. Ensure that all staff follow the instructions for each resident contained on the resident's nutritional and physical support plans.

8. Implement and maintain a system to provide review and oversight of at-risk residents so that those identified as at highest risk may benefit quickly from comprehensive nutritional and physical supports. The system shall clearly define and document the oversight role with regard to ensuring the effectiveness of implementation strategies. The system shall develop and implement a methodology and clearly defined policies and procedures related to follow-up and documentation to ensure that individualized outcomes are achieved.

9. Implement and maintain a system to ensure that staff assist residents with proper head alignment and other techniques during tooth-brushing, dental exams and medication administration to minimize aspiration risk. Ensure that there is proper coordination with dental and nursing personnel to accomplish this. Ensure that staff use proper infection control techniques during tooth-brushing to minimize risks of cross-contamination.

10. Continue to ensure that residents who use a feeding tube are fed through the tube only when medically necessary. Evaluate and document the continued appropriateness of the tubes on a regular basis, and, where appropriate, develop and implement plans to return residents to oral eating and drinking. Ensure that residents who take nutrition through a tube are provided with proper postural alignment and with adequate supervision to intervene whenever needed, especially if the resident is coughing during a tube feeding.

C. The State shall provide each resident with adequate, appropriate and timely occupational therapy, physical therapy, speech therapy, assistive technology support and physical assistance support services to meet the individualized needs of the residents, to enhance the capacity of the residents to function, and to help the residents live safely and as independently as possible.

D. The State shall undertake the following measures:

1. Identify and provide a comprehensive assessment of all residents who are in need of occupational therapy, physical therapy, speech therapy, assistive technology and physical assistance supports. Such assessments shall address: diagnoses and/or description of significant health care issues; health risk indicators; orthopedic concerns; musculoskeletal status, posture' functional mobility; functional performance of activities of daily living; communication; impact of health care issues on performance and therapeutic

intervention; description of current therapeutic supports, which include mealtime, positioning and alignment, and assistive technology; and shall include baseline measurements where appropriate. Comprehensive assessments shall include analysis of findings to provide a rationale for recommendation and intervention strategies.

2. Conduct a comprehensive assessment of all residents who use mobility, alternative/ therapeutic positioning, or other assistive technology supports (hereinafter in this Section, called "supports"). These assessments shall be completed in an interdisciplinary manner, including appropriate therapy staff and other appropriate staff, as well as direct care staff persons who know the resident well. Such assessments shall occur as frequently as needed to meet the individualized needs of the residents.

3. Develop and implement occupational therapy, physical therapy, speech therapy, assistive technology and physical assistance supports for all residents in need of such services as an integral part of the residents' Life Plans. These supports shall have functional outcome goals and expectations that are measurable which shall be implemented so as to document observable changes in a resident's function as a result of therapy intervention. Conduct a comprehensive review of any existing occupational therapy, physical therapy, speech therapy, assistive technology or physical assistance supports for residents and determine whether these supports adequately meet the needs of the residents and are working as intended. Develop new or modified Life Plans to meet the individualized needs of each resident identified in the assessments. Implement each resident's Life Plans.

4. Implement and maintain the supports based on the comprehensive assessments so as to ensure that the supports and positioning are promoting good body alignment and functional health status. Ensure that for residents with physical and nutritional problems, the supports mitigate the occurrence of aspiration and support other therapy goals for each resident based on the individualized needs of each resident. Proper supports and positioning are to be integrated into the resident's activities throughout the day.

5. Provide continuing education to professional staff to support proper resident outcomes based on their individual needs.

6. Systematically and routinely monitor the implementation of all of the aforementioned direct and indirect therapy supports to ensure that they are working as effectively to achieve specific, measurable outcomes. Develop and implement changes, whenever warranted, in the residents' supports and interventions to meet the individualized needs of the residents.

a. Adequately document direct therapy supports and interventions to justify initiation, continuation or discontinuation of such services to determine a resident's progress and the efficacy of treatment interventions.

b. Direct therapy supports and interventions shall be documented and a monthly summary should identify the resident's status, progress and a comparative analysis of progress over time.

c. Implementation of indirect therapy supports shall be documented quarterly per the individual Life Plans.

7. Develop and implement a quality assurance system and a peer review process for speech, occupational and physical therapy supports and services to self-monitor for quality improvement so as to achieve functional outcomes for residents.

8. Residents shall be provided with identified assistive technology supports such as: (a) individualized, properly fitted seating systems that provide support and alignment for function that is optimal for that resident; (b) appropriate footwear while in such seating systems unless there is clear justification documented in the resident's record; and (c) seatbelts on wheelchairs and other mobility devices are appropriately positioned and adequately secured whenever appropriate to meet the needs of the residents. All supports shall be maintained in good working order and shall be repaired whenever necessary.

9. Develop and implement optimal alternative positioning options for residents.

10. Develop and implement a system to ensure that staff utilize appropriate lifting and transfer techniques.

11. With regard to speech therapy and communication, ensure that a qualified speech language pathologist with expertise in augmentative and alternative communication conducts comprehensive assessments of residents who need speech therapy and/or communication supports, develops and implements plans based on these assessments and monitors the implementation of the plans on an ongoing basis to ensure that they meet the individualized needs of the residents. Ensure that such plans shall be reviewed and revised, as needed, but at least annually. Develop and implement a screening and evaluation tool and process designed to identify residents who would benefit from the use of alternative and/or augmentative communication devices or systems.

Respectfully submitted,

FOR THE UNITED STATES:

/s/ David R. Dugas
DAVID R. DUGAS
United States Attorney
Middle District of Louisiana

/s/ R. Alexander Acosta
R. ALEXANDER ACOSTA
Assistant Attorney General
Civil Rights Division

/s/ Bradley J. Schlozman
BRADLEY J. SCHLOZMAN
Deputy Assistant Attorney General
Civil Rights Division

/s/ Shanetta Y. Cutlar
SHANETTA Y. CUTLAR
Chief
Special Litigation Section

/s/ Judy C. Preston
JUDY C. PRESTON
Deputy Chief
Special Litigation Section

/s/ Richard J. Farano
RICHARD J. FARANO
ELIZABETH A. WELSH
DANIEL L. LOW
Trial Attorneys
U.S. Department of Justice
Civil Rights Division
Special Litigation Section

FOR THE STATE OF LOUISIANA:

/s/ M.J. "Mike" Foster, Jr.

M.J. "Mike" FOSTER, JR.

Governor
State of Louisiana

/s/ David W. Hood

DAVID W. HOOD
Secretary
Louisiana Department of Health and Hospitals

/s/ Kathleen Dawkins

KATHLEEN DAWKINS, LBN. 4749
FRANK H. PEREZ
ELIZABETH P. RIFFLE
Attorneys
Department of Health and Hospitals
State of Louisiana
Telephone: (225) 342-1128
Facsimile: (225) 342-2232

WHEREFORE, the parties to this action having agreed to the provisions in the Settlement Agreement and Plan set forth above, and the Court being advised in the premises, this Settlement Agreement and Plan are hereby entered as the order and judgment of this Court. It is so ordered, this 12th day of January, 2004, at Baton Rouge, Louisiana.

/S/

United States District Judge
James J. Brady

ATTACHMENT A

Independent Expert's Annual Budget

Nirbhay N. Singh, Ph.D.

Pinecrest Developmental Center and Hammond Developmental Center

Independent Expert's Annual Budget Pursuant to the Parties' Settlement Agreement
and 2003 Plan

As the Independent Expert, I will provide unbiased monitoring of the implementation of and compliance with the Settlement Agreement and 2003 Plan with regard to the Pinecrest Developmental Center and the Hammond Developmental Center. In this role, I will work closely with the United States, the State of Louisiana, including the administration and professionals at the two facilities, and the parents and family members of individuals with developmental disabilities who reside in the two facilities, in developing a reliable and valid monitoring system for both process and outcomes that will meet the requirements of the Settlement Agreement and 2003 Plan. If needed, I will discuss with the facilities how they may set up structural aspects of the systems change process, internal compliance criteria in terms of behavioral and measurable goals and objectives, data collection systems, data reduction and evaluation methodologies, and a process for using the data for performance improvement.

I will undertake monthly evaluations (and more often as needed) of all aspects of the systems change process and outcomes pertinent to meeting the requirements of the Settlement Agreement and 2003 Plan. I will personally monitor each site at least quarterly and more often as needed. In addition, other consultants who will provide discipline-specific monitoring under my direct supervision will assist me in these evaluations.

At a minimum, I will prepare an Executive Report of my findings at least once every quarter and more often as necessary. These Executive Reports will be accompanied by my independent as well as state monitoring data on every aspect of the implementation of and compliance with the Settlement Agreement and 2003 Plan. Copies of the monthly data updates and the Executive Reports will be made available to the State and the United States.

A yearly budget for the independent monitoring of the implementation of and compliance with the Settlement Agreement and 2003 Plan is provided in the following table.

12-Month Budget

	Days	Rate/day	Total/yr	Trips/yr	Travel & Associated Expenses	Total Travel Expenses
Independent Expert	**60**	**$2,500.00**	**$150,000.00**	**4**	**$1,500.00**	**$6,000.00**
Expert Consultants						
Psychiatrist	**10**	**$2,000.00**	**$20,000.00**	**2**	**$1,500.00**	**$3,000.00**
Nurse/Health Care Professional	**20**	**$1,200.00**	**$24,000.00**	**4**	**$1,500.00**	**$6,000.00**
Risk management and safety	**10**	**$1,200.00**	**$12,000.00**	**2**	**$1,500.00**	**$3,000.00**
Integrated services	**10**	**$1,200.00**	**$12,000.00**	**2**	**$1,500.00**	**$3,000.00**
Others, as needed (e.g., OT/PT/speech/nutrition)	**10**	**$1,200.00**	**$12,000.00**	**2**	**$1,500.00**	**$3,000.00**
						$24,000.00
Administrative Assistant	**60**	**$500.00**	**$30,000.00**			
Standard office supplies, hardware/software, telephone, postage, and printing			**$16,000.00**			
			$276,000.00			
SUBTOTALS						
Independent Expert, Consultants, etc			**$276,000.00**			
Travel and Associated Expenses			**$24,000.00**			
Administration of Contract by ONE Research Institute: 10% of costs			**$30,000.00**			
TOTAL BUDGET			**$330,000.00**			

NOTE: The Independent Expert reserves the right to make internal adjustments to the budget within the total amount specified, as deemed necessary.

Address: ONE Research Institute: ONE Research Institute, P.O. Box 5419, Midlothian, VA 23112. Tel: (804) 743-3121.

Fed ID #: 54-1964303.