

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE STATE OF NEW MEXICO; and)
Michelle Lujan Grisham, Secretary,)
Department of Health, in her)
official capacity only,)
)
Defendants.)
_____)

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. On April 18, 2005, the United States notified New Mexico officials of its intent to investigate conditions of resident care and treatment at the Fort Bayard Medical Center ("Ft. Bayard"), a nursing home in Bayard, New Mexico, pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997.

2. In July and September 2005, the United States toured Ft. Bayard with consultants in the fields of geriatric medical care, geriatric nursing, nursing home administration, and community placement.

3. Throughout the course of the investigation, the United States received complete cooperation and access to Ft. Bayard

and documents from the State of New Mexico.

4. On May 1, 2006, the United States issued a findings letter pursuant to 42 U.S.C. § 1997(a)(1), which concluded that certain conditions at Ft. Bayard violated the constitutional and federal statutory rights of residents of the nursing home.

5. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1345. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

6. The Defendants are the State of New Mexico; and Michelle Lujan Grisham, Secretary, Department of Health, in her official capacity only. The Defendants are responsible, in whole or in part, for the operation and conditions at the Ft. Bayard Medical Center. The Defendants also acknowledge they have the authority and responsibility to implement all requirements of this Settlement Agreement, including implementation at Ft. Bayard and with regard to the State's responsibilities under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, the Defendants shall ensure that all state agencies take any action necessary to comply with the provisions of this Settlement Agreement.

7. This Settlement Agreement is not intended to have any preclusive effect except between the parties. Should the issue of the preclusive effect of this Settlement Agreement be raised

in any proceeding other than this civil action, the parties agree to certify that this Settlement Agreement was intended to have no such preclusive effect.

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

9. Nothing in this Settlement Agreement shall prevent the State from modifying or closing Ft. Bayard or from developing alternative community placements for the residents currently at Ft. Bayard.

10. This Settlement Agreement resolves the CRIPA investigation conducted by the United States Department of Justice ("DOJ") and addresses the corrective measures set forth by DOJ in its May 1, 2006 letter to the State ("Findings Letter"). This Settlement Agreement does not serve as an admission by the State that corrective measures are necessary to meet the constitutional and statutory rights of the residents of Ft. Bayard.

11. In conformity with CRIPA, this Settlement Agreement represents a voluntary effort by the State to meet the concerns

raised by DOJ's investigation. See 42 U.S.C. § 1997b(a)(2)(B) and § 1997g.

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

13. This Settlement Agreement shall constitute the entire integrated Settlement Agreement of the parties. With the exception of the Findings Letter referenced in Paragraph 10 hereof, no prior contemporaneous communications, oral or written, or prior drafts shall be relevant or admissible for purposes of determining the meaning of any provisions herein in this litigation or in any other proceeding.

14. Since the DOJ initiated the investigation and issued the Findings Letter, the State has made significant progress in remedying the problems the DOJ identified in the Findings Letter. The parties agree that it is in their mutual interests to avoid

litigation. The parties further agree that resolution of this matter pursuant to this Settlement Agreement is in the best interests of Ft. Bayard residents.

15. All parties shall bear their own costs, including attorneys' fees, in this and any subsequent proceeding.

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

17. This Settlement Agreement shall take effect on the day it is entered as an Order of the Court by the United States District Court, District of New Mexico.

II. DEFINITIONS

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

18. "Adequate" shall mean that level of service required for compliance with all applicable federal, state, and local laws, regulations, and codes, and with generally accepted professional standards.

19. "Appropriate" shall mean that which is suitable for a particular purpose.

20. "Care plan" shall mean a formal written individualized plan of treatment and activities, based upon comprehensive assessments performed by an appropriately-comprised interdisciplinary team of qualified professionals, and which

describes the medical, nursing, and psychosocial needs of the individual resident, how such needs will be met, and sets timetables for meeting those needs in order that each resident attains or maintains the highest practicable physical, mental, and psychosocial well-being, and which is periodically reviewed and revised, as appropriate.

21. "Dietician" shall mean a person registered by the American Dietetic Association qualified to supervise the nutritional care of residents, including meal planning, dietary counseling, monitoring of health changes related to nutrition, including weight loss, decubitus ulcers, and nutritional care for residents with special needs such as tube-feeding, diabetes, and other health needs requiring therapeutic diets.

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

23. "Ft. Bayard" shall mean the Fort Bayard Medical Center, a nursing care facility owned and operated by the State of New Mexico and located in Fort Bayard, New Mexico, which provides skilled and long-term nursing care and related services for residents who require medical or nursing care; and rehabilitation services for injured, disabled, or sick persons who require such services. "Ft. Bayard" shall also mean any facility constructed as a replacement to the facility in place at the time of entry of this Settlement Agreement as an order of the Court.

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

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

26. "Physician" shall mean a medical doctor lawfully entitled to practice medicine in the State of New Mexico.

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

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

29. "RNs" shall mean individuals licensed as Registered Nurses by the State of New Mexico.

30. "Resident" shall mean any person residing at Ft. Bayard during the operation of this Settlement Agreement.

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

III. SUBSTANTIVE REMEDIAL MEASURES

32. The intent and purpose of this Settlement Agreement is to ensure that each Ft. Bayard resident is provided the necessary care and services to allow the resident to attain or maintain the highest practicable physical, mental, and psychosocial well-being in accordance with comprehensive assessments and a plan of care. The requirements of this Settlement Agreement shall be interpreted according to this intent and purpose.

A. TIMELY ASSESSMENTS AND CARE PLANS

33. The State shall ensure that qualified health professionals adequately assess and document each resident's medical, functional, and psychological needs, and identify all interventions necessary for each resident to maintain or improve

his or her medical status, functional abilities, and psychological status.

34. Each resident shall be provided, and have implemented by qualified staff, a care plan, developed by an appropriately comprised interdisciplinary team of qualified professionals, including a physician, a registered nurse, and a dietician, and where appropriate, a psychiatrist, a pharmacist, and rehabilitation/restorative therapist(s), which describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met. The care plan shall be based upon a comprehensive assessment of each resident's functional capacity and shall be prepared within timelines established by federal law. The care plan shall include, to the maximum extent possible, input from the resident or, for cognitively impaired residents who are not competent to make decisions about their care and treatment, from the resident's guardian, legal representative, or other legally designated or appointed surrogate decision maker. The care plan shall comply with 42 C.F.R. § 483.20, and include, at a minimum, assessments addressing:

- a. Medically defined conditions and prior medical history;
- b. Medical status measurement;
- c. Physical and mental functional status;
- d. Sensory and physical impairments;

- e. Nutritional status and requirements;
- f. Special treatment or procedures (including special rehabilitative services);
- g. Mental and psychosocial status;
- h. Discharge potential;
- i. Dental condition;
- j. Activities potential;
- k. Rehabilitation potential;
- l. Cognitive status;
- m. Pain management needs;
- n. Behavioral and mental health diagnosis and treatment needs; and
- o. Medication therapy.

35. The State shall evaluate adequately residents' acute and ongoing medical status to ensure that residents' health status is monitored accurately, and that residents who experience a significant change of status are evaluated and treated adequately.

36. The State shall ensure that Ft. Bayard staff are trained adequately in evaluating, monitoring, and treating the needs of Ft. Bayard residents, particularly with regards to conditions such as diabetes, seizure disorders, and pain management.

37. The State shall require all staff to use all available data in their assessments (such as lab/diagnostic studies, other health professions' data, etc.) to identify each resident's problems/conditions and prepare professionally acceptable care plans to address the problems/conditions.

38. The State shall ensure that there are sufficient numbers of adequately trained staff, particularly RNs, LPNs, and Certified Nursing Assistants, present and on duty on each shift to ensure adequate supervision of residents, to provide routine and preventative care, and to ensure that residents' care plans are implemented adequately.

39. For every resident who requires transfer to an acute care setting, qualified staff shall conduct a review to determine if adequate care was provided to the resident by Ft. Bayard staff prior to the transfer.

40. To the full extent that Ft. Bayard's access to residents' medical records permits, mortality reviews shall be conducted for every resident who dies at Ft. Bayard or who dies at an acute care facility after being transferred there from Ft. Bayard. This mortality review shall be conducted by a physician and a registered nurse, qualified to conduct such reviews, to determine if adequate care was provided to the resident by Ft. Bayard prior to the death. If a mortality review identifies any deficiencies in care provided by Ft. Bayard, Ft. Bayard shall

institute reasonable and appropriate corrective measures to address any such deficiency.

41. Ft. Bayard shall implement adequate quality assurance mechanisms to monitor the delivery of medical, nursing, and all other health care services to residents.

B. USE OF PSYCHOTROPIC MEDICATION

42. The State shall provide adequate psychiatric and psychosocial care to Ft. Bayard residents to ensure that each resident attains or maintains the highest practicable physical, mental, and psychosocial well-being possible. The use of psychotropic medication shall comply with 42 C.F.R. § 483.25(1). The use of psychotropic medications shall be safe and appropriate. The care shall include, at a minimum:

a. Prescribing psychotropic medications only in accordance with generally accepted professional judgment and standards and ensuring that such medication is used appropriately;

b. Ensuring that there is adequate oversight by qualified professionals of the psychotropic medication practices in place for the residents of Ft. Bayard;

c. Ensuring there is adequate consultation from psychiatric and pharmacy consultants as appropriate to the resident needs;

d. Ensuring that psychotropic medications are not used in ways that threaten the health or well-being of residents and that

particular attention is paid to the use of psychotropic medications with residents who are at risk of aspiration.

e. Ensuring that psychotropic medications are not used as a form of chemical restraint to control resident behavior in the absence of less-intrusive treatment modalities; and

f. Ensuring that there are sufficient psychological and psychosocial services to meet the needs of residents, particularly those residents with a diagnosis of depression.

C. PAIN MANAGEMENT

43. The State shall immediately ensure that Ft. Bayard residents do not experience unnecessary and undue pain and suffering.

44. The State shall pay particular attention to ensuring that residents with compromised cognitive functioning receive adequate pain management assessments and care.

45. The State and Ft. Bayard shall implement policies, procedures, and protocols to ensure that medications are appropriately stored and secured, and are administered to residents in accordance with the residents' physician's orders.

46. The State and Ft. Bayard shall implement policies, procedures, and protocols, to ensure the adequate tracking of medication use and to investigate and follow-up on any lost, stolen, unaccounted for, or potentially misused medications, with particular emphasis on the tracking of opiate medications.

47. The State shall initiate appropriate disciplinary action against, and report to the appropriate state and/or federal law enforcement agency for potential criminal prosecution, any employee or agent of the State who is found to have diverted medication from Ft. Bayard residents.

D. PROTECTION FROM HARM

48. The State shall ensure that Ft. Bayard residents are adequately protected from harm.

49. The State shall immediately provide adequate supervision of Ft. Bayard residents to protect them from harm to the extent reasonably possible, including instances of resident-on-resident assaults.

50. The State shall ensure that there are sufficient numbers of adequately trained staff, particularly RNs, LPNs, and Certified Nursing Assistants, present and on duty on each shift to ensure adequate supervision of residents and to prevent otherwise preventable injuries and incidents, including resident-on-resident assaults.

51. The State shall identify Ft. Bayard residents who are at risk of harm, or who pose a risk of harm to other residents, based upon residents' cognitive impairments or dangerous behaviors, and develop and implement measures to protect residents from the potential of self-harm or harm to other residents.

52. The State shall identify residents who are at risk of being victimized and take adequate steps to protect them.

53. Anytime a resident suffers an injury or experiences any event that exposes the resident to harm, such as an elopement, the resident shall receive adequate medical evaluation and treatment, including but not necessarily limited to the following items discussed in this paragraph. An incident report shall be completed at the time of the occurrence and submitted to the Medical Director and the Director of Nursing. The Medical Director and the Director of Nursing shall review and sign all incident reports and initiate any appropriate administrative and/or clinical action. At the time of the occurrence, a Registered Nurse shall assess the resident to determine if there is actual or suspected injury and implement necessary and appropriate care to prevent further complications. A physician shall be notified immediately of any change in the resident's condition as a result of the incident and shall evaluate the resident's condition and the circumstances surrounding the incident and prescribe medical care as needed. The resident's family shall be promptly notified of the incident whether the resident suffers an injury or not. All incidents shall be investigated by the Director of Nursing or a competent designee.

54. If the investigation reveals that a staffing issue contributed to the incident, the State shall take those measures necessary to resolve the issue.

55. Upon completion of the investigation, the Director of Nursing, in conjunction with other staff, including the Administrator, where appropriate, shall determine if further action should be taken. Further action may include, but is not necessarily limited to: education with the staff, resident, and/or others involved; referral of the resident to an appropriately comprised interdisciplinary team for evaluation and implementation of preventive measures; or appropriate disciplinary action of any staff involved. The family of the resident(s) involved in the matter shall be kept advised and informed of the outcome and subsequent action of the investigation, where appropriate and where provided by law.

56. The Administrator and the Director of Nursing shall meet daily to discuss any incidents as well as any measures that should be taken to prevent further occurrences (the Administrator and Director of Nursing may appoint designees to serve this function for weekends and holidays only). The Administrator shall implement measures to prevent, to the extent possible, recurrence of incidents involving neglect, abuse, resident-on-resident assaults, and other unusual occurrences. Further, the Administrator shall ensure that such incidents, including

incidents of unknown origin, be reported appropriately to state authorities in accordance with state statutes and regulations. See 42 C.F.R. § 483.13(c)(2).

57. For any resident who sustains more than one injury during any three-month period of time, the Director of Nursing, or the Director's designee, shall refer the record(s) of each incident to an appropriately comprised interdisciplinary team for review. The State shall implement all corrective measures necessary to avoid future injuries, to the extent possible. The team's evaluation shall include reviewing the resident's medical record, current Minimum Data Sets (MDS), the current care plan, and interviewing direct caregivers.

E. FALL PREVENTION

58. The State shall ensure that Ft. Bayard residents are not exposed to unreasonable risk of harm associated with falling.

59. The State shall assess each resident, upon admission and periodically thereafter, to determine whether the resident is at risk for falls. Because many falls occur as a result of the need to use the bathroom, such assessments shall pay particular attention to the need for bowel and bladder training or continence maintenance. For all residents who are identified to be at risk of falls, the State shall:

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

b. Include the residents' fall prevention plans in their care plans;

c. Provide each resident with adequate supervision to prevent falls to the extent reasonably possible;

d. Ensure that each resident receives adequate and appropriate assistive devices to prevent falls;

e. Utilize adequate safety devices to prevent falls; and

f. Take actions to ensure that the residents' environment remains as free of fall hazards as is possible.

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

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

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

c. Notify the resident's family/responsible party;

d. Investigate the fall and determine the possible cause(s) of the fall, and identify and implement any appropriate measures to prevent similar falls from occurring in the future;

e. Maintain records of all falls at Ft. Bayard, including: the date and time of the fall; the specific cause of the fall, if known; the identity of the nursing staff member or members who were involved in the treatment of the resident at the time of the

fall; and any follow-up education provided to these staff members; and

f. Analyze the data on a monthly basis, and take actions to eliminate, to the extent possible, the causes of falls.

F. NUTRITION, HYDRATION, AND ASPIRATION PREVENTION

61. The State shall provide each resident with sufficient nutritional and hydration services and aspiration prevention and care to ensure that each resident's health care needs are met.

62. The State shall conduct adequate individual nutrition and hydration assessments, by staff trained adequately to do so, and develop and implement appropriate interventions which shall be reviewed and updated as required by 42 C.F.R. § 483.23(i)-(j). In accordance with these assessments, the State shall ensure that each resident's diet meets his or her daily nutritional and special dietary needs.

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

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

65. The State shall provide adequate care to prevent aspiration. Utilizing an interdisciplinary approach, Ft. Bayard shall properly assess and appropriately treat, in accordance with generally accepted professional procedures, residents with

swallowing problems and residents who need assistance to eat orally safely. To this end, Ft. Bayard shall:

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

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

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

G. ACTIVITIES PROGRAM

66. Each Ft. Bayard resident shall be provided, in accordance with the resident's comprehensive assessments and care plan, an ongoing program of activities, with a special emphasis on recognizing and treating depression, that meets the residents' needs consistent with federal regulations.

67. The activities program shall be directed by a qualified therapeutic recreation specialist or a qualified activities professional.

68. The State shall provide sufficient supplies and staff to facilitate resident participation in, or at, activity programs. Activities shall be of sufficient duration to have a positive impact on the resident's well-being and shall involve interaction with others.

69. The State shall ensure that each resident is out of bed for the maximum amount of time possible in accordance with the resident's care plan and the wishes of the resident.

70. The State shall ensure that adequate and appropriate activities shall take place on weekends and evenings, as well as during the weekdays.

71. The State shall give all residents sufficient advance notice of all available activities and events, and residents shall be offered and provided assistance to attend or participate in such activities and events.

H. ENVIRONMENT

72. The State shall maintain the environment at Ft. Bayard in a manner that promotes care for the residents and maintains or enhances dignity, respect, and individuality of residents.

73. The State shall ensure that residents' rooms and the physical environment of Ft. Bayard provide residents with an adequate amount of privacy within the limits of the current physical plant.

I. MOST INTEGRATED SETTING

74. Qualified professionals shall evaluate each resident on a quarterly basis to determine whether the resident is being served in the most integrated setting appropriate to the resident's needs in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; 28 C.F.R. § 35.130(d).

75. The State shall implement professional decisions that a resident can be served in a more integrated setting by transferring the resident to the alternative setting when the resident is advised of and does not oppose an alternative setting.

76. Before any resident is transferred to a more integrated setting, the State shall determine that the setting is capable of meeting the resident's needs.

77. The State shall make reasonable efforts to redress barriers that prevent individual Ft. Bayard residents, particularly those residents with mental illness, from being served in an alternative setting.

J. FEDERAL STATUTORY COMPLIANCE

78. In the operation and management of Ft. Bayard and in providing services to Ft. Bayard residents, Ft. Bayard shall achieve compliance with all applicable federal statutes and applicable implementing regulations, including but not limited to

the following laws, to the extent they apply to Ft. Bayard:

Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395i-3 et seq.; Title XIX of the Social Security Act, 42 U.S.C. §§ 1396r et seq.; Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12132 et seq.; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

K. IMPLEMENTATION OF THE SETTLEMENT AGREEMENT

79. The effective date of this Settlement Agreement will be the date the Settlement Agreement is entered as an order of the Court.

80. Except where otherwise specifically indicated, the State shall achieve compliance with all of the provisions of this Settlement Agreement within one year of its effective date.

81. The State contends that, as of the effective date of this Settlement Agreement, the State is in compliance with each and every requirement of the Settlement Agreement. For the purposes of this Settlement Agreement, "provision" shall be defined as each complete Paragraph of Section III of the Settlement Agreement (e.g., Section III. A. subparagraphs 33-41). Sub-paragraphs are not severable.

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

83. The DOJ and its expert consultants and agents may, at their discretion, tour Ft. Bayard to assess compliance with this Settlement Agreement.

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

85. The DOJ and its attorneys, expert consultants, and agents shall have full and complete access to the facility, facility records, resident records, staff records, state records relating to this Settlement Agreement, residents, and employees of the State and Ft. Bayard upon reasonable notice to the State for the purpose of ascertaining compliance with this Settlement Agreement. The DOJ shall have the right to conduct confidential interviews with residents. Such access shall continue until this Settlement Agreement is terminated.

86. Ft. Bayard shall promptly forward to the DOJ any mortality reviews, including incident reports, conducted in accordance with Paragraph 40 above.

87. The State shall respond to any written questions from the DOJ concerning the State's compliance with this Settlement Agreement, within 30 days of receipt of such written questions. The State shall provide the DOJ with access to any requested documents regarding the State's compliance with the requirements of this Settlement Agreement.

88. The State shall maintain sufficient records to document its compliance with all of the requirements of this Settlement Agreement, for the duration of the Settlement Agreement.

89. The State shall designate a single point of contact to coordinate and oversee this Settlement Agreement.

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

91. This Settlement Agreement shall be binding on all successors, assignees, employees, agents, and all those working for or on behalf of the State.

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

93. Throughout the duration of the Settlement Agreement, the DOJ and its expert consultants and agents shall maintain the confidentiality of all information provided pursuant to this Settlement Agreement consistent with state and federal law and consistent with the law enforcement responsibilities of the DOJ. In addition, throughout the duration of this Settlement Agreement, letters between counsel for the DOJ and counsel for the State shall be confidential.

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

V. COMPLIANCE AND TERMINATION

95. The purpose of this Settlement Agreement is that the State will be able to achieve desired outcomes for and provide the necessary protections, supports, and services to Ft. Bayard residents.

96. In its monitoring role, the DOJ will periodically tour Ft. Bayard to determine the status of the facility's compliance with the Settlement Agreement. As part of this monitoring, the DOJ will conduct a tour of Ft. Bayard approximately six months after the effective date of the Settlement Agreement to determine the status of Ft. Bayard's compliance with the terms of this Settlement Agreement. At that time, should the DOJ find the facility in compliance with any or all provisions (as defined in Paragraph 81) of the Settlement Agreement, the parties agree, as expeditiously as possible upon such finding(s), to jointly move the Court to terminate jurisdiction over, and close those Settlement Agreement provisions, including the entire Settlement Agreement if so agreed upon by the parties.

97. For the remainder of the time that this Settlement Agreement remains in effect and the DOJ continues its monitoring, should the DOJ find the facility in compliance with any or all provisions (as defined in Paragraph 81) of the Settlement

Agreement not terminated pursuant to Paragraph 96, the DOJ will notify the State of such findings and shall cease monitoring of such provision(s) for the remainder of the Settlement Agreement.

98. Regardless of the above, this Settlement Agreement shall nevertheless terminate and the case dismissed two years after the effective date of the Settlement Agreement. The Settlement Agreement may terminate prior to the two-year date if the parties agree that the State is in substantial compliance with each of the provisions of this Settlement Agreement. The burden will be on the State to demonstrate substantial compliance.

IV. ENFORCEMENT OF THE SETTLEMENT AGREEMENT

99. This Settlement Agreement is enforceable only by the parties and is binding upon the parties, by and through their officials, agents, employees, assigns, and successors.

100. In the event of failure by the State to comply with this Settlement Agreement in whole or in part, the DOJ retains the right to seek appropriate judicial relief in federal court. Prior to seeking such relief, the DOJ will provide the State written notice of the breach. The DOJ may seek judicial relief if the State fails to cure such breach within 60 days from receipt of the written notice of the breach. However, in the case of an emergency posing an immediate threat to the health and safety of Ft. Bayard residents, the DOJ may omit the notice and cure requirements herein before seeking judicial action.

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

102. To the extent that any of the legal authorities cited in this Settlement Agreement (e.g., federal statutes, regulations, or case law) are amended or superceded, this Settlement Agreement shall be amended accordingly.

VII. MODIFICATION OF THE SETTLEMENT AGREEMENT

103. If, at any time, any party to this Settlement Agreement desires to modify it for any reason, that party will notify the other party in writing of the proposed modification and the reasons therefor. No modification will occur unless there is written agreement by the parties. If the parties are not able to reach an agreement, the party seeking the modification may petition the Court for a modification.

AGREED TO:

FOR THE UNITED STATES:

LARRY GOMEZ
Acting United States Attorney

/s/ Wan J. Kim
WAN J. KIM
Assistant Attorney General
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/s/ Elizabeth Mitchell
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FOR THE STATE OF NEW MEXICO:

/s/ Michelle Lujan Grisham
Michelle Lujan Grisham
Cabinet Secretary
New Mexico Department
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/s/ Kathyleen M. Kunkel
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SO ORDERED:

This 16th day of May, 2007

UNITED STATES DISTRICT COURT JUDGE