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

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

PROPOSED INTERVENORS' REPLY TO THE DEPARTMENT OF JUSTICE'S OPPOSITION TO MOTION TO INTERVENE

The Proposed Intervenors, by counsel, reply to the Department of Justice's Opposition to Proposed Intervenors' Motion to Intervene. Proposed Intervenors ask this Court to grant their Motion to Intervene, and, in support thereof, state as follows:

I. PROPOSED INTERVENORS' INTEREST WILL BE IMPAIRED BY THE PROPOSED SETTLEMENT AGREEMENT

In its Brief in Opposition, the United States Department of Justice ("DOJ") claims that "the Agreement does not mandate the closure of Training Centers" and that "these claims are factually incorrect and based on a misreading of the Agreement." [Dkt. # 28 at 10]. On February 23, 2012 the Court held a status conference in this case. See Status Conf. Transcript attached as Exhibit A. The Commonwealth of Virginia ("Commonwealth") and the DOJ both admitted that although the Settlement Agreement does not specifically state that Virginia Training Centers must close, it does bind the state legislature to appropriate funds which would require their

closure. [Status Conf. Tr. at 44:23-45:12]. As the Court pointed out during the status conference, the language regarding the closure of training centers should be seen as substance over form where the Federal Court is being used as a "goad to make the General Assembly do what they have to do to make this agreement come true." [Status Conf. Tr. at 46:7-9]. The Commonwealth went on to admit that there will be no public ICF/MR's after this consent decree is enforced. [Status Conf. Tr. at 50:9-15]. It is disingenuous for the DOJ to claim that closure is not necessary and rely on the purposefully cryptic language of the Agreement to argue that it does not require the closure of training centers in the Commonwealth.

The DOJ claims that Proposed Intervenors have "misread" the Settlement Agreement as eliminating the option of institutional care. To the contrary, the Proposed Intervenors have not misread the Agreement which is evidenced by statements made by Ms. Tysinger and Ms. Barkoff at the status conference. It is true that the Agreement only calls for a plan to be submitted to the General Assembly. However, as the Court pointed out during the status conference, the General Assembly is bound by the threat of contempt if the waiver slots (which are required as part of the Settlement Agreement) are not created and funded. [Status Conf. Tr. at 45:-9]. It is clear what the true intentions of this Consent Decree are: to secure the closure of the Commonwealth's Training Centers to the detriment of the rights held by the Proposed Intervenors. The Proposed Intervenors have not misunderstood and no "misreading" of the Settlement has occurred. As Proposed Intervenors stated in their moving brief, the Settlement Agreement "calls" for the closure of the training centers. [Dkt. # 20 at 2-4]. The Proposed Intervenors have not misread this Agreement, just as they have not misread the statements made by the parties and by the Court during the status conference. To argue that there is no substance behind this agreement is a clear attempt to mislead the public and ignore the clear intent of the

Agreement which was partially described during the status conference held by the Court on February 23, 2012.

In a misrepresentation of the standard by which the Court should assess the Motion to Intervene, the DOJ cites Benjamin v. PA Dep't of Pub. Welfare, 432 Fed. Appx. 94, 98 (3d Cir. Pa. 2011) and ARC of Virginia v. Timothy Kaine, 2009 WL 4884533 *7 (E.D.Va. December 17, 2009). Those cases are inapposite.

In Benjamin, the plaintiffs were a private group of residents who wished to be moved from ICF/MR care and sued the Commonwealth of Pennsylvania to effectuate that end. The Court addressed the intervenors' interests by stating the following:

> The District Court made its intent clear. The class it certified expressly excludes all current and future residents of ICFs/MR who oppose, or would at any relevant time in the future oppose, community placement. It therefore excludes Intervenors, and they will not be personally bound by anything that is decided in this litigation. It follows that, if the DPW should threaten in the future to coerce them into leaving their current institutions, Intervenors would be free to file their own suit and litigate whether they have a legally enforceable right to remain in the institution where they currently reside.

Benjamin v. Dept of Pub. Welfare, 432 Fed. Appx. 94, 98 (3d Cir. Pa. 2011).

Here, Proposed Intervenors seek to litigate their legally enforceable rights that are to be taken away by the Settlement Agreement.[1] In the interest of judicial economy, instead of filing a

[1] The DOJ cites to a self-published study, by K.Charlie Lakin, *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and /or Developmental Disabilities* [Dkt. #28 at 15], which repeatedly relies on data collected by James W. Conroy, whose findings have been discredited in the literature for many years. See, *The credibility of Conroy et al*. (2003) and Walsh and Kastner (2006). MENTAL RETARDATION *44*(5), 370-371. In addition to those articles cited by the Proposed Intervenors, many studies and articles have cited problems with community care, including safety, oversight, access to health care and isolation concerns. Many articles in addition to those cited by Proposed Intervenors, (which do not rely on Conroy's flawed methodology) have covered this dilemma. See, *Sexual Abuse of the Mentally Retarded Patient: Medical and Legal Analysis for the Primary Care Physician* by Jamie. P Morano, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC181173/?tool=pmcentrez.

separate action, Proposed Intervenors seek to resolve their claims now. In Benjamin, the District Court and Third Circuit held that because the class definition specifically excluded the proposed intervenors, they would not be affected by that litigation. Id at 98.

That same result was reached by the District Court in Ligas v. Maram, 2010 U.S. Dist. LEXIS 34122 (N.D. Ill., 2010). Residents of a state operated institution, who opposed discharge, sought intervention. The District Court initially denied intervention because the class definition specifically excluded residents of the state-operated institution who opposed discharge. However, when the plaintiff class and defendants settled their claims and sought court approval of a consent decree, the proposed intervenors renewed their motion to intervene. The district court granted intervention at that juncture because the proposed intervenors rights were implicated in the proposed consent decree. That court held:

> Proposed Intervenors have a right under Olmstead to have their needs considered before the Amended Proposed Consent Decree is approved. The interest the Proposed Intervenors have in this litigation is "direct, significant, and legally protectable."

Ligas, 2010 U.S. Dist. LEXIS 34122 (citing Solid Waste Agency of N. Cook County v. U.S. Army Corp of Eng'rs, 101 F.3d 503, 506 (7th Cir. 1996). The Ligas court reasoned that "[i]f the needs of the Proposed Intervenors are not considered before the Amended Proposed Consent Decree is approved, the Proposed Intervenors' future ability to have their needs considered in balance with the State's obligations to other individuals with mental disabilities would be significantly impaired 'as a practical matter.'" Ligas, 2010 U.S. Dist. LEXIS 34122 (citing Fed. R. Civ. P. 24(a)(2).

The DOJ's reliance on Benjamin v. PA Dept of Pub. Welfare or the District Court's initial denial of intervention in Ligas would only be appropriate if there was no Settlement Agreement proposed in this matter and the Proposed Intervenors were specifically excluded from

the DOJ's Complaint. The present posture of this matter necessitates the intervention by the Proposed Intervenors. Proposed Intervenors have shown that they will be affected practically by the Settlement Agreement and that their rights will be deprived. They are entitled to intervention in accordance with the Third Circuit decisions in Benjamin v. PA Dept of Pub. Welfare and Ligas v. Maram.

The DOJ also cites to ARC of Virginia v. Kaine, 2009 WL 4884533 *7 (E.D.Va. December 17, 2009), claiming that it held that judicial intervention is not appropriate when legislative approval is uncertain and contingent. However, the Court in that case was addressing a preliminary injunction requested by the ARC of Virginia. As such, the standard differed from that of intervention, and this case is entirely distinguishable and has no bearing on the case at hand.

The DOJ has no legal support for its position that the Proposed Intervenors' interests are not impaired and the DOJ has misrepresented the true intentions of the Agreement. The Proposed Intervenors clearly have an interest that will be impaired in this litigation in that they are described as the target population of the Agreement and the Agreement modifies their rights. [Dkt. # 2-2 at 3]. ("The target population of this Agreement shall include individuals with ID/DD who meet any of the following additional criteria: a. are currently residing at any of the Training Centers"). This language is clear evidence that the Proposed Intervenors are set apart from the intervenors in Benjamin. It is clear that the Proposed Intervenors here are affected by the Agreement in that they are the target of the Agreement and the only purpose of the Agreement is to effect change to their care. Thus, they have a sufficient interest in this litigation for intervention.

II. PROPOSED INTERVENORS DO HAVE A RIGHT TO RECEIVE CONTINUED SERVICES AT THE COMMONWEALTH'S TRAINING CENTERS.

Contrary to the Commonwealth's position, it does have an obligation to continue to provide ICF/MR institutional care as long as it accepts federal funding pursuant to the Medical Assistance Program authorized by 42 U.S.C. § 1396, et seq. By accepting that funding and operating its Training Centers, the Commonwealth has voluntarily assumed certain obligations under federal law. Those obligations specifically include providing ICF/MR institutional services, 42 U.S.C. §§ 1396a(a)(10) and 1396d(a)(l5); giving qualified individuals the choice of receiving services in an ICF/MR institutional placement, 42 U.S.C. § 1396n and 42 CFR § 441.302(d); and discharged only pursuant to 42 CFR § 483.440(b)(4)(i) and in accordance with the ADA and Olmstead v. L. C. by Zimring, 527 U.S. 581, 607 (U.S. 1999). Under 42 U.S.C. § 1396a(a)(8), "[a] State plan for medical assistance must … provide that all individuals wishing for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals". The responsible state agency must "furnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures," and "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930(a)-(b) (1996). All Proposed Intervenors receive assistance under the Medical Assistance Program and are owed these and other duties by the Commonwealth. The proposed Settlement Agreement in this matter will displace these duties at the peril of Proposed Intervenors.

In its Opposition and at the Status Conference, counsel for the DOJ misrepresented to this Court that the Commonwealth can simply cease operations at all of the Commonwealth's Training Centers. [Dkt. # 28 at 12]; [Status Conf. Tr. at 11:14-13:18]. If the Commonwealth is

to cease operation of its Training Centers immediately, it must give up the federal funding it receives through the Medical Assistance Program. That decision is unlikely though, because that funding is necessary for the proposed Settlement Agreement in this matter. If the Commonwealth desires to downsize or eliminate ICF/MR institutional care, pursuant to the ADA and Olmstead, it could create community based services in less restrictive settings and allow treating professionals at the Training Centers to determine whether or not to recommend those alternative services to Training Center residents.

In its Opposition to Proposed Intervenors' Motion to Intervene, the Commonwealth concedes its obligations, but notes them only cursorily in a footnote. [Dkt. # 27 at 5, fn 4]. The Commonwealth is correct, and Proposed Intervenors concede, they do not generally have a federally enforceable "right to reside in a particular facility." See [Dkt. # 27 at 5]. However, Proposed Intervenors do have a federally protected right to receive ICF/MR services at an institution. All of the cases cited by the Commonwealth and the DOJ on this issue merely indicate that Medicaid recipients do not have a right to pick a particular service provider. Proposed Intervenors have not represented that they have such a right. Proposed Intervenors have conceded that their right to receive care at a Training Center is not absolute. However, the system proposed by the Settlement Agreement will replace Proposed Intervenors' federally enforceable rights with an amorphous unenforceable system that provides less protection for Proposed Intervenors.

Further, the Commonwealth is prohibited from using criteria or methods of administration, such as those in the proposed Settlement Agreement, that have the effect of subjecting Proposed Intervenors to discrimination on the basis of handicap or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the

recipient's program with respect to handicapped persons. 45 CFR § 84.4(b)(4); 28 CFR § 41.51(b)(3)(I).

The DOJ has misleadingly represented that if the Commonwealth closes its Training Centers, such a decision would be subject to the proposed Settlement Agreement's "requirements about the safety of individuals and the appropriateness of services." [Dkt. # 28 at 12]. Conspicuously, the DOJ does not identify the section of the proposed Settlement Agreement that ensures such protections. There is no such section. If the Commonwealth decided to close its Training Centers tomorrow and turn Proposed Intervenors out onto the street, it would be up to Proposed Intervenors to file suit against the Commonwealth to stop it. The proposed Settlement Agreement could not stop such action. In fact, the Commonwealth could point to the DOJ's assent to section III.C.9 of the proposed Settlement Agreement as the federal government's endorsement of the Commonwealth's decision. [Dkt. # 2 at III.C.9]. If the DOJ or the Commonwealth intended to protect Proposed Intervenors they would have agreed to a provision in their Settlement Agreement that ensures Training Centers continue to provide the same high level of care they currently provide for as long as they operate or as long as the Settlement Agreement remains in force. The DOJ and Commonwealth likely never even considered such a provision because neither party realistically envisions the continued operation of the Training Centers. [Status Conf. Tr. at 50:9-15; 13:12-18]; [Dkt. # 2 at III.C.9]. Because the DOJ and Commonwealth have failed to protect Proposed Intervenors' interests, Proposed Intervenors must note that they are entitled to receive the services they currently receive at a Training Center. The effort of the DOJ and the Commonwealth to expand community based services, while supported by Proposed Intervenors, cannot be accomplished at the sake of Proposed Intervenors' rights. Proposed Intervenors have a right to receive the services they currently receive. The

proposed Settlement Agreement fails to ensure that the same standard of care and services currently provided at the Training Centers will continue to be provided to Proposed Intervenors while the Commonwealth implements the proposed expansion of community based programs.[2]

The DOJ and Commonwealth represent that they are entitled to deprive Proposed Intervenors of their rights and potentially decrease their care because they intend to expand services for other disabled Virginians. [Dkt. # 2 at III.C.]; [Dkt. # 28 at 12, 22-23]; [Dkt. # 27 at 13]; [Status Conf. Tr. at 4:1-4]. That justification is unlawful and not endorsed by any case law cited by the DOJ. Olmstead does not stand for the proposition that community services can be expanded by forcing individuals from their training center homes. Olmstead did recognize that states have limited resources and may allocate those resources as it deems fit. However, the proposed Settlement Agreement does not comport with that decision. The DOJ strains to find support for its position by misquoting the Olmstead decision. The actual language from the Olmstead decision is:

> Of course, it is a quite different matter to say that a State without a program in place is required to create one. No State has unlimited resources and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. If, for example, funds for care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment, however, is a political one and not within the reach of the statute.

Olmstead, 144 L. Ed. 2d 540, 565. Olmstead does not give the DOJ and Commonwealth permission to surreptitiously take away Proposed Intervenors' rights. The language from Olmstead clearly refers to the limitation on the federal government to force an allocation

[2] Training centers offer extensive services that simply cannot be replicated in scattered community-based settings, such as specialized staff, onsite health care, accessible pools, gymnasiums, nature trails, and the regional community support clinics which offer these same services to community-based individuals. All of those services would be lost if training centers closed.

of state resources when such would adversely impact others being or to be served. Here, the Commonwealth is not assessing the needs of its disabled citizens statewide and deciding how best to allocate resources. It is taking away resources from Proposed Intervenors and developing new programs at the direction of the DOJ.

The only post-Olmstead decision that the DOJ cites to support its outrageous position here is Ricci v. Patrick, 544 F.3d. 8 (1st Cir, 2008). The District Court in that matter sought to reopen a consent decree at the request of the class because the consent decree required that transfers only be "equal to or better" than the current residence. Ricci, 544 F.3d 8, 19. The class members alleged that transfers were no longer being made to settings that were "equal or better." Id. However, the transfers were being done according to that state's administrative procedures, so the First Circuit reversed the district court's order, noting: "We hold only that the district court lacked authority to reopen the consent decree in this case and that it lacked jurisdiction on that or any other basis to reopen and to enter the orders it did." Ricci, 544 F.3d. 8, 22.

None of the cases cited by the DOJ support its assertion that "[c]ourts have shown particular deference to a state's discretion regarding closure of institutions where, as here, the state's efforts are intended to maximize its available resources to serve effectively the greatest number of people." [Dkt. # 28 at 13]. None of the cases it cites involved the elimination of "institutional" care and the redirection of state resources to other individuals with less severe disabilities.

That position is also contrary to the laws that the DOJ claims to enforce; namely, the ADA and Medicaid Act. The DOJ selectively cites the Congressional Findings section of the ADA in footnote eight (8) of its Opposition. [Dkt. # 28 at 14, fn 8]. The complete quote, which is only disjointedly cited by the DOJ states:

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(emphasis added) 42 U.S.C. § 12101(a)(5).

The DOJ's position in this case literally discriminates against Proposed Intervenors solely because of the severity of their disabilities. The DOJ would have the Commonwealth eliminate services for a current Training Center resident, who requires extensive clinical and therapeutic services, and take the money that was spent on that individual and spend it on individuals with less severe disabilities, because, theoretically, more people could be served with that money.[3] This is the type of bald discrimination that the ADA was intended to eradicate. The net result of the DOJ's plan is to leave the most fragile and needy Virginians with lower quality services than they currently receive and potentially without adequate services at all. The DOJ and Commonwealth have shown that they do not represent Proposed Intervenors' interests because they openly admit to bargaining away Proposed Intervenors' rights and resources in order to serve other individuals. Proposed Intervenors must be given the right to intervene in this matter to ensure that they can protect their rights.[4]

[3] Although the proposed settlement contemplates the creation of waiver settings for displaced training center residents, these waiver settings will not, by definition, provide services which equate to training center-level supports. For example, at Central Virginia Training, there is a five (5) minute response to any medical emergency. In contrast, in Central Virginia, a 911 response takes about one hour and the proposed settlement contemplates a 2-3 hour crisis stabilization response. These differentials can mean the difference between life and death.

[4] Proposed Intervenors do not wish to interrupt or delay services to disabled Virginians, who would receive services pursuant to the DOJ and Commonwealth's Settlement Agreement, but the expansion of community-based services cannot be done at the sacrifice of Proposed Intervenors' rights. The DOJ and Commonwealth have accused Proposed Intervenors of trying to delay

Similarly, Proposed Intervenors have not argued that "the ADA or Olmstead creates a legal right to remain in an institution or to override state decisions about closure." [Dkt. # 28 at 13]. Proposed Intervenors cite Olmstead to point out that the proposed Settlement Agreement seeks to modify Proposed Intervenors' rights to be discharged only when recommended by treating professionals and not opposed by the resident or his guardian. Proposed Intervenors do maintain that the State Plans for Medical Assistance precludes the Commonwealth from eliminating ICF/MR services statewide as long as the Commonwealth is receiving federal funding for those programs. See 42 U.S.C. 1396 et seq. If the Commonwealth desires to eliminate its Training Centers and keep receiving federal funding, it should first create sufficient community-based services to allow Proposed Intervenors' treating professionals to make recommendations to those alternative services. Then, the resident or guardian should be given the opportunity to consent to or oppose that recommended discharge. Such a process would comply with Olmstead and the ADA. Instead, the Commonwealth, whether through the Settlement Agreement or independently, seeks to eliminate services at the Training Centers while simultaneously expanding only selective community based services. Services currently provided in the community are inadequate for current Training Center residents. See Declaration of Dr. Adam Kaul attached as Exhibit B. The Proposed Intervenors also have not argued that Olmstead or the ADA "require public entities to provide segregated services." [Dkt. # 28 at 13]. Proposed Intervenors have only relied on Olmstead and the ADA to show that they have

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services for other disabled Virginians, but Proposed Intervenors are merely seeking to protect their interests. Because the DOJ and Commonwealth not only failed to protect Proposed Intervenors' rights in their Settlement Agreement, but actually seek to transfer some of their benefits to others, Proposed Intervenors have been forced to seek intervention. Ideally, Proposed Intervenors would prefer to see the Settlement Agreement move forward to expand community services for as many disabled Virginians as possible, but the Settlement Agreement should guarantee that Proposed Intervenors' rights are all protected, including those provided for in the Medicaid Act, the ADA, and Olmstead decision.

individual, federally protected rights. Olmstead and the ADA provide certain rights for individuals with disabilities. Proposed Intervenors cited those laws for precisely the purposes that they were intended.

III. PROPOSED INTERVENORS' RIGHTS WILL BE IMPAIRED BY THE PROPOSED SETTLEMENT AGREEMENT

The DOJ argues that the Proposed Intervenors' interests to receive services that meet their needs and keep them safe are not impaired by this Agreement. As evidence of its assertion, the DOJ cites to various sections of the Agreement which address the safety of community placements which the residents of the Commonwealth will be moved into. However, many of these terms are vague and do not describe the necessary processes which ensure safety in sufficient detail. Furthermore, the Proposed Intervenors would be forced from a known quality environment into an untested, not-yet-built community system which has no way of being enforced or redefined by the Court. As the Court wisely addressed at the status conference, these terms are too vague for purposes of a consent decree. [Status Conf. Tr at 32: 7-24]. The DOJ agrees that the Agreement is too vague for the Court to adequately enforce and that the parties are charged with agreeing on what is meant by various terms in the Agreement. [Status Conf. Tr. at 33: 13-24]. These terms include those regarding safety and quality of life. Additionally, it is likely that the push for quota placements will take precedence over the quality assurance language in the agreement when funding has already been assigned and services are being rapidly transferred from the training centers to community providers. The Proposed Intervenors' rights are impaired by this agreement because of its vagueness and its lack of enforceability. Essentially, the DOJ and Commonwealth will use this vagueness to impose their own desired goals on the Proposed Intervenors as the Agreement is implemented without adequate protection of the rights of the Proposed Intervenors. This poor Agreement has the potential to become a

disastrous agreement as the DOJ and the Commonwealth supply the missing specifics, to the great detriment of the Proposed Intervenors who will have no voice. All of this will be performed, if the present parties have their way, with the imprimatur of this Court.

The lack of any mention in the Settlement Agreement of the judgment of treating professionals demonstrates why the Proposed Intervenors' interests will necessarily be impaired if intervention is denied. The Proposed Intervenors challenge the DOJ to find even one (1) mention of the term "treating professional" in the four (4) corners of the Settlement Agreement, because this term does not appear at all. The DOJ and the Commonwealth have attempted to contract away the rights of individuals to receive the judgment of treating professionals before transfer. The parties apparently have the mistaken view that treating professionals do not perform an important necessary role, which is contrary to the standard set forth in Olmstead v. Zimring, 527 U.S. 581 (1999). Further, they incorrectly believe that they can determine where an individual is adequately served better than the treating professionals. According to the Olmstead standard, the treating professional must make their independent determination of whether the individual can handle or benefit from an alternative setting. Then, once that determination is made, and the individual does not oppose transfer, then the rest of the team can assist the individual with transfer. Id at 607. The DOJ's disregard for this standard is displayed in Section III, D, 1 of the Agreement which states: "The Commonwealth shall serve individuals in the target population in the most integrated setting consistent with their informed choice and needs." [Dkt. #2-2 at 11]. This term of the agreement is silent on treating professionals' judgment. The Proposed Intervenors have a concrete interest in ensuring that language regarding their treating professionals making judgments be inserted into this Settlement, since, without this language, their rights under the ADA as interpreted by Olmstead may be violated. Furthermore,

what "meets their needs" is a term which could be given any meaning. Such a determination of what setting adequately meets the needs of an individual should not be left up to a monitor who does not know these individuals, is not their treating professional, and may have never even met the individual. It should not be the burden of this Court to determine whether this term of the Agreement is being followed. It is clear that the Proposed Intervenors' interests are impaired by the Agreement in that those interests are not properly defined and the terms addressing those interests are too vague and cannot be enforced by the Court.

IV. THE PROPOSED SETTLEMENT AGREEMENT WILL DISPLACE PROPOSED INTERVENORS' ADA AND OLMSTEAD RIGHTS IN FAVOR OF AN UNLAWFUL CONSTRUCT CREATED BY DOJ AND THE COMMONWEALTH

Pursuant to the ADA and Olmstead, Proposed Intervenors do have a right to receive recommendations from their treating professionals as to whether or not they should be discharged from a Training Center. The DOJ falsely represents that Proposed Intervenors do not have the right to receive recommendations from treating professionals prior to making a decision about whether to consent to discharge or oppose discharge from a Training Center. [Dkt. # 28 at 17]. The DOJ cites a series of district court decisions in a footnote that it claims support its misrepresentation of Olmstead. Those cases do not support their position.

In Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d. 184 (EDNY 2009), individuals with mental illnesses, who were residing in adult care facilities, filed suit against the state. The defendants in that case admitted that their professionals did not do ongoing assessments of individuals in adult care facilities. Id. at 259. However, the court did not rely on that fact to reach its decision. The evidence in that case showed that the plaintiffs had been found to be eligible for community services by "a variety of sources, including the Defendants' Assessments Project." Id. That court reasoned:

> Given the facts of this case, to require determinations from treatment providers would indefinitely forestall Adult Home residents who are actually qualified to receive services in the community from access to the most integrated setting appropriate to their needs, simply because their own treatment providers have not bothered to assess them.

Id. There are no similar allegations in this case. Proposed Intervenors are routinely assessed by a range of treating professionals, who, at least annually, confer with each other through a program planning process and discuss alternative placement options with residents and guardians at each annual meeting. The language from Paterson, cited by DOJ, does not eradicate the rights of developmentally disabled and mentally ill residents of congregate settings to have their treating professionals' recommendations about whether they are appropriate for discharge. That Court merely held that defendants could not withhold such judgments and then claim that such judgments were a prerequisite to filing suit. Olmstead does entitle Proposed Intervenors to receive recommendations from their treating professionals prior to discharging them from a Training Center. Olmstead also acknowledged Proposed Intervenors' right to oppose a recommendation for discharge.

The Court's reasoning in Olmstead and the language of the ADA directly undercut the conclusion Plaintiff is trying to reach. The Olmstead Court expressly held:

> Consistent with these provisions [of the ADA], the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting.

Olmstead at 602.

In Joseph S., advocacy groups and residents of privately operated facilities filed a complaint and the defendants filed a motion to dismiss, maintaining that Olmstead precluded plaintiffs' claims because plaintiffs' treating professionals were not employed by the state.

Joseph S. v. Hogan, 561 F. Supp. 2d. 280 (EDNY 2008). Defendants maintained that plaintiffs could not show that the state's treating professionals had recommended their discharges because there were no state treating professionals and that the plaintiffs' complaint therefore should be dismissed. The court disagreed, reasoning that:

> the language from Olmstead concerning determinations by "the State's treatment professionals," appears to be based on the particular facts of that case and not central to the Court's holding. Indeed, the determinations regarding community treatment for both of the named plaintiffs in Olmstead were made by their treating professionals, who also happened to be the state's treatment professionals simply because the plaintiffs were institutionalized in a state facility. Accordingly, I reject defendants' argument that Olmstead requires that the state's mental health professionals be the ones to determine that an individual's needs may be met in a more integrated setting.

Joseph S, 561 F. Supp. 2d 280, 291 (italics in original) (internal citations omitted). The DOJ has no support for its position from Joseph S. Interpreting Olmstead, that court held:

> plaintiffs here may prevail if the complaint alleges, with sufficient factual detail to render their claims plausible, that individuals are placed in nursing facilities even though 1) a determination has been made that a particular individual's needs may be met in a more integrated setting, 2) the individual consents to reside in a more integrated setting, and 3) the state can reasonably accommodate a placement in a more integrated setting.

Joseph S, 561 F. Supp. 2d 280, 290.

Similarly, Plaintiff's reliance on Long v. Benson, No. 08-cv-26 (RH/WCS), 2008 WL 4571904, is also misplaced. That decision is a district court order certifying a class of private plaintiffs, nursing home residents, who wanted to receive Medicaid services in community settings. The dispute at that juncture was over the class definition. The defendants maintained that the class should be limited to individuals who defendants or its employees determine "could appropriately be treated in the community." Long, 2008 WL 4571904, 2. Recognizing that most

of the professionals treating nursing home residents are not employed by the state, but rather private physicians, nurses, and other professionals, the court found that:

> The Secretary's proposed class definition will not do. If, as the plaintiffs assert, the ADA gives a disabled individual for whom a state provides Medicaid assistance in an institution the right to receive assistance for appropriate care in the community, then the Secretary cannot deny the right simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise the right would, or at least could, become wholly illusory.

Long, 2008 WL 4571904, 2. The Court was merely making the observation that a narrow class definition could be used by defendants to avoid fully litigating plaintiffs' allegations. That court's decision on class certification simply has no relevance to this case. By no means did Long abrogate Proposed Intervenors' right to receive recommendations from treating professionals prior to discharge, as required by Olmstead.

The DOJ also selectively cited the district court decision in Frederick L, which merely noted that treating professionals must make recommendations regarding the service needs of institutionalized individuals with mental disabilities. Frederick L. v. Penn. Dept. of Pub. Welfare, 157 F. Supp 2d. 509, 540 (2001). Proposed Intervenors' treating professionals do just that. There has been no allegation to the contrary. For each training center resident, those recommendations and needs are documented extensively in program plans and clinical records. The court in Frederick L. did not second-guess the professional judgments of treating professionals, as the construct proposed by the Settlement Agreement in this matter would inappropriately do.

The plaintiffs in Frederick L. brought an action on their own behalf seeking discharge from a state-operated mental health hospital to community settings. Frederick L., 157 F. Supp. 2d. 509, 512. In addressing defendants' motion to dismiss, the court accepted the plaintiffs'

representations that one of them was recommended for discharge and, for the other plaintiff, "a formal recommendation for discharge [had] not been made because the treatment professional believed that an appropriate community placement was not available." Frederick L., 157 F. Supp 2d. 509, 540. It was in the context of that motion to dismiss that the court stated:

> I do not read Olmstead to require a formal 'recommendation' of community placement, as that term may be used in the mental health field. Olmstead does not allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals with mental disabilities.

Frederick L., 157 F. Supp 2d. 509, 540. To the extent that it is relevant, the District Court's opinion in Frederick L. actually supports Proposed Intervenors' position in this case. In fact, to avoid the type of misapplication of Olmstead that Plaintiff seeks to make here, when the Frederick L. case was appealed on other issues, the Third Circuit expressly cautioned:

> The plurality [in Olmstead] held that unnecessary institutionalization only violates the ADA when the following conditions are met: (1) the State's treatment professionals have determined that community placement is appropriate, (2) the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and (3) the placement can be reasonably accommodated, taking into account (a) the resources available to the State and (b) the needs of others with mental disabilities.

Frederick L. v. PA Dept. of Pub. Welfare, 364 F.3d 487, 492 (2004).

The cases cited by the DOJ are also not dispositive of the issues in this matter and do not abrogate Proposed Intervenors' rights articulated by Olmstead, as the DOJ has represented. Aside from the Joseph S. case, in all of the cases cited by the DOJ, the courts were compelled to conclude that no professional judgments had been made. Consistent with precedent, those courts found that they could appropriately intercede, not to substitute their judgment for that of treating professionals, but rather to ensure that private plaintiffs were not negatively impacted because of treating professionals' alleged failure to render their judgments. In the instant matter, DOJ has

not alleged or produced evidence that Proposed Intervenors' treating professionals have not exercised professional judgments.

In U.S. v. Arkansas, the DOJ tried to misrepresent the Olmstead decision in exactly the same way. In fact they cited the exact same cases. See U.S. v. Arkansas, 794 F. Supp. 2d 935, 982 (E.D. Ark. 2011), 4:09-cv-00033 [Dkt. # 218 at 85]. The district court in U.S. v. Arkansas did not accept the DOJ's misrepresentation of Olmstead and neither should this Court. See Arkansas, 794 F. Supp. 2d 935, 982 (E.D. Ark. 2011) (citing Olmstead and ADA regulations, that court held "[a] state generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community based program. There is no requirement that community based treatment be imposed on persons who do not desire it." (internal citations omitted).)

In this matter, if the Court adopts the DOJ's misrepresentation of Olmstead, it would potentially abrogate Proposed Intervenors' rights provided by Olmstead and the ADA in this and other litigation in this district. There has been no allegation in this matter that treating professionals have failed to render such judgments. The DOJ only argues that they can ignore such judgments. Yet, the proposed Settlement Agreement displaces Proposed Intervenors rights provided in the ADA and expressly delineated in the Olmstead decision.

Currently, Proposed Intervenors are each served by several treating professionals. Pursuant to the ICF/MR regulations, those treating professionals confer at least annually and make recommendations to Proposed Intervenors about whether discharge to an alternative setting would be appropriate. Those treating professionals know Proposed Intervenors' clinical and personal needs better than anyone else. Those treating professionals are also bound by their respective professional disciplines to serve the best interests of Proposed Intervenors. If

discharge is recommended, Proposed Intervenors are able to consent or oppose that recommendation. In the unlikely scenario that there is disagreement about a discharge recommendation because a guardian unreasonably opposes the treating professionals' recommendation, the only lawful means of second-guessing an individual or guardian's decision is through state law, which provides that such decisions can be overridden only if the Commonwealth can demonstrate that the resident or guardian is not acting in the best interest of the resident. Va. Code. Ann. § 37.2-1000 et seq.

The construct proposed by the DOJ and Commonwealth's Settlement Agreement would displace Proposed Intervenors' rights expressly provided by the ADA, Olmstead, and state law. In place of those rights, the DOJ and Commonwealth would substitute their own system. [Dkt. # 2 at IV.B.6]. Instead of Proposed Intervenors getting the unencumbered recommendations of their treating professionals, "[f]or all individuals residing in a Training Center on the date that this Agreement is signed by both parties, the Commonwealth shall ensure that a discharge plan is developed as described herein within six months of the effective date of this Agreement." [Dkt. # 2 at IV.B.8.]. The proposed Settlement Agreement goes on to say that "[d]ischarge planning will be done by the individual's PST." [Dkt. # 2 at IV.B.6; Dkt. # 28 at 17]. Nowhere in the proposed Settlement Agreement is there a provision which incorporates the recommendations of Proposed Intervenors' treating professionals. In its Opposition to Proposed Intervenors' Motion to Intervene, the DOJ represents that "the Agreement expressly contemplates that the Personal Support Team ("PST") for Training Center residents will include the Training Center's treating professionals…." [Dkt. # 28 at 17]. That representation is patently false. The phrase "treating professional" is not used anywhere in the proposed Settlement Agreement. The section cited by DOJ to support its false representation is the following:

> Discharge planning will be done by the individual's PST. The PST includes the individual receiving services, the authorized representative (if any), CSB case manager, Training Center staff, and persons whom the individual has freely chosen or requested to participate (including but not limited to family members and close friends). Through a person-centered planning process, the PST will assess an individual's treatment, training, and habilitation needs and make recommendations for services, including recommendations of how the individual can be best served.

[Dkt. # 2 at IV.B.6]. Contrary to DOJ's representation, this provision does not guarantee that Proposed Intervenors will have the unencumbered recommendations of their treating professionals. This provision guarantees that whatever a "person-centered planning process" is will be determined by almost anyone but the treating professionals. Among other things, that amorphous group of people will not be bound by any professional discipline to serve the best interests of Proposed Intervenors and will likely put their own interests before Proposed Intervenors' interests. The reference in this section to "Training Center staff" appears to be a deliberate attempt to ensure that non-treating professionals will direct Proposed Intervenors' treatment and discharge. Not only does this provision fail to protect Proposed Intervenors' rights provided by the ADA and Olmstead, it actually creates a paradigm that is directly the opposite of what Olmstead guarantees Proposed Intervenors.

V. THE PRESENT PARTIES DO NOT ADEQUATELY REPRESENT PROPOSED INTERVENORS' INTERESTS

In its Opposition, the DOJ attempts to minimize Proposed Intervenors' stated interests. Proposed Intervenors concede that they do not have a right to reside in a particular Training Center. However, the DOJ and the Commonwealth seek to implement a Settlement Agreement that only allows for community based options and, either directly or indirectly, seeks the elimination of congregate care ICF/MR facilities, without consideration of Proposed Intervenors' ADA and Olmstead rights. In addition to protecting their interests in receiving appropriate

services in the Training Centers where they currently reside, the Proposed Intervenors also seek to protect their interests in having the benefit of the recommendations of treating professionals regarding the most appropriate setting to receive services. These interests have not been represented in the Settlement Agreement and, thus, the present parties are not adequately representing the Proposed Intervenors' interests.

The DOJ argues that the Proposed Intervenors cannot show collusion or nonfeasance. [Dkt. #28 at 18]. However, this is not the standard for intervention. As stated in the Proposed Intervenors' moving brief, the movant need not show that the representation by existing parties will definitely be inadequate in this regard. Trbovich v. United Mine Workers, 404 U.S. 528 (1972). Rather, one need only demonstrate "that representation of his interest 'may be' inadequate." Id. For this reason, the Supreme Court has described the applicant's burden on this matter as "minimal." Teague v. Bakker, 931 F.2d 259, 262 (4th Cir. N.C. 1991) (quoting Trbovich v. United Mine Workers, 404 U.S. 528 (1972); see also, JLS, Inc. v. PSC of W. Va., 321 Fed. Appx. 286, 289 (4th Cir. W. Va. 2009) (citing In re Sierra Club, 945 F.2d 776, 780 (4th Cir. 1991)).

Further, there is no evidence that the parties considered and balanced the diverse needs and circumstances of all Virginians with ID/DD. To the contrary, the parties specifically did not consider the needs of the current residents of the five (5) Training Centers affected by the Agreement and have shown that they have not balanced the need for individuals' rights under the ADA as set forth in Olmstead with their desire to eliminate large congregate ICFs/MR. The Agreement is silent on one of the most important interests of the Proposed Intervenors, to receive treating professional judgments as to the least restrictive environment they can handle or benefit from.

It has already been shown by the terms of the Agreement that the present parties inadequately represent the interests of Training Center residents by omitting any mention of the judgments of treating professionals, and many of the terms, dealing with appropriate placements, have no way of being enforced. This inadequacy of representation is a sufficient justification for intervention to be granted.

VI. PERMISSIVE INTERVENTION IS APPROPRIATE IN THIS MATTER

As noted in Proposed Intervenors' Memorandum of Law, permissive intervention lies within the discretion of this Court. Hill v. Elec. Co., Inc., 672 F.2d 381, 385-86 (4th Cir 1982). Contrary to the DOJ's Opposition, Rule 24(b) allows the Court to permit anyone to intervene on 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).

The DOJ has conceded that Proposed Intervenors' motion is timely. [Dkt. # 28 at 8]. The DOJ does note that, in considering permissive intervention, Rule 24 requires the Court to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." (emphasis added) [Dkt. # 28 at 21]. However, the DOJ does not identify any prejudice that it will incur if the Court grants Proposed Intervenors' permissive intervention. Instead, the DOJ blurs its interest as a party with the interests of the individuals who, as a practical matter, it actually represents. The DOJ maintains that "[p]ermitting the Movants to become a party to this action would be extremely prejudicial to the thousands of other interested Virginians affected by this Agreement." [Dkt. # 28 at 22]. The DOJ's position fails to satisfy the requirement of Rule 24(b)(1)(B), as those "thousands of other interested Virginians" are not parties to this matter. The DOJ's position also betrays the fact that it has represented those "thousands of other interested Virginians" in this litigation and not the Proposed Intervenors. In

fact, DOJ's representation of those "thousands of other interested Virginians" has been to the detriment of Proposed Intervenors.[5]

The DOJ cites Hill v. Western Elec. Co. to support its position that the theoretical benefit that "thousands of other interested Virginians" may receive from its Settlement Agreement justifies eradicating Proposed Intervenors' rights and putting Proposed Intervenors at risk of injury and death. [Dkt. # 28 at 22 (citing Western Elec., 672 F.2d 381 (4th Cir. 1982).] However, the DOJ's reliance on that case demonstrates its hostile posture toward Proposed Intervenors. As an initial matter, the DOJ has misrepresented the Fourth Circuit's decision in Western Elec. to manufacture case law support for its representation of the "thousands of other interested Virginians," who it actually represents. In Western Elec., a class of private plaintiffs sued the defendant alleging discrimination in its hiring and employment decisions. Western Elec., 672 F.2d 381 (4th Cir. 1982). The proposed intervenors in that case sought to intervene as a specific class of individuals, within the class previously defined by the class certification. The district court denied their motion to intervene because it was filed five years after the litigation began and after the case had been appealed once and remanded on other issues. Western Elec., 672 F.2d 381, 385. In the case cited by the DOJ, the Fourth Circuit actually vacated the district court's decision that denied intervention and remanded with specific instructions to the district court to reevaluate the proposed intervenors' motion because the significant delay and potential prejudice to other class members was not sufficient to justify denying the motion to intervene. Western Elec., 672 F.2d 381, 390-92.

The DOJ quotes Western Elec. for noting that "'[c]ourts have properly emphasized the seriousness of the prejudice which results when relief from long-standing inequities is delayed."

[5] Indeed, in its "Findings Letter," DOJ cites the many stakeholders with whom it met during its investigations, but families and guardians of Training Center residents are conspicuously absent.

[Dkt. # 28 at 22 (citing Western Elec., 672 F.2d 381, 386)]. That quote was taken from the Court's discussion of the timeliness requirement of a motion to intervene and the delay that actual parties to the litigation, the class members, would suffer in the delay of adjudication if intervention was permitted after several years of litigation. Western Elec. 672 F.2d 381, 386. Western Elec. further supports Proposed Intervenors' position in this matter because the Fourth Circuit vacated and remanded to the district court despite the parties having recently reached a settlement agreement. Western Elec. 672 F.2d 381, 385.

In relying on Western Elec., the DOJ attempts to represent that the "thousands of other interested Virginians affected by [its] Agreement" are actually class members who it represents. The DOJ should not be representing any private interests. By setting forth this argument, the DOJ exposes its true motives. The DOJ not only opposes Proposed Intervenors' interests and will not protect Proposed Intervenors' rights. Instead of serving its function as a government agency, the DOJ is serving as private counsel for the "thousands of other interested Virginians affected by [its] Agreement." It has never represented Proposed Intervenors' interests, which is precisely why Proposed Intervenors must represent their own interests. Further, the Western Elec. case did not conclude that, even where a settlement agreement had been reached that would grant relief to actual parties and a five year delay had lapsed, the district court was justified in denying intervention.

Similarly, the DOJ argues that because Proposed Intervenors have submitted a Motion to Dismiss with their Motion to Intervene, the Proposed Intervenors should be denied intervention. [Dkt. # 28 at 22]. The DOJ's position is illogical and inconsistent with our judicial system. The proposed first pleading of an intervenor is immaterial to a determination of whether a proposed intervenor has the right, or should be granted permission, to intervene. If the Proposed

Intervenors' Motion to Dismiss raises legitimate issues, it should be granted and the DOJ should have to comply with the law if it re-files. If the Motion to Dismiss is not proper, the Court will deny it. It is shocking that the DOJ has actually taken the position, that if Proposed Intervenors' intend to defend their rights, then they should not be permitted to intervene.

VII. INTERVENTION IS NECESSARY FOR THE PROPOSED INTERVENORS TO PURSUE THEIR LEGALLY PROTECTABLE INTERESTS

Both the DOJ and Commonwealth argue that Proposed Intervenors should be content with filling amicus briefs, in accordance with the Court's March 6, 2012 Order. [Dkt. # 28 at 22 and Dkt. # 27 at 13 (citing Dkt. # 22)]. Filing an Amicus Brief does not give Proposed Intervenors them standing as a party.

Tafas v. Dudas, 511 F. Supp. 2d 652, 660-61 (E.D. Va. 2007) expressly held that a district court "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"). While Tafas cautioned that "the mere fact that a non-party seeks to put forth an opinion in the case does not disqualify it as an amicus," it severely limited the ability of Amici to present arguments to the Court. Id. (citing Waste Mgmt., Inc. v. City of York, 162 F.R.D. 34, 36 (D. Pa. 1995)) (quoting U.S. 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)). The Tafas Court granted motions for leave to file amicus curiae briefs, but it 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).

While Proposed Intervenors appreciate that the option of Amicus briefs is available, Tafas v. Dudas makes it nearly impossible for Proposed Intervenors to assert all the relevant and necessary arguments. The DOJ and Commonwealth have intentionally avoided raising the legal issues and arguments that Proposed Intervenors are asserting. Further, while Proposed Intervenors trust that the Court has their best interest in mind, the Court should not be burdened with advocating for the Proposed Intervenors against the DOJ and Commonwealth. Intervention is the only mechanism that will ensure that Proposed Intervenors rights are protected.

VIII. CONCLUSION

For the foregoing reasons, the Proposed Intervenors request that the Court grant their motion for intervention pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, the Proposed Intervenors respectfully request that the Court grant permission to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on the 19th 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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