

REPORT OF THE INDEPENDENT REVIEWER
ON COMPLIANCE
WITH THE
SETTLEMENT AGREEMENT
UNITED STATES v. COMMONWEALTH OF VIRGINIA

United States District Court for
Eastern District of Virginia

Civil Action No. 3:12 CV 059

April 1, 2020 – September 30, 2020

Respectfully Submitted By

A handwritten signature in black ink, appearing to read "Donald J. Fletcher", with a stylized flourish at the end.

Donald J. Fletcher
Independent Reviewer
December 15, 2020

I. EXECUTIVE SUMMARY

This is the Independent Reviewer's seventeenth Report on the status of compliance with the Provisions of the Settlement Agreement (Agreement) between the Parties to the Agreement: the Commonwealth of Virginia (the Commonwealth) and the United States, represented by the Department of Justice (DOJ). This Report documents and discusses the Commonwealth's efforts and the status of its progress and compliance during the seventeenth Review Period, April 1, 2020 – September 30, 2020.

Tragically, the COVID-19 pandemic dominated this Review Period, with its repercussions felt across the entire country. Individuals with IDD, like the elderly, and the essential workers who support them, suffered disproportionately, especially in congregate settings. Overall, Virginia's service providers responded diligently to meet the challenge of ensuring that their essential workers continued to deliver care and supports. In doing so, however, providers could not avoid exposing their most valuable assets – their employees – and their loved ones to life-threatening health risks, even with safety protocols in place. Many of these organizations offered additional services within the Commonwealth without receiving a corresponding financial rate increase.

Virginia's service providers now report being under financial strain. If the Commonwealth is to meet its Agreement obligations, it must supply the resources necessary for providers to retain caring, qualified, trained and experienced direct support professionals, as well as supervisors, nurses, and behavioral specialists. All these workers are especially critical for supporting individuals with complex needs. Serving this population effectively is underscored throughout the Agreement.

During the seventeenth Review Period, Virginia focused intensively on implementing the Agreement's Provisions for a Quality and Risk Management (QRM) system. To be effective, the Parties had agreed that this QRM system would require both external oversight mechanisms and internal self-monitoring mechanisms.

To create such a system in the Commonwealth, Virginia would implement four foundational oversight mechanisms:

1. Frequent and unannounced inspections and investigations by the Department of Behavioral Health and Development (DBHDS)'s Office of Licensing (OL);
2. Frequent in-person observations and assessments by case managers to determine whether services are being appropriately implemented;
3. Annual on-site assessments of the adequacy of services by the OL; and
4. Annual Quality Service Reviews (QSRs) to determine whether individuals' needs are being met.

The Agreement required that the internal self-monitoring mechanisms would be a twofold development, implemented by each of the Commonwealth's forty Community Services Boards (CSBs), as well as all of its licensed service providers. This would involve:

1. A QRM Program, and
2. A Quality Improvement (QI) Program.

During the initial years of the Agreement, Virginia prioritized developing, delivering and monitoring services for individuals who transitioned from institutional to community settings. Since 2012, the OL fulfilled the first external cornerstone by implementing frequent and unannounced inspections and investigations.

DBHDS has continued to this day to expand and strengthen the oversight and quality assurance functions of OL and the Office of Human Rights (OHR). Unfortunately, though, effective development and implementation of the remaining five mechanisms listed above was hampered and delayed, due to two primary reasons:

1. The QSRs implemented by DBHDS in previous Review Periods utilized inadequate tools and processes and were conducted by insufficiently qualified reviewers. This resulted in unreliable findings and conclusions.
2. The development and approval of new regulations was necessary before DBHDS could implement assessments by OL and case managers, as required by the Agreement, and before the Department could require providers to implement QRM and QI Programs.

Creating these new regulations has taken several years. The DBHDS Licensing Rules and Regulations received final approval in August 2020. The new Home and Community-Based Services DD Waiver (Waiver) regulations are still not yet in effect. Because the regulatory process is so lengthy, and in order to make needed progress toward achieving Compliance, the Commonwealth approved emergency Licensing Rules and Regulations in September 2018. Both the emergency and now final licensing regulations require providers to develop QRM and QI Programs. Implementation of these two internal quality assurance mechanisms began in late 2018.

Of the remaining three external oversight mechanisms, OL assessments of adequacy began in January 2020, and the case management assessments and QSRs began in July 2020.

To demonstrate effective implementation of these three mechanisms, DBHDS needed to develop new and improved tools and processes. The Department also needed to document their effectiveness while completing on-site reviews of services based on face-to-face observations of individuals in their home settings and interviews with their caregivers.

Prior to the seventeenth Review Period, without five of the foundational and cornerstone elements of Virginia's QRM system being firmly in place, these monitoring mechanisms could not produce reliable performance and outcome data for analysis, nor could targeted QI initiatives be reliably determined.

Then COVID-19 struck, and required face-to-face observations and interviews had to be replaced with remote processes. DBHDS staff, case managers and its QSR vendor implemented telehealth methodologies to ensure that individuals and their services were still being reviewed. However, the remaining three external oversight mechanisms could not be tested during this Review Period with face-to-face assessments that utilized the new and improved tools and processes.

In the fifteenth Report, dated December 2019, the Independent Reviewer informed the Court that DBHDS did not have sufficient time – i.e., the minimum two years that are typically necessary – to demonstrate that its QSR process could achieve the required outcomes by June 2021. This date represents the end of the Agreement's originally estimated ten-year implementation schedule (i.e., July 1, 2011 – June 30, 2021). Once implementation begins, two years is typically needed because completion of a single cycle necessarily includes sequenced and coordinated performance and evaluation phases. Phases include start-up, operation, review,

correction, demonstration of effective performance, and documentation of the process and outcomes. If, after completion of a cycle, performance has not achieved the agreed to outcomes, the cycle needs to be repeated with QI initiatives.

Once pandemic-related precautions are no longer necessary, DBHDS will complete face-to-face assessments. These should allow for reliable determinations and documentation of system performance to identify needed quality improvement actions.

The Independent Reviewer commends the Commonwealth for maintaining a serious and concerted management focus throughout this challenging seventeenth Review Period. The seventeenth was the first full Review Period since the Indicators were approved, and Virginia sustained Compliance that it had previously achieved, and, for the first time, achieved Compliance with the Provider Training Provision V.H.2. Although it met many of the Indicators required for the remaining Provisions, the Commonwealth did not meet *all* the required Indicators for each Provision, and therefore did not achieve Compliance.

During the eighteenth Review Period, in addition to completing targeted analysis and providing feedback to the Parties, the Independent Reviewer will prioritize studying the status of Virginia's progress toward fulfilling the requirements of the Provisions in the following areas:

- Creation of Waiver Slots;
- Individual and Family Support Program;
- Case Management;
- Crisis Services;
- Peer to peer/family to family programs and guidelines for families;
- Serving individuals in the most integrated setting, including children residing in nursing facilities and the largest ICFs;
- Independent living options;
- Serving individuals with complex medical needs, and
- Quality and Risk Management (V.B. and V.C.1.)

Throughout the seventeenth Review Period, the Commonwealth's staff were once again accessible and forthright. They worked hard to be responsive, providing the Independent Reviewer and his consultants with a dramatically increased number of documents needed for study since the many new Compliance Indicators were established. It was unfortunate, however, that Virginia did not provide DOJ access to the documents that were reviewed by the

Independent Reviewer and his consultants for this Report. As a result, DOJ was not able to evaluate and judge, nor to concur with or object to many of the Independent Reviewer's findings and conclusions. Accordingly, once DOJ receives and reviews these documents, it may supplement the comments it made to the draft Report.

During this Review Period, the Commonwealth's staff and DOJ gathered and shared other information that has helped to facilitate further progress toward effective implementation of the Agreement's Provisions. Overall, the willingness of both Parties to openly and regularly discuss implementation issues, as well as any concerns about progress toward shared goals has been critical and productive. The involvement and contributions of the advocates and other stakeholders have helped Virginia make measurable progress.

The Independent Reviewer greatly appreciates the assistance that was so generously given by the individuals at the heart of this Agreement, as well as their families, their case managers and their service providers.