

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

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

**UNITED STATES’ NOTICE REGARDING THE COMMONWEALTH’S
COMPLIANCE WITH THE SETTLEMENT AGREEMENT**

Pursuant to Section VII.B.2 of the Settlement Agreement (Agreement), the United States files this Notice to dispute compliance. Relying on the Independent Reviewer’s determinations, the United States asserts that the Commonwealth is not in compliance with the Agreement. Further, the United States asserts that the Commonwealth cannot attain compliance with the Agreement by the end of State Fiscal Year 2021 (June 30, 2021). The updated chart at Attachment A provides the United States’ assessment of the Commonwealth’s compliance with each provision, noting where the Commonwealth has achieved sustained compliance with the provision, is not in compliance with the provision, or has achieved compliance for one period but

has not yet demonstrated sustained compliance as required by the Agreement.¹ The United States has adopted the Independent Reviewer's assessments in their entirety; further, the United States has made assessments or determinations for the few provisions noted below that the Independent Reviewer does not monitor.

The Agreement establishes a process to determine whether the Commonwealth has complied with the requirements of the Agreement. Pursuant to § VI.B: "The Independent Reviewer shall conduct the factual investigation and verification of data and documentation necessary to determine whether the Commonwealth is in compliance with this Settlement Agreement, on a six-month cycle continuing during the pendency of the Agreement." Further, "[t]he Independent Reviewer shall file with the Court a written report on the Commonwealth's compliance with the terms of this Agreement within 60 days of the close of each review cycle." § VI.C.

Section VII.B.2 requires the United States to inform the Court and the Commonwealth that it disputes compliance by January 1, 2021. The Agreement makes clear that "the Party that disagrees with the Independent Reviewer's assessment of compliance shall bear the burden of proof." VII.B.2. The United States agrees with each of the Independent Reviewer's assessments. Accordingly, the United States has adopted the Independent Reviewer's compliance determinations in his most recent two reports (ECF 383, filed in December 2020, and ECF 381, filed in June 2020). In the limited instances where the most recent two reports do not

¹ The United States previously filed a chart with its compliance assessments on April 1, 2020 (ECF 375 and 375-1). The updated chart included at Attachment A denotes all changes from the April filing in bolded text. There are only five provisions where the Independent Reviewer's determination of compliance has changed since the April 2020 filing. Three provisions came into compliance because of the Commonwealth's provision of waiver slots (III.C.1.a.ix, III.C.1.b.ix, and III.C.1.c.ix); one provision about risk management training moved out of compliance (V.C.4); and one provision about supervisor training and coaching came into compliance (V.H.2).

assess a provision, the United States has adopted the assessment of the latest Independent Reviewer report to do so.²

In addition, the United States offers its separate assessment of compliance of provisions that the Independent Reviewer has not assessed.³ These provisions fall into two categories.

First, the Independent Reviewer has not monitored the following provisions pertaining to planning and discharges from Training Centers: III.C.9, IV.B.1, IV.B.2, IV.B.8, IV.B.12, IV.B.13, IV.B.14, IV.D.2.b-f, and IV.D.3.a-c. As noted in its April 1, 2020 submission (ECF 375 and 375-1) and the attached chart, the United States accepts that the Commonwealth is in compliance with these provisions, based on the Independent Reviewer's assessments of individuals who have been discharged from Training Centers and the United States' periodic review of discharge planning.

Second, the Independent Reviewer has never assessed compliance with provisions III.A (requiring the development and provision of community services in order to the prevent unnecessary institutionalization of people with IDD and to provide them opportunities to live in the most integrated settings) and V.A (requiring the development and implementation of a quality and risk management system in order to ensure that services are of good quality, available, and accessible; meet individuals' needs; and help individuals achieve positive

² There are a few provisions which the Independent Reviewer previously assessed but no longer assesses for compliance. In these instances, the United States has adopted the Independent Reviewer's previous assessment of compliance. *See, e.g.*, III.C.6.b.ii.F ("By June 30, 2012, the Commonwealth shall have at least one mobile crisis team in each Region...") (last assessed in period 5 and found to be in sustained compliance by the Independent Reviewer at that time).

³ The United States' compliance chart does not address one provision for which an assessment of compliance is not necessary per agreement of the Parties. The Independent Reviewer does not monitor III.C.6.b.iii.C and has questioned whether this provision should be retained. *See* ECF 357 at 31. This provision addresses circumstances when a community provider may offer an alternative community placement to an individual who is receiving crisis stabilization services and already has an existing community placement. The Parties agree that this provision should not be retained and compliance should not be assessed.

outcomes). The Commonwealth's compliance with these provisions is determined through compliance with all the subordinate provisions in Section III and Section V, respectively.

Because the Commonwealth is not in compliance with all the subordinate provisions in Section III and Section V, the United States asserts that it is not in compliance with III.A and V.A.

For the foregoing reasons, the United States disputes that the Commonwealth will be in compliance with the Agreement at the end of State Fiscal Year 2021 and adopts the Independent Reviewer's determinations in full.

Respectfully submitted,

Dated: December 30, 2020

FOR THE UNITED STATES:

G. ZACHARY TERWILLIGER
United States Attorney
Eastern District of Virginia

ERIC S. DREIBAND
Assistant Attorney General
Civil Rights Division

STEVEN H. ROSENBAUM
Chief
Special Litigation Section

BENJAMIN O. TAYLOE, JR.
Deputy Chief
Special Litigation Section

By: _____/s/
ROBERT McINTOSH
Virginia Bar Number 66113
Attorney for the United States of America
United States Attorney's Office
919 East Main Street, Suite 1900
Richmond, Virginia 23219
Telephone: (804) 819-7404
Facsimile: (804) 819-7417
Robert.McIntosh@usdoj.gov

By: _____/s/
KYLE SMIDDIE
JESSICA POLANSKY
BETH KURTZ
Trial Attorneys
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave, NW
Washington, D.C. 20530
Phone: (202) 532-3249
Fax: (202) 514-4883
kyle.smiddie@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2020, I will electronically file the foregoing UNITED STATES' NOTICE REGARDING THE COMMONWEALTH'S COMPLIANCE WITH THE SETTLEMENT AGREEMENT with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Allyson Kurzmann Tysinger
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
(804) 786-2071
ATysinger@oag.state.va.us

Gerard Thomas Schafer
Schafer Law Group
5265 Providence Rd
Suite 303
Virginia Beach, VA 23464
rschafer@schaferlawgroup.com

Thomas York
The York Legal Group LLC
3511 North Front Street
Harrisburg, PA 17110
tyork@yorklegalgroup.com

/s/
Robert P. McIntosh
Virginia Bar Number 66113
Attorney for the United States of America
United States Attorney's Office
919 East Main Street, Suite 1900
Richmond, Virginia 23219
Telephone: (804) 819-5400
Facsimile: (804) 819-7417
Email: Robert.McIntosh@usdoj.gov