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.*,
Intervenor-Defendants.

MEMORANDUM ORDER

THIS MATTER is before the Court on the Intervenor-Defendants' Motion to Dismiss (Dk. No. 66) filed May 9, 2012. The facts and legal contentions are adequately presented in the materials for the Court, and oral argument would not aid in the decisional process. For the reasons stated herein, the motion to dismiss is DENIED.

On January 26, 2012, the plaintiff-United States of America filed its complaint (the "Complaint") against the defendant-Commonwealth of Virginia ("Commonwealth"), alleging violations of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12134, through the unnecessary institutionalization of individuals with intellectual and developmental disabilities ("ID/DD") in Virginia. (Compl. ¶ 14.); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). The parties simultaneously filed a consent decree (Dk. No. 2-2, the "Agreement") which established a ten-year plan for the expansion of "the availability of existing community services to support individuals with ID/DD." (Joint Mot. for Entry of Agreement 3.) The Complaint and Agreement represent the culmination of more than three

years of investigation and negotiation between the parties. In August of 2008, the United States had begun an investigation of the Central Virginia Training Center for potential violations of the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, *et seq.* CRIPA protects persons with ID/DD from civil rights violations related to institutional conditions and treatment.

As information concerning all of Virginia's facilities was collected, the Department of Justice ("DOJ") realized the need to expand its investigation to resolve broader, more fundamental deficiencies. Such deficiencies implicated the ADA and necessitated the instant suit.

On March 2, 2012, a group of Training Center residents (the "Intervenor-Defendants" or "Intervenors") filed a motion to intervene in the litigation, contending that their rights were implicated by the Complaint and Agreement. The Court permitted intervention by order on May 9, 2012. Simultaneously, the Court docketed the Intervenors' motion to dismiss attached to their motion to intervene. That motion is now ripe for decision. Ultimately, the Intervenors claim this Court does not have subject matter jurisdiction because the United States lacks standing to enforce the ADA, and even assuming standing, the plaintiff failed to follow the procedural prerequisites for filing a claim under Title II of the statute. *See* Fed. R. Civ. P. 12(b)(1). Alternatively, the Intervenors move for dismissal of the Complaint under Rule 12(b)(6) for failure to state a plausible claim. As to all of the Intervenors' arguments, the Court disagrees. The claims in the instant motion are either incorrect, inappropriate at this juncture, or both.

A. Motion to Dismiss pursuant to Federal Rule of Procedure 12(b)(1)

A motion under Rule 12(b)(1) may attack subject matter jurisdiction in two ways. The Intervenors may contend either that the Complaint fails to allege facts upon which subject matter

jurisdiction can be based, or that the jurisdictional facts alleged in the Complaint are untrue. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In both situations, the burden is on plaintiff, as the party asserting jurisdiction, to prove that federal jurisdiction is proper. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams*, 697 F.2d at 1219. In the first type of 12(b)(1) motion to dismiss, "the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.* The Court construes all facts in favor of the plaintiff, and it relies solely on the pleadings, disregarding affidavits or other materials. *Id.* Alternatively, the Intervenors may argue that the jurisdictional facts in the complaint are simply not true. This type of Rule 12(b)(1) motion attacks "the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *White v. CMA Const. Co., Inc.*, 947 F. Supp. 231, 233 (E.D. Va. 1996) (quoting *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). When presented with this type of argument, no presumption of truthfulness attaches to the allegations in the Complaint, and the Court must weigh the evidence presented and evaluate for itself the merits of the jurisdictional claims. *Arthur Young & Co. v. City of Richmond*, 895 F.2d 967, 971 n.4 (4th Cir. 1990); *White*, 947 F. Supp. at 233.

Although somewhat unclear, the Court will treat the Intervenors' motion pursuant to Fed. R. Civ. P. 12(b)(1) as the second type. Nevertheless, their arguments fail to demonstrate a lack of subject matter jurisdiction.

As a threshold matter, the United States has the authority to initiate legal action to enforce Title II of the ADA.[1] Courts have routinely recognized or implicitly supported this

[1] The Court, therefore, rejects the Intervenors' claim that the United States' sole enforcement mechanism to resolve the alleged violations is CRIPA. That argument ignores statutory language, legal precedent, and clear Congressional intent. The Complaint alleges fundamental, statewide ADA deficiencies, not CRIPA violations at Virginia's institutions for ID/DD.

authority. *See, e.g., United States v. City of Baltimore*, Nos. JFM-09-1049, JFM-09-1766, 2012 WL 662172, *1 (D. Md. Feb. 29, 2012); *McCachren v. Blacklick Valley Sch. Dist.*, 217 F. Supp. 2d 594, 600 (W.D. Pa. 2002); *United States. v. City and Cnty. of Denver*, 927 F. Supp. 1396, 1399 (D. Colo. 1996).[2]

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In its enactment, Congress set forth a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). As such, Congress specifically sought to ensure that the federal government played a "central role" in creating and enforcing those standards. 42 U.S.C. § 12101(b)(2) & (3); *see also* 42 U.S.C. § 12133; 28 C.F.R. Pt. 35, App. B, subpts. F, G (providing the Attorney General with the authority to commence legal action at the occurrence of ADA-implicating discrimination). Although Title II coverage is not dependent on the receipt of federal funds, the remedies are borrowed from existing statutes prohibiting discrimination in federally assisted programs and activities. *See City & County of Denver*, 927 F. Supp. at 1399-1400; *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972). The relevant provision states: "The

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[2] The legislative history of the ADA also supports DOJ enforcement:

> The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local government. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, the Federal government would use the enforcement sanctions of section 505 of the Rehabilitation Act of 1973. . . . The Department of Justice may then proceed to file suits in Federal District Court.

S. Rep. No. 101-116, at 57-58 (1989).

remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133.

In turn, section 794a of Title 29, § 505 of the Rehabilitation Act provides: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*] shall be available to any person aggrieved . . . ." 29 U.S.C. § 794a(2).

Title VI provides: "Compliance . . . may be effected (1) by the termination of or refusal to grant or to continue [federal financial] assistance . . . or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1.

Courts have interpreted the words "by any other means authorized by law" to mean that a funding agency, after finding a violation and determining that voluntary compliance is not forthcoming, could refer a matter to the DOJ to enforce the statute's nondiscrimination requirements in court. *City & County of Denver*, 927 F. Supp. at 1399-1400; *see, e.g.*, *National Black Police Ass'n, Inc. v. Velde*, 229 U.S. App. D.C. 255, 712 F.2d 569, 575 & n.33 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984); *United States v. Marion County Sch. Dist.*, 625 F.2d 607, 612 & n.12 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981).

Here, through extensive investigation, the United States alleged significant violations of the ADA by Virginia's current framework for ID/DD care. Pursuant to its statutory enforcement power, the DOJ approached the Commonwealth to secure its voluntary compliance and remedy the identified violations. *See* 28 C.F.R. § 35.174 ("If the public entity declines to enter into

voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Attorney General with a recommendation for appropriate action.") That process resulted in a 20-page findings letter and year-long negotiation between the parties. The letter reported the DOJ investigation findings, provided notice to the Commonwealth of its failure to comply with the ADA, and outlined the specific steps necessary for compliance with its ADA obligations. (Compl. ¶ 14.) Ultimately, the negotiation period culminated in the Agreement—a consent decree that represents the Commonwealth's voluntary compliance and encapsulates the parties' concerted efforts to resolve the ADA violations. *See* 28 C.F.R. § 50.3(c), I.C. The fact that the parties petitioned this Court to endorse the Agreement is irrelevant to the voluntary-compliance calculus. The United States recognized certain ADA violations, approached the Commonwealth with them, negotiated a complex, 10-year plan for remedy purposes, and now seeks to memorialize that long-term compliance plan with a consent decree. *See Adams,* 351 F. Supp. at 641 ("The underlying thrust of the statute [§ 2000d-1 of Title VI] requires the agency involved . . . to secure compliance by voluntary means . . . [which] involves negotiation, and negotiation takes time.").

As such, the Court finds that the plaintiff has the authority to enforce the ADA in the manner it has pursued in this case. It also finds that the procedural prerequisites of voluntary compliance under 42 U.S.C. § 2000d-1 have been met. Finally, the Court determines that it has proper subject matter jurisdiction over this matter.

B. Motion to Dismiss pursuant to Federal Rule of Procedure 12(b)(6)

Next, the Intervenors move for dismissal of the Complaint on the basis that it fails to assert sufficient facts to state a plausible claim under the ADA. Among other things, the Intervenors argue that the Complaint ignores the role of treating professionals under *Olmstead*

and fails to allege that Training Center residents favor discharge.[3] These claims ignore the plain language of the Complaint and Agreement.

The standard of review on a 12(b)(6) motion is well-established. A motion to dismiss for failure to state a claim upon which relief can be granted challenges the legal sufficiency of a claim, not the facts supporting it. Fed R. Civ. P. 12(b)(6); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). Thus, in deciding a Rule 12(b)(6) motion, a court must accept all of the factual allegations in the Complaint, *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (per curiam), as well as provable facts consistent with those allegations, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and view those facts in the light most favorable to the plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). Although a motion to dismiss challenges only the legal sufficiency of a claim, Rule 8(a)(2) requires a plaintiff to allege facts that show that its claim is plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007). As the Fourth Circuit has explained, "'naked assertions' of wrongdoing necessitate some 'factual enhancement' within the complaint to cross 'the line between possibility and plausibility of entitlement to relief.'" *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 557). The Court need not accept legal conclusions couched as factual allegations, *Twombly,* 550 U.S. at 555, or "unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). Ultimately, the Complaint must contain factual allegations sufficient to apprise a defendant of "what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

[3] These are the Intervenors' primary contentions. None of their arguments pursuant to Rule 12(b)(6) warrant dismissal of the Complaint at this stage. Furthermore, nothing in the ADA or its regulations requires a treating professional's determination to be an element of a prima facie ADA claim.

Here, the Complaint is well-pleaded and states a plausible claim for ADA violations as interpreted by *Olmstead*. Title II of the ADA requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.103(d). Under *Olmstead*, violations of this integration mandate qualify as ADA discrimination. *See* 527 U.S. at 597. In its Complaint, the United States alleges that the Commonwealth's current system houses approximately 1,100 individuals with ID/DD in its five Training Centers while nearly 6,000 disabled Virginians remain on waitlists to receive necessary services. (Compl. ¶¶ 20-23.) Three thousand of these waitlist individuals are classified as "urgent," creating a greater risk of unnecessary institutionalization. (*Id.* ¶ 28.) Citing extensive investigation and analysis, the Complaint concludes that the Commonwealth's current set-up poses a significant risk of unnecessary institutionalization, thereby threatening the well-being of disabled Virginians. (*Id.* ¶¶ 34-40.)

Specifically, the Complaint contends that "the vast majority, and likely all, of the individuals at the Training Centers can benefit from community settings with appropriate community-based services," (*Id.* ¶ 37.), and "[m]any individuals do not object to receiving services in a more integrated setting but remain in the Training Centers due to the lack of appropriate community services and supports, a flawed discharge planning process, and deficient coordination with community providers." (*Id.* ¶ 38.) Assuming these allegations as true, violations of the ADA are readily apparent.

In short, the Court finds the Intervenors' motion under Rule 12(b)(6) to be an attempt to decide the merits of this litigation at an improper juncture.[4] The Complaint states a prima facie

[4] Similarly, the Court rejects the Intervenors' argument that the Complaint violates the ICF/MR regulations promulgated by the Centers for Medicare and Medicaid Services. Despite being an improper consideration on a motion to dismiss, this argument assumes the Agreement's closing of Virginia's Training Centers, which is false, and ignores the ADA's role in holding states

case for violations of the ADA's integration mandate, citing sufficient facts to allege a plausible claim.

Accordingly, the Court hereby DENIES the Intervenor-Defendants' Motion to Dismiss (Dk. No. 66).

It is so ORDERED.

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

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

Date: June 4, 2012
Richmond, VA

accountable for providing previously-elected services to individuals with ID/DD. *See Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1302 (M.D. Fla. 2010).