

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

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>CIVIL ACTION NO: 3:12CV59-JAG</b>
<b>v.</b>	)	
	)	
<b>COMMONWEALTH OF VIRGINIA,</b>	)	
	)	
<b>Defendant,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>PEGGY WOOD, et al.,</b>	)	
	)	
<b>Intervenor-Defendants.</b>	)	

**THE COMMONWEALTH’S RESPONSE TO THE COURT’S PROPOSED  
AMENDMENTS TO THE SETTLEMENT AGREEMENT**

COMES NOW the Commonwealth, by counsel, and states the following with respect to the Court's proposed amendments to the Settlement Agreement:

**1. Proposed amendment defining "authorized representative"**

The Commonwealth agrees to add a new section II.E defining "authorized representative" as proposed by the Court with slight modifications (shown using strikethrough and underlining) as set forth below:

E. As used in this Agreement, the term Authorized Representative means a person authorized to make decisions about ~~health care or treatment or services, including~~ residence, on behalf of an individual who lacks the capacity to consent ~~or make a knowing decision.~~

1. The Authorized Representative shall be recognized by the Commonwealth (which may be delegated to local care providers) from the following, if available:

- a. An attorney-in-fact who is currently empowered to consent or authorize the disclosure under the terms of a durable power of attorney;
  - b. A health care agent appointed by the individual under an advance directive or power of attorney in accordance with the laws of Virginia; or
  - c. A legal guardian of the individual, or if the individual is a minor, a parent with legal custody of the minor or other person authorized to consent to treatment pursuant to § 54.1-2969A of the Code of Virginia.
2. If an attorney-in-fact, health care agent or legal guardian is not available, the Commonwealth or its designee shall designate a substitute decision maker as authorized representative in the following order of priority:
- a. The individual's family member as designated by the individual, unless doing so is clinically contraindicated.
  - b. If the individual does not have a preference or the preference is clinically contraindicated, the best qualified person shall be selected according to the following order of priority:
    - i. A spouse;
    - ii. An adult child;
    - iii. A parent;
    - iv. An adult brother or sister; or
    - v. Any other relative of the individual.
  - c. Next friend of the individual. If no other person specified above is available and willing to serve as authorized representative, the Commonwealth or its designee may designate a next friend of the individual in accordance with 12 VAC 35-115-146, who has either:
    - i. Shared a residence with the individual; or
    - ii. Had regular contact or communication with the individual and provided significant emotional, personal, financial, spiritual, psychological, or other support and assistance to the individual.
3. No director, employee, or agent of a provider of services may serve as an authorized representative for any individual receiving services delivered by that provider unless the authorized representative is a relative or the legal guardian.

The modifications made by the Commonwealth to the Court's proposed language simply align the language with the state's *Rules and Regulations to Assure the Rights of Individuals*

*Receiving Services from Providers Licensed, Funded, or Operated by the Department of Mental Health, Mental Retardation, and Substance Abuse Services [DBHDS]*, 12 VAC 35-115.

## **2. Proposed amendment regarding consent to discharge**

The Commonwealth does not agree to add a new section IV.B.10 as proposed by the Court. The Commonwealth believes that the language proposed by the Court would give current training center residents an entitlement to state-operated ICF/MR training center services. Such an entitlement does not exist in federal law.<sup>1</sup> *See Rolland v. Patrick*, 562 F. Supp. 2d 176, 185 (D. Mass. 2008), *aff'd sub nom., Voss v. Roland*, 592 F.3d 242 (1st Cir. 2010) (finding that federal law does not give an individual the right to reside in a particular facility); *Bruggeman v. Blagojevich*, 324 F.3d 906, 910-11 (7<sup>th</sup> Cir. 2003); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980) (holding that 42 U.S.C. § 1396a(a)(23) of the Medicaid Act does not confer a right to continued residence in the placement of one's choice).

Although state law at present does not permit the Commonwealth to discharge current training center residents without their consent, the General Assembly has the power to repeal this law at any time. It is foreseeable that this law will have to be repealed in order to enable the Commonwealth to close four of its five training centers as it currently plans to do, with or without the entry of the Settlement Agreement. A situation can be envisioned where, at some point, Southeastern Virginia Training Center (SEVTC) will be at capacity and there will be a small number of residents remaining in another training center who do not wish to be discharged. If there are no available training center beds to which to transfer those residents because SEVTC

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<sup>1</sup> Federal Medicaid law provides Medicaid recipients who are eligible the right to choose services in an ICF/MR or through a Home and Community Based Services waiver. 42 U.S.C. § 1396n(c)(2)(C); 42 C.F.R. § 441.302(d). The Medicaid Act provides that an individual eligible for medical assistance may obtain such assistance from any institution, agency, community pharmacy, or person qualified to perform the services who undertakes to provide such services. 42 U.S.C. § 1396a(a)(23)(A). Pursuant to 42 C.F.R. § 431.51(b)(1)(ii), a Medicaid recipient may receive services from any institution, agency, pharmacy, person, or organization that is willing to furnish them to that particular recipient. There is no law that requires states to operate ICFs/MR or that gives individuals a right to receive services from a particular service provider, including a state-operated provider.

is at capacity, the Commonwealth would be required to maintain multiple training centers unless Virginia Code § 37.2-837(A)(3) was repealed, thereby allowing the Commonwealth to discharge those residents to a community ICF/MR. There is no question that the Commonwealth must comply with Virginia Code § 37.2-837(A)(3) while it remains effective and the Commonwealth has no objection to explicitly stating that in the Settlement Agreement. However, the Commonwealth is not willing to add language to the Settlement Agreement that creates a right for current training center residents to receive services in a state-operated ICF/MR training center that does not exist absent a state law.

Furthermore, the Commonwealth will not agree to add language that requires it to maintain a training center for residents who do not consent to discharge. There is no law, state or federal, that requires a state to operate an ICF/MR. As this Court has previously made clear, it is the Commonwealth, not the federal government or this Court, that determines what kind of facilities the state will or will not operate. If the General Assembly repealed Virginia Code § 37.2-837(A)(3) and decided to close all of its trainings centers, it could legally do so. *See Leslz v. Kavanagh*, 783 F. Supp. 286, 298 (N.D. Tex. 1991,) *aff'd*, 983 F.2d 1061 (5th Cir. 1993) (holding that the state could unilaterally close any of its institutions for individuals with developmental disabilities, for economic reasons or otherwise); *Baccus v. Parrish*, 45 F.3d 958, 961 (5th Cir. 1995) (finding that the state has the right to close an institution for administrative or financial reasons). The Commonwealth will not agree to add language that limits its ability to determine the future of its state-operated ICF/MR training centers.

As an alternative to the Court's language, the Commonwealth is willing to amend the settlement agreement with the following language:

The Commonwealth shall not move any individual residing in an ICF/MR to waiver services without the consent of the individual or, if the individual is not capable of consent, his authorized

representative, except that providers of services may decline to offer services or continued services to an individual. In accordance with Virginia Code § 37.2-837(A)(3), for as long as it remains effective, no resident of a training center shall be discharged from a training center to a community setting if he or his authorized representative chooses to continue receiving services in a training center. If the General Assembly repeals Virginia Code § 37.2-837(A)(3), the Commonwealth shall immediately notify the Court and the parties, and the parties agree to appear before the Court if requested to address any concerns it may have. Nothing in this Agreement shall prevent the Commonwealth from closing its training centers or transferring residents from one training center to another.

### **3. Proposed amendment regarding investigations of incidents**

The Commonwealth agrees to add a new section VI.D regarding the reporting and investigation of deaths and serious injuries of former training center residents to the Independent Reviewer as proposed by the Court with modifications (shown using strikethrough and underlining) as set forth below:

VI.D. Upon receipt of notification, the Commonwealth shall immediately report to the Independent Reviewer the death or serious injury resulting in ongoing medical care of any former resident of a training center. The Independent Reviewer shall forthwith investigate any such death or injury and report his findings to the Court in a special report, to be filed under seal with copies to the parties.

Under Virginia law, a serious injury is defined as any injury resulting in bodily hurt, damage, harm, or loss that requires medical attention by a licensed physician, doctor of osteopathic medicine, physician assistant, or nurse practitioner. 12 VAC 35-105-20. This is a broad definition. Providers are required to notify the Department of Behavioral Health and Developmental Services (DBHDS) and the individual's authorized representative within 24 hours of discovery of a death or serious injury. 12 VAC 35-105-160; 12 VAC 35-115-230. Such incidents are investigated by the DBHDS Offices of Licensing and Human Rights. They may also be investigated by the Inspector General for Behavioral Health and Developmental Services, the Virginia Office for Protection and Advocacy, the Department of Social Services Adult Protective Services, and law enforcement agencies, if warranted.

It should be recognized that not all incidents are indicative of problems. Rather than require the Independent Reviewer to investigate all reports he receives, it may be a more efficient and productive use of his time to review the investigations done by the state oversight agencies to ensure they are done well and then investigate only the incidents where he finds the state oversight investigation lacking. For instance, if the state oversight agency determined that a death was a natural one caused by a previously diagnosed cancer, there would be little benefit from the Independent Reviewer conducting another investigation.

#### **4. Conclusion**

The Commonwealth has provided this report to counsel for the United States and the Intervenor and has filed it with the Court. The Commonwealth welcomes comments prior to the conference call scheduled for June 29, 2012.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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## CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2012, 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:

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