IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO:
	)	3:12cv59-JAG
v.	)	
	)	
COMMONWEALTH OF VIRGINIA,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
PEGGY WOOD, et al.,	)	
	)	
Intervenor-Defendants.	)	
_____	)	

UNITED STATES' STATEMENT OF ISSUES AND MOTION FOR COURT-ORDERED SCHEDULE

The United States respectfully submits this Statement of Issues and Motion for a Court-Ordered Schedule regarding the implementation of the Settlement Agreement, ECF No. 112, August 23, 2012 ("Agreement"). The Parties entered into the Agreement more than three years ago with the goal to dramatically increase the integration of Virginians with intellectual and developmental disabilities in all areas of life. Over the last three years, the Commonwealth has made significant progress in a number of areas. The Commonwealth has created more than 2,000 new waiver slots to move individuals to community settings, has discharged more than 500 individuals from its state-operated Training Centers, has created basic infrastructure around adult crisis services, and has developed a supported employment plan. However, in other critical areas, progress is lagging. A number of the Commonwealth's key initiatives, including

developing integrated housing, a functioning children's crisis system, and integrated day and supported employment programs, have been delayed. These delays and the attendant lack of services have real implications for the Commonwealth's citizens who have intellectual and developmental disabilities ("ID/DD"). These individuals are more likely to be institutionalized unnecessarily, to have to move far from their communities and natural supports, to live in congregate settings, to experience crises, and to end up in hospitals or jails – the very outcomes that the Agreement is intended to prevent.

The Commonwealth represents that it will address these gaps and build its service system by restructuring its Home and Community-Based Services Waivers ("HCBS waivers").[1] The United States does not question the good faith of the Department of Behavioral Health and Developmental Services ("DBHDS"). However, even according to the Commonwealth's timelines, the waiver restructuring is taking years to implement, and the Commonwealth elected this year to delay implementation for at least one more year. There is also no guarantee that the waiver restructuring will obtain necessary legislative approvals or that it will be adequate to address the gaps in the system.

In part because of the Commonwealth's failure to restructure the waivers, the planned development or expansion of services under the Agreement has been significantly delayed, sometimes without notice to the public, the United States, or this Court. The parties, the citizens of the Commonwealth, and the Court now face a substantial risk that the Commonwealth will not achieve compliance with the Agreement within delineated or otherwise reasonable timeframes. Current delays are already harming the Commonwealth's citizens with

[1] Home and Community-Based Services Waivers refer to "the program approved by the Centers for Medicare and Medicaid Services ('CMS') for the purpose of providing services in community settings for eligible persons with developmental disabilities who would otherwise be served in ICFs [intermediate care facilities for individuals with intellectual and developmental disabilities]." Agreement § II.C.

ID/DD. And this harm is being inflicted against a backdrop in which the Commonwealth is falling further behind in addressing a growing list of almost 10,000 individuals who are waiting for intellectual and developmental disability services. *See* Report of the Independent Reviewer on Compliance with the Settlement Agreement, June 6, 2015, ECF No. 177 ("June 2015 Report"), at 6.

It is time that the Commonwealth commits the resources necessary to serve its citizens with ID/DD as contemplated in the Agreement and provides binding assurances that it will meet its commitments. Accordingly, the United States respectfully requests that the Commonwealth provide a schedule of implementation, acceptable to this Court and to the United States, which sets out reasonable timeframes for implementation consistent with the requirements of the Agreement, and which shall be issued as an order of this Court.

I. The Commonwealth is Failing to Develop Community Services and Integrated Settings

The Agreement provides that the Commonwealth shall provide services to Virginians with ID/DD "in the most integrated setting appropriate to meet their needs." Agreement § I.A. The Commonwealth has committed to providing community services and placements in order to "prevent the unnecessary institutionalization of individuals with ID/DD and to provide them opportunities to live in the most integrated settings appropriate to their needs [and] consistent with their informed choice." *Id.* § III.A. This obligation runs to all individuals with ID/DD, including medically and behaviorally complex individuals. *See id.* § III.B.2. Unfortunately, the Commonwealth's progress in a number of critical areas is lagging.

a. The Commonwealth's Crisis Services Do Not Meet the Needs of the ID/DD Population

As the Independent Reviewer has stated, crisis services are a critical component of a community-based service system that, when functioning appropriately, prevent unnecessary institutionalization. June 2015 Report at 43. The Agreement mandates that the Commonwealth establish a crisis system that works to proactively prevent crises and to quickly deescalate those crises that do occur in order to allow individuals to safely remain in their homes.[2] The Agreement additionally calls for the Commonwealth to ensure that individuals with ID/DD have their complex behavioral needs met, with the understanding that this can prevent crises in the first instance.[3]

Virginia has failed to develop a crisis system that meets the needs of the individuals that it is intended to serve. First, Virginia is currently unable to meet the needs of children in crisis. Virginia previously determined that it would create a separate crisis system for children and would fully implement the children's crisis system by August 31, 2014. *See* Jan. 2014 Crisis Response System Plan at 23, attached as Exhibit ("Ex.") #1. The Commonwealth failed to meet that timeline and now intends to establish a children's crisis system by the end of this calendar

[2] *See, e.g.*, Agreement § III.C.6.a.ii (requiring services focused on crisis prevention); § III.C.6.a.i (requiring timely supports for individuals with ID/DD who are experiencing crisis); § III.C.6.b.ii (requiring mobile crisis teams that provide timely assessment and treatment to de-escalate crises without removing individuals from their placements when possible, respond onsite within established timelines, assist with strategies for preventing future crises, and work with law enforcement personnel); § III.C.6.b.iii (requiring the creation of crisis stabilization programs that offer short-term alternatives to institutionalization or hospitalization for individuals who need inpatient stabilization services).

[3] *See, e.g.*, Agreement § III.B.2 (explicitly including individuals with complex behavioral needs in the target population benefiting from the Agreement's protections); § III.C.5.b.ii (requiring case managers to help individuals access therapeutic, behavioral, and psychiatric services) (noncompliance in sixth reporting period); § IV.C.5 (requiring that essential supports are in place prior to an individual's discharge from a training center) (noncompliance during the fifth period, the last period assessed); § IV.D.3 (compelling Regional Support Teams to resolve barriers to services especially for individuals with complex behavioral needs) (not in compliance during fifth period, the last period assessed); §§ V.A & V.D.3.c (obligating the Commonwealth to implement a quality management system "to ensure appropriate services are available and accessible for individuals in the target population" to avoid crises including contact with the criminal justice system) (noncompliance with § V.D.3.c during fifth period, the last period assessed).

year – sixteen months beyond its previous deadline. However, some of the Commonwealth's records indicate that it will not meet its children's crisis system's performance targets until December 2016 – that is, an additional year's delay. Letter from Allyson Tysinger to Judge Gibney (Sept. 11, 2015), attaching Outcome Timelines ("Updated Outcome Timelines"), attached as Ex. #2 (filed under seal), at 5; June 2015 Report at 43. At best, the children's crisis system will come into effect more than 15 months after originally planned and years after deadlines have come due for mobile crisis teams and crisis stabilization programs. *See* Agreement §§ III.C.6.b.ii.F-H, III.C.6.b.iii.G. Additionally, critical components, such as the availability of mobile crisis teams and responses within the required timeframes, likely will not be in place for an additional year. Updated Outcome Timelines at 5.

This delay has real and often devastating implications for children and families. Without a crisis system, families must instead rely on emergency rooms, police transports, and, ultimately, congregate settings. For example, eight-year-old MP, who is on the intellectual disability waiver waitlist, has experienced at least three emergency room visits since he began exhibiting behavioral issues last summer. Pangle Affidavit, attached as Ex. #3 ¶¶ 12,14, and 16. MP's parents tried to access crisis services; however, they were told that there were not any crisis services available for children in his area. *Id*. ¶ 8. Instead, his parents were told to take MP to the emergency room when his behaviors became too much for them to handle. *Id*. ¶ 9. In May 2015, MP and his parents spent approximately eight hours in the emergency room. *Id*. ¶ 17. MP was then sedated and transported by ambulance to an acute psychiatric facility 100 miles from his home. *Id*. ¶¶ 19 and 20. MP's stay in this facility was the first time he had been separated from his parents in two years, and the experience traumatized MP and his family.

Id. ¶ 21. Because of the lack of sufficient community-based supports, this child is now living in a congregate residential placement. *Id*. ¶ 22.

The Commonwealth has established a crisis system for adults, as required by the Agreement. However, there are significant questions regarding the quality of those services. June 2015 Report at 43-46. The Independent Reviewer noted concerns that mobile crisis teams are not responding onsite as required, *id*. at 44, that teams are not responding within required timeframes, *id*. at 46, and that "REACH [crisis] programs may not be an option for individuals with challenging behaviors, physical care, medical, and communication needs," *id*. at 45.[4] In addition, there are "serious questions . . . regarding the effectiveness of the timely supports, crisis prevention, and proactive planning, and whether these services are implemented to avoid potential crises and to prevent institutionalization." *Id.* at 48.

The United States' own review unearthed significant concerns with crisis services for people with complex behavioral needs. Letter from Kyle Smiddie to Allyson Tysinger (May 7, 2015), attached as Ex. #4. For example, many of these people reportedly had not received constructive crisis prevention plans or other preventive services; mobile crisis teams often failed to respond onsite to crises; people whose needs were "too difficult" – in other words, those most in need of crisis services – were excluded from the crisis stabilization program; services often required a "pre-planned" assessment and consequently were not made available when a crisis arose; and, as a result, a number of people fell into the custody of hospitals or law enforcement. *Id*.

[4] REACH (Regional Educational Assessment Crisis Response and Habilitation) is the Commonwealth's name for its statewide crisis system that serves adults with ID/DD. The Independent Reviewer found the Commonwealth in compliance with certain aspects of its adult crisis system, but also acknowledged that "[t]he consultant's study of crisis services for adults did not evaluate the qualitative aspects or whether these crisis services achieved positive outcomes." June 2015 Report at 46. Given the concerns raised about the crisis system, the Independent Reviewer has decided to prioritize monitoring the quality of crisis services during his next review. *Id*. at 44.

These concerns are borne out in DBHDS's own data. In a well-functioning crisis system, people in crisis can receive in-home support through crisis prevention plans, emergency hotlines, and mobile crisis units that respond onsite, so that crises are resolved onsite without the person leaving home. This is reflected in the Agreement, which provides that crisis services should be available to respond to people in their homes, without removing them from their current placement whenever possible. Agreement § III.C.6.b.ii.A. One year ago, the United States expressed concern that almost one-fourth of the people using crisis services had to receive a crisis assessment outside of their home. Letter from Richard J. Farano to Allyson Tysinger (Sept. 5, 2014), attached as Ex. #5, at 3. Now, almost half of all crisis assessments (48%) occur outside of the individual's home.[5] REACH Data Summary Report: Quarter IV/FY15, attached as Ex. #6 (filed under seal), at 9. This raises significant concerns about the Commonwealth's capacity to deescalate crises and meet individuals' needs in their homes.

The crisis system's reliance on hospitals to serve individuals in crisis is also concerning: Almost one-third of all crisis assessments are occurring in hospitals or emergency rooms, and in one region,[6] this number is more than 50%. *Id*. Even more alarming, Virginians with ID/DD are experiencing psychiatric hospitalizations at increasing rates. The number of individuals who were hospitalized during a crisis has almost tripled over the last year – it rose from 47 individuals who were hospitalized in the previous two quarters to 119 in the most recent two quarters. June 2015 Report at 45. This is one of the worst outcomes for an individual in crisis, but sadly common when a crisis system lacks capacity.

The Commonwealth acknowledges that lack of provider capacity is straining its crisis services. It has reported that one region is adding another bed to its crisis stabilization program

[5] This includes all assessments except those that occur in the individual's home and those that occur at a residential provider when that is where the person lives.

[6] The Commonwealth uses Virginia's five health planning regions to split its statewide services into regions.

because of "a larger systemic issue in the region; namely a shortage of providers skilled in working with individuals with significant behavioral disorders." REACH Data Summary Report: Quarter IV/FY15 at 10. The report continues: "This information underscores how the limited number of residential providers in the region impacts all aspects of the system, from duration of inpatient stays, to utilization of the CTH [crisis stabilization programs], and in an indirect way, rates of hospitalization." *Id*.

The Commonwealth represented in a September 2015 meeting with the United States and the Independent Reviewer that it plans to make improvements to the crisis system in response to the United States' behavioral study and the Independent Reviewer's concerns. However, at this point, the United States does not have any verified information to confirm that these improvements are occurring or any data to demonstrate that they are having any impact on people in need of crisis supports.

Also, the Commonwealth has publicly represented that its redesigned waivers should increase access to community behavioral supports and crisis services. *See* Va. Dep't of Behavioral Health & Dev. Servs., Virginia's ID/DD Waiver Re-Design Update, attached as Ex. #7, at 31 (June 8, 2015). The Commonwealth originally planned for this increase to begin in late 2015. However, the redesign has not yet occurred and is behind even this prolonged schedule.

b. <u>The Commonwealth is Failing to Provide Integrated Living Settings</u>

1. <u>The Commonwealth Continues to Rely on Segregated Housing and Inappropriate Placements</u>

The core provision of the Agreement requires that "the Commonwealth shall serve individuals in the target population in the most integrated setting consistent with their informed choice and needs."[7] Agreement § III.D.1. In order to promote integration, the Commonwealth

[7] The Agreement defines the target population as individuals with ID/DD who either currently reside at a

committed to "facilitate individuals receiving HCBS waivers . . . to live in their own home, leased apartment, or family's home, when such a placement is their informed choice and the most integrated setting appropriate to their needs," *id*. § III.D.2, and to develop a plan to increase access to independent living options, *id*. § III.D.3. There is a "presumption that, with sufficient supports and services, *all individuals (including individuals with complex behavioral and/or medical needs)* can live in an integrated setting." *id*. § IV.B.7 (emphasis added). The Commonwealth also agreed to avoid placing individuals, if at all possible, in nursing facilities or congregate settings with five or more individuals.[8] *id*. § III.D.6.

However, more than three years since making these commitments, the Commonwealth has made minimal progress towards developing integrated housing options. The Independent Reviewer has continually found Virginia in noncompliance in this area. June 2015 Report at 15, §§ III.D.1, 2, & 3 (listing three consecutive rating periods of non-compliance on the three principal provisions regarding community living options). In his most recent report, the Independent Reviewer found that "[i]ndividuals are primarily offered congregate settings," *id*. at 15, § III.D.1, the Commonwealth "has not substantially increased access to independent living options," *id*. at 15, § III.D.3, and "[m]ost integrated residential . . . options for individuals with complex needs are often not available," *id*. at 18, § IV.A.

It is unsurprising that most individuals continue to be offered congregate segregated settings, given the Commonwealth's failure to secure significant funding for independent housing. While DBHDS and its sister agencies have genuinely attempted to increase housing

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Training Center, meet the criteria for the wait list for the ID or DD waiver, or currently reside in a nursing home or ICF. Agreement § III.B.1. Individuals are not excluded from the target population if they receive HCBS waiver services or individual and family supports or if they have complex behavioral or medical needs or co-occurring conditions. *Id*. §§ III.B.2-3.

[8] The Commonwealth can place an individual in a nursing facility or congregate setting with five or more individuals if it is "consistent with the individual's needs and informed choice and has been reviewed by the Region's Community Resource Consultant and [if necessary] the Regional Support Team." Agreement § III.D.6.

capacity for individuals with ID/DD, *only 39 individuals* to date have obtained housing through those efforts.[9] Rental assistance, which the Commonwealth was required to have distributed in 2013 in order to support individuals living in their own homes or apartments, was not provided to individuals until more than a year later. *See* Agreement § III.D.4; Report of the Independent Reviewer on Compliance with the Settlement Agreement, June 6, 2014, ECF No. 149 ("June 2014 Report"), at 33. Today, seven of the eighteen individuals who were approved to receive this rental assistance do not even have housing. 4th_Quarter_2015_Report_UPDATE_ TO_ VA_Plan_to_Increase_Independent_Living _ 7_21_15 ("4th Quarter Update"), at Action Item 2.2.3, attached as Ex. #8 (filed under seal).[10] Separately, the Commonwealth expects to use its low income housing tax credit program to serve a minimum of 74 individuals with ID/DD in multiple housing projects, but these are not likely to be available until some time in 2017. Finally, DBHDS attempted to secure a modest amount of funds for ongoing rental assistance for Virginians with ID/DD, but the General Assembly rejected the request.[11]

DBHDS has set a goal of adding 847 independent housing options for individuals with ID/DD over the next six years. *See* Updated Outcome Timelines at 9. But its efforts have had little material impact thus far. Delays in implementation and insufficient funding have impeded the Commonwealth's efforts to move individuals to more integrated community placements. The United States submits that the Commonwealth should be doing more to create permanent

[9] DBHDS reports that it has created 115 independent housing options, but it is unclear whether these options are in fact being utilized. Updated Outcome Timeline at 8.

[10] In addition, Virginia has received approval to develop a special admissions preference to permit housing authorities to set aside vouchers to subsidize public housing rental costs and prioritize those vouchers for individuals with ID/DD. *See* Letter from Jeanine Worden to Susan Dewey (Mar. 12, 2013), attached as Ex. #9; Letter from Jeanine Worden to Maurice Jones (Apr. 9, 2015), attached as Ex. #10. As of July 2015, the Commonwealth reported that its own housing authority had set aside 97 vouchers, and the additional 37 authorities had set aside 62 vouchers. However, only 28 of these 159 potential vouchers have been utilized. 4th Quarter Update at Action Item 2.1.1.

[11] DBHDS proposed including $400,000 in the base budget for the rental assistance pilot program and $675,000 for rental subsidies linked to a new waiver service, but neither proposal was accepted by the General Assembly. *See* FINAL_March_26_2015 Meeting notes (eliminating $400,000), attached as Ex. #11 (filed under seal); Item 307 #8c (eliminating $675,000), attached as Ex. #12.

rental assistance, to ensure that vouchers are available when housing developments are being proposed, and to link individuals seeking housing to actual units.

In some instances, insufficient resources in DBHDS's Office of Licensing have impeded individuals from moving to more integrated settings. For example, Office of Licensing delays reportedly blocked a provider from moving four people from group homes to independent housing. Each individual had a voucher enabling him or her to receive services in the independent housing setting, the housing had been identified, the housing had been modified to meet the individual's needs, leases had been signed, and rent for the housing was being paid. Yet, a request to the Office of Licensing to approve the service location sat for more than two months. Accordingly, as of mid-July, these four people still had not been able to move into these settings. Email Tonya Fowler to Eric Leabough (July 9, 2015), attached as Ex. #13. This example appears to be typical. Informed providers report that there is a lack of capacity in the Office of Licensing and that it routinely takes months for providers to obtain a necessary license.

In part, the Commonwealth has failed to move people to more integrated housing because it has yet to implement its waiver redesign. The Commonwealth acknowledges that "the current Waiver provides more congregate residential supports as opposed to more integrated options." Letter from Allyson Tysinger to Judge Gibney (Mar. 13, 2015), attaching Outcome Timelines ("Outcome Timelines"), attached as Ex. #14 (filed under seal), at 7. Similarly, the Independent Reviewer found that the Commonwealth has not met its commitment to use discharge planning and transition processes at its Training Centers that ensure that individuals with ID/DD, including those with complex needs, are served in the most integrated setting appropriate to their needs. June 2015 Report at 18, § IV.A. The Commonwealth has not done so, in part because the "[m]ost integrated residential and day options for individuals with complex needs are often not

available." *Id*. As in other areas, the Commonwealth's solution to this problem hinges on restructuring its waivers, which, as noted, it has yet to do. *Id*. at 18-19.

As a result of the limited community housing capacity – including both independent housing and provider capacity – individuals transitioning out of Training Centers are increasingly being discharged to congregate settings with five or more individuals, contrary to the requirements of the Agreement. *Cf.* Agreement § III.D.6 (prohibiting placement of individuals in congregate settings with five or more individuals unless exceptions exist).[12] In fiscal year 2012, 33% (18/55) of the individuals who transitioned from Training Centers were discharged to congregate settings, which included settings with 5 or more beds, nursing homes, other Training Centers, and settings with fewer than 5 beds but which were also co-located adjacent to similar settings. *See* Discharges as of June 30, 2015 (DBHDS document provided to the United States on September 21, 2015), attached as Ex. #15 (filed under seal). This percentage has steadily and significantly increased. By fiscal year 2015, 59% (64/109) of individuals discharged from Training Centers moved to another congregate setting, as defined above. *See Id.* The Agreement explicitly favors smaller living settings, as those tend to promote integration, allow for greater independence, and promote other positive outcomes for individuals. Yet, many individuals in the target population increasingly have no choice but to move to a congregate setting because the Commonwealth has failed to adequately fund alternative settings.

Another consequence of the lack of housing capacity is that, statewide, individuals are discharged from Training Centers to distant placements. For instance, in Fiscal Year 2015, 63% (29/46) of individuals transitioning from the Northern Virginia Training Center ("NVTC") were discharged to regions outside their home health planning region. TC Weekly HHR

[12] *See also* §§ III.E.3.b, IV.B.15, IV.C.6, IV.D.2.a, V.F.3.f (other safeguards for individuals in settings with five or more individuals).

Chart_6.29.15 (DBHDS document provided to the Independent Reviewer and the United States on June 29, 2015), attached as Ex. #16 (filed under seal). This is not only an issue in Northern Virginia. During that same time period, 42% (16/38) of individuals transitioning from the Central Virginia Training Center ("CVTC") were discharged to regions outside their home health planning region. *Id.* Similarly, large percentages of individuals are being discharged from Training Centers to locations more than 100 miles away. In Fiscal Year 2015, this was true for 55% (21/38) of individuals discharged from CVTC, 41% (7/17) of individuals discharged from Southwestern Virginia Training Center ("SWVTC"), and 40% (17/46) of individuals discharged from NVTC, all of whom moved to locations more than 100 miles away. June_2015_Discharges_7.2.15_FY2015 Mileage Report, attached as Ex. #17.

These data indicate that individuals are compelled to move away from their families and natural supports to find services that meet their needs. To the extent that this occurs, it is contrary to the Commonwealth's commitments that "[t]he individual shall be offered a choice of providers consistent with the individual's identified needs and preferences," Agreement § IV.B.9.a, and that discharge planning will assist the individual in achieving positive outcomes related to all domains of the individual's life, including relationships, *id*. § IV.B.4.

2. The Commonwealth is Failing to Provide More Integrated Settings for Children in Nursing Facilities and Large Institutions

Recognizing the detrimental impact of segregation upon children in particular, the Commonwealth agreed to prioritize its efforts to serve children under 22 years of age in the community instead of in nursing homes and in the largest intermediate care facilities ("ICFs").[13] *Id*. §§ III.C.1.b, III.C.1.c. Further, the Commonwealth committed to serve all individuals in the target population in the most integrated setting consistent with their informed choice and needs,

[13] Under Medicaid regulations, an ICF is a residential institution that provides 24-hour care and diagnosis, treatment, or rehabilitation for individuals with intellectual or developmental disabilities.

id. § III.D.1, and that no individual would be placed in a nursing facility or other congregate setting with five or more individuals unless they chose such a setting, *id*. § III.D.6.

The Commonwealth has not met these commitments. In the most recent review period, the Independent Reviewer found that the Commonwealth had not complied with these provisions because it "ha[d] not yet implemented its planned process to facilitate [the] transition to community homes" of children who reside in nursing facilities or the largest ICFs. June 2015 Report at 37; *see also id*. at 7-8. In his previous report, the Independent Reviewer also found that "[t]he Commonwealth's previous action plans have not increased the number of children who have transitioned" from nursing facilities or the largest ICFs. Report of the Independent Reviewer on Compliance with the Settlement Agreement, December 8, 2014, ECF No. 158, at 31. As a result, children are stuck in institutions, often for months or even years, without the opportunity to live with their families, go to school, or attend other community activities. Yet, it is well-established that institutions do not meet children's developmental and emotional needs and that they frequently cause trauma and lead to difficulties forming and maintaining relationships.

Despite these harms, it does not appear that the Commonwealth's current plan will transition children out of nursing facilities or large ICFs in a timely way. In 2014, the Commonwealth had recommended establishing a pilot project to begin transitioning children out of nursing facilities and large ICFs. Nursing Facility and Large ICF IID Overarching Plan Draft, Aug. 2014, attached as Ex. #18, at 9-10. However, to our knowledge, no pilot was ever initiated. The Commonwealth has since developed another plan to begin transitioning children from nursing facilities and large ICFs to the community but does not even intend to initiate its plan until March 31, 2016. Updated Outcome Timelines at 3. The Commonwealth has established a

target that 75% of children residing in nursing facilities as of March 2016 will move to a more integrated setting by March 2020. *Id*. That goal is four and one-half years from now (and seven and one-half years from the entry of the Agreement) – an extremely long time in the life of a child. The Commonwealth may largely meet that metric simply by permitting children to age in place, consigned to institutional settings, until they reach the age of majority or are moved to a facility for older individuals. Moreover, the Commonwealth only seeks to reduce the number of children in nursing facilities by 15% over the next one and one-half years. *Id*. Yet the Agreement requires the Commonwealth to have developed 160 waiver slots specifically for this population by that time, Agreement §§ III.C.1.b.ii-v, III.B.1.c.ii-v, which is enough waivers for the entire population of children in nursing facilities. Unfortunately, the Commonwealth's projections do not reflect a serious commitment to move children back to their communities.

The Commonwealth's plan for children currently residing in large ICFs is even less ambitious. Its ultimate target is that only 25% of children residing in the largest ICFs as of June 2016 will have moved to more integrated settings by June 2020. Updated Outcome Timelines at 3. Again, the Commonwealth does not even seek to meet this target for almost five years. Moreover, its target presumes that 75% of children who live in these large institutions will remain there. It is unacceptable that so few children will be moved from large ICFs or that it will take five years to accomplish even this minimal goal.

The Commonwealth contends that it has made progress in diverting children from placement in nursing facilities and ICFs, and the United States applauds those efforts. However, the United States has not been provided with data about these diversions or whether children have successfully remained in the community. Although DBHDS has created goals for diversion, it is not clear how those goals relate to current performance or how DBHDS is

quantifying its current performance. In order to ensure accountability, the United States, stakeholders, and the Court need to have access to data to ensure that children truly are being kept from needless institutionalization.

Further, and just as importantly, as the Independent Reviewer noted in his latest report, "it is the IR's [Independent Reviewer's] opinion that the children living in nursing facilities should have an equal opportunity to transition to community homes with needed services and supports, as have the residents of the state owned Training Centers and those the Commonwealth is diverting to community-based services." June 2015 Report at 37. The Commonwealth's obligation does not run solely to children who have not yet entered nursing facilities and large ICFs. Rather, the children and youth currently in large institutions are entitled to be served in the community to the extent possible, and the Commonwealth must make expeditious efforts to meet the needs of these children.

The United States recognizes that the Commonwealth cannot move children to integrated settings without the support and authorization of the children's parents or their other authorized representatives. However, as the Independent Reviewer has reported, some "[a]uthorized representatives of children living in nursing facilities have expressed reservations about transferring their children to community homes because of the lack of nursing and other support services needed to support individuals with complex medical needs in community homes." June 2014 Report at 27. In other words, because the Commonwealth has not created the community support services to meet the needs of children with complex medical needs, they are confined indefinitely in nursing homes, even when their families want them at home.

Sadly, this appears to be the case for a one-and-one-half-year-old child who has lived in a nursing facility and a hospital for his entire life, according to information the United States

obtained from the Virginia Department of Social Services.[14] Although his father wishes to care for him, and the state is working to discharge the child from the nursing facility and reunite him with his family, this may not occur because no providers in the child's home region are equipped to meet his needs. Accordingly, as of late July, it was unclear whether the child would be able to move to his parent's home despite his father's wishes to care for him. This violates the intent of the Agreement.

3. The Commonwealth is Failing to Provide Skilled Nursing Services for Medically Complex Individuals

The Agreement calls for the Commonwealth to ensure that individuals with ID/DD have their complex medical needs met.[15] However, the Commonwealth has yet to comply with these provisions. For example, the Commonwealth has been in noncompliance for the last three review periods with the requirement that case managers help individuals access needed medical, nursing, and personal care services. June 2015 Report at 8, § III.C.5.b.ii. Similarly, in the last reporting period, the Commonwealth did not meet the requirement that essential supports are in place prior to an individual's discharge from a training center. *Id*. at 24, § IV.C.5.

In August 2014, the United States conducted a review of individuals with complex medical needs. The review found that some providers did not have the appropriate services or staff expertise to meet individuals' needs; that the Commonwealth was not providing adequate

[14] The child was hospitalized at birth and was later transferred to a nursing facility. It does not appear that there was ever an assessment before the child was moved to the nursing facility of whether the child could live in a family home with the appropriate medical supports.

[15] *See, e.g.*, Agreement § III.B.2 (making certain that individuals with complex medical needs are not excluded from the target population that benefits from the Agreement's protections); § III.C.5.b.ii (requiring that case managers help individuals access needed medical, nursing and personal care services) (noncompliance last 3 periods); IV.C.5 (requiring that essential supports are in place prior to individual's discharge from training center) (noncompliance); § IV.D.3 (compelling Regional Support Teams to resolve barriers to services especially for individuals with complex medical needs) (noncompliance); §§ V.A & V.D.3.b (obligating the Commonwealth to implement a quality management system "to ensure appropriate services are available and accessible for individuals in the target population" concerning their physical healthcare and well being) (noncompliance regarding V.D.3.b and no compliance determination regarding V.A).

supports or technical assistance to providers; and that these problems at times led to individuals having to move to restrictive placements or to experience hospital stays, often after having experienced avoidable medical problems. In addition, the review found that some community providers were reluctant to serve individuals with complex needs because the Commonwealth had not assured them of the sustainable financial support necessary to serve these individuals. This continues to be a significant concern. Stakeholders report that many providers are struggling to serve medically complex individuals. This reluctance by providers limits placement options and jeopardizes the opportunity for individuals to live in the community.

The Commonwealth has recognized the challenges of serving this population and the lack of community capacity. As a result, the Commonwealth is developing a Developmental Disability Health Support Network, which is intended to help support and train medical professionals regarding the needs of individuals with developmental disabilities. The Health Support Network is being rolled out regionally as different Training Centers downsize and close. *See* Outcome Timeline at 10. The United States applauds this effort but notes that the proposed timeframes do not account for individuals with complex needs who currently live in the community and that this effort alone will likely not be sufficient to develop community capacity.

Additionally, the Commonwealth recently reported that it plans to develop housing in central Virginia targeted for individuals who are leaving CVTC and have complex medical needs. Again, this initiative appears promising. However, at most this initiative is intended to serve 40 individuals and will not be implemented for several years. In the meantime, individuals with complex needs wait in central Virginia and in many other parts of the state.

c. The Commonwealth is Failing to Provide Integrated Day Opportunities

The Independent Reviewer describes integrated day opportunities as one of the "cornerstone" services needed to achieve the overarching commitment "to prevent unnecessary institutionalization and provide opportunities [for individuals] to live in the most integrated setting appropriate to their needs and consistent with . . . informed choice." June 2015 Report at 3. Both paid, supported employment and unpaid activities are critical components to help promote individual growth toward increasing independence. Accordingly, the Commonwealth agreed to "provide individuals in the target population . . . with integrated day opportunities, including supported employment" to the greatest extent practicable. Agreement § III.C.7.a. The Commonwealth also agreed to create a plan that would aim to increase these integrated day opportunities, including "supported employment, community volunteer activities, community recreational opportunities, and other integrated day activities." *Id.* at § III.C.7.b.i.

More than three years since the entry of the Agreement, the Commonwealth has made only minimal progress towards developing supported employment and other integrated day activities. First, under the Agreement, the Commonwealth is required to establish (1) annual baseline information regarding the number of individuals receiving supported employment, the length of time that they maintain work, and the amount of their earnings, and (2) targets to meaningfully increase the number of individuals who enroll in supported employment and who remain employed in integrated work settings for at least 12 months. *Id.* at §§ III.C.7.b.i.B.1.a-c, III.C.7.b.i.B.2. However, in the latest review period, the Independent Reviewer found that the Commonwealth was in noncompliance with these provisions because it failed to accurately capture the number of individuals who enrolled or remained in supported employment. June 2015 Report at 50. The Commonwealth's new methodology for collecting these data appears to

be promising; however, as of the time of the latest report, DBHDS had only collected data from 44% of the Employment Service Organizations and 70% of the individuals. *Id*. at 13. Accordingly, there is no data to establish whether the Commonwealth's efforts to increase supported employment are in fact having the desired impact.

Furthermore, some of the Commonwealth's limited activities regarding supported employment have languished. For instance, the Independent Reviewer's consultant noted that the Commonwealth's efforts to build supported employment capacity in rural areas of Virginia "appears to have stalled" and that it has made "no progress" to educate businesses on employing individuals with ID/DD. June 2015 Report at 107-108. Similarly, although the Commonwealth acknowledges the consistent concern that individuals with ID/DD may graduate from high school without the prospect of a job or other regular daytime activities, three years into the Agreement the Commonwealth is still in planning stages to meet these transition needs, and DBHDS has only identified unfunded positions to support this effort. *Id*. at 107.

Unfortunately, the Commonwealth's progress regarding unpaid integrated day activities has also failed to gain traction. The Commonwealth is in continued noncompliance with the provision requiring it to develop an implementation plan to increase integrated day opportunities. June 2015 Report at 13, § III.C.7.b.i. Its plan lacks critical elements, including how the Commonwealth will expand capacity for more integrated day opportunities so that individuals have a choice over the large congregate facilities that dominate Virginia's day support system today. *Id*. at 48. Even more concerning, the Commonwealth has made minimal progress towards actually providing integrated day options. The Independent Reviewer found that the Commonwealth's efforts to increase unpaid integrated day activities have largely been put "on hold" until at least Fiscal Year 2017, nearly four years after the Commonwealth agreed to

complete its implementation plan. *Id*. at 49. In his most recent report, the Independent Reviewer stressed that the Commonwealth will remain in noncompliance with this provision "until it effectively implements system reform strategies that facilitate the major changes needed to move from a day system that is characterized by very large congregate facilities to one that provides opportunities in integrated settings with needed supports." *Id*. And for individuals with complex needs, integrated day options "are often not available." *Id*. at 18 § IV.A.

The United States recognizes that the process of transforming Virginia's day system from an institution-based model to one that is truly integrated within the community is a significant undertaking that requires a sustained effort and resources. However, this initiative is important to Virginians with ID/DD,[16] and the Commonwealth's corresponding lack of progress is concerning. As in other areas, the Commonwealth has represented for years that its primary strategy to come into compliance with this provision and to move to an integrated day system is to restructure its waivers. *Id*. at 49; Outcomes Timelines at 5. However, the waiver redesign is delayed until Fiscal Year 2017 at the earliest, June 2015 Report at 49, and the Commonwealth has not offered alternative strategies to achieve this reform.

d. <u>The Commonwealth is Failing to Ensure Quality and Risk Management</u>

A crucial part of the Agreement is the Commonwealth's commitment to develop a quality and risk management system. This system is intended to ensure that the services provided under the Agreement are of good quality, meet individuals' needs, and help individuals achieve positive outcomes. Agreement § V.A. The Independent Reviewer has found that the majority of individuals who have transitioned from the Training Centers have adjusted well to life in the community and have experienced positive outcomes. June 2015 Report at 5-6. This is

[16] The United States received 64 letters from individuals who attended the Arc of Virginia Convention in August 2015. Of those, 14 letters expressed concern about the lack of supported employment opportunities, and seven were concerned about the lack and quality of integrated day opportunities.

commendable. In order to ensure that this is true for all members of the target population, the Commonwealth must have an effectively functioning oversight system in place in order to proactively identify risks and take remedial actions. This will be particularly important as the Commonwealth moves to a more integrated community-based service system.

According to the Agreement, the "Quality Management System shall: identify and address risks of harm; ensure the sufficiency, accessibility, and quality of services to meet individuals' needs in integrated settings; and collect and evaluate data to identify and respond to trends to ensure continuous quality improvement." Agreement § V.B. The Commonwealth has not complied with these commitments. During the fifth review period the Independent Reviewer concluded that the Commonwealth was in noncompliance with most of the quality and risk management provisions and that there was little point in evaluating its efforts during the next reporting period, because it would have been impossible for the Commonwealth to make sufficient improvements within that time period to achieve compliance. June 2015 Report at 5. The Commonwealth acknowledges that it is not in compliance with many of these provisions. Outcome Timelines at 13.

While the Commonwealth has begun to establish an oversight system, this system raises significant concerns. For example, the Independent Reviewer recently identified troubling breakdowns in services regarding an individual who died while at a hospital due to a bowel obstruction that the Commonwealth's own oversight systems did not detect. Report #44 (filed under seal on Aug. 22, 2015). The Independent Reviewer noted a number of significant systemic concerns in his review. First, although the Commonwealth is required to have a process to investigate reports of critical incidents or deaths, identify the remediation steps taken, and verify the implementation of corrective action plans, Agreement § V.C.3, the licensing investigation

was not completed for nearly five months and the licensing specialists did not have sufficient medical expertise to perform the required analysis, Report # 44 at 4. In addition, the licensing investigation failed to note that the individual's service plan had not been amended to address his nutritional needs after he received a gastric feeding tube. *Id*. at 3. Significantly, the investigation failed to account for four recent Corrective Action Plans ("CAPs") imposed on the individual's residential provider. *Id*. at 4. The Independent Reviewer noted: "These four CAPs resulted from investigations that found similar regulatory violations during the nine months prior to [this individual's] death." *Id*. Beyond identifying practice deficiencies that result in individual harm, the purpose of the Quality and Risk Management provisions is precisely to identify deficiencies that might affect other Virginians in the target population, particularly other individuals served by the same provider, and then to facilitate corrective actions to address those deficiencies. Yet the Quality and Risk Management system is failing in this basic function.

Similarly, DBHDS has established a Mortality Review Committee pursuant to § V.C.5 of the Agreement. That committee is designed to identify the causes of an individual's death, and to provide recommendations. The Committee is also required "to identify trends, patterns and problems at the individual service-delivery and systemic levels," and to implement initiatives to reduce mortality rates. *Id*. The Mortality Review noted that this was the third case in which a hospital had recently failed to respond to an individual with bowel obstruction. Report #44 at 3.[17] In fact, in this instance, the patient had already been discharged and was waiting in the emergency room to be transported back to his group home at the time he became unresponsive without the hospital identifying that he had a bowel obstruction. *Id*. Nonetheless, it appears that the Committee did not provide any follow up to the hospital. *Id*. In fact, the Committee failed to

[17] Originally, the Mortality Review Committee reported that this was the third incident which had occurred at the particular hospital. Subsequently, DBHDS clarified that these incidents occurred at different hospitals.

include *any* recommendations in its review, for example, providing training with the hospital staff about how to identify bowel obstruction or guidance about how to communicate with individuals with ID/DD. *Id*. at 4. The Independent Reviewer concluded that the Committee should, as a standard practice, make recommendations and findings at individual and systemic levels and should share its concerns with hospitals and medical practitioners. *Id*. at 5. The Committee's failure to do so is particularly concerning since DBHDS acknowledges that bowel obstruction is one of the most common causes of death for Virginians with ID/DD,[18] yet providers that frequently work with the Target Population appear to be unaware of this medical issue as evidenced by the other incidents in multiple hospitals. The Commonwealth has an obligation to offer providers training and guidance on proactively identifying and addressing risks of harm, Agreement § V.C.4, but it appears to be failing to comply with these provisions of the Agreement. Unfortunately, failure to comply here is having tragic consequences.

In another example, disAbility Law Center of Virginia assessed the mortality reviews conducted regarding three unanticipated deaths of individuals in the target population. Each of the mortality reviews was completed outside of the 90-day timeline required by the Agreement, *cf.* § V.C.5, and in one case the review was not completed for *more than eight months* after the individual's death. *See* Letter Erin Haw to Debra Ferguson (July 17, 2015), attached as Ex. #19. The United States is not aware of any aggregate data about the timeliness of mortality reviews or licensing investigations, although in numerous cases, it appears that these investigations are not completed for months after they are due.

[18] DBHDS document "Reminding Medical Practitioners of High Risk Conditions," attached as Ex. #20. This comports with the United States' review of information provided in the "cause" or "fact section" of Comprehensive Human Rights Information System (CHRIS) reports provided to the United States for deaths since February 2012. According to the United States' review, bowel obstruction accounts for 6.5% of all deaths with a known cause for Virginians with ID/DD.

II. The Lack of Integrated Community Services and Settings Harms Virginians, and the Commonwealth Has Not Taken Sufficient Steps to Prevent these Harms

As noted above, the Commonwealth's failure to timely develop community services and settings has caused harm to Virginians with ID/DD. Without appropriate crisis services, including preventive services, individuals are more likely to fall into crisis, experience a placement disruption and have to find a new home, and end up in congregate placements. In severe cases, law enforcement may become involved, and individuals may be hospitalized or even placed in jail.

For other individuals, the lack of appropriate community-based services and housing means that they are compelled to leave their natural supports and communities to get the services they need, or to live in congregate housing instead of having the option to live more independently. Children are consigned indefinitely to nursing facilities or large ICFs instead of being able to live at home with their families.

In addition, many people do not even have access to the basic community services that they need to function productively. Almost 10,000 people are currently on a waitlist for an HCBS waiver,[19] and that waitlist has continued to grow – by more than a thousand during just the past year. June 2015 Report at 6. Even individuals with severe needs may be on the waitlist for a decade or more. Unfortunately, due to their lack of access to community services, these people are more likely to end up in a congregate residential setting. For example, MP, the eight-year-old child discussed above, is on the waiver waitlist. His parents were unable to obtain the intensive services that might allow him to remain in his family home. Without those services or other services to prevent crises, MP's behaviors have become unmanageable, and, as a result, MP has been in a congregate residential setting since May 2015. Pangle Aff. ¶¶ 17, 19 and 20.

[19] As of April 2015, 9,867 individuals were on the waitlist. June 2015 Report at 6.

The Commonwealth has determined that its solution to many of these issues is to restructure its waivers. Yet, the Commonwealth's full commitment to implementing reforms to achieve compliance with the Agreement is unclear. Despite identifying restructuring the waivers as its "primary strategy to reform the service system and to come into compliance with many provisions of the Agreement," June 2015 Report at 3, the Commonwealth has delayed this restructuring. Consequently, necessary changes that were projected to become operational in late 2015 cannot begin any earlier than some time in Fiscal Year 2017. *Id*. at 49. This is four years after the Agreement was issued as a Court Order.[20]

Further exacerbating this issue, the Commonwealth's willingness to honor its commitments regarding the funding of its ID/DD system is unclear. Notably, the Commonwealth has represented in statute that net proceeds from the sale of Training Center lands would be reinvested into services for individuals with ID/DD through the Behavioral Health and Developmental Services Trust Fund ("Trust Fund"). *See* Va. Code § 37.2-319 (2012). Instead, last year funds equal to proceeds from land sales were discounted from general funds that DBHDS would have received though its budget appropriations. Accordingly, DBHDS's appropriation from its general fund for Fiscal Year 2015 was actually *reduced* by the full amount of anticipated proceeds from Training Center land sales for that fiscal year – a reduction of $5.4 million. Summary of 2014-16 Budget Actions, H.B. 5002, Spec. Sess., Ch. 2 at 74 (Va. 2014), attached as Ex. #21. Although the Commonwealth identified the Trust Fund as a resource to "financ[e] a broad array of community-based services" for individuals with ID/DD, Va. Code § 37.2-319(B), thus far it appears that the Trust Fund provides no additional funding to support individuals with ID/DD.

[20] This Court gave preliminary approval of the Agreement on March 6, 2012, ECF No. 22, and it gave final approval of the Agreement, with modifications, on August 23, 2012, ECF No 112.

This is particularly alarming in light of the Independent Reviewer's findings of noncompliance that are associated with delays in funding and a context in which the Commonwealth's spending for community services for individuals with ID/DD is comparatively low – Virginia is currently ranked 40th nationwide in state spending for community services for individuals with ID/DD. The State of the States in Intellectual and Developmental Disabilities at 18 (citing Braddock et al., Coleman Institute and Department of Psychiatry, University of Colorado, 2015).[21] At the same time, the Commonwealth recently announced a revenue surplus of $549.6 million and is considering a number of new and continuing state initiatives for these funds. Press release, Governor McAuliffe Addresses General Assembly Money Committees, Aug. 27, 2015, attached as Ex. #22. None of these initiatives included meeting the Commonwealth's existing, but unfulfilled, commitments to Virginians with ID/DD. *Id*.

III. The Parties Need an Enforceable Schedule for Implementation

Three years into the implementation of the Agreement, the Commonwealth has fallen behind in serving Virginians with ID/DD in key areas. There have been numerous delays in implementation, due to lack of resources, DBHDS's failure to obtain approval from the General Assembly to restructure its HCBS waivers, and other obstacles. In light of these delays, the United States seeks assurances that the Commonwealth will timely and successfully implement the provisions of the Agreement. Accordingly, the United States seeks an order requiring the Commonwealth to provide a schedule of implementation which sets out reasonable timeframes for implementation consistent with the requirements of the Agreement, which is acceptable to this Court and to the United States, and which shall be enforceable.

Requiring a schedule for compliance is well within the Court's authority. This Court has the authority to enter an order to effectuate compliance with the Agreement. "Federal courts are

[21] By contrast, Virginia is ranked 20th nationwide for institutional services. *Id*.

not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004); *see also Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) ("A consent decree, because it is entered as an order of the court, receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders . . . ."). It is well accepted that district courts have the authority to enter ancillary orders to enforce their consent decrees, including setting schedules and interim deadlines. *See, e.g.*, *United States v. Gov't of V.I.*, 363 F.3d 276, 279-80 (3d Cir. 2004) (holding that district court's order setting deadlines and enjoining a particular contract after defendant's noncompliance with consent decrees "was surely within the ambit of its broad discretion"); *Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004) (upholding district court's order establishing deadline for defendant to complete implementation of particular provision of consent decree); *see also Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 404 F.3d 821, 833 (4th Cir. 2005) (noting that a "court's inherent authority over its own judgment" provides it with continuing authority to enforce its consent decree). The United States believes that such a schedule is necessary here.

The Commonwealth represents that it has plans to improve its service provision or oversight in a number of areas. For example, DBHDS recently represented that it is making improvements to the adult crisis system. The United States is pleased to hear about new efforts by the Commonwealth to meet its obligations. However, the United States and the public cannot rely on reported plans alone. Moreover, many of these plans have not been formally shared with the United States or the public, and those that have are generally not sufficiently comprehensive or tied to reasonable dates. The Commonwealth developed an Outcome Timeline document as required by this Court, but that document is not sufficient. It addresses only some of the

Agreements' provisions, although there are others without specific timelines. It includes timelines that are very attenuated: for example, it does not plan to reach its targets for moving children out of restrictive nursing facilities and ICFs until 2020. The goals of that document are very limited, and the document continues to be revised. The Commonwealth does not appear to be treating the Outcome Timelines as mandatory deadlines but rather as aspirational goals that it hopes to reach. The United States and the public need a timeline for these plans that is comprehensive and appropriately ambitious, and a mechanism to hold the Commonwealth accountable for implementation. If the Commonwealth fails to provide a schedule, or fails to timely implement it, the United States may be forced to move for specific performance or contempt.

For the foregoing reasons, the United States respectfully requests that this Court require the Commonwealth to provide a schedule of implementation, acceptable to this Court and to the United States, which sets out reasonable timeframes for implementation consistent with the requirements of the Agreement, and which shall be issued as an order of this Court.

Respectfully submitted,

Dated: September 23, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2015, I will electronically file the foregoing STATEMENT OF ISSUES AND MOTION FOR COURT-ORDERED SCHEDULE with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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