

Memorandum of Agreement

Between

the United States

and

the State of Hawai'i

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I. INTRODUCTION

- (A) This Memorandum of Agreement ("Agreement") resolves litigation concerning protection from harm, access to medical and mental health care, and special education claims, and therefore settles all claims asserted in United States v. Hawai'i, Civil No. [_____] (D. Haw) (referred to herein as the "litigation" or the "lawsuit"). This litigation concerned conditions of confinement at the Hawai'i Youth Correctional Facility ("HYCF") in Kailua, Hawai'i, and was brought pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141").
- (B) From October 5, 2004 to October 8, 2004, the United States toured HYCF with a consultant in the field of juvenile justice. On October 26, 2004, the United States conducted individual interviews with each of the girls from HYCF temporarily placed at the Salt Lake Valley Detention Center in West Salt Lake City, Utah.
- (C) Throughout the course of the investigation, the United States received complete cooperation from the State. The State permitted access to HYCF and provided requested documents.
- (D) On August 4, 2005, the United States issued a findings letter pursuant to 42 U.S.C. § 1997(a)(1), which concluded that certain conditions at HYCF violated the constitutional and federal statutory rights of youth confined in the facility.
- (E) In order to resolve all claims in the litigation, including the protection from harm, access to medical and mental health care, and special education claims, the parties have entered into this Agreement, which, if complied with by State of Hawai'i ("State") officials within the time frames specified below, will result in the lawsuit remaining dismissed and the filing of a joint stipulation for final dismissal with prejudice.
- (F) The terms of this Agreement shall apply to HYCF. If the State closes HYCF and transfers youth to a state-run facility substantially similar to HYCF or, without closing HYCF transfers all girls or 20 or more youth to another state-run facility which provides services substantially

similar to HYCF, the applicable and relevant terms of this Agreement will also apply to the new state-run facility. The State reserves the right to transfer youth to a private facility. If the State transfers youth to a private facility which is substantially similar to HYCF, the State shall do everything in its power to facilitate DOJ's inspection of the conditions of care at that facility. The State will not transfer youth out of HYCF in order to attempt to avoid compliance with this Agreement or any constitutional requirements.

- (G) The State enters into this Agreement because it is firmly committed to providing legally adequate conditions at HYCF by instituting the remedial measures required by this Agreement.
- (H) This Agreement does not constitute an admission of liability by the State.
- (I) Defendants named in the lawsuit were the State; Linda Lingle, Governor of Hawai'i; Lillian B. Koller, Director of the Hawai'i Department of Human Services; Sharon Agnew, Director of the Office of Youth Services; Patricia Hamamoto, Superintendent, Hawaii Department of Education; Kaleve Tufono-Iosefa, HYCF Administrator.
- (J) This Agreement is not intended to have any preclusive effect in the litigation or in any other proceeding. Should the issue of the preclusive effect of this Agreement be raised in any proceeding, the parties agree to certify that this Agreement was intended to have no such preclusive effect.
- (K) This Agreement shall not be used against the State in any proceeding other than a proceeding as between the United States and the State. Further, if the Agreement is introduced in a proceeding as between the United States and the State, evidence shall not be admitted as to the State's compliance or noncompliance with the Agreement and nothing in the Agreement shall be relevant to the required constitutional standards.
- (L) Nothing in this Agreement shall prevent the State from modifying or closing HYCF, or developing alternative community placements for the youth currently in the facility.

- (M) 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. 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, the Agreement does not alter legal standards governing any such claims, including those under Hawai'i law.

II. DEFINITIONS

In this Agreement, the following definitions shall apply:

- (A) "HYCF" means the Hawai'i Youth Correctional Facility located at 42-477 Kalaniana'ole Highway, Kailua, Hawai'i.
- (B) "Close Observation" means documented visual observation of youth at all hours and interaction with youth during waking hours periodically, but at least every ten minutes round the clock.
- (C) "DOJ" means the United States Department of Justice, which represents the United States in this matter.
- (D) "Defendants" means the State; Linda Lingle, Governor of Hawai'i; Lillian B. Koller, Director of the Hawai'i Department of Human Services; Sharon Agnew, Director of the Office of Youth Services; Kaleve Tufono-Iosefa, HYCF Administrator; and their successors, contractors and agents.
- (E) "Effective Date" means the date the lawsuit is conditionally dismissed by the Court.
- (F) "Implement" means to give practical effect and ensure actual fulfillment by concrete measures, including appropriate training of relevant staff.
- (G) "Include" or "including" means "include, but not be limited to" or "including, but not limited to."
- (H) "Isolation" means placement of a youth alone in a locked room, and includes such practices as lockdown, seclusion, and early dorms. The term isolation does not apply to

locking a youth in a room during normal sleeping hours, with normal sleeping hours not to exceed 8 to 10 hours, as long as any period in excess of 8 hours is as part of a behavior modification and/or level system for the youth and not associated with discipline or punishment of the youth (such as "early dorms").

- (I) "OYS" means Office of Youth Services within the Hawai'i Department of Human Services that oversees the safety, treatment, and rehabilitation of youth residing at HYCF.
- (J) "Precautionary Direct Supervision" means continuous staff observation of a youth, or direct eyeball supervision.
- (K) "Qualified medical professional" means a physician, nurse, or other medical provider licensed and sufficiently trained to provide the services he or she undertakes to provide.
- (L) "Qualified mental health professional" means a psychologist, psychiatrist, or other mental health provider sufficiently trained to provide the services and possessing at least a Master's degree in the relevant mental health field.
- (M) "Quality Improvement Program" means a system of self-auditing and improvement to assess the implementation and effectiveness of all remedies instituted pursuant to this Agreement, to identify deficits that may exist, and to effectuate new measures to cure deficits identified.
- (N) "Restraints" means devices or methods to control or limit the freedom of movement of a person's limbs or which restrict movement of a person's body or overcome resistance to external control. Restraints include the following:
 - (a) "Security Restraint" means a mechanical restraint device, including handcuffs, leg irons, flex cuffs and transport belts or chains designed for the restraint of committed persons.
 - (b) "Chemical Agent Restraint" means an active chemical substance, such as capicum spray, mace or tear gas (CS or CN), that is used to immobilize a person, overcome resistance to physical control, or to deter or stop activities that may cause personal harm to the individual or others.

- (c) "Therapeutic Medical Restraint" means soft physical restraints approved by the medical authority and applied only for medical or psychiatric purposes and used in conjunction with restraint chairs or beds.
- (d) "Physical Restraint" means use of approved methods of physical force to effect control of a person's limbs or body and limit the person's ability to resist external control.
- (O) "Self-Harm" means when a youth attempts or intentionally commits more than a minor injury to himself or herself. Self-Harm includes conduct by a youth in cutting or carving into his or her own skin or body.
- (P) "State" means the Defendants as described in paragraph (II.D) above.
- (Q) "Suicide Precautions" means any level of watch or observation or measures (including, but not limited to, Precautionary Direct Supervision and Close Observation) to prevent a particular youth from committing self-harm or suicide.
- (R) "The facility" means the Hawai'i Youth Correctional Facility located at 42-477 Kalaniana'ole Highway, Kailua, Hawai'i, and any secure state-run facilities built or obtained to replace HYCF.
- (S) "Train" means to appropriately instruct in the skills addressed, including ongoing assessment of mastery of instructional material. Training shall incorporate testing and instructional methods that establish minimal standards for defining staff competency. After the Effective Date of this Agreement, the State will submit the training curriculum and required number of training hours to the Monitor for review and approval.
- (T) "Youth" means any juvenile or youth committed by a court to the custody of OYS and residing at HYCF or any secure facility used in place of HYCF during the operation of this Agreement.

III. CONSTITUTIONALLY REQUIRED CARE

The State does not concede that the terms in this Agreement

are constitutionally mandated and reserves all rights in this regard. The sole purpose of this Agreement is to protect the constitutional rights of youth committed to HYCF, as well as those federal statutory rights identified herein.

IV. SUBSTANTIVE REMEDIAL MEASURES

A. PROTECTION FROM HARM

1. SUICIDE PREVENTION

- (1) Development and Implementation of Policy The State shall develop and implement appropriate policies, procedures, and practices relating to suicide prevention, intervention, and supervision as set forth in this Agreement.
- (2) Identification of Youth At Risk of Suicide The State shall develop and implement policies and procedures pertaining to the screening of youth in order to:
 - (a) place all newly-arrived youth under heightened observation until they can be assessed by a qualified mental health professional, except those youth who had previously been in the facility within the last 60 days need not be placed under such heightened observation if they had not been subject to any suicide precautions in their last stay at the facility and if there is no indicia that the youth is contemplating Self-Harm;
 - (b) request from the Oahu Family Court and the Hawai'i Juvenile Detention Center all mental health reports for each newly-arrived youth within one week of the youth's arrival;
 - (c) place youth on Precautionary Direct Supervision when the youth has a documented history of suicide attempts or Self-Harm, has declared that he or she has recently contemplated or attempted suicide or Self-Harm, or has expressed or communicated a suicidal or Self-Harming plan;
 - (d) place youth on Close Observation where the youth reasonably appears to be at risk of suicide or Self-Harm but has no history of recent suicide or Self-Harm attempts and does not acknowledge a suicidal or Self-Harming plan;

- (e) create a system whereby mental health and medical staff have access to centralized medical and mental health records for youth in their care;
 - (f) require that all HYCF mental health staff appropriately utilize progress notes to document interactions with and/or assessment of suicidal youth; and
 - (g) facilitate appropriate communication between direct care, medical, and mental health personnel and outside providers of medical and mental health regarding the needs of suicidal youth.
- (3) Suicide Risk Assessments, Evaluations, and Review of Files by Mental Health Staff The State shall develop and implement policies and procedures so that:
- (a) qualified mental health professionals conduct timely suicide risk assessments using reliable instruments (including but not limited to the MAYSI assessment):
 - (1) for all youth exhibiting behavior which reasonably may indicate suicidal ideation;
 - (2) within 24 hours of the initiation of suicide precautions;
 - (3) when determining whether to change the level of suicide precautions; and
 - (4) when determining whether to remove suicide precautions;
 - (b) qualified mental health professionals evaluate youth who attempt or commit Self-Harm or have a history of Self-Harm; and
 - (c) mental health staff thoroughly review as appropriate all of a youth's files, including medical files and any case files, for documentation of any prior suicidal or Self-Harming behavior upon intake and again whenever the youth is placed on suicide precautions.
- (4) Placement of Youth on Suicide Precautions The State shall develop and implement policies and procedures so that any staff member who identifies a youth as suicidal immediately shall place the youth on suicide precautions and refer the youth to a qualified mental health professional for assessment.

- (5) Mental Health Response to Suicidal and Self-Harming Youth Where a qualified mental health professional makes a determination that a youth represents a continuing risk of suicide or Self-Harm to himself, the qualified mental health professional shall write a plan for monitoring, intervention and care, and re-evaluation of the youth ("Mental Health Care Plan"). The Mental Health Care Plan shall provide that youth discharged from suicide precautions receive adequate follow-up treatment within the facility, according to the clinical judgment of the qualified mental health professional.
- (6) Documentation of Youth on Suicide Precautions The State shall develop and implement policies and procedures so that direct care staff who supervise youth on suicide precautions:
- (a) read the youth's Mental Health Care Plan,
 - (b) document the following information during each shift in which the staff supervises the youth in such a way as to be accessible by other direct care staff:
 - (1) that the staff member read: (a) the type of precaution established by a qualified mental health professional or the youth's removal from precautions; (b) the time the youth was placed on such precaution or removed; (c) the time of the youth's last status re-evaluation by the qualified mental health professional and any modification or update to the Mental Health Care Plan;
 - (2) the housing location of the youth on precaution;
 - (3) for youth on Close Observation (or other periodic observation), the times of observation and an overall statement regarding the youth's behavior, status, or emotional state for each time recorded; and
 - (4) for youth on Precautionary Direct Supervision (or other continuous observation), narratives detailing the youth's behavior.
- (7) Documentation of Youth at Risk of Self-Harm The State shall

develop and implement policies, procedures, and practices so that incidents of Self-Harm by youth and youth at heightened risk of Self-Harm, and the actions taken to address such incidents, are documented.

- (8) Access to Programs and Services by Youth on Suicide Precaution The State shall develop and implement policies and procedures so that youth on suicide precautions continue to receive programs and services, in accordance with safety and security needs, and in accordance with the clinical judgment of a qualified mental health professional.
- (9) Step Down Levels of Observation The State shall develop and implement policies and procedures establishing a "step-down" level of observation whereby youth on suicide precaution are gradually released from the more restrictive levels of supervision to less restrictive levels for an appropriate period of time as established by qualified mental health professionals and documented in the youth's care plan prior to the youth's discharge from suicide precaution.
- (10) Treatment Plans for Youth Discharged from Suicide Precaution The State shall develop and implement policies and procedures so that all youth discharged from suicide precaution continue to receive mental health treatment in accordance with the treatment plan developed by a qualified mental health professional, unless the qualified mental health professional determines that no such continued treatment is necessary.
- (11) Access to Emergency Equipment The State shall provide direct care staff with immediate access to appropriate equipment to intervene in the event of an attempted suicide, including cut down tools, CPR microshields, and filled oxygen tanks.
- (12) Safe Housing of Suicidal, Self-Harming Youth, and Youth in Isolation The State shall develop and implement policies and procedures so that all housing for youth on suicide precautions, at risk of Self-Harm, or in isolation is, in accordance with generally accepted professional standards, free of hazards that would allow youth to hang themselves or attempt suicide or commit acts of Self-Harm.
- (13) Suicide and Suicide Attempt Review The State shall develop and implement policies and procedures so that appropriate

staff review all suicides and suicide attempts for policy and training implications.

2. STAFF ABUSE AND YOUTH ASSAULTS

- (14) Protection from Harm The State shall provide youth confined at HYCF with reasonably safe living conditions and shall appropriately protect youth from violence and other physical or sexual abuse by staff and other youth.
- (15) Protection from Undue Restraints The State shall develop and implement policies, procedures and practices so that only safe methods of restraint are used at the facility, and only in those circumstances necessary for safety and security, or with respect to therapeutic restraints pursuant to a medical order to protect the health of the youth.
- (16) Use of Force The State shall develop and implement comprehensive policies, procedures and practices governing use of force, so that the least amount of force necessary for the safety of staff, youth, and visitors is used on youth, and that staff adequately and promptly document and report all uses of force by staff.
- (17) Reporting of Staff Misconduct and Other Serious Incidents The State shall develop and implement appropriate policies and procedures which contain definitions approved by the Monitor after review and comment by the DOJ for the terms "use of force," "staff-on-youth violence," "youth-on-youth violence," "inappropriate staff relationships with youth," "sexual misconduct between youth," and "abusive institutional practices," and will develop and implement such policies, procedures, and practices so that:
 - (a) appropriate HYCF staff report all incidents of use of force, staff-on-youth and youth-on-youth violence, inappropriate staff relationships with youth, sexual misconduct between youth, and abusive institutional practices (such as unwarranted use of isolation or restraint or denial of education or medical care) to appropriate individuals at the facility;
 - (b) appropriate HYCF staff call and document in writing to the Office of Youth Services to report all serious incidents of uses of force, staff-on-youth and youth-on-youth violence, inappropriate staff

relationships with youth, sexual misconduct between youth, and abusive institutional practices, and document the call and written correspondence in the youth's medical or case file;

- (c) such reporting may be done without fear of retaliation; and
 - (d) all such incidents are appropriately documented and reported, including the facts of the incident, any injury that occurred as a result of the incident, and in a way that permits review.
- (18) Review of Incidents by Senior Management The State shall develop and implement policies, procedures, and practices so that senior management review all incidents of use of force, staff-on-youth and youth-on-youth violence, inappropriate staff relationships with youth, sexual misconduct between youth, and abusive institutional practices.
- (19) Investigations The State shall develop and implement policies, procedures, and practices so that senior management initiate investigations of all incidents of use of force, staff-on-youth violence, serious youth-on-youth violence, inappropriate staff relationships with youth, sexual misconduct between youth, and abusive institutional practices. Investigations shall be conducted by persons who do not have direct or immediate indirect responsibility for the conduct being investigated.
- (20) Documentation and Tracking of Investigations The State shall develop policies, practices, and procedures for documenting all incidents of use of force, staff-on-youth violence, youth-on-youth violence, inappropriate staff relationships with youth, sexual misconduct between youth, and abusive institutional practices, and for documenting and tracking the status and outcome of all investigations. Where there is evidence of staff misconduct, the State shall initiate appropriate personnel actions and systemic remedies, where appropriate.
- (21) Reporting Possible Criminal Violations The State shall develop policies, practices, and procedures to define those circumstances in which staff must report possible criminal violations to the police, the prosecuting attorney, or the Attorney General.

- (22) Health Care Inquiries Regarding Injury A nurse or other health care provider shall question, outside the hearing of other staff or youth (unless the facility administrator determines that the youth cannot be left alone with the health care provider), each youth who reports to the medical unit with an injury, regarding the cause of the injury. If, in the course of the youth's medical unit visit, a health care provider suspects staff-on-youth abuse, that health care provider shall immediately:
- (a) take all appropriate steps to preserve evidence of the injury (e.g., photograph the injury and any other physical evidence);
 - (b) report the suspected abuse to the appropriate local officials;
 - (c) appropriately document the matter in the youth's medical record; and
 - (d) complete an incident report.
- (23) Isolation The State shall develop and implement policies, procedures and practices so that staff use isolation (as defined in this Agreement) only in accordance with policy and in an appropriate manner, and so that staff document fully the use and administrative review of any imposition of isolation, including the placing of youth in their cells outside normal sleeping hours.
- (24) Due Process The State shall provide youth confined for disciplinary reasons for more than 24 hours with an appropriate due process hearing by an impartial supervisory staff member to determine whether the cause exists for continued disciplinary confinement and appropriate representation at such hearing. The State shall give youth a copy of rule violation charges and the hearing record for review (including the incident report and witness statements), and shall document that youth were: (a) given the opportunity to ask that witnesses be interviewed, and (b) were provided with accommodation where the youth has disabilities that might interfere with his or her capacity to understand the process or outcome. The State shall adequately document any such due process hearings, including the result of the hearing and justification for the result.

- (25) Staffing The State shall provide sufficient numbers of adequately trained direct care and supervisory staff to (a) supervise youth safely, (b) protect youth from harm, (c) allow youth reasonable access to medical and mental health services, and (d) provide youth with adequate time spent in out-of-cell activities. In furtherance of this requirement, the State shall submit a proposed staffing plan to be approved by the Monitor, with the Monitor's approval establishing the sufficient number of staff required by this Agreement. Prior to approval by the Monitor, DOJ may submit comments to the Monitor regarding the State's staffing plan, which comments shall also be provided to the State. The State shall establish mandatory minimum staffing requirements, including a determination of all direct supervision posts that must be filled on each shift. In establishing mandatory post coverage, the State shall include provisions for coverage for all required staff training as well as authorized leave time. The State shall also document daily shift coverages and shall report to the Office of Youth Services, Department of Human Services, and to the Monitor, all instances of failure to provide the minimum post coverage and the closing of a post due to lack of direct care staff. The State shall regularly report to the Office of Youth Services, Department of Human Services, and to the Monitor, the status of all current vacancies.
- (26) Employment Practices The State shall only employ individuals with reputable and responsible characters to work with youth residents at the facility. Within 120 days of the Effective Date of this Agreement, the State shall conduct a criminal record check for all current employees at HYCF, in accordance with Hawaii Revised Statutes section 352-5.5 (2006), taking appropriate actions where new information is obtained. At least as often as every year thereafter, the State shall update such criminal record checks for all employees who come into contact with youth. HYCF administration shall develop policies and procedures so that applicants and all current staff are required to immediately report to it any arrest other than a minor traffic violation and also report the issuance of a restraining order entered against the staff member due to alleged abusive behavior.
- (27) Exploitation The State shall develop and implement policies, procedures, and practices so that staff do not

financially exploit youth or their families.

- (28) Grievances The State shall develop and implement policies, procedures, and practices so that the HYCF has an appropriate grievance system for youth.
- (29) Retaliation and Intimidation The State shall develop and implement policies, procedures, and practices so that staff do not intimidate or retaliate against youth who file grievances or against staff members, volunteers, contractual employees, or youth families who report allegations of staff abuse or misconduct. The policies, procedures, and practices contemplated by this paragraph will not preclude appropriate action where a youth, employee, or other person knowingly asserts a false complaint or grievance. As to retaliation against staff members, the policies and procedures contemplated by this paragraph may reference Hawaii Revised Statutes, Chapter 378, Part V (Whistleblowers' Protection Act).
- (30) Admissions Intake and Orientation The State shall develop and implement policies, procedures and practices to establish a consistent, orderly admissions intake system, conducive to gathering necessary information about youth, disseminating information to staff providing services and care for youth, and maintaining their safety. Each youth entering the facility shall receive an orientation that shall include simple directions for reporting abuse, and assure youth of their right to be protected from harm and from retaliation for reporting allegations of abuse. Orientation shall also clearly set forth the rules youth must follow at the facility, explain how to access medical and mental health care and the grievance system, and provide other information pertinent to the youth's participation in facility programs.
- (31) Classification The State shall develop and implement a classification system that, upon intake, places youth appropriately and safely within the facility, and provides for later reclassification in appropriate circumstances.

B. TRAINING

- (32) Training The State shall develop and implement policies, procedures, and practices to provide staff, volunteers and contractual employees of HYCF, and OYS employees as deemed

appropriate by OYS, with training regarding their responsibilities. These policies, procedures and practices shall include:

- (a) a comprehensive training plan for all HYCF employees and appropriate OYS employees, reviewed and updated annually;
- (b) requirements by job category;
- (c) standards for qualification of trainers;
- (d) processes for approval of the training curriculum;
- (e) schedules for staff training;
- (f) criteria for determining that staff volunteers and contractual employees have mastered the instructional materials and methods being taught; and
- (g) specific requirements by professional discipline for any continuing education credits established by licensure, certification, or recognized professional academies and organizations.

- (33) Use of Force Training The State shall train direct care staff in the approved method for physical restraint that minimizes the risk of injury to youth. The State shall only use instructors that are appropriately certified to teach the approved physical restraint method. All training shall include each staff's demonstration of the approved techniques and 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' use of the approved restraint methods and must provide evaluation of the staff's proper use of these method(s) in their reports addressing use of force incidents.
- (34) Suicide and Self-Harm Prevention Training The State shall conduct suicide prevention training for direct care staff.

Within six months of the Effective Date of this Agreement, HYCF shall develop a prevention training curriculum, which shall include the following topics:

- (a) a suicide prevention policy consistent with this Agreement;
 - (b) the ways in which facility environments may contribute to suicidal behavior;
 - (c) potential predisposing factors to suicide;
 - (d) high risk suicide periods;
 - (e) warning signs and symptoms of suicidal behavior;
 - (f) case studies of recent suicides and serious suicide attempts;
 - (g) the proper role of staff in responding to a suicide attempt by youth, including different levels of observation and the types of precautions that should be taken;
 - (h) strategies for de-escalating youth engaging in self-harming behaviors;
 - (i) instruction and mock demonstrations regarding the proper response to a suicide attempt; and
 - (j) the proper use of emergency equipment.
- (35) Staff Training in Behavior Management, De-Escalation and Crisis Intervention The State shall provide appropriate competency-based training to staff in behavior management, de-escalation techniques, appropriate communication with youth, and crisis intervention before staff may work in direct contact with youth.
- (36) Staff Training in Incident Reporting The State shall develop and implement policies, procedures, and practices so that staff are appropriately trained in incident reporting consistent with the type of incident reporting required under this Agreement.
- (37) Behavior Management Program The State shall develop and

implement a behavior management program. The program shall provide youth with positive and systematic recognition and rewards for accomplishments and shall teach social and cognitive skills, reinforce appropriate choices, and assist youth in establishing understandable and reachable goals. The program shall also provide that mental health staff (a) consult custody and other direct care custody staff regarding behavior management, and (b) assess the effectiveness of such program and any interventions utilized. HYCF administration shall incorporate means to assess and refine the program based on mental health staff assessment of outcomes and shall share results with program units.

C. ACCESS TO MEDICAL AND MENTAL HEALTH CARE

- (38) Access to Care The State shall provide youth with access to adequate, appropriate, and timely medical and mental health care to meet the individualized needs of youth in accordance with clinical judgment.
- (39) Policies, Procedures and Protocols The State shall develop and implement adequate medical and mental health policies, procedures and protocols as set forth in this Agreement. The State shall provide sufficient numbers of qualified medical professionals to meet these needs. In furtherance of this requirement, the State shall submit a proposed staffing plan to be approved by the Monitor, with the Monitor's approval establishing the sufficient number of staff required by this Agreement. Prior to approval by the Monitor, DOJ may submit comments to the Monitor regarding the State's staffing plan, which comments shall also be provided to the State. The State shall also provide that direct care staff do not restrict or deny the provision of adequate medical and mental health care.
- (40) Privacy Subject to safety considerations, the State shall provide for an appropriately private environment in which to conduct medical and mental health assessments at HYCF.
- (41) Mental Health and Medical Records Retrieval The State, through appropriate HYCF and OYS staff, shall develop and implement policies, procedures and practices so that, consistent with State and Federal law, all reasonable efforts are made to have the juvenile courts in the State, all juvenile detention facilities, and all placement

settings from which youth are committed, timely forward all pertinent youth records or discharge summaries regarding medical and mental health care, in accordance with the clinical judgment of the qualified medical professional or qualified mental health professional.

- (42) Interdisciplinary Communication The State shall develop and implement policies, procedures and practices so that interdisciplinary communication occurs to facilitate mental health treatment among medical and mental health staff and outside providers of medical and mental health services.
- (43) Mental Health and Medical Record System The State shall develop and implement policies, procedures and practices so that medical and mental care staff have reasonable access to all documents that are relevant to the care and treatment of the youth.

D. SPECIAL EDUCATION

- (44) Provision of Special Education The State shall provide youth confined at the facility with special education in compliance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., and regulations promulgated thereunder. The State understands that providing appropriate special education services includes having staff sufficient to transport and, if necessary, appropriately supervise youth during the provision of special education services.
- (45) Documentation The State shall adequately document any lapse in the provision of special education, including the number of youth who were denied access to special education, the date, time, periods missed, and reason for the lapse. The State shall submit such documentation to the facility director for prompt action to try to cure and prevent recurrence of such denial.
- (46) Timeliness in Providing Special Education Youth who qualify for special education services shall receive such services within a reasonable time following intake at the facility.
- (47) Vocational Education The State shall develop and implement appropriate vocational education services for youth with disabilities.

- (48) Section 504 Plans The State shall develop and implement policies, procedures and practices to provide that Section 504 plans are developed and implemented for eligible youth.
- (49) Parent, Guardian and Surrogate Involvement The State shall develop and implement policies, procedures and practices to appropriately notify and involve parents, guardians or surrogate parents in the provision of special education services, whenever possible.

V. COMPLIANCE AND QUALITY IMPROVEMENT

- (50) Document Development and Revision The State shall revise and/or develop policies, procedures, protocols, training curricula, and practices so that they are consistent with, incorporate, address, implement, document, and assess 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, and internal audit or quality improvement methods to effectuate the provisions of this Agreement and report the outcomes, findings, and corrective action plans.
- (51) Document Review The State shall draft policies and procedures in conjunction with comments and discussions with the DOJ and the Monitor, and will send newly-drafted and revised policies and procedures to the DOJ and the Monitor for review and approval as they are promulgated. The State shall provide initial and refresher training to all facility staff with respect to newly-implemented or revised policies and procedures. The State shall document employee review and training in policies and procedures.
- (52) Quality Improvement Programs The State shall develop and implement a Quality Improvement Program for HYCF.
- (53) Corrective Action Plans The State shall develop and implement policies and procedures to address problems that are addressed in this Agreement or uncovered during the course of quality improvement activities. The State shall develop, implement, and document corrective action plans to address these problems in such a manner as to prevent them from occurring again in the future, and shall report such plans to the Office of Youth Services, Department of Human Services.

(54) Technical Assistance by DOJ In the first instance, the State shall request technical assistance from the Monitor. DOJ will thereafter provide the State with technical assistance as requested by the State, including assistance in the formulation and development of policies and procedures, documentation, and quality improvement methods that are required to monitor and effectuate the terms of this Agreement. DOJ will assist the State in identifying additional financial or technical resources to supplement those resources currently allocated to the facilities. When the State seeks assistance from DOJ, the scope of DOJ's review shall be limited to the area in which the State requested assistance.

VI. MONITORING AND ENFORCEMENT

(55) Monitor Selection The parties have jointly selected Russell Van Vleet to serve as the monitor ("Monitor"). Should the position become vacant and the parties cannot agree on a replacement, the parties shall recommend candidates to the Court, and the Court will select the Monitor. Neither party, nor any employee or agent of either party, shall have any supervisory authority over the Monitor's activities, reports, findings, or recommendations. The cost for the Monitor's fees and expenses shall be borne by the State. The State will apply to the Chief Procurement Officer for an exemption from the state procurement code to retain the Monitor. The Monitor may be terminated only for good cause, unrelated to the Monitor's findings or recommendations, and only with prior notice to and approval of both parties or by Court order.

(56) Monitor Qualifications The Monitor shall have experience and education or training in the field of juvenile justice. The Monitor also may have education, training, or experience in general or special education, adolescent health and mental health needs (particularly the needs of institutionalized adolescents), and institutional abuse and incident investigations.

(57) Monitor Access The Monitor shall have full and complete access to the facilities, all facility and OYS records, staff, and residents. The State shall direct all employees to cooperate fully with the Monitor. All non-public information obtained by the Monitor shall be maintained in a confidential manner.

- (58) Monitor Ex Parte Communications The Monitor shall be permitted to initiate and receive *ex parte* communications with all parties.
- (59) Limitations on Public Disclosures by Monitor Except as required or authorized by the terms of this Agreement or the parties acting together, the Monitor shall not: make any public statements (at a conference or otherwise); issue findings with regard to any act or omission of the State or its agents, representatives or employees; or disclose non-public information provided to the Monitor pursuant to this Agreement. Any press statement made by the Monitor regarding his employment must first be approved by the parties. Other than this lawsuit as between the United States and the State, the Monitor shall not testify in any litigation or proceeding with regard to any act or omission of the State, OYS or any of their agents, representatives, or employees, nor testify regarding any matter or subject that he or she may have learned as a result of his or her performance under this Agreement. In this lawsuit as between the United States and the State, either party may call the Monitor as a witness. Neither party will call the Monitor as their own expert or designate the Monitor as their own expert pursuant to the federal rules of civil procedure. The scope and purpose of the Monitor's testimony shall be left to the discretion of the Court. Other than this lawsuit as between the United States and the State, reports issued by the Monitor shall not be admissible against the State in any proceeding for any reason. In this lawsuit as between the United States and the State, the admissibility into evidence of the Monitor's reports, or portions thereof, shall be governed by the federal rules of evidence, and the parties reserve all rights to either seek admissibility or object to admissibility of those reports. The Monitor is not a state or local agency or an agent thereof, and accordingly the records maintained by the Monitor shall not be deemed public records subject to public inspection. In the event of a proceeding before a court, in which the court needs to determine whether or not the Monitor has performed any contracts or subcontracts for monitoring this Agreement, such testimony as is necessary for the determination of such issue(s) may be allowed, in the discretion of the court, notwithstanding this paragraph.
- (60) Limitations on Other Employment by the Monitor Unless such

conflict is waived by the parties, the Monitor shall not accept employment or provide consulting services that would present a conflict of interest with the Monitor's 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.

- (61) Limitations on Monitor's Liability Other than a proceeding regarding whether or not the Monitor has performed any contracts or subcontracts for monitoring this Agreement, neither the Monitor nor any person or entity hired or otherwise retained by the Monitor to assist in furthering any provision of this Agreement shall be liable for any claim, lawsuit or demand arising out of the Monitor's performance pursuant to this Agreement.
- (62) Monitor Reports The Monitor shall provide the parties with reports describing the steps taken by the State to implement this Agreement and evaluate the extent to which the State has complied with each substantive provision of the Agreement. The Monitor shall issue reports every four (4) months, unless the parties agree otherwise. The Monitor shall provide reports to the parties in draft form for comment at least two weeks prior to their issuance. These reports shall be written with due regard for the privacy interests of individual youth and staff and the interest of the State in protecting against disclosure of non-public information. The Monitor's reports, which shall not be filed with the Court, may be made public by the Monitor or by the State or United States. The Monitor may keep confidential any personally-identifiable information, or any information in the interest of privacy or public safety.
- (63) Monitor Budget The State shall provide the Monitor with a budget to be set forth in an agreement with the Monitor. The Monitor may consult experts or consultants retained by either party. All parties shall receive copies of all draft reports from experts to the Monitor prior to the issuance of any Monitor's report, and shall have the option of being present at briefings from such experts to the Monitor and to the State. The Monitor may initiate and receive *ex parte* communications with the parties and with the parties' consultants.

- (64) Technical Assistance by the Monitor The Monitor shall provide the State with technical assistance as requested by the State.

VII. REPORTING REQUIREMENTS AND RIGHT OF ACCESS

- (65) DOJ Access The DOJ shall have full and complete access to the youth at the facilities. The DOJ shall have full and complete access to the facilities, youth records, staff records, and staff of the facilities regarding the topics addressed in this Agreement. The DOJ shall have the right to conduct unannounced visits to the facilities, provided that the Special Litigation Section will notify the State in the event that the United States Attorney's Office for the District of Hawai'i accesses youth or records at the facility. The DOJ shall have the right to conduct interviews with staff, and confidential interviews with residents and former residents. State attorneys may be present at interviews of staff and tours of facilities. All non-public information obtained by the DOJ shall be maintained in a confidential manner.
- (66) State Response to DOJ Questions The State shall respond to written questions from the DOJ within 30 days of receipt. The State shall provide the DOJ with written answers and access to any requested documents regarding the State's compliance with the requirements of this Agreement. Any dispute regarding the scope or burden of the requests shall be resolved by the Monitor.
- (67) State Documentation of Compliance The State shall maintain sufficient records to document its compliance with all of the requirements of this Agreement. The State shall also maintain (so long as this Agreement remains in effect) any and all records required by or developed under this Agreement.
- (68) State Compliance Reports Thirty (30) calendar days before each report from the Monitor is due, the State shall provide the Monitor and the United States with a status report regarding its compliance with this Agreement.
- (69) Privileges This Agreement shall not be deemed to waive the attorney/client, attorney work product, deliberative process, victim/counselor, or executive privileges. The

State shall not assert physician/patient or psychotherapist/patient privileges with respect to the monitoring of this Agreement.

VIII. IMPLEMENTATION AND TERMINATION

- (70) Information to Employees The State shall provide that all current and future relevant State employees understand the terms of this Agreement (to the extent necessary to carry out their job duties and responsibilities) and implement the terms of this Agreement.
- (71) Implementation The State shall implement all reforms necessary to effectuate this Agreement. The State will begin implementation immediately upon the Effective Date of this Agreement. Minor, inconsequential, sporadic, unintentional or isolated harmless instances of noncompliance with the Agreement shall not be a basis for enforcement, provided they do not affect a substantial interest of the youth.
- (72) Integration This Agreement shall constitute the entire integrated Agreement of the parties. With the exception of DOJ's findings letter dated August 4, 2005 related to HYCF, no prior or contemporaneous communications, oral or written, will be relevant or admissible for purposes of determining the meaning of any provisions herein.
- (73) Enforcement If DOJ believes that the State has failed to substantially comply with any obligation under this Agreement, DOJ will give the State written notice of the State's failure prior to reinstating the lawsuit. The parties shall conduct good-faith discussions to resolve the dispute. The parties shall attempt in good faith to mediate the dispute with the Monitor for a minimum of 30 days prior to DOJ seeking the reinstatement of the civil proceeding that this Agreement settled. The terms of this Agreement are not subject to State or federal court enforcement other than the reinstatement of the Complaint that this Agreement settled. DOJ shall have no remedy or action available for the State's alleged breach of this Agreement other than the reinstatement of the Complaint that this Agreement settled. DOJ commits to work in good faith with the State 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, including the provision regarding remediation, before seeking reinstatement.

- (74) Agreement Coordinator The State shall appoint an Agreement Coordinator to coordinate and oversee compliance with this Agreement.
- (75) Termination 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 of the Agreement if the State has substantially complied with each of the provisions of the Agreement and has maintained substantial compliance for at least two years. If the DOJ agrees that the State has maintained such compliance, the parties shall file a joint stipulation to dismiss with prejudice. If DOJ does not agree that the State has maintained such compliance, the burden shall be on the State to demonstrate this level of compliance. There are four substantive sections of this Agreement - protection from harm, training, access to medical and mental health care, and special education. A section of the Agreement may be terminated if the State sustains its burden with respect to that section of the Agreement. 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.
- (76) Defense of Agreement 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.
- (77) Successors This Agreement shall be binding on all successors, assignees, employees, agents and all those working for or on behalf of the State.
- (78) 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 any other provision herein shall not be construed as a waiver of its right to enforce other deadlines or provisions of this Agreement.

- (79) Notice "Notice" under this Agreement shall be provided by courier or overnight delivery and shall be provided to the Governor of the State and to the Attorney General of the State.
- (80) Unforeseen Delay 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 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 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 implement all reasonable measures to avoid or minimize any such failure.
- (81) Non-Retaliation 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. The State is not precluded from taking appropriate action where an individual knowingly asserts a false complaint or makes knowingly false statements.
- (82) Subheadings 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.
- (83) Severability 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.
- (84) Attorney's Fees and Expenses Each party shall bear the cost of their fees and expenses incurred in connection with this cause.

FOR THE UNITED STATES:

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Date: February 7, 2006