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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	**CIVIL ACTION 3:12-cv-059**
	:	
v.	:	
	:	
COMMONWEALTH OF VIRGINIA,	:	**MOTION TO INTERVENE**
	:	**Fed. R. Civ. R. 24**
Defendant.	:	

Proposed Intervenors, PEGGY WOOD, by and through her father, Wriley Wood; BARBARA SUSAN FALLIS, by and through her father, Charles Fallis; TAMI LASSITER, by and through her father, Arnold Lassiter; TERESA KOURY, by and through her sister, Lorraine Koury; JONATHON SPEILBERG, by and through his father, Howard Spielberg; MARINDA LEWIS, by and through her father, Charles Lewis; ADAM SAMUEL BERTMAN, by and through his mother, Judith Korf; JASON KINZLER, by and through his mother, Jane Anthony; KEVIN PATRICK MORAN, by and through his mother, Mary Jane Moran; NEAL HAMPTON, by and through his Mother, Loretta Evans; SEAN JOHNSON by and through his mother Alice Johnson; KENT OLSEN, by and through his father, Kent Olsen and AMBER ROBINSON, by and through her father, Wade Robinson, (hereinafter collectively referred to as the "Proposed Intervenors") respectfully submit this Motion to Intervene, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for an Order allowing the Proposed Intervenors to intervene in the above-captioned matter, and aver the following:

BACKGROUND

1. The Proposed Intervenors are residents of the five (5) training centers in the Commonwealth of Virginia whose rights are affected by this action. Not only do the Proposed

Intervenors reside in the training centers, but they have chosen to reside at the training centers. The Proposed Intervenors require the services at the training centers and are being served in the least restrictive setting appropriate to their needs.

2. On January 26, 2012, Plaintiff, the United States of America, through the Department of Justice, Civil Rights Division (hereinafter referred to as the "DOJ"), filed a Complaint in the United States District Court for the Eastern District of Virginia against the Commonwealth of Virginia (hereinafter referred to as the "Commonwealth"), alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134. [Dkt. #1, Complaint ¶ 12]. The DOJ alleged that the Commonwealth was "violating the ADA by unnecessarily institutionalizing, and placing at risk of unnecessary institutionalization, individuals with ID/DD throughout Virginia." [Dkt. #1, Complaint ¶ 14]. That Complaint seeks declaratory relief and injunctive relief. Id. ¶ 44-45.

3. On the same day, the original parties filed a Joint Motion for Entry of a Settlement Agreement. [Dkt. #1, Complaint ¶15] (stating "the parties have reached a settlement agreement to resolve these claims and simultaneously are filing a 'Joint Motion for Entry of Settlement Agreement and Brief in Support Thereof'").

4. Among other things, the proposed settlement agreement requires the closure of four (4) training centers and thus requires the cessation of services at those training centers. [Dkt. #2-2, Settlement Agreement at 11 ¶9].

5. The Proposed Intervenors have a meaningful and concrete interest in their own care and their legally protectable rights, and therefore have an interest in this action. Notwithstanding the DOJ's claim that appropriate care can only be provided by community-based programs, the Proposed Intervenors believe that persons with intellectual disabilities

should receive the care and services they require in a setting appropriate to each individual's unique needs, be it an Intermediate Care Facility for the Mentally Retarded ("ICF/MR") or an alternative setting. The Proposed Intervenors object to this action being allegedly prosecuted on their behalf when they do not seek the results that the DOJ has agreed to in the settlement agreement. Further, the Proposed Intervenors object because this action implicates their federally-protected rights and the settlement agreement executed by the original parties will deprive the Proposed Intervenors of these rights.

6. Pursuant to the settlement agreement, the Commonwealth of Virginia is required to discharge individuals from the training centers, but it is silent on the legally-required determinations by treating professionals of the most appropriate setting to meet the needs of the Proposed Intervenors, and silent on the legally-recognized rights of parents and guardians to oppose transfer or discharge.

7. If the settlement agreement were to be approved, the Proposed Intervenors would be transferred or discharged from the training centers without regard for the rights afforded them by the ADA, the decision in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), and other relevant law.

GROUNDS FOR INTERVENTION AS OF RIGHT

8. A movant is entitled to intervention as of right where: (a) the motion is timely, (b) the intervenor claims an interest relating to the property or transaction that is the subject of the action; (c) the intervenor is so situated that disposing of the action may as a practical matter impair or impede his ability to protect the interest; (d) existing parties do not adequately represent that interest. Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989); Fleming v.

Citizens for Albemarle, Inc., 577 F.2d 236 (4th Cir. 1978), see also, JLS, Inc. v. Pub. Serv. Comm'n of W. Virginia, 321 F. App'x 286, 289 (4th Cir. 2009).

9. The Proposed Intervenors respectfully submit that this request for intervention is timely because the case is in its initial pleadings stage, in that the Complaint was just recently filed and because the intervention will not significantly expand the issues to be litigated. Scardelletti v. Debarr, 265 F.3d 195, 203 (4th Cir. 2001); Media Gen. Cable of Fairfax, Inc., v. Sequoyah Condo Council of Co-Owners, 721 F. Supp. 775, 780 (E.D.Va. 1989). Further, no discovery has occurred yet in this case. See e.g., Cox Cable Communications, Inc., v. United States, 699 F. Supp. 917, 924 (M.D. Ga. 1988).

10. The Proposed Intervenors have a concrete, legally protectable interest in their own care (in particular, the availability of ICF/MR care), which is implicated in this litigation, particularly by the settlement agreement entered into by the parties. Dairy Maid Dairy, Inc. v. United States, 147 F.R.D. 109 (E.D. Va. 1993). Specifically, they are all residents of ICFs/MR who do not wish to be forced into community-based care. Ligas v. Maram, 2010 U.S. Dist. LEXIS 34122, 12 (N.D. Ill. Apr. 7, 2010). The Proposed Intervenors have rights afforded them by the ADA to receive services in the most appropriate setting for their needs. They also have rights recognized by the Olmstead decision to be transferred or discharged only upon the recommendation of treating professionals and where such transfers or discharges are not opposed by the residents or their guardians. Olmstead at 587.

11. The settlement agreement, if approved, will impair or defeat the rights of the Proposed Intervenors to choose ICF/MR care, as well as their rights to be discharged in compliance with the ADA and the Olmstead decision. The Proposed Intervenors will, as a practical matter, be bound by the terms of the settlement in this case. Additionally, the Proposed

Intervenors will suffer substantial harm if the settlement agreement were adopted and they were forced into community supported living against their wishes or inconsistent with professional judgment. JLS, Inc. v. Pub. Serv. Comm'n of W. Virginia, 321 F. App'x 286, 289 (4th Cir. 2009). Because both the DOJ and the Commonwealth seek to force all training center residents to "choose" community-based care, whereas the Proposed Intervenors wish to protect their rights to choose appropriate treatment in an ICF/MR setting, the original parties lack the ability to adequately represent the interests of the Proposed Intervenors. Furthermore, the Commonwealth, which appears to acquiesce in assertion by the DOJ that community placement is appropriate for all persons residing in the state-operated ICFs/MR, cannot adequately represent the interests of the Proposed Intervenors. Additionally, as a matter of law, the DOJ does not represent the interests of any of the residents in the training centers. See, 42 U.S.C. § 1997; H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 13, reprinted in 1980 USCCAN 837.

12. The original parties do not adequately represent the interests of the Proposed Intervenors because (a) they lack the substantive knowledge as to treating professionals' judgments concerning appropriate placement for the residents at the training centers at issue as well as whether residents or their guardians would oppose discharge to alternative settings, (b) as government agencies, they represent, at best, only the public interest as a whole and not the specific interests of the Proposed Intervenors, JLS, Inc., 321 F. App'x at 289; and (c) they have settled on terms unfavorable to the Proposed Intervenors, including failing to raise issues associated with the appropriateness of care of residents in ICFs/MR as well as rights afforded them by the ADA and the Olmstead decision. [Dkt. #2-2, Settlement Agreement at 11].

ALTERNATIVE GROUNDS FOR INTERVENTION

13. In the alternative, should the Court deny this motion for intervention as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, the Proposed Intervenors move this Court for an Order, pursuant to Rule 24(b), allowing them to permissively intervene.

14. Federal Rule of Civil Procedure 24(b) permits, upon timely motion, permissive intervention when the party seeking intervention "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). Permissive intervention lies within the discretion of this Court. Hill v. W. Elec. Co., Inc., 672 F.2d 381, 385-86 (4th Cir. 1982).

15. The Motion to Intervene is timely because (1) the case is in its initial pleadings stage in that the Complaint was filed recently; (2) the intervention will not significantly expand the issues to be litigated (see, Media Gen. Cable of Fairfax, Inc., v. Sequoyah Condo Council of Co-Owners, 721 F. Supp. 775, 780 (E.D.Va. 1989)); and (3) no discovery has occurred yet in this case. See, e.g., Cox Cable Communications, Inc., v. United States, 699 F. Supp. 917, 924 (M.D. Ga. 1988).

16. The Proposed Intervenors share a common question of law or fact with the main action because they are residents of the training centers at issue and set forth a question of whether the pending settlement agreement will protect their rights under the ADA as set forth in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), including whether community-based care is in fact desired by all of the residents of the five (5) training centers in the Commonwealth.

CONCLUSION

In support of this Motion, the Proposed Intervenors submit the accompanying Memorandum of Law and, attached as Exhibit A, their proposed Motion to Dismiss pursuant to Rule 24 of the Federal Rules of Civil Procedure.

WHEREFORE, Proposed Intervenors respectfully request that this Court grant their Motion to Intervene as of right, or, alternatively, Proposed Intervenors respectfully request that this Court exercise its discretion to grant permissive intervention.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on the 2nd 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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