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 DEFENDANT'S OPPOSITION TO MOTION TO INTERVENE

Proposed Intervenors, by counsel, reply to the Defendant'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. THE PARTIES SETTLEMENT AGREEMENT DEPRIVES PROPOSED INTERVENORS OF THEIR LEGALLY PROTECTABLE RIGHTS

In its Brief in Opposition, the Commonwealth claims that "the proposed Settlement Agreement does not require the Commonwealth to close its state-operated Training Centers." On February 23, 2012 the Court held a status conference in this case. Exhibit A, Status Conference Transcript. According to the transcript from the status conference, the Commonwealth and the DOJ both admit 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 center 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 facilities after this consent decree is enforced. [Status Conf. Tr. at 50:9-15]. It is disingenuous for the Commonwealth 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 Commonwealth claims that the Proposed Intervenors "mischaracterize" and "misinterpret" the Agreement as eliminating the option of institutional care. To the contrary, the Proposed Intervenors have not misinterpreted 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 for the closure of the Training Centers, however, as the Court pointed out during the status conference, the General Assembly is bound by the threat of contempt if the waiver slots are not created and funded. The creation of waiver slots is a concrete term of the agreement, it is not just a plan to submit to the legislature. Thus, if the waiver slots are funded, it is unlikely that the budget would withstand the continued operation of the Training Centers. [Dkt. # 2-2 at 3; Status Conf. Tr. at 45:3-9]. In fact, it is clear from the statements made by Ms. Tysinger at the status conference what the true intentions of this Consent Decree are: to secure the closure of the Commonwealth's Training Centers. She states "I don't think this agreement does compel the General Assembly to fund these changes, Your Honor. Now, I think we'd have trouble if they didn't." [Status Conf. Tr. at 44:23-45:2]. In addition to the Commonwealth's comments, the Proposed Intervenors contend that this position is also firmly held by Governor McDonnell. In a letter that he wrote to the members of the General Assembly

on January 26, 2012, Governor McDonnell attempts to convince the General Assembly that the Settlement Agreement should be funded because it reflects the Commonwealth's long term goals. Exhibit B. In the letter, he states "the Commonwealth has been moving towards a community-based system of care for many years." The letter goes on to state "this settlement will accelerate those efforts." The Proposed Intervenors clearly have an interest in this litigation in that they are the subject of this letter and the target population of the Agreement. See, Settlement Agreement 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"). See also, Exhibit B at 3 ("The health, safety and well-being of individuals leaving the training centers are paramount.") In his letter to the General Assembly, the Governor admits that the residents of the Training Centers are the core of this settlement agreement thus giving them a sufficient interest for intervention. The intent of the Commonwealth is to obtain their long range goals through this Settlement Agreement which as the Court pointed out, the Commonwealth could attempt to do without the Agreement. However, once the Commonwealth entered into the Agreement and failed to take into account the rights of individuals who will undoubtedly be affected, the right to intervention was created. Governor McDonnell's letter to the General Assembly is evidence that the Commonwealth intends to bind the General Assembly with the Settlement Agreement by agreeing to terms that convert it to a consent decree, obtaining enforceability by the Court's powers of contempt, and thereby using the Agreement as a hammer to obtain the financial support which otherwise might not be available. Not surprisingly, many legislators have told their constituents that they understood the letter to mean that the agreement bound their hands and all they could do was vote for funds to implement it. Neither the governor nor any of his representatives chose to disabuse them of this notion.

The Proposed Intervenors have not misinterpreted this Agreement, just as they have not misinterpreted the statements made by Ms. Tysinger during the status conference or the confirmed state of affairs regarding the current budget. 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.

The Commonwealth has no support for its position that the Proposed Intervenors' interests are not impaired. The Commonwealth has refused to acknowledge the true ramifications of the Agreement in an attempt to prevent the Proposed Intervenors from asserting their own interests, which are substantially affected in this litigation. The Proposed Intervenors recognize that the Commonwealth has the ability to close the Training Centers under certain conditions or limitations, however, they do qualify for intervention if the Commonwealth misuses a Settlement Agreement to effectuate closure which does not provide adequate recognition and protection of the residents' rights under the ADA as interpreted by Olmstead v. L. C. by Zimring, 527 U.S. 581, 607 (U.S. 1999).

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 discharging them only pursuant to 42 CFR § 483.440(b)(4)(i) and in accordance with the ADA and Olmstead decision. 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 to the peril of Proposed Intervenors.

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 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 should 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 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 their 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 Commonwealth has inadequately represented that if it 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. # 27 at 6]. 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. # 2-2 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 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 be heard to argue that they are entitled to receive the services they currently receive at Training Centers. The DOJ and Commonwealth's effort 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.

In a misrepresentation of the standard by which the Court should assess the Motion to Intervene, the Commonwealth cites Benjamin v. PA Dept. of Pub. Welfare, 432 Fed. Appx. 94, 98 (3d Cir. Pa. 2011. [Dkt. # 27 at 6]. That case is 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 separate action that may be too late to fully protect their rights, 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, which is a similar situation to the case at hand. 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."

[1] Many journal articles in addition to those cited by Proposed Intervenors have covered this dilemma of unsafe conditions in community supported placements. See e.g., *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.

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:

> If 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 Commonwealth'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 intervention. 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 decision in Benjamin v. PA Dept of Pub. Welfare and the District Court decision in Ligas v. Maram.

The DOJ and Commonwealth both represent that they are entitled to deprive Proposed Intervenors of their rights and limit 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 Commonwealth to support its proposition. In fact, none of the cases cited by the Commonwealth were even decided subsequent to Olmstead. [Dkt. # 27 at 5].

Olmstead did recognize that states have limited resources and may allocate those resources as it deems fit. Olmstead, 144 L. Ed. 2d 540, 565. However, the proposed Settlement Agreement does not comport with that decision. Nothing in Olmstead or any other law gives the

DOJ and Commonwealth permission to surreptitiously take away Proposed Intervenors' rights. Olmstead clearly refers to limitations on the DOJ to compel allocation of state resources when that allocation will adversely impact others receiving or waiting to receive services. In this matter, the Commonwealth is not assessing the needs of its disabled citizens statewide and deciding how best to allocate resources. It has agreed to take away resources from Proposed Intervenors and use those resources to develop new programs at the direction of the DOJ.

The Commonwealth's position is also contrary to the ADA, which notes:

> 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;

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

The parties' position in this case literally discriminates against Proposed Intervenors solely because of the severity of their disabilities. The parties have agreed to eliminate services for current training center residents, who require extensive clinical and therapeutic services along with other supports, and take the funding from those discontinued services to develop new services for individuals with less severe disabilities, because theoretically more people could be served with that money. This is the type of bald discrimination that the ADA was intended to eliminate. The net result of the parties' plan is to leave the most fragile and needy Virginians with less appropriate services or potentially without basic 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. The Commonwealth represented at the Status

Conference that it intends to cease operations at its Training Centers. [Status Conf. Tr. at 50]. Yet, in its Opposition, the Commonwealth argues as if it has no such intentions. Proposed Intervenors must be given the right to intervene in this matter to ensure that they can protect their rights and interests, as it is clear that those interests are not represented by the present parties.[2]

Proposed Intervenors have not argued that the ADA or Olmstead creates a legal right to remain in a particular Training Center or to override the state's lawful decisions about closing its Training Centers. 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. The State Plans for Medical Assistance preclude 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

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

community based services. Services currently provided in the community are inadequate for current Training Center residents. See Exhibit C, Declaration of Dr. Adam Kaul.

III. 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 have a right to receive recommendations from their treating professionals as to whether or not they should be discharged from a Training Center prior to making a decision about whether to consent to discharge or oppose discharge from a Training Center. The Commonwealth conveniently fails to acknowledge that Proposed Intervenors have that right.

As noted recently by the District Court in U.S. v. Arkansas, where the DOJ sought to eradicate the Olmstead rights of residents of a state operated institution, "[t]here is no requirement that community based treatment be imposed on persons who do not desire it." U.S. v. Arkansas, 794 F. Supp. 2d 935, 982 (E.D. Ark. 2011) (citing Olmstead).

In this matter, if the Court enters the proposed Settlement Agreement, it would potentially abrogate Proposed Intervenors' rights provided by Olmstead and the ADA in this and other litigation in this district. The DOJ and Commonwealth simply want a different judgment than the Proposed Intervenors' treating professionals have already rendered. There has been no allegation in this matter that those treating professionals have failed to render such judgments. Yet, the proposed Settlement Agreement displaces Proposed Intervenors' rights provided in the ADA and 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's or a 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 to incorporate the recommendations of Proposed Intervenors' treating professionals. In its Opposition to Proposed Intervenors' Motion to Intervene, the Commonwealth represents that "the proposed Agreement also ensures the involvement of the individual's treating professionals." [Dkt.# 27 at 7]. That representation is

patently false. The phrase "treating professional" is not used anywhere in the proposed Settlement Agreement. The section cited by the Commonwealth 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 the Commonwealth's representation, this provision does not guarantee that Proposed Intervenors will have the unencumbered recommendations of their treating professionals. That 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 to the Proposed Intervenors.

IV. PROPOSED INTERVENORS' RIGHTS WILL BE IMPAIRED BY THE SETTLEMENT AGREEMENT IF INTERVENTION IS DENIED

The Commonwealth argues that the Proposed Intervenors' interests would not be impaired if intervention is denied. However, as part of its argument, it misconstrues the

Proposed Intervenors' stated interests and, thus, they have thwarted their own argument. To begin with, the Commonwealth cites to Benjamin v. Dept. of Pub. Welfare of Commonwealth, 432 Fed. Appx. 94, 98 (3d Cir. Pa. 2011) as support for their assertion that the Proposed Intervenors' rights would not be impaired if intervention was denied. However, as previously explained, Benjamin is not only distinguishable from this case and therefore not on point, but it is also not binding on this Court. 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. Here, the Proposed Intervenors are attempting to litigate a legally enforceable right that is adversely impacted by the Agreement between the DOJ and the Commonwealth. They seek to protect their right to remain in the institution where they currently reside until they consent to be moved and to be discharged only after appropriate judgments by treating professional judgments have been made.[3] Instead of filing a separate suit that may be less effective, and in the interest of judicial efficiency, these individuals have chosen to intervene in this litigation. The Benjamin court recognized that the intervenors in that case would have had a right to intervene if they were part of the affected class. Id at 98. Thus, since the Proposed Intervenors have shown that they will be affected by this Agreement, they are entitled to intervention in accordance with the Third Circuit decision in Benjamin.

The Commonwealth advances a side point that this Court cannot order the Commonwealth to close or continue operation of its Training Centers. [Dkt. #27 at 9]. However, as is stated in the Proposed Intervenors' brief in support of intervention, the interest advanced is not specifically to keep Virginia Training Centers open, but rather, to ensure the protection of the

[3] Community settings are by their nature unsafe, and many articles in addition to those cited by Proposed Intervenors 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.

Intervenors' rights under the ADA as interpreted by Olmstead v. LC, 527 U.S. 581 (1999). [Dkt. #20 at 6]. The Commonwealth has deliberately attempted to mischaracterize the interests set forth in the Proposed Intervenors' Motion to Intervene in an attempt to unfairly defeat intervention.

The Commonwealth urges that the disposition of this litigation cannot require closure of the Training Centers. Although this may be technically accurate, this fact alone is not the primary concern of the Proposed Intervenors. Rather, the interest of the Proposed Intervenors is to ensure that treating professionals will provide judgments as to where these individuals should receive services. The Settlement Agreement ignores residents' right to have treating professionals render judgments as to where these individuals should receive services most appropriate to their needs. Indeed, each resident is evaluated annually to determine treatment needs and whether the training center remains the most appropriate home. These annual evaluations by the residents' treating professionals have been largely ignored by this Settlement Agreement. The Complaint does not allege that treating professionals have failed to render such judgments, that any treating professionals disagree in their recommendations about where residents should receive services, or that treating professionals fail to communicate those judgments to residents and guardians, but rather, the Settlement Agreement and the Complaint are both silent on the right of residents to receive and to rely upon professional judgments as to the settings appropriate to meet their needs. The silence on the part of the DOJ and the Commonwealth demonstrates that the Proposed Intervenors must represent their own interests in this matter. In fact, Intervenors have a federally protected right to receive recommendations from treating professionals as to whether community placement is appropriate and to oppose that transfer, even if the proposed transfer is from "institutional" care to an appropriate community

setting. In fact, the Virginia Code incorporates this federal right: "Pursuant to regulations of the Centers for Medicare & Medicaid Services and the Department of Medical Assistance Services, no consumer at a training center who is enrolled in Medicaid shall be discharged if the consumer or his legally authorized representative on his behalf chooses to continue receiving services in a training center." Va. Code. Ann. § 37.2- 837(A)(3). [Dkt. #20 at 11-12].

In its Opposition, the Commonwealth states that the Agreement "ensures that treating professionals, as part of the personal support team, assist individuals in making placement choices." [Dkt. # 27 at 9]. This statement itself also demonstrates why the Proposed Intervenors' interests will necessarily be impaired if intervention is denied. The Proposed Intervenors challenge the Commonwealth to find even one (1) mention of the term "treating professional" in the Settlement Agreement, because this term does not appear at all. The Commonwealth has attempted to contract away the rights of individuals to receive the judgment of treating professionals before transfer. The Commonwealth apparently has the view, even though this is not even clearly stated in the Agreement, that treating professionals should perform their obligations to the Intervenors as part of a larger "personal service team" and somehow "assist individuals in making placement choices" which is contrary to the standard set forth in Olmstead. Further, it incorrectly implies that the Commonwealth can determine where an individual is adequately served better than the treating professionals. According to the Olmstead standard, the treating professionals 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 guardian does not oppose transfer, then the rest of the team can assist the individual with transfer. Olmstead v. L. C. by Zimring, 527 U.S. 581, 607 (U.S. 1999). The Commonwealth'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." Settlement Agreement at 11. This term of the agreement is silent on treating professional judgments. The Proposed Intervenors have a concrete interest in ensuring that language regarding their treating professional judgment be unequivocally inserted into the Agreement, since without this language, their rights under the ADA as interpreted by Olmstead may be violated. Furthermore, what "meets their needs" is often subjective. Such a subjective determination 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 them. It should not be the burden of this Court to determine whether this term of the Agreement is being followed. The Proposed Intervenors have a right to intervene because, without intervention, they have no way to ensure their health and safety.

The standard dictated by Olmstead will be changed by the Agreement into some inconsistent arbitrary system of quotas, numbers, and non-specifics, making it clear that the interests claimed by the Proposed Intervenors will be impaired if intervention is denied. The parties used almost three (3) pages of the Settlement Agreement to describe, in extensive detail, the waiver slots to be created under the agreement, even down to the minimum number of individuals to be supported in each year. However, when it came to addressing the rights of the residents of the Training Center, the agreement is conveniently too vague to be enforceable and is completely silent on treating professional judgments with regard to transfer. The rights of the Proposed Intervenors will be impaired if intervention is denied.

V. PROPOSED INTERVENORS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE PRESENT PARTIES

The Commonwealth and the Proposed Intervenors do not have the same interests or ultimate objectives in the litigation. This statement is supported by both the terms of the

Settlement Agreement and by statements made by counsel for the Commonwealth. [Status Conf. Tr. at 50:9-15]. The Commonwealth disingenuously argues that the continued operation of the Training Centers by the Commonwealth is not at issue in this litigation and cannot be addressed by this Court. To the contrary, one of the key purposes of the Settlement Agreement is to downsize and eventually eliminate the five (5) Training Centers within the Commonwealth. This political push can be seen in the plethora of state documents and by the DOJ's involvement in ARC of Virginia v. Timothy Kaine, 2009 WL 4884533 *7 (E.D.Va. December 17, 2009). It is and always has been the aim of the DOJ to close large ICF/MR facilities. This political agenda is also advanced by the Association for Retarded Citizens ("ARC"), who in many cases work side-by-side with the DOJ to effectuate this end. In ARC of Virginia v. Timothy Kaine, the DOJ intervened to advance the same agenda as ARC to stop the appropriation of funds for a new ICF/MR facility in Virginia.

The Commonwealth's interpretation of the pertinent laws, particularly the ADA as interpreted by Olmstead, are at odds with those of the Intervenors. The position of the Commonwealth, that there is no need for state operated ICF/MR facilities is also in conflict with that of the Intervenors who believe that there is a significant need for these facilities to provide services. The Commonwealth also holds the position that the rights of the Intervenors to receive the judgment of a treating professional before discharge is not meaningful enough to be recognized in the Agreement. This is in direct conflict with the position of the Intervenors who believe that if the Settlement Agreement specifically addresses the creation of waiver slots, the transfer of funds from ICFs/MR to community programs, and the closure of ICF/MR facilities, it should also sufficiently describe the right to receive the judgment of treating professionals with regard to whether any resident can handle or benefit from an alternative setting.

The Commonwealth 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)).

The Commonwealth goes on to allege that they believe that residents "should not be forced into placements that are not appropriate to meet their needs" and that they "fought for these very principals." [Dkt. # 27 at 10]. However, Proposed Intervenors contend that they were continuously mislead by the Commonwealth, prior to the day the Settlement Agreement was filed, as the Commonwealth was consistently informing residents and their guardians that only one Training Center would be closing as a result of the DOJ investigation and negotiations.

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.

It has already been shown by the terms of the Agreement that it inadequately represents the interests of Training Center residents and that many of the terms have no way of even 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). The Commonwealth's Opposition to Proposed Intervenors' motion for permissive intervention appears to misunderstand the procedural posture of this matter. The Commonwealth's argument focuses on the allegations in the DOJ's Complaint and fails to mention that there is a proposed Settlement Agreement before the Court. The Commonwealth incorrectly represents that because the DOJ's Complaint could be read to exclude some Proposed Intervenors, Proposed Intervenors should not be granted permission to intervene. [Dkt. # 27 at 12]. The Commonwealth's position is untenable. The Commonwealth is trying to bargain away Proposed Intervenors' rights in the proposed Settlement Agreement. It cannot ignore that reality by acting like the Settlement does not exist. As discussed in Proposed Intervenors' moving brief and above, Ligas v. Maram makes clear that where a proposed Settlement Agreement implicates the rights of residents of a state operated institution, those residents should be granted intervention. The Commonwealth's position reinforces Proposed Intervenors' fears: namely, that it either does not know that it is eradicating Proposed Intervenors' rights or it does not care. In either scenario, it is clear that the Commonwealth has not adequately represented Proposed Intervenors' interests.

The Commonwealth also argues that if Proposed Intervenors are granted intervention it could potentially encourage other individuals with disabilities to seek intervention. [Dkt. # 27 at 13]. That possibility is simply not a valid reason to deny Proposed Intervenors' Motion. Further, the DOJ already admittedly represents the interests of "the thousands of other interested Virginians affected by this Agreement." [Dkt. # 28 at 22]; See also Proposed Intervenors' Reply to DOJ Opposition.

The Commonwealth cites Westinghouse Elec. Corp. to support its position, but that case does not support the Commonwealth's strained conclusion. See [Dkt. # 27 at 13(citing Westinghouse Elec. Corp., 542 F.2d 214, 217).] In Westinghouse, the Commonwealth sought intervention, but was denied. The page of that decision cited by the Commonwealth in its Opposition to Proposed Intervenors explains the reason for denying the Commonwealth intervention:

> In addition to the near identity of interests, the near duplication of pleadings, and Virginia's concession at oral argument [Virginia conceded at oral argument that its primary concern lies with being a party to settlement negotiations and that its interests was adequately represented by the Plaintiff should the case proceed to trial.], we also must consider the potential unmanageability of the VEPCO-Westinghouse litigation should we allow intervention. At least thirteen other states are possible litigants. It is not unlikely that Virginia's success would provide the incentive for other states to seek intervention. The resultant complexity of the litigation, combined with increases in cost and judicial time, would hinder resolution of the present conflict. The trial court, deluged with additional briefs and pleadings, would be provided with no new viewpoints and little if any illumination to the original Westinghouse contracts disputes.
>
> Our conclusion is, and must be, that since Virginia did not show that its interests would be impaired or impeded by denying intervention, and did not show the inadequacy of the representation of its interests by the existing parties, the trial judge correctly exercised his discretion in denying intervention. The decision of the district court is affirmed.

Virginia v. Westinghouse Electric Corp., 542 F.2d 214, 216-217 (4th Cir. Va. 1976)

Unlike the Commonwealth in Westinghouse, Proposed Intervenors' interests have been represented nowhere in the instant matter. As noted in Proposed Intervenors' Reply to the DOJ's Opposition, the DOJ is representing disabled individuals who do not reside in the Training Centers. Based on the Commonwealth's position in its Opposition, it doesn't even know that it is giving away Proposed Intervenors' rights in its Settlement Agreement. See [Dkt. # 27 at 12 (arguing that because the DOJ Complaint could be read to exclude the Proposed Intervenors, the

Proposed Intervenors should not be allowed to intervene and failing to understand or acknowledge that the Settlement Agreement does implicate Proposed Intervenors' rights)]. The Westinghouse case is also much different from the instant matter because the proposed intervention in this matter will serve judicial economy. If Proposed Intervenors are denied intervention in this matter, they will have to initiate separate litigation against the Commonwealth to ensure that they rights are protected as the Commonwealth implements its Settlement Agreement. Allowing intervention now will expedite resolution of those substantive claims. If intervention is permitted now, the DOJ, the Commonwealth, and the Proposed Intervenors can obtain clear guidance on the limits of their respective rights and interests.

The Commonwealth's misunderstanding of Westinghouse is typical of its position in this case. Just like the Commonwealth has agreed to a Settlement Agreement that will take away Proposed Intervenors' federally protected individual rights, the Commonwealth appears to misunderstand the Proposed Intervenors' interests in this matter too.

The Commonwealth argues that because Proposed Intervenors have submitted a Motion to Dismiss with their Motion to Intervene, the Proposed Intervenors should be denied intervention. [Dkt. # 27 at 13]. 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. Like its misunderstanding of Westinghouse, the Commonwealth appears to simply want to avoid acting within the bounds of the law. 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 an action. If the Motion to Dismiss is not proper, the Court will deny it. The Commonwealth has taken the untenable position that if Proposed Intervenors intend to defend their rights then they should not be permitted to intervene.

Like the DOJ, the Commonwealth does not identify any prejudice that it, as a party, will incur if the Court grants Proposed Intervenors' permissive intervention. Instead, the Commonwealth blurs its interest as a party with the interests of the individuals outside the Training Centers to whom it seeks to extend services.

The DOJ and Commonwealth's misrepresentations in their respective Oppositions to Proposed Intervenors is further evidence that the DOJ and Commonwealth are not representing Proposed Intervenors' interests. In fact, it is even more apparent now after responses that the DOJ and Commonwealth's interests are significantly adverse to the Proposed Intervenors' 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)]. However, 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)). Tafas 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 fully assert all the relevant and necessary arguments. The DOJ and Commonwealth have attempted to avoid raising the very legal issues and arguments that Proposed Intervenors are now seeking to assert. Further, while Proposed Intervenors trust that the Court has their best interest in mind, the Court should not be burdened with advocating the interests of the Proposed Intervenors against the DOJ and Commonwealth. Intervention is the only mechanism that will ensure that the Proposed Intervenors' rights are protected.

VII. 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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