



MR-NM-002-005

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

Plaintiff,

v.

STATE OF NEW MEXICO; Garrey Carruthers,  
Governor of the State of New Mexico;  
Dennis Boyd, Secretary,  
New Mexico Health and Environment  
Department; Miriam Brownstein,  
Acting Administrator, Los Lunas  
Hospital and Training School,

Defendants.

Civil Action No.

CIV 89-1165M

FILED  
AT ALBUQUERQUE

FEB 2 1990

JESSE CASAUS  
CLERK

SETTLEMENT AGREEMENT

1. This case was instituted by the United States on October 27, 1989, pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. Section 1997, et seq.
2. This Court has jurisdiction over this action pursuant to 28 U.S.C. Section 1345.
3. Venue is appropriate pursuant to 28 U.S.C. Section 1391(b).
4. The United States is authorized to institute this civil action by 42 U.S.C. Section 1997a and has met all the prerequisites for the institution of this civil action prescribed by the statute.
5. The defendants are the State of New Mexico, Garrey Carruthers, Governor of the State of New Mexico; Dennis Boyd, Secretary, New Mexico Health and Environment Department; Miriam

10

Brownstein, Acting Administrator, Los Lunas Hospital and Training School, and are sued in their respective official capacities.

6. The defendants have authority and responsibility for the operation of Los Lunas Hospital and Training School and are officers of the Executive Branch of the State of New Mexico.

7. On January 21, 1987, the Attorney General of the United States, through Assistant Attorney General, William Bradford Reynolds, Civil Rights Division, notified the Governor of New Mexico, the New Mexico Attorney General, the Secretary of the New Mexico Health and Environment Department, and the Administrator of the Los Lunas Hospital and Training School of his intent to investigate, pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. Section 1997, allegations of unconstitutional conditions at the Los Lunas Hospital and Training School, Los Lunas, New Mexico.

8. Following a thorough investigation, the Attorney General of the United States, by and through the Assistant Attorney General, on September 12, 1988, informed the Governor of New Mexico, the New Mexico Attorney General, the Secretary of the New Mexico Health and Environment Department, and the Administrator of the Los Lunas Hospital and Training School that persons residing in or confined to Los Lunas were being subjected to conditions that deprived them of rights, privileges, and immunities secured by the Constitution of the United States.

9. The parties agree that care, confinement, and training of Los Lunas residents implicate rights of these residents that

are secured and protected by the Constitution of the United States. The parties entering into this Settlement Agreement recognize these constitutional interests and, for the purpose of avoiding protracted and adversarial litigation, agree to the provisions set forth herein. This Settlement Agreement provides for procedures that the United States deems constitutionally required and the State of New Mexico has agreed to implement the procedures.

10. In entering into this Settlement Agreement, the defendants do not admit any violation of law and this Settlement Agreement may not be used as evidence of liability in any other legal proceeding.

11. The provisions of this Settlement Agreement are a fair and appropriate resolution of this case.

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

#### I. Definitions

As used in this Settlement Agreement, the following definitions shall apply:

1. Physician: A medical doctor lawfully entitled to practice medicine in New Mexico.

2. Psychiatrist: A physician who is either certified by or is eligible for certification by the American Board of Psychiatry and Neurology or who has successfully completed an approved residency program in psychiatry and upon completion of

post-residency requirements will become eligible for examination for such certification.

3. Psychologist: A person who has attained at least a master's degree in the field of psychology.

4. Direct Care Worker: Staff immediately responsible for implementing training programs and providing care to residents.

5. Qualified Professional: A person who is employed or under contract by the State, and who is competent, whether by education, training, or experience, to make the particular decision at issue.

6. Professional Judgment: A decision shall be deemed to be a reasonable exercise of professional judgment unless it can be shown that the decision is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

7. Bodily Restraint: (a) Any physical or mechanical device used to restrict the movement of a resident or the movement or normal function of any portion of the resident's body, excluding those devices used only to provide support for the achievement of functional body position or balance and devices used for specific medical and surgical (as distinguished from behavioral) treatment; (b) Chemical substances used solely for the purpose of controlling the behavior of a resident.

8. Papoose Board: Any device consisting of a solid backing upon which a resident is placed in a prone position and

restrained in any manner thereto for purposes of behavioral control.

9. Psychotropic medications: Chemical substances used in the treatment of mental illness which affect psychic function, behavior, or experience. Included in this definition are major tranquilizers, and minor tranquilizers and antidepressants to the extent that they are used to affect psychic function, behavior, or experience.

10. Training Programs: A program of steps and activities, developed by qualified professionals pursuant to the exercise of professional judgment which is designed individually to promote a resident's physical, social, emotional or intellectual growth and development. Such programs will be sufficient to protect a resident from unreasonable risks to personal safety and to facilitate his or her ability to function free from undue bodily restraint.

11. Seclusion: Placement of an individual in a locked room, or a room from which the resident is physically prevented from egress.

12. Time Out: A behavior management technique which removes a resident from a situation for a period of time for the purpose of modifying a specific inappropriate behavior.

13. Resident: A person residing at the Los Lunas Hospital and Training School who is receiving services from the New Mexico Health and Environment Department.

14. The State: The Executive Branch of the Government of the State of New Mexico, specifically including the Governor of the State of New Mexico, the New Mexico Health and Environment Department, the Administrator of the Los Lunas Hospital and Training School, and any of their officials, agents, employees, assigns, and the successors in office of such officials, agents, employees, or assigns.

## II. REMEDIAL MEASURES

### A. Evaluation and Training

Defendants shall design professionally based training programs for all Los Lunas residents for whom it is determined by qualified professionals are in need of such programs in order to reduce or eliminate unreasonable risks to personal safety or unreasonable use of bodily restraints.

To this end, defendants shall:

1. professionally evaluate, or reevaluate each resident in a timely manner to determine training and treatment needs;
2. develop professionally designed training programs, reflected in individualized program plans, for residents, including appropriate behavior management training, training in daily living skills speech, physical and occupational therapy, as necessary to protect residents from unreasonable risks to personal safety and to permit them to function free from undue bodily restraint;

3. implement the training programs on a consistent basis by staff trained to implement such programs;

4. professionally evaluate each resident no less than annually and each program plan no less than quarterly to ensure the adequacy of training programs;

5. implement on a priority basis training programs for residents exhibiting dangerous aggressive behavior, self injurious behavior, pica behavior, residents subject to the administration of anti-psychotic medication on an emergency or "PRN" basis or placed in seclusion or restraints six times in any 30 day period.

Defendants shall implement paragraph A.1, by October 15, 1989; A.2, by November 15, 1989; A.3, by January 15, 1990; A.4, and A.5, by December 15, 1989.

B. Restraint and Seclusion

Defendants shall insure that seclusion, bodily restraint, and time out are administered only pursuant to the judgment of a qualified professional; none shall be used as punishment, in lieu of necessary training programs, or for the convenience of staff.

To this end, defendants shall:

1. Immediately cease and desist from the use of papoose boards, except as may be medically required based on the exercise of professional judgment, to administer dental or medical treatment;

2. Immediately cease and desist from use of spray mist devices and ammonia capsules for behavioral control purposes;

3. Use seclusion, bodily restraint, and time out for behavior modification only in conjunction with a written behavior modification program;

4. Insure that any program plan utilizing seclusion, bodily restraint, or time out specifies:

- a) the behavior to be eliminated, the behavior to trigger use of the method;
- b) the method to be used;
- c) the duration for use of the method, when employed;
- d) the person responsible for the program;
- e) the data to be collected to assess progress toward the objectives; and
- f) justification that other behavior modification techniques have been systematically tried and have been demonstrated to be ineffective.

5. Use seclusion and bodily restraint only when in accordance with the exercise of professional judgment, it is determined they are necessary to protect a resident from injury to self or others.

Defendants shall implement paragraph B.3, by January 15, 1990; B.4, by November 15, 1989; and B.5, by July 30, 1990.

C. Medical care

Each resident shall be provided adequate medical care.

To this end, defendants shall:



1. Provide continuous 24 hour per day coverage by at least one physician who is immediately available to provide medical care and supervise medical emergencies;

2. Immediately ensure in accordance with the exercise of professional judgment, timely identification of symptoms, diagnosis and treatment of illness and communicable disease;

3. Professionally evaluate all residents with physical handicaps and develop and implement based on professional judgment, physical therapy services necessary to prevent or reduce contractures, body deformities, or other threats to the physical health of residents;

4. Based on the exercise of professional judgment, obtain adaptive equipment designed to meet the needs of physically handicapped residents who require such equipment; and

5. Ensure that all physically handicapped residents are fed in a manner which does not expose such residents to undue risks to their physical health and safety; and

6. Professionally evaluate all residents with regard to their occupational therapy needs, and based on the exercise of professional judgment, provide such services or devices which will permit residents to eat safely, communicate or otherwise meet their health needs.

Defendants shall implement paragraph C.1, by January 1, 1990; C.3, 4, and 6 by June 30, 1990 and C.5, by March 30, 1990.

D. Staffing

1. By no later than March 30, 1990, the State shall ensure that a sufficient number of physicians, registered nurses, licensed practical nurses, psychologists, physical therapists, occupational therapists, and direct care workers are employed or contracted for to assure attainment and consistent maintenance of at least the ratios of such staff to residents at the Los Lunas Hospital and Training School delineated below.

Physicians	1:100	
Registered Nurses and Licensed Practical Nurses	1:7	(no fewer than 1 RN shall be present and on duty at each unit on any shift)
Psychologists	1:40	
Physical Therapists	1:80	
Occupational Therapists	1:80	
P.T. and O.T. Aides	1:80	
Direct Care 1st shift	1:4	
2nd shift	1:4	
3rd shift	1:8	

2. By no later than October 30, 1989, the State shall ensure that there is no less than 20 hours per week of consultation by a psychiatrist available at Los Lunas.

3. By no later than December 31, 1989, the State shall ensure sufficient consultation or otherwise provide services at Los Lunas by such medical specialists as may be needed to provide adequate routine and emergency medical care to each resident.

4. By no later than March 30, 1990, the State shall employ

at least one psychologist possessing a Ph.D. in the field of psychology, licensed or certified by the State, with a minimum of 2 years of post-doctoral experience in the field of mental retardation, who shall have primary responsibility for supervising, monitoring, and coordinating all psychological services at Los Lunas.

5. At least sixty percent of the full-time equivalent nurses at Los Lunas shall be registered nurses.

E. Medications

Psychotropic medications and other medications shall be prescribed and administered to residents only pursuant to the exercise of professional judgment by a qualified professional.

To this end, defendants shall:

1. administer prescription medication only upon order of a physician;
2. review the drug regimen of each resident every 30 days through team review by all physicians who prescribe medication for the resident;
3. write prescriptions with a 30 day termination date;
4. note in the record of each resident receiving psychotropic medication, the following:
  - a) the mental illness diagnosis for which the medication is prescribed;
  - b) the justification for the drug and dosage level;

c) any changes in medication when made and rationale for the change; and,

d) periodic notes of the effect of such medication on residents behavior;

5. periodically evaluate each resident receiving psychotropic medication for drug induced side effects, including tardive dyskinesia;

6. permit only qualified staff to administer medication;

7. report and record in resident records all medication errors and drug reactions;

8. ensure that psychotropic medications are used pursuant to professional judgment, properly and in a manner that facilitates, and does not interfere with a resident's program, unless medically required; and

9. ensure that all residents with epilepsy are prescribed the fewest combinations of anticonvulsants appropriate for effective seizure management.

Defendants shall implement the requirements of paragraph E by October 15, 1989.

F. Recordkeeping

1. The State shall develop and maintain a professionally based recordkeeping system to insure that necessary information relating to each resident is maintained and readily available to professional and direct care staff to enable them to make

informed judgments with respect to medical care, treatment, and training of residents.

2. The parties agree that the components of an adequate individualized program plan are described in Appendix A.

#### G. Staff Training

The State shall develop and implement a training and inservice training program for all professional and direct care staff sufficient to enable such staff to fully implement the requirements of this Settlement Agreement.

### III. Plans

In addition to the requirements specified above, the State agrees to file with the Court as provided in Section IV herein, a plan or plans describing the steps it will take to implement certain requirements of this Settlement Agreement.

1. Section II, paragraph D: A description of all strategies that the State intends to implement in order to recruit and retain additional professional and other direct care staff called for under the terms of this Agreement. Strategies may include, but are not limited to, personnel policies, hiring standards and practices, recruitment efforts and techniques, incentives to attract and retain qualified staff, and reduction of the resident population. The State agrees that if it decides to reduce the population of Los Lunas through the transfer of a substantial number of residents to alternate programs, the determination as to which residents shall be transferred or placed elsewhere shall be made by professional staff qualified to

make such decisions. If such transfers or placements are to be made, the state agrees to file a plan for such transfers or placements no later than 30 days after it determines that it intends to proceed with such a plan. Any such plan shall become part of this Settlement Agreement and shall be fully enforceable.

2. Section II, paragraph F: a description of the recordkeeping systems, policies, and procedures with respect to each resident's care, training, and medical treatment that shall be utilized to maintain and make readily available in each resident's record and elsewhere, as necessary, such information as is professionally necessary to permit the exercise of professional judgment in each resident's care and training. Such plan shall be implemented by March 30, 1990.

3. Section II, paragraph G; a description of the training and continuing inservice training program(s) necessary to enable all staff to fully implement the requirements of this Agreement. Such plan shall commence no later than November 15, 1989, and continue during the pendency of this Settlement Agreement.

#### IV. Construction and Implementation

In construing and implementing the terms of this Agreement, the following are agreed to by the parties:

1. A. The Defendants shall file the plan(s) required by Section III with the Court and the United States within 30 days of the entry of this Settlement Agreement. The United States shall have thirty (30) days from receipt of any plan in which to file a response to the plan with the Court. If the United States

objects to any plan or portion thereof filed by the State, State and Federal officials shall meet in a good faith effort to resolve their differences. If the State and Federal officials are unable to resolve their differences through negotiation, the adequacy of the contested portions of the proposed plan shall be determined by the Court.

B. If, after a plan is approved, State officials decide to modify that plan or any portion thereof, State officials shall notify the Court and the United States of the proposed modification. The United States shall have thirty (30) days from the receipt of any proposed modification in which to file a response to the proposed modification with the Court. If the United States objects to the modification sought, State and Federal officials shall meet in a good faith effort to resolve their differences concerning the proposed modification. If State and Federal officials are unable to resolve their differences through negotiation, the adequacy of the proposed modification shall be determined by the Court. The Defendants shall have the burden to persuade the Court that the modified plan is adequate.

C. Plans submitted to the Court, including modifications of plans, to which the United States does not timely object, shall be deemed approved by the Court.

D. All plans required under this Agreement, if approved by the Court, shall be issued as orders of the Court and shall be enforceable as such.

2. If, after the Settlement Agreement is approved, the State seeks to modify the terms of the Agreement, the State shall notify the Court and the United States of the proposed modification. If the United States objects to the modifications sought, State and Federal officials shall meet in a good faith effort to resolve their differences concerning the modification and propose a joint stipulation of modification regarding the proposed changes. If the parties are unable to resolve their differences, the State may move the Court to modify this Settlement Agreement under governing legal or equitable standards. The parties agree that any authoritative change in the substantive law governing the matters at issue in this Settlement Agreement shall lead to a corresponding modification of the terms hereof so that this Agreement shall reflect current constitutional requirements.

3. A. The State shall submit quarterly compliance reports to the United States and the Court regarding the status of the State's compliance with the requirements of this Settlement Agreement.

B. The format and content of these compliance reports is specified in Appendix B.

4. The United States and its attorneys, consultants, and agents shall have reasonable access to the facilities, records, residents, and employees of Los Lunas upon reasonable notice to the State for the purpose of ascertaining compliance with the



Decree. Such access shall continue until this Settlement Agreement is terminated.

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

V. Termination of Agreement

1. The parties contemplate that the Defendants shall have fully and faithfully implemented all provisions of this Agreement, and plans herein required to be submitted and approved by the Court, on or before December 31, 1990.

2. The Court shall retain jurisdiction of this action for all purposes under this Settlement Agreement until the Defendants shall have fully and faithfully implemented all provisions of the Settlement Agreement and plans submitted pursuant thereto and until the judgment be discharged.

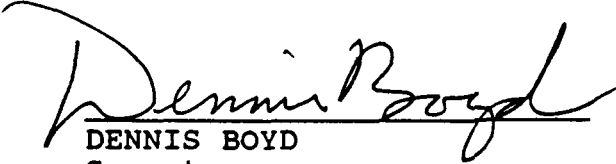
3. Defendants may move to dismiss this Settlement Agreement at such time as they have fully and faithfully implemented all provisions of this Agreement and the plans submitted pursuant thereto. Defendants shall serve any such motion upon the United States which shall have sixty (60) days to respond. If Defendants move to dismiss the Settlement Agreement prior to December 31, 1990, they shall have the burden of persuading the Court that the requirements of this Settlement Agreement and the plans required pursuant to its terms have been fully and faithfully implemented. If defendants move to dismiss this Settlement Agreement after December 31, 1990, dismissal shall be granted unless, within 60 days after receipt of the Defendants'

motion, the United States objects to the motion. If such an objection is made with particularity, and the parties are unable to resolve any dispute regarding dismissal, the Court shall hold a hearing on the motion and the burden shall be on the United States to demonstrate that the Defendants have not fully and faithfully implemented all provisions of this Settlement Agreement or any approved plan(s) or any part thereof.


CONSENTED TO BY THE UNDERSIGNED:

FOR THE STATE OF NEW MEXICO


  
GARREY CARRUTHERS  
Governor  
State of New Mexico

  
DENNIS BOYD  
Secretary  
Health and Environment  
Department


  
HAL STRATTON  
Attorney General  
State of New Mexico

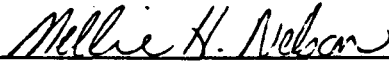
  
CHRIS COPPIN  
Assistant Attorney General  
State of New Mexico

FOR THE UNITED STATES OF AMERICA

  
JAMES P. TURNER  
Acting Assistant Attorney General  
Civil Rights Division

  
WILLIAM LUTZ  
United States Attorney  
District of New Mexico

  
ARTHUR E. PEABODY, JR.  
Chief  
Special Litigation Section

  
MELLIE H. NELSON  
Deputy Section Chief  
Special Litigation Section

*Miriam Brownstein*

MIRIAM BROWNSTEIN  
Administrator  
Los Lunas Hospital  
and Training School

*Joel Klein*

JOEL KLEIN  
CHRISTOPHER CERF  
SUSAN COSKEY  
Attorneys for Defendants  
Onek, Klein and Farr  
2550 M. Street, NW  
Suite 350  
Washington, D.C. 20037

*Jeremy D. Schwartz*

VERLIN HUGHES  
JEREMY D. SCHWARTZ  
CYNTHIA L. KATZ  
Attorneys  
Special Litigation Section  
Civil Rights Division  
U.S. Department of Justice  
320 First Street, NW  
Washington, D.C. 20530

WHEREFORE, the parties to this action having agreed to the provisions in the Settlement Agreement set forth above, and the Court being advised in the premises, this Settlement Agreement is hereby entered as the JUDGMENT of this Court.

IT IS SO ORDERED, this 12<sup>th</sup> day of February, 1980,  
at Albuquerque, New Mexico.

*[Signature]*

UNITED STATES DISTRICT JUDGE