

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

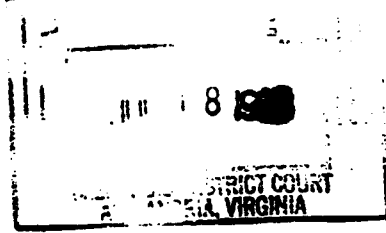
UNITED STATES OF AMERICA,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Defendants.



Case Number: 96-283-A

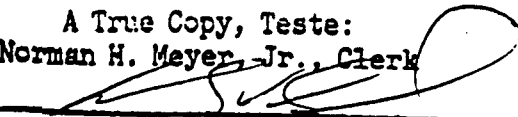
SETTLEMENT AGREEMENT

The United States of America (hereinafter the "United States"), and the Commonwealth of Virginia (hereinafter "Virginia"), agree to settle the above captioned matter (hereinafter "this Action") on the terms and conditions set forth below in this Settlement Agreement (hereinafter the "Agreement").

I. Introduction.

A. By letter dated May 4, 1990, the Assistant Attorney General for Civil Rights, United States Department of Justice, informed the then Governor of the Commonwealth of Virginia that the United States was commencing an investigation of the Northern Virginia Training Center (hereinafter "NVTC") pursuant to the Civil Rights of Institutionalized Persons Act (hereinafter "CRIPA"), 42 U.S.C. § 1997 *et seq.*

B. NVTC is an institution covered by CRIPA and operated by Virginia to provide habilitation and other services to persons with developmental disabilities and mental retardation.

A True Copy, Teste:
Norman H. Meyer, Jr., Clerk
By 
Deputy Clerk

U.S. v. Virginia



MR-VA-002-007

C. On July 16-17, 1990, and continuing from time to time through September 13-15, 1993, representatives of the United States conducted on-site inspections and evaluations of NVTC.

D. As a result of these examinations and inspections, the United States advised the Governor of Virginia, in letters dated April 9, 1991, May 31, 1994, and February 8, 1995, that, in its opinion, conditions at NVTC constituted a pattern or practice of violations of the constitutional and federal statutory rights of NVTC residents.

E. Beginning in 1991 and continuing from time to time thereafter, Virginia voluntarily developed and commenced implementation of a written plan to address the care provided at NVTC ("the Plan") ("Exhibit A").

F. Virginia has at all times denied that conditions at NVTC violate the constitutional or federal statutory rights of residents at NVTC.

G. Virginia has at all times maintained that, as a matter of state policy, it aspires to provide a level of care to NVTC residents in excess of what it regards as the minimal level of care required by the Constitution and federal law. By entering into this Agreement and agreeing to implement the Plan, Virginia does not admit that any of the terms of such documents or the level of care it provides are legally required pursuant to the Constitution or federal law.

H. On March 4, 1996, the United States filed the complaint in this Action.

I. The parties agree it is in their mutual interests to avoid the continuation of adversarial litigation. To that end, the parties have resolved their differences by agreeing upon the Plan and upon methods of communication and conciliation as set forth in this Agreement.

The parties recognize that implementation of the Plan provides NVTC residents with a level of care satisfying all constitutional and federal statutory standards at issue in this Action.

J. The parties agree that the resolution of this case is in the best interests of NVTC residents, and otherwise in the best interests of their common citizens.

Accordingly, the parties agree as follows:

II. Rule 41(a)(2) Dismissal Without Prejudice.

Immediately upon execution of this Agreement, the parties shall jointly move the Court for entry of an Order of dismissal without prejudice pursuant to Rule 41(a)(2), in the form attached as Exhibit B. In the event the Court refuses or fails to enter that Order in the attached form, this Agreement shall be null and void.

III. Dismissal With Prejudice.

1. The Court shall enter a dismissal of this Action with prejudice upon the occurrence of one or more of the following conditions:

a. In the event the United States fails to file a Motion to Restore (defined in § VIII below), Virginia shall be conclusively entitled to an order dismissing this Action with prejudice exactly nine months from the Notice Date (defined in § VII below);

b. Joint motion of the parties;

c. Unopposed motion of defendants; or

d. In the event the United States files a Motion to Restore pursuant to the procedures set forth in § VIII below, but the Court does not find that Virginia failed to achieve substantial compliance with the Plan.

IV. Plan Implementation.

Virginia agrees to implement the Plan by the Notice Date, as defined in § VII(2) below.

V. Consultation Tour.

1. To allow the United States an opportunity to observe Virginia's implementation of the Plan, and to promote the sharing of technical information and the amicable resolution of any disagreements, the United States shall retain expert consultants to tour NVTC to assess the status of such implementation and to confer with NVTC with respect to such implementation.

2. On dates mutually agreed upon by the parties, but no later than 45 days after entry of the Order described in § II above, the United States shall tour the facility with its expert consultants, after reasonable notice to Virginia of the identity and curriculum vitae of those consultants. Within 10 days of entry of the Order, the United States shall inform Virginia of the documents its expert consultants will need in preparation for the tour. Said documents shall be substantially similar to those previously requested and provided during expert consultant tours of NVTC. The United States agrees to provide information to Virginia based on these tours within 45 days of the tours. The parties agree to confer regarding the desirability of further sharing of technical information, including a conference between the United States' expert consultants and Virginia's professionals.

3. The United States' expert consultants shall tour NVTC utilizing the same procedures used during prior United States' expert consultant tours at NVTC, including but not limited to procedures governing confidentiality of patient records.

4. The United States shall not commence or support any civil action under this Agreement or otherwise, or initiate any other CRIPA proceeding against Virginia, based on any

matter observed during these tours or documents produced in connection with the tours. The findings and conclusions of the United States' expert consultants based on this tour shall not be used by the United States in any court proceeding, nor shall they be disclosed or used by the United States for any purpose other than as set forth in § V of this Agreement.

VI. Interim Reports.

1. Beginning on October 15, 1996, and continuing every three months thereafter until the Notice Date, defined in § VII below, Virginia shall provide the United States with quarterly summaries of each reported Category I and II incident as defined in the Standard Administrative Practices and Procedures Manual, Chapter 28, Reporting and Responding to Unusual Incidents, Appendix B (Exhibit C) occurring at NVTC (hereinafter "Incident Summaries"), and each open or founded allegation of abuse and/or neglect as defined in Departmental Instruction #33 (Exhibit D) (hereinafter "Abuse/Neglect Summaries"). The Incident Summaries shall be in the form attached as Exhibit E. The Abuse/Neglect Summaries shall be in the form attached as Exhibit F.

2. The United States may request reasonable follow-up information, including documents from Virginia with respect to any incident identified on the Incident and/or Abuse and Neglect Summaries.

3. The United States shall advise Virginia of any alleged deficiencies in the implementation of the Plan ascertained from its evaluation of Incident and/or Abuse and Neglect Summaries and follow-up information. Virginia agrees to confer with the United States, in person or in writing, with respect to any such alleged deficiencies.

VII. Certification Tour.

1. The purpose of the certification tour is to permit the United States to assess the status of Virginia's implementation of the Plan before this case is dismissed with prejudice as provided by § III, so that the United States may file a Motion to Restore, if necessary, pursuant to § VIII.

2. On or before June 1, 1997, Virginia shall provide written notice to the United States that it may conduct the certification tour. A copy of the notice shall be filed simultaneously with the Clerk of the U.S. District Court in Alexandria. If Virginia fails to send this notice on or before June 1, 1997, the United States shall have the right to provide written notice to Virginia that it will conduct the certification tour. A copy of the notice shall be filed simultaneously with the Clerk of the U.S. District Court in Alexandria. The date such notice is filed with the Clerk, either by Virginia or the United States, shall be deemed the "Notice Date" for purposes of this Agreement.

3. During the first month after the Notice Date, the United States shall inform Virginia of (i) the identity and vitae of any expert consultants it will retain to assess Virginia's compliance with the Plan, and (ii) the documents it seeks to assess Virginia's compliance with the Plan, which shall be substantially similar to those previously requested and provided during expert consultant tours of NVTC.

4. No later than the second month after the Notice Date, Virginia shall inform the United States of the identity and vitae of any expert consultants it will retain for the certification tour, and shall provide the United States with the requested documents.

5. No sooner than the third month and no later than the end of the fourth month after the Notice Date, the United States' attorneys and expert consultants shall tour NVTC to assess the status of Virginia's compliance with the Plan. The procedures for such tour shall be substantially similar to those previously used during expert consultant tours at NVTC (including, but not limited to, procedures governing confidentiality of patient records), except that Virginia shall have the right for its own attorneys and expert consultants to accompany those of the United States on all aspects of the tour.

6. No later than the fifth month after the Notice Date, Virginia and the United States shall receive from their respective expert consultants their reports evaluating Virginia's implementation of the Plan. In selecting and retaining their expert consultants, the United States and Virginia shall each be responsible for assuring that said expert reports can be completed by their expert consultants within this time period.

7. No later than the sixth month after the Notice Date, the United States shall notify Virginia of any alleged deficiencies in Virginia's implementation of the Plan. The United States shall specify by page numbers, paragraphs and subparagraphs, each provision of the Plan which it alleges has been implemented in a deficient manner. The United States shall set forth in reasonable detail (i) the evidentiary basis of its allegations of deficiency and (ii) the remedial measures which it proposes to remedy each deficiency. The reasonable details to be provided shall include, but not be limited to, a complete statement of all the opinions of any expert consultants, on which the United States relies, the basis and reasons for such opinions and the information considered by the expert in forming such opinions.

8. No later than the seventh month after the Notice Date, Virginia shall notify the United States of Virginia's concurrence or disagreement with each of the United States' allegations of deficiency and proposed remedial measures. If Virginia concurs with any of the United States' allegations of deficiency, but disagrees with the proposed remedial measure, it shall propose an alternative remedial measure.

9. During the seventh and eighth months following the Notice Date, Virginia and the United States shall endeavor in good faith to resolve any disputes over the United States' allegations of deficiency and/or disputes over the proposed remedial measures. The conciliation process shall include at least one face-to-face meeting between representatives of the parties; and if such meeting does not achieve conciliation, then the conciliation process shall continue with a prompt mediation session before a judicial officer, if feasible under the timeframes in this Agreement. During the conciliation process, Virginia shall have the right, but shall not be required, to support its position by disclosing relevant portions of its expert reports.

VIII. Motion to Restore the Action.

1. In the event Virginia and the United States are unable to resolve any dispute concerning the United States' allegations of Virginia's failure to implement the Plan or a provision of the Plan, but in no event earlier than the end of the eighth month following the Notice Date, the United States may file a motion to vacate the dismissal without prejudice and to restore the Action to the Court's active docket ("Motion to Restore") for the purpose of adjudicating allegations by the United States that Virginia has failed to substantially comply with the Plan.

2. The Motion to Restore shall (i) identify those portions of the Plan the United States alleges that Virginia has violated, specifying Plan page numbers, paragraphs and subparagraphs; and (ii) identify with reasonable specificity the remedial measure sought by the United States.

3. Any Motion to Restore shall be served upon counsel for Virginia by certified mail, return receipt requested.

4. Unless a different time is ordered by Order of the Court, Virginia shall have twenty (20) days from the receipt of such motion to file its response.

5. Upon the filing of the Motion to Restore, the Action shall be litigated in accordance with the applicable Federal Rules of Civil Procedure, Local Rules, and orders of the Court, including but not limited to such rules and orders pertaining to discovery; provided, however, that the Complaint shall be deemed amended and superseded in accordance with the allegations set forth within the Motion to Restore pursuant to ¶ 2 above.

6. The United States shall have the burden of proof. To prevail, the United States must show that Virginia failed to achieve substantial compliance with the Plan.

7. The parties shall request the Court to hear such motions and to conduct such trial as may be necessary to adjudicate the Motion to Restore and the Action, including the allegations set forth pursuant to ¶ 2 above. If the Court finds that Virginia is in substantial compliance with the Plan, it shall dismiss this Action with prejudice. If the Court finds that Virginia is not in substantial compliance with the Plan, it may order specific performance of those portions of the Plan which the Court finds Virginia has violated.

8. The exclusive remedy for any alleged failure by Virginia to achieve substantial compliance with the Plan shall be an Order for specific performance pursuant to ¶ 7 above; provided, however, that this limitation shall not be construed as an attempt to limit the power of the court in the event any such order for specific performance is entered and thereafter violated. Any such order for specific performance may be directed against Virginia and/or such officials whom the Court may determine are responsible for such violations. Neither Virginia nor any officials thereof shall be subject to a finding of, or sanctions for, contempt unless an order for specific performance has been entered pursuant to a Motion to Restore and is thereafter violated in such a manner as to make such a finding or sanctions appropriate. The provisions of this paragraph are of the essence of this Agreement.

IX. Emergency Provision.

1. The United States may seek immediate relief from the Court for the limited purpose of redressing an alleged emergency at NVTC. An emergency shall be defined as a pattern or practice of violating the Plan that creates an immediate, substantial risk of serious bodily harm to NVTC resident(s).

2. In any motion seeking relief for an alleged emergency, the United States shall file an enhanced pleading which sets forth the specific facts on which an emergency is alleged, the specific violations of the Plan, and the legal basis for the allegations (hereinafter "Motion for Emergency Relief").

3. The parties shall confer in good faith in an effort to resolve any such allegations prior to filing any such Motion for Emergency Relief.

4. Any Motion for Emergency Relief shall be served upon counsel for Virginia by certified mail, return receipt requested.

5. Unless a different time is ordered by Order of the Court, Virginia shall have twenty (20) days from the receipt of such motion to file its response.

6. Upon the filing of any Motion for Emergency Relief, the motion shall be litigated in accordance with the applicable Federal Rules of Civil Procedure, Local Rules, and orders of the Court, including, but not limited to, such rules and orders pertaining to discovery.

7. The United States shall have the burden of proof. To prevail, the United States must prove the existence of an emergency as defined in ¶ 1 above.

8. The parties shall request the Court to hear such motions and to conduct such trials as may be necessary to adjudicate the Motion for Emergency Relief, including the allegations as required by ¶ 2 above. If the Court finds that no emergency exists, it shall dismiss the Motion with prejudice. This dismissal shall have no effect on the United States' ability to file a Motion to Restore pursuant to § VIII. If the Court finds that an emergency exists, it may order specific performance of those portions of the Plan which the Court finds gave rise to the emergency.

9. The exclusive remedy for an alleged emergency shall be specific performance, pursuant to ¶ 8 above; provided, however, that this limitation shall not be construed to limit the power of the court in the event any such order for specific performance is entered and thereafter violated. Any order for specific performance may be directed against Virginia and/or such officials whom the Court may determine are responsible for such emergencies. Neither Virginia nor any officials thereof shall be subject to a finding of, or sanctions for, contempt unless an

order for specific performance has been entered pursuant to a Motion for Emergency Relief and is thereafter violated in such a manner as to make such findings or sanctions appropriate.

X. Interpretation of the Plan.

1. The parties recognize that portions of the Plan must be interpreted in light of standards not expressly set forth in the Plan. In such cases, for purposes of determining whether NVTC has implemented the Plan, or any portion thereof, the parties agree that the relevant and applicable standard shall be as follows: Decisions by Virginia with respect to the implementation of policies, procedures, and other activities required by the Plan shall be evaluated for the purpose of determining compliance with the Plan by the "professional judgment" standard articulated in *Youngberg v. Romeo*, 457 U.S. 457 (1982).

2. This Agreement, together with attachments, is an integrated document and contains the entire agreement between the parties, and wholly cancels, terminates, and supersedes any and all previous and/or contemporaneous oral agreements, negotiations, and commitments and writings between the parties thereto with respect to this Action and NVTC.

3. Except as provided in ¶ 7 below, no change, modification, extension, termination, discharge, abandonment or waiver of this Agreement or any of the provisions hereof, nor any representation, promise or condition relating to this Agreement shall be binding upon the parties hereto unless made in writing and signed by the parties or their counsel.

4. Nothing contained in this Agreement or in the Plan shall be construed as an admission or evidence (i) that practices at NVTC at anytime or in any way violated constitutional standards or other legal standards governing the provision of care at NVTC, (ii) that the terms of the Agreement or the Plan are necessary to meet constitutional standards or other legal

standards governing the provision of care at NVTC, or (iii) that the policies, practices, and procedures described in the Plan did not exist at NVTC prior to the initiation of the CRIPA investigation, nor shall this Agreement nor the Plan be used by any person or party as the basis for any liability of Virginia except as expressly provided herein with respect to this Action.

5. Each of the terms of the Agreement and the Plan shall be deemed to have been mutually drafted by the parties, and shall not be construed against either party as the author thereof.

6. Deadlines and time references (e.g. use of present and past tenses) used in the Plan shall be treated as NVTC's internal planning objectives and reflect NVTC's schedule for implementation as of the original and/or a revised date of the Plan. They may be used for purposes of consultation between the United States and Virginia, pursuant to the Consultation Tour provided by § V. Notwithstanding such deadlines and time references, NVTC shall be deemed to have implemented the Plan for all purposes under this Agreement if it has been implemented by the Notice Date.

7. Virginia shall have the right to propose modifications to the Plan from time to time by giving the United States written notice of the language proposed for deletion from and/or addition to the Plan. Such proposed modifications shall be deemed effective for all purposes under this Agreement on the date specified in the proposal unless the United States gives Virginia written notice of its objection within thirty days of its receipt of the proposed modification.

8. Virginia shall not be deemed to have failed to achieve substantial compliance with the Plan due to any shortage of staff where such shortage is the result of an unusual level of

absences beyond Virginia's reasonable control, or vacancies created by the death, discharge, retirement or resignation of any employee or by the creation of new positions in response to an increase in census, so long as Virginia takes necessary steps to fill any such vacancies with reasonable promptness.

XI. Miscellaneous.

1. The parties shall request that the Motion to Restore and any other proceeding held in this case be heard by the Honorable Leonie M. Brinkema, United States District Judge. Any party may file a motion to vacate the dismissal without prejudice and to restore the case to the active docket for the limited purpose of adjudicating an alleged violation of § V, VI or VII of this Agreement. Any such motion shall be adjudicated pursuant to the Federal Rules of Civil Procedure and the local rules of this Court. Any such motion shall state the paragraphs of the Agreement that are alleged to be violated. The exclusive remedy for any such violation shall be an order for specific performance. Any such order for specific performance shall be directed against such officials whom the Court may determine are responsible for such violations. No party nor any official thereof shall be subject to a finding of, or sanctions for, contempt unless such an order for specific performance has been hereafter entered and is thereafter violated in such a manner as to make such finding or sanctions appropriate. The parties shall attempt in good faith to resolve any dispute prior to filing any motion alleging a violation of this Agreement.

2. This Agreement shall be applicable to and binding on the parties to the Agreement, their officers, agents, employees, and successors.

3. Notwithstanding any other provision of this agreement, the United States shall

have no standing to seek, nor shall it be entitled to entry of, any order for specific performance that would, as a practical matter, require the expenditure of funds in any biennium in excess of the level of funding appropriated for the facility by the General Assembly in the 1996-98 biennium. Virginia represents its good faith belief that the funding for the 1996-1998 biennium is sufficient to implement the Plan.

4. This Agreement and the Rule 41(a)(2) Dismissal referenced in this Agreement resolve all of the allegations raised in the Complaint. The United States shall not amend its Complaint (except as provided in § VIII, ¶¶ 2, 8 above) nor file any new CRIPA action based on events at NVTC occurring prior to any dismissal with prejudice of this Action.

5. Each party shall bear its own costs, including attorney's fees, except that Virginia may move for attorney's fees pursuant to 28 U.S.C. § 1997a(c) at the conclusion of any proceeding brought by the United States pursuant to §§ VIII and IX herein.

6. An executed copy of this Agreement shall be filed with the Clerk of the Court, and a copy delivered to the Honorable Leonie M. Brinkema, United States District Judge.

7. The following shall govern the termination of Virginia's obligations under the Agreement and Plan:

(a) subject to the provisions of subparagraph (b), Virginia's obligation with respect to the Agreement and the Plan shall terminate nine months from the Notice Date or with the entry of a Dismissal with Prejudice, whichever is earlier.

(b) With respect to any provisions of the Plan which are the subject of a Motion to Restore under § VIII, the obligations of such provisions shall continue pending an adjudication of such Motion to Restore.

(c) With respect to any provisions of the Plan for which the Court has entered an order for specific performance, the parties agree to jointly move the Court to dismiss such orders and to dismiss the case with prejudice within one year from the date such order for specific performance was entered, unless and to the extent that the United States has moved for a finding of civil contempt with respect to such order within said one year period.

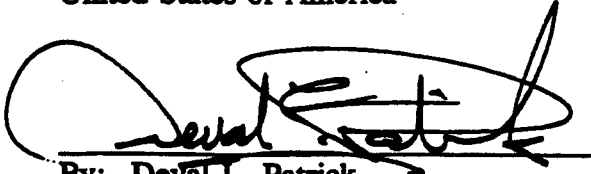
(d) If the United States moves for a finding of civil contempt, but the Court finds no such contempt, Virginia's obligations under the Agreement and Plan shall terminate as of that time with respect to the provision(s) that was the subject of said motion for contempt.

(e) If a finding of civil contempt has been made, the obligations under the provisions of the Plan with respect to which such finding has been made shall be extended for such period as may be required by the Court as a remedy for such contempt.

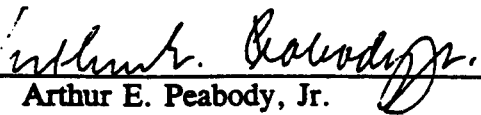
8. This Settlement Agreement is signed on behalf of the United States by Deval L. Patrick, Assistant Attorney General and other counsel of record for the United States, and on behalf of the Commonwealth of Virginia by William H. Hurd, Deputy Attorney General and other counsel of record for the Commonwealth of Virginia. Each of said counsel represents that he has and/or has obtained all authority necessary to sign on behalf of the United States and the Commonwealth of Virginia, respectively. Counsel for the Commonwealth further represent that they execute this Settlement Agreement on behalf of the Commonwealth with the authorization, consent and/or approval of the other Defendants in this case, to-wit: Governor George F. Allen, Secretary Robert C. Metcalf, Commissioner Timothy A. Kelly, Janet W. Hill, Director of

Mental Retardation Services and David H. Lawson, Director of the Northern Virginia Training Center.

United States of America



By: DeVal L. Patrick
Assistant Attorney General
Civil Rights Division



By: Arthur E. Peabody, Jr.
Chief
Special Litigation Section



By: David Deutsch
Senior Trial Attorney
Special Litigation Section

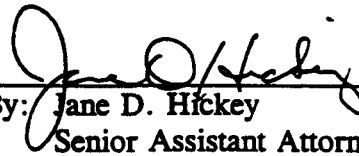


By: Richard Parker
Assistant United States Attorney

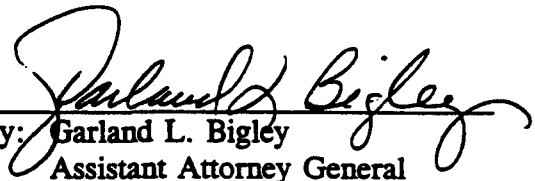
Commonwealth of Virginia



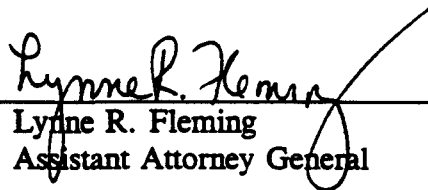
By: William H. Hurd
Deputy Attorney General



By: Jane D. Hickey
Senior Assistant Attorney General



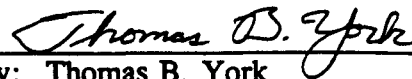
By: Garland L. Bigley
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By: Lynne R. Fleming
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