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

UNITED STATES OF AMERICA, **Plaintiff,** **and** **COMMONWEALTH OF VIRGINIA,** **Defendant,** **against** **PEGGY WOOD, by and through her father, Wriley Wood, et al.** **Intervenors.**	:	**CIVIL ACTION NO: 3:12-cv-059**

PROPOSED INTERVENORS' REPLY TO AMICI BRIEF IN OPPOSITION TO MOTION TO INTERVENE

I. The Amici Do Not Represent All Disabled Individuals In Virginia And Do Not Adequately Address Why Proposed Intervenors Do Not Qualify For Intervention

The Amici are separate corporate entities who have a pecuniary interest in the Court's approval of the Settlement Agreement between the Department of Justice ("DOJ") and the Commonwealth of Virginia ("Commonwealth"). As such, they have filed an Amici Brief which largely mirrors arguments already presented by the parties. Several arguments which have not been advanced by the Commonwealth or by the DOJ but which have been presented by the Amici are seriously flawed in that they present inaccurate statistics and misquoted case law. As a preface to their arguments, the Amici attempt to umbrella their representation and insinuate that they represent all disabled individuals in the Commonwealth in order to present a false appearance that the Proposed Intervenors are a small group of individuals who wish to prevent

the majority of disabled individuals from receiving services. However, it must be acknowledged that these corporations do not represent all of the disabled in the Commonwealth and have views regarding institutional care that directly conflict with many Virginia disabled residents. See Exhibit A, Declaration of Julie Huso, Executive Director of Voice of the Retarded, Inc. ("VOR"). The VOR, in contrast with organizations such as the ARC of Virginia and others like it, believes that no organization, including any organization requesting Amicus status, have rights so personally and directly implicated as compared to the Proposed Intervenors, whose life-sustaining supports at their current ICF/MR homes are directly at risk. The Amici, through their oppositional brief, attempt to sidestep the legal standard for intervention and argue other points which do not comport with the standard for intervention. Proposed Intervenors have responded to the arguments presented by the Amici, including those arguments containing false statistics and misquoted case law and urge this Court to rule in favor of Intervention.

A. The Proposed Intervenors Have A Right To Intervene Regardless Of The Court's Allowance Of Families To Express Concerns With The Settlement Agreement

Intervenors are the residents of the Commonwealth's five Training Centers and the subject of the Settlement Agreement reached in U.S. v. Virginia, Case No. 3:06-cv-00059.

The Amici, made up of nine (9) separate corporate entities, including the ARC of Virginia, filed a Brief opposing the Motion to Intervene, which was filed by the residents of the five Training Centers. In their opposition, the Amici inaccurately argue that intervention will invite others to intervene and render the lawsuit unmanageable, thus, the residents should be limited only to filing an Amici Curiae brief. [Dkt. #34-9 at 29-30]. Although this is not the standard for intervention, the Amici have chosen to showcase this argument in an attempt to thwart intervention since the Proposed Intervenors may prevent the Amici from obtaining their

goals. The Amici begin their argument opposing intervention and advancing their own solution, stating that the Court has allowed all interested persons (including the Proposed Intervenors) to have an opportunity to present their views regarding the Agreement, which include submitting informal written comments or amicus curiae briefs to the Court. [Dkt. #34-9 at 9 (citing 3/06/12 Order)]. Some courts, after finding intervention to be inappropriate, when no new questions are presented, have found that a third party can contribute more effectively by brief amicus curiae than by intervention. Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D.Mass. 1943). Here, unlike Crosby Stream and other cases like it, the Proposed Intervenors are asserting private constitutional rights which the Settlement Agreement does not address and which will undoubtedly be violated if the Settlement Agreement is given final approval by the Court. The Proposed Intervenors have asserted new arguments, arguments which qualify them for Intervention, thus making the argument advanced by Amici unconvincing. Not only do the Proposed Intervenors qualify for intervention as of right, the small amount of delay and prejudice that could occur if intervention were allowed, does not outweigh the interest to be served by admitting the Intervenors into the case as a party plaintiff. Wooten v. Moore, 42 F.R.D. 236, 242 (E.D.N.C. 1967). The Proposed Intervenors qualify for Intervention in this matter. The Amici have chosen to suggest Amicus Curiae status for the Intervenors before even making the argument that the Proposed Intervenors do not meet the standard set forth in Federal Rule 24. Since the Proposed Intervenors qualify for intervention as of right, converting them to Amicus Curiae would not be a viable option in the interest of justice and would not be supported by the law. [1]

[1] The Amici seemingly would eliminate the right to intervene entirely in favor of forcing rightful parties to be relegated to the lower status of amici. Not only would this be unfair, but it would create a procedurally ineffective and inefficient method of addressing the rights of the Proposed Intervenors. If the Proposed Intervenors are not parties at the negotiating table to be considered in redrafting the seriously flawed Settlement, it will fall on the

The Amici offer to the Court that the Proposed Intervenors may present their views by submitting an Amicus Brief. [Dkt. #37 at 4]. As asserted in their Motion to Intervene, the Agreement between the Commonwealth of Virginia and the DOJ violates the Proposed Intervenors' civil rights. [Dkt. # 20 at 1, 2, 6-18]. Asserting civil rights which will be violated in the event of the Court's approval of the Agreement is distinguishable from merely "presenting their views." If the residents of the five training centers were merely presenting views, rather than asserting civil rights, the Amici would be correct in their assertions. However, since the Agreement between the Commonwealth of Virginia and the DOJ impairs the rights of the Proposed Intervenors, and absent intervention, those rights will be negatively impacted, the Proposed Intervenors have a protectable interest, qualifying them for intervention. As stated in their Motion to Intervene, the Proposed Intervenors meet all of the other requirements for intervention; thus, they have a right to intervene in this action, regardless of whether or not the Court has allowed family members of disabled citizens in the Commonwealth of Virginia to express their thoughts about the Agreement by way of amicus curiae. See, Dkt. #19, Motion to Intervene. The intervention of the residents at the Commonwealth's five Training Centers is not advanced merely as a means to have family members be heard by the Court, but rather as a means to protect their civil rights which are violated by the Agreement.

Court to be an advocate for the Proposed Intervenors in correcting the flaws based only upon one time comments by amici. Not only is this an inappropriate posture in which to place the Court, but any court-supervised revised agreement will again have to be subjected to comments by amici and to further intervention by the Court in negotiating an acceptable and enforceable agreement. It would be far superior, in efficiency and effectiveness to allow the Proposed Intervenors to negotiate directly with the current allied parties to reach a much improved agreement. Furthermore, if the current allied parties refuse to change the agreement and it must be litigated, the Court cannot represent the Proposed Intervenors in any hearing or trial. Unless the Court wants to become an advocate for the position of the Proposed Intervenors, the only likely options would be for the Court to reject the Agreement entirely or to approve an extremely flawed Agreement. This is precisely why intervention is allowed by the Rules and why intervention by the Proposed Intervenors is the only fair, necessary and logical choice in this case.

The Amici also argue that if intervention is granted for the residents of the five training centers, then it will "invite others to seek formal party status." [Dkt. 34-9 at 29]. Individuals, such as family members of disabled residents in the Commonwealth who do not reside in one of the five Training Centers, and whose rights are not violated by the agreement, can submit informal written comments to the Court regarding their thoughts on the Agreement. However, if those people are guardians of disabled individuals and the Agreement is violating those individuals' civil rights, they may likewise be entitled to intervention. However, these individuals must also meet each of the requirements for intervention. Thus, an entirely separate group of individuals must prove that they meet the standards set forth in Federal Rule 24. They will not be awarded intervention status merely because the residents of the five Training Centers meet the standard for intervention. As the Court ordered on March 6, 2012, any resident of the Commonwealth who may be interested in this matter may submit their comments to the Court. It is unlikely that the Court meant to thwart intervention by this Order (if a group of individuals would otherwise qualify), but rather to give individuals within the Commonwealth an opportunity to have their comments be heard by the Court. The Court's Order of March 6, 2012 should, therefore, not be interpreted as preemptively denying intervention, but rather, to allow those individuals who may not necessarily qualify for intervention, to have an avenue to submit comments on the topic of this Agreement and its effects on their lives. Indeed, we interpret the Court's silence in its March 6, 2012 Order on the question of intervention as clear indication that the Court is still pondering the question of intervention and that the Court properly recognizes intervention to be a question separate and distinct from the opportunity for nonparties to submit comments.

An amici cannot raise new issues which were not already raised by the present parties, and the Court should limit its consideration to only those issues already raised by the existing parties. Amicus Curiae has been defined as "one who, as a stander by, when a judge is in doubt or mistaken in a matter of law, may inform the court." Kemp v Rubin, 187 Misc. 707, 708, 64 N.Y.S.2d 510 [Sup Ct, Queens County 1946]. "[T]he function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter . . . that might otherwise escape its consideration; it is a privilege and not a right; he is not a party, and cannot assume the functions of a party; he must accept the case before the court with issues made by the parties, and may not control the litigation." Id. at 709. "In cases involving questions of important public interest leave is generally granted to file a brief as amicus curiae." Colmes v Fisher, 151 Misc. 222, 223, 271 N.Y.S. 379 [Sup Ct, Erie County 1934]. "Unlike the typical intervenor, amici are quite often large organizations or associations that represent a particular interest group." (Davies, Stecich, and Gold, New York Civil Appellate Practice § 8:4 [8 West's NY Prac Series 1996].) A district court has broad discretion in deciding whether to allow a non-party to participate as an amicus curiae. Tafas v. Dudas, 511 F. Supp. 2d 652, 659 (E.D. Va. 2007) (citing Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982)); Waste Mgmt., Inc. v. City of York, 162 F.R.D. 34, 36 (M.D. Pa. 1995). Such non-party participants have "been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance." Tafas v. Dudas, 511 F. Supp. 2d 652, 659 (E.D. Va. 2007) (citing Bryant v. Better Business Bureau, 923 F. Supp. 720, 727 (D. Md. 1996)); Northern Sec. Co. v. United States, 191 U.S. 555, 556, 24 S. Ct. 119, 48 L. Ed. 299 (1903). However, "[a] motion for leave to file an amicus curiae brief . . . should not be granted unless the court 'deems the proffered information timely and useful.'" Tafas v. Dudas, 511 F. Supp. 2d 652, 659 (E.D.

Va. 2007) (citing Bryant v. Better Business Bureau, 923 F. Supp. 720, 727-28 (D. Md. 1996); Yip v. Pagano, 606 F. Supp. 1566, 1568 (D.N.J. 1985)).

Tafas v. Dudas, 511 F. Supp. 2d 652, 660-61 (E.D. Va. 2007) expressly held that "it may not consider legal issues or arguments not raised by the parties." (citing Cellnet Communs. v. FCC, 149 F.3d 429, 443 (6th Cir. 1998) (holding that "[t]o the extent that the amicus raises issues or make arguments that exceed those properly raised by the parties, [the Court] may not consider such issues").) Tafas cautioned though, "the mere fact that a non-party seeks to put forth an opinion in the case does not disqualify it as an amicus." (citing Waste Mgmt., Inc. v. City of York, 162 F.R.D. 34, 36 (D. Pa. 1995)) (quoting United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991) and Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993)). Therefore, the Tafas Court granted motions for leave to file an amicus curiae brief, but refused to "consider any legal issues or arguments therein that were not raised by the parties themselves." Tafas v. Dudas, 511 F. Supp. 2d 652, 660-661 (E.D. Va. 2007). Like the Tafas court, this Court should limit its consideration of amicus arguments to only the arguments raised by the parties themselves.[2] This case, in its particularly unique circumstances, is one where the parties have not set forth any arguments in the beginning. Thus, the Proposed Intervenors would not be able to sufficiently protect their rights by only filing a brief in Amicus Curiae rather than the Motion to Intervene. The Proposed Intervenors have rights that will necessarily be violated absent their intervention and have advanced arguments which the parties have not only failed to address, but have argued against in

[2] The Amici have raised several arguments in their Brief Amicus Curiae which have not been raised by either party on the issue of intervention and therefore should not be considered by the Court. Section I(A)(B)(C), Section II (D) and Section IV (A)(B) of the Amicus Brief all contain arguments which have not been advanced by the Plaintiff or Defendant in opposition to intervention. In line with the current case law regarding amicus arguments that can appropriately be considered, the Court should refrain from considering those arguments which the Plaintiff and Defendants have not advanced themselves.

their Responses. Thus, the Proposed Intervenors' Motion to Intervene was proper in this circumstance and likewise, a Brief of Amicus Curie would have been insufficient to protect the rights of the Intervenors.

B. The Terms Of The Agreement Do Not And Cannot Adequately Protect The Interests Of The Proposed Intervenors.

The Amici attempt to justify the denial of the rights of the Proposed Intervenors by inappropriately arguing that "numerous provisions of the Agreement also afford a wide range of opportunities and forums for families to participate in all aspects of its implementation."[3] [Dkt. #37 at 5]. However, those provisions do not adequately describe or respect the rights of the Proposed Intervenors under the ADA and Olmstead. Furthermore, the Agreement creates a system of diverting funds and setting arbitrary quotas that will result in ICF/MR services not being available to the Proposed Intervenors to their great detriment. As a result, the claimed "opportunities and forums" will be inadequate and too late.

The Amici note that the "Agreement contains seven-pages [sic] exclusively devoted to discharge planning and transition from the Centers to the community." [Dkt. #37 at 5]. That certainly must please them since their sole focus is to force everyone into the community. But, what is important to the proposed Intervenors is what is missing from the Agreement. There is no intelligent and reasoned discussion of the rights of Proposed Intervenors to have treating professionals render unbiased judgments as to where residents can receive adequate services and there is no adequate acknowledgment of the need to obtain the consent of residents or their guardians. Instead, the Amici cite vague and incomplete statements that they ask the Court to

[3] One must question why the Amici corporations, which purport to protect the rights of the intellectually disabled, and who claim that the Agreement will allow Proposed Intervenors to later be heard, are trying so hard to silence the very people they should be protecting. The answer is that they are pursuing a political agenda, and they know full well that the delay in allowing the Proposed Intervenors to be heard will effectively silence them because they will no longer have public ICF/MR services for treating professionals to consider and for them to choose.

assume mean much more. Not only does this not adequately protect the rights of the Proposed Intervenors, but it creates an enforcement nightmare for the Court which will be asked to guess the meaning or to incorporate the correct legal standards. The Amici cannot explain, if they truly want to respect the rights of the Proposed Intervenors, why specific, adequate, and enforceable language of those rights cannot be included in the Agreement. The truth is that the Amici do not want to recognize and protect the rights of the Proposed Intervenors.

The Amici quote language from the Agreement which is vague and unenforceable, and therefore offers the Proposed Intervenors no real protection. For example:

> "necessary support to ensure that they have a meaningful role in the process", and the development of discharge and transition plans that are "*consistent with informed individual choice"*

[Dkt. #37 at 5]. Not only would treating professionals disagree on vague terms like 'necessary," "meaningful," and "consistent," but the definitions that the Amici, and their cohorts, the DOJ and the Commonwealth, would provide is drastically different than the more reasonable definition that the Proposed Intervenors would support. More importantly, this quoted language is not consistent with the prescriptions of the ADA and Olmstead. If the Amici really want the Olmstead standard to apply, why would they oppose the addition of language to the Agreement that much more clearly states that standard? Again, this is because vaguery works to their benefit to accomplish things beyond what the ADA and Olmstead would allow.

Similarly, but not nearly exhaustively, the Amici again refers to another vague statement that:

> Discharge planning must include both the individual consumer and his or her authorized representative…. The Agreement requires that an individualized process must be available to address any concerns….

[Dkt. #37 at 5]. The Agreement fails to describe how the consumer is to be included and does not define "individualized," and therefore does not even remotely comply with the ADA or Olmstead. Apparently, the Proposed Intervenors are to have faith in the parties, who chose not to include them in any meaningful manner in the negotiations, that those parties will later supply the proper meaning to these terms. Since the parties have acknowledged their goal to move everyone out of the Training Centers, these vague terms will be given whatever interpretation that is convenient to accomplish that goal. If not, the parties would not oppose making the Agreement clear, enforceable, and consistent with relevant law.

The Proposed Intervenors will not here burden the Court with all the examples of vague and unenforceable terms, some of which were acknowledged by the Court at the Status Conference. In summary, the Agreement does not provide adequate protection to the Proposed Intervenors and is not consistent with relevant law. Also, any alleged "opportunities" to protest the dictates of the Agreement will be largely ineffective and too late to adequately protect the Proposed Intervenors. If this seriously flawed Agreement is allowed to move forward for too long a period before issues arise and the vague "opportunities" can be attempted, it will become a fait accompli that all public ICFs/MR will be closed, or beyond the point to stop closure, and there will be no options left for the Proposed Intervenors.

C. The Proposed Intervenors Have No Obligation To Exhaust State Administrative Procedures Before Pursuing Rightful Intervention And, In Any Case, Those Procedures Will Be Inadequate And Inefficient To Protect Their Rights.

The Amici, without any legal authority, seemingly argue that because there are some limited state administrative procedures that have not been exhausted then the Proposed Intervenors cannot intervene in a federal court case that adversely impacts their rights. [Dkt. #37 at 7-9]. There is no legal basis for such an argument. It is the current parties who dragged this

matter into federal court and sought the imprimatur of this federal Court on an Agreement that does not comply with federal law. It is patently absurd to argue in these circumstances that interested parties cannot intervene because only they are limited to state administrative processes.[4] In fact, an argument could be made that, if the current parties are intent in overriding the rights of residents and guardians to force everyone into community settings, then their recourse should be state proceedings to challenge the decisions by residents and guardians to remain in ICFs/MR. The current parties, however, want to avoid both state and federal law to accomplish their clear goal of closing all public ICFs/MR. They want to accomplish indirectly what they would have difficulty accomplishing directly. And, the ARC wants to join this conspiracy because it fits their political agenda.

Also, the delay in forcing the Proposed Intervenors to wait for individual administrative actions will make those efforts ineffective and inefficient. Not only will hundreds of administrative actions need to be inefficiently brought at overwhelming expense, but the Agreement will have progressed so far that there will be no meaningful review, and therefore there is no adequate procedural due process. There will not be any public ICFs/MR to be considered by administrative officers if the Agreement is allowed to progress too far. Proposed Intervenors, and those like them, will be pressured by waiver quotas, insufficient funding of public ICFs/MR, and state actors implementing the Agreement into moves to the community out of fear that their loved one's home may soon no longer exist and that they have no real choice. The administrative process will not be able to react in a timely enough matter on hundreds of appeals to prevent this damage to the Proposed Intervenors and others similarly situated. Also, state administrative proceedings are not the most appropriate place to bring claims based upon

[4] Another red herring alleged by the Amici is that the state administrative processes meet constitutional requirements of procedural due process. Whether or not those procedures comply with procedural due process, the Proposed Intervenors are not limited to those procedures.

federal statutes and federal case law. Those administrative proceedings lack sufficient authority and jurisdiction to even grant full relief to the Proposed Intervenors. In fact, these administrative officers may decline to rule on matters of federal law. As a result, there will not even be adequate substantive due process.

The Amici also strangely cite to internal reviews conducted by the “directors” of the ICFs/MR themselves. [Dkt. #37 at 8-9]. First and foremost, these proceedings are not appropriate to resolve issues over federal rights, and, in fact, are tailored to address simple cases of abuse, neglect, exploitation, and such. Certainly, the Amici are not ridiculously suggesting that the Proposed intervenors are limited in asserting their federal rights in an internal administrative investigation conducted by the “director” of the facility where they reside. Furthermore, there would be a serious question as to whether the “director,” an employee of the Commonwealth who is being ordered by his superiors, and under possible sanction by the federal Court, to carry out the terms of the Agreement, could objectively, fairly, and competently rule on issues of federal law on which even legal scholars may argue. If the Amici really believe that such limited internal reviews are adequate, they should suggest that the Agreement be withdrawn and that we all litigate this with the facility directors.

Additionally, the very state regulations cited by the Amici clearly state:

> These regulations shall not prevent any individual from pursuing any other legal right or remedy to which he may be entitled under federal or state law.

12 VAC 35-115-40. Clearly, any available state administrative procedure was not intended to preclude a rightful intervention in a federal proceeding.

The Amici fail to cite to any legal authority that supports its claim that the Potential Intervenors are limited to protecting their federal rights in state administrative proceedings. In

fact, such a limitation would not adequately, efficiently, and reasonably protect the rights that Proposed Intervenors seek to preserve.

II. The Proposed Settlement Agreement Will Impair Proposed Intervenors' Rights

Like the Commonwealth, Amici argue that Proposed Intervenors' interests in this matter must be limited to the claims asserted in the DOJ's Complaint. [Dkt. # 37 at 15]. That position is both logically and legally incorrect.[5] Amici fail to acknowledge that the proposed Settlement Agreement bargains away Proposed Intervenors' rights and available resources in favor of expanding new programs to be operated by the Commonwealth, under the supervision of the DOJ. Amici cannot ignore that reality by acting like the Settlement Agreement does not exist. As discussed in Proposed Intervenors' moving brief and Reply briefs, Ligas v. Maram makes clear that where a proposed Settlement Agreement implicates the rights of residents of state-operated "institutions," those residents should be granted intervention. See [Dkt. # 20 at 12-15; Dkt. # 31 at 7-9; Dkt. # 32 at 3-5 9] (comparing results reached in Ligas v. Maram, 2010 U.S. Dist. LEXIS 34122 (N.D. Ill., 2010) and Benjamin v. Dept. of Pub. Welfare, 432 Fed. Appx. 94, 98 (3d Cir. Pa. 2011)). Amici go on to recast and misrepresent Proposed Intervenors' interests in order to oppose intervention.

A. Proposed Intervenors Cannot Pursue Federal Civil Rights Claims Against Privately Operated Facilities

Residents of publicly operated ICFs/MR are entitled to pursue violations of their civil rights in federal court pursuant to 42 U.S.C.A. § 1988(b); 29 U.S.C. § 794a(b); 42 U.S.C.A. § 12205; See e.g. Belmonte v. Lawson, 750 F. Supp. 735, 736 (E.D. Va. 1990). All of the

[5] If the Amici are correct, then parties could collude to reach a result desired only by them and then fashion a complaint in such a manner as to exclude all other interested parties. Again, the right to intervene would largely be rendered meaningless if intervenors were arbitrarily and unfairly limited to a complaint drafted merely to memorialize and to seek judicial sanction of a settlement that adversely impacts their interests and in which they were allowed no role.

Commonwealth's Training Centers are state-operated ICFs/MR. If Proposed Intervenors incur abuse or neglect or some violation of due process or deprivation of a basic need while residents at a Training Center, Proposed Intervenors can pursue those claims in federal court. In addition to providing a clear forum for pursuing claims, federal law also ensures that legal counsel is available to plaintiffs of limited means, who would otherwise not have it. See 42 U.S.C.A. § 1988(b); 29 U.S.C. § 794a(b); 42 U.S.C.A. § 12205.[6]

Individuals with developmental disabilities and mental illnesses have uniformly been denied access to the federal courts if they receive even some of their services from privately operated organizations. See e.g. Blum v. Yaretsky, 457 U.S. 991 (U.S. 1982); Sybalski v. Ind't. Group Home Living Program, Inc., 2007 U.S. Dist. LEXIS 30097, 2007 WL 1202864, aff'd. Sybalski, 546 F.3d 255, 2008 U.S. App. LEXIS 21507 (2d Cir. N.Y. 2008) (holding that private home engaged in providing "custody, care and habilitation services to mentally retarded citizens" was not involved in a public function "traditionally and exclusively reserved to the state"); Schneider v. Arc of Montgomery County, 497 F. Supp. 2d 651, 658 (E.D. Pa. 2007) (granting motion to dismiss § 1983 claim against nonprofit corporation that received State funding and was engaged in care, education, and support of the developmentally disabled for failure to adequately allege state action; expressly rejecting argument that such a decision must wait until a summary judgment motion); Dow v. Terramara, Inc., 835 F.Supp. 1299 (D. Kan. 1993) ("[I]t cannot be said that providing services and housing to mentally handicapped adults has been "traditionally the exclusive prerogative of the State."); Mochan v. Arc of Montgomery County, 2007 U.S. Dist.

[6] In Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), it was noted that, although the legislative history of § 706(k) is "sparse," 434 U.S., at 420, 98 S.Ct. at 699-700, it is clear that one of Congress' primary purposes in enacting the section was to "make it easier for a plaintiff of limited means to bring a meritorious suit." Christiansburg, 434 U.S. 412, quoting 110 Cong.Rec. 12724 (1964) (remarks of Sen. Humphrey). Because Congress has cast the Title VII plaintiff in the role of "a private attorney general," vindicating a policy "of the highest priority," a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances." 434 U.S. at 416-417.

LEXIS 15265, 2007 WL 655604 (finding specifically that The Arc and MARC, Defendants in this case, are not engaged in activities traditionally or exclusively within province of the state); Zarebicki v. Devereux Found., 2011 U.S. Dist. LEXIS 70559 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 351, (1974) (regulation of a private entity, even if "extensive and detailed," is insufficient to support a finding of state action); Karaahmetoglu v. Res-Care, Inc., 480 F. Supp. 2d 183, 187 (D.D.C. 2007) (granting defendants' motion to dismiss as to claims alleging that defendant was a state actor.); See also Watts-Means v. Prince George's Family Crisis Ctr., 7 F.3d 40, 42 (4th Cir. 1993) (employee sued private corporation that provided shelter and support services to victims of domestic violence, alleging discrimination in violation of 42 U.S.C. § 1983 and court held that defendant was not a state actor, motion to dismiss granted.); Ormsby v. C.O.F. Training Servs., 194 F. Supp. 2d 1177, 1180 (D. Kan. 2002), aff'd. 60 Fed. Appx. 724 (10th Cir. 2003) (court held that arm-of-the-state defense was not available to community provider who sought to avoid federal claim of employment discrimination).

In all the aforementioned cases, the defendants successfully maintained that they are not "state actors" because they have not assumed a role that was exclusively within the province of the state." See Schneider v. Arc of Montgomery County, 497 F. Supp. 2d 651, 658 (E.D. Pa. 2007) (explaining that historically services for the disabled were provided by families and charities and, although the Commonwealth of Pennsylvania had assumed that role for nearly 150 years, those services were not "exclusively within the province of the state," where the state allowed private organizations to provide those services.)

Amici falsely claim that Proposed Intervenors argued "that [the] ADA, as interpreted by the Supreme Court in Olmstead, conveys a right to remain in a segregated institution, as opposed to a right to live in the community." [Dkt. # 37 at 19]. Amici have tortured Proposed

Intervenors' argument and the Olmstead decision to make that representation. Since the Supreme Court decision in Olmstead, the Amici and related organizations, have supported lawsuits in federal court, noting that Olmstead requires states and courts to defer to treating professionals and residents of institutions regarding the place where they receive services. See e.g. Rolland v. Cellucci, 52 F. Supp. 2d 231 (D. Mass. 1999); M.R. v. Dreyfus, 663 F.3d 1100, 1124 (9th Cir. Wash. 2011); Ricci v. Patrick, 544 F.3d 8, 12 (1st Cir. Mass. 2008).

Like any of the residents of the facilities in those cases, Proposed Intervenors have the right to receive recommendations from their treating professionals and to not be discharged if they oppose that recommendation. Amici's reading of the Olmstead decision is untenable. They want Olmstead to convey rights on residents of institutions, but only if those residents want to receive services in an alternative community setting. Residents of institutions have certain rights afforded by the ADA. Those rights cannot be selectively recognized based only on whether the residents agree with Amici as to placement in the community. Olmstead and the ADA do not compel deinstutionalization. Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993) ("[N]either the explicit language of the ADA nor its legislative history call for or require deinstitutionalization of mentally disabled individuals." "[I]f Congress had actually intended to require states to provide community based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so.")

Amici's argument that Proposed Intervenors' seek "to require continued institutionalization" is absurd. [Dkt. # 37 at 20]. Amici's misrepresentation implies that Proposed Intervenors seek to do something to someone else. Proposed Intervenors are real individuals, who receive services at the Training Centers. Proposed Intervenors do not seek to inhibit anyone's choice to receive services in an alternative setting. Unlike Amici, Proposed

Intervenors support the rights of all disabled Virginians to access supports and services, and to make decisions for themselves or their loved ones. In contrast, it is the Amici that are trying to impose their organization's views and ideology on the individual residents of ICF's/MR, and on their families and guardians.

Amici cite three cases that allegedly support their misrepresentation of Olmstead. None of those cases actually reached the conclusion for which they are cited. In fact, they reached precisely the same conclusion as advanced by the Proposed Intervenors.

In Richard C. v. Houston, private plaintiffs who sought discharge from an institutional setting reached a settlement with state defendants to discharge residents to alternative settings. Richard C. ex rel Kathy B. v. Houstoun, 196 F.R.D. 288 (W.D. Pa. 1999). Six years later, residents remaining at the institution sought intervention. The court denied the motions and determined that the motions were not timely. The court reasoned that to permit intervention would be prejudicial to the parties because the terms of the settlement agreement had been implemented for six years before intervention was sought. The court also found no justification for the delay in moving for intervention. Although that court denied the motion to intervene because it was not timely, it noted that in Olmstead:

> The Supreme Court examined Title II regulations, stating that 'it would be inappropriate to remove a patient from [a] more restrictive setting' absent a determination by state professionals that the patient met the 'essential eligibility requirements' for habilitation in a community-based program.

Richard C., 196 F.R.D. 288, 291-292 (citing Olmstead, 119 S.Ct. 21176, 2188).

In Messier v. STS, et al., the district court found that Olmstead required defendants' treating professionals to make recommendations regarding whether the Southbury Training School was the most integrated setting for its residents. That court further concluded that residents or their guardians had to be given the opportunity to oppose or consent to any discharge

recommended by the treating professionals. Messier, 562 F. Supp. 2d. 294, 345 (D. Conn. 2008). That court expressly held that "[t]here is no "federal requirement that community-based treatment be imposed on patients who do not desire it." Messier, 562 F. Supp. 2d. at 323 (citing Olmstead, 527 U.S. at 602; 28 C.F.R. § 35.130(e)(1)).

Amici also cite to Benjamin v. PA Dept. of Pub. Wel., which Proposed Intervenors discuss and distinguish in its Reply brief to the Commonwealth and DOJ's respective Oppositions to Intervention. See [Dkt. # 20 at 12-15; Dkt. # 31 at 7-9; Dkt. # 32 at 3-5 9] (comparing results reached in Ligas v. Maram, 2010 U.S. Dist. LEXIS 34122 (N.D. Ill., 2010) and Benjamin v. Dept. of Pub. Welfare, 432 Fed. Appx. 94, 98 (3d Cir. Pa. 2011).

Amici also argue that Proposed Intervenors have no interest in the instant litigation because ICF/MR services are available from private providers. [Dkt. # 27 at 11]. Amici note that as of April 2011, there were approximately 273 ICF/MR beds operated by providers other than the Commonwealth. [Dkt. # 27 at 11 (citing Dkt. # 27-2)]. Although the number of non-Commonwealth ICF/MR beds is immaterial to a disposition of whether Proposed Intervenors have a right to intervene in this matter, Amici fail to note whether there are any ICF/MR beds actually available from non-Commonwealth providers. There are over 1,100 Proposed Intervenors. Even if Proposed Intervenors would not have to sacrifice their civil rights to receive services from those providers, it is reckless of Amici to suggest that there are adequate services for Proposed Intervenors. If anything, the limited number of ICF/MR beds in non-Commonwealth-operated facilities suggests that it is highly unlikely that Proposed Intervenors could be supported in that limited number of facilities.[7]

[7] Incidentally, ninety-two (92) of the 273 beds identified by Amici are at St. Mary's Home for Disabled Children, which presumably does not provide services to adults.

Amici also argue that the number of residents in the Commonwealth's Training Centers has declined over the past twelve (12) years. [Dkt. # 37 at 11]. Even if that fact were accurate, it is unclear why Amici note it. It is simply irrelevant to the pending Motion to Intervene. Proposed Intervenors note that the power point presentation cited by Amici was prepared by the Commonwealth's Secretary of Human Services to support that proposition. [Dkt. # 37 at 11-3]. To the extent that the Court deems any portion of that presentation relevant, Proposed Intervenors note that the Commonwealth has admitted that it has no support for the majority of representations in that presentation. On March 1, 2012, a FOIA request was submitted to the Secretary of Health and Human Services requesting all documentation in the agency's possession that was relied upon to create the slides and the data contained in the slides. See Exhibit B. On March 19, 2012, the agency responded to the FOIA request citing statutory privilege that "Virginia Code 2.2-3704(D) provides that '…no public body shall be required to create a record if the record does not already exist.' Thus, we are not creating new document responsive to respond to your questions." See Exhibit C. The Commonwealth responded to each request citing that same privilege or indicating "No documents responsive to this request." See Exhibit C. Proposed Intervenors maintain that their rights should be protected regardless of the decline or increase in services provided by the Commonwealth.

Like the Commonwealth and DOJ, Amici have misrepresented that Proposed Intervenors' interest would only exist if the proposed Settlement Agreement expressly required the Training Centers to cease operation. [Dkt. # 37 at 11]. Proposed Intervenors have already discussed this misrepresentation in their Reply brief to the Oppositions of the Commonwealth and the DOJ. See [Dkt. # 31 at 1-4; Dkt. # 32 at 2-5]. Similarly, Amici, just like the DOJ and Commonwealth, misrepresent the Commonwealth's obligation to mete out services for the

disabled as it deems necessary. Generally, the Commonwealth can assess the needs of its disabled citizens and administer services with an even hand. See Olmstead, 119 S.Ct. 2176, 2189 (The Supreme Court noted that "the State must have more leeway" "to maintain a range of facilities and to administer services with an even hand…."). That is not what the Commonwealth is doing in this case. The Commonwealth has agreed to take away Proposed Intervenors' rights and resources surreptitiously, in order to avoid liability in a lawsuit brought by the DOJ and to serve its own political agenda. The objective of unencumbered allocation of resources envisioned by Olmstead is not what the Commonwealth is engaged in here. The Commonwealth is not administering services with an even hand. The DOJ investigation and lawsuit have caused, or served as a convenient excuse for, the Commonwealth to agree to terms in the proposed Settlement Agreement. Please see Proposed Intervenors' complete response to the Commonwealth and DOJ's similar arguments. [Dkt. # 31 at 9-10; Dkt. # 32 at 9-11].

Proposed Intervenors do not seek, as Amici claim, "to require that the state maintain a specific institution, once the state executive or legislative branch decides to close it." [Dkt. # 37 at 23]. Docket for Proposed Intervenors' discussion of their rights to receive recommendations from treating professionals and the suggested method for the Commonwealth and DOJ to implement their proposed plan [Dkt. # 31 at 4-12; Dkt. # 32 at 12-13]. The proposed Settlement Agreement was entered into only by the executive branch of the Commonwealth, yet it would have the force of law, binding the Commonwealth's legislative and executive branches. The proposed Settlement Agreement would impact the Commonwealth's entire system for administering services to disabled Virginians. The Amici are supporting the manipulation of checks and balances. Through the proposed Settlement Agreement, the executive branch seeks to expand its function well beyond the planning and budgeting role that it should serve. The Amici support that manipulation only because it fits their political agenda to deny public

ICF/MR care to anyone. Amici's accusation that Proposed Intervenors seek to engage in such manipulation is hypocritical and disingenuous.

In an effort to support an otherwise baseless position, Amici, like the DOJ and Commonwealth, misrepresent Lelsz v. Kavanaugh and other case law. Please see [Dkt. # at 11-12; Dkt. # 32 at 7-13] for Proposed Intervenors' Reply to the substance of that argument. Proposed Intervenors do note that, contrary to Amici's representations, Lelsz v. Kavanaugh, actually found that for some individuals the least restrictive alternative, or the most integrated setting, may well be an institutional setting. Lelsz v. Kavanagh, 807 F.2d 1243, 1255 (5th Cir. 1987).

Similarly, footnote 10 in Amici's brief cites to the Patient Protection and Affordable Care Act, but the citation provided appears to be inaccurate. That statute does not propose the elimination of publicly operated ICFs/MR or a preference for non-publicly operated ICF/MR care. The statute does expressly state that "long term services and supports should be made available in the community in addition to in institutions." (emphasis added) Pub.L.No. 111-148 § 2406(b)(2). That legislation is among the most recent federal legislation impacting healthcare services and it clearly envisions the continued existence of "institutional care" for the developmentally disabled.

Like the DOJ and the Commonwealth, Amici also note that Proposed Intervenors do not have a right to remain in the Training Center of their choice. As noted in Proposed Intervenors' Reply briefs to the Oppositions of the DOJ and the Commonwealth, Proposed Intervenors are not necessarily seeking such relief. See [Dkt. # 31 at 12-14; Dkt. # 32 at 15-22]. Proposed Intervenors do have a right to receive the services they currently receive, and receive those services "in the most integrated setting appropriate to [their] needs" 28 CFR § 35.130(d). For all

Proposed Intervenors, that setting is currently the Training Center where they reside. Please see Proposed Intervenors' Reply briefs to the DOJ and Commonwealth's respective Oppositions. [Dkt. # 31 at 4-12; Dkt. # 32 at 6-13].

Similarly, Amici argue that the Commonwealth and the DOJ adequately represent Proposed Intervenors' interests in this litigation. [Dkt. # 37 at 28-31]. Amici cite Brody v. Spang, 957 F. 2d 1108, 1123 (3d Cir. 1992) for the proposition that "[a] government entity charged by law with representing a national policy is presumed adequate for the task." [Dkt. # 27 at 28]. That case did not reach that conclusion. It did not even consider that issue. That court considered whether proposed intervenors had an interest in the remedial phase of litigation and concluded that they likely did. Brody, 957 F. 2d 1108, 1125. Brody remanded to the district court for determination of that interest. Id. (holding "[s]uch intervention would be as a party defendant entitled to participate fully "in the formation of the terms of the settlement agreement in this case." (citing Harris v. Pernsley, 820 F.2d 592, 600 (3d Cir. 1987), cert. denied, 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987).

Neither the Commonwealth nor the DOJ represent Proposed Intervenors' interests. As described in Proposed Intervenors' moving and Reply briefs, the Commonwealth and DOJ are attempting to bargain away Proposed Intervenors' rights and they have taken an adversarial position against Proposed Intervenors in an effort to seal their deal. For Proposed Intervenors' discussion of this argument, please see [Dkt. # 31 at 18-20; Dkt. #32 at 22-24]

B. Proposed Intervenors Represent A Class Consisting Of Training Center Residents

The Amici are nine corporate entities. Counsel for Amici do not represent any individual or any individual's interests. Those nine corporations do not have an interest in this litigation. Proposed Intervenors acknowledge that some of the members of Amici organizations may gain

from the proposed Settlement Agreement in this matter.[8] Those well-funded corporations are pushing their own organizational agenda, while hiding behind the false cloak of impartiality. As indicated in Amici's Exhibit 3, various organizations related to the Amici already operate private community-based facilities, which would be expanded under the proposed Settlement Agreement.[9] Although the Amici may have a financial interest in the proposed Settlement Agreement, they do not have any legally protected interest. Even though Amici claim to have members who may gain from the proposed Settlement Agreement, those organizations do not have any rights or legally protected interests in this litigation.

Throughout their Opposition to Proposed Intervenors' motion, Amici suggest that Proposed Intervenors are acting for a limited number of individuals. To the contrary, Proposed Intervenors' motion and position is intended to represent the interest of virtually all current residents of the Commonwealth's Training Centers in this matter. The Motion to Intervene was filed on behalf of thirteen individuals, Proposed Intervenors, who represent themselves. Those individuals are representative of other individuals similarly situated and, if granted intervention, they intend to seek class certification, pursuant to Fed. R. Civ. P. 23(a) and (b)(2), in order to efficiently and definitively resolve their interests in this matter. The proposed class would consist of: Virginia residents who reside or resided at the Commonwealth's Training Centers as of January 26, 2012, or at any time during this litigation. Joinder of the entire Class would be impracticable because the Class Members are severely or profoundly developmentally disabled persons and virtually all proposed Class Members are unable to give their consent except through

[8] When Amici represent their membership numbers, it is likely they are inappropriately counting some of the Proposed Intervenors among their membership.

[9] For instance, the ARC of the Piedmont, Inc. and the ARC of the Virginia Peninsula, Inc. operate private ICFs/MR and, given their corporate designations, appear to share some relationship with the ARC organizations who are Amici.

guardians or family members. All proposed Class Members are diagnosed as in need of state-run ICF/MR "institutional" care and have been appropriately designated as eligible for state-operated ICF/MR level of care.

All Proposed Class Members are medically and developmentally inappropriate for residence in any setting other than the Training Centers where they currently reside. All Proposed Class Members are physically, mentally, and emotionally fragile and inappropriate for transfer to any alternative setting. All Proposed Class Members are in need of continuous care by multidisciplinary teams of professionals currently serving them at the Training Centers where they currently reside. Services provided to residents at the Training Centers are uniquely tailored to the needs of the residents of the Center.

All Proposed Class Members have been consistently evaluated by their treating professionals and determined to be in need of ICF/MR services, and that the best setting for all Proposed Class Members to receive those services is at the Training Centers where they currently reside. All Proposed Class Members have the right to receive ICF/MR level services from the Commonwealth of Virginia. All Proposed Class Members imminently will have their rights to receive ICF/MR level services at their respective Training Centers denied. The policies and procedures in the proposed Settlement Agreement will usurp Proposed Class Members' treating professionals' ability to make independent professional judgments.

The policies and procedures in the proposed Settlement Agreement will ultimately result in Proposed Class Members' discharge from Training Centers to settings that may not be appropriate for their needs and may be contrary to their wishes, solely for the purpose of arbitrarily conforming to the terms of the proposed Settlement Agreement.

Proposed Intervenors' claims are typical of the claims asserted on behalf of the Class. They do not have any interests that are adverse or antagonistic to any claims or potential claims of the Class. Proposed Intervenors would fairly and adequately protect the interests of the members of the Class. Proposed Intervenors are committed to the vigorous prosecution of this action and have retained counsel competent and experienced in this type of litigation.

Proposed Intervenors do not seek monetary damages. Hence, the burden and expense of prosecuting this litigation makes it unlikely that members of the Class would or could prosecute individual actions. If individual actions were pursued by Class Members, prosecution of those individual claims would be impracticable and inefficient. This Court is the most appropriate forum for adjudicating the claims at issue, which arise under federal law.

Proposed Intervenors do not anticipate any difficulty in the management of this action as a Class action. There are many questions of law and fact common to the Class, which predominate over any questions which may affect individual members. Proposed Intervenors would bring the action pursuant to the Civil Rights Act, 42 USC § 1983; the Americans with Disabilities Act, 42 USC § 12132; § 504 of the Rehabilitation Act, 29 USC § 794 ("Section 504"); and the waiver of state sovereign immunity enacted in 42 USC § 2000d-7(a)(1); various Medicaid federal statutes; and regulations incorporated into Virginia law and the United States Constitution, on behalf of a Class consisting of themselves and all other persons who are residents of the Commonwealth's Training Centers.

A Class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Proposed Intervenors seek declaratory and injunctive relief, attorneys' fees and expenses as permitted by law, on behalf of themselves and the Class. Each Proposed Class Member has a constitutional right, a life and liberty interest in, and a statutory

entitlement in receiving treatment and services from the Commonwealth of Virginia in the most appropriate setting for his or her needs. As indicated in Proposed Intervenors' moving and Reply briefs, Olmstead interpreted the ADA and DOJ regulations issued under it, and emphasized that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." Olmstead v. Zimring, et al., 527 U.S. 581, 602 (1999). Olmstead further stressed that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." Id. at 601-02. "[T]he ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." Id. at 605. In fact, Olmstead recognized that "for [some] individuals, no placement outside the institution may ever be appropriate." Id. (citing and quoting Brief for American Psychiatric Association et al. as *Amici Curiae* at 22-23 ("Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times—perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings"); Brief for Voice of the Retarded et al. as *Amici Curiae* at 11 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution"); Youngberg v. Romeo, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) ("For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know").

By virtue of the ADA and the Olmstead decision, Proposed Class Members have a federally-protected right to receive recommendations from treating professionals as to whether discharge is appropriate and to oppose that recommendation, even if the proposed discharge is

from "institutional" care to a less restrictive setting. The only proper mechanism for second-guessing an individual or guardian's decision to oppose a treating professional's recommended transfer to a less restrictive setting is through state law and state court rules.

The paradigm created by the Olmstead decision dictates that residents of the Commonwealth's Training Centers and their guardians have the benefit of treating professionals' recommendations regarding the most appropriate place to receive services. Only after they have the benefit of that information are residents and guardians required to oppose or consent to continued residence at the facility or discharge to an alternative setting. Class Members have constitutional and statutory protections:

(a) to receive services in the "most integrated setting appropriate to the needs of qualified individuals with disabilities," a setting that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." (28 C.F.R. pt. 35 app. A.);

(b) not to be placed in more restrictive or dangerous settings than they currently enjoy;

(c) to appropriate ICF/MR institutional placement;

(d) to be discharged from their current ICF/MR certified institutional setting only where medically and therapeutically appropriate, upon an impartial recommendation by treating professionals;

(e) to understand their right to receive treatment and care at an ICF/MR certified facility prior to opposing or consenting to discharge from a Training Center; and

(f) to provide input and informed consent for recommended discharges.

The Settlement Agreement does not adequately consider or protect these rights.

III. Proposed Intervenors Qualify for Permissive Intervention

In opposition to the Proposed Intervenors' Motion to Intervene, the ARC of Virginia and accompanying Amici have requested that this court also deny permissive intervention. The

Amici concede, as did the Commonwealth and DOJ, that the Motion to Intervene was timely filed. Their primary argument is that the Intervenors do not assert a claim that shares a common question of law or fact with the present parties. [Dkt. #29 p.38]. The Amici base this argument on the same misconception that they base the remainder of their brief: that the Proposed Intervenors' only aim is to prevent the closure of the institutions in which they live. However, as discussed *supra*, the Proposed Intervenors have an interest in protecting their rights under Olmstead, to have a treating professional recommendation in transition decisions, which is integral to their care and their civil rights. The Proposed Intervenors do qualify for intervention in that their interests are *not* currently represented by the present parties. By advancing this misunderstood version of the Motion to Intervene, the Amici, like their counterpart, the DOJ, attempt to mischaracterize the Proposed Intervenors' interests in an attempt to set up a straw man that they can easily knock down. To the contrary, the Proposed Intervenors do qualify for permissive intervention in that their motion was timely filed and they do share a common question of law and fact.

A. The Proposed Intervention Is Timely And Does Not Prejudice The Parties

The Proposed Intervenors respectfully requested that this Court allow them to intervene permissively, pursuant to Fed. R. Civ. P. 24(b). Permissive intervention under Rule 24(b) is appropriate since the Court can permit anyone to intervene upon timely motion who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention lies within the discretion of this Court. Hill v. Elec. Co., Inc., 672 F.2d 381, 385-86 (4th Cir 1982).

Rule 24(b) notes that in "exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the application of the rights of the original parties."

Rule 24(b)(3). In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991); Media General Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners, 721 F. Supp. 775, 780 (E.D.Va. 1989) (noting that in assessing potential prejudice, courts consider whether the addition of a party will significantly expand the issues in the litigation). The Proposed Intervenors do not foresee that intervention will unnecessarily expand the litigation issues in the instant matter, and it may reduce the issues to be litigated. Also, the Court may ensure that the issues are not inappropriately expanded. Id. The Amici argue that individuals who stand to benefit from this agreement could suffer if the Intervenors are granted intervention. [Dkt. #34 at 30]. However, this is not the standard for intervention and it would be improper for the Court to consider the interests of nonparties in its consideration of the Proposed Intervenors' request for intervention. The proper question is whether the *present parties* would be prejudiced by the proposed intervention. See, Cox Cable Communications, Inc. v. United States, 699 F.Supp. 917, 924 (M.D. Ga. 1988). In this case, the present parties would not be prejudiced if intervention were granted.[10] The intervention by the Proposed Intervenors would ensure that all interested parties are participating in the litigation and will be adequately served by the Agreement. In fact, the present parties have not advanced arguments that either the State or the DOJ will be prejudiced by intervention, and it is inappropriate for the ARC of Virginia, as amici, to argue a position that has not been adopted by the parties. The Amici, likewise, are not arguing that the present parties will be prejudiced if the intervention is granted, only that other families affected by the

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[10] The Proposed Intervenors do not concede that the individuals in the community that might benefit from this Agreement would be prejudiced by intervention. Just because these individuals might benefit from the flawed Agreement, this is not the type of prejudice that the law considers in determining intervention. There would be no prejudice to these purported beneficiaries because their position to assert their rights is not compromised at all by this timely intervention. If the possibility that an individual might obtain a less favorable result was sufficient prejudice to deny intervention, then intervention would virtually never be granted. The rights of the Proposed Intervenors should not be ignored, or even trampled, because some individuals claim that ultimately, after full and fair litigation by all interested parties, their cut of a limited pie may turn out to be less. There is no legally recognizable prejudice to the persons the Amici claim to represent in the context of considering intervention.

agreement would be impacted. Not only do the Amici bypass the standard for permissive intervention in applying the prejudice to non-parties, but they fail to describe the supposed "impact" on other affected individuals. To merely state that there will be an impact, without describing what the impact is, coupled with applying the prejudice standard to non-parties, clearly indicates that the Amici have not asserted an adequate argument to oppose permissive intervention.

B. There is a Common Question of Law or Fact

Permissive intervention is available upon timely application when an applicant's claim or defense and the main action have a question of law or fact in common. See Zimmerman v. Bell, 101 F.R.D. 329, 331 (D. Md. 1984). As detailed above, the Proposed Intervenors share common questions of fact and law with the United States and with the Commonwealth of Virginia in relation to this case and with the proposed Settlement Agreement, but whose interests are not advanced nor represented by the parties. The common issues include whether individuals living in the Training Centers should be permitted to continue to receive services at these Training Centers or whether they should be discharged in violation of their rights guaranteed them under the ADA and Olmstead.

Unlike intervention of right, where courts review whether the intervenors' interests are adequately represented, under permissive intervention courts review the similarities between the claim asserted by the intervenor and the claim advanced in the main action. Id. In Zimmerman, the court found that the intervenor's claim was sufficiently similar to the plaintiff's claim because the intervenor's "claim was virtually indistinguishable[.]" Id. See also Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 179 F.R.D. 505, 508 (W.D.N.C. 1998) (permissive

intervention was appropriate where proposed intervenors sought to litigate the same issue regarding school desegregation).

According to the DOJ, this action relates to whether the Commonwealth of Virginia is complying with the ADA and the Supreme Court's decision in Olmstead. [Dkt. #1, Complaint ¶12]. Whether there was a violation of any of the provisions of the ADA will of course depend on the application of those laws to the facts of this case and, if permissive intervention is granted, all parties will be advancing arguments with respect to the ADA and the tenets of Olmstead. Importantly, the facts in this case primarily center on the procedures utilized by the Commonwealth to provide services to developmentally disabled Virginians and, specifically, the residents of the Training Centers operated by the Commonwealth. As a result, the United States, the Commonwealth, and the Proposed Intervenors will be advancing arguments based primarily on the same set of operative facts. It is unlikely that there will be serious factual disputes about what procedures were used and the timing thereof. Additionally, the Proposed Intervenors have an interest in whether community-based care is appropriate for all of the residents of the five (5) Training Centers, and whether community-based care or an alternative setting is in fact desired by all residents of the Training Centers. Thus, their claim is common to the claims of the United States and the acquiescence of the Commonwealth of Virginia.

The Amici have not cited to a single case and has not cited to any facts to support the claim that the Proposed Intervenors do not share a common question of law and fact with the present parties. The Amici attempt to argue instead, that by granting intervention, the Court would invite others to seek intervention as well, citing to Wyatt v. Hanan, 170 F.R.D. 189, 194 (M.D. Ala. 1995). However, not only does this argument fail to reflect the standard for permissive intervention, the Wyatt case also does not support their argument. In Wyatt, the

intervenor was the father of an institutionalized woman. The father essentially asked that the state be enjoined to keep his daughter's institution open, to continue to provide needed individual care to her, and to continue to make the necessary improvements of the facility and programs. The court denied the father's motion to intervene because he did not prove that the interests he sought to assert had not been adequately represented and he did not show that he had anything to contribute beyond underlining the positions already taken by the current parties. Id. at 189. ("Indeed, a review of the record in this lawsuit indicates that the ongoing battle between parties over the issues of "least restrictive environment" and "community placement" is detailed, sincere, and vigorously adversarial; these issues are, if anything, being over-litigated.") Id. at 194. The Wyatt court ruled against intervention because the father's interests were clearly already being advanced by the present parties and he only sought to intervene on his daughter's behalf, rather than on behalf of all of the residents at her facility. Id. The circumstances of the Wyatt case are very different than those in the present case, in that the DOJ and Commonwealth have not over-litigated the issues, but rather, have not really litigated the issues at all. The parties agreed to the Settlement and have not vigorously advocated for the Proposed Intervenors' rights. Thus, the Wyatt case can be used more properly to support a decision in favor of granting intervention in this case rather than for support to deny it.

Accordingly, this Court should conclude that the Proposed Intervenors have timely filed their Motion and will share a question of law and fact in common with the present parties already before this Court, and should grant the Motion to Intervene.

IV. The Settlement Agreement Does Not Assure The Safety Or The Preservation Of Rights Of The Training Center Residents In The Transition From The Training Centers To Community Programs

The Amici argue that other states have successfully transitioned individuals from institutions to community settings; that other states have reduced the numbers of individuals; and that other states have completely eliminated institutions.[11] [Dkt. #37 at 25-27]. It is presumed that Amici are suggesting that because such has been done in other states, deinstitutionalization or reduction of institutions will necessarily be done so successfully in Virginia via the Settlement Agreement. However, to the contrary, the terms of the Settlement Agreement (which disregard treating professional evaluations as to least restrictive environment, guardian choice, assurances of ICF/MR level care, and assurances of capability of community services to provide continued care) guarantee no such success.

The Proposed Intervenors are not conceding that the literature supports community living as a "norm". [Dkt. #37 at 25, 26]. The Proposed Intervenors believe that for purposes of intervention, it is immaterial whether the literature supports a reduction of institutional living. The rights of the individuals residing in the institutions need to be respected regardless of any such trend.

Further, with regard to the closure of state-operated facilities, states have typically transferred a number of individuals to either other institutions, nursing homes or private ICFs/MR [Dkt. #37 at 25, 26]. In New Hampshire, the state had only one state-operated center and a small population, thus, the process was more manageable to place the higher functioning individuals in community settings and to place the small group of severe and profound individuals into nursing homes or private ICFs/MR. New Hampshire may have had fewer than

[11] Of the few states that have eliminated public ICFs/MR, nearly all of them still utilize private ICFs/MR. Also, the "success" in closing public ICFs/MR has been accompanied with higher mortality rates and other adverse results on the moved population.

one hundred individuals transferring from the institution whereas Virginia has as many as 1,200 individuals currently living in state training centers. In a large population, a state moving all severely and profoundly disabled individuals into private ICFs/MR is not possible, as the capacity does not exist. In addition, nursing homes are not a viable option for most individuals living in training centers in Virginia. Individuals in ICFs/MR receive active treatment whereas such services are not provided in nursing homes. Further, Virginia nursing homes already have a purported 2,877 residents, which is more than twice the population of those living in training centers. Thus, the private ICFs/MR capacity and nursing home capacity and services are inadequate for many of the current training center residents.

The Amici state that state officials have become "adept in addressing" concerns and resistance of families to institutional closings. They state that states have offered approaches to successfully transition thousands of individuals into the community. [Dkt. #37 at 26, 27]. The Amici are referring to other states and not specifically to Virginia. Thus, it is immaterial for purposes of intervention, what other states have or are doing with respect to community outreach. Further, it is the lack of consideration of the Proposed Intervenors' concerns and rights which is precisely the issue here. The terms of the Settlement Agreement inadequately address the concerns and resistance of the families. The terms of the Settlement Agreement inadequately afford the families any avenues to question or appeal any discharge decision. The terms of the Settlement Agreement inadequately address the informed resistance of the families to be discharged from the training centers and inappropriately suggest, as Amici do, that such resistance is due to ignorance which can be overcome by helping families become better educated about community options.[12]

[12] In contrast, the U.S. Supreme Court recognizes that families and guardians of individuals with life-long intellectual disabilities have unique and valuable insights with regard to the "…close relatives and guardians, both

The Amici claim that the "advantages of community living are powerfully and convincingly supported by a large body of professional literature." [Dkt. #37 at 27-30]. The methodology used for these studies is highly questionable and controversial. It is unclear whether these studies were peer-reviewed, whether the studies can be replicated by independent researchers, whether there were errors in statistical testing, and whether the studies included systematic review of methodology. Further, the studies do not directly address mortality issues and are not specific to Virginia. Resources that do consider state comparisons rank Virginia very low relative to nearly every other state in its commitment to providing well-funded, high quality community-based supports for individuals with intellectual and developmental disabilities. Proposed Intervenors know of no peer-reviewed study that suggests Virginia is prepared in funding, experience or infrastructure to provide comprehensive, life-sustaining supports which match what they now receive in Virginia's ICF/MR. Studies from other states, therefore, which suggest "advantages of community-living" are not only questionable, but wholly unrelated to Virginia, the focus of the settlement and especially the Motion for Intervention filed by the residents of Virginia Training Centers.

The cited Pennhurst Longitudinal Study [Dkt. #37 at 27, 28] is a 25-year-old study that does not reflect the present situation in Virginia. The conditions and population in Pennhurst cannot be generalized to those in Virginia.[13] Similarly, the Larson and Lakin [Dkt. #37 at 28]

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whom likely have intimate knowledge of a mentally retarded person's abilities and experiences, have valuable insights which should be considered during the involuntary commitment process." Heller v. Doe, 509 U.S. 312 (1993) (see also, Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 15001(c)(3)(2000); "individuals with developmental disabilities and their families are the primary decisionmakers regarding the services and supports such individuals and their families receive, including regarding choosing where the individuals live from available options, and play decisionmaking roles in policies and programs that affect the lives of such individuals and their families.")

[13] The work of primary author of the Pennhurst study, Dr. James Conroy, has received critical reviews regarding the reliability of his data and his methodology, especially with respect to mortality studies. See, for example, Felce, D. (2006), both accurate interpretation of deinstitutionalization and a postinstitutional research agenda are needed, *Mental Retardation, 44,* 375-382; Fujiura, G.T. (2006), lessons drawn from the critique of the Hissom closure

review has been challenged as being flawed. Individuals leaving institutions in the 1980s possessed different characteristics than those currently residing in institutions.

The studies cited by Amici are self-serving and Proposed Intervenors can similarly cite a large body of professional literature inapposite to those studies. The question of intervention is not the proper forum for such debate. In fact, this disagreement on the benefit of "deinstitutionalization," or often actually the privatizing of "institutionalization," is exactly why intervention is necessary so that there is someone at the table to reveal the truth as to the harm that is likely to result to those being moved from Virginia's public ICFs/MR. The long-standing controversial question which underlies the studies cited by the Amici becomes less important as the question is not institution versus community but rather how to provide each individual the services and supports that he or she requires and wants. The Settlement Agreement inadequately assures full accessibility of services for those individuals with severe and profound disabilities.

The Proposed Intervenors are not claiming that there is never any benefit to community living, or that the community cannot ever be the most integrated setting. The Proposed Intervenors' point is that a treating professional, and not a State or Federal official, should be making such determination. If, for an individual being cared for in an institution, the treating professional determines that ICF/MR level care is necessary, then assurances must be made that such level of care is provided. It is inappropriate, inadequate, and irresponsible for a government official to merely deem the community as offering more benefits and then move an individual from his "institutional" home without proper evaluation, assurances of transition and care, and

evaluation, *Mental Retardation, 44, 372-375*; Kastner, T. (2000), on the need for policy requiring data-sharing among researchers publishing in AAMR journals: Critique of Conroy and Adler (1998), *Mental Retardation, 38,* 519-529; Taylor, S.J. (2000), The editor's perspective, *Mental Retardation, 38,* 517-518; Taylor, S.J. & Krauss, M.W. (2006), The credibility of Conroy et al. (2003) and Walsh and Kastner (2006): Introduction to commentaries: The editors' perspective. *Mental Retardation, 44*, 370-371; Walsh, K.K. & Kastner, T.A. (2007) Needed: An AAIDD policy on removing articles from its journals, *Intellectual and Developmental Disabilities, 46,* 239-411; Walsh, K.K. & Kastner, T.A. (2006), The Hissom closure in Oklahoma: Errors and interpretation problems in Conroy, et al. (2003), *Mental Retardation, 44,* 353-369.

consent of the guardian. Such should be the case regardless of the alleged benefits of the community.

The Amici tout the benefits of community placement but completely ignore the detriments of transitioning an individual from ICF/MR level care without the proper supports. See, for example, Exhibit C to Proposed Intervenors' Reply to Defendant's Opposition to Motion to Intervene, Declaration of Dr. Adam Kaul. See, also, Boo, K. (1999), article series at www.washingtonpost.com/invisible, Washington: Post Company (anecdotal depiction of system-wide problems related to issues of care, mortality rates, and lack of access to needed ancillary services in the community); and Hakim, D. and Buettner, R., "In State Care, 1,200 Deaths and Few Answers, New York Times (November 6, 2011 (detailing 1,200 "unknown and natural deaths in state group homes over 10 years; http://www.nytimes.com/2011/11/06/nyregion/at-state-homes-simple-tasks-and-fatal-results.html).

V. Conclusion

For the reasons cited above, and in the Memorandum of Law in Support of Motion for Intervention by Proposed Intervenors, the Motion for Intervention should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on the 29th day of March, 2012, I electronically filed the foregoing 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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