UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NEW YORK and THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, Defendants.	Civil No. _____

SETTLEMENT AGREEMENT

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I. INTRODUCTION

1. This Settlement Agreement ("Agreement") is entered into between the United States of America, through the Department of Justice (the "United States"), the State of New York ("State"), and the New York State Office of Children and Family Services ("OCFS") (collectively, "Parties") to address conditions at four juvenile justice facilities: the Finger Lakes Residential Center ("Finger Lakes," formerly known as the Louis Gossett Jr. Residential Center) and Lansing Residential Center ("Lansing") in Lansing, New York, and the Tryon Residential Center ("Tryon Boys") and the Tryon Girls Center ("Tryon Girls") in Johnstown, New York (collectively, "Facilities").

2. This Agreement resolves the investigation of the Facilities conducted by the United States pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, and the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141").

3. On December 14, 2007, the United States notified State officials of its intent to investigate conditions of confinement at the Facilities. On June 2-5, June 30-July 3, November 12-14, and November 24-26, 2008, the United States conducted on-site inspections of the Facilities with experts in protection from harm, use of force, and mental health care.

4. The State has cooperated and negotiated in good faith with the United States regarding its investigation of the Facilities, provided the United States and its consultants full access to the toured Facilities and documents, and was receptive to the on-site recommendations of the Department of Justice's consultants.

5. On August 14, 2009, the United States issued a Findings Letter pursuant to 42 U.S.C. § 1997(a)(1), which concluded that certain conditions at the Facilities violated the constitutional rights of juveniles committed to the Facilities ("Findings Letter").

6. Prior to the issuance of the Findings Letter by the United States that forms the basis of this Agreement, in September 2008, Governor Paterson convened a Task Force on Transforming New York's Juvenile Justice System. The Task Force was charged in part with examining the needs of adjudicated youth in the care and custody of OCFS. The United States recognizes that the State of New York, through the convening of the Task Force and other actions, has taken independent steps to transform the State's juvenile placement facilities.

7. While not named as Parties to this Agreement, the State recognizes that the cooperation of other state agencies will be required to comply with this Agreement. In the event that the State enters into contracts with non-governmental third parties to perform any of the obligations identified in this Agreement, the State will incorporate by reference the terms and conditions of this Agreement into such contracts, and will take all actions reasonably necessary to enforce such terms and conditions.

8. Nothing in this Agreement shall prevent the State from modifying or closing any or all of the Facilities or from developing alternative community placements for youth placed at the Facilities.

9. This Agreement is not intended to have any preclusive effect except between the Parties. Should the issue of the preclusive effect of this Agreement be raised in any proceeding other than this civil action, the Parties agree to certify that this Agreement was intended to have no such preclusive effect.

10. This Agreement is not intended to be used to prove deficiencies in the level of care provided by the Defendants at any of the Facilities in any proceeding other than an enforcement action between the Parties.

11. No person or entity is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no person or entity may assert any claim or right as a beneficiary or protected class under this Agreement. This Agreement is not intended to impair or expand the right of any person or organization to seek relief against the State, or its officials, employees, or agents for their conduct; accordingly, this Agreement does not alter legal standards governing any such claims, including those under New York law.

12. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1345, and 42 U.S.C. § 14141. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

13. As long as the State's policies and procedures are in accordance with federal law and meet constitutional standards and the requirements of this agreement, the State of New York has the right to determine the philosophy by which it will operate its juvenile justice system.

14. To the extent that the State's implementation of this Agreement requires the exercise of professional judgment, the standard articulated in Youngberg v. Romeo, 457 US 307 (1982), shall be applied.

15. For purposes of this Agreement only and in order to settle this matter, the Parties stipulate that this Agreement complies in all respects with the provisions of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a) ("PLRA").

16. The Parties stipulate and agree that all of the prospective relief in this Agreement is narrowly drawn and extends no further than necessary.

17. The issue of liability has not been litigated. The Parties ask the Court to approve this Agreement without a full hearing on the merits, on the basis of the United States' complaint and the above stipulations.

18. This Agreement shall constitute the entire integrated agreement of the Parties. With the exception of the Findings Letter referenced in paragraph 5 hereof, no prior contemporaneous communications, oral or written, or prior drafts shall be relevant or admissible for purposes of determining the meaning of any provisions herein in this litigation or in any other proceeding.

II. DEFINITIONS

As used in this Agreement, the following definitions apply:

19. "Consistent with generally accepted professional standards" shall mean a decision by a qualified professional that substantially complies with and is based upon contemporary and professional judgment, practice, or standards.

20. "Day" shall mean a calendar day.

21. "Effective Date" shall mean the date of service of the Court executed Agreement on the Defendants or their representatives.

22. "Facility" shall mean the Finger Lakes Residential Center, Lansing Residential Center, Tryon Girls Center, or Tryon Residential Center.

23. "Facilities" shall mean the Finger Lakes Residential Center, Lansing Residential Center, Tryon Girls Center, and Tryon Residential Center, collectively.

24. "Facility Administrator" shall mean the Facility Director.

25. "Finger Lakes" shall mean Finger Lakes Residential Center, formerly called the Louis Gossett Jr. Residential Center, located at 250 Auburn Road, Lansing, New York, or any facility that is used to replace or supplement Finger Lakes.

26. "Lansing" shall mean the Lansing Residential Center, located at 270 Auburn Road, Lansing, New York, or any facility that is used to replace or supplement Lansing.

27. "Mental health crisis" shall mean an acute disturbance of thinking, mood, behavior, or social relationships that requires an immediate intervention. Indicators of such a disturbance may include, but are not limited to: suicidal threats, gestures or attempts; self-injurious or self-mutilative behavior; and behavioral manifestations of psychiatric disorders.

28. "OCFS" shall mean the New York State Office of Children and Family Services, which is responsible, for, among other things, the care, treatment, and rehabilitation of youth confined at the Facilities.

29. "Psychotropic medication" shall mean any substance used in the treatment of mental health problems or mental illness which exerts an effect on the mind and is capable of modifying mental activity or behavior.

30. "Qualified mental health professional" shall mean a mental health care provider authorized and sufficiently trained to provide the services he or she undertakes to provide.

31. "Restraint" shall mean any method that restricts, limits, or directs an individual's freedom of movement, including but not limited to mechanical restraints (e.g., handcuffs, belly chains, leg shackles) and physical restraints (e.g., manual holds). The term "restraint" does not include verbal directives, room confinement or use of restraints for transport.

32. "State" shall mean the State of New York, including the executive branch of the State government, and OCFS.

33. "Train" shall mean to instruct an individual or individuals in the skills addressed, including ongoing assessment of mastery of instructional material. Training shall be competency based and shall incorporate testing and instructional methods that establish minimal standards for defining staff competency.

34. "Treatment plan" shall mean a document that: sets out, in an integrated and coherent manner, all of the individualized treatments, behavioral interventions, counseling services, support services, and activities to be provided to a resident youth; includes individualized, specific goals and objectives for the resident youth to meet during his or her residence at a Facility; is based upon comprehensive assessments performed by an interdisciplinary team comprised of qualified professionals; reflects to the

fullest extent possible the resident youth's input and family input (where appropriate); identifies the youth's preferences, strengths, and needs; and specifies methods to track and document progress toward identified goals and objectives.

35. "Tryon Boys" shall mean the Tryon Residential Center, located at 881 County Highway 107, in Johnstown, New York, or any facility that is used to replace or supplement Tryon Boys.

36. "Tryon Girls" shall mean the Tryon Girls Center, located at 881 County Highway 107, in Johnstown, New York, or any facility that is used to replace or supplement Tryon Girls.

37. "United States" shall mean the United States Department of Justice, Civil Rights Division, which represents the United States in this matter.

38. "Use of force" shall mean any physical contact initiated by a staff person that intentionally restricts the movement of a youth, including a physical restraint.

39. "Youth" shall mean any person committed by a court to OCFS and who is residing at a Facility.

III. SUBSTANTIVE REMEDIAL MEASURES

A. Protection From Harm

40. The State shall, at all times, provide youth in the Facilities with reasonably safe living conditions as follows:

41. **Use of restraints.** The State shall require that youth must not be subjected to undue restraints. The State shall create or modify policies, procedures, and practices to require that the use of restraints be limited to exceptional circumstances, as set forth below, where all other appropriate pro-active, non-physical behavioral management techniques have been tried and failed and a youth poses a danger to himself/herself or others. Restraints shall never be used to punish youth. Accordingly, restraints shall be used only in the following circumstances:

    i. where emergency physical intervention is necessary to protect the safety of any person;

    ii. where a youth is physically attempting to escape the boundary of a Facility; or

iii. where a youth's behavior poses a substantial threat to the safety and order of the Facility.

Further, the State shall:

a. Create or modify and implement policies, procedures, and practices to require that in the limited circumstances when the use of restraints is necessary, staff shall employ only the minimum amount of physical control and time in restraints necessary to stabilize the situation.

b. Create or modify and implement policies, procedures, and practices regarding the application of restraints to youth at heightened risk of physical or psychological harm from restraints, including, but not limited to, youth who are obese, have serious respiratory or cardiac problems, have histories of sexual or physical abuse, or are pregnant.

c. If face-down restraints continue to be used, create or modify and implement policies, procedures, and practices to require that staff utilize them only in emergencies when less restrictive measures would pose a significant risk to the safety of the youth, other youth, or staff. In addition:

    i. Face-down restraints shall be employed for only as long as it takes to diffuse the emergency, but in no event shall a youth be restrained in a face-down position for more than three (3) minutes.

    ii. Trained staff shall monitor youth for signs of physical distress and the youth's ability to speak while restrained.

    iii. Medical personnel shall be immediately notified of the initiation of a face-down restraint position, and the youth shall be immediately assessed by medical personnel thereafter. In no event shall more than 4 hours lapse between the end of a face-down restraint incident and the assessment of the involved youth by medical staff.

d. Prohibit the use of chemical agents such as pepper spray for purposes of restraint.

e. Prohibit use of psychotropic medication solely for purposes of restraint.

f. Create or modify and implement policies, procedures, and practices to require that staff are adequately trained in appropriate restraint techniques, procedures to monitor the safety and health of youth while restrained, first aid, and cardiopulmonary resuscitation ("CPR"). The State shall require that only those staff with current training on the appropriate use of restraints are authorized to utilize restraints.

42. **Use of force.** In order to adequately protect youth from excessive use of force at the Facilities, the State shall:

a. Continue to prohibit "hooking and tripping" youth and using chokeholds on youth.

b. Create or modify and implement a comprehensive policy and accompanying practices governing uses of force, which shall provide, among other things, that the least amount of force necessary for the safety of staff and youth is used.

c. Create or modify and implement policies, procedures, and practices to require that staff adequately and promptly document and report all uses of force.

d. Create or modify and implement a system for review, by senior management, of uses of force and alleged child abuse so that they may use the information gathered to improve training and supervision of staff, guide staff discipline, and/or make policy or programmatic changes as needed.

e. Establish procedures and practices whereby each Facility Administrator or his or her designee will conduct weekly reviews of the use of force reports and videotaped incidents involving uses of force to evaluate proper techniques. Upon this review, staff who exhibit deficiencies in technique(s) shall be prohibited from using force until such staff receive documented instruction on the proper technique(s).

f. Train direct care staff in conflict resolution and approved uses of force that minimize the risk of injury to youth. The State shall only use instructors who have successfully completed training designed for use of force instructors. All training shall include each staff member's demonstration of the approved techniques and require that each staff member meet the minimum standards for competency established by the method. Direct care staff skills in employing the method shall be periodically re-evaluated. Staff who demonstrate deficiencies in technique or method shall be re-trained at least every six months until

they meet minimum standards for competency established by the method. Supervisory staff who are routinely involved in responding to incidents and altercations shall be trained to evaluate their subordinates' uses of force and must provide evaluation of the staff's proper use of these methods in their reports addressing use of force incidents.

43. **Emergency response.** The State shall create or modify and implement policies, procedures, and practices relative to staff use of personal safety devices (sometimes referred to as "pins") to call for assistance in addressing youth behavior. To this end, the State shall:

a. Immediately revoke the December 18, 2007 directive to staff of Finger Lakes to "push the pin."

b. Create or modify policies providing staff with guidelines as to when a call for assistance is appropriate.

c. Create or modify policies and procedures regarding the appropriateness of the response to the situation presented.

d. Require administrators of each Facility to submit an emergency response plan for review and approval in accordance with statewide policy.

e. Train all Facility staff in the operation of the above policy and procedures.

44. **Reporting and investigation of incidents.** The State shall adequately report, investigate, and address the following allegations of staff misconduct:

i. inappropriate use of restraints;

ii. use of excessive force on youth; or

iii. failure of supervision or neglect resulting in:

(1) youth injury; or

(2) suicide attempts or self-injurious behavior.

To this end, the State shall:

a. Create or modify and implement policies, procedures, and practices to require that such incidents or allegations are reported to appropriate individuals, that such reporting may be done without fear of retaliation, and that such reporting be done in a manner that preserves confidentiality to the extent possible, consistent with the need to investigate and address allegations.

b. Create or modify and implement policies, procedures, and practices providing that such incidents or allegations are promptly screened and which establish criteria for prioritizing Facility investigations based on the seriousness and other aspects of the allegation. There shall be a prompt determination of the appropriate level of contact between the staff and youth, if any, in light of the nature of the allegation and/or a preliminary investigation of the credibility of the allegation. The determination shall be consistent with the safety of all youth. The determination must be documented.

c. Create or modify and implement policies, procedures, and practices to require that a nurse or other health care provider will question, outside the hearing of other staff or youth, each youth who reports to the infirmary with an injury regarding the cause of the injury. If, in the course of the youth's infirmary visit, a health care provider suspects staff-on-youth abuse, the health care provider shall immediately take all appropriate steps to preserve evidence of the injury, report the suspected abuse to the Statewide Central Register of Child Abuse and Maltreatment ("SCR"), document adequately the matter in the youth's medical record, and complete an incident report.

d. Create or modify and implement policies, procedures, and practices to require that all allegations of staff misconduct described above are adequately and timely investigated by neutral, trained investigators and reviewed by staff with no involvement or personal interest in the underlying event.

    i. Such policies, procedures, and practices shall address circumstances in which evidence of injuries to youth, including complaints of pain or injury due to inappropriate use of force by staff, conflicts with the statements of staff or other witnesses.

    ii. If a full investigation is not warranted, then the reasons why a full investigation is not conducted shall be documented in writing. In cases where a youth withdraws an allegation, a preliminary investigation shall be conducted to determine the

reasons for the withdrawal and, in cases where it is warranted, a full investigation will be conducted.

e. Create or modify and implement policies, procedures, and practices to require prompt and appropriate corrective measures in response to a finding of staff misconduct described above.

f. Provide adequate training to staff in all areas necessary for the safe and effective performance of job duties, including training in: child abuse reporting; the safe and appropriate use of force and physical restraint; the use of force continuum; and crisis intervention and de-escalation techniques. Routinely provide refresher training consistent with generally accepted professional standards.

g. Create or modify and implement policies, procedures, and practices to require adequate supervision of staff.

h. The State shall utilize reasonable measures to determine applicants' fitness to work in a juvenile justice facility prior to hiring employees for positions at the Facilities, including but not limited to state criminal background checks. The State shall update state criminal background checks and SCR clearances for all staff who come into contact with youth every two years.

B. Mental Health Care and Treatment

45. The State shall provide adequate and appropriate mental health care and treatment to youth consistent with generally accepted professional standards as follows:

46. **Behavioral treatment program.** The State shall provide an integrated, adequate, appropriate, and effective behavioral treatment program at the Facilities. To this end, the State shall:

a. Create or modify and implement policies, procedures, and practices for an effective behavioral treatment program consistent with generally accepted professional standards and evidence-based principles. The behavioral treatment program shall be implemented throughout waking hours, including during school time.

b. Create or modify and implement policies, procedures, and practices to require that mental health staff provide regular consultation regarding behavior management to direct care staff and other staff involved in the behavioral treatment program.

c. Create or modify and implement policies, procedures, and practices to regularly assess the effectiveness of the interventions utilized.

d. Explain the behavioral treatment program to all youth during an orientation session, setting forth Facility rules and the positive incentives for compliance as well as the sanctions for violating those rules. The rules for the behavioral treatment program shall be posted conspicuously in Facility living units.

47. **Mental health crises.** The State shall provide any youth experiencing a mental health crisis with prompt and adequate mental health services appropriate to the situation. To this end, the State shall:

a. Train all appropriate staff, including direct care staff, on appropriate, positive strategies to address a youth's immediate mental health crisis, including a crisis manifesting in self-injurious behavior or other destructive behavior. Such strategies should be utilized in an effort to stabilize and calm the youth, to the extent possible, while awaiting the arrival of a qualified mental health professional. Staff shall not resort to uses of force, including restraints, except as provided in paragraphs 41 and 42, *supra*.

b. Create or modify and implement policies, procedures, and practices for contacting a qualified mental health professional outside of regular working hours in the event of a youth's mental health crisis or other emergency situation.

c. Require that any youth who experiences a mental health crisis and resorts to maladaptive coping strategies, such as self-injurious behavior, is referred for mental health services following the resolution of the immediate crisis. A qualified mental health professional shall develop a crisis management plan in conjunction with the youth and his or her other mental health service providers. The crisis management plan shall specify methods to reduce the potential for recurrence through psychiatric treatment, treatment planning, behavioral modification, and environmental changes, as well as a strategy to help the youth develop and practice positive coping skills. Such services shall continue throughout the duration of the youth's commitment to the Facility.

48. **Evaluation of mental health needs.** The State shall require that youth with mental health needs are timely identified and provided adequate mental health services. To this end, the State shall:

a. Create or modify and implement policies, procedures, and practices to require that each youth admitted to a Facility is comprehensively screened by a qualified mental health professional in a timely manner utilizing reliable and valid measures. The State shall require that any youth whose mental health screening indicates the possible need for mental health services receives timely, comprehensive, and appropriate assessment by a qualified mental health professional and referral when appropriate to a psychiatrist for a timely mental health evaluation.

b. Require that any youth whose mental health screen identifies an issue that places the youth at immediate risk is immediately referred to a qualified mental health professional. The qualified mental health professional shall determine whether assessment or treatment is necessary. A determination to transfer a youth to a more appropriate setting on other than an emergency basis shall require consultation with a committee designated by OCFS' Deputy Commissioner for Juvenile Justice and Opportunities for Youth ("DJJOY") or his or her designee or successor. Such committee may include qualified mental health professionals at OCFS' central office. If a determination is made that the youth should be transferred to a more appropriate setting, the State shall immediately initiate procedures to transfer the youth to such setting.

c. Require that assessments take into account new diagnostic and treatment information that becomes available, including information about the efficacy or lack of efficacy of treatments and behavioral interventions.

d. Create or modify and implement policies, procedures, and practices to require that for each youth receiving mental health services, the youth's treating qualified mental health professional(s), including the treating psychiatrist, if applicable, develop a consistent working diagnosis or diagnoses. The diagnosis or diagnoses shall be updated uniformly among all qualified mental health professionals providing services to the youth.

e. Create or modify and implement policies, procedures, and practices to require that both initial and subsequent psychiatric evaluations are consistent with generally accepted professional standards. Initial evaluations shall be legibly written and detailed, and shall include, at minimum, the following information for each youth evaluated:

i. current mental status;

ii. history of present illness;

iii. current medications and response to them;

iv. history of treatment with medications and response, including adverse side effects or medication allergies;

v. social history;

vi. substance abuse history;

vii. interviews of parents or guardians;

viii. review of prior records; and

ix. explanation of how the youth's symptoms meet diagnostic criteria for the proffered diagnosis or diagnoses.

49. **Use of psychotropic medications.** The State shall require that the prescription and monitoring of the safety, efficacy, and appropriateness of all psychotropic medication use is consistent with generally accepted professional standards. To this end, the State shall:

a. Create or modify and implement policies, procedures, and practices to require that any psychotropic medication is:

i. prescribed only when it is tied to current, clinically justified diagnoses or clinical symptoms;

ii. tailored to each youth's symptoms;

iii. prescribed in therapeutic amounts, as dictated by the needs of the youth served;

iv. modified based on clinical rationales; and

v. documented in the youth's record with: (1) the name of each medication; (2) the rationale for the prescription of each medication; and (3) the target symptoms intended to be treated by each medication.

b. Create or modify and implement policies, procedures, and practices for the routine monitoring of psychotropic medications, including:

i. establishing medication-specific standards and schedules for laboratory examinations;

ii. monitoring appropriately for common and/or serious side effects, including requiring that staff responsible for medication administration regularly ask youth about side effects they may be experiencing and document responses;

iii. establishing protocols for timely identification, reporting, data analyses, and follow up remedial action regarding adverse drug reactions;

iv. monitoring for effectiveness against clearly identified target symptoms and time frames;

v. requiring that such medications are used on a time-limited, short-term basis where such use is appropriate, and not as a substitute for adequate treatment of the underlying cause of the youth's distress;

vi. requiring that youth are not inhibited from meaningfully participating in treatment, rehabilitation, or enrichment and educational services as a result of excessive sedation; and

vii. establishing protocols for reviewing such policies and procedures to require that they remain consistent with generally accepted professional standards.

c. Require that the results of laboratory examinations and side effect monitoring are reviewed by the youth's psychiatrist, if applicable, and that such review is documented in the youth's record.

50. **Staff training on psychotropic medications and psychiatric disabilities.** The State shall create or modify policies and procedures requiring staff in Facilities to complete competency-based training on psychotropic medications and psychiatric disabilities.

a. The training shall provide, at minimum, an overview of the behavioral and functional impact of psychiatric disabilities on youth, common treatments for such psychiatric disabilities, including both behavioral and pharmaceutical interventions; commonly used

medications and their effects, including potential adverse side effects and intended benefits; and warning signs that a youth may be suffering a serious adverse effect of a psychotropic medication and the immediate and follow-up actions to be taken by the staff in such an incident.

b. The State shall create or modify policies, procedures, and training materials for staff at all Facilities as follows:

i. Staff employed at the Facilities who routinely work directly with youth (but not including qualified mental health professionals or medical professionals) shall complete a minimum of six (6) hours of competency-based training regarding psychotropic medications and psychiatric disabilities annually for the term of this Agreement. Such staff includes, but is not limited to, Youth Division Aides, Youth Counselors, teachers, recreation staff, licensed practical nurses, Facility Administrators, and Deputy Administrators.

ii. All other staff at the Facilities shall be required to complete a minimum of one (1) hour of competency-based training regarding psychotropic medications and psychiatric disabilities annually for the term of this Agreement.

51. **Psychotropic medication refusals.** The State shall create or modify and implement policies, procedures, and practices regarding psychotropic medication refusals by youth which provide, at minimum, as follows:

a. All youth who are scheduled to receive medication shall be taken without the use of force to the medication administration location at the prescribed time. Any youth who expresses his or her intent to refuse medication shall communicate his or her refusal directly to medical staff.

b. In circumstances where staff's verbal efforts to convince a youth to report to the medication administration location results in an escalation of a youth's aggressive behavior, staff shall not forcibly take the youth to receive medication. Staff shall contact a supervisor to report to the location. The supervisor shall document the youth's refusal on a medical refusal form, and shall complete an incident report documenting the circumstances of the refusal, including the justification for not escorting the youth to medication.

c. A medical refusal form shall be completed each time a youth is scheduled to receive medication and refuses. In addition to the date and time, youth's name, and prescribed medication which the youth is refusing, the form shall include an area for either the youth or a staff person to record the youth's stated reason for refusing medication, an area for the youth's treating psychiatrist to certify that s/he has reviewed the medication refusal form, and a signature line for the refusing youth.

d. The youth's psychiatrist shall receive, review, and sign all medication refusal forms prior to meeting with the youth.

e. The youth's treatment team shall address his or her medication refusals.

52. **Informed consent.** The State shall revise its policies and procedures for obtaining informed consent for the prescription of psychotropic medications consistent with generally accepted professional standards. In addition, the State shall require that the information regarding prescribed psychotropic medications is provided to a youth and to his or her parents or guardians or person(s) responsible for the youth's care by an individual with prescriptive authority, such as a psychiatric nurse practitioner. This information shall include:

i. the purpose and/or benefit of the treatment;

ii. a description of the treatment process;

iii. an explanation of the risks of the treatment;

iv. a statement of alternative treatments, including treatment without medication; and

v. a statement regarding whether the medication has been approved for use in children.

53. **Treatment planning.** The State shall develop and maintain adequate formal treatment planning consistent with generally accepted professional standards. To this end, the State shall:

a. Create or modify and implement policies, procedures, and practices regarding treatment planning which address, among other elements, the required content of treatment plans and appropriate participants of a youth's treatment team.

b. Require that treatment teams focus on the youth's treatment plan, not collateral documents such as the "Resident Behavior Assessment."

c. Require that the youth is present at each treatment team meeting, unless the youth is not physically located in the Facility during the meeting or the youth's presence is similarly impracticable, and that, if applicable, the youth's treating psychiatrist attend the treatment team meeting a minimum of every other meeting.

d. If a youth has a history of trauma, require that treatment planning recognizes and addresses the youth's history of trauma and its impact, and includes a strategy for developing appropriate coping skills by the youth.

e. Require that treatment plans are individualized for each youth, and that treatment plans include:

    i. identification of the mental and/or behavioral health issues to be addressed in treatment planning;

    ii. a description of any medication or medical course of action to be pursued, including the initiation of psychotropic medication;

    iii. a description of any individual behavioral treatment plan or individual strategies to be undertaken with the youth;

    iv. a description of the qualitative and quantitative measures to monitor the efficacy of any psychotropic medication, individual behavioral treatment plan, or individual strategies utilized with the youth;

    v. a description of any counseling or psychotherapy to be provided;

    vi. a determination of whether the type or level of treatment needed can be provided in the youth's current placement; and

    vii. a plan for modifying or revising the treatment plan if necessary.

f. Require that treatment plans are modified or revised as necessary, based on the efficacy of interventions, new diagnostic information, or other factors. The treatment plan shall be updated to reflect any changes in the youth's mental health diagnosis.

54. **Substance abuse treatment.** The State shall create or modify and implement policies, procedures, and practices to require that:

a. all youth who have a suspected history of substance abuse are provided with adequate prevention education while residing at a Facility; and

b. all youth who are known to have current problems with substance abuse or dependence are provided adequate treatment for those problems while residing at a Facility.

55. **Transition planning.** The State shall require that each youth who has mental health issues, or who has been or is receiving substance abuse treatment, who is leaving a Facility has a transition plan. The State shall create or modify and implement policies, procedures, and practices for the development of a transition plan for each such youth. The transition plan shall include information regarding:

a. mental health resources available in the youth's home community, including treatment for substance abuse or dependence if appropriate;

b. referrals to mental health or other services when appropriate; and

c. provisions for supplying psychotropic medications, if necessary, upon release from the Facility.

C. Document Development and Quality Assurance

56. **Document development and revision.** Consistent with paragraph 68 of this Agreement, the State shall create or modify policies, procedures, protocols, training curricula, and practices to require that they are consistent with, incorporate, address and implement all provisions of this Agreement. In accordance with paragraph 68 of this Agreement, the State shall create or modify, as necessary, other written documents – such as screening tools, handbooks, manuals, and forms – to effectuate the provisions of this Agreement. The State shall submit all such documents to the United States for review and approval, which shall not be unreasonably withheld.

57. **Quality assurance programs.** The State shall create or modify and implement quality assurance programs consistent with generally accepted professional standards for each of the substantive remedial areas addressed in this Agreement. In addition, the State shall:

a. create or modify and implement policies and procedures to address problems that are uncovered during the course of quality assurance activities; and

b. create or modify and implement corrective action plans to address identified problems in such a manner as to prevent them from occurring again in the future.

IV. IMPLEMENTATION AND MONITORING

58. The State shall implement all reforms necessary to effectuate this Agreement within twenty-three (23) months of the Effective Date of this Agreement**.** If the State cannot fully implement the reforms required by this Agreement within the allotted time, the State shall notify the United States pursuant to paragraph 83 of this Agreement.

59. Within two weeks of the Effective Date, the State shall communicate the provisions set forth in this Agreement to officials, employees, agents, and independent contractors who are involved in providing care to the youth confined at the Facilities.

60. The State shall require that youth admitted prior to the Effective Date of this Agreement and residing at any of the Facilities are afforded all of the same protections and services provided by this Agreement to youth admitted on or subsequent to the Effective Date.

61. **Monitoring Team.** Compliance with this Agreement shall be assessed by a Monitoring Team of two jointly selected subject matter experts ("Monitors") consisting of one expert in the area of protection from harm and one expert in the area of mental health services.

a. The State shall bear all reasonable fees and costs of the Monitoring Team. Payment for travel and lodging shall be at the applicable federal government rate.

b. The Monitors shall be permitted to initiate and receive ex parte communications with all Parties.

c. All non-public information obtained by the Monitors shall be maintained in a confidential manner.

d. Except as required or authorized by the terms of this Agreement or the Parties acting together, no member of the Monitoring Team shall make any oral or written public statements – including but not limited to

statements to the press, conference presentations, lectures, or articles – with regard to: the status of the State's compliance or noncompliance with this Agreement; any act or omission of the State or its agents, representatives or employees; or the terms of his or her employment on the Monitoring Team.

e. Except as required or authorized by the terms of this Agreement or the Parties acting together, no Monitor shall testify in any other litigation or proceeding with regard to the status of the State's compliance or noncompliance with this Agreement; any act or omission of the State or its agents, representatives or employees; or the terms of his or her employment on the Monitoring Team, unless otherwise lawfully compelled to do so. The Monitors may testify in this litigation concerning the State's compliance or noncompliance with this Agreement.

f. Unless such conflict is waived by both Parties, members of the Monitoring Team shall not accept employment or provide consulting services that would present a conflict of interest with their 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 State or its departments, officers, agents or employees concerning matters relevant to this Agreement.

g. Neither Party, nor any employee or agent of either Party, shall have any supervisory authority over the Monitoring Team's activities, reports, findings, or recommendations.

h. Members of the Monitoring Team may be terminated if both Parties agree and upon good cause shown. Good cause shall include any violation of State or federal law which reasonably calls into question the Monitoring Team member's fitness to continue serving as a member of the Monitoring Team. In the event the Parties do not agree upon the need for termination, the Parties agree to work in good faith to resolve their differences.

62. **Monitoring Team access to Facilities and records.** In order to assess the State's implementation of each substantive provision of this Agreement, the Monitoring Team will conduct regular compliance reviews to ensure that the State has implemented and continues to implement all measures required by this Agreement.

a. The first compliance review will be conducted approximately eight (8) weeks from the approval of the master action plan as set forth in paragraph 64 of this Agreement. Thereafter, routine compliance reviews will be conducted by the Monitoring Team approximately every six (6) months at each of the Facilities until this Agreement is terminated. Such routine compliance reviews will assess the State's compliance with each of the substantive remedial measures set forth in Section III. The United States and the Monitoring Team shall consult with the State to schedule mutually acceptable dates for the compliance reviews.

b. The United States may determine that an additional compliance review or reviews is necessary due to emergent issues at a Facility (including but not limited to the death of a youth or receipt of credible allegations of sexual abuse by staff of youth) or recurring problems with substantive provision(s) of the Agreement. If the United States believes that such additional compliance reviews are necessary, the United States and the Monitoring Team shall consult with the State to schedule mutually acceptable dates for such additional compliance reviews.

c. At each compliance review, each Monitor shall have the responsibility and authority to independently observe, assess, review, and report on the State's implementation and compliance with the provisions of this Agreement. In order to accurately assess conditions at each Facility, each Monitor shall: conduct on-site inspections; observe programs and activities; interview pertinent administrators, professional staff, direct care staff, and contractors; individually interview a sample of youth; and conduct detailed reviews of youth records and other pertinent documents. The Monitoring Team shall spend a sufficient amount of time at each Facility in order to accurately assess day-to-day operations and conditions. The Monitoring Team shall be responsible for independently verifying representations from the State regarding progress toward compliance, examining supporting documentation where applicable.

d. Within sixty (60) days after each compliance review, the Monitoring Team shall file with the Court a final consolidated report which describes the steps taken by the State to implement this Agreement, evaluates the extent to which the State has complied with each substantive provision of the Agreement, cites the evidence upon which such evaluation is based, and provides recommendations. Each report shall be provided to the Parties in draft form for comment within twenty-eight (28) days after each compliance review, and the Parties

shall have twenty (20) days after receipt of the draft report to comment on the report before it is finalized by the Monitoring Team. Neither Party, however, shall have authority over the Monitoring Team's reports, findings, or recommendations.

e. For the purpose of ascertaining compliance with this Agreement, the Monitoring Team shall have reasonable access to: the buildings and grounds of each Facility; Facility documents and records; OCFS documents and records; Facility officials, employees, agents, and independent contractors; OCFS officials, employees, agents, and independent contractors; and youth residing at the Facilities, including the right to meet with youth privately. The Monitoring Team shall coordinate the timing of its on-site Facility visits and requests for documents so as to minimize disruption to Facility operations and State employee work functions. Such access shall continue until this Agreement is terminated in accordance with the termination provisions herein.

63. **Settlement agreement coordinator.** The State shall appoint a settlement agreement coordinator to oversee compliance with this Agreement. The settlement agreement coordinator shall:

a. Develop reports regarding compliance with this Agreement and provide such reports to the United States and the Monitoring Team every six months until this Agreement is terminated. The first report shall be provided by the settlement agreement coordinator six months after the approval of the master action plan as set forth paragraph 64 of this Agreement.

b. Provide to the United States and the Monitoring Team the raw data upon which each compliance report is based, any reports prepared by the State's technical consultants regarding compliance with this Agreement, and any other reports routinely submitted to the point of contact regarding compliance with this Agreement.

64. **Master Action Plan (MAP).** Within sixty (60) days of the Effective Date of this Agreement, the State shall submit to the United States for review and approval a master action plan ("MAP") to implement the provisions of the Agreement. The purpose of the MAP is to provide a practical framework for the actions the State and OCFS must take on both systemic and Facility-specific levels to effectuate the substantive provisions of this Agreement. It shall be periodically reviewed, modified, updated, and approved by the United States throughout the term of this Agreement. The MAP shall:

a. Set forth specific target and deadline dates for implementation of goals, objectives, and tasks to effectuate compliance with this Agreement in a timely and effective manner.

b. Include a timeline for the revision or development of written policies, procedures, protocols, training materials, screening and assessment tools, or other documents needed to effectuate the provisions of this Agreement.

c. Designate the persons responsible for oversight and implementation of tasks outlined in the MAP.

d. Include copies of any written policies, procedures, protocols, training materials, screening and assessment tools, or other documents relevant to the provisions of this Agreement and/or which are cited in the MAP, and that have been created or revised before the completion of the MAP.

Approval of the MAP and any subsequent modifications shall not be unreasonably withheld.

65. If requested by the State, the United States and the Monitoring Team will provide technical assistance to the State in developing the initial and subsequent iterations of the MAP.

66. If the United States has any objection to the MAP, it will provide its objections and recommended modifications to the MAP within thirty (30) days of receipt of the MAP from the State.

67. The State shall evaluate its adherence to the MAP in consultation with the United States and the Monitoring Team on at least an annual basis and on the basis of those consultations. The State shall update or modify the MAP in consultation with the United States and the Monitoring Team to effectuate compliance with this Agreement in a timely and effective manner.

68. **Document development and revision.** The State shall timely revise and/or develop policies and procedures, forms, screening tools, blank log forms, and other documents as necessary to ensure that they are consistent with, incorporate, address, and implement all provisions of this Agreement.

a. Within sixty (60) days of its receipt of the policies, procedures and other written documents, the United States shall provide either written approval of each document, or written concerns or objections it has to the documents that include proposed revisions. Such approval

shall not be unreasonably withheld. In the event that the United States asserts that policies, procedures, or other written documents are not in compliance with the terms of this Agreement, the Parties will confer on the matter for up to thirty (30) days. If it is ultimately determined by the Parties that revisions are required in order to make such policies consistent with this Agreement, the Parties shall within ten (10) days, agree to a schedule for the State to submit revisions. If the United States does not provide written approval or concerns regarding a document within ninety (90) days of receipt, the document shall be considered approved. If, after the policies, procedures, and practices affected by this Agreement are implemented, any of the Parties determines that a policy, procedure, or practice, as implemented, fails to effectuate the terms of this Agreement, the State shall consult with the United States and revise the policy, procedure, or practice to effectuate the terms of this Agreement.

69. **Request for technical assistance.** The United States, at its discretion, and the Monitoring Team agree to provide technical assistance to the State for policy/procedure development in general, and in particular, for policy/procedure and program development for girls' facilities, conflict resolution, appropriate use of restraints, security classification of youth, and positive youth development.

70. **United States access to Facilities and records.** The United States and its attorneys shall have full and complete access to: the buildings and grounds of each Facility; Facility documents and records; OCFS documents and records; Facility officials, employees, agents, and independent contractors; OCFS officials, employees, agents, and independent contractors; and youth residing at the Facilities, including the right to meet with youth privately. Such access shall continue until this Agreement is terminated in accordance with the termination provisions herein. The United States shall have the right to conduct unannounced visits to the Facilities; however, the United States shall generally coordinate the timing of its on-site Facility visits and requests for documents so as to minimize disruption to Facility operations and State employees' work functions.

71. **Response to questions.** Within thirty (30) days of the receipt of written questions from the United States regarding the State's compliance with this Agreement, the State shall provide the United States with written answers and access to any requested documents regarding the State's compliance with the requirements of this Agreement. The United States shall provide the State with written responses to any questions regarding the State's compliance with the Agreement within thirty (30) days of the receipt of such questions.

72. **Monitor's response to questions.** Within thirty (30) days of the receipt of written questions from the United States regarding a Monitor's activities in assessing compliance with this Agreement and/or the State's compliance with this Agreement, the Monitor shall provide the United States with written answers.

73. **Notification of the United States of incidents.** The State shall notify the United States no later than one business day after the State becomes aware of the following categories of incidents: youth death; any youth injury resulting in transport of the youth to the emergency room or requiring hospitalization; and allegations of custodial sexual misconduct involving sexual contact.

a. The State shall timely forward to the United States copies of all incident reports and final reports of investigations related to such incidents, as well as any autopsies, mortality reviews, and death summaries.

b. For the purposes of this provision, the requirement to notify the United States is met when the State contacts at least one of the Special Litigation Section trial attorneys assigned to this matter.

74. **Confidentiality.** With respect to non-public information, the Parties agree that there is a valid and relevant Confidentiality Agreement in place, attached hereto as addendum number 1, incorporated herein and made a part hereof, and further agrees to continue to abide by the terms thereof.

V. ENFORCEMENT AND TERMINATION

75. **Notice prior to judicial action.** With the exception of conditions or practices that pose an immediate and serious threat to the life, health, or safety of youth, if the United States believes that the State has failed to substantially comply with any obligation under this Agreement, the United States shall give written notice of the failure to the State prior to seeking judicial enforcement of the Agreement.

a. With the exception of an immediate or serious threat to life, health, or safety of youth residing at the Facilities, the State shall have thirty (30) days from the date of such written notice to cure the failure and provide the United States with sufficient proof of its cure if the failure can be cured within thirty (30) days. If the failure cannot be cured within thirty (30) days, the State shall promptly submit a plan to cure

the failure, but, in any event, no later than forty-five (45) days from receipt of the written notice.

b. If either the State or the United States believes or if the Parties agree that modification of this Agreement is required to cure the failure, the Party or Parties shall move the Court to modify the Agreement.

c. If the Parties agree to a plan to cure an alleged violation and the United States believes that the violation has still not been cured, the United States must provide at least fifteen (15) days notice before filing any motion with the Court.

d. In the event a disagreement occurs, the United States and the State commit to work in good faith to resolve disputes; provided, however, nothing in this subparagraph shall impede resolution of a matter deemed by the United States to present an immediate and serious threat to the life, health, or safety of youth.

e. The State reserves the right to seek judicial review, upon motion to the Court, in the event the United States makes a determination that the State has failed to substantially comply with any obligation under this Agreement.

76. **Exigent circumstances defense.** If the United States institutes judicial enforcement of this Agreement, the State reserves the right to raise as a defense exigent circumstances in the State, including but not limited to: economic recession, fiscal constraints, necessary diversion of resources and personnel in the event of widespread threat to public health, an act of war, or legal impossibility. The United States reserves the right to oppose any such claim.

77. **Termination.** This Agreement shall terminate in accordance with the following conditions:

a. The Agreement will terminate in its entirety when the United States certifies that the State is in substantial compliance with all provisions of this Agreement for twelve (12) consecutive months.

b. The State may, at any time during the term of this Agreement, request that the United States certify that the State has maintained substantial compliance with all provisions of this Agreement for twelve (12) consecutive months. If the United States so certifies, this Agreement will terminate in its entirety.

c. The State may, at any time during the term of this Agreement, request that the United States certify that the State has maintained substantial compliance for twelve (12) consecutive months with this Agreement with respect to one or more Facilities. If the United States so certifies, this Agreement will terminate with respect to said Facility or Facilities.

d. The State may, at any time during the term of this Agreement, request that the United States certify that the State has maintained substantial compliance for twelve (12) consecutive months with a portion of this Agreement with respect to one or more Facilities. If the United States so certifies, this Agreement will terminate with respect to such portions in such Facilities independently of other portions of this Agreement. For purposes of this paragraph, "portion" shall mean all provisions that relate to either Section III.A or III.B of this Agreement.

e. The United States shall notify the State by the fifty-eighth (58) month after the Effective Date of this Agreement if it has determined that the State will not be in substantial compliance with this Agreement, or portions thereof, in month sixty (60) of this Agreement. If the United States provides such notification, the parties shall discuss the anticipated date of fulfillment of the provisions of this Agreement and may agree to revise the MAP accordingly. If this Agreement shall not have terminated by the sixtieth (60) month of this Agreement, the United States shall notify the State every six (6) months thereafter, beginning with the sixty-sixth (66) month after the effective date, of whether it will certify that the State has been in substantial compliance for twelve (12) consecutive months with this Agreement, or portions thereof, and, if it will not so certify, the basis for its determination that the State has not achieved substantial compliance.

f. If the United States certifies at any time that the State is in substantial compliance for twelve (12) consecutive months with: (1) the entirety of this Agreement pursuant to paragraphs (a), (b) or (e); (2) this Agreement with respect to a Facility or Facilities pursuant to paragraph (c); or (3) a portion of this Agreement with respect to a Facility or Facilities pursuant to paragraph (d); the parties shall jointly move the Court to dismiss this action in whole or in part.

g. The State reserves the right to seek judicial termination of this Agreement if the State believes that it has been in substantial compliance with the provisions of this Agreement, as set forth in paragraphs (a) (b) (c), or (d) of this section and the United States

refuses to certify that the State has been in substantial compliance for twelve (12) consecutive months.

h. A determination that the State is in substantial compliance shall not be unreasonably withheld.

i. Any alleged noncompliance must be systemic. Noncompliance with mere technicalities or temporary failure to comply with a period of otherwise sustained compliance will not constitute failure to maintain substantial compliance. At the same time, intermittent or temporary compliance during a period of sustained noncompliance shall not constitute substantial compliance.

j. Pursuant to the PLRA, 18 U.S.C. 3626(b), the State reserves the right to seek judicial termination of this Agreement, or portions thereof, upon motion to the Court. The State shall give written notice to the United States prior to seeking such a termination.

VI. GENERAL PROVISIONS

78. **Successors.** This Agreement shall be binding on all successors, assignees, employees, agents, contractors, and all others working for or on behalf of the State.

79. **Non-retaliation.** The State agrees that it shall not retaliate against any person because that person has provided any information or assistance to the United States or the Monitoring Team, has filed or will file a complaint, or has participated in any other manner in an investigation or proceeding relating to this Agreement. The State agrees that it shall timely and thoroughly investigate any allegations of retaliation in violation of this Agreement and take any necessary and legally permissible corrective actions identified through such investigations.

80. **Notice.** "Notice" under this Agreement shall be provided by electronic mail and overnight delivery and shall be provided to counsel for the State of New York and OCFS and counsel for the United States.

81. **Defense of agreement.** The Parties agree to defend the provisions of this Agreement. The Parties shall notify each other of any court challenges to this Agreement. In the event any provision of this Agreement is challenged in any local or state court, removal to a federal court shall be sought.

82. **No waiver for failure to enforce.** Failure by either Party to enforce this entire Agreement or any provision thereof with respect to any deadline or

other provision herein shall not be construed as a waiver of its right to enforce deadlines or provisions of this Agreement.

83. **Unforeseen delay.** If an unforeseen circumstance occurs that causes a failure to timely fulfill any requirement of this Agreement, the State shall notify the United States in writing within twenty (20) days after the State becomes aware of the unforeseen circumstance and its impact on the State's ability to perform under the Agreement. The notice shall describe the cause of the failure to perform and the measures taken to prevent or minimize the failure. The State shall take all reasonable measures to avoid or minimize any such failure.

84. **Appropriations.** The State, through the Governor, agrees to propose an appropriation in order to fulfill the obligations of the State under this Agreement in the Executive Budget each year during the term of the Agreement in an amount sufficient to meet its obligations hereunder, and will work in good faith to obtain legislative approval.

85. **Sub-headings.** All subheadings in this Agreement are written for the convenience of locating individual provisions. If questions arise as to the meanings of individual provisions, the Parties shall follow the text of each provision.

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

87. **Fees and expenses.** Each Party shall bear the cost of their fees and expenses incurred in connection with this matter.

Respectfully submitted, this 14th day of July, 2010,

FOR THE UNITED STATES:

s/Thomas Perez

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s/Samuel R. Bagenstos

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THE STATE OF NEW YORK

s/Peter J. Kiernan

Dated: _____

PETER J. KIERNAN
Counsel to the Governor

THE NEW YORK STATE OFFICE OF
CHILDREN AND FAMILY SERVICES

s/Karen Walker Bryce

Dated: _____

KAREN WALKER BRYCE
Deputy Commissioner and General Counsel
New York State Office of
Children and Family Services

ANDREW M. CUOMO
Attorney General of the State of New York
ATTORNEY FOR DEFENDANTS

s/Megan Levine

Dated: 7.14.10 By:_____

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SO ORDERED THIS ____ DAY OF _____, 2010

_____
U.S. DISTRICT JUDGE