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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION NO: 3:12CV059**
v.	)	
	)	
COMMONWEALTH OF VIRGINIA,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Comes now the Defendant, the Commonwealth of Virginia ("Commonwealth"), by counsel, and opposes Proposed Intervenors' ("Applicants") motion to intervene. Defendant asks this Court to deny the Applicants' Motion to Intervene and in support thereof, states as follows:

I. STATEMENT OF FACTS

On August 21, 2008, the United States, through its Department of Justice, initiated an investigation of Central Virginia Training Center pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997. On April 23, 2010, the United States expanded its investigation to determine whether the Commonwealth violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., by discriminating against individuals with developmental disabilities. The United States issued a findings letter to the Commonwealth on February 10, 2011, alleging that the Commonwealth failed to provide services to individuals with developmental disabilities in the most integrated setting appropriate to their needs in violation of the ADA.

After receipt of the findings letter, the Commonwealth engaged in negotiations with the United States in an effort to reach an amicable resolution of the United States' claims to avoid complex and costly litigation. After almost a year of negotiations, a settlement agreement between the parties was reached. On January 26, 2012, the United States filed the Complaint in this case and simultaneously filed the parties' Joint Motion for Entry of the Settlement Agreement. Applicants now seek to intervene.

II. APPLICANTS' MOTION TO INTERVENE SHOULD BE DENIED

In order to intervene as of right, the Applicants must show an interest sufficient to merit intervention, that without intervention their interest may be impaired, and that the present litigants do not adequately represent their interests. Fed. R. Civ. P. 24(a)(2); *Commonwealth of Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). All three prongs of this standard must be met to establish a right to intervene. *Id.*; *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 110 (E.D. Va. 1993).

Permissive intervention may be granted when an applicant's claim or defense and the main action have a question of law or fact in common. Fed. R. Civ. P. 24(b)(1)(B). Granting of permissive intervention lies within the sound discretion of the Court and in making a determination regarding intervention, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b)(3); *Allen v. County School Board of Prince Edward County*, 28 F.R.D. 358, 363 (E.D. Va. 1961).

Applicants are residents of the Commonwealth's five state-operated ICFs/MR, commonly referred to as Training Centers. Applicants contend that they have a right to intervene pursuant to Fed. R. Civ. P. 24(a)(2) because they have an interest in the subject matter of this litigation based on their status as residents of the Training Centers. Applicants further contend that the

disposition of the litigation will impair their ability to protect that interest, and the Commonwealth does not adequately represent their interests. In the alternative, the Applicants assert that they should be allowed to permissively intervene because there is a common question of law or fact with the main action based on their status as residents of the Training Centers.

Because the Applicants do not have a legal interest in the subject matter of this litigation and their ability to protect their purported interest will not be impaired by the disposition of this case, they are not entitled to intervention as of right. Moreover, permissive intervention is also not warranted because the Applicants do not have a claim or defense with a question of law or fact in common with the case and intervention would create delay and hinder the resolution of the litigation. In addition, denial of intervention would in no way prejudice the interests asserted by the Applicants.

A. Applicants Are Not Entitled to Intervention as of Right

1. Applicants Do Not Assert an Interest Sufficient to Warrant Intervention as of Right

The nature of an interest that is sufficient to entitle an applicant to intervention as of right is not defined in Fed. R. Civ. P. 24(a)(2). The United States Court of Appeals for the Fourth Circuit has held that "the only interest that will entitle an applicant to the right of intervention is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights." *Radford Iron Co., Inc. v. Appalachian Electric Power Co.*, 62 F.2d 940, 942 (4th Cir. 1933), *cert. denied*, 289 U.S. 748 (1933); *See also Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of America*, 3 F.R.D. 251, 253 (1943). The United States Supreme Court has stated that it is a significantly protectable interest. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). It is well-established that a mere general interest is not a protectable interest. *Dairy Maid*, 147 F.R.D. at 111; *NISH and Goodwill Services, Inc. v.*

Cohen, 191 F.R.D. 94, 96 (2000). To be protectable, the interest claimed must bear a close relationship to the dispute between the existing litigants and must be direct, rather than remote or contingent. *Id*.

Applicants move to intervene to protect their interest in their own care and specifically the availability of ICF/MR care provided by the state-operated Training Centers. They argue that the proposed Settlement Agreement requires the closure of four of the Commonwealth's Training Centers and would cause their discharge or transfer in violation of their rights under the ADA, *Olmstead v. L.C. ex rel. Zimring*[1], and Virginia Code § 37.2-837(A)(3). It is clear that Applicants seek to challenge closure of the Training Centers through intervention. Applicants misinterpret and mischaracterize the proposed Settlement Agreement in an attempt to derive a significantly protectable interest. Ultimately, Applicants fail to express an interest that entitles them to intervention.

Contrary to the assertions of Applicants, the proposed Settlement Agreement does not require the Commonwealth to close its state-operated Training Centers. It only requires the Commonwealth to provide to its General Assembly a plan to cease residential operations at four of the five Training Centers. Implementation of the plan is not required by the proposed Settlement Agreement. In fact, the United States has no authority, through the proposed Settlement Agreement or otherwise, to force the Commonwealth to close its state-operated institutions and as this Court recognized in its Order dated March 6, 2012, it has no authority to order closure. Ultimately, the decision regarding closure of the Training Centers rests with the Commonwealth's Governor and General Assembly.[2] *See Baccus v. Parrish*, 45 F.3d 958, 961 (5th

[1] 527 U.S. 581 (1999).

[2] A state must administer services with an even hand and judicial deference should be given to the discretion of the state in determining the manner in which it allocates its resources. *Olmstead*, 527 U.S. 581, 597 (1999); *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring in judgment); *Arc of Virginia, Inc., v. Kaine*, 2009 U.S. Dist. LEXIS

Cir. 1995) ("The state reserves the right to unilaterally close a state school [for individuals with developmental disabilities] for administrative or financial reasons, even if it means that certain residents will have to relocate as a result."); *Lelsz v. Kavanagh*, 783 F. Supp. 286, 298 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir. 1993), *cert. denied*, 510 U.S. 906 (1993) ("[T]he state has always possessed the power and frequently exercises the power to relocate its residents for its own administrative needs. If it so desired, the state could unilaterally close any of the state [ICFs/MR] for economic reasons or otherwise.").

It should also be noted that Applicants do not have a right or an entitlement to care in a state-operated Training Center[3]. Although the Supreme Court in *Olmstead* recognized that the ADA does not require a state to close its state-operated institutions, it did not say that a state was required to maintain such institutions either. Applicants have not pointed to any law that requires states to operate ICFs/MR or that gives them a right to receive services from a particular service provider[4] because they cannot do so. To the contrary, federal law does not give Applicants the right to reside in a particular facility. *See Rolland v. Patrick*, 562 F. Supp. 2d 176, 185 (D. Mass. 2008), *aff'd sub nom.*, *Voss v. Roland*, 592 F.3d 242 (1st Cir. 2010); *Leslz*, 783 F. Supp. at 298; *Bruggeman v. Blagojevich*, 324 F.3d 906, 910-11 (7th Cir. 2003); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980). While Virginia Code § 37.2-

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117677, *17 (E.D. Va. 2009). It cannot be ignored that there are approximately 7,100 individuals on the Commonwealth's waiting lists for community services under the Home and Community Based Services Waiver. Currently there are 1,018 individuals residing in the Commonwealth's Training Centers. The average number of long-term admissions to all five of the Training Centers has been only 13 per year. *See Backgrounder: A Brief History and Background on Virginia's Developmental Disability System*, *at* http://www.DBHDS.Virginia.Gov/settlement/ID-DDSystem.pdf.

[3] Under current Virginia law, admission to a Training Center is not absolute. The Training Center must first approve the admission by finding that there is available space and service capacity to meet the needs of the individual. *See* Virginia Code § 37.2-806(B); 12 VAC 35-190-30.

[4] A Medicaid recipient has the right to choose whether to receive services through an ICF/MR or a Home and Community Based Services Waiver. 42 U.S.C. § 1396n(c)(2)(C); 42 C.F.R. § 441.302(d). The Medicaid Act provides that an individual eligible for medical assistance may obtain such assistance from any institution, agency, community pharmacy, or person qualified to perform the services who undertakes to provide such services. 42 U.S.C. § 1396a(a)(3)(A). Pursuant to 42 C.F.R. § 431.51(b)(1)(ii), a Medicaid recipient may receive services from any institution, agency, pharmacy, person, or organization that is willing to furnish them to that particular recipient.

837(A)(3) states that no consumer in a Training Center who is a Medicaid recipient may be discharged if he or his authorized representative chooses continued placement, it in no way requires the continued operation of the Training Centers. Applicants' desire for the continued state operation of the Training Centers and their continued placement in the Training Centers is not a legal or significantly protectable interest sufficient to entitle them to intervention. *See Benjamin v. Department of Public Welfare*, 432 Fed. Appx. 94, 99 (3rd Cir. 2011); *Richard C. v. Houstoun*, 196 F.R.D. 288, 292 (W.D. Pa. 1999), *aff'd*, 229 F.3d 1139 (3rd Cir. 2000).

The proposed Settlement Agreement also does not in any way prohibit ICFs/MR. Instead, the proposed Agreement clearly states that the Commonwealth shall serve individuals in the most integrated setting consistent with their informed choice and needs. *See* Sections III.A; III.C.6.b.iii.C; III.D.1; III.D.2; III.D.4; III.D.5; III.D.6; III.E.2; IV.A; IV.B.5; IV.B.9; IV.B.10; IV.C.6; V.A; V.D.1; and V.I.2 of the proposed Settlement Agreement. The Agreement simply ensures that individuals are not served in congregate settings, whether sponsored homes, group homes or ICFs/MR, unless it is consistent with their choice and in some cases reviewed to ensure that informed choice was offered. *See* Sections III.D.5 and 6, and IV.C.6 of the proposed Settlement Agreement. Under the proposed Settlement Agreement, Applicants will continue to maintain their choice to receive services in any willing ICF/MR. Because the proposed Settlement Agreement is replete with language of choice, Applicants cannot show an interest in the litigation that justifies intervention as of right. *See Benjamin v. Department of Public Welfare*, 267 F.R.D. 456, 462 (M.D. Pa. 2010), *aff'd*, 432 Fed. Appx. 94 (3rd Cir. 2011).

Applicants further argue that the proposed Settlement Agreement will force their discharge from the Training Center without regard to the opinions of their treating professionals. This is simply untrue. The Agreement does call for the creation of waiver slots to enable

individuals residing in the Training Centers to transition to the community. Nothing in the Agreement requires those waiver slots to be used or requires any particular individual to accept a created waiver slot. If created waiver slots are unused, the proposed Agreement permits the re-allocation of those unused slots to individuals on the urgent wait list. *See* Section III.C.4 of the proposed Settlement Agreement.

The proposed Agreement also ensures the involvement of the individual's treating professionals. Discharge planning will be performed by the individual's personal support team, made up of the individual and his authorized representative, Training Center staff including treating professionals, and the community services board case manager. This team will assess an individual's treatment, training, and habilitation needs and make recommendations for services. *See* Section IV.B.6 of the proposed Settlement Agreement. Specific options for services will be recommended by the personal support team and the team will assist the individual in choosing a provider. *See* Section IV.B.9 of the proposed Settlement Agreement. The personal support team is not prohibited from making a recommendation for continued placement in a Training Center. *See* Section IV.B.14 of the proposed Settlement Agreement.

Finally, Applicants argue that they have an interest in protecting themselves from harm. However, the proposed Settlement Agreement will ensure that the Commonwealth improves its quality and risk management system. The system is designed not only to protect individuals from harm but to also ensure that appropriate services are available for all individuals. *See* Section V.A of the proposed Settlement Agreement. All providers of services, including Training Centers, community ICFs/MR, and community providers, must establish risk management systems to address harms and risks of harm. *See* Section V.C.1 of the proposed Settlement Agreement. The Commonwealth must also implement a process to investigate and

remediate suspected abuse and neglect. *See* Section V.C.3 of the proposed Settlement Agreement. Data will be collected from providers of services, case managers and the Office of Licensing of the Commonwealth's Department of Behavioral Health and Developmental Services to identify trends, strengths and problems at individual and systemic levels regarding quality of services and areas where service gaps exist. *See* Section V.D.2 of the proposed Settlement Agreement. Regional Quality Councils will be established by the Commonwealth to assess the data and recommend actions for improvement. *See* Section V.D.5 of the proposed Settlement Agreement.

Applicants have a general interest in the outcome of this litigation in the same respect that all other citizens of the Commonwealth with developmental disabilities do. Applicants' general interest in their own health care and protecting themselves from harm is insufficient to warrant intervention as of right. *See Benjamin*, 267 F.R.D. at 462. If it were, all individuals with developmental disabilities would have a similar right. Applicants' specific concerns focus on the possible closure of the Training Centers and their understandable apprehension of being forced from their current Training Center placements. As this Court does not have the authority to order the Training Centers to close or remain open, Applicants do not stand to gain or lose by the direct legal operation of the Court's judgment in this case. *See Teague v. Bakker*, 931 F.2d 259, 261 (1991). As such, their interests are not direct and do not bear a close relationship to the litigation between the existing parties. *Dairy Maid*, 147 F.R.D. at 111; *NISH*, 191 F.R.D. at 96. Thus, Applicants fundamentally do not have a significantly protectable or legal interest entitling them to intervention as of right.

2. Applicants Alleged Interests Will Not Be Impaired by Denying Intervention

As argued above, Applicants do not have a legally protectable interest that warrants intervention as of right. Thus, their alleged interest cannot be placed in jeopardy by this litigation because the interest they allege is not implicated in this case. *See Benjamin*, 267 F.R.D. at 462.

Even if this Court finds that Applicants' interest for continued placement at the Training Centers is sufficient to support intervention as of right, Applicants cannot show that their interests will be impaired if they are denied intervention. As stated above, this Court cannot order the Commonwealth to close or continue operation of its Training Centers. Because the future of the Training Centers rests solely with the Commonwealth's Governor and General Assembly and is outside the scope of the present litigation, Applicants can protect their interests by advocating their position with the Governor and General Assembly members.

The disposition of this litigation, either by entry of the proposed Settlement Agreement or other Court order, cannot require closure of the Training Centers and will in no way affect Applicants' ability to advocate for their position. *See Lelsz*, 783 F. Supp. at 298. Thus, Applicants' alleged interest in continued placement in the Training Centers will not be impaired if intervention is denied. *See Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510, 515 (2007).

In addition, the proposed Settlement Agreement in no way prohibits the Applicants from choosing to receive services in an ICF/MR and ensures that treating professionals, as part of the personal support team, assist individuals in making placement choices. Similarly, the proposed Settlement Agreement will significantly improve the Commonwealth's quality and risk management system thereby ensuring individuals with disabilities greater protection from harm. Therefore, Applicants' general interest in their own health care and protection from harm is not

impaired. *See Benjamin*, 478 F.3d at 774; *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007).

3. The Commonwealth Adequately Represents the Interests of the Applicants

Although the burden of demonstrating inadequate representation is minimal, a presumption of adequacy of representation exists if the Applicants and the Commonwealth have the same interest or ultimate objectives in the litigation. *NISH and Goodwill Services*, 191 F.R.D. at 97; *Dairy Maid*, 147 F.R.D. at 112. The Commonwealth and the Applicants share the same interpretation of the ADA and *Olmstead* that a state cannot be forced to close its institutions. The Commonwealth also shares the Applicants' position that individuals with developmental disabilities should not be forced into placements that are not appropriate to meet their needs or are inconsistent with individual choice. During settlement negotiations, the Commonwealth vigorously fought for these very principles. In fact, the proposed Settlement Agreement contains abundant language promoting the provision of services in the most integrated settings appropriate to individuals' needs and consistent with their informed choice after receiving options for services. *See* Sections III.A; III.C.6.b.iii.C; III.D.1; III.D.2; III.D.4; III.D.5; III.D.6; III.E.2; IV.A; IV.B.5; IV.B.9; IV.B.10; IV.C.6; V.A; V.D.1; and V.I.2 of the proposed Settlement Agreement.

The Commonwealth also agrees with Applicants that a continuum of care, including ICFs/MR, should be available to individuals with developmental disabilities. As stated previously, the proposed Settlement Agreement does not prohibit the provision of services in an ICF/MR, and the Commonwealth would defend against attempts to prohibit the ICF/MR level of care.

The only area in which the Commonwealth may diverge from the views of the Applicants is with respect to the future of the Training Centers. As argued above, the continued operation of the Training Centers by the Commonwealth is not at issue in this litigation and cannot be addressed by the Court. Additionally, Applicants do not have a legal interest in the continued state-operation of the Training Centers. Thus, the fact that the Commonwealth's position with respect to the Training Centers may differ from that of the Applicants does not affect the Commonwealth's ability to adequately represent the interests of the Applicants in this particular case and is not sufficient to overcome the presumption of adequacy of representation. With respect to the interpretation of the pertinent laws governing this case and the interests and objectives that can be addressed by this litigation, the Commonwealth's interpretation of the pertinent laws and positions are not sufficiently different from or at odds with those of the Applicants. *See Cooper Technologies*, 247 F.R.D. at 516; *NISH and Goodwill Services*, 1191 F.R.D. at 97.

Applicants do not allege collusion between the parties or malfeasance. No collusion occurred. Negotiations were conducted at arms' length and continued over the course of close to a year. Both parties vigorously represented their positions and there were at least two occasions where negotiations reached an impasse causing both sides to stop communicating.[5] As the Seventh Circuit has recognized, a consent decree may be the inescapable legal consequence of application of fundamental law to the facts. The fact that Applicants would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the Commonwealth failed to adequately represent their interest. *United States v. Board of*

[5] It is doubtful that Applicants' counsel could make a good faith allegation of collusion. Counsel for the Commonwealth contacted Applicants' counsel to discuss his representation of the Commonwealth should the case proceed to trial. In the two instances where negotiations stalled and the parties stopped communicating, counsel for the Commonwealth contacted Applicants' counsel to inform him of the status of negotiations and to inform him that his representation could become necessary.

School Commissioners, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *Washington v. Keller*, 479 F. Supp. 569, **7-8 (D. Md. 1979). The Commonwealth has and will continue to adequately represent the general interests of the Applicants.

B. Permissive Intervention Is Not Warranted

Applicants argue that if intervention of right is denied, they should be granted permissive intervention. Fed. R. Civ. P. 24(b)(1)(B) states that a court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. In deciding whether to permit intervention, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3).

In this case, the United States alleges that the Commonwealth violates the ADA by administering its system of delivering services to individuals with developmental disabilities in a manner that denies such individuals the opportunity to receive services in the most integrated setting appropriate to their needs and that leads to the unnecessary institutionalization of many individuals who are qualified to receive services in a more integrated setting and do not oppose receiving services in a more integrated setting. *See* Complaint ¶ 42. Applicants are individuals who choose to reside in the state-operated Training Centers (ICFs/MR) and oppose receiving services in a more integrated setting. The United States does not allege that the Commonwealth is violating the ADA with respect to Applicants. Similarly, the Applicants are not arguing that the Commonwealth is currently violating the ADA with respect to its provision of services to them.

Instead, Applicants argue that the Commonwealth will violate their ADA rights if the Training Centers cease to operate. The United States does not seek closure of the Training Centers, nor does the proposed Settlement Agreement require the Commonwealth to close its

facilities. The Applicants' claim does not involve a question of law or fact in common with the main action. In addition, it is a claim that is baseless because the ADA does not require a state to operate institutions. Further, the Court has no authority to order the Commonwealth to continue operating its Training Centers and thus, can offer no remedy to the Applicants.

If Applicants are permitted to intervene, it will unduly delay and prejudice the adjudication of this action. Allowing Applicants to intervene would provide an incentive for any individual with a developmental disability, as well as advocacy groups, to intervene. Because individuals with developmental disabilities, their authorized representatives, and various advocacy groups hold a myriad of viewpoints on how best to administer the services system for individuals with developmental disabilities, the litigation would become unmanageable and the complexity of the litigation would increase resulting in increased cost and judicial time. *See Westinghouse Electric Corp.*, 542 F.2d at 217.

Further, Applicants have made clear that if permitted to intervene, they will file a motion to dismiss on which the Court would be obligated to rule. There is no doubt that resolution of the litigation would be delayed if intervention is allowed.

Clearly, the adjudication of the rights of the parties will be unduly delayed and prejudiced if intervention is permitted. On the other hand, Applicants will not be prejudiced by being denied intervention as the Court cannot order the Training Centers to remain open thereby providing the relief they seek. Applicants can adequately convey their interests to this Court by submitting their comments and amicus briefs to the Court for consideration as set forth in this Court's Order of March 6, 2012. Additionally, Applicants can advocate for their interests in the political realm. Because Applicants do not present a common question of law or fact to the main

action and intervention would unduly delay and prejudice the adjudication of the parties' rights, the Applicants' request for permissive intervention should be denied.

III. CONCLUSION

The Applicants do not have a significantly protectable interest in this litigation and fail to meet the standard that would entitle them to intervention as of right. Similarly, permissive intervention must also be denied as Applicants have not raised a common question of law or fact with the main action and intervention would unduly delay and prejudice the adjudication of this case. The Court has already established a process in its Order dated March 6, 2012, t hrough which Applicants can submit written comments and amicus briefs regarding the proposed Settlement Agreement. Applicants should avail themselves of this process. Intervention should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: _____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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Notification of such filing has also been made by placing a copy of the foregoing in the United States mail, first-class postage prepaid, to the following:

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