IN THE UNITED STATES DISTRICT COURT
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.	)	

DEFENDANT'S RESPONSE TO THE UNITED STATES' AND INTERVENORS' STATEMENTS OF ISSUES AND IN OPPOSITION TO THE UNITED STATES' MOTION FOR COURT-ORDERED SCHEDULE

On August 23, 2012, after more than a year of negotiation between the parties, this Court approved a Settlement Agreement between the Commonwealth and the United States to resolve claims raised by the United States regarding the Commonwealth's system of services for individuals with intellectual and developmental disabilities ("ID/DD"). Except for a few provisions that have earlier dates specified by which the Commonwealth must comply, the Agreement states that "the Parties anticipate that the Commonwealth will have complied with all provisions of the Agreement by the end of State Fiscal Year 2021." Agreement § VII.B. This ten-year period for compliance agreed to by the Parties was in recognition that the extensive transformation of the Commonwealth's system of services for individuals with ID/DD required

by the Agreement would take significant time and resources. Now, only three years into the ten-year Agreement, the United States asks the Court to rewrite the Agreement by imposing a schedule of compliance for provisions that are subject to the general compliance deadline of State Fiscal Year 2021. Due to the Commonwealth's continued progress in implementing the Agreement, such a schedule, that would in effect change the terms of the Agreement as negotiated by the Parties, is not necessary.

I. The Commonwealth is Committed to Achieving Compliance with the Settlement Agreement.

In the three years since the Agreement was approved by the Court, the Commonwealth has committed significant financial and staff resources to implement it. The Commonwealth has expended more than $159 million to implement the Agreement in the three full fiscal years since it was approved. More than forty-five positions have been created with or are supported by these funds at the Department of Behavioral Health and Developmental Services ("DBHDS") Central Office alone. The Commonwealth has created 2,470 new waiver slots, 415 more than required by the Agreement. As of October 1, 2015, 522 individuals have moved from training centers into more integrated settings in the community. These and other efforts are positively impacting the lives of individuals with ID/DD and their families. As a result, individuals with ID/DD are more likely to be served in integrated community settings and less likely to be institutionalized. And the Independent Reviewer found that "the vast majority of individuals who have moved [to the community] have adjusted well to their new homes and have experienced positive life outcomes." *See* Report of the Independent Reviewer on Compliance with the Settlement Agreement, June 6, 2015, ECF No. 177 ("June 2015 Report"), at 6. In the conclusion to his June 2015 Report, the Independent Reviewer notes that the Commonwealth has maintained compliance where previously achieved and come into compliance with additional requirements.

June 2015 Report at 56. Most significantly, he further wrote that the Commonwealth's leaders continue "to develop and implement plans to address the Agreement's requirements and to improve people's lives." *Id.*

Despite the significant funding, progress, and efforts made by the Commonwealth thus far, the United States contends that the Commonwealth is not committed to achieving compliance with the Agreement. As support for this contention, the United States points to the alleged failure of the Commonwealth to restructure its Home and Community Based Services ("HCBS") waivers. It must be emphasized that the Agreement does not require the Commonwealth to restructure its waivers. The Commonwealth has, however, acknowledged that its current waivers are not structured in a way to promote the goals of the Agreement. The Commonwealth believes that redesigning its HCBS waivers will expand available services, raise rates, incentivize creation of more integrated settings, and serve more individuals. Thus, the Commonwealth has presented the restructuring of its waivers as a strategy to achieve compliance with the Agreement and, on its own initiative, began the process to amend the waivers.

To start, the Commonwealth engaged nationally recognized consultants to study its waiver service packages and rate structures. It consulted with other national-level experts and requested input from multiple stakeholders. Rate proposals were made available for public review and comment. The Commonwealth has also had regular discussions with the Centers for Medicare and Medicaid Services ("CMS"), which is the United States' agency responsible for approving HCBS waivers.

Ultimately, amendment of the waivers requires funding approval by the Commonwealth's legislature. During the 2015 legislative session, the General Assembly did not approve the funding requests necessary to restructure the waivers. Although Commonwealth

officials provided education to General Assembly members, waivers are extremely complex and the short 45-day legislative session was not enough time for General Assembly members to become completely comfortable with the action that it was being asked to take. Competing priorities of multiple stakeholders also contributed to an impression that there were still issues to be addressed with the redesign of the waivers. Recognizing the importance of the issue, the General Assembly directed the Department of Medical Assistance Services ("DMAS"), in collaboration with DBHDS, to submit a report on the proposed HCBS waiver redesign by November 2015.

Although the General Assembly's request for a report resulted in the timetable initially established by the Commonwealth's officials for implementation of the restructured waivers to be pushed back, this delay is not as significant as represented by the United States. The original timeline for implementation of the redesigned HCBS waivers contemplated a phased approach. The redesigned "Building Independence Waiver" was hoped to be implemented in January 2016, followed by implementation of the redesigned "Family and Individual Supports" and "Community Living" Waivers in March 2016. Assuming General Assembly approval is obtained during the 2016 session, the current timeline is for all redesigned HCBS waivers to be implemented simultaneously on July 1, 2016. This is, at most, a six-month delay for the redesigned "Building Independence Waiver" and a three-month delay for the redesigned "Family and Individual Supports" and "Community Living" Waivers.

In order to facilitate the legislative process during the upcoming 2016 Session of the General Assembly, former DBHDS Commissioner Debra Ferguson met with delegates and senators to discuss DBHDS priorities, specifically regarding the HCBS waiver amendments. Presentations on HCBS waiver redesign were made to the Health and Human Resources

Subcommittee of the House Appropriations Committee and the Health and Human Resources Subcommittee of the Senate Finance Committee on June 15, 2015, and September 29, 2015, respectively. Information on the importance of the HCBS waiver amendments was presented to the Special Joint Subcommittee to Consult on the Plan to Close State Training Centers on September 2, 2015, with all stakeholders agreeing that the key to successful closure of the training centers was the timely implementation of the amended waivers. In October 2015, leadership of DBHDS and DMAS met with the staff of the House Appropriations and Senate Finance Committees and the Department of Planning and Budget to brief them on the HCBS waiver implementation process. Commonwealth officials believe that their efforts on education will result in approval of the funding necessary to restructure the waivers during the next legislative session. *See* Hazel Declaration, attached as Ex. 1. Although the restructuring has not happened as quickly as Commonwealth officials might have hoped, the process is still moving forward and it is much too early to allege that the Commonwealth has failed with respect to restructuring its waivers. The extraordinary efforts put forth by Commonwealth officials to address concerns of stakeholders and educate legislators regarding the waivers, combined with the actions taken by the Commonwealth in the three years since approval of the Agreement, clearly show that the Commonwealth is committed to achieving compliance with the Agreement in accordance with its ten-year term.

II. The Commonwealth Has Made Significant Efforts in Implementing the Settlement Agreement.

In addition to questioning the Commonwealth's commitment as a whole, the United States asserts that the Commonwealth is failing to develop community services and integrated settings. To support its assertion, the United States alleges that the Commonwealth's progress in the areas of crisis services, housing, integrated day activities, and quality and risk management is

insufficient. The Intervenors allege that individuals in the training centers are being discharged to inappropriate placements and that there is inadequate risk management and quality assurance. Since the Agreement became effective, the Commonwealth has, as a policy, always been open with the United States and the Court during regular meetings of the Parties and status conferences in acknowledging implementation challenges and areas where more work needs to be done. Below, the Commonwealth details the substantial progress that has been made in the areas that the United States and the Intervenors challenge. In keeping with its policy of openness, the Commonwealth also acknowledges where more work can be done. The mere fact that there is more progress to be made should not be taken as a sign that the Commonwealth lacks commitment but rather reflects that this is a ten-year Agreement with seven years still remaining.

A. Crisis Services

Contrary to the United States' assertions regarding the Commonwealth's crisis system for adults, in his June 2015 Report, the Independent Reviewer found that the Commonwealth is operating the program elements required by the Agreement. June 2015 Report at 43. REACH crisis response services are available 24 hours per day and make appropriate referrals. June 2015 Report at 10. CSB Emergency Services personnel in each region are trained. *Id.* Trained mobile crisis team members respond to individuals in their homes and other community settings and offer timely assessment, services, support, and treatment to de-escalate crises without removing individuals from their current placements whenever possible. *Id.* Mobile crisis teams provide crisis response, crisis intervention, and crisis planning to prevent future crises. *Id.* Trained mobile crisis teams work with law enforcement when individuals with ID/DD come into contact with law enforcement. *Id.* Mobile crisis teams

respond on-site to crises 24 hours per day, seven days per week. June 2015 Report at 11. Mobile crisis teams provide in-home support for an average of more than three days, which is more than required by the Agreement. *Id.* Crisis stabilization is available and used as a last resort, with teams appropriately attempting to resolve crises and avoid out-of-home placements. *Id.* And the Commonwealth's regional crisis stabilization programs have capacity to assist other regions when necessary. June 2015 Report at 12. All five regions' crisis stabilization programs continue to comply. *Id.* Significantly, in his June 2015 Report, the Independent Reviewer found that the Commonwealth moved into compliance with three additional provisions of the Agreement.[1]

The United States points to its review of services for individuals with complex behavioral needs to support its assertion that the Commonwealth's crisis system is failing individuals with ID/DD. First, the United States' review was flawed. The cohort of their review was "individuals who have had contact with law enforcement, often resulting in their being incarcerated or institutionalized in a psychiatric hospital." *See* Letter from Kyle Smiddie to Allyson Tysinger (May 7, 2015), United States' Statement of Issues Ex. #4. By drawing from cases that already had negative outcomes instead of drawing a random selection from the entire target population, the United States' review, by its design, excluded positive outcomes and its results were largely predetermined. Second, the sample of cases was simply too small to draw reliable conclusions. The Independent Reviewer noted that, "The number of reviews was not large enough to be able to generalize the findings to the broader population." June 2015 Report at 44. Third, the United States' assertions are not supported by the Independent Reviewer's findings. The United States' said in its Statement

[1] Agreement §§ III.C.6.b.ii.B, III.C.6.b.ii.C, and III.C.6.b.ii.D. June 2015 Report at 10-11.

of Issues that many individuals had not received constructive crisis prevention plans, mobile crisis teams often failed to respond onsite to crises, people were excluded from the crisis stabilization program, and services often required a pre-planned assessment and consequently were not made available when a crisis arose. To the contrary, the Independent Reviewer found that: "REACH teams continue to provide crisis response, crisis intervention, and crisis planning" (June 2015 Report at 10); "All five Regions' crisis stabilization programs continue to comply" (June 2015 Report at 12); and that the Commonwealth's system responds to individuals in their homes and other community settings and offers timely assessment, services, support, and treatment to de-escalate crises without removing individuals from their current placement whenever possible (June 2015 Report at 10) (finding the Commonwealth compliant with III.C.6.b.ii.A). Finally, particularly with respect to individuals with complex behavioral needs, the Independent Reviewer found that, "The Commonwealth provided increased community supports for individuals with complex needs by creating Bridge Funding and exceptional rates. It has begun new initiatives to increase behavioral support resources." June 2015 Report at 56.

Although the Independent Reviewer has found the Commonwealth compliant with these provisions, and although the United States' review methodology was flawed, the Commonwealth conducted its own review of the same cases reviewed by the United States in order to further improve the crisis system. In response, the Commonwealth has taken several actions. It has developed behavioral competencies for all levels of staff and will be supplementing this with recommended trainings to attain these competencies. Training expectations for adult and children's crisis staff have been standardized. The Virginia Autism Council has developed autism competencies and training to meet those competencies.

DBHDS is incorporating curricula such as those developed by the Virginia Autism Council into its trainings. The Commonwealth has adjusted billable services under behavioral consultation, and adjusted service delivery expectations. Adult and children's crisis services standards have been clarified to more clearly state that crisis staff must respond when law enforcement or emergency services are involved and to ensure REACH involvement throughout potential hospitalization and step-down, as necessary and appropriate. Finally, the Commonwealth continues to implement a broad and multi-faceted law enforcement outreach plan to disseminate information and training about adult and children's crisis services.[2]

The United States has expressed concern that individuals using crisis services were receiving assessments outside their homes, and they note that, "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." As noted above, the Independent Reviewer found the Commonwealth to be compliant with all of these related provisions.[3] Nonetheless, the Commonwealth is committed to serving individuals wherever they may present and it continues to review its data and make necessary and appropriate system improvements to achieve positive outcomes for individuals with ID/DD in crisis.

With respect to crisis services for children, the Commonwealth acknowledges that it did not meet the timelines contained in the Agreement. The REACH Program was designed for

[2] In his June 2015 Report, the Independent Reviewer noted that the REACH programs trained 226 law enforcement officers during the review period and that the Commonwealth's Law Enforcement Outreach plan are both very positive steps. June 2015 Report at 45.

[3] In his June 2015 Report, the Independent Reviewer determined that the Commonwealth is compliant with: III.C.6.b.ii.E (mobile crisis teams shall provide local and timely in home crisis support for up to three days), III.C.6.b.ii.B (mobile crisis teams shall assist with crisis planning and identifying strategies for preventing future crises), III.C.6.b.i.A (Commonwealth shall utilize CSB Emergency Services, including hotlines, which shall be available 24 hours per day, 7 days per week), and III.C.6.b.ii.A (mobile crisis teams shall respond to individuals at their homes and other community settings, and shall de-escalate crises without removing individuals from their current placement whenever possible). June 2015 Report at 10-11.

adults, and Commonwealth officials did not believe that simply adopting that program for children would produce the best results. Child crisis services are different from adult crisis services in that they require a focus on the family and child. DBHDS has required that crisis services for children with ID/DD be coordinated and linked with crisis services for children with mental health needs to take advantage of all resources available to children and their families. The Commonwealth has now developed a crisis program for children and as of July 1, 2015, $1 million was allocated to each region to implement the program. A single point of entry for children in crisis has been established in each region and standards for the delivery of children's crisis services have been published and disseminated. Data is being collected to determine if the standards are being met and improvements will be made as necessary, in the same manner in which improvements have been made to the REACH program for adults. Going forward, the annual base budget for each region's children's crisis program will be $1 million.

B. Housing and Integrated Settings

1. Independent Housing

In order to facilitate individuals in the target population to live in the community, the Settlement Agreement requires the Commonwealth to develop a plan to increase access to independent living options. Agreement § III.D.3. That plan was required to be developed through the cooperation of representatives of various state agencies and to establish baseline information regarding the number of individuals who would choose independent living options and recommendations to provide access to those settings in each year of the Agreement. Agreement §§ III.D.3.a and III.D.3.b. The Commonwealth developed this plan, and the Independent Reviewer determined that the Commonwealth's plan is compliant with

the Agreement. June 2015 Report at 16 (determining the Commonwealth's compliance with §§ III.D.3.a, III.D.3.b.i, and III.D.3.b.ii).

Section III.D.4 of the Agreement requires the Commonwealth to establish and distribute from a one-time fund of $800,000 to provide and administer rental assistance to as many individuals as possible who receive HCBS waivers under the Agreement, express a desire to live in their own home or apartment, and for whom such a placement is the most integrated setting appropriate to their needs. The Independent Reviewer found the Commonwealth compliant with this provision, stating, "The Commonwealth has established the one-time fund. Distribution of the funds began." June 2015 Report at 16. As of the date of this filing fourteen individuals are living in housing with rental assistance from this fund.

The United States asserts that the Commonwealth has made "minimal progress" developing integrated housing options, but it points to no Settlement Agreement provision that establishes a quota. It cannot because, although the Agreement establishes quotas in some areas,[4] it does not establish quotas in this area. Despite this, the Commonwealth recognizes the importance of increasing integrated housing options and continues to make progress in this area.[5]

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[4] Agreement §§ III.C.1 (establishing the numbers of waiver slots the Commonwealth must create in each year of the Agreement and III.C.2 (establishing the number of individuals who the Commonwealth must support through its individual and family support program each year of the Agreement).

[5] In support of its assertion that the Commonwealth is not providing integrated community options, the United States appears to argue that in section III.D.6 of the Agreement, the Commonwealth agreed to avoid serving individuals with ID/DD in congregate settings of five or more individuals. The United States misconstrues §III.D.6. Section III.D.6 says that,"No individual in the target population shall be placed in a nursing facility or congregate setting with five or more individuals unless such placement is consistent with the individual's needs and informed choice and has been reviewed by the Region's Community Resource Consultant and, under certain circumstances described in Section III.E below, by the Regional Support Team." Clearly, the provision simply requires review before an individual is placed in a setting of five or more individuals. The Independent Reviewer has found the Commonwealth compliant with this provision for the past three review periods. June 2015 Report at 17. The Independent Reviewer also noted in his June 2015 Report that, "individuals reviewed during the fourth and fifth review periods moved to congregate settings that were consistent with the individuals' needs and informed choice." June 2015 Report at 17. Further, the June 2015 Report states that, "The discharge records reviewed throughout the fourth and fifth review periods indicated that individuals who moved to settings of five or

Developing the availability of housing options takes significant time because, in many cases, existing housing stock must be renovated or new housing must be constructed. But the Commonwealth's housing plan is growing and providing access to individuals in the target population. Nineteen individuals have been approved for the Rental Choice VA program, and eighteen of them have been referred to the Fairfax or Virginia Beach Housing Choice Voucher programs for a permanent rental assistance voucher. Fourteen of those individuals are in rental housing, four are waiting for their housing units' construction or renovation to be completed, and one has been approved and is actively looking for housing.

DBHDS has been working collaboratively with the Virginia Housing Development Authority and other local voucher programs to increase the number of rental assistance resources available to people in the target population. To date, 66 people have moved into their own housing via the Rental Choice VA initiative and the VHDA/Local Public Housing Authorities' voucher program admissions preferences and set-asides. Currently, 117 people in the target population are being screened for voucher program eligibility or have been approved for a voucher and are currently looking for housing.

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more did so based on their informed choice after receiving options." June 2015 Report at 25 (finding compliance with § IV.C.6).

The United States and the Intervenors also allege that a lack of housing capacity compels individuals to be discharged from Training Centers to distant placements. First, the Agreement contains many specific provisions about the training center discharge planning and transition processes but it does not prescribe acceptable distances that individuals may be discharged from their Training Centers. *See* Agreement § IV. Discharges to settings of five or more require prior review, but the Agreement contains no such requirements for review of discharges of certain distances. Second, the Mileage Report attached by the United States as Exhibit #17 to their Statement of Issues reflects only raw numbers and distances and does not explain the reasons for chosen settings. Discharge data previously provided by DBHDS to the United States indicates that, of forty-three individuals who were discharged outside their HPR from NVTC: twenty-four moved out of their HPR to be closer to their families, eight moved out of their HPR because their families lived out of state and they had no preference for location, three moved out of their HPR because their authorized representatives had not preference for location, and eight moved out of their HPR because they preferred services in another area. Because of the unique services that it offers, Central Virginia Training Center ("CVTC") serves individuals from around the Commonwealth, and discharges outside the CVTC HPR are not uncommon. The aggregate data regarding distances of discharges cited by the United States is insufficient to conclude that individuals are being forced to move to distant areas.

The United States alleges that the Commonwealth has failed to secure significant funding for independent housing, and it admonishes the Virginia General Assembly for not approving a budget request for ongoing rental assistance. The only funding required by § III.D is a *one-time* $800,000 rental assistance fund, which the Commonwealth created and began distributing from. The General Assembly's denial of a funding request for ongoing rental assistance is not an example of lack of commitment to improving access to community living options. Rather, this is reflective of legislative and budgetary realities in a state of more than eight million people.[6] In fact, regrettably, the United States itself, through its Department of Housing and Urban Development, denied a request from the Commonwealth for a Section 811 Project Rental Assistance grant that would have enabled the Commonwealth to augment its efforts in increasing integrated housing for the target population.

As state, local, and private relationships and linkages continue to grow, more independent housing options have been and are being created, and more individuals will continue to move into community living options. The Commonwealth submits that its housing plan will ultimately achieve the goals of the Settlement Agreement and increase access to independent living options.

With respect to community placements, the Intervenors allege that residents of the state training centers are being discharged to inappropriate placements that do not meet their needs. Contrary to that assertion, the Independent Reviewer has found that "individuals reviewed during

[6] The United States also alleges that insufficient resources in DBHDS's Office of Licensing has impeded individuals from moving to more integrated settings, relaying an example in which the Office of Licensing has allegedly blocked a provider from moving four people from group homes to independent housing. Without support, the United States says this example appears typical. The United States' example is incorrect and out-of-date. The provider submitted a request for modification and request to add a new service in May 2015 but did not submit a service description for the new service until two months later in July 2015. Because the service description was not sufficient, Office of Licensing staff personally visited with the provider to give guidance. The provider was issued a conditional license for the service in late July 2015. To the knowledge of the Office of Licensing, all of the residents are now living in their own apartments.

the fourth and fifth review periods moved to congregate settings that were consistent with the individuals' needs and informed choice" and that "the vast majority of individuals who have moved [to the community] have adjusted well to their new homes and have experienced positive life outcomes." June 2015 Report at 6, 17. The Intervenors also assert that residents of the state training centers are not being offered intermediate care facility ("ICF")-level of care placements in the community. That is simply incorrect. Individuals being discharged from the training centers are offered various placement options that are appropriate to their needs, including placements offering an ICF-level of care. In fact, some residents of training centers have been discharged to community ICFs in accordance with their choice.

2. Children in Nursing Facilities and ICFs

Section III.C.1 of the Agreement requires the Commonwealth to create HCBS waiver slots for individuals in the target population. Sections III.C.1.b and III.C.1.c require the Commonwealth to prioritize a specified number of HCBS waiver slots for individuals under 22 years of age residing in nursing homes and the ICFs. The Commonwealth has created the waivers required by the Agreement and has prioritized waivers for children in nursing homes and ICFs. June 2015 Report at 7-8, 37.

The Commonwealth also has developed and is implementing a plan to transition and divert children from these facilities, and this plan does not focus on diversion to the exclusion of transition. By December 2015, the Commonwealth will have conducted resident reviews of all forty-two children in nursing facilities, regardless of the reason for their initial admission, to determine which children continue to require nursing home-level of care. Resident reviews for this population will occur every ninety days. Those children identified as not needing nursing home-level of care will be referred to Community Services Boards and Regional Support Teams

("RSTs"). The RSTs will review those cases according to the requirements of the Agreement. The CSBs will discuss and begin discharge planning with the families and educate families about the prioritized waiver slots. The Commonwealth also screens children before admission to these facilities to determine whether admission is indicated. Since January 2015, only seven children have presented for such a screening. Five of these children were diverted to the community. One child was admitted for medical rehabilitation and is actively making progress, with plans to return to his family home upon discharge. The last child was admitted for respite and is scheduled for a resident review in November 2015.

3. Serving Individuals with Complex Medical Needs

The Commonwealth is fostering the expansion of medical resources in the community. The Commonwealth prepared an eight-hour training course for providers seeking to support individuals with high medical support needs. This training has been provided at three locations to approximately 135 people. During fourteen different regional nursing meetings, nurses working with the target population have been provided with dental resources, nursing assessment tools, and education on training direct support professionals. The Commonwealth is also developing additional plans to train providers on how to establish nursing as part of their support teams; where and how to locate ancillary services that individuals with high medical needs will need in the community, such as therapy; and how to become a waiver provider to receive reimbursement for nursing support. Moreover, the Commonwealth provided increased community supports for individuals with complex needs by creating Bridge Funding and exceptional rates and added staff resources and expertise to improve services for individuals with

complex medical needs. June 2015 Report at 37, 56.[7] Finally, the reimbursement rate for skilled nursing services was increased on July 1, 2015, and it is hoped that it will be increased again effective July 1, 2016.

The Commonwealth also has developed its Developmental Disability Health Support Network, which is providing support to individuals and training medical professionals in the community. This Network is not required by the Agreement but was implemented by the Commonwealth as an additional means of developing and coordinating resources and meeting needs in the community. Additionally, the Commonwealth issued a request for proposals for providers to develop community residential services for forty individuals with intense medical needs. The Commonwealth has received proposals that are moving through the procurement process and expects to make an award by January 2016.

C. Integrated Day Activities

Pursuant to the Settlement Agreement, the Commonwealth developed a plan to increase integrated day opportunities for individuals in the target population. Agreement § III.C.7. Regarding supported employment, the Commonwealth established baseline information and targets and has revised that information annually as required by § III.C.7.b.i.B. The Commonwealth has greatly improved the data it gathers and its accuracy by changing the source from which it obtains data, thereby significantly increasing the number of individuals it encompasses, and the Commonwealth is already receiving increased responses to its requests for data from employment service organizations. The Independent Reviewer commended the Commonwealth for these improvements. June 2015 Report at 50-51. The Commonwealth

[7] The United States cites to the Independent Reviewer's finding that the Commonwealth is not in compliance with § III.C.5.b.ii to support its assertion that the Commonwealth is not providing skilled nursing services for medically complex individuals. In his comments regarding §§ III.C.5.b.i and III.C.5.b.ii, the Independent Reviewer makes no mention of nursing services. June 2015 Report at 8 and 40-43.

expects the improved data will allow it to show compliance with the supported employment provisions of the Agreement.

The Commonwealth's Community Engagement Plan also addresses increasing other integrated day opportunities in addition to supported employment. In his most recent Report, the Independent Reviewer noted that the plan contains many commendable features. June 2015 Report at 48. The Commonwealth acknowledges, as the Independent Reviewer also notes, that this plan needs further development. The Commonwealth is currently working with a stakeholder group to revise this plan by October 30, 2015, to include measurable milestones. It should be noted that the provision of integrated day opportunities is still an emerging area nationwide. More than one year ago, the Commonwealth sought input from the United States to guide its planning process. The United States responded but was only able to offer general principles rather than specific guidance. *See* Letter from Jennifer Keen to Allyson Tysinger dated March 14, 2014, attached as Ex. 2.

In addition to the Community Engagement Plan and in preparation for the proposed new HCBS waiver structure, the Commonwealth has issued a request for proposals for a demonstration project where current day program providers would convert from center-based services to integrated community services. Procedures and techniques developed through the demonstration project will be used to develop a guide to help other providers plan their own conversions to integrated community services. Although an award has not yet been made for the demonstration project, it is moving properly through the Commonwealth's procurement process.

Aside from the requirement of § III.C.7.b.i that the Commonwealth create a plan within 180 days of the Agreement to increase integrated day opportunities and to establish annual baseline information and targets for supported employment, both of which the Commonwealth

has done, § III.C.7 does not establish any other timelines. This recognizes the Parties' understanding that development of integrated day opportunities will take significant time.

D. Quality and Risk Management

Establishing a quality and risk system is a tremendous undertaking and the Commonwealth is making progress. DBHDS established a Division of Quality Management and Development headed by an Assistant Commissioner. This Division includes several new positions including a Case Management Coordinator, a Director of Risk Management, a Quality Improvement Specialist, a Data Quality and Analytics Coordinator, and a Nurse Quality Improvement Specialist. The DBHDS Office of Licensing has been greatly enhanced to accommodate the increase in licensed providers. DBHDS has developed a data warehouse to manage data created and received in support of Agreement initiatives and aid in its analysis. The Commonwealth has also established a Mortality Review Committee and a Quality Management Committee. In addition, the Commonwealth has established Regional Quality Councils and is conducting Quality Service Reviews as required by the Agreement.

The United States asserts that the Commonwealth is not offering providers guidance on identifying and addressing risks of harm but such is not the case. DBHDS has issued twenty-one safety alerts for professionals and service providers, three of which dealt specifically with constipation and risks of obstruction. In addition, the DBHDS Clinical Quality and Risk Management Office assists providers with the development of risk management planning, monitoring, investigating, and reporting. Tools and training materials for providers regarding risk management are maintained on the DBHDS website.

Although the Commonwealth's progress in each of the areas of crisis services, housing, integrated day activities, and quality and risk management may not be as far along as the United

States would like, the Commonwealth is making progress and has submitted to the Court Outcome Timelines that address each of these areas and establish benchmarks going forward. The Commonwealth acknowledges that more work needs to be done in each of these areas to achieve full compliance with the Agreement but believes that it is well on its way to full compliance by the end of State Fiscal Year 2021 as anticipated by the Parties.

III. A Court-Ordered Schedule of Compliance is Not Necessary.

The United States asks this Court to impose a court-ordered schedule of implementation. The Commonwealth argues that the Agreement itself establishes the time frame for compliance and therefore, a court-ordered schedule of implementation is not necessary.

Many provisions of the Agreement contain dates certain by which the Commonwealth must comply. The Commonwealth has, for the most part, met the requirements of those provisions. Where it has not, the Commonwealth has been forthright with the United States and the Court about challenges and plans for achieving compliance. The Commonwealth has also been responsive to suggestions and recommendations made by the Independent Reviewer and his consultants. The remainder of the provisions of the Agreement requires significant and substantial change that can only be achieved over a period of time. In recognition of this, the Parties negotiated a ten-year period during which the Commonwealth will achieve compliance. *See* § VII.B. In the three years since the Agreement was approved, the Commonwealth has effectuated change in its system of services for individuals with ID/DD that move it towards full compliance with the Agreement. At the request of this Court, the Commonwealth also submitted Outcome Timelines[8], which further detail its plans to achieve full compliance by the end of State Fiscal Year 2021 as required by the Agreement. To date, the Commonwealth has met all of the

[8] The Commonwealth notes that at the time of the request, it was assured that it would not be held in contempt for failure to meet the Outcome Timelines because the time frames contained in the Timelines were not included in the negotiated Agreement.

milestones that it self-imposed in the Outcome Timelines. There simply is no need at the present time for the Court to impose a schedule for implementation because the Commonwealth is steadily making progress.

Further, the Agreement sets forth a process the United States must follow if it believes that the Commonwealth has failed to fulfill any obligation prior to initiating a court proceeding to remedy the failure. *See* § VII.D. The United States has not complied with that process and thus, its request for a court-ordered schedule is premature.

The United States sets forth case law establishing that courts have the inherent authority to enforce their consent decrees, which the Commonwealth does not dispute. As argued above, the Commonwealth does dispute, however, that it has violated the terms of the Agreement such that enforcement is warranted.[9] Even if enforcement was found to be justified, the court's authority to enforce is constrained by the language of the decree and because the Agreement does not contain a more-detailed schedule of implementation as the United States now seeks, one should not be imposed as an enforcement mechanism. *See Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 404 F.3d 821, 832 (4th Cir. 2005); *see also United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) ("the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it").

In actuality, by asking for a court-ordered schedule, the United States is asking this Court to modify the Agreement.[10] In making this request, the United States fails to reference the standard by which a request for modification should be judged, namely whether the party

[9] The cases cited by the United States where enforcement and modification of consent decrees was found to be justified characterize implementation efforts as follows: "jaw-droppingly short of fulfilling their obligations," "utter failure," and "nearly complete failure to comply" *Thompson,* 404 F.3d at 824-827; "repeatedly failed to comply with the consent decree's requirements" *U.S. v. Gov't of the Virgin Islands*, 363 F.3d 276, 279 (3rd Cir. 2004). The same cannot be said of the Commonwealth's efforts.

[10] The Intervenors' Statement of Issues acknowledges that the Court is being asked to modify the Agreement when they state that the Agreement "should be amended." *See* Intervenors' Statement of Issues at 10.

seeking modification of a consent decree has established a significant change in circumstances that warrants revision of the decree. *Thompson,* 404 F.3d at 827 (4th Cir. 2005). At the time the Agreement was entered into, it was anticipated that it would take ten years for the Commonwealth to satisfy the majority of its terms. Thus, the fact that the Commonwealth has not achieved full compliance at year three of the Agreement cannot be considered to be a change in circumstances. "Ordinarily, modification of a consent decree should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 385 (1992). The United States simply cannot meet its burden to show that a change in circumstances exists that warrants modification of the Agreement at this time.

IV. Conclusion

For the foregoing reasons, the Commonwealth asks this Court to deny the United States' Motion for Court-Ordered Schedule.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Kyle Smiddie
Jessica Polansky
Benjamin O. Tayloe, Jr.
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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
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.	)	

DECLARATION OF WILLIAM A. HAZEL, JR., M.D.

William A. Hazel, Jr. M.D., Declarant, states that to the best of his personal knowledge and belief, the following statements are true and correct:

1. I am the Secretary of Health and Human Resources for the Commonwealth of Virginia and I have held this position since January 2010. As Secretary, I oversee eleven state agencies, including the Department of Behavioral Health and Developmental Services (DBHDS), the lead agency for implementation of the Settlement Agreement, and the Department of Medical Assistance Services (DMAS).

2. I participated in the negotiation of the Settlement Agreement and have maintained oversight of implementation efforts in my role as Secretary. I agreed to be reappointed as

Secretary in 2014 by Governor McAuliffe, in part, to make sure that implementation efforts continued.

3. Although not required by the Settlement Agreement, one of the strategies the Commonwealth is undertaking to achieve full compliance with the Settlement Agreement is restructuring its HCBS waivers to expand available services, raise reimbursement rates, incentivize creation of more integrated settings, and serve more individuals.

4. In order to restructure the waivers, the General Assembly must approve the funding necessary to do so. During the 2015 legislative session, the General Assembly did not approve the funding request. In my opinion, the disapproval was not based on an unwillingness to restructure the waivers but rather due to a lack of understanding of the restructuring plan and a lack of confidence that the plan for the redesigned waivers was complete. The short 45-day session combined with the complexity of the restructuring plan and multiple stakeholders with differing objectives made it difficult to adequately educate legislators. Instead of approving the funding necessary, the General Assembly directed DMAS, in collaboration with DBHDS, to submit a report on the proposed waiver redesign by November 2015.

5. Education of members of the General Assembly involved explaining the shift from three disability-focused waivers with separate systems of care into one system for all individuals with developmental disabilities that will use one case management and waiting list system and three waivers to support individuals where they live and how they wish to spend their day. As part of educating the members about the new system, it had to be explained how individuals would be assigned to levels of care based on their needs

and preferences after a uniform assessment process and that there would be tiers with differing levels of services to support individuals in accordance with their needs.

6. Since the adjournment of the 2015 legislative session, work has been done with stakeholders to further refine the waiver restructuring plan. In my opinion, there is now a unified voice amongst stakeholders.

7. In addition, former DBHDS Commissioner Debra Ferguson has met with General Assembly members to discuss the restructuring of the waivers.

8. Further, both the Health and Human Resources Subcommittees of the House Appropriations and Senate Finance Committees have held meetings solely focused on waiver redesign. During these meetings, detailed presentations on the restructuring of the waivers were made by DBHDS staff, DMAS staff, and stakeholders. The Special Joint Subcommittee to Consult on the Plan to Close State Training Centers was also informed of the importance of the waiver redesign and all stakeholders agreed that the key to successful closure of the training centers was the implementation of the restructured waivers. The agendas from each meeting are attached to this declaration.

9. In October 2015, Joe Flores, Deputy Secretary of Health and Human Resources, along with DBHDS staff and DMAS staff, met with the staff of the House Appropriations and Senate Finance Committees and the Department of Planning and Budget to provide information on the implementation process for the restructured waivers.

10. After the increased efforts to educate the General Assembly members and reach a unified voice with stakeholders, I believe approval for funding the restructured waivers will be obtained during the 2016 legislative session.

11. DBHDS and DMAS have been working with the Centers for Medicare and Medicaid Services throughout the restructuring process to ensure that amendments to the waivers will obtain the necessary federal approval as quickly as possible.

11. I have reviewed the Defendant's Response to the United States' and Intervenors' Statement of Issues and in Opposition to the United States' Motion for Court-Ordered Schedule. The actions undertaken by the Commonwealth to implement the Settlement Agreement that are discussed in the Response are accurately reflected.

12. I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Oct 13, 2015

William A. Hazel, Jr., M.D.
Secretary for Health and Human Resources
Commonwealth of Virginia

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

APPROPRIATIONS COMMITTEE
9TH FLOOR, GENERAL ASSEMBLY BUILDING
CAPITOL SQUARE
POST OFFICE BOX 406
RICHMOND, VIRGINIA 23218
804-698-1590

S. CHRIS JONES, CHAIRMAN
ROBERT P. VAUGHN, STAFF DIRECTOR

House Appropriations Committee
Health and Human Resources Subcommittee
Agenda

Monday, June 15, 2015
Riley E. Ingram, Chairman
Appropriations Room
2:00 p.m.

I. History of the Medicaid Waiver Redesign for Intellectual and Developmental Disability Services

- Jennifer Fidura, Virginia Network of Private Providers

II. U.S. Dept. of Justice Settlement Agreement and ID/DD Waiver Redesign

- Debra Ferguson, Ph.D., Commissioner
  Department of Behavioral Health and Developmental Services (DBHDS)

III. Status of ID/DD Waiver Redesign

- Dawn Traver, Waiver Operations Director, DBHDS
- Karen E. Kimsey, Deputy Director of Complex Care & Services, Department of Medical Assistance Services

IV. Medicaid Waiver Provider Rate Study

- Stephen Pawlowski, Burns and Associates

V. Responses from Community Providers

- Jennifer Faison, Executive Dir., Virginia Association of Community Services Boards
- Ray Ratke, Virginia Network of Private Providers
- Jack Wall, Wall Residences
- Maureen Hollowell, Virginia Association of Centers for Independent Living

VI. Use of Unobligated VPBA Funds for Community Housing

- Don Darr, Assist. Commissioner for Finance, Administration & Technology, DBHDS

SENATE OF VIRGINIA
Senate Finance Committee

Subcommittee on Health and Human Resources

Tuesday, September 29, 2015
10th Floor Conference Room, GAB
2:00 p.m. – 4:00 p.m.

AGENDA

Welcome and Opening Remarks (2:00 – 2:05 p.m.)
- Senator Emmett W. Hanger, Jr., Chair

1) **Update on DOJ Motion for Court-Ordered Schedule of Implementation of the Settlement Agreement (2:05 – 2:10 p.m.)**

   - Michael Tweedy, Senate Finance Committee Staff

2) **Update on the Redesign of the Intellectual Disability and Developmental Disability Waivers (2:10 – 2:50 p.m.)**

   - Dr. Jack Barber, Interim Commissioner, DBHDS
   - Cindi Jones, Director, DMAS
   - Karen Kimsey, Deputy Director, DMAS
   - Dawn Traver, Waiver Operations Director, DBHDS

3) **Medicaid Waiver Provider Rate Study (2:50 – 3:15 p.m.)**

   - Stephen Pawlowski, Burns and Associates

4) **Stake holder Perspectives on Waiver Redesign (3:15 – 4:00 p.m.)**

   - Jennifer Fidura, Virginia Network of Private Providers
   - Jennifer Faison, Virginia Association of Community Services Boards
   - Jamie Liban, The Arc of Virginia
   - Maureen Hollowell, Association of Centers for Independent Living
   - Karen Tefelski, Association of Community Rehabilitation Programs

➢ *Agenda is subject to change without notice.*

COMMONWEALTH OF VIRGINIA

GENERAL ASSEMBLY

Special Joint Subcommittee to Consult on the Plan to Close State Training Centers

Wednesday, September 2, 2015
Northern Virginia Training Center, Gymnasium
9901 Braddock Road, Fairfax, VA 22032

AGENDA

9:45 – 1:30 p.m. – **Tours of Community Programs and Northern Virginia Training Center***

1:30 – 1:35 p.m. – **Joint Subcommittee Meeting Begins – Welcome and Introductions**

1:35 – 2:20 p.m. – **Update on Training Center Closures, Discharges to the Community, and Report on the Acuity Level of Remaining Residents**

- Debra Ferguson, Commissioner
  Department of Behavioral Health and Developmental Services

2:20 – 2:40 p.m. – **Private Providers' Perspective of Community Transitions**

- Ray Ratke, Virginia Network of Private Providers
- Nancy Eisele, Chief Operating Officer, Chimes Virginia

2:40 – 3:00 p.m. **Community Services Boards' Perspective of Community Transitions**

- Jean Hartman, Assistant Deputy Director, Fairfax - Falls Church CSB
- Alan Wooten, Executive Director, Prince William CSB

3:00 – 3:25 p.m. **Family and Community Perspectives**

- Jane Anthony, and Rikki Epstein from The Arc of Northern Virginia
- Judith Korf
- Donna McHugh
- Mary Jane Moran
- Peter Kinzler
- Robert Anthony

3:25 – 3:30 p.m. – **Discussion of Next Meeting; Adjourn**

** Note: The tours of the community programs and Northern Virginia Training Center are limited to members and staff due to transportation and space requirements, and consideration for the clients.*

MEMBERSHIP:

Senator Emmett W. Hanger Jr. (Co-Chair)
Senator Janet D. Howell
Senator Stephen D. Newman
Senator Kenneth C. Alexander

Delegate Riley E. Ingram (Co-Chair)
Delegate R. Steven Landes
Delegate Mark D. Sickles
Delegate T. Scott Garrett

Exhibit 2

U.S. Department of Justice
Civil Rights Division

JMS:BOT:KS:RJF:JK:JH
DJ 168-80-24

Special Litigation Section - PHB
950 Pennsylvania Ave. NW
Washington DC 20530

March 14, 2014

VIA EMAIL & U.S. MAIL

Allyson K. Tysinger, Esq.
Senior Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Re: U.S. v. Virginia, Civil Action No. 3:12cv59; Integrated Day

Dear Ms. Tysinger:

Further to the parties' brief exchanges on this topic, we thought that the Commonwealth would find it helpful if we provided our understanding of the principles of integrated day activities as required by the Settlement Agreement in section III.C.7. In general terms, integrated day activities:

- are non-paid activities (in contrast to paid, supported employment);
- are integrated within the community;
- are individualized to the individual's preferences; and
- promote individual growth toward increased independence.

In other words, integrated days activities are meaningful, nonpaid community activities, involving persons not paid to be in the individual's life, accomplished during normal daytime periods of activity, including weekends, when a person is not working in supported employment. To be clear, supported employment should remain the first priority, but the employment first policy is not an employment *only* policy. Supported employment and integrated day activities should complement each other. For those who do not work 40 hours a week and those served in congregate day support facilities, they should be offered integrated day activities that are true to the principles above.

In addition, integrated day activities should be tailored to the individual's preferences. The activities should be person-centered and based on an individual's choice of what they want to do after being provided a range of options. The options should not be limited because of convenience.

Integrated day activities must promote individual growth toward increased independence. More specifically, they should promote competence, independence, and socialization; should enhance family ties, adaptive skills, and psychosocial skills; should support physical and mental health; and should allow individuals to contribute to society and develop intimate relationships in the community. At its foundation, these activities should challenge the individual to take charge of their life.

We hope that the Commonwealth finds the foregoing useful. We are available to discuss it in more detail, should you wish.

Sincerely,

Jennifer Keen for
Benjamin O. Tayloe, Jr.
Deputy Chief
Special Litigation Section

cc: Donald J. Fletcher (by email only)