MEMORANDUM of UNDERSTANDING between the State of Michigan and the United States Department of Justice

TABLE OF CONTENTS

I. INTRODUCTION 1

II. DEFINITIONS 2

III. COMPLIANCE MEASURES 3

A. Juvenile Justice Management 3

B. Education 4

C. Medical Care 6

D. Mental Health Care 7

E. Fire Safety 8

IV. QUALITY ASSURANCE AND MONITORING 9

A. Quality Assurance Program 9

B. Department of Justice Monitoring 11

V. IMPLEMENTATION AND TERMINATION 13

I. INTRODUCTION

A. On June 6, 2002, the United States notified State of Michigan officials of its intent to investigate conditions of confinement at the W.J. Maxey Training School ("Maxey") in Whitmore Lake, Michigan pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, and the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.

B. On March 11-13 and April 2-4, 2003, the United States toured Maxey with consultants in the fields of juvenile justice management, medical and mental health care, fire safety protection, and education.

C. Throughout the course of the investigation, the United States received complete cooperation and access to Maxey and documents from the State of Michigan.

D. On April 19, 2004, the United States issued a findings letter pursuant to 42 U.S.C. § 1997(a)(1) which concluded that certain conditions at Maxey violate the constitutional and/or statutory rights of juveniles confined at the facility.

E. The State of Michigan denies that conditions at the facility violate the constitutional and/or statutory rights of youth confined there.

F. The State of Michigan represents that: from March 2003 to the present, the State has been working to implement changes recommended by DOJ; it has revised its policies and procedures for Maxey; and it has trained its employees in the revisions.

G. Notwithstanding the United States' findings, the State of Michigan voluntarily enters into this agreement because it is firmly committed to protecting the constitutional and statutory rights of juveniles housed at Maxey.

H. The United States and the State of Michigan stipulate and agree that all of the prospective relief in this agreement is narrowly drawn, extends no further than necessary to correct deficiencies identified by the United States and is the least intrusive means necessary to ensure compliance with federal law.

I. The parties have engaged in good faith negotiations to reach agreement in this document for the purpose of memorializing the efforts the State has begun, and will be required to continue, to avoid protracted, contested litigation related to the United States' investigation of the facility.

J. 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 a civil action between the parties to this agreement, the parties agree to certify that this agreement was intended to have no such preclusive effect. This agreement is not intended to create any rights in any person or entity not a party to it.

II. DEFINITIONS

A. The term "DOJ" shall refer to the United States Department of Justice, including its agents and employees, which represents the United States in this matter.

B. The term "State" shall refer to the Governor and Director of the Michigan Family Independence Agency and its employees, agents, contractors or successors, who are wholly or partially responsible for the care of youth confined to Maxey.

C. The term "Family Independence Agency" or "FIA" shall refer to Michigan's public assistance, child, and family welfare agency. FIA is responsible for the care, training, and treatment of institutionalized juveniles at the W.J. Maxey Training School.

D. The term "Maxey" or "facility" shall refer to the W.J. Maxey Training School located at 9036 East M-36, Whitmore Lake, Michigan, including the units contained therein: Sequoyah Center, Woodland Center East, Woodland Center West, Life Safety Unit, and Maxey Academic Center or "MAC," as well as any facility that is built to replace or supplement Maxey or any of its units.

E. The term "youth" shall refer to any resident who is in placement at Maxey during the operation of this agreement.

III. COMPLIANCE MEASURES

A. Juvenile Justice Management

1. The State shall, at all times, provide youth at the facility with reasonably safe living conditions and ensure that all youth are protected from harm.

2. The State shall ensure that restraints are only used in conformity with policy approved pursuant to this agreement and generally accepted standards, including, but not limited to, full and complete documentation of any use of restraints on youth for any period of time.

3. The State shall ensure that all uses of isolation are appropriate and consistent with policy approved pursuant to this agreement and generally accepted standards. This includes:

   a. developing and implementing consistent and appropriate policies, procedures, and practices for isolating youth for disciplinary purposes and behavior management purposes;

   b. requiring full and complete documentation of any use of isolation of youth for any period of time;

   c. utilizing isolation without due process only in those circumstances in which it is necessary for the safety of the youth or others; and

   d. ensuring that youth are afforded adequate due process protections, including, but not limited to, a due process hearing when isolation is in excess of 24 hours.

4. The State shall fully implement its policies, procedures, and practices related to a formal and adequate grievance system, including ensuring confidentiality, an administrative response to grievances, and a right to appeal.

5. The State shall employ and maintain a sufficient

number of trained staff to ensure programming and safety and develop and implement an effective shift reporting system.

B. Education

6. The State shall, at all times, provide all youth confined at the facility with special education services as required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1490, and regulations promulgated thereunder, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, ("Section 504") and regulations promulgated thereunder, and this agreement.

7. The State has designated and shall maintain a Director of Education within the facility who meets the minimum standards specified by the State. The State shall provide the Director with sufficient staff and resources to perform the tasks required by this agreement, including:

   a. overseeing the special education programming in the facility, including development and implementation of policies and training programs;

   b. monitoring whether special education staffing and resources are sufficient to provide adequate special education services to youth at the facility and to ensure compliance with this agreement; and

   c. developing and implementing an adequate vocational education program for youth with disabilities.

8. The State shall develop and implement policies, procedures, and practices for identifying youth who were declared eligible for special education in a prior placement and/or youth who were receiving special education in their home school districts. Such procedures shall include prompt requests for school records from the previous school district to confirm eligibility and to learn what services the student was receiving. This prompt request shall occur, absent exceptional, documented circumstances, within

three (3) business days of the student's admission to the facility. If records are not received within ten (10) business days from the date of the request, the State shall initiate procedures with the Michigan Department of Education to address any barriers to receipt of the requested materials. The State shall continue to make good faith efforts to obtain these records until they are received.

9. The State shall develop and implement policies, procedures, and practices to ensure that qualified professionals provide prompt and comprehensive screening and assessment of youth with previously unidentified disabilities. This includes reviewing education records and court-ordered assessments, and observing classroom performance. Such review should occur, absent exceptional, documented circumstances, within five (5) business days of the receipt of records or, in the case where no records have been received or receipt of records is delayed, within ten (10) business days of the student's admission to the facility.

10. The State shall ensure that appropriate Section 504 plans are developed and implemented for all eligible youth.

11. The State shall develop and implement policies, procedures, and practices to expedite the consent process for special education evaluations when parents/guardians are unresponsive. This includes appropriately limiting the time interval the State waits between attempts to gain consent, specifying that the facility may re-evaluate a previously identified student after reasonable good-faith attempts to obtain consent have failed, and providing that a surrogate may be used as permitted by law.

12. The State shall ensure that all students referred for eligibility assessment receive comprehensive evaluations for all suspected disability categories and related services needs. This includes:

    a. clearly articulating assessment requirements for each category of disability; and

b. creation of a checklist to ensure that all required education and psychological tests, behavioral observations, functional assessments, and social and school history information are compiled for each student.

13. The State shall create Individual Education Plans ("IEP") that satisfy the requirements of the IDEA. This includes:

    a. clearly and adequately filling out each required section of the IEP; and

    b. providing additional training to facility staff on IEP completion including providing facility staff with concrete examples of quality IEP documents.

14. The State shall develop and implement policies, procedures, and practices that ensure that all eligible students receive special education instruction and all related services required by their IEP.

15. The State shall provide students requiring special education services with the full range of placement options, and ensure that students receive a placement that meets their needs. The State shall also develop and implement policies, procedures, and practices that articulate the differences between special education placement options; specify the circumstances in which each option is appropriate; and explain how to assess the level of service needed by individual students.

16. The State shall develop and implement policies, procedures, and practices to ensure that parents/guardians are sent all required notifications and progress reports regarding special education services, as appropriate.

C. Medical Care

17. The State shall provide the youth at Maxey adequate medical care.

18. The State shall develop and implement policies, procedures, and practices for effectively obtaining medical records for youth entering Maxey.

19. The State shall fully implement policies, procedures, and practices to ensure that all youth receive adequate health screening, including obtaining a medical history and conducting all required lab work.

20. The State represents that it has revised its policies, procedures, and practices to ensure that all relevant and appropriate mental health and medical information for each youth is contained in one chart accessible to all clinicians who need such information, and shall continue to ensure the same.

21. The State shall develop and implement a confidential and effective sick call system.

D. Mental Health Care

22. The State shall develop and implement policies, procedures, and practices to ensure that adequate mental health care and treatment services are provided to youth in the facility. This includes but is not limited to invoking the appropriate legal and administrative procedures for ensuring that all youth with mental illness or significant cognitive impairment who cannot safely and appropriately be treated at Maxey are transferred to an appropriate alternative placement that can meet such needs. In addition, while an affected youth's alternative placement is pending or unavailable, such youth shall be provided adequate and appropriate programming, mental health care and treatment services, and protection from harm, without undue reliance on isolation and restraints.

23. The State shall develop and implement policies, procedures, and practices requiring appropriate medical authorization for the dispensing of psychotropic medication to all youth; obtaining appropriate consent; and reassessing and monitoring the use of psychotropic medication.

The State shall ensure that all psychotropic medication is dispensed by appropriately trained medical care staff.

24. The State shall ensure that all youth with mental health needs have adequate and current comprehensive individual treatment plans that reflect the appropriate input of the youth and the treatment team, including mental health practitioners.

25. The State shall develop and implement policies, procedures, and practices to ensure adequate clinical supervision of mental health practitioners.

26. The State shall develop and implement policies, procedures, and practices for treatment teams that clearly define the administrative and clinical lines of authority.

27. The State shall place youth with mental illness in programs and housing units where they receive adequate mental health care and are not punished and/or harmed in response to their mental illness.

28. The State shall develop and implement policies, procedures, and practices to tailor appropriate treatment modalities to the special needs of youth with mental illness or significant cognitive impairment.

E. Fire Safety

29. The State shall provide adequate fire safety protection at Maxey. The State of Michigan represents that it meets the fire safety requirements specified by the Michigan State Fire Marshall. Additionally, the State of Michigan voluntarily agrees to pursue fire safety enhancements, including but not limited to:

    a. Sequoyah Center - install smoke detection systems, including upgrades in the fire alarm system; install sprinkler system for youth rooms and activity areas; install remote door unlocking system, including upgrades in the

electrical system to support a remote door unlocking system; and install smoke detection system in unit supply fan (gymnasium); and

b. Maxey Academic Center - install sprinkler system for classrooms and hallways; install smoke detection system; and install smoke detectors in unit supply fans.

IV. QUALITY ASSURANCE AND MONITORING

A. Quality Assurance Program

30. The State shall develop and implement policies, procedures, protocols, training curricula, and practices to ensure that they are consistent with, incorporate, and implement all provisions of this agreement. The State shall revise and/or develop as necessary other written documents such as screening tools, logs, handbooks, manuals, and forms, to effectuate the provisions of this agreement, as determined by the comprehensive quality review audits to be conducted within 120 days of the effective date of this agreement; on a quarterly basis for the next year; and semi-annually thereafter.

31. The Quality Assurance Program, at a minimum, shall include the following components:

    a. Comprehensive audits by qualified professionals of relevant programs at the facility to monitor compliance with the facility's policies and procedures and the terms of this agreement. A comprehensive audit shall be conducted at the facility within 120 days of the effective date of this agreement, and on a quarterly basis for the next year, and on a semi-annual basis thereafter. A comprehensive audit shall include, at a minimum:

        i. Review of relevant documents (for example, medical, mental health, and institutional records; incident, use of force, restraint, isolation, and disciplinary reports; grievances; shift reporting; staff training; educational

accommodations, lesson plans, IEP, and test results; and behavior management and treatment plans). Records shall be reviewed for both adequacy of documentation and for quality of services.

ii. Interviews with relevant staff, including not only those staff directly involved in the service being audited, but also other staff who may have relevant information, including administrators.

iii. Interviews with residents.

iv. Observation of relevant activities (such as treatment team and IEP meetings, classes, admission screenings, educational testing, physicals, etc.).

v. Written findings and the development of plans of correction.

vi. Review of the adequacy of the facility's internal quality assurance activities when relevant.

b. Regular unannounced site-visits, in addition to comprehensive audits, to monitor compliance with policies and procedures and the terms of this agreement, and to conduct other quality assurance activities.

c. Monitoring and review of serious incidents relevant to the area of care supervised by the Quality Assurance Program, in accordance with written guidelines that determine when such review is triggered. Such review shall involve debriefings with relevant staff to determine whether policies, practices, or training should be modified to minimize the risk of such events in the future.

d. Facility-wide collection and analysis of relevant data to measure compliance with the facility's policies and the terms of this agreement.

e. Quarterly and semi-annual reports as appropriate summarizing quality assurance activities, findings, and recommendations.

B. DEPARTMENT OF JUSTICE MONITORING

32. All State policies, procedures, protocols, training materials, and screening and assessment tools revised and/or developed to effectuate the provisions of this agreement shall be submitted to the DOJ for review and approval within ninety (90) calendar days of the effective date of this agreement. The DOJ shall provide prompt guidance to the State, including specific explanations as to how the provisions, policies, or procedures, if any, are inconsistent with the terms of the agreement, and shall suggest revisions, if any, or request additional time within forty-five (45) days of receipt of any such policy, procedure, protocol, training material, or screening and assessment tools affecting this agreement. In the event that the DOJ asserts that policies, procedures, and other written documents are not in compliance with the terms of this agreement, the parties will agree to a schedule for the parties' experts to communicate and for the State to submit revisions. If, after the policies, procedures, and practices affected by this agreement are implemented, either of the parties determines that a policy, procedure, or practice, as implemented, fails to effectuate the terms of this agreement, the parties shall consult and the policy, procedure, or practice shall be revised as necessary to effectuate the terms of this agreement.

33. The State agrees that, within ninety (90) days of the date of this agreement, the State will provide the DOJ with a status report, including any supporting documentation, delineating all steps taken during the reporting period to comply with each substantive provision of this agreement. The report shall also include a status report regarding: i) incidents involving mechanical or physical restraints; ii) incidents involving isolation, including due process procedures; iii) a list of all occasions when educational records

have not been obtained in a timely manner and efforts to rectify; iv) summary of completion and implementation of all IEPs; v) a list of all occasions when medical records have not been obtained in a timely manner and efforts to rectify; vi) list of youth arriving at the facility having prescriptions for psychotropic medications and the timing of mental health evaluations of such youth; vii) status of alternative placements for youth with mental illness; viii) summary of submission and resolution of grievances; ix) attendance record of all participants at treatment team meetings; x) copies of all quality assurance reports and analyses over the preceding 90 days; and xi) progress reports on the hiring of personnel and the formation and implementation of the Quality Assurance program. Thereafter, for the duration of this agreement, the State will send a status report every 90 days to the DOJ.

34. The DOJ shall have full and complete access to the facility, youth records, staff records, staff, meetings, and youth. The DOJ shall have the right to conduct unannounced visits to the facility. The DOJ shall have the right to conduct confidential interviews with staff, youth, and former residents. Any confidential information or documents obtained pursuant to this paragraph shall not be disseminated to any person not a party (or an employee or contractor of a party) to this agreement, including the media, unless consented to by the parties. Such information may, however, be used in any proceedings to enforce the requirements of this agreement.

35. Within thirty (30) days of receipt of written questions from the DOJ concerning the State's compliance with this Agreement, the State shall provide the DOJ with written answers and any requested documents regarding the State's compliance with the requirements of this agreement.

36. The State shall designate a representative as a Coordinator of the State's efforts in reporting to the DOJ and as a point of contact.

V. IMPLEMENTATION AND TERMINATION

A. The State shall ensure that all relevant current and future employees understand and implement the terms of this agreement.

B. The State shall implement all reforms necessary to effectuate this agreement.

C. The State shall ensure that no person reporting conditions which may constitute a violation under this agreement shall be subjected to retaliation in any manner for so reporting.

D. This agreement shall constitute the entire integrated agreement of the parties. With the exception of the DOJ findings letter, and any written DOJ technical assistance recommendations, no prior or contemporaneous communications, oral or written, will be relevant or admissible for purposes of determining the meaning of any provisions herein in this matter or in any other proceeding. If DOJ believes that the State has failed to fulfill any obligation under this agreement, DOJ will, prior to seeking enforcement of the terms of this agreement, give written notice of the failure to the State. The State shall have sixty (60) days from the date of such notice to cure the failure, and provide DOJ with sufficient proof of its cure. At the end of the 60-day period, in the event that DOJ determines that the failure has not been cured, DOJ may request enforcement action without further notice, other than that notice required by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Eastern District of Michigan. DOJ and the State commit to work in good faith with each other to avoid enforcement actions. However, in case of an emergency posing an immediate threat to the health or safety of youth, the United States may omit the notice and cure requirements herein, before seeking enforcement action.

E. This agreement shall terminate three years from the effective date of the agreement. The agreement may also end earlier than three years from the effective date if the State has substantially complied with each of the provisions of the agreement and has maintained substantial compliance for at least one year. The burden shall be on the State to demonstrate this level

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

F. The State shall maintain sufficient records to document their compliance with all of the requirements of this agreement. During the period of this agreement, the State shall maintain any and all records required by or developed under this agreement.

G. The parties agree to defend the provisions of this agreement. The parties shall notify each other of any court challenge 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.

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

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

J. "Notice" under this agreement shall be provided by courier or overnight delivery and shall be provided to the Governor of the State of Michigan and to the Attorney General of the State of Michigan.

K. If any unforeseen circumstance occurs which causes a failure to timely carry out any requirements of this agreement, the State shall notify the DOJ in writing within twenty (20) calendar days of the time that the State becomes aware of the unforeseen circumstance and its impact on the State's ability to perform under this 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 implement all reasonable measures to avoid or minimize any such failure.

L. The State agrees that it shall not retaliate against any person because that person has filed or may file a complaint, provided information or assistance, or participated in any other manner in an investigation or proceeding relating to this agreement.

M. All subheadings in this agreement are written for convenience of locating individual provisions. If questions arise as to the meanings of individual provisions, the parties shall follow the text of each provision.

N. In the event 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.

O. The Parties may jointly agree, in writing, to modify this Agreement.

FOR THE STATE OF MICHIGAN:

Robert S. Welliver

ROBERT S. WELLIVER
Assistant in Charge
Education & Social Services Division

William R. Morris

WILLIAM R. MORRIS
Assistant Attorney General
Education & Social Services Division

Joel D. McGormley

JOEL D. MCGORMLEY
Assistant Attorney General
Education & Social Services Division

LEONARD DIXON
Bureau of Juvenile Justice
Family Independence Agency

DEREK HITCHCOCK
Campus Director
W.J. Maxey Boys Training School
Family Independence Agency

FOR THE UNITED STATES:

CRAIG S. MORFORD
United States Attorney
Eastern District of Michigan

R. ALEXANDER ACOSTA
Assistant Attorney General
Civil Rights Division

BRADLEY J. SCHLOZMAN
Deputy Assistant Attorney General
Civil Rights Division

SHANETTA Y. CUTLAR
Chief
Special Litigation Section

JUDITH E. LEVY
Assistant U.S. Attorney
Eastern District of Michigan

ELIZABETH JOHNSON
RYAN H. RAINEY
JE YON JUNG
Trial Attorneys
Special Litigation Section