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,	)	
	)	
Defendant.	)	
	)	
_____	)	

THE UNITED STATES' OPPOSITION TO
PROPOSED INTERVENORS' MOTION FOR INTERVENTION

The Proposed Intervenors ("Movants"), thirteen family members of people who live in Training Centers operated by the Commonwealth of Virginia ("Commonwealth"), seek to intervene in this case and to dismiss it in its entirety. Motion to Intervene ("Mot. to Intervene") [Dkt. #19]; Motion to Dismiss [Dkt. #19-1]. The United States respectfully submits that Movants' Motion to Intervene is based on a misreading of the Settlement Agreement ("Agreement") [Dkt. #2-2], and that the process set forth by this Court for the public to be heard on the Agreement – not intervention and dismissal of this action – is the appropriate mechanism to address Movants' concerns. As detailed below, this Court should deny Movants' motion because they do not meet the requirements for intervention as of right and because permissive intervention is unnecessary and will cause prejudice to the parties and to the thousands of other Virginians who will get relief under this Agreement.

INTRODUCTION

Following an extensive investigation, the United States found that the Commonwealth systematically violates the civil rights of people with intellectual and developmental disabilities ("ID/DD") under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), by exposing them to unnecessary institutionalization and the risk of unnecessary institutionalization. The Agreement remedies these systemic violations of the ADA and provides relief to thousands of people. It is carefully calibrated to accommodate the Commonwealth's legal obligations under the ADA, the diverse needs and circumstances of Virginians with ID/DD, and the Commonwealth's available resources. It furthers the Commonwealth's goal of "meet[ing] the needs of all individuals with ID/DD, including those with the most complex needs, and of using its limited resources to serve effectively the greatest number of individuals with ID/DD." Agreement III.C.9.

The Agreement was reached after meetings with hundreds of people, including a range of people with ID/DD and their family members. These conversations provided critical information for the development of the negotiated terms. The Agreement requires the expansion of essential community services for people with ID/DD (including those with the most complex needs), ensures that people are provided real options and given necessary information to make informed choices about them, and creates mechanisms to ensure quality of services and the safety of people served. It will bring remedial relief to a wide range of Virginians with ID/DD – people on long waitlists for community services, people who are currently receiving community services that are inadequate to meet their needs, and people who are in state-operated and private institutions who have not been offered any meaningful alternatives. As the Court noted in its March 6, 2012 Order, "[a]t heart, the purpose of this

agreement is to allow disabled people to live in the community." March 6, 2012 Order [Dkt. #22] at 1.

The Movants seek both to be parties to this lawsuit and to move for the dismissal of the entire action. Their goal is to prevent the entry of the Agreement, which will jeopardize long-needed relief to thousands of people and interfere with the Commonwealth's efforts to comply with the ADA. Despite their claim to the contrary, the Movants have no legally protectable interest that is impaired by this Agreement. Their motion for intervention, at its core, is based on a misunderstanding that the Agreement requires closure of the Training Centers and will eliminate all institutional care, known as Intermediate Care Facilities for the Mentally Retarded ("ICF-MR") services. In truth, any decisions about closure of Training Centers will be made by the Commonwealth's Executive and Legislative branches and is not required or otherwise dictated by the Agreement. *Accord* March 6, 2012 Order at 2. State-funded institutional care, whether through Training Centers or privately-operated ICF-MRs, remains an option under the Agreement.

If the Court denies their Motion, the Movants will not be denied an opportunity to be heard. The Court has established a mechanism for anyone who wishes to be heard to provide written, and in some cases, oral comments on the Agreement. *Id.* at 3-4. If, on the other hand, the Court permits the Movants to become a party to this action, the United States and the Commonwealth – along with the thousands of people who will get relief under the Agreement – will be severely prejudiced.

In the absence of a legally cognizable right and in light of the procedure established by the Court for public comment, Movants have no right to intervention and permissible intervention is inappropriate. Movants' motion should be denied.

FACTUAL BACKGROUND

After years of investigation, on February 10, 2011, the United States issued comprehensive findings, concluding that the Commonwealth systematically violates the ADA by placing thousands of people in, or at risk of, needless institutionalization in order for them to receive ID/DD services. Specifically, the United States found that more than 6,000 people are without necessary services while they are on the Commonwealth's years-long waitlists for community services. These people want to remain in the community, yet more than 3,000 of them are in living situations that place them at particularly high risk of institutionalization. Findings Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Robert F. McDonnell, Governor of Virginia, 16 (Feb. 10, 2011) ("Findings Letter"). The United States found that the lack of adequate crisis and respite services for individuals with acute medical or behavioral issues is a primary cause of people being forced to leave their communities and enter the Commonwealth's Training Centers. Findings Letter at 17. The United States also found that the Commonwealth's process for assessing and transitioning residents of the Training Centers creates unreasonable barriers that prevent people, including those whose treatment teams have agreed community placement is appropriate, from moving to the community. Findings Letter at 10. Finally, the United States found that the Commonwealth fails to use available resources to expand community-based services, and instead prioritizes investment in institutions over addressing the critical need to expand community services. Findings Letter at 2.[1]

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[1] *Accord*, *e.g.*, United Cerebral Palsy, The Case for Inclusion, 8 (2011), *available at* http://medicaid.ucp.org/download.php (ranking Virginia 41st nationally in allocating resources to those in the community and 47th in keeping families together through family support for persons with disabilities); Charlie Lakin et al., Residential Services for Persons with Developmental Disabilities: Status and Trends Through 2009, 33, 37 (2010), *available at* http://rtc.umn.edu/publications/index.asp#risp (finding that Virginia has third highest use nationally of large, congregate settings for people with ID/DD).

Following issuance of its findings, the United States commenced negotiations with the Commonwealth to resolve the identified violations of the ADA. The United States engaged in complex negotiations and eventually reached the Agreement at issue here. While the negotiations were underway, the United States continued the statewide effort to meet with people with ID/DD and their families that it had begun during the investigation. Community meetings were held in every corner of the State, and hundreds of concerned citizens participated, including some of the Movants. The information gathered at these community meetings directly informed all aspects of the relief the United States sought in the Agreement, including not only provisions that expand community services but also those that ensure the quality of those services[2] and people's informed choice about them.[3]

On January 26, 2012, the United States filed a complaint detailing the Commonwealth's alleged violations of the ADA, and the parties jointly moved for entry of the Agreement as an order of this Court. Complaint [Dkt. #1]. The Agreement, if approved by the Court, will substantially expand the Commonwealth's ID/DD system over the next nine years, to enable people who need and qualify for services to have real options to receive appropriate services in integrated settings, with substantial safeguards regarding the quality and safety of those services.

The Agreement is comprehensive, covering all aspects of the Commonwealth's system of services for people with ID/DD. It requires the Commonwealth to expand significantly a range

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[2] As discussed more fully below, the Agreement provides for a robust quality and risk management system. Agreement V.C (Risk Management), V.D (Data to Assess and Improve Quality), V.F (Case Management), V.G (Licensing), V.H (Training), V.I (Quality Service Review).

[3] As discussed more fully below, the Agreement requires that people with ID/DD and their families be provided a choice to receive services in the most integrated setting appropriate to their needs and the information necessary to make a choice. But ultimately, a person with ID/DD or, when relevant, their authorized representative can make a choice for institutional care. Agreement VI.A-D; I.A (regarding transition planning); III.A, D.1-2, 4-6, E.23; IV.B.4- 6, 9,11, C.5-6; V.A, D.1,3, F.2, H.1-2, I.1-2 (regarding choice of services).

of critical community services so it can safely serve more people with ID/DD in integrated settings, including individuals with complex behavioral or medical needs. Agreement III.C. The Agreement recognizes that safety is paramount, requiring the provision of appropriate services that meet each person's needs and close oversight of providers. It also requires the Commonwealth to create comprehensive systems for responding to crises and ensuring that people receive safe and appropriate services through rigorous oversight and quality assurance at the individual, regional, and statewide levels, with providers, case managers, and other components of the system providing data across a range of relevant outcome measures.[4] Agreement III.C.6, V. At the individual level, this oversight includes post-transition monitoring for people who leave Training Centers and enhanced case management to ensure that each person is receiving appropriate services in a safe placement. Agreement IV.C.3, V.F.3.

The Agreement also requires the Commonwealth to implement an individualized process for discharge planning that involves the individual and his or her family, ensures that people receive sufficient information from adequately trained professionals about a range of options, and requires that individuals have the opportunity to visit placements and meet with other people with disabilities and their families so that they can make informed decisions about where they want to live and can ensure that the placement is appropriate and safe. Agreement IV. There will be comprehensive oversight of the implementation of the Agreement by both an Independent Reviewer with extensive experience in the field and this Court. Agreement VI. The Independent Reviewer's semi-annual public reports will ensure transparency throughout the life of the Agreement. Agreement IV.C.

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[4] These data include measures, for example, about safety and freedom from harm; access to physical, mental and behavioral healthcare; avoiding crises; and community inclusion. Agreement V.D.

On March 2, 2012, the Movants filed their motion to intervene. The basis for their Motion – and their primary objection to the Agreement – is their contention that the "settlement agreement requires the closure of four (4) training centers and thus requires the cessation of services at those training centers." Mot. to Intervene at 2. The Movants also attached a motion to dismiss that, if granted, would set aside the relief provided under the Agreement designed to remedy the violation of the rights under the ADA of thousands of Virginians who are at risk of or experiencing unnecessary – and unwanted – institutionalization.

On March 6, 2012, this Court issued an Order setting forth a process for interested people and groups to comment on the Agreement. The Court invited "interested people or groups to submit written comments about the agreement," and stated it "will consider these written comments in deciding if the agreement is adequate, fair, and reasonable, and if the agreement is unlawful, or if it is against public policy." March 6, 2012 Order at 3.

LEGAL ARGUMENT

This Court should deny the Movants' motion for intervention. The Movants have not met the legal standards for intervention as a matter of right. They have failed to identify a legally protectable interest that will be impaired by the Agreement and have failed to show that their interests are not adequately represented. This Court should also deny their motion for permissive intervention. Intervention is not necessary because this Court has already set forth a mechanism for the Movants and other interested persons to comment on the Agreement. Moreover, intervention would prejudice the parties and elevate the interests of the Movants over those of the thousands of other people who would be affected by the Agreement.

I. THE MOVANTS DO NOT MEET THE LEGAL STANDARD FOR INTERVENTION AS A MATTER OF RIGHT

Rule 24 (a)(2) of the Federal Rules of Civil Procedure allows intervention as a matter of right only when:

> [o]n timely motion . . . [the applicant] claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The standard in the Fourth Circuit requires that Movants demonstrate that they meet each of the following four factors in order to intervene as a matter of right: (1) their motion is timely; (2) they possess a "direct and substantial interest" in the subject matter of the litigation; (3) the denial of intervention would significantly impair or impede their ability to protect their interests; and (4) their interests are not adequately represented by the existing parties. *Richman v. First Woman's Bank*, 104 F.3d 654, 658-59 (4th Cir. 1997). "[A] would-be intervenor bears the burden of demonstrating to the court a right to intervene." *Id.* at 658. If an intervenor fails to meet his burden to show that all four criteria are met, then the district court must deny intervention as of right. *Id.* at 659-60; *see also Reid L. v. Ill. State Bd. of Educ.,* 289 F.3d 1009, 1017 (7th Cir. 2002). Other than timeliness, the Movants meet none of the requirements for intervention as of right.

A. The Movants Have Not Asserted A Legally Protectable Interest That Is Impaired By The Settlement Agreement

In order to intervene, a party must have a legally protectable interest. *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998); *see also Radford Iron Co. v. Appalachian Elec. Power Co.*, 62 F.2d 940, 942 (4th Cir. 1933); *Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of America*, 3 F.R.D. 251, 253 (W.D. Va. 1943). Under Rule 24(a), "[w]hat is obviously meant

. . . is a significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). "Of course, a general interest in the subject matter of pending litigation" will not suffice. *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 111 (E.D. Va. 1993). "To be protectable, the putative intervenors claim must bear a close relationship to the dispute between the existing litigants and therefore must be direct, rather than remote . . . ." *Id.*; *see also Sch. Bd. of Newport News v. T.R. Driscoll, Inc.*, 2011 WL 3809216, *3 (E.D. Va. July 29, 2011).

Even if Movants can identify a legally protectable interest, they must also show that disposition of the action, as a practical matter, impairs or impedes their ability to protect that interest. *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 431 (4th Cir. 2000) (denying intervention as of right because there was no showing that the action would "impair or impede" proposed intervenors' ability to protect their interests). In other words, the Movants "must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene." *Benjamin v. Pennsylvania*, 432 F. App'x 94, 97 (3d Cir. 2011) (internal quotations omitted).

Here, the Movants have failed to show that they have a legally protectable interest that is directly related in a concrete fashion to the relief sought and that would be impaired by the Agreement. Thus, their motion to intervene as of right must be denied.

1. The Movants' Alleged Interest In Institutional Care Is Not Impaired Because The Settlement Agreement Does Not Require Closure Of The Training Centers Or Eliminate The Option Of Institutional Care In ICF-MRs

The Movants contend that the Agreement requires closure of four of the Commonwealth's five state-operated Training Centers and will eliminate ICF-MR services as an option. Mot. to Intervene at 2; Memorandum of Law in Support of Motion for Intervention by

Proposed Intervenors at 2-4, 9, 18-19 [Dkt. #20] ("Intervention Memo."). These claims are factually incorrect and based on a misreading of the Agreement.

As this Court has already determined, the Agreement does not mandate the closure of Training Centers. Instead, the Agreement recognizes that decisions about continued operations of the Training Centers are within the purview of the Commonwealth's Executive and Legislative Branches. Agreement III.C.9; *accord* March 6, 2012 Order at 2 ("Most importantly, the agreement ***does not*** force the closing of any institution or Training Center in Virginia. Rather, the agreement requires the Governor of Virginia to submit to the General Assembly a plan to close four of the residential Training Centers. The General Assembly need not close the facilities . . . .") (emphasis in original). The Commonwealth has already met the terms of paragraph III.C.9 of the Agreement – to submit a plan to the legislature.[5] Any further action or decision by the Virginia legislature regarding a plan to close Training Centers is beyond the scope of this action and the Agreement.

In a similar circumstance, the Third Circuit affirmed denial of intervention when plans to close one or more state-operated ICF-MRs were not definite, finding that "any possible impact on Intervenors' interest in maintaining their current institutional care is not the kind of direct impact that gives rise to a right to intervene." *Benjamin,* 432 F. App'x at 99; *accord ARC of Va. v. Kaine*, 2009 WL 4884533 *7 (E.D. Va. December 17, 2009) (holding that plan to build new facility dependent on legislative approval and funding was not ripe for judicial intervention because it was "uncertain and contingent"); *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 358 (D. Conn. 1998) (denying motion to opt out by class members claiming the action could lead

[5] On January 26, 2012, the Governor submitted a preliminary plan to the General Assembly. William Hazel, Sec'y of Health and Human Res., Commonwealth of Va., Plan to Transition Individuals from State Training Centers to Community-based Settings (Feb. 13, 2012), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD862012/$file/RD86.pdf.

to closure of the institution, stating that "the Court must follow the law free from speculation as to the legislature's eventual reaction to the final result in this case").

The Movants also misread the Agreement as eliminating the option of institutional care in *any* ICF-MR. Mot. to Intervene at 4 ("The Settlement Agreement, if approved, will impair or defeat the rights of the Movants to choose ICF/MR care . . . ."). Nothing in the Agreement eliminates this institutional option. To the contrary, the Agreement specifically preserves the ability of individuals to make an informed choice for congregate care, including ICF-MR services. Agreement III.D.5 ("Individuals in the target population shall not be served in a sponsored home or congregate setting, unless such placement is consistent with the individual's choice after receiving options for community placements, services, and supports . . . ."); Agreement IV.C.6, IV.D.2.f, IV.D.3.b.[6] Even if the Commonwealth chooses to close one or more of its Training Centers, state-funded, privately-operated ICF-MR services will remain.

The Movants also misunderstand the section of the Agreement that gives priority for a portion of new waiver slots to people leaving the Training Centers. Agreement III.C.1.a. These waiver slots are not a "quota system that dictates" discharge, Intervention Memo. at 20; they are waiver slots set aside for Training Center residents who want to transition to the community. Nothing in that provision requires that those waivers be filled. In fact, a separate provision in the Agreement allows the Commonwealth to shift unused waivers set aside for people in the Training Centers to individuals on waitlists for services. Agreement III.C.4. In sum, the

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[6] Courts have denied intervention in circumstances where the complaint is "replete with language of choice" and nothing in the complaint would eliminate institutional care. *Benjamin v. Dep't. of Pub. Welfare*, 267 F.R.D. 456, 462 (M.D. Pa. 2010), *aff'd* 432 F. App'x 94 (3d Cir. 2011) (citing *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)). The Agreement contains numerous provisions regarding individual choice, preferences, and self-determination. Agreement I.A, III.A, III.D.1, 2, 4, 5, 6, III.E.2, IV.B.4, 5, 6, 9,11, IV.C.5,6, V.A, V.D.1,3, V.F.2, V.H.1, V.I.1-2.

Agreement does not require closure of any Training Center, nor will it deny state-funded ICF-MR services to Movants or others who choose them.

2. The Movants Do Not Have A Legally Protectable Interest In Remaining In Their Training Centers Or In Overriding State Decisions About Allocation Of Resources

Even if the Agreement could be interpreted to constrain the Movants' claimed interest in institutional care, that interest does not rise to the level of being legally protectable. The Movants do not have the right to placement in a particular facility. *Rolland v. Patrick*, 562 F. Supp. 2d 176, 185 (D. Mass. 2008) ("[N]either federal nor state law gives class members the right to reside in a particular facility."); *Lelsz v. Kavanaugh*, 783 F. Supp. 286, 298 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir. 1993) (no right to remain in two state-operated ICF-MRs that were closing pursuant to a settlement agreement). Available placement choices can legitimately be limited by the placements a state chooses to fund. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775, 785-86 (1980) (no right to remain in decertified facility); *Bruggeman v. Blagojevich*, 324 F.3d 906, 910-11 (7th Cir. 2003) (no right to ICF-MRs other than those offered by the state).

Thus, if the Commonwealth elects to close Training Centers, it has the right to do so, although such decisions are subject to the Agreement's requirements about the safety of individuals and the appropriateness of services. Courts 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. Agreement III.C.9 (The Commonwealth has a "goal and policy . . . of using its limited resources to serve effectively the greatest number of individuals with ID/DD."); *Ricci v. Patrick*, 544 F.3d 8, 17-18 n.8 (1st Cir. 2008) (noting the importance of the state's broad discretion in "allocating

its resources to ensure equitable treatment of its citizens," including discretion to close any facility); *see also Baccus v. Parrish*, 45 F.3d 958, 961 (5th Cir. 1995) (holding that the state "reserves the right to unilaterally close a state school for administrative or financial reasons, even if it means that certain residents will have to relocate as a result"); *Lelsz*, 783 F. Supp. at 298 ("The 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 schools for economic reasons or otherwise."); *accord* March 6, 2012 Order at 2. The *Olmstead* decision itself underscores that states are to allocate limited resources with an even hand. *Olmstead v. L.C.*, 527 U.S. 581, 605, 612 (1999) ("No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. . . . The judgment, however, is a political one and not within the reach of the statute.").

Despite the Movants' arguments to the contrary, nothing in the ADA or *Olmstead* creates a legal right to remain in an institution or to override state decisions about closure. Intervention Memo. at 8, 20.[7] The ADA and *Olmstead* require public entities to avoid unnecessary institutionalization and provide community-based services under certain circumstances – they cannot reasonably be read to require public entities to provide segregated services. In passing the ADA, Congress intended to eliminate discrimination against people with disabilities,

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[7] Movants' reliance on *United States v. Oregon,* 839 F.2d 635 (9th Cir. 1988), is misplaced. Intervention Memo. at 14-15, 18. In *Oregon*, a pre-ADA, pre-*Olmstead* case, the proposed intervenors were residents of a state-operated ICF-MR seeking community-based care. *Id.* In granting intervention, the Ninth Circuit noted that the United States – unlike in this case – had limited the relief it was seeking in its complaint to remedying unconstitutional conditions within the facility and was not seeking the broader systemwide relief, including expansion of community services, that the movants wanted. *Id.* at 638-39. Considered in light of the ADA and *Olmstead*, the *Oregon* decision supports the need for states to allocate resources with an even hand and provide options for community-based care. It certainly does not support Movants' alleged interest in state-operated ICF-MR care.

including segregation and institutionalization. 42 U.S.C. § 12101(a).[8] Consistent with this purpose, the ADA's implementing regulations require public entities to "administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). In *Olmstead*, the Supreme Court held that the ADA prohibits unjustified segregation of people with disabilities and described the harms of segregation: that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 600-01.

Intervention as a matter of right was denied under nearly identical circumstances in *Benjamin v. Dep't. of Pub. Welfare*, 267 F.R.D. 456, 465 (M.D. Pa. 2010), *aff'd* 432 F. App'x 94 (3d Cir. 2011). Like the Movants here, the *Benjamin* putative intervenors argued "that they have a concrete, legally protectable interest in their own care, i.e., the availability of institutional care." *Id.* at 459. The district court found that while the intervenors had "a bona fide interest in their own care, that concern does not rise to the level of a significantly protectable interest in the litigation warranting intervention as a party" where the litigation, like the instant matter, would

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[8] *See* 42 U.S.C. § 12101(a)(1) ("Physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination."); § 12101(a)(2) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."); § 12101(a)(3) ("[D]iscrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ."); § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . [and] segregation . . . .").

not deny the movants a choice of institutional care. *Id.* at 462. The Third Circuit affirmed, finding that institutional care remained a choice. 432 F. App'x at 98. Accordingly, the Movants do not have a legally protectable interest in remaining in their Training Centers or in overriding the state's decisions about allocation of resources and thus cannot intervene on this basis.

3. The Movants' Interest In Receiving Services That Meet Their Needs and Keep Them Safe Is Not Impaired By This Agreement

The Movants also misread the Agreement as forcing them into community settings that are inadequate and inappropriate, claiming it impairs their right to safety. Intervention Memo. at 2, 4, 5, and 11.[9] But the Agreement does no such thing. First, as discussed above, ICF-MR services remain an option for people who so choose. *See supra* at 10-11. The Movants can continue to receive state-funded ICF-MR services if they believe those services are necessary to keep their loved ones safe and meet their needs.

Second, the Agreement ensures that individuals are not discharged to settings that are unsafe or lack necessary services. The discharge planning process is designed to ensure proper assessment of a person's specific needs and informed choice. The process is individualized, requires deep knowledge by and extensive training of relevant staff, includes the individual and the family's input and the "opportunity to discuss and meaningfully consider" the various options, connects people to potential community-based placements on a timely basis, and provides opportunities to meet with potential providers. Agreement IV.B, C.

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[9] They also imply that community settings are, by their nature, unsafe. However, Movants rely on single study in support of this contention. Intervention Memo. at 15-16. In contrast, multiple studies demonstrate that even persons with complex needs who have transitioned from institutions can thrive in community settings. *See, e.g.,* K. Charlie Lakin et al., *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies 1977-2010*, 2 RESEARCH AND TRAINING CENTER ON COMMUNITY LIVING, 8 (review of 45 studies finding "consistent evidence of benefits accruing to people with ID/DD from movement from institutions to community").

Individuals who have complex needs must have those needs met in whatever placement is provided. Agreement IV.B.2, 7. Essential supports must be identified and be "in place at the individual's community placement prior to the individual's discharge from the Training Center." Agreement IV.C.5. People discharged from Training Centers will be closely monitored through post-move checks, monthly face-to-face visits by case managers, and enhanced licensing inspections. Agreement IV.C.3, V.F.3, V.G.2. Any potential closures must comport with the Agreement's provisions requiring safety and appropriate services upon discharge.

Third, the Agreement greatly expands the Commonwealth's quality assurance system in the community, through mechanisms that monitor safety and the quality of services both for individuals and systemically, a risk management system, quality service reviews, statewide training for providers and staff, and regional quality councils that include people receiving services and their families. Agreement V.C-I. Additional mechanisms for public involvement and accountability are provided, including making the independent reviewer's reports public. Agreement VI.C.

Thus, the Agreement does not force individuals into unsafe or inappropriate community placements. Rather, it mandates the creation of a community infrastructure that is safe and appropriate, so that people and their families will be comfortable in choosing community rather than an institution. Moveover, any decision the Commonwealth independently makes to close Training Centers is subject to the protections of the Agreement. Accordingly, the Agreement does not impair any right individuals have to receive appropriate services and be kept safe. *Accord Lelsz*, 783 F. Supp. at 298 (approving settlement agreement over concerns about inappropriate community placements where the agreement provided that placements would be

made in accordance with individuals' plans, quality assurance mechanisms would be put in place, and monitoring of community placements would be greatly enhanced).

4. The Movants' Alleged Interest In Recommendations By Treatment Professionals Is Not Impaired By The Agreement

The Movants claim a right to "have the benefit of the recommendations of treating professionals regarding the most appropriate setting to receive services," Intervention Memo. at 4-5, and contend that the Agreement "ignores residents' rights to have treating professionals render judgments as to where these individuals should receive services," *id.* at 11. Whether or not the Movants have a legally protectable interest to receive recommendations of treating professionals,[10] nothing in the Agreement impinges on treating professionals providing their recommendations. To the contrary, the Agreement expressly contemplates that the Personal Support Team ("PST") for Training Center residents will include the Training Center's treating professionals, and 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." Agreement IV.B.6. Accordingly, the Movants cannot show that their alleged interest in treating professional recommendations is impaired by the Agreement.

Because the Movants have not demonstrated that they have a legally protectable interest that will be impaired by the Agreement, this Court must deny their motion for intervention as of right.

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[10] A determination by a state's treating professional is not a "prerequisite to community placement," as the Movants contend, nor does *Olmstead* create such a legally protectable interest. *See, e.g., DAI v. Patterson*, 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009) (*Olmstead* does not "create a requirement that a plaintiff alleging discrimination under the ADA must present evidence that he or she has been assessed by a 'treatment provider' and found eligible to be served in a more integrated setting."); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008) (same); *Long v. Benson*, 2008 WL 4571905, at *2 (N.D. Fla. Oct. 14, 2008); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d at 541 (same).

B. The Movants Have Failed To Show Adversity Of Interest, Collusion, Or Nonfeasance By The Parties

To permit intervention as of right, the Movants must show that their interests are not adequately represented by an existing party in the litigation. *JLS, Inc. v. Pub. Serv. Comm'n of W. Va.*, 321 F. App'x 286, 289 (4th Cir. 2009). The primary result the Movants are seeking in this case is the protection of their ability to choose institutional care. *See, e.g.,* Intervention Memo. at 2-4, 9, 18-19. But, as discussed previously, the Agreement allows people, like Movants, who want institutional care, to make that choice. Agreement III.D.5 ("Individuals in the target population shall not be served in a sponsored home or congregate setting, unless such placement is consistent with the individual's choice after receiving options for community placements, services, and supports . . . ."); *see supra* at 11. Therefore, the Court should presume that Movants' interests are adequately represented unless they show "adversity of interest, collusion, or nonfeasance." *JLS*, 321 F. App'x at 289. The Movants have failed to do so.

The Movants have not shown the United States and the Commonwealth colluded in reaching this Agreement. Prior to this Agreement, the United States conducted a full investigation and issued a Findings Letter. The parties engaged in a year-long, arms-length negotiation, in which the state officials tasked with implementing the Agreement and with serving people with developmental disabilities had full participation in the negotiation process. Negotiations were difficult, and several times over the course of the year, they broke down.

The Movants likewise have not shown nonfeasance by the parties. The United States and the Commonwealth have invested extensive time and energy into negotiations to reach an Agreement that carefully balances the variety of needs and circumstances of Virginians with ID/DD in developing a remedy to comply with violations of the ADA. As explained above, the United States sought the input of affected persons, including the Movants, throughout the course

of the investigation and negotiations. The protections in the Agreement are in part the product of this extensive public engagement and fact-finding. *See supra* at 2-4. Not only is reaching an Agreement here not nonfeasance, but conservation of resources and the law itself encourage settlement under these circumstances. *See* 42 U.S.C. § 12212 ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations . . . is encouraged to resolve disputes arising under [the ADA]."); *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (holding, in a civil rights case, that "[i]n considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged"); *United States v. Arch Coal, Inc.*, --- F. Supp. 2d ----, 2011 WL 5358723, *6, 7-8 (S.D. W. Va. Nov. 7, 2011) (discussing interest in avoiding "consum[ing] a significant amount of time and expense by the parties, including the public fisc"); *Am. Canoe Ass'n, Inc. v. U.S. Envtl. Prot. Agency*, 54 F. Supp. 2d 621, 625 (E.D. Va. 1999) (holding that the parties' "expertise and comparative freedom in crafting a remedy promise a more sensible and practical resolution to the problems presented by complex . . . litigation than that likely to result from judicial intervention").

Moreover, the Commonwealth is charged with protecting the interests of the people with ID/DD it serves, and the United States is charged with protecting the public interest in its enforcement of civil rights law. The evidence establishes that the Parties considered and balanced the diverse needs and circumstances of all Virginians with ID/DD. *See Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 2011 WL 4459095, *4 (D. Md. Sept. 23, 2011) ("[T]here is an assumption of adequacy when the government is acting on behalf of a constituency that it represents.") (internal citation and quotations omitted); *Am. Canoe Ass'n, Inc.,* 54 F. Supp. 2d at 629 ("[W]here a government agency . . . has pulled the laboring oar in

constructing the proposed settlement, a reviewing court may appropriately accord substantial weight to the agency's expertise and public interest responsibility . . . .") (internal quotations omitted); *accord, Ligas*, 478 F.3d at 775 ("The intervenors have made no effort to show gross negligence or bad faith on the part of the state defendants, and therefore have not overcome the presumption that the defendants, as governmental bodies charged with protecting the interests of proposed intervenors, will provide adequate representation."); *Benjamin,* 267 F. App'x at 464 (finding that the state developmental disabilities service agency adequately represented the interests of the proposed intervenors). Thus, there is no adversity of interest with respect to the actual issues in this action and the terms of this Agreement.

Because the Movants have not shown adversity of interest, collusion, or nonfeasance by the parties, this Court must deny their intervention as a matter of right.

II. THE COURT SHOULD DENY PERMISSIVE INTERVENTION

The Court should also deny permissive intervention. As discussed below, the Movants have not asserted a claim or defense that shares a "common question of law or fact" with one that is actually at issue in this action or resolved by the Agreement. Moreover, intervention is unnecessary because this Court has already set forth a process for the Movants – like all other interested parties – to raise concerns about the Agreement prior to the Court's final determination. Finally, permitting the Movants' intervention in this matter would prejudice the parties and unfairly elevate the interests of the Movants above the thousands of other Virginians affected by the Agreement.

When, as here, there is no right to intervene, the Court may, in its discretion, nevertheless grant permission to intervene to a person 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). A court, in exercising its

discretion, "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 moving for permissive intervention, the Movants assert that "[t]he common issues include whether individuals living in the training centers should be permitted to continue to receive services at these training centers or whether they should be discharged in violation of the rights guaranteed them under the ADA and by *Olmstead*." Intervention Memo. at 27. But, as discussed throughout this brief, the Agreement does not require closure of the Training Centers, institutional care remains an option, and the discharge planning provisions respect informed choice. *See supra* at 9-10, 16. Thus, the Movants have failed to assert 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).

Moreover, permissive intervention is not necessary. This Court has already granted the Movants the right to comment and raise concerns about the Agreement before the Court makes a determination about its final approval. Under the process set forth by the Court in its March 6, 2012 Order, the Movants have the same opportunity as the thousands of other people with ID/DD and their families who are affected by this Agreement.[11] *Accord Benjamin*, 267 F. App'x at 465 (denying permissive intervention when that intervention would not add to the litigation).

The Movants' reliance on *Ligas v. Maram*, 2010 WL 1418583, *1 (N.D. Ill. Apr. 7, 2010), to support their intervention is misplaced. In *Ligas*, the proposed intervenors sought to intervene for the "limited purpose" of participating in the approval of Consent Decree. *Id.* Because the *Ligas* intervenors were not part of the Rule 23 class, they did not otherwise have a

[11] Indeed, under the terms of the Agreement, people with I/DD and their families, including the Movants, will have an ongoing opportunity throughout the life of the Agreement to be involved in its implementation, through regional quality councils, independent reviewer's public reports, and court oversight. Agreement V.D.5; VI.

right to comment on the fairness of the proposed Consent Decree. Here, intervention is unnecessary for that purpose because, unlike in *Ligas*, this Court already has created a vehicle through which the Movants' concerns can be raised. *See* March 6, 2012 Order at 3-4 (inviting *amicus* briefs addressing whether the Agreement should be entered as an order).[12]

Additionally, an important factor to consider for permissive intervention is whether the original parties will be prejudiced. *See Hill v. W. Elec. Co., Inc.,* 672 F.2d 381, 386 (4th Cir. 1982). "Courts have properly emphasized the seriousness of the prejudice which results when relief from long-standing inequities is delayed." *Id.* (internal quotations omitted). Movants seek more than a delay of relief; they propose a denial of relief by seeking to have this case dismissed in its entirety.[13] Permitting the Movants to become a party to this action would be extremely prejudicial to the thousands of other interested Virginians affected by this Agreement. The Court has provided a forum in which everyone with an interest in this matter is on equal footing to raise concerns and otherwise be heard. The Movants have asserted no basis for elevating their concerns over the thousands of other people impacted by the Agreement.

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[12] Also, unlike the Movants here, the intervenors in *Ligas* did not seek to dismiss the entire action and eliminate the relief for the thousands of members of the class.

[13] The United States reserves the right to provide this Court with a full response to Movants' Motion to Dismiss, should the Court grant Movants' Motion to Intervene. The United States has jurisdiction to bring this action to enforce Title II of the ADA. The plain language of Title II of the ADA authorizes the United States to bring a civil action to address violations of Title II, 42 U.S.C. §12131; §12133, and the ADA explicitly contemplates that the United States play "a central role in enforcing the standards established . . . [by the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101. Moreover, contrary to the Movants' claims, the United States has complied with the ADA's pre-requisites of notice and attempt at voluntary compliance before filing this action. 42 U.S.C. § 2000d-1 (incorporated into Title II by 42 U.S.C. §12133). As the United States' complaint demonstrates, the United States provided notice through its February 10, 2011 findings letter and attempted voluntary compliance through a year-long negotiation, which ultimately resulted in this Agreement. Complaint, ¶¶ 12-15. Finally, the Movants' citation to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, its statutory pre-requisites to suit, the United States' authority under CRIPA, and CRIPA cases are inapposite; the United States did not bring this action pursuant to CRIPA, but rather, pursuant to its enforcement authority under Title II of the ADA.

Moreover, "the potential unmanageability of the [ ] litigation should [a court] allow intervention" is a factor that must be considered. *Commonwealth of Va. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 217 (4th Cir. 1976). The Fourth Circuit affirmed denial of intervention where, like here, the movants "success would provide the incentive for other [people] to seek intervention," and "the resultant complexity of the litigation, combined with increases in cost and judicial time, would hinder resolution of the present conflict." *Id. Accord Benjamin*, 432 F. App'x at 99 (denying permissive intervention, noting that "[e]very competitor for [a state's] limited resources has an interest that potentially may be adversely affected" by budgetary decisions made by the state).

Accordingly, this Court should deny permissive intervention here because it will cause undue prejudice to the parties and the thousands of people who will get relief under this Agreement and is unnecessary because this Court has already created a process for the Movants to have their concerns heard.

CONCLUSION

The Agreement before this Court remedies systemic violations of the ADA and will provide relief to thousands of people. It is the result of extensive outreach and months of negotiation, and reflects careful and deliberate consideration of the Commonwealth's legal obligations under the ADA, the diverse needs and circumstances of Virginians with ID/DD, and the Commonwealth's available resources. The Movants seek to intervene in this case, and to prevent the Agreement from taking effect, based on an erroneous understanding that the Agreement requires closure of Training Centers. The Agreement does *not* eliminate the choice of institutional care. Rather, it ensures that people who want to live in the community have a meaningful opportunity to do so.

As set forth above, Movants have no legally protectable interests that will be impaired by the Agreement and, therefore, are not entitled under the law to intervene as a matter of right. Moreover, this Court already has provided a forum for Movants – along with all the other people interested in this Agreement – to voice concerns and otherwise be heard. Permitting the Movants to become parties to this action is unnecessary and will cause prejudice both to the parties and to the thousands of other Virginians who are impacted by the Agreement.

For these reasons, the Court should deny Movants' Motion to Intervene.

Dated: March 16, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2012, I will electronically file the foregoing THE UNITED STATES' OPPOSITION TO PROPOSED INTERVENORS' MOTION FOR INTERVENTION 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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