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

Richmond Division

UNITED STATES OF AMERICA,
Plaintiff,

v. Civil Action No. 3:12cv59-JAG

COMMONWEALTH OF VIRGINIA,
Defendant,

and

PEGGY WOOD, *et al.*,
Intervener-Defendants and Third-Party Plaintiffs,

v.

ROBERT MCDONNELL, *et al.*,
Third-Party Defendants.

ORDER APPROVING CONSENT DECREE

This case comes before the Court on a joint motion of the United States and the Commonwealth of Virginia (the "Commonwealth" or "Virginia") for the Court to approve and adopt a consent decree. The Court finds that the parties entered into their settlement agreement without collusion, and that the agreement, as embodied in the decree, is lawful, fair, adequate, and reasonable. The Court therefore APPROVES the decree and GRANTS the Joint Motion for Entry of Settlement Agreement (Dk. No. 2).

I. Proceedings

The United States commenced this proceeding by filing a complaint alleging that the Commonwealth had violated the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* Simultaneously, Virginia and the United States submitted a consent decree for the Court's

consideration. In essence, they had worked out a settlement before the suit was filed. As discussed below, the settlement dramatically changes the way Virginia provides services to its intellectually and developmentally disabled population.

Not everyone liked the terms of the settlement, and a group of disabled citizens moved to intervene to oppose the settlement (the "Intervenors"). The Court granted their motion to intervene, and they participated actively in the litigation, arguing at every step that the proposed settlement was unfair to the residents of Virginia's five training centers (the "Training Centers"). Funded and operated by the Commonwealth, the Training Centers are large, hospital-like facilities built to house hundreds of disabled people. The Intervenors considered the Training Centers their homes. They opposed the settlement because they believed that the proposed consent decree would mandate removing them from the Training Centers and putting them in harm's way.

The Court received hundreds of letters both for and against the consent decree. The Court has treated those letters as briefs amicus curiae. In addition, the Court received several formal amicus briefs, filed by counsel for interested groups. The Court has considered the letters and briefs in reaching its decision.

Several months ago, the Court toured a number of facilities, accompanied by counsel[1] and the Commissioner of Behavioral Health and Developmental Services. The tour included not only residential homes but also sites for supported day activities—essentially examples of most of the types of facilities that provide services to disabled Virginians. The Court selected places to inspect from a list of facilities provided by the Attorney General of Virginia's office. The Court created an itinerary for its tour, but did not share the proposed stops with the parties.

[1] The inspection of facilities occurred before the Court granted the motion to intervene, so counsel for the Intervenors did not participate in the tour.

Rather, after inspecting one facility, the Court would then tell counsel the next place to visit. The Court's purpose was to prevent anyone from receiving advanced notice of the visit and somehow improving the conditions before the Court's arrival.

The Court also held a fairness hearing. It allowed the Commonwealth, the United States, and the Intervenors ninety minutes each to put on evidence supporting their positions. A Court-appointed expert also testified regarding the impact of the consent decree on Virginia's community service boards and, specifically, whether those boards could handle the number of new clients envisioned in the decree.

Having held these proceedings, the Court is now prepared to decide whether to adopt the settlement as a consent decree.

II. Facts

This case involves Virginia's treatment of its intellectually and developmentally disabled population. Intellectual disabilities consist of a number of conditions, including autism, Downs Syndrome, self-destructive behavior, retardation, and a host of other behavioral and intellectual difficulties. Developmental disability refers to people born with physical issues that prevent them from being able to feed themselves, to walk, and to accomplish myriad other activities. Although intellectual disability and developmental disability are two different categories, most of the people with developmental issues also have intellectual disabilities. In this Order, therefore, the Court will simply refer to "disabled" individuals, encompassing both branches of disability.

Several decades ago, Virginia developed a group of five Training Centers to serve its disabled population. As noted above, the Training Centers are large hospital-like facilities housing a number of disabled people. Although the Training Center residents sometimes go on

outside trips, most of their time is spent with other disabled people in the centers. The facilities provide recreation, housing, supported work, and meals to their residents.

At the time it created the Training Centers, the Commonwealth encouraged families to put their disabled relatives in them, in order to provide a safe and healthful environment. The Intervenors in this case largely come from families that accepted the Commonwealth's invitation to use the Training Centers. The Intervenors are uniformly satisfied with the treatment of their loved ones in the centers, and are afraid that a change of homes will lead to disruption and danger. In its tour of facilities, the Court visited the Southside Regional Training Center in Petersburg, Virginia. That facility is clean and well-run. The residents seemed largely content. The staff was very supportive and loving to the residents.

As the years passed, however, new modalities of care were developed, and became the preference of experts in the disability field. Specifically, the preferred method involved allowing disabled people to live in the broader community, rather than in facilities restricted to disabled residents. Over the years, the Commonwealth has taken fewer and fewer residents into Training Centers, and has discharged many residents to community facilities. As a result, the population of the Training Centers has diminished from 6000 to less than a thousand residents. Nevertheless, the Commonwealth maintains the facilities to house the vastly diminished population of disabled citizens.

Congress passed the Americans with Disabilities Act ("ADA") in 1990, providing further impetus to the movement toward community services. In the ADA, "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'" *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). "The ADA stepped up earlier measures to secure

opportunities for people with developmental disabilities to enjoy the benefits of community living." *Id.* at 599.

The United States, through the Department of Justice ("DOJ"), believes that hospital-type settings are precisely the kind of segregated facility frowned upon in the ADA. In 2008, the DOD began to look into the Central Virginia Training Center in Lynchburg, Virginia. Recognizing system-wide problems, the DOJ eventually broadened the investigation to include all of Virginia's Training Centers. The DOJ concluded that Virginia's entire system of Training Centers violated the ADA by denying disabled citizens the right to be part of the broader community. Accordingly, the DOJ sent a letter of findings to the Commonwealth, demanding changes in the system.

The DOJ's demands were consonant with Virginia's own plans. As noted above, Virginia had taken long strides to lessen the population of the Training Centers by this time. The Commonwealth essentially agreed with the DOJ's goal of community-based services.

Thereafter, a lengthy negotiation commenced between the Commonwealth and the United States to find a solution. It became apparent that the issue of community services had ramifications that would affect many more people than those in the Training Centers. Virginia has long waiting lists of disabled people who are not receiving appropriate services, and any plan to reduce the Training Center population needed to address the broader problems of the disabled community.

The solution came in the form of a vast increase in the number of "Medicaid waivers" available to Virginians. Medicaid waivers are, essentially, government subsidies to pay for care and services for disabled people. The funds are provided by both the federal and state government. Virginia's problem was that it spent so much money on Training Centers that it had

very little left over for waivers. Hence, Virginia has extensive waiting lists of people who need waivers to secure services.

Waivers can be used to fund any number of services. These include community-based living arrangements such as intermediate-care facilities for disabled people, group homes, residences with "sponsored families," and supported apartments. The Court visited most of these types of facilities in its tour, and they are, like the Training Centers, clean, healthful, and managed by caring staff members. Going further, however, the waivers can also provide assistance to families who choose to have disabled people live in their homes. This can include medical equipment and even part-time help with the care of a disabled family member.

After months of negotiations, the United States and the Commonwealth agreed on a plan to address both the Training Centers and the waiting lists. The consent decree embodies that agreement.[2] Under the proposed settlement, Virginia has agreed to provide 4170 additional waiver slots, divided among current Training Center residents, disabled people in various segregated facilities other than the Training Centers, and people on the waiting list for services.

The settlement also prescribes in great detail how Virginia will administer the services it provides to disabled citizens. This process will be a shared responsibility of the Department of Behavioral Health and Developmental Services and local community service boards ("CSBs"). CSBs are agencies that coordinate—and sometimes provide—a variety of services in the communities of the Commonwealth, including services for disabled people. The CSBs will be responsible for placing disabled people who are discharged from a Training Center into an appropriate community setting. Under the consent decree, the CSBs will need to find a large

[2] The Court suggested several minor changes to the proposed decree, but they do not affect the heart of the agreement.

number of community placements for residents of Training Centers as well as people on the waiting lists. The Court-appointed expert testified that the CSBs can handle this task.

The decree also provides for changed procedures at the Training Centers and spells out how the Commonwealth will assist the CSBs with technical assistance. Each Training Center resident will have a discharge plan crafted by the professionals at the facility. Virginia will set up case-management teams, crisis teams, and plans for supported day services in the community. Essentially, the Commonwealth's efforts—and those of the CSBs—will all be focused on keeping disabled people in the community.

To protect its disabled citizens, the Commonwealth also agrees in the decree to conduct inspections to determine the quality of services. Further, Virginia must develop a risk-management plan that will insure that community-based disabled people are safe. At each stage from planning to implementation, health professionals will participate in the process of identifying appropriate services.

Finally, the consent decree requires the appointment of an independent reviewer who will report to the Court on the progress of implementing the decree.

III. Discussion

"In considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999). Courts may accord deference to the judgment of parties with experience in the area of the decree, and should especially give substantial weight to the expertise of public agencies entering settlements. *American Canoe Association v. United States EPA*, 54 F. Supp. 2d 621, 625 (E.D. Va. 1999). While settlements are desirable, the court must not "blindly accept" the terms of a proposed consent decree. *Id.* Rather, the court should

insure that the agreement is not illegal, is not the product of collusion, is not against the public interest, and is fair, adequate and reasonable. *North Carolina*, 180 F.3d at 581. Obviously, these concepts—illegality, collusion, public interest, fairness, adequacy, and reasonableness—overlap a great deal. For instance, it is hard to imagine a fair, adequate, and reasonable settlement that is not also in the public interest. These factors are not a checklist, but rather considerations that point the court in the right direction. In this case, they support approval of the settlement and consent decree.

A. Illegality

Clearly, the agreement is not illegal. The decision of what kind of services to offer to citizens and how to allocate limited funds are inherent in the sovereign power of the states. In this instance, the consent decree is completely consonant with the principles set forth in the ADA, as interpreted by Justice Ginsburg in *Olmstead*, *supra*. One purpose of the ADA is "to secure opportunities for people with developmental disabilities to enjoy the benefits of community living." *Id.* at 599.

The Intervenors, however, argue that the settlement agreement requires Virginia to close down the Training Centers and allows the Commonwealth to force current Training Center residents out of their long-term homes, all in violation of the ADA. They point out that *Olmstead* also states that no one should be compelled to leave a facility without his or her consent. *Id.* at 602 (noting that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it.").

The Intervenors read the consent decree incorrectly. Nothing in the decree compels Virginia to close any facility. Decisions of that sort lie in the hands of the Virginia General Assembly. If it deems it wise, the General Assembly can appropriate funds to continue to

operate some or all of the Training Centers, even while funding the Medicaid waivers. The Court recognizes that the Virginia Department of Behavioral Health and Developmental Services is trying to move away from a care model with Training Centers, but the ultimate decision whether to close any Training Center lies not with the Department, but with the legislature.

Moreover, the Intervenors ignore a provision of state law that forbids the horrible outcomes they conjure up. Virginia Code Section 37.2-837(A)(3) provides that no one may be forced to leave a Training Center against his or her will. Va. Code § 37.2-837(A)(3). The statute serves as bedrock assurance that no one will be evicted from a Training Center. The parties have even agreed that the Court may reopen the case in the event § 37.2-837(A)(3) is repealed. (*See* Settlement Agreement, Ex. A, § IV, ¶ 10.) At that time, the Court can revisit the fairness of the decree.

B. Collusion

The agreement is also not the product of collusion between the Commonwealth and the United States. The DOJ began an investigation of the Central Virginia Training Center in 2008, and eventually expanded the scope to include all of the Training Centers. It sent a letter to the Commonwealth outlining various ADA violations and demanding changes. The parties then engaged in long and difficult negotiations at arms' length to reach an agreement. The settlement agreement provides hundreds of millions of dollars of benefits for disabled Virginians. Clearly, the plaintiff and the Commonwealth did not collude in any way to reach the agreement presented to the Court.

C. Public Interest, Fairness, Adequacy, and Reasonableness

As the Intervenors have demonstrated, one can argue vigorously that disabled people are best treated in a hospital-type setting, such as a Training Center. The existence of such an

argument, however, does not mean that the consent decree is improper. The Commonwealth, as its right, has decided that the public interest compels community placements. As observed above, a public agency charged with protecting the public interest deserves substantial deference. *See American Canoe Assoc.*, 54 F. Supp. 2d at 625. The Court trusts the expertise of the Commonwealth's Department of Behavioral Health and Developmental Services to adopt a plan of action that benefits Virginia's disabled citizens. In this case, the Court need not look beyond the number of people receiving greater, more beneficial services. In Training Centers, fewer than one thousand Virginians receive services. When the waivers are fully funded, over 4000 people will be able to afford the services they need. The entry of the decree is a valid decision in the public interest.

Furthermore, the settlement agreement addresses pressing needs. Virginia currently has over 2900 people on an "urgent wait list" for Medicaid waivers. Those citizens and their families must fend for themselves in dealing with disability. Many of them will receive benefits under the decree. The decree, thus, balances the needs of these citizens. The Court certainly cannot say that the agreement is not fair, reasonable, and adequate. Rather, the parties have come up with a plan to fund a broad range of services for disabled Virginians.

The Court finds that the agreement is fair, reasonable, adequate, and in the public interest. The Court therefore approves the consent decree; the final settlement agreement is attached as Exhibit A to this Order, and is deemed part of this Order.

IV. Third Party Complaint

The Intervenors have filed a third party complaint against a number of state officials. Their claim arises under the ADA, the Rehabilitation Act of 1973, and the Medicaid statute and regulations. 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 42 U.S.C. § 1396, *et seq*. In essence, the

Intervenors say that they are being forced out of Training Centers, and ask this Court to fashion appropriate relief, whatever that may be.

The third-party complaint fails in at least three ways. First, it is not a proper third-party pleading. A third-party complaint is brought by a litigant who claims that someone else "is or may be liable to it for all or part of the claim against it." Fed. R. Civ. P. 14(a). The Intervenors' third-party complaint simply does not fit in the mold set by the rules for such pleadings.

Second, the claims are not ripe. No one has been involuntarily removed from a state facility. Whatever injury the Intervenors might suffer simply has not occurred yet.

Third, the claim is based on a misreading of the settlement agreement. The agreement compels Virginia to offer Medicaid waivers and associated services; it does not compel the shutdown of any Training Center. The Court recognizes that it is unlikely that the Commonwealth can afford to operate five Training Centers while funding the Medicaid waivers. It is possible, however, that the Commonwealth will keep one center open and consolidate its operations there. Nothing in the agreement forbids the state from doing so. This matter is a judgment left to the Virginia General Assembly as it considers the state's various needs. Nothing, however, forces the General Assembly to close down any facility. The settlement agreement does not have the effect attributed to it in the third-party complaint.

For these reasons, the third-party complaint is DISMISSED.

Furthermore, the Joint Motion for Entry of Settlement Agreement (Dk. No. 2) is GRANTED. The Court FINDS that the consent decree is fair, reasonable, adequate, and in the public interest. Accordingly, the Court hereby APPROVES the final settlement agreement (Ex. A) in this case.

It is SO ORDERED

Let the Clerk send a copy of this Order to all counsel of record.

Date: August 23, 2012
Richmond, VA

/s/
John A. Gibney, Jr.
United States District Judge