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

Richmond Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**Civil Action No. 3:12CV59-JAG**
	)	
v.	)	
	)	
COMMONWEALTH OF VIRGINIA,	)	
	)	
Defendant,	)	
	)	
PEGGY WOOD, et al.,	)	
	)	
Intervenors	)	

COMMONWEALTH'S RESPONSE IN OPPOSITION TO INTERVENORS' MOTION FOR INJUNCTIVE RELIEF

Intervenors' Motion purports to be an attempt to enforce the Settlement Agreement between the United States and the Commonwealth. But in substance it seeks to litigate new state law claims. Intervenors lack standing to enforce the Settlement Agreement and fail to raise a federal question invoking this Court's jurisdiction. Thus, the Commonwealth respectfully asks this Court to deny Intervenors' Motion for Injunctive Relief ("Intervenors' Motion"). In support thereof, the Commonwealth states as follows:

I. Background

In 2012, the United States and the Commonwealth of Virginia ("Commonwealth") entered into a Settlement Agreement to resolve the Department of Justice's investigation of whether the Commonwealth's system of services for individuals with developmental disabilities complied with the Americans with Disabilities Act. The Settlement Agreement

established a ten-year plan for expansion of the availability of existing community services for individuals with developmental disability.

Shortly after the United States and the Commonwealth filed the Settlement Agreement with the Court for approval, thirteen residents of the Commonwealth's state-operated training centers petitioned for and were granted the right to intervene. (Dk. No. 65 at pp. 1-2.) The Memorandum Order names the following as Intervenors in this case: Peggy Wood, Barbara Susan Fallis, Tami Lassiter, Teresa Koury, Jonathon Speilberg, Marinda Lewis, Adam Samuel Bertman, Jason Kinzler, Kevin Patrick Moran, Neal Hampton, Sean Johnson, Kent Olsen, and Amber Robinson. (Dk. No. 65 at pp. 1-2.) The Intervenors were never certified as a class to include all residents of the training centers. The only Intervenor who was a resident of the nursing facility unit at Central Virginia Training Center ("CVTC") is Peggy Wood.

In accordance with the Commonwealth's plan to cease residential operations at four of its five training centers by the end of state fiscal year 2021, CVTC is scheduled to close in 2020. In recent years, CVTC has experienced significant difficulty maintaining staff, particularly in the nursing facility unit where Intervenor Peggy Wood resided. Despite efforts to retain existing employees and attract new hires, in calendar year 2015, fourteen registered nurses, thirteen licensed practical nurses, and fifty certified nurse assistants separated from the entire CVTC facility, including the nursing facility unit. In calendar year 2016, sixteen registered nurses, sixteen licensed practical nurses, and thirty-four certified nurse assistants separated from the entire CVTC, including the nursing facility unit. *See* Exhibit 1, Declaration of Jack Barber (hereinafter referred to as "Barber Decl.") Upon careful consideration of the needs of the CVTC nursing facility unit residents and the risks faced by those residents in the context of a declining nursing staff, the decision was made to decertify the skilled nursing beds and close the nursing facility unit.

By letter dated August 26, 2016, the Department of Behavioral Health and Developmental Services ("DBHDS") notified authorized representatives of individuals residing in the CVTC nursing facility unit, including Intervenor Peggy Wood and others mentioned in the Intervenors' Motion, about its plans to decertify the nursing facility unit. *See* Barber Decl. ¶ 8. This notice was sent months prior to the scheduled decertification to provide time for affected families and CVTC to work together to identify alternate placements, develop appropriate transfer and discharge plans, and ensure safe and orderly transfers. *See id*.

Families of several individuals, including that of Intervenor Peggy Wood and others mentioned in the Intervenors' Motion, were unwilling to work with DBHDS and CVTC to consider other options. A November 28, 2016 letter from DBHDS Acting Commissioner Barber to affected individuals acknowledged that although several options for alternate placements had been discussed with each of them, no decision had been communicated to DBHDS or CVTC. Acting Commissioner Barber advised them that if a decision was not communicated by a specified date, they would be transferred, in accordance with Virginia Code § 37.2-840, to a skilled nursing facility bed at Hiram Davis Medical Center, another facility operated by DBHDS that qualifies as a training center. Those who did not choose an alternative placement, including Intervenor Peggy Wood, were transferred to Hiram Davis Medical Center. *See* Barber Decl. ¶ 9.

Intervenor Peggy Wood, and other individuals mentioned in the Intervenors' Motion, sought to challenge the transfer and filed an appeal with the Virginia Department of Medical Assistance Services ("DMAS"). (Appeal of Peggy Wood, Case # 990011908012, Department of Medical Assistance Services.) In her appeal, Wood asserted that Virginia Code § 37.2-837 and Chapter 639 of the 2014 Acts of Assembly barred her transfer to Hiram Davis Medical Center. After an administrative hearing, a DMAS hearing officer remanded

the case to DBHDS with instructions on December 30, 2016.[1] (Appeal of Peggy Wood, Case # 990011908012, Department of Medical Assistance Services, Appeal Decision, December 30, 2016.) Wood neither sought judicial review of the hearing officer's decision nor appealed DBHDS's new decision after remand.

More than four months after being notified that the CVTC nursing facility unit would be decertified yet less than one month before their scheduled transfers to Hiram Davis Medical Center, Intervenor Peggy Wood and others mentioned in the Motion filed two motions for injunctive relief in state court to prevent their transfers. (Bryant, et al. v. Commonwealth, Case No. 17000005, Circuit Ct. for Amherst County.) The Commonwealth filed timely responses in opposition to the state court motions, but the motions were not scheduled for hearing. Therefore, those state court actions were never ruled upon by the court and are still pending.

Intervenors now ask this Court for various forms of injunctive relief to prevent further discharges and transfers from training centers. Intervenors also ask that other individuals, including individuals who are not named Intervenors, be returned from current placements to their previous training center placements. In effect, Intervenors ask this Court to direct they be placed in the training centers of their choice, even training centers that have already been closed.

For the reasons stated below, Intervenors' Motion should be denied.

[1] The hearing officer remanded the case to DBHDS with instructions to document a finalized written discharge plan, note in her medical record that Wood had been examined by her attending physician, orient Wood to her discharge from the nursing facility, and provide a written notice of discharge consistent with Medicaid regulations.

II. Argument

A. Claims of Individuals Who Were Not Granted the Right to Intervene Are Not Properly Before this Court.

It is unclear whose interests are being represented in the Intervenors' Motion, which appears to assert claims on behalf of all Intervenors, some Intervenors, and even other individuals who have not been recognized by this Court as Intervenors.

Throughout the Motion and Brief in Support, there are references to Peggy Wood, Taylor Bryant, Tyler Bryant, thirty-six unnamed residents transferred from the CVTC nursing facility unit to the intermediate care facility at CVTC or to the community, and six patients transferred from the CVTC nursing facility unit to Hiram Davis Medical Center. *See, e.g.*, Intervenors' Mot. ¶¶ 4, 16, 18, 20-22, 46-48, 50. Peggy Wood, however, is the only individual specifically mentioned in the Intervenors' Motion who has been recognized by this Court in the Memorandum Order as an Intervenor in this case. Taylor Bryant and Tyler Bryant are not Intervenors.

Moreover, this Court has not certified all training center residents as a class for purposes of this case nor held that the Intervenors have associational standing to represent the interests of all training center residents. To the extent individuals are referenced either expressly or implicitly in the Intervenors' Motion but have not been recognized by the Court as Intervenors, and to the extent Intervenors request relief for individuals other than the Intervenors, these claims are not properly before this Court. Peggy Wood is the only Intervenor who resided in the CVTC nursing facility unit and was transferred to Hiram Davis Medical Center when the unit closed.

B. Intervenors Lack Standing.

A federal court's power to hear cases is limited "to the resolution of 'Cases' or 'Controversies.'"[2] "An essential element of this bedrock principle is that any party who invokes the court's authority must establish standing."[3] The well-worn standard for establishing standing[4] is muddied in the case of an intervenor. An intervenor is allowed to "piggyback" upon the standing of the party on whose side the intervenor enters the case.[5] While a case is actively being litigated, an intervenor, while considered a party, does not have to establish an independent basis for standing.[6] Once a final judgment or consent decree is entered, however, the opposing parties are no longer adversarial and the case no longer presents an ongoing case or controversy. If the intervenor wishes to continue as a party in the case, either to appeal the final judgment or enforce a consent decree at some later date, she may no longer latch onto the original party's standing. Instead, she must "independently satisf[y] the requirements of constitutional standing."[7] "The mere existence of a permanent injunction or consent decree [] is insufficient to provide an ongoing case or controversy upon which an intervenor may ride 'piggyback.'"[8]

The Court entered the Settlement Agreement in 2012, ending the case or controversy. The Intervenors must therefore present an independent basis for standing. The Intervenors' Motion contains no evidence or allegations that the Intervenors possess an independent basis for standing. Their failure to plead the basis for standing to seek injunction alone warrants

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[2] *Ansley v. Warren*, 2017 U.S. App. Lexis 11511, at *5 (4th Cir. June 28, 2017).
[3] *Id.* (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011)).
[4] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
[5] *Diamond v. Charles*, 467 U.S. 54, 64 (1986)
[6] *Diamond*, 467 U.S. at 68 (1986) (citing *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338 (1945)); *see also Shaw v. Hunt*, 154 F.3d 161, 165-66 (4th Cir. 1998).
[7] *See Doe v. Public Citizen*, 749 F.3d 246, 262 (4th Cir. 2014) (citing *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 65 (1997)).
[8] *Dillard v. Chilton Cty. Com'n.*, 495 F.3d 1324, 1337 (11th Cir. 2011), *cert. denied, Green v. Chilton Cty. Com'n.*, 554 U.S. 918 (2008) (quoting *Diamond*, 467 U.S. at 64).

dismissal of this action for lack of standing.[9] The Intervenors, however, also lack standing in fact.

"[A] well-settled line of authority from [the Supreme] Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it."[10] "In order to have enforcement rights, third parties to a consent decree must demonstrate that they are intended beneficiaries, as opposed to merely incidental beneficiaries."[11] Settlement agreements involving the government are almost always viewed as treating third parties like incidental beneficiaries.[12] To establish that she is an intended beneficiary, a third party must "demonstrate that the contracting parties 'intended [her] to be able to sue to protect the benefit' the consent judgment conferred on the third party; it is not sufficient to show simply that the parties had some intent to benefit the third party."[13]

The Intervenors are not a party to the Settlement Agreement, which was entered into between the United States and the Commonwealth of Virginia. (Dk. No. 112 at p. 1.) The Intervenors intervened in this suit as defendants on the side of the Commonwealth, the very same party against whom they now seek to enforce the Consent Decree. As non-parties to the Settlement Agreement, they can only seek an injunction if the parties to the Settlement

[9] *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017) (citing *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013)).
[10] *Kalisz v. Am. Express Centurion Bank*, No. 1:15-cv-01578, 2016 U.S. Dist. LEXIS 46246, *5 (E.D. Va. Apr. 5, 2016) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975)) (alterations in original).
[11] *Rehbein v. CitiMortgage, Inc.*, 937 F. Supp. 2d 753, 761 (E.D. Va. 2013) (quoting *SEC v. Prudential Sec.*, 136 F.3d 153 (D.C. Cir. 1998); *but see Aiken v. City of Memphis*, 37 F.3d 1155, 1168 (6th Cir. 1994) (finding that even intended third-party beneficiaries of a consent decree lack standing to enforce its terms).
[12] *Id.* (quoting *Prudential Sec.*, 136 F.3d at 158) ("third parties [to consent decrees involving the government] are presumed to be incidental beneficiaries," not intended beneficiaries) (alteration in citation in original).
[13] *Id.* (quoting *Prudential Sec.*, 136 F.3d at 159) (alteration in original).

Agreement considered the Intervenors as intended beneficiaries. The Intervenors are not intended beneficiaries for four reasons.

First, the parties expressly agreed that "[n]o person or entity is intended to be a third-party beneficiary of the provisions of this settlement agreement . . . ." (Dk. No. 112, Ex. A at § I, ¶ G.) When paired against the general principle that third parties are not intended beneficiaries of government contracts, the plain language of the contract is strong evidence that the Intervenors are not intended beneficiaries, and, consequently, do not have an independent basis for standing.

Second, the United States is the only person or entity given the power to file suit to enforce the agreement–individuals are not mentioned in any way. (Dk. No. 112, Ex. A at § VII.) The principle of *expressio unius est exclusion alterius* therefore counsels this Court to find that under the terms of the Settlement Agreement, the Intervenors are not eligible to bring an enforcement action.[14]

Finally, the nature of the suit and the Settlement Agreement are strong evidence that the Intervenors are not intended beneficiaries. Specifically, the United States filed suit, alleging that Virginia was violating the law as a general matter in the operation of its training centers. The complaint did not contain specific allegations relating to individual patients, but rather alleged violations in Virginia policies and procedures. The eventual settlement also did not mention individual patients, focusing instead on the general policies and procedures that the Commonwealth would employ to manage its training centers and expand community services.

[14] *See Rehbein*, 937 F.Supp.2d at 762 ("The Consent Judgment specifies that any enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee. Third party borrowers are conspicuously absent from this list. Under the principle of *expressio unius est exclusio alterius*, it follows that, pursuant to the Consent Judgment's own terms, individual borrowers are not eligible to bring enforcement actions.") (internal quotations and alterations omitted).

Lastly, the Court itself implicitly found that the Intervenors did not have an independent ability to challenge the Settlement Agreement. Peggy Wood, along with several other Intervenors who may be part of the present Motion, opposed the Settlement Agreement because she feared that it would result in her being transferred from her training center. (Dk. No. 112 at p. 8.) That is the exact claim that the Intervenors make in their injunction motion. In its Order Approving Consent Decree ("Order"), however, this Court found that should the Intervenors' fears come to pass, their remedy was not through the Settlement Agreement but rather in state law. (Dk. No. 112 at p. 9.) The Court itself therefore implicitly found that the Intervenors are not intended beneficiaries of the Settlement Agreement.

Because the Intervenors are not parties to the Settlement Agreement, they must establish an independent basis for standing. They are not intended beneficiaries of the Settlement Agreement, and therefore do not have an independent basis for standing. The Court therefore lacks jurisdiction to hear their claim.

C. The Court Does Not Have Jurisdiction Over the Subject of Intervenors' Motion.

The Court lacks subject-matter jurisdiction over the Intervenors' Motion. The Intervenors have failed to allege any basis for federal question jurisdiction.[15] The sole basis for the requested relief is a violation of state statutes and regulations, which plainly do not "arise under federal law." If the Intervenors attempt to base jurisdiction on the Court's ongoing jurisdiction to enforce the Settlement Agreement, the Court should reject this attempt for two reasons.

First, outside of the fact that the Intervenors filed suit in the instant closed case, the Motion does not claim that the Commonwealth is non-compliant with any term of the

[15] *See Comm. of Va. v. SupportKids Svs., Inc.*, No. 3:10-cv-73, 2010 U.S. Dist. LEXIS 30726 at *6 (E.D. Va. Mar. 29, 2010) (citing *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894)) ("[U]nder well-settled law a state is not considered a 'citizen' for purposes of 28 U.S.C. § 1332 and therefore there is no diversity of citizenship as long as it is considered a real party in interest in the controversy.").

Settlement Agreement. It does not ask that the Commonwealth be held in contempt or that the Settlement Agreement be modified in any way. The lack of any allegations tying the Motion to the Settlement Agreement in any way falls far short of meeting the Intervenors' burden of establishing subject-matter jurisdiction.[16]

Second, while Intervenors bring their Motion under the purview of the Court's jurisdiction to enforce the Settlement Agreement, it is not enforcement they seek. In fact, rather than seeking enforcement of the Settlement Agreement, the Motion sets forth new allegations against the Commonwealth that are not related to the Commonwealth's compliance with the Americans with Disabilities Act, the sole federal law upon which the Complaint giving rise to the Settlement Agreement is based. These new allegations are grounded solely in state law and make no reference to federal law. While the Court retains jurisdiction to enforce the Settlement Agreement, the United States is the only party that has the authority to challenge the Commonwealth's compliance with the Settlement Agreement. Non-parties to the Settlement Agreement, such as the Intervenors, cannot enforce it. Further, this Court does not have jurisdiction under the Settlement Agreement to consider purely state law claims between the Commonwealth and her citizens that do not implicate the Commonwealth's compliance with the Settlement Agreement.

Even if the Court finds that the Intervenors do have authority under the Settlement Agreement to challenge the Commonwealth's compliance, the Court does not have jurisdiction over the Intervenors' Motion. The Court's jurisdiction over state-law claims in civil actions under 28 U.S.C. § 1367(a) extends only to those claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or

[16] "The burden of establishing subject matter jurisdiction is on [] the party asserting jurisdiction." *Robb Evans & Assocs., LLC v. Holibaugh*, 609 F.3d 359, 362 (4th Cir. 2010) (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)).

controversy under Article III of the United States Constitution."[17] The claims asserted in Intervenors' Motion are not related to the Commonwealth's compliance with the Americans with Disabilities Act. Instead, they allege and ask this Court to find that the Commonwealth has violated Virginia Code § 37.2-837 and Chapter 639 of the 2014 Acts of the Assembly. They also claim that Hiram Davis Medical Center does not qualify as a training center, as that term is defined in Virginia Code § 37.2-100.[18] These claims do not form part of the same case or controversy on which this Court currently exercises jurisdiction in this case.

D. Intervenors Have Failed to Meet the Standard for Injunctive Relief.

Even assuming, *arguendo*, that Intervenors have standing and this Court has jurisdiction, Intervenors have not made a clear showing that they are entitled to injunctive relief. Injunctive relief is an extraordinary remedy and is not appropriate in this case, which centers not on the issues raised by Intervenors in their Motion for Injunctive Relief, but on expansion of the availability of existing community services for individuals with developmental disability.

The Fourth Circuit has stated that, "[a] preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief *pendente lite* of the type available after the trial."[19] To obtain such relief, a plaintiff must prove four elements: "(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in

[17] 28 U.S.C. § 1367(a).

[18] In fact, Intervenor Peggy Wood, and other individuals mentioned in the Intervenors' Motion but who are not named Intervenors, filed for an injunction in Amherst County Circuit Court raising the same issues that are alleged in this Motion. Technically, even though the state court action has not been fully prosecuted, it would provide this Court a basis for abstention. Additionally, Intervenor Peggy Wood, and other individuals mentioned in the Intervenors' Motion but who are not named Intervenors, also filed state administrative appeals with the Virginia Department of Medical Assistance Services, raising the same issues that are alleged in this Motion. The administrative hearing officer issued final decisions, and these individuals did not seek further judicial review of those decisions.

[19] *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010).

his favor, and (4) that an injunction is in the public interest."[20] Furthermore, "[a] preliminary injunction is . . . never awarded as of right."[21] Rather, "injunctive relief . . . may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[22] "In exercising their sound discretion, courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[23] "Federal injunctive relief is an extreme remedy,"[24] and, ultimately, it should be "applied only in the limited circumstances which clearly demand it."[25] In light of these principles, Intervenors cannot clearly prove the four elements necessary to obtain the extraordinary remedy of a preliminary injunction.

1. Intervenors are unlikely to succeed on the merits.

Intervenors cannot demonstrate that the transfers complained of were in violation of state law or the Settlement Agreement.

a. Intervenors' claims based on Virginia Code § 37.2-837 do not provide grounds for relief.

Intervenors allege that, "The forced transfer of individuals out of the NF at CVTC to Hiram Davis, which is not a training center, violates [Virginia Code § 37.2-837(A)(3)]. Intervenor's Mot. ¶ 88. Intervenors are incorrect. Hiram Davis Medical Center meets the definition of a Training Center in Virginia Code § 37.2-100[26] and provides the same nursing facility level of care as the nursing facility unit at CVTC. Therefore, as discussed below, discharges and transfers of Intervenors were consistent with state law.

[20] *Id.* (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).
[21] *Winter*, 555 U.S. at 24.
[22] *Id.* at 22.
[23] *Id.* at 24.
[24] *Simmons v. Poe*, 47 F.3d 1370, 1382 (4th Cir. 1995).
[25] *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (citations omitted).
[26] "'Training center' means a facility operated by the Department that provides training, habilitation, or other individually focused supports to persons with intellectual disability." Virginia Code § 37.2-100.

Virginia Code § 37.2-837(A)(3) says:

> …[T]he director of a state hospital or training center may discharge, after the preparation of a discharge plan: … Any individual in a training center who chooses to be discharged or, if the individual lacks the mental capacity to choose, whose legally authorized representative chooses for him to be discharged. Pursuant to regulations of the Centers for Medicare & Medicaid Services and the Department of Medical Assistance Services, no individual at a training center who is enrolled in Medicaid shall be discharged if the individual or his legally authorized representative on his behalf chooses to continue receiving services in a training center.

Some Intervenors remain in their original training centers and have not been discharged or transferred. Some Intervenors chose to be transferred to other training centers or to be discharged to community placements. None of the Intervenors were discharged from a training center to a community placement without their consent in accordance with Virginia Code § 37.2-837(A)(3).

Peggy Wood is the only Intervenor who resided in the CVTC nursing facility unit. Because she had not selected another placement at the time it was decertified, she was transferred to Hiram Davis Medical Center. As noted above, Hiram Davis Medical Center meets the definition of a training center. Pursuant to Virginia Code § 37.2-840(A), "The Commissioner [of DBHDS] may order the transfer of an individual receiving services…from one training center to another." This provision does not require the consent of the individual or his authorized representative to transfer. Thus, Peggy Wood's transfer to Hiram Davis Medical Center was consistent with Virginia Code § 37.2-837 and clearly within the Commissioner's authority under Virginia Code § 37.2-840.

In addition, Intervenors have not alleged any violation of the Settlement Agreement; regardless, it does not provide a basis for relief, either. Section IV.B.10 of the Settlement Agreement states, in part:

> Nothing in this Agreement shall prevent the Commonwealth from closing its Trainings Centers or transferring residents from one Training Center to another….

Thus, the transfer of residents from one training center to another, including from CVTC to Hiram Davis Medical Center, does not violate the Settlement Agreement.

For these reasons, Intervenors are unlikely to succeed on their claims based upon Virginia Code § 37.2-837.

b. Intervenors' claims based on Chapter 639 of the 2014 Acts of Assembly do not provide grounds for relief.

Intervenors allege that the Commonwealth failed to provide certifications required by Chapter 639 of the 2014 Acts of the Assembly. Intervenor's Mot. ¶ 98.

Chapter 639 of the 2014 Acts of the Assembly states:

> § 1. That the Department of Behavioral Health and Developmental Services shall, before transferring any training center resident to another training center or to community-based care, provide written certification to such training center resident or his legally authorized representative that (i) the receiving training center or community-based option provides a quality of care that is comparable to that provided in the resident's current training center regarding medical, health, developmental, and behavioral care and safety and (ii) all permissible placement options available under the Commonwealth's August 23, 2012, settlement agreement with the U.S. Department of Justice, including the option to remain in a training center, have been disclosed to the training center resident or his legally authorized representative. A training center resident or his legally authorized representative may waive the certification requirement imposed in clause (i).[27]

Contrary to Intervenors' assertions, after this requirement went into effect, the Commonwealth provided the required certifications to all Intervenors who were discharged or transferred.[28] *See* Exhibit 2 for the certification provided for Peggy Wood.[29] Any assertion that any Intervenors still residing in a training center will not receive the required certifications before future transfers is mere speculation. In addition, even had the

[27] 2014 Va. Acts ch. 639.

[28] Intervenors' allegations include the assertion that certifications were defective and inadequate because they omitted the name of the receiving facility. Intervenor's Mot. ¶ 98. These issues are not germane to the Settlement Agreement and serve to illustrate that this case is not the proper setting for raising these issues.

[29] The Commonwealth has provided only the certification for Peggy Wood because she is the only Intervenor who was transferred from the CVTC nursing facility unit to Hiram Davis Medical Center, which is the primary focus of the Intervenors' claims. The Commonwealth will gladly provide certifications of other Intervenors if the Court would like them.

Commonwealth violated this provision of state law, it would not give rise to a cause of action.

2. Intervenors fail to show they are likely to suffer irreparable harm.

Intervenors' allegations that they are likely to suffer irreparable harm at Hiram Davis Medical Center are mere speculation. Intervenors argue that Hiram Davis Medical Center provides a lesser level of care than the nursing facility unit at CVTC. This is simply not the case. Hiram Davis Medical Center is certified by the Centers for Medicare and Medicaid Services as both a nursing facility and ICF/IID, which are the same certifications that were held by CVTC. Any inspection deficiencies that may have been cited in the past have been corrected. Peggy Wood receives the same level of care at Hiram Davis Medical Center as she received at CVTC. Most importantly, Hiram Davis Medical Center, unlike CVTC, currently has the staffing necessary to meet the needs of Intervenors. Commissioner Barber proactively ordered Intervenor Wood's transfer from the CVTC nursing facility unit to Hiram Davis Medical Center precisely to avoid the harm that could result if she remained there without adequate staff to meet her needs.

Further, Intervenors merely allege but fail to show that Intervenors who were transferred to other training centers or to community settings are likely to suffer irreparable harm if they remain in those training centers or community settings.

3. The Balance of Equities tips in favor of the Commonwealth.

The balance of equities inquiry consists of a balance of the hardships imposed on the defendant if the injunction is granted versus the hardships imposed on the plaintiff if the injunction is denied.

Intervenors merely allege and imply that Intervenors' current training center and community placements are inferior to their previous training center placements. Intervenors currently reside in various community homes and training centers, including Southwestern

Virginia Training Center, Southeastern Virginia Training Center, and Central Virginia Training Center but they have failed to make a showing that these settings are inferior.

If the Commonwealth was directed, as requested by Intervenors, to return Intervenors to their previous training center placements, the Commonwealth would be in the untenable position of having to return Peggy Wood to a CVTC nursing facility unit that has been decertified and other Intervenors to Southside Virginia Training Center or Northern Virginia Training Center, which closed in 2014 and 2016, respectively. In addition, the issuance of an injunction will not solve the staffing problems that had been faced by the CVTC nursing facility unit.

Where the harm alleged by Intervenors is speculative, the balance of the equities has not been clearly shown to tip in their favor.

4. An injunction is not in the public interest.

Intervenors have failed to even allege, let alone clearly show, that an injunction is in the public interest. The only interest they have raised is their own personal interest in residing in the specific training center of their choosing. The Commonwealth has already determined that it is in the public's interest to close four training centers and redirect those resources to provide services in the community.

Intervenors have failed to make a clear showing that they are entitled to injunctive relief.

III. Conclusion

Based on the arguments above, the Commonwealth respectfully requests this Court to deny the Intervenors' Motion for Injunctive Relief in its entirety.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2017, 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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