



U.S. Department of Justice

Civil Rights Division

JP:BOT:KES:JP:SM
DJ 168-80-24

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

VIA EMAIL & U.S. MAIL

June 15, 2015

The Honorable John A. Gibney, Jr.
United States District Court
Eastern District of Virginia
701 East Broad Street, Suite 6014
Richmond, VA 23219-3528

Re: *United States v. Virginia* (3:12cv59): Request for Public Status Conference

Dear Judge Gibney:

In response to the Court's June 3, 2015, letter regarding the status conference set for July 9, 2015, the United States respectfully requests that the status conference be held in open court, to address areas of noncompliance with the Court-ordered Settlement Agreement, ECF No. 112 ("Agreement"), that are attributable to the Commonwealth's decision to delay critical system reforms.¹

The United States commends the leadership of the Commonwealth's Department of Health ("DOH") and Department of Behavioral Health and Developmental Services ("DBHDS") for their genuine commitment to implementing the spirit and substance of the Agreement. Yet, the Commonwealth has represented to the Independent Reviewer and the Court that the primary strategy to reform its service system and provide integrated services to qualified Virginians with intellectual and developmental disabilities ("ID/DD") is through implementation of redesigned waivers,² and the Commonwealth has elected to delay this important reform.

As the Independent Reviewer determined in December 2014:

For many provisions with which it is not yet in compliance, the Commonwealth proposes the restructuring of its Home and Community-Based Services waivers as the solution.

¹ The Commonwealth's attorneys have informed us that they plan to oppose this request for a public status conference.

² Officially called Home and Community-Based Services Waivers, 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 [intermediate care facilities for individuals with intellectual and developmental disabilities]." Agreement § II.C.

The Commonwealth has indicated that the Waivers will be restructured to change the existing service definitions and funding rates that have fostered congregation rather than integration, independence, self-sufficiency, and quality in residential and day settings. It is the Independent Reviewer's judgment that restructuring is required. *It is clearly evident that substantive improvements in current community services will not be possible with the existing structure of the Home and Community-Based Services waivers.*

Report of the Independent Reviewer on Compliance with the Settlement Agreement, December 8, 2014, ECF No. 158, at 3 ("December 2014 Report") (emphasis added). In his latest report, the Independent Reviewer again emphasized that the Commonwealth's failure to proceed with its waiver redesign prevented it from achieving compliance with the Agreement:

For more than two years, the Commonwealth has identified the redesign of its Home and Community Based Services (HCBS) waivers as its primary strategy to reform the service system and to come into compliance with many provisions of the Agreement. During this review period, the Commonwealth has not been able to put its redesigned waivers into effect. The Commonwealth continues, therefore, not to be in compliance with many provisions. Furthermore, the Commonwealth will remain in non-compliance until it puts into effect, and effectively implements, a restructuring of its system that accomplishes the changes needed to meet these requirements. The Commonwealth's proposed redesign of its HCBS waiver program includes reforms needed to provide essential community-based services for individuals with complex medical and behavioral [needs], and to offer integrated day and independent living options, as required.

Report of the Independent Reviewer on Compliance with the Settlement Agreement, June 6, 2015, ECF No. 177, at 3 ("June 2015 Report") (emphasis added).

Notwithstanding strong leadership at DOH and DBHDS, 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," *id.*, the Commonwealth has delayed this restructuring. Consequently, necessary changes that were projected to become operational in January 2016 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. ECF No. 112.

The delay matters. The Independent Reviewer concluded that the Commonwealth has not "made substantive progress implementing planned changes to achieve compliance with many core structural and programmatic provisions of the Agreement." *Id.* at 56. Nearly three years after the Agreement was approved, the Independent Reviewer reports that the Commonwealth continues to "lag[] significantly behind schedule." *Id.* For instance, the Independent Reviewer found the Commonwealth to be in continued non-compliance with its commitment to develop and implement discharge planning and transition processes at all Training Centers to ensure that individuals with ID/DD are served in the most integrated setting appropriate to their needs. *Id.* at 18, § IV.A. In part, this is because the "[m]ost integrated residential and day options for individuals with complex needs are often not available." *Id.* The Independent Reviewer noted

that the Commonwealth's solution to achieving compliance with this provision hinges on restructuring its waivers, but it has yet to do so. *Id.* at 18-19.

Community providers have told us that they are reluctant to serve individuals with complex needs because the Commonwealth has not assured them of the sustainable financial support necessary to serve these individuals. This reluctance limits placement options. As a likely consequence, individuals are being discharged from Training Centers to placements outside of their home health planning region. For instance, in Fiscal Year 2015 (July 1, 2014 – June 8, 2015), 67% (23/49) of individuals transitioning from the Northern Virginia Training Center (NVTC) were discharged to regions outside their home health planning region. TC Weekly HHR Chart_6.8.15 (data provided to the Independent Reviewer and the United States on June 8, 2015). Forty-five percent (18/40) of individuals discharged in Fiscal Year 2015 prior to June 2, 2015 were placed more than 100 miles from NVTC. May_2015_Discharges_6.2.15 (data provided to the Independent Reviewer and the United States on June 5, 2015).

These data suggest 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 violates 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.

Similarly, the Commonwealth has not complied with its overarching commitment to serve all qualified individuals, in addition to Training Center residents, in the most integrated setting consistent with their informed choice and needs. June 2015 Report at 15, § III.D.1. The Independent Reviewer explained that this is, in part, because the "Commonwealth lacks capacity in northern Virginia." *Id.* Again, this is an issue that implementation of the Commonwealth's redesigned waivers was intended to address, and which the Commonwealth has delayed pursuing.

In the Independent Reviewer's previous report, he emphasized that it is critical for individuals with complex behavioral needs to have access to preventative behavioral supports to avoid harm, institutionalization, and other adverse outcomes. December 2014 Report at 35. However, in his latest report, the Independent Reviewer found that 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." June 2015 Report at 48. In fact, given his concerns, the Independent Reviewer has decided to prioritize monitoring the quality of crisis services during his next review. *Id.* The Commonwealth has publicly represented that its redesigned waivers should increase access to community behavioral supports and crisis services, but this redesign has not occurred. *See* Va. Dep't of Behavioral Health & Dev. Servs., Virginia's ID/DD Waiver Re-Design Update, 17 & 31 (June 8, 2015) (presented at the Virginia Association of Community Rehabilitation Program's ("vaACCSES") Annual Provider Conference).

The Commonwealth is also in continued non-compliance 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. 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.” *Id.* at 3. Yet, the Commonwealth’s primary strategy to come into compliance with this provision (redesigning its waivers) is delayed until Fiscal Year 2017, at the earliest. *Id.* at 49. In his most recent report, the Independent Reviewer stressed that the Commonwealth will remain in non-compliance 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.*

In addition, the Commonwealth has represented publicly 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).³ But those representations appear to be illusory: funds equal to the proceeds from land sales are simply discounted, or “swept,” from general funds that DBHDS would have received through its budget appropriations.

Thus, for Fiscal Year 2015, DBHDS’s appropriation from its general fund 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). The Commonwealth reportedly anticipates similar reductions of general funds to occur in the future. Accordingly, even though 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), by “sweeping” the funds, in reality, the Trust Fund provides no additional funding to support individuals with ID/DD. Although not a requirement of the Agreement, this is concerning in light of the Independent Reviewer’s findings of non-compliance with provisions associated with delays in funding, and appears to represent another example in which the Commonwealth’s full commitment to implement long-needed reforms for Virginians with ID/DD, as required under the Agreement, is lacking.

³ The Virginia Code states in relevant part:

Moneys in the Fund shall be used for mental health, developmental, or substance abuse services and to *facilitate transition of individuals with intellectual disability from state training centers to community-based services*. Notwithstanding any other provision of law, *the net proceeds from the sale of any vacant buildings and land shall first be used to (i) deliver mental health, developmental, and substance abuse services within the same service area where the sold buildings and land were located to ensure the same level of mental health, developmental, and substance abuse services as before the sale*

. . . .
For each fiscal year starting with the Commonwealth’s 2011-2012 fiscal year, any funds directed to be deposited into the [Behavioral Health and Developmental Services Trust] Fund pursuant to the general appropriation act shall be appropriated for financing (i) a broad array of community-based services including but not limited to Intellectual Disability Home and Community Based Waiver services. . . . (emphasis added).

Given the concerns we raise above, we respectfully ask for the Court's consideration of our request that the status conference on July 9, 2015, be public, to facilitate progress towards compliance with the Agreement and to ensure that qualified Virginians with ID/DD receive the supports and services they need, in the most appropriate integrated setting.

Sincerely,

A handwritten signature in blue ink that reads "Kyle Smiddie". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kyle Smiddie
Trial Attorney
Special Litigation Section

cc: Allyson K. Tysinger, Senior Assistant Attorney General (by email only)
Donald Fletcher, Independent Reviewer (by email only)
Thomas B. York, Esq. (by email only)