

**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF KENTUCKY**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE COMMONWEALTH OF KENTUCKY, <u>et al.</u> ,	)	
	)	Civil No. _____
Defendants.	)	
	)	
_____	)	

**Settlement Agreement**

**I. Jurisdiction and Parties**

- i. This case was instituted by the United States Department of Justice pursuant to the Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. § 1997.
- ii. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345.
- iii. Venue is appropriate pursuant to 28 U.S.C. § 1391(b).
- iv. 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.
- v. The Defendants are the Commonwealth of Kentucky (“Commonwealth”); Ernie L. Fletcher, Governor of the Commonwealth of Kentucky, in his official capacity only; Mark D. Birdwhistell, Secretary, Cabinet for Health and Family Services, in his official capacity only; John M. Burt, Commissioner, Department for Mental Health and Mental Retardation Services, in his official capacity only; and the Deputy Commissioner for the Department of Mental Health and Mental Retardation Services, in his official capacity only. The Defendants are ultimately responsible for operation of the Communities at Oakwood (“Oakwood”).

- vi. Parties: This Agreement is by and between the United States Department of Justice (“DOJ”) and the Commonwealth of Kentucky (“Commonwealth”). The Commonwealth includes those government agencies, departments, entities, and persons involved at all relevant times in the management, oversight, and regulation of Oakwood and/or matters identified in Section II, “Subject Matter,” including those persons listed in paragraph v. above, in their official capacities.
- vii. On June 22, 2001, the Attorney General of the United States, by and through the Assistant Attorney General, Civil Rights Division, notified the Governor of the Commonwealth of Kentucky, the Attorney General of the Commonwealth of Kentucky, the Secretary of the Cabinet for Health Services, and the Facility Director of Oakwood, of his intention to investigate allegations of unconstitutional and unlawful conditions at Oakwood pursuant to CRIPA.
- viii. Following a thorough investigation, on November 7, 2002, the Attorney General of the United States, by and through the Assistant Attorney General, Civil Rights Division, informed the Governor of the Commonwealth of Kentucky, the Attorney General for the Commonwealth of Kentucky, the General Counsel for the Cabinet for Health Services of the Commonwealth of Kentucky, the Secretary of the Cabinet for Health Services, the Commissioner of the Department for Mental Health and Mental Retardation, and the Acting Facility Director of Oakwood that the Attorney General had reasonable cause to believe that persons residing in, or confined to, Oakwood were being subjected to egregious and flagrant conditions that deprived them of rights, privileges, and immunities secured by the Constitution or laws of the United States.
- ix. The Commonwealth has voluntarily come forward with a Strategic Action Plan (“SAP”), which details methods by which the Commonwealth will operate Oakwood and provide services to residents of the facility. This SAP is incorporated into this Settlement Agreement (“Agreement”) as Exhibit A and, as such, is a fully enforceable order of this Court.
- x. The parties to this Agreement share a common interest in seeking to protect the rights of those individuals with developmental disabilities living at Oakwood. In furtherance of the mutual commitments toward this interest, the parties have worked together to identify issues and provide solutions for ensuring that individuals with developmental disabilities living at Oakwood enjoy a safe and growth-oriented environment. This Agreement sets forth an agreed-upon manner for measuring and realizing these common interests.

## II. Subject Matter

This Agreement arises from an investigation performed by DOJ concerning conditions of confinement at Oakwood. The investigation was performed pursuant to CRIPA. DOJ issued its findings of fact on November 7, 2002.

- i. Oakwood. Oakwood is an intermediate care facility for persons with developmental disabilities located in Somerset, Kentucky. At all times relevant herein, Oakwood was and is a state-operated facility.
- ii. DOJ Investigation. The DOJ performed an initial on-site review of the conditions at Oakwood on November 5-9, 2001, with attention to the care and treatment of persons admitted to Oakwood. The investigation included reviews of facility records and interviews with administrators, staff, and residents.
- iii. DOJ Findings. As a result of its investigation, the DOJ made findings, including the following:
  1. *Protection from Harm.*
    - a. The investigation found that Oakwood fails to protect its residents from harm due to abuse and mistreatment.
    - b. The investigation found that Oakwood fails to protect its residents from harm due to neglect or failing to maintain a safe environment.
  2. *Behavioral Services.*
    - a. The investigation found that persons with developmental disabilities receive inadequate care from Oakwood's treatment teams.
    - b. The investigation found that Oakwood prepares inadequate individual support plans ("ISP") for its residents.
    - c. The investigation found that Oakwood prepares inadequate behavioral support plans ("BSP") for its residents.
    - d. The investigation found that Oakwood's psychology staff fails to provide adequate behavior and psychology services to its residents.

3. *Psychiatric Services.* The investigation found that Oakwood's psychiatric services fall substantially below generally accepted professional standards of care.

4. *General Medical Care.*

- a. The investigation found that Oakwood provides inadequate preventative medical care designed to keep serious medical problems and disease from developing.
- b. The investigation found that Oakwood has inadequate and incomplete communication and documentation systems.
- c. The investigation found that Oakwood's physician staff lacked sufficient training in the field of developmental disabilities.
- d. The investigation found that Oakwood fails to provide adequate evaluation, diagnosis, and treatment for residents with seizure disorders.

5. *Nursing Care.*

- a. The investigation found that Oakwood's nursing assessments and documentation, particularly those of acute illnesses and injuries, are incomplete, fragmented, inconsistent, and simply repeat prior assessments.
- b. The investigation found that Oakwood's nursing staff does not follow established standards and protocols regarding medication administration, resulting in an unacceptably high number of medication errors and consequent harm to residents.
- c. The investigation found that the medical emergency response system at Oakwood falls below generally accepted professional standards of care and places the health and well-being of residents at risk of injury or death.
- d. The investigation found that Oakwood staff engages in infection control practices that are outdated, unsafe, and ineffective for preventing the spread of infectious and contagious diseases, placing themselves and Oakwood residents at risk of harm.

- e. The investigation found that Oakwood's nursing and direct care staff training programs are insufficient to protect its residents from harm and this is a major contributing factor to the inadequate nursing care provided at Oakwood.
- f. The investigation found that Oakwood's system for staffing nurses and direct care staff is inadequate and jeopardizes resident safety and quality of care.

6. *Nutritional Management.* The investigation found that Oakwood's residents are not adequately managed during mealtimes; that residents lack adequate individual meal management plans; and that there is no interdisciplinary management connecting the resident's nutritional management issues with his/her behavioral problems.

7. *Physical Therapy.* The investigation found that Oakwood does not provide sufficient physical therapy services to residents in need of such services.

8. *Quality Improvement.* The investigation found that the quality improvement program in existence at the time of the investigation was inadequate to address the crisis of care found to exist within the clinical services provided at Oakwood.

9. *Serving Institutionalized Persons In The Most Integrated Setting Appropriate To Their Needs.* The investigation found that Oakwood fails to accommodate persons who desire to live in the community in violation of the Commonwealth's obligations under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq.*, and the regulations promulgated thereunder, 28 C.F.R. § 35.130(d).

### **III. Understandings of Positions**

- i. The Commonwealth admits that, at the time of the DOJ investigation in 2001, the conditions at Oakwood may have violated the constitutional and/or statutory rights of its residents.
- ii. DOJ acknowledges the Commonwealth's efforts and progress in improving the quality of conditions and services at Oakwood since the findings letter was issued.

- iii. Nothing in this Agreement shall be construed as an acknowledgment or admission that the Commonwealth has not acted, or continues not to act, in full compliance with the United States Constitution or federal law.
- iv. The provisions of this Agreement are a lawful, fair, adequate, and reasonable resolution of this investigation.
- v. DOJ and the Commonwealth have engaged in good faith negotiations to reach an understanding in this Agreement. This Agreement memorializes the Commonwealth's efforts to implement and maintain necessary improvements at Oakwood and to avoid protracted, contested litigation related to the DOJ CRIPA investigation.
- vi. This Agreement is not intended to create any rights in any person or entity not a party to it.

#### **IV. Strategic Plan for Enhancing Service Delivery**

The Commonwealth shall implement and maintain implementation of this Agreement and the SAP for Oakwood. A copy of the SAP is attached as Exhibit A and incorporated fully by reference herein. The Parties mutually agree that the Agreement and the Commonwealth's SAP are a thorough and complete plan of response to those findings identified by DOJ in Section II, Part iii of this Agreement. The Commonwealth's obligations and a summary of the SAP follows:

- i. Support for a Treatment Planning Process.
  - 1. *Treatment Planning.* The Commonwealth shall implement a treatment planning process that allows for effective interdisciplinary work and encourages active participation by the individual, as appropriate to his/her functional status, and chosen family and friends. As contained in the SAP, the treatment planning process shall consist of an integrated treatment plan that integrates all assessments, develops supports and services based upon assessed needs, monitors systems for providing services and supports, and formulates evidence-based, empirically-validated treatment and training methods that comport with generally accepted professional standards. Emphasis shall be placed upon the creation of a treatment team assigned to each individual responsible for creating, implementing, monitoring, and updating an integrated treatment plan for each individual, including integrating all assessments, services, treatments, and supports. The treatment team membership shall include a treatment team leader

responsible for the adequate functioning of each treatment team and implementation of the integrated treatment plan and shall reflect a consistent and enduring team of interdisciplinary caregivers as appropriate to the individual's needs.

2. *Holistic Assessment.* The Commonwealth shall ensure that individuals are provided a holistic assessment of the individual's needs and preferences, including an assessment of the individual's psychosocial, behavioral, medical, and habilitation needs. Such assessments shall be revisited regularly and revised as needed given the individual's circumstances.
3. *Comprehensive Case Formulation.* The Commonwealth shall develop and maintain comprehensive case formulations for each individual for the purpose of generating targeted and complete hypotheses about each individual's status, course, treatment, and habilitation needs.
4. *Need-Driven Planning.* The Commonwealth shall focus treatment planning for each individual based upon the comprehensive assessment of the individual's particular needs in all life areas (e.g., home living, community life, social life, health, wellness, work/education, and behavioral/psychiatric factors). The individual's needs shall be updated in writing as warranted so that the individual's objectives are identified in a manner that is realistic and attainable.
5. *Monitoring of Plans.* The Commonwealth shall routinely and systematically monitor treatment plans for individuals for implementation and effectiveness.
6. *Transition Support.* The Commonwealth shall develop and maintain a community transition plan as part of each resident's individual treatment plan.

ii. Integrate Discipline Specific Services.

Each of the professional disciplines listed below shall provide adequate assessments and services necessary to support an individualized interdisciplinary treatment planning process consistent with generally accepted professional standards.

1. *Psychiatric Services.* The Commonwealth shall provide adequate and appropriate routine and emergency psychiatric and mental health services for the purpose of meeting the individualized needs of each resident, consistent with generally accepted professional standards. To this end, the Commonwealth shall ensure that psychiatric services are sufficient to meet the needs of each individual receiving psychotropic medications as well as those individuals who have or may have mental illness. Such services shall include the following:

- a. **Psychiatric Assessment.** The Commonwealth shall perform a comprehensive psychiatric assessment for each individual with a mental health concern.
- b. **Psychotropic Medication Assessment.** The Commonwealth shall make ongoing, timely, and documented psychiatric assessments of each individual receiving psychotropic medications.
- c. **Integrated Into Plan.** The Commonwealth shall ensure that interdisciplinary treatment team functions are integrated into the individual's treatment plan.
- d. **Integration Among Services.** The Commonwealth shall ensure that psychiatric assessments are integrated with behavioral, neurological, and medical services for targeted treatment.
- e. **Psychiatric Staff.** The Commonwealth shall provide an orientation and competency plan that promotes a system of adherence to standards of care on an ongoing basis.
- f. **Medication Management.** The Commonwealth shall create and maintain an appropriate, safe, and effective medication management system.

2. *Neurological Services.* The Commonwealth shall ensure that individuals with seizure disorders are properly diagnosed, treated, and regularly monitored.

3. *General Medical Care.* The Commonwealth shall provide residents with adequate and appropriate preventative, routine, acute, and emergency health care, including neurological care, and dental care to meet the individualized needs of the residents, consistent with generally accepted professional standards. To this end, the Commonwealth agrees to do the following:



- a. Preventative Health Care. The Commonwealth shall provide residents with appropriate and timely preventative health care.
  - b. Routine and Emergency Health Care. The Commonwealth shall provide residents with appropriate and timely routine, emergency, and specialized health care.
  - c. Medication Use. The Commonwealth shall monitor medication use to ensure appropriateness, safety, and efficacy.
  - d. Physician Monitoring. The Commonwealth shall include physicians in the processes of monitoring medication use.
  - e. Mortality Review. The Commonwealth shall implement a formal mortality review process to provide specific recommendations to improve quality of care.
  - f. Dental Care. The Commonwealth shall provide timely and appropriate dental care.
  - g. Quality Management. The Commonwealth shall develop and maintain a medical quality management system.
4. *Psychological and Behavioral Services.* The Commonwealth shall provide adequate and appropriate psychological and behavioral services to meet the individualized needs of each resident, especially those with challenging behaviors, consistent with generally accepted professional standards. To this end, the Commonwealth agrees to do the following:
- a. Sufficiency. The Commonwealth shall implement psychological and behavioral services that are sufficient to meet the needs of each individual in terms of general clinical/mental health, functional status, skills, and supports needed to exercise optimal autonomy or independence.
  - b. Positive Behavior Support. The Commonwealth shall develop and implement Positive Behavior Support (“PBS”) programs.
  - c. System Monitoring. The Commonwealth shall regularly monitor each individual’s skills training plan, supports provision, and PBS plan.

- d. Regression Prevention. The Commonwealth shall ensure that psychological services are sufficient to prevent or decelerate physical, functional, and psychological regression, and to ensure an individual's reasonable safety, security, and freedom from receiving restrictive procedures, and undue bodily restraint.
  - e. Behavior Intervention Committee. The Commonwealth shall create and implement a Behavior Intervention Committee to review and approve any restrictive interventions for individuals.
5. *Nursing Services.* The Commonwealth shall ensure that Oakwood residents receive adequate and appropriate nursing care, including adequate and appropriate practices governing medication administration, emergency response, and infection control to meet the individualized needs of each resident, consistent with generally accepted professional standards. To this end, the Commonwealth agrees to do the following:
- a. Sufficiency. The Commonwealth shall ensure that nursing services are sufficient to meet the need of its residents.
  - b. Performance Improvement. The Commonwealth shall implement and maintain a nursing performance improvement process.
6. *Nutritional, Speech, Occupational, and Physical Therapy.* The Commonwealth shall provide each resident with adequate and appropriate physical and nutritional management to meet the individualized needs of each resident, consistent with generally accepted professional standards. Furthermore, the Commonwealth shall provide each resident with adequate and appropriate occupational therapy, physical therapy, and speech therapy to meet the individualized needs of each resident, consistent with generally accepted professional standards. To this end, the Commonwealth agrees to do the following:
- a. Sufficiency. The Commonwealth shall ensure that all individuals receive sufficient nutritional, speech, occupational, and physical therapy, as needed.
  - b. Performance Improvement. The Commonwealth shall implement and maintain a performance improvement plan to outline and measure goals for the delivery of nutritional, speech, occupational, and physical therapy services.

iii. Risk Management.

1. *Safe and Secure Environment.* The Commonwealth shall provide a safe and secure environment to all individuals at Oakwood by protecting them from abuse, neglect, and other high-risk behaviors. To this end, the Commonwealth shall provide ongoing supervision of Oakwood residents in accord with generally accepted professional standards; adequate numbers of direct care staff necessary to manage and supervise clients in accordance with their individual program plans and to avoid extensive use of mandatory overtime and/or requiring direct care staff to perform support services to the extent that these duties interfere with the exercise of their primary direct client care duties; adequate and ongoing supervision of staff responsible for the direct care and treatment of Oakwood residents; and adequate training of direct care staff in all areas of the SAP for which they are responsible.
2. *High-Risk Behavior.* The Commonwealth shall identify thresholds for high-risk behavior and to ensure timely interventions to reduce ongoing risk.
3. *Restraints.* The Commonwealth shall promote a restraint-free environment by not using restraints as punishment or as part of a PBS plan, but allowing for the use of restraints only for medical emergencies or when there is immediate risk of harm to the individual or to others.
4. *Criteria for Using Restraints.* The Commonwealth shall promulgate and follow established criteria consistent with generally accepted professional standards for the use of restraints.
5. *Restraint Procedures.* The Commonwealth shall ensure that all staff members are competent in implementing restraint procedures.
6. *Quality Management.* The Commonwealth shall institute a quality management program on the use of restraints.
7. *Risk Management System.* The Commonwealth shall develop and implement an adequate risk management system, including an adequate management information system, to identify, track, monitor, and substantially reduce the incidents of harm due to abuse, neglect, and/or mistreatment, consistent with generally accepted professional standards.
8. *Environmental Safety.* The Commonwealth shall develop and implement a plan to provide Oakwood residents and staff with a safe and secure

living and working environment, particularly in the common spaces, lavatories, and in areas frequented by residents with pica behaviors, self-injurious behaviors, and aggressive behaviors.

iv. Quality Assurance.

1. *Quality Assurance Program.* The Commonwealth shall develop and implement quality assurance mechanisms consistent with generally accepted professional standards that enable the Commonwealth to comply fully with this Agreement and SAP, that timely and adequately detect problems with the provision of services and supports required under this Agreement and SAP, and that ensure appropriate corrective responses are implemented.

v. Community Transition.

In accordance with Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, et seq., and implementing regulation 28 C.F.R. § 35.130(d), the Commonwealth shall ensure that each Oakwood resident is served in the most integrated setting appropriate to meet their needs. To this end, the Commonwealth agrees to do the following:

1. *Evaluation.* The Commonwealth shall review and revise, as needed, its procedures, role, and function of Oakwood in serving its residents' needs.
2. *Transition Process.* The Commonwealth shall implement and maintain a transition process that begins at admission and is an integral part of each individual's treatment plan. The Commonwealth shall provide sufficient professional and support staff to implement fully this commitment to transition planning as an integral part of individual treatment planning.
3. *Community Providers.* The Commonwealth shall foster collaborative relationships with community providers, and provide sufficient additional community placements to ensure that each individual is served in the most integrated setting appropriate to his or her needs.
4. *Available Services.* The Commonwealth shall educate its residents, their families, and guardians regarding available community-based services.
5. *Monitoring.* The Commonwealth shall develop and implement systems to monitor services at community-based homes and ensure adequate staff training at such homes in order to protect residents from harm.

Community-based homes are defined as those located outside the current geographic boundaries of Oakwood.

**V. Implementation and Monitoring**

- i. The Commonwealth represents that it has implemented, or will implement, the policies and procedures summarized in Section IV of this Agreement and in the SAP.
- ii. DOJ represents that it has reviewed the SAP and believes that the implementation of the Agreement, including the fully incorporated and enforceable SAP, will substantially and adequately address the issues raised by the DOJ CRIPA investigation.
- iii. The Commonwealth represents that it will continually and periodically refine and revise the policies and procedures outlined in this Agreement and the SAP to assure compliance with the letter and spirit of this Agreement and the SAP. Upon request, DOJ shall be provided with copies and an opportunity to provide substantive comment upon any policies and procedures revised pursuant to this Agreement and the SAP.
- iv. The Commonwealth represents that it has educated, or will educate, all employees at Oakwood with respect to the policies and procedures outlined in this Agreement and SAP. To this end, the Commonwealth warrants that all supervisory personnel, including both employees and consultants, shall sign a written statement that they have read and understand the terms of the Agreement and the SAP.
- v. The Commonwealth shall maintain sufficient records to document its compliance with all terms of this Agreement and the SAP. The Commonwealth shall also maintain any and all records required by or developed under this Agreement and the SAP. DOJ shall have unrestricted access to and, shall, upon request, receive copies of any document and/or any databases relating to the implementation of this Agreement and the SAP. DOJ shall have unrestricted access to all staff and facilities, including private interviews with residents and staff, as necessary, to assess compliance with this Agreement and the SAP.
- vi. The Commonwealth shall provide the DOJ, its staff, consultants and agents, with reasonable access to:
  1. All buildings and facilities at Oakwood.
  2. All staff having duties relating to Oakwood.

3. All residents living at Oakwood, outside the presence of staff (unless the resident requests otherwise) consistent with this Agreement and the SAP.
  4. Any records regarding Oakwood, its staff or residents.
  5. Records of residents transitioned to community-based homes or other facilities, in order to evaluate compliance with the terms of this Agreement and the SAP.
- vii. The Commonwealth shall designate contact agent(s) for ensuring that the Commonwealth adheres to the terms and conditions of this Agreement and the SAP.
- viii. If the Commonwealth further subdivides Oakwood into smaller facilities and/or outsources any of the services covered under this Agreement and the SAP, this Agreement and SAP shall be fully applicable to, and binding upon, those subdivided facilities and/or outsourced services.
- ix. The parties agree to the appointment of Nirbhay N. Singh, Ph.D., as the jointly-selected expert to monitor the Commonwealth's implementation of this Agreement and the SAP (the "Monitor"). The Monitor shall have full authority to independently assess, review, and report no less than semi-annually on the Commonwealth's implementation of and compliance with the provisions of this Agreement and the SAP. The parties further agree that the Monitor may use consultants to aid in fulfilling the duties of the Monitor, under the same terms and conditions applicable to the Monitor. All reasonable costs and expenses of the Monitor, including the cost of any consultant to assist the Monitor, shall be borne by the Commonwealth. The Monitor shall simultaneously submit to DOJ a copy of any bill and/or request for payment made to the Commonwealth. The Monitor shall also submit to DOJ a copy of all payments made by the Commonwealth. In the event that Dr. Singh is unable to serve or continue serving as the Monitor, the Parties shall meet or otherwise confer within thirty (30) days of being notified of this eventuality to select a new Monitor. If the parties are unable to agree upon a selection, each Party shall submit two names, along with resumes or curricula vitae and cost proposals, to the Court and the Court shall appoint the Monitor from among the names submitted. The procedure described in this paragraph shall apply to all successor Monitors.
- x. The overall duties of the Monitor and/or his/her designees shall be to observe, review, report findings, and make recommendations to the parties with regard to the implementation of the Agreement and the SAP. The Monitor shall regularly review the protections, services, and supports provided to residents in their residential settings and programs to determine the Commonwealth's

implementation of and compliance with this Agreement and the SAP. DOJ, the Monitor and/or his/her designees, may make both announced and unannounced inspections of the facility and of residential settings to which Oakwood residents are transitioned, in order to evaluate compliance with the terms of this Agreement and the SAP.

- xi. The Monitor shall file with the Court, and also submit to the Commonwealth and to DOJ, a written report no less than every six months with regard to the Commonwealth's implementation efforts and compliance with the Agreement and the SAP. The Commonwealth will take timely action to remedy any deficiencies cited by the Monitor.
- xii. The Commonwealth shall notify the Monitor and DOJ immediately upon the death of any resident and/or any situation resulting in a resident being placed in imminent and/or immediate jeopardy that has caused or may cause severe injury to such Oakwood resident. The Commonwealth shall forward to the Monitor and DOJ copies of any completed incident reports related to deaths, autopsies and/or death summaries of residents, as well as all final reports of investigations of those incidents described in this subsection.
- xiii. Except as required or authorized by the terms of this Agreement or the Parties acting together, or as authorized by a Court order, the Monitor shall not: issue public statements (at a conference or otherwise) or make findings with regard to any act or omission of the Commonwealth or its agents, representatives or employees, nor disclose to any person or entity, other than the Court or the Parties, any non-public information provided to the Monitor pursuant to this Agreement. Any press statement made by the Monitor regarding his/her employment must first be approved by the Parties. The Monitor shall not testify in any other litigation or proceeding with regard to any act or omission of the Commonwealth or any of its agents, representatives, or employees related to this case. The Monitor may testify in any case brought by either Party herein regarding the implementation, enforcement, or dissolution of this Agreement. Unless such conflict is waived in writing by the Parties, the Monitor shall not accept employment or provide consulting services that would present a conflict of interest with the Monitor's responsibilities under this Agreement, including being retained (on a paid or unpaid basis) by any current or future litigant or claimant, or such litigant's or claimant's attorney, in connection with a claim or suit against the Commonwealth or its departments, officers, agents or employees. The Monitor is not a state or local agency or an agent thereof, and accordingly the records maintained by the Monitor shall not be deemed public records subject to public inspection. Neither the Monitor nor any person or entity hired or otherwise retained by the Monitor to assist in furthering any provision of this Agreement shall be liable for any claim, lawsuit or demand arising out of the Monitor's

performance pursuant to this Agreement. This paragraph does not apply to any proceeding before a court related to performance of contracts or subcontracts for monitoring this Agreement.

## **VI. Compliance and Termination**

- i. This Agreement, and exhibits specifically referenced herein, shall constitute the entire integrated agreement of the Parties with respect to the DOJ CRIPA investigation. Except for the November 7, 2002 letter from the United States to the Commonwealth informing the Commonwealth that the United States had reasonable cause to believe that persons residing in or confined to Oakwood were being subjected to egregious or flagrant conditions that deprived them of rights, privileges, and immunities secured by the Constitution or laws of the United States, no prior or contemporaneous communications, oral or written, shall be relevant or admissible for purposes of determining the meaning of any provisions herein.
- ii. If DOJ believes that the Commonwealth has failed to fulfill any obligation under this Agreement and SAP, DOJ will, prior to initiating any action to enforce the terms of this Agreement and SAP, give written notice to the Commonwealth of the claimed failure. Upon receipt of said written notice, the Commonwealth shall then have 60 days in which to cure the claimed failure, if necessary, and provide DOJ with sufficient proof of its cure. At the end of the 60 day period, in the event that DOJ determines that the failure has not been cured, DOJ may initiate any action against the Commonwealth to enforce this Agreement and SAP without further notice. However, in the case of an emergency posing an immediate threat to the health or safety of Oakwood's residents, the United States may omit the notice and cure requirements herein, before seeking judicial action. If DOJ does not notify the Commonwealth of the Commonwealth's failure to fulfill any obligation under this Agreement and SAP, such lack of notice shall not constitute a waiver of the Commonwealth's underlying obligation.
- iii. If, at any time, any Party to the Agreement and the SAP desires to modify it for any reason, that Party will notify the other party in writing of the proposed modification and the reasons therefor. The Parties shall meet and confer with regard to the proposed modification. The Parties may jointly petition the Court to adopt any such modification.
- iv. No waiver of any of the terms of the Agreement and the SAP shall be valid unless it is in writing and signed by both Parties to the Agreement and the SAP.
- v. This Agreement and the SAP will terminate five years after the effective date of the Agreement and the SAP, as defined in Part VI. ix. If the Parties agree that the Commonwealth and Oakwood officials are in compliance with each of the



provisions of this Agreement and SAP earlier than five years from the effective date of the Agreement and the SAP, and have maintained compliance for at least one year, then the Agreement and the SAP may terminate at an earlier date. The burden will be on the Commonwealth and Oakwood officials to demonstrate such compliance.

- vi. To the extent that any of the legal authorities cited in the Agreement (e.g., federal statute, regulations or case law) are amended or superseded, this Agreement shall be amended accordingly.
- vii. The Commonwealth shall abide by all federal and state licensing requirements applicable to Oakwood and/or to any facility to which an individual residing at Oakwood is discharged.
- ix. This Agreement shall be effective on the first day of the month following the date of filing in a court of competent jurisdiction (“Effective Date”). Except where an earlier date is specified in this Agreement or the SAP, all provisions, objectives and/or action items shall be implemented within 36 months of the Effective Date of this Agreement.
- x. The Parties, by their signatures below, consent to entry of the foregoing Agreement as an order of the Court.

**FOR THE COMMONWEALTH OF KENTUCKY:**

/s/ Ernie L. Fletcher  
ERNIE L. FLETCHER  
Governor  
Commonwealth of Kentucky

/s/ Mark D. Birdwhistell  
MARK D. BIRDWHISTELL  
Secretary  
Cabinet for Health & Family Services

/s/ John M. Burt  
JOHN M. BURT, Commissioner  
Department of Mental Health  
& Mental Retardation  
Cabinet for Health & Family Services

/s/ Deputy Commissioner  
Deputy Commissioner  
Department of Mental Health  
& Mental Retardation  
Cabinet for Health & Family Services

/s/ David E. Fleenor  
DAVID E. FLEENOR  
Deputy General Counsel  
Office of the Governor

/s/ Wesley R. Butler  
WESLEY R. BUTLER  
General Counsel  
Cabinet for Health & Family Services

Dated: August 31, 2006

**FOR THE UNITED STATES:**

/s/ Amul R. Thapar

AMUL R. THAPAR  
United States Attorney

/s/ Wan J. Kim

WAN J. KIM  
Assistant Attorney General  
Civil Rights Division

/s/ Shanetta Y. Cutlar

SHANETTA Y. CUTLAR  
Chief  
Special Litigation Section

/s/ Judy Preston

JUDY PRESTON  
Deputy Chief  
Special Litigation Section

/s/ Mary R. Bohan

MARY R. BOHAN  
Attorney  
Special Litigation Section  
950 Pennsylvania Avenue, NW  
U.S. Department of Justice  
Civil Rights Division  
Washington, DC 20035-6400  
(202) 514-6255

Dated: August 31, 2006

IT IS SO ORDERED.

DATED: \_\_\_\_\_, 2006

\_\_\_\_\_  
/s/  
UNITED STATES DISTRICT JUDGE