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

UNITED STATES OF AMERICA, Plaintiff, v. COMMONWEALTH OF VIRGINIA, Defendant, and PEGGY WOOD, *et al.*, Intervenor-Defendants.	)	CIVIL ACTION NO: 3:12-cv-00059-JAG **THE UNITED STATES' MEMORANDUM IN RESPONSE TO THE COURT'S PROPOSED AMENDMENTS TO THE SETTLEMENT AGREEMENT**

The United States, by and through undersigned counsel, hereby submits this Memorandum in Response to the Court's Proposed Amendments to the Settlement Agreement. The United States requests that the Court incorporate proposed amendments submitted by the Commonwealth (*see* Dkt. No. 104) into the Court's final order entering the Settlement Agreement in lieu of the language proposed by the Court on June 13, 2012 (*see* Dkt. No. 100), and requests an additional modification to the provision regarding the Independent Reviewer's reporting requirements.

INTRODUCTION

The Commonwealth proposes alternative terms regarding transfers from Training Centers and reviews of death and serious injuries that retain the primary objectives of the Court's June 13

proposal.[1] The Commonwealth's proposed amendment regarding the transfer of individuals from Training Centers, like the Court's proposal, ensures that individuals are not discharged from Training Centers without consent, but clarifies that this provision relies upon State law, which the Virginia General Assembly may repeal or modify. The Commonwealth's proposal also includes changes to the death and serious injuries provision. The United States is amenable to the Commonwealth's proposed modifications, subject to a clarification to confirm that the Independent Reviewer will review all deaths and serious injuries requiring ongoing medical care, separately investigate serious incidents where necessary, and maintain the ability to fully discharge all his other duties under the Agreement. The alternative language submitted by the Commonwealth, with the United States' alteration, is necessary to preserve a Settlement Agreement that is fair, adequate, and reasonable, and that is consistent with individuals' rights under federal law.[2]

ARGUMENT

The Commonwealth's proposal, coupled with the United States' modification, addresses the Court's concerns and maintains an Agreement that is fair, reasonable, and adequate to remedy the Commonwealth's violations of the Americans with Disabilities Act ("ADA").

I. LEGAL STANDARD GOVERNING JUDICIAL APPROVAL OF SETTLEMENT AGREEMENT

In order to enter a settlement agreement as a court order, "the court must satisfy itself that the agreement is fair, adequate, and reasonable and is not illegal, a product of collusion, or against the public interest." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999)

[1] The Commonwealth also proposes slight modifications to the Court's proposed language regarding who may serve as an authorized representative of an individual with intellectual or developmental disabilities. *See* Commonwealth's Response to the Court's Proposed Amendments to the Settlement Agreement (Dkt. No. 104) at 1-2. The United States agrees with these changes.

[2] The United States maintains the Settlement Agreement submitted to this Court for approval on January 26, 2012 (Dkt No. 2) meets the requisite standard for approval. *See United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999).

(internal quotation marks omitted). The Fourth Circuit has held that, "[i]n considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged."[3] *Id.* "This principle is especially apposite in cases where, as here, the parties' expertise and comparative freedom in crafting a remedy promise a more sensible and practical resolution to the problems presented by this complex litigation than that likely to result from judicial intervention." *Am. Canoe Ass'n, Inc. v. U.S. Envtl. Prot. Agency*, 54 F. Supp. 2d 621, 625 (E.D. Va. 1999). Moreover, "where a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement, a reviewing court may appropriately accord substantial weight to the agency's expertise and public interest responsibility." *Id.* (internal quotation marks omitted). This is particularly true if the proposed agreement has the potential to save significant public funds that would otherwise be spent on litigation. *United States v. Arch Coal, Inc.*, No. 2:11-0133, 2011 WL 5358723, at *7 (S.D.W. Va. 2011).

In reviewing proposed agreements, a court must remain mindful that it "sits not as a participant to the settlement negotiations," *Bragg v. Robertson*, 54 F. Supp. 2d 653, 663 (S.D.W. Va. 1999), and as such, it should not inquire as to "whether the settlement is one which the court itself might have fashioned, or considers as ideal," *id.* (quoting *United States v. Kramer*, 19 F. Supp. 2d 273, 280 (D.N.J. 1998)). *See also United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991) ("In evaluating the decree, it is not our function to determine whether this is the best possible settlement that could have been obtained, but only whether it is fair, adequate and reasonable."); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir.

[3] The ADA also explicitly encourages settlement. *See* 42 U.S.C. § 12212 ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under [the ADA].").

1990) (noting standard for reviewing settlement agreement is "not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute."); *FTC v. Standard Fin. Mgt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) (acknowledging court "has the duty to approve" a decree proposed by a public agency unless it is "'unfair, inadequate or unreasonable'") (citation omitted).

II. THE COMMONWEALTH'S AND UNITED STATES' MODIFICATIONS TO THE SETTLEMENT AGREEMENT ARE FAIR, ADEQUATE, AND REASONABLE

A. The Commonwealth's Proposal Regarding Transferring Individuals from Training Centers is Fair, Adequate, and Reasonable and Consistent with Federal Law

The Commonwealth's proposal regarding the Agreement's provision relating to the transfer of individuals from State-operated Training Centers maintains an Agreement that is fair, adequate, and reasonable. The Commonwealth's proposal guarantees care in an Intermediate Care Facility for Individuals with Mental Retardation ("ICF-MR")[4] to anyone who both qualifies for that level of care and chooses to be served in an ICF-MR. Further, pursuant to Virginia Code § 37.2-837, individuals residing at Virginia's Training Centers are guaranteed the option of continuing to receive services in an ICF-MR operated by the Commonwealth. Individuals will retain the choice of a State-operated ICF-MR so long as § 37.2-837 of the Virginia Code remains in effect.

If the relevant provision of the Agreement were explicitly to give individuals a right to remain in a Training Center—and effectively require the Commonwealth to maintain its Training Centers with an unknown capacity and continue serving as a provider of ICF-MR services

[4] Effective July 16, 2012, the term ICF-MR will change to ICF-IID (Intermediate Care Facility for Individuals with Intellectual Disabilities) to reflect current terminology. Medicaid and Medicare Program, 77 Fed. Reg. 29002, 29021 (May 16, 2012) (to be codified at 42 C.F.R. pt. 400).

indefinitely—it would create substantive rights for individuals and impose obligations on the Commonwealth far beyond those contained in federal law. Nothing in the ADA or the Medicaid Act gives an individual the right to care in a Training Center or obligates the Commonwealth to continue operating Training Centers.

The ADA does not mandate that States themselves operate institutions such as State-operated ICF-MRs. Rather, Title II of the ADA requires public entities, like the Commonwealth, to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The regulations define the "most integrated setting" as that which "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. B (2010). Indeed, in enacting the ADA, Congress sought to end the isolation and segregation of persons with disabilities. 42 U.S.C. § 12101(a)(2). Interpreting the ADA as requiring States to maintain institutions that *segregate* individuals with disabilities turns this mandate on its head.[5]

Nor does the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), create a right to a State-operated ICF-MR or require States to maintain its State-operated ICF-MRs. In *Olmstead,* the Supreme Court held that the ADA prohibits unjustified segregation of people with disabilities and described the harms of segregation: that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that

[5] To suggest that an individual has the right to institutional care or that States must offer institutional services under the ADA is illogical when considering the requirements of Title II of the ADA. Title II only applies to "services, programs, or activities" of a public entity. 28 C.F.R. §35.130(a). Title II requires that "a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.…" 28 C.F.R.§ 35.130(b)(7). The discrimination at issue here is unnecessary segregation, and the Commonwealth has an obligation to modify its programs, through the provision of integrated services, to avoid unnecessary segregation. While an individual cannot be forced to accept a particular accommodation or service, 28 C.F.R. § 35.130(c), Title II does not then give the individual a right to institutional service or require a public entity to provide it by virtue of the individual's rejection of an offered accommodation. *See also Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (finding Congress must unambiguously intend to confer a statutory federal right to create a private right of action.).

persons so isolated are incapable or unworthy of participating in community life" and that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 600-01. The Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id*. at 607. The decision addresses when non-institutional options must be presented to individuals; it does not require States to continue institutionalizing persons who oppose moving. *See Richard C. v. Houstoun*, 196 F.R.D. 288, 292 (W.D. Pa. 1999) (*Olmstead* does not require ongoing institutionalization if any of three *Olmstead* factors are not met.); *see also Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 338 (D. Conn. 2008) (discussing the ADA's "preference for integrated settings," and holding that a State's use of an institution as a "default" without first engaging the guardians and offering informed choice about community alternatives is inconsistent with the ADA's integration mandate.)

The Medicaid Act likewise does not create a right to receive services in a State-operated ICF-MR, nor does it obligate the Commonwealth to act as a provider of ICF-MR services. Medicaid only requires that if a State offers ICF-MR services as part of its Medicaid State Plan, it must offer an ICF-MR placement to individuals who both qualify for and request ICF-MR care. *See* 42 U.S.C. § 1396a(a)(8) and 42 U.S.C. § 1396d(a)(15). However, the ICF-MR made available to the qualified individual can be State-run, public, or private, all of which are subject to the same federal regulations. *See* 42 C.F.R. § 400 *et seq*. As such, States are not required to

serve as ICF-MR care providers. 42 U.S.C. § 1396a(a)(23) (providers of Medicaid services must be willing to be a provider). Reflecting this fact, as of 2011, eleven States have already elected not to operate a State-run ICF-MR facility. *See* David Braddock et al., The State of the States in Developmental Disabilities 2011 51 (2011).

Courts have recognized consistently that nothing in the Medicaid Act or the ADA prevents a State from exercising its discretion to close public facilities and that individuals do not have a right to a particular facility. *See, e.g., Ricci v. Patrick*, 544 F.3d 8, 21 (1st Cir. 2008) (recognizing a State's ability to close its State-operated facilities and noting the ADA's preference for community integration under the *Olmstead* decision); *Bruggeman v. Blagojevich*, 324 F.3d 906, 910-11 (7th Cir. 2003) (finding no right to ICF-MRs other than those the State chooses to offer); *Rolland v. Patrick*, 562 F. Supp. 2d 176, 185 (D. Mass. 2008) (finding that federal law does not give individuals with disabilities the right to reside in a particular facility); *Alexander v. Rendell*, No. 05-419J, 2006 U.S. Dist. LEXIS 3378, at *18-19 (W.D. Pa. Jan. 30, 2006) (finding that "the Defendants' closing of the Altoona Center and its plan for transfer of its residents serves both the public policy of the ADA, Rehabilitation Act and the applicable Medicaid statutes and proper judicial deference to the discretion of the State in determining the manner in which it allocates its resources . . . ."); *see also Baccus v. Parrish*, 45 F.3d 958, 961 (5th Cir. 1995) (State may close its public institutions for individuals with intellectual and developmental disabilities); *Lelsz v. Kavanagh*, 783 F. Supp. 286, 298 (N.D. Tex. 1991), *aff'd* 983 F. 2d 1061 (5th Cir. 1993), cert. denied, 510 U.S. 906 (1993) (same).

Given that nothing in the ADA, *Olmstead*, or the Medicaid Act can be read to create a federal requirement that Virginia maintain operation of its Training Centers, the Commonwealth's proposed revisions to the Agreement are fair, adequate, and reasonable, in the

public interest, and not illegal. *See United States v. City of Welch*, No. 1:11-00647, 2012 WL 385489, at *2–4 (S.D.W. Va. Feb. 6, 2012) (finding agreement in public interest because it comported with the goals of the relevant statute); *Am. Canoe Ass'n*, 54 F. Supp. 2d at 625–29 (finding agreement fair, reasonable and adequate in part because it was consistent with the contested statute).

Mandating that the Commonwealth continue operating one or more Training Centers, even if its legislature were to reach a different judgment, exceeds what the Court can require and weakens the Commonwealth's ability to expand badly needed community services. The Court has acknowledged that decisions about continued operations of the Training Centers are within the purview of the Commonwealth's executive and legislative branches. *See* June 8, 2012 Hearing Transcript (Dkt. No. 103) at 7, 257; March 6, 2012 Order (Dkt. No. 22) at 2. Deference to a State's discretion regarding closure of institutions is particularly appropriate where, as here, the State's efforts are intended to maximize its available resources to serve effectively the greatest number of people. *See* Agreement III.C.9 (The Commonwealth has a "goal and policy . . . of using its limited resources to serve effectively the greatest number of individuals with ID/DD."); *Ricci*, 544 F.3d at 17-18 n.8 (noting the importance of the State's broad discretion in "allocating its resources to ensure equitable treatment of its citizens," including discretion to close any facility).[6]

[6] The United States understands the concerns raised by the Court regarding individuals currently residing in State Training Centers. However, current residents of Training Centers will receive far more protections if the Agreement is approved with the Commonwealth's amendments than they would if the Agreement is not approved. As this court has repeatedly recognized, Virginia's plan to phase out its Training Centers is not required by this Agreement, and the Commonwealth has represented that it will move forward with those plans whether this Agreement receives approval or not. *See, e.g.*, Commonwealth's Response to the Court's Proposed Amendments to the Settlement Agreement (Dkt. No. 104) at 3. Given that Virginia can—and likely will—close its Training Centers regardless of whether this Agreement is approved, those individuals residing in the Training Centers stand only to gain from the Agreement's numerous protections and quality assurance mechanisms. Those protections and mechanisms relate to pre- and post-transfer services, enhanced case management, and stringent quality management with independent monitoring. *See, e.g.*, Settlement Agreement at IV.B. (discharge planning), IV.C. (transition

B. The Commonwealth's Proposed Language, as Modified by the United States, Regarding the Independent Reviewer's Reporting Requirements is Fair, Adequate, and Reasonable and Accommodates the Court's Concerns Regarding Quality Assurance

The United States is amenable to the changes the Commonwealth has proposed to the Court's suggested language regarding the investigation and reporting of deaths and serious injuries. However, the United States requests a further modification as set forth below so as to ensure the provision is fair, adequate, and reasonable:

> 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**~~ **review** 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.

(The Commonwealth's modifications underlined; the United States' modification in bold.)

The United States' proposal will require the Independent Reviewer to review each death and serious injury requiring ongoing medical attention and, in the process, assess the quality of the Commonwealth's own reporting and investigating systems, without requiring the Independent Reviewer to create and maintain a stand-alone system of clinicians and investigators redundant of the Commonwealth's own reporting and investigating systems. If the Independent Reviewer determines from his review that there are problems in the Commonwealth's investigation of specific incidents, he can direct the Commonwealth to address those problems or conduct an independent investigation.

The United States' examination of this issue, including inquiries of monitors from similar litigation and the Independent Reviewer in this case, confirms that this approach is uniformly implemented and appropriate here. This approach would provide oversight of the

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services), V.F. (case management system), and V.I. (quality service reviews). Training Center residents can only be ensured of benefiting from those safeguards if the Agreement is approved.

Commonwealth's investigation of each death and serious injury requiring ongoing medical care to ensure that the Commonwealth's reporting and investigating systems are reliable and self-sustaining, while also ensuring that the Independent Reviewer can maintain his ability to discharge fully all his other duties under the Agreement. Accordingly, the United States urges that the Court accept the Commonwealth's proposal as modified by the United States.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court approve the Agreement with the Commonwealth's proposed amendments inclusive of the United States' modification of the Independent Reviewer reporting provision. A proposed Order is attached.

Dated: June 26, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2012, I will electronically file the foregoing UNITED STATES' MEMORANDUM IN RESPONSE TO THE COURT'S PROPOSED AMENDMENTS TO THE SETTLEMENT AGREEMENT and proposed ORDER 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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