

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE STATE OF SOUTH CAROLINA; the)
SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH;)
and the C.M. TUCKER, JR. NURSING CARE CENTER,)
)
Defendants.)
_____)

MEMORANDUM OF AGREEMENT

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I. INTRODUCTION

1. This Memorandum of Agreement ("MOA") is entered into by the United States and the State of South Carolina ("State"), acting by and through the South Carolina Department of Mental Health ("SCDMH"). This MOA resolves the United States' investigation into the conditions of care and treatment of the residents in the C.M. Tucker, Jr. Nursing Care Center ("Tucker Center"), Columbia, South Carolina, pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 ("CRIPA").

2. In conformity with CRIPA, this MOA represents a voluntary effort by the State to meet the concerns raised by the DOJ's investigation. See 42 U.S.C. § 1997b(a)(2)(B) and § 1997g.

3. On July 25, 2006, the United States notified State officials of its intent to investigate conditions of resident care and treatment at the Tucker Center.

4. In November and December 2006, the United States Department of Justice ("DOJ") toured Tucker Center with consultants in the fields of geriatric medicine, psychiatry, nursing, protection from harm, and environmental health and safety.

5. Throughout the course of the investigation, DOJ received complete cooperation and access to Tucker Center and documents pertaining to Tucker Center, including resident records and other policies, procedures, and reports.

6. On May 6, 2008, DOJ issued a letter pursuant to 42 U.S.C. § 1997(a)(1), which concluded that certain conditions at Tucker Center violate the constitutional and federal statutory rights of residents ("Findings Letter").

7. Since the United States issued its Findings Letter, Tucker Center has made progress in remedying the problems the United States identified in the Findings Letter.

8. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1345. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

9. The parties to this Memorandum of Agreement ("MOA") are the United States of America, represented by the United States Department of Justice, and the State of South Carolina, acting by and through the SCDMH. The State and SCDMH are responsible, in whole or in part, for the operation of and conditions at Tucker Center. The State acknowledges that it has the authority and responsibility to implement all requirements of this MOA, including under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 et. seq. Accordingly, the State shall ensure that all State agencies and departments take any action necessary to comply with the provisions of this MOA.

10. Nothing in this MOA shall be construed as an acknowledgment, an admission, or evidence of liability of the State, SCDMH or Tucker Center under CRIPA, the United States

Constitution, or federal or state law, and this MOA may not be used as evidence of liability in this or any other civil or criminal proceeding.

11. Nothing in this MOA shall be construed as an acknowledgment or admission by the United States that the State, SCDMH or Tucker Center has acted, or continues to act, in compliance with CRIPA, the United States Constitution, or federal or state law.

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

13. This MOA 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 or the conduct of State employees; accordingly, this MOA does not alter legal standards governing any such claims, including those under South Carolina law.

14. Nothing in this MOA shall prevent the State from modifying or closing Tucker Center or from developing alternative community placements for the residents currently at Tucker Center.

15. This MOA is enforceable only by the parties, and is binding upon the parties, by and through their officials, agents,

employees, assigns, and successors. No person or entity is intended to be a third party beneficiary of the provisions of this MOA 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 MOA in any civil, criminal, or administrative action. Similarly, this MOA does not authorize, nor shall it be construed to authorize, access to State documents by persons or entities not a party to this MOA.

16. This MOA shall constitute the entire integrated agreement of the parties. With the exception of the Findings Letter referenced in Paragraphs 6 and 7 hereof, no prior or contemporaneous communications, oral or written, or prior drafts shall be relevant for purposes of determining the meaning of any provisions herein in this litigation or in any other proceeding.

17. The parties agree that it is in their mutual interests to avoid contested litigation. The parties further agree that resolution of this matter pursuant to this MOA is in the best interests of Tucker Center residents. Now, therefore, pursuant to Fed. R. Civ. P. 41(a)(2), the parties hereby agree to file this MOA in the United States District Court for the District of South Carolina, together with a Complaint and a Joint Motion for Conditional Dismissal. A copy of this MOA shall be attached to the Joint Motion for Conditional Dismissal and that motion shall: (1) request that the court dismiss the complaint upon the passage of

two (2) years from the date of its filing; (2) request that the court place the case on its inactive docket; and (3) request that the court retain jurisdiction over the case until two (2) years have passed or an earlier final dismissal is entered. The parties further agree that this provision shall not be interpreted to provide for active judicial supervision.

18. All parties shall bear their own costs, including attorneys' fees, in this and any subsequent proceeding.

II. DEFINITIONS

As used in this MOA, the following definitions apply to the terms below:

19. "Adequate" shall mean that level of service required for compliance with all applicable federal, state, and local laws, regulations, and codes, and with generally accepted professional standards.

20. "Appropriate" shall mean that which is suitable for a particular purpose.

21. "Care plan" shall mean a formal written individualized plan of treatment and activities, based upon comprehensive assessments performed by an appropriately-comprised interdisciplinary team of qualified professionals, and which describes the medical, nursing, and psychosocial needs of the individual residents, how such needs will be met, and sets timetables for meeting those needs in order that residents attain

or maintain their highest practicable physical, mental, and psychosocial well-being, and which is periodically reviewed and revised, as appropriate.

22. "C.M. Tucker Center, Jr., Nursing Care Center" ("Tucker Center") shall mean the C.M. Tucker Center, Jr., Nursing Care Center located in Columbia, South Carolina, and any buildings and facilities constructed, renovated, added to replace any existing Tucker Center building, and/or designated as part of the facility in the future.

23. "DOJ" shall mean the Civil Rights Division of the Department of Justice, and its employees or agents.

24. "Effective date" shall mean the date on which the United States District Court for the District of South Carolina ("Court") conditionally dismisses this case.

25. "Highest Practicable" shall mean the highest level of function and well-being consistent with generally accepted professional standards, limited only by the resident's present functional status and potential for improvement or reduced rate of functional decline.

26. "Serious Incident" shall mean any unusual or unexplained occurrence that results in actual or potential physical harm, pain, or mental anguish to a resident; any known, alleged, or suspected event of abuse, neglect, or exploitation of a resident; or any unexpected death of a resident.

27. "Physician" shall mean a medical doctor lawfully entitled to practice medicine in the State of South Carolina.

28. "Psychoactive Medication" shall mean a controlled substance or drug that may not be dispensed or administered without a prescription and whose primary indication for use has been approved by the U.S. Food and Drug Administration for the treatment of mental disorders and is listed as a psychotherapeutic agent in drug facts and comparisons or in the American hospital formulary service.

29. "Qualified Professional" or "Qualified Staff" shall mean an individual who is competent, whether by education, training, or experience, to make the particular decision at issue.

30. "Resident" shall mean any person residing at Tucker Center during the operation of this MOA.

III. SUBSTANTIVE REQUIREMENTS

The State, SCDMH and Tucker Center shall implement, or where indicated, continue to implement, the following measures:

A. HEALTH CARE ASSESSMENTS AND CARE PLANS

31. The SCDMH and Tucker Center shall provide health care services to the residents of Tucker Center sufficient to ensure that residents obtain their highest practicable, physical, mental, and psychosocial well-being in accordance with generally accepted

professional standards of care. To this end, SCDMH and Tucker Center shall, at a minimum, implement Paragraphs 32-39.

32. Tucker Center shall ensure that qualified health professionals adequately assess and document residents' medical, functional, and psychological needs, and identify all interventions necessary for residents to maintain or improve their medical status, functional abilities, and psychological status.

33. Tucker Center shall ensure that residents are provided care plans, which are implemented by qualified staff, and developed by an appropriately comprised interdisciplinary team of qualified professionals, including a physician, a registered nurse, and a dietitian, and where appropriate, a psychiatrist, a pharmacist, and a rehabilitation/restorative therapist(s). The care plan shall describe the medical, nursing, and psychosocial needs of the resident and how such needs will be met. The care plan shall be based upon a comprehensive assessment of residents' functional capacity and shall be prepared within timelines established by federal law. The care plan shall include input from residents or, for cognitively impaired residents who are not competent to make decisions about their care and treatment, from the residents' guardians, legal representatives, or other legally designated or appointed surrogate decision makers. The care plan shall comply with 42 C.F.R. § 483.20, and include, at a minimum, assessments addressing:

- a. Medically defined conditions and prior medical history;
- b. Medical status measurement;
- c. Physical and mental functional status;
- d. Sensory and physical impairments;
- e. Nutritional status and requirements;
- f. Special treatment or procedures (including special rehabilitative services);
- g. Mental and psychosocial status;
- h. Discharge potential;
- i. Dental condition;
- j. Activities potential;
- k. Rehabilitation potential;
- l. Cognitive status;
- m. Pain management needs;
- n. Behavioral and mental health diagnosis and treatment needs; and
- o. Medication therapy.

34. With respect to Paragraph 33(n) above, Tucker Center shall develop and implement an integrated behavioral treatment planning process consistent with generally accepted professional standards of care. To this end, SCDMH and Tucker Center, shall, at a minimum:

- a. ensure that there are sufficient psychological and psychosocial services to meet the needs of residents, particularly

those residents with a diagnosis of dementia.

b. develop and implement policies and procedures regarding the development of individualized behavior treatment plans consistent with generally accepted professional standards of care.

c. review and revise, as appropriate, each resident's behavior treatment plan to ensure that it is current, individualized, strengths-based, outcome-driven, emanates from an integration of the individual disciplines' assessments of residents, and that goals and interventions are consistent with clinical assessments. Tucker Center shall revise each resident's behavior treatment plan if it is not effective.

d. ensure that a psychiatrist verify, in a documented manner, that psychiatric and behavioral treatments are properly integrated.

e. require all clinical staff to successfully complete competency-based training on the development and implementation of individualized behavior treatment plans. Behavioral management shall focus on teaching alternative, adaptive behaviors.

f. ensure that individualized behavior treatment plans are implemented in a consistent manner in accordance with generally accepted professional practices.

g. develop and implement psychological evaluations to assess each resident's cognitive deficits and strengths to ensure that behavior treatment interventions are selected based on the resident's capacity to benefit.

h. develop and implement treatment goals that will establish an objective, measurable basis for evaluating resident progress.

i. ensure that nursing staff monitor, document, and report accurately and routinely, patients' participation in behavioral programming activities and on patients' responses, or lack thereof, to behavioral interventions.

35. Tucker Center shall ensure that staff are trained adequately in Tucker Center's policies and procedures. The policies and procedures shall reflect current standards of evaluating, monitoring, and treating the needs of the residents of Tucker Center. Particular attention should be paid to educating staff regarding conditions such as nutritional status, weight, food intake, hydration, dysphagia, pressure sores, diabetes, and pain management.

36. Tucker Center shall adequately evaluate residents' acute and ongoing medical status to ensure that residents' health status is monitored accurately, and that residents who experience a significant change of status are evaluated and treated adequately.

37. Tucker Center shall ensure that there are sufficient numbers of adequately trained staff, present and on duty on each shift to ensure adequate supervision of residents, to provide routine, preventative, and restorative care, and to ensure that residents' care plans are implemented adequately.

38. Tucker Center shall ensure that mortality reviews are conducted for residents who die at Tucker Center, or who die at an acute care facility within 30 days of being transferred there from Tucker Center, to the fullest extent that Tucker Center's access to residents' medical records from the acute care facilities permits. This mortality review shall be conducted, at a minimum, by a physician and a registered nurse, qualified to conduct such reviews, to determine if adequate care was provided to residents by Tucker Center prior to death. If a mortality review identifies any deficiencies in care provided by Tucker Center, Tucker Center shall institute reasonable and appropriate corrective measures to address any such deficiency.

39. Tucker Center shall develop and implement adequate quality assurance mechanisms to monitor the delivery of medical, mental health, nursing, and all other health care services to residents, to ensure that the services are properly implemented and effective.

B. NUTRITION AND HYDRATION CARE AND ASPIRATION PREVENTION

40. The SCDMH and Tucker Center shall continue to provide the residents of Tucker Center with sufficient nutrition and hydration services to ensure that residents' nutritional needs are met in a safe manner. To this end, SCDMH and Tucker Center shall continue to implement the provisions of Paragraphs 41-44.

41. Tucker Center shall conduct adequate individual nutrition and hydration assessments, by staff trained adequately to do so, and develop and implement appropriate interventions which shall be reviewed and updated as required by 42 C.F.R. § 483.23(I)-(j). In accordance with these assessments, SCDMH and Tucker Center shall ensure that residents' diets meet their daily nutritional and special dietary needs.

42. Tucker Center shall ensure that residents who need assistance in eating are assisted by adequately trained staff.

43. Tucker Center shall ensure that adequate fluids are available and accessible to residents at all times.

44. The SCDMH and Tucker Center shall continue to provide adequate care to the residents of Tucker Center to prevent aspiration, whenever possible. Using an interdisciplinary approach, Tucker Center shall properly assess and appropriately treat, in accordance with generally accepted professional standards, residents with swallowing problems and residents who need assistance eating. To this end, SCDMH and Tucker Center shall:

a. Provide adequate care for residents at risk of aspirating, take any appropriate steps to ameliorate the individual's aspiration risk, and develop and implement an individualized feeding and positioning plan for each individual identified as at

risk of aspirating;

b. Provide competency-based training to staff in how to properly implement the feeding and positioning plans, and develop and implement a system to regularly monitor the progress of residents who are at risk of aspirating to ensure that staff members are adequately taking the appropriate assessment, diagnostic, supervision, and treatment steps necessary to ameliorate the individual's risk;

c. Ensure that any change in a resident's nutritional or hydration status is identified and documented, and that any significant change is reported promptly to a physician and responded to adequately;

d. Perform physician-ordered swallowing evaluations in a timely manner; and

e. Ensure that residents' medication regimens do not pose undue risk of aspiration.

**C. PSYCHIATRIC ASSESSMENTS, PSYCHIATRIC SERVICES, AND
PSYCHOACTIVE MEDICATION**

45. Tucker Center shall ensure that each resident receives an accurate, complete, and timely mental health assessment and diagnosis, consistent with generally accepted professional standards.

46. Tucker Center shall ensure that, if the initial psychiatric assessments indicate a psychiatric disorder and

diagnosis, the assessments lead to a plan of care that outlines specific strategies, with rationales, including adjustments of medication regimens, and initiation of specific treatment interventions, if warranted.

47. Tucker Center shall ensure that:

a. clinically justifiable, current assessments and diagnoses are provided for each individual;

b. the documented justification of the diagnoses are in accord with the criteria contained in the most current Diagnostics and Statistics Manual ("DSM");

c. differential diagnoses, "rule-out" diagnoses, and diagnoses listed as "NOS" ("Not Otherwise Specified") are timely addressed, through clinically appropriate assessments, and resolved in a clinically justifiable manner; and

d. each individual's psychiatric assessments, diagnoses, and medications are clinically justified consistent with generally accepted professional standards of care, and promptly and properly documented.

48. Tucker Center shall develop protocols consistent with generally accepted professional standards of care to ensure ongoing and timely psychiatric reassessments.

49. The SCDMH and Tucker Center shall continue to provide adequate psychiatric and psychosocial care to the residents of Tucker Center to ensure that residents attain or maintain their

highest practicable physical, mental, and psychosocial well-being possible, in compliance with the requirements of 42 C.F.R. § 483.45. The use of psychoactive medication shall comply with 42 C.F.R. § 483.25(1). The use of psychoactive medications shall be safe and appropriate. To this end, SCDMH and Tucker Center shall continue to implement the provisions of Paragraphs 50-54.

50. Tucker Center shall provide psychiatrist staffing to ensure that residents receive adequate psychiatric services.

51. Tucker Center shall ensure that psychoactive medications are used only in accordance with generally accepted professional standards and federal regulations.

52. Tucker Center shall ensure that qualified professionals oversee adequately psychoactive medication practices at Tucker Center.

53. Tucker Center shall ensure that residents receiving psychoactive medication are monitored adequately for potential negative side-effects of such medication.

54. Tucker Center shall ensure that the use of psychoactive medications is properly documented in the medical record, including the rationale for the choice and continued use of drug treatments, and documentation of the effect of dosage levels on changes in residents' overall medical condition.

D. PRESSURE SORE PREVENTION AND CARE

55. The SCDMH and Tucker Center have instituted and shall maintain adequate pressure sore prevention and treatment measures to ensure that residents do not develop otherwise preventable pressure sores and that adequate treatment is provided to residents who have pressure sores. To this end, SCDMH and Tucker Center shall continue to implement the provisions of Paragraphs 56-60.

56. Tucker Center shall identify and adequately assess all residents who are at risk of developing pressure sores.

57. Tucker Center shall develop and implement adequate skin care plans for residents identified as at risk of skin breakdown or with actual skin breakdown.

58. Tucker Center shall ensure that staff, especially staff dedicated to wound care treatment, are trained adequately in current professional standards, practices, and techniques regarding pressure sore assessment and methods of care, including the accurate "staging" of pressure sores.

59. Tucker Center shall ensure that residents are provided appropriate pressure relieving devices, such as pillows, mattresses, cushions, and devices to "float" areas of skin breakdown, where needed.

60. Tucker Center shall ensure that residents' medical conditions, including nutrition and hydration status, mental health

status, and continence status, are taken into account when addressing residents' skin care needs.

E. PAIN MANAGEMENT AND END-OF-LIFE CARE

61. The SCDMH and Tucker Center have instituted and shall maintain an adequate pain management program to ensure that the residents of Tucker Center do not experience unnecessary and undue pain and suffering and that end-of-life care comports with generally accepted professional standards. To this end, SCDMH and the Tucker Center shall, at a minimum, continue to implement the provisions of Paragraphs 62-65.

62. Tucker Center shall adequately assess residents' pain and ensure that residents receive treatment sufficient to alleviate unnecessary pain.

63. Tucker Center shall ensure that medications are administered to residents in accordance with physicians' orders.

64. Tucker Center shall ensure that residents' end-of-life care comports with generally accepted professional standards and, specifically, that residents do not suffer undue pain during this time.

65. Tucker Center shall continue to conduct on-going training and provide information to its staff, residents' families, and residents regarding pain management and end-of-life care.

F. FALL PREVENTION

66. The SCDMH and Tucker Center shall ensure that residents are not exposed to unreasonable risks of harm associated with falling. To this end, SCDMH and Tucker Center shall, at a minimum, implement Paragraphs 67-68.

67. Tucker Center shall assess residents upon admission, and periodically thereafter, to determine whether residents are at risk for falls. Such assessments shall pay particular attention to the need for bowel and bladder training or continence maintenance. For all residents who are identified to be at risk of falls, SCDMH and Tucker Center shall, at a minimum:

- a. Develop and implement a proactive, individualized, fall prevention plan;
- b. Include the residents' fall prevention plans in their care plan;
- c. Provide residents with adequate supervision to prevent falls to the extent reasonably possible;
- d. Ensure that residents receive adequate and appropriate assistive devices to prevent falls;
- e. Utilize adequate safety devices to prevent falls; and
- f. Take actions to ensure that the residents' environment remains as free of fall hazards as possible.

68. Anytime a fall occurs, Tucker Center shall, in a timely manner:

a. Assess the resident's health status, including performing neurological assessments, if indicated, and take any measure necessary to ensure the health and well-being of the resident;

b. Complete an incident report and submit it to the appropriate authority for review;

c. Notify the resident's family/responsible party;

d. Review the circumstances surrounding the fall and determine the possible cause(s) of the fall, with particular emphasis on the potential effects of any psychoactive medication, and identify and implement any appropriate measures to prevent similar falls from occurring in the future;

e. Maintain records of all falls at Tucker Center, including: the date and time of the fall; the specific cause of the fall, if known; the identity of the nursing staff member or members who were involved in the resident's treatment at the time of the fall; and any follow-up education provided to these staff members; and

f. Conduct a monthly review of all falls to determine if adequate supervision was provided, and take action to eliminate, to the extent possible, the causes of falls related to supervision of residents.

G. PROTECTION FROM OTHER HARM

69. The SCDMH and Tucker Center shall ensure that Tucker Center's residents are adequately protected from harm. To this end, SCDMH and Tucker Center, shall, at a minimum, implement Paragraphs 70-80.

70. Tucker Center shall create or revise, as appropriate, and implement policies and procedures addressing the investigation of serious incidents. Such policies and procedures shall include requirements that such incidents are to be thoroughly investigated, that the investigations will include consideration of staff's adherence to programmatic requirements, and that the investigations will be performed by qualified internal investigators.

71. Tucker Center shall require the internal investigators to successfully complete competency-based training on technical and programmatic investigation methodologies and documentation requirements necessary in nursing home settings.

72. Tucker Center shall monitor the performance of staff charged with investigative responsibilities and provide technical assistance and training whenever necessary to ensure the thorough, competent, and timely completion of investigations of serious incidents.

73. Tucker Center shall develop and implement a reliable system to identify the need for, and monitor the implementation of,

appropriate corrective and preventative actions addressing problems identified as a result of investigations.

74. Tucker Center shall create or revise, as appropriate, and implement policies and procedures related to the tracking and trending of incident data, including data from the abuse and neglect allegations, to ensure that appropriate corrective actions are identified and implemented in response to problematic trends.

75. The SCDMH and Tucker Center shall continue to ensure that residents are free from undue use of restraint. Tucker Center shall follow generally accepted professional standards in formulating protocols to minimize the use of restraint on residents. Tucker Center shall ensure that restraints are used only pursuant to accepted professional standards and are not used as punishment, in lieu of providing other needed activities, supports, or services, or for the convenience of staff.

76. Tucker Center shall develop and implement a specific policy and protocol that adequately defines what constitutes a restraint. The policy and protocol shall be based on current, generally accepted practice and shall emphasize: keeping residents physically active, meaningfully engaged, and out of bed, whenever possible and appropriate; that medication not be used as a form of punishment or for the convenience of staff; and that restraints will be used only as a measure of last resort to protect the safety of the resident and others.

77. Tucker Center shall develop and implement a protocol to fully document each use of any physical or mechanical restraint, specifying the exact type of restraint or procedure used, as well as the length of time it was used each time. Documentation of each use of restraint shall be kept in the resident's file and in a central location.

78. Tucker Center shall develop and implement a protocol to minimize the use of standing PRN or "stat" orders for the unplanned or emergency administration of psychoactive medication.

79. Tucker Center shall identify each resident who, in the past 12 months, has been physically or mechanically restrained, or for whom medication has been used as a restraint. For each such resident identified, Tucker Center shall develop and implement prompt and appropriate protections, services and supports that meet each resident's individualized needs that are consistent with professional standards.

80. Tucker Center shall provide structured and ongoing competency-based training to professional, direct care, and supervisory staff on how to properly address resident needs and behaviors without resorting to the undue use of restraints.

H. ACTIVITIES AND PSYCHOSOCIAL PROGRAMS

81. Tucker Center shall continue to provide, in accordance with residents' comprehensive assessments and care plans, an ongoing program of meaningful activities that meet the residents'

needs, consistent with federal regulations. To this end, SCDMH and Tucker Center shall, at a minimum, continue to:

a. ensure that activities and psychosocial programs are directed by a qualified therapeutic recreation specialist or a qualified activities professional; and

b. provide sufficient supplies and staff to facilitate residents' participation in activity programs.

82. Activities shall be of sufficient duration to have a positive impact on residents' well-being and shall involve interaction with others.

I. ENVIRONMENTAL CONDITIONS

83. Consistent with generally accepted professional standards and applicable federal regulations, Tucker Center shall continue to provide a clean, safe environment for all of its residents. At a minimum, Tucker Center shall:

a. provide each resident with safe food services;

b. provide adequate infection control, particularly with respect to laundry sanitation practices; and

c. provide adequate housekeeping services.

J. SERVING RESIDENTS IN THE MOST INTEGRATED SETTING APPROPRIATE TO RESIDENTS' NEEDS

84. The State, SCDMH and Tucker Center shall ensure that the residents of Tucker Center are being served in the most integrated setting appropriate to their needs in accordance with the Americans

with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; 28 C.F.R. § 35.130(d). To this end, the State, SCDMH and Tucker Center shall, at a minimum, implement Paragraphs 85-89.

85. Tucker Center shall ensure that qualified professionals evaluate residents to determine whether they may be ready for community placement.

86. Tucker Center shall ensure that residents are made aware of possible alternative settings, if any, to Tucker Center.

87. Tucker Center shall implement professional decisions that residents can be served in a more integrated setting by transferring residents to alternative settings when residents are advised of, and do not oppose, an alternative setting.

88. Tucker Center shall ensure that, before residents are transferred to a more integrated setting, the setting is capable of meeting the residents' needs.

89. The State, SCDMH and Tucker Center shall make reasonable efforts to redress barriers that prevent Tucker Center residents from being served in an alternative setting.

IV. DOCUMENTATION

90. Tucker Center shall ensure that a resident's records accurately reflect the resident's progress as to all treatment identified in the individual's treatment plan, consistent with generally accepted professional standards of care. Tucker Center shall develop and implement policies and/or protocols setting forth

clear standards regarding the content and timeliness of progress notes, transfer notes, and discharge notes, including, but not limited to, an expectation that such records include meaningful, accurate assessments of the individual's progress relating to treatment plans and treatment goals.

91. Tucker Center shall pay particular attention to adequately documenting residents' food and liquid intake and bathing, and shall train staff regarding the importance of adequate record keeping.

V. FEDERAL STATUTORY COMPLIANCE

92. In the operation and management of Tucker Center and in providing services to the residents of Tucker Center, the State, SCDMH and Tucker Center shall maintain compliance with all applicable federal statutes and applicable implementing regulations, including but not limited to the following laws, to the extent they apply to Tucker Center: Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395i-3 et seq.; Title XIX of the Social Security Act, 42 U.S.C. §§ 1396r et seq.; and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12132 et seq.

VI. IMPLEMENTATION OF THE MOA

93. The State and SCDMH shall implement all reforms necessary to effectuate this MOA. The implementation of this MOA will begin immediately upon the effective date.

94. Unless otherwise specified, all provisions in this MOA shall be implemented within one year of the effective date.

95. Within one month of the effective date of this MOA, the State, SCDMH and Tucker Center shall communicate with State officials, employees, and independent contractors involved in providing care to the residents at Tucker Center the provisions set forth in this MOA that are applicable to their respective job duties.

96. For the purposes of this MOA, "provision" shall be defined as each complete substantive area of Section III of this MOA (e.g., Nutrition and Hydration Care and Aspiration Prevention - Section III.B, subparagraphs 40-44). Paragraphs and sub-paragraphs are not severable.

VII. DOJ MONITORING, RIGHT OF ACCESS, AND REPORTING REQUIREMENTS

97. The DOJ shall monitor compliance with this MOA. During the term of this MOA, the DOJ and its expert consultants and agents may, at their discretion, conduct up to four (4) on-site tours of Tucker Center to assess compliance with this MOA. The parties agree that the DOJ will conduct a baseline assessment tour shortly after the Court conditionally dismisses this case. The parties further agree that the DOJ will also have immediate access in an emergency situation where the life, immediate health, or immediate safety of a resident(s) is at issue.

98. Prior to any tour, the DOJ shall provide reasonable notice to the SCDMH. Within a reasonable time in advance of the tour, the DOJ shall identify any expert consultants it plans to use on the tour. The parties agree that no notice shall be required in the event that an emergency situation arises as described in paragraph 97.

99. The DOJ and its attorneys, expert consultants, and agents shall have full and complete access to the facilities, including: facilities' records; residents' records; staff records; State, SCDMH and Tucker Center records relating to this MOA; Tucker Center residents and employees of the SCDMH and Tucker Center; and any such other information necessary for DOJ to fully evaluate compliance with this MOA. The DOJ shall have the right to conduct confidential interviews with residents. Such access shall continue until this MOA is terminated.

100. Within a reasonable period of time after the conclusion of any tour, the DOJ shall make available to Tucker Center any post-tour reports prepared by its expert consultants.

101. The SCDMH and Tucker Center shall notify the DOJ immediately upon the death of any resident and shall thereafter forward to the DOJ copies of any completed incident reports related to death, autopsies and/or death summaries of residents, as well as all final reports of investigations that involve residents' deaths.

102. The State, acting through SCDMH, and Tucker Center shall respond to any written requests from the DOJ concerning compliance by SCDMH and Tucker Center with this MOA within 30 days of receipt of such written questions. The SCDMH shall provide the DOJ with access to any requested documents regarding compliance by SCDMH and Tucker Center with the requirements of this MOA.

103. Within 60 days from the effective date of this MOA, the State, acting through SCDMH, shall prepare and submit to the DOJ a comprehensive action plan specifying the measures the SCDMH and Tucker Center intend to take in order to achieve compliance with the substantive requirements of Section III of this MOA, including anticipated time frames for completion of each measure.

104. If Tucker Center closes and residents are moved to another facility or facilities, the DOJ reserves the right to evaluate the appropriateness of such placement. If the State contracts for any of the services to be delivered at Tucker Center which are covered under this MOA, the MOA shall be fully applicable to, and binding upon, any contracted services.

105. The State, SCDMH, and Tucker Center shall maintain sufficient records to document its compliance with all of the requirements of this MOA for the duration of this MOA.

106. The SCDMH shall designate a single point of contact to coordinate and oversee compliance with this MOA.

107. The parties agree to defend the provisions of this MOA. The parties shall notify each other of any court challenge to this MOA. If any provision of this MOA is challenged in any local or state court, removal to a federal court shall be sought.

108. If any provision of this MOA is declared invalid for any reason by a court of competent jurisdiction, said finding shall not affect the remaining provisions of this MOA.

109. Throughout the duration of this MOA, the DOJ and its expert consultants and agents shall maintain the confidentiality of all information provided pursuant to this MOA consistent with State and federal law and consistent with the law enforcement responsibilities of the DOJ, including the potential need to bring an enforcement action in this case. In addition, throughout the duration of this MOA, letters between counsel for the DOJ and counsel for SCDMH shall be confidential.

VIII. ENFORCEMENT OF THE MOA

110. This MOA is enforceable only by the parties and is binding upon the parties, by and through their officials, agents, employees, assigns, and successors.

111. If the DOJ maintains that the State, acting through SCDMH, has failed to carry out any requirement of this MOA, the DOJ shall notify SCDMH of any instance(s) in which it maintains that

SCDMH and the Tucker Center have failed to carry out the requirements of this MOA.

112. With the exception of conditions or practices that pose an immediate and serious threat to the life, health, or safety of Tucker Center residents, the State, acting through SCDMH, shall take substantial steps within 90 days of notice of non-compliance. The State, acting through SCDMH, shall correct the claim of non-compliance within a reasonable time. During this period, the DOJ and the State, acting through SCDMH, shall coordinate and discuss areas of disagreement and attempt to resolve outstanding differences. If the DOJ and SCDMH fail to reach an agreement, the DOJ is not limited in any fashion in pursuing its law enforcement obligations without further notice, including any adverse litigation against the State and/or seeking appropriate enforcement of any provision of this MOA.

113. Failure by any party to enforce this entire MOA, 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 and provisions of this MOA.

114. To the extent that any of the legal authorities cited in this MOA are amended or superceded, this MOA shall be amended accordingly.

IX. TERMINATION

115. This MOA shall terminate two (2) years after the effective date. The parties may agree to terminate this MOA prior to the end of the two-year term, provided the State, SCDMH and Tucker Center have implemented all provisions of the MOA and maintained implementation of all provisions of the MOA for one year.

116. The burden shall be on the State, SCDMH and Tucker Center to demonstrate that they have substantially complied with each and every provision of the MOA. A finding of substantial compliance may not be unreasonably withheld. 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.

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