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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:12-CV-00059 JAG
	)	
COMMONWEALTH OF VIRGINIA,	)	
	)	
Defendant.	)	
	)	

BRIEF AMICI CURIAE ON BEHALF OF THE ARC OF VIRGINIA, THE AUTISM SOCIETY OF CENTRAL VIRGINIA, THE AUTISM SOCIETY OF NORTHERN VIRGINIA, THE AUTISM SOCIETY OF TIDEWATER VIRGINIA, THE PENINSULA AUTISM SOCIETY, AND THE VIRGINIA DOWN SYNDROME ALLIANCE, AND THREE NATIONAL ORGANIZATIONS, THE ARC OF THE UNITED STATES, TASH, AND THE ASSOCIATION OF UNIVERSITY CENTERS ON DISABILITIES IN OPPOSITION TO MOTION TO INTERVENE

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FINANCIAL DISCLOSURE STATEMENT

Pursuant to Local Rule 7.1, *amici curiae* in the above-captioned matter, submit the following financial disclosure statements:

The Arc of Virginia ("The Arc of VA") states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of The Arc of VA's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

The **Association of University Centers on Disabilities** ("AUCD") states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of AUCD's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

The **Autism Society of Central Virginia** ("ASCV") states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of ASCV's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

The **Autism Society of Northern Virginia** ("ASNV") states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of ASNV's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

The **Autism Society, Tidewater Virginia** ("AS Tidewater") states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of AS Tidewater's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

The **Down Syndrome Alliance** states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of the Down Syndrome Alliance's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

The **Peninsula Autism Society** states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of the Peninsula Autism Society's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

TASH states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of TASH's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

The Arc of the United States ("The Arc") states that it does not have a parent corporation. It is a nonprofit corporation operating under §501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of The Arc's stock and it does not have any parties in any partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCS or other close held entities. There is, therefore, nothing to report under Local Civil Rule 7.1(A)(1)(a).

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INTRODUCTION

Thirteen family members of residents of several state Training Centers have filed a Motion to Intervene in this case. *See* Doc. 19. These families are plainly committed to obtaining the best care possible for their loved ones and understandably skeptical of changes in the Commonwealth of Virginia's service system for persons with developmental disabilities. Their Motion, and the accompanying Motion to Dismiss, not only oppose the Proposed Settlement Agreement (Agreement), but also seek to terminate the case. *See* Doc. 19-1. Seven Virginia organizations comprised of over 5900 family members and persons with intellectual and developmental disabilities (ID/DD), including The Arc of Virginia, the Autism Society of Central Virginia, the Autism Society of Northern Virginia, the Autism Society of Tidewater Virginia, the Peninsula Autism Society, and the Virginia Down Syndrome Alliance, as well as three national organizations, including The Arc of the United States, TASH, and the Association of University Centers on Disabilities, acknowledge the intervenors' concerns, but do not believe these general concerns constitute a legal basis to intervene in this case and delay or derail the substantial benefits that this Agreement provides for thousands of Virginians with ID/DD who are on lengthy waiting lists for community-based services. Therefore, *amici* submit this memorandum in opposition to the Motion to Intervene.

INTEREST OF *AMICI*

Amici are several Virginia and national organizations that include thousands of individuals with intellectual and developmental disabilities and their families. *Amici* deeply value the views and preferences of all families. Each organization and its members have a fundamental belief in, and an abiding respect for, the right of all people

with disabilities and their families to have a voice in important decisions about their lives. Moreover, *amici* fully support the right of all people with disabilities and their families to make informed decisions about residential and support services provided by the Commonwealth of Virginia ("Commonwealth").

The Virginia *amici* organizations have members who have a direct interest in this case. They, like the proposed intervenors, receive or seek services from the Virginia Department of Behavioral Health and Developmental Services ("the Department"). They, like the proposed intervenors, are deeply affected by the Agreement. But they, unlike the proposed intervenors, believe that intervention is neither necessary nor legally warranted for affected families to have their concerns about, or their support for, the Agreement fairly considered by the Court, especially in light of the inclusive procedures established by the Court's March 6, 2012 Order and the provisions of the Agreement ensuring that the views of families are respected during its implementation. Were the Court to determine otherwise, the Virginia *amici* organizations also would seek to intervene, in order to ensure that *their* views, like those of the proposed intervenors, are presented to the Court and that the proposed intervenors' efforts to dismiss this case in its entirety are opposed.

If the Agreement is approved and implemented, it will have a beneficial impact on the Virginia *amici's* members. *See, e.g.,* Agreement ¶ III.B.1 (individuals who are on a wait list for certain services are some of the beneficiaries of the Agreement). It will greatly expand the community programs available to the members and enable thousands of them who have been waiting for years for services from the Commonwealth to finally

receive the care that they need and deserve. A description of each *amicus* organization is attached in an Appendix to this Memorandum.

ARGUMENT

I. Intervention Is Not Necessary For Families To Have A Forum To Express Their Concerns With The Settlement Agreement Or Its Implementation.

The Commonwealth and the United States have entered into the Agreement in order to ensure the Commonwealth's compliance with the Americans with Disabilities Act ("ADA") and *Olmstead v. L.C.*, 527 U.S. 581 (1999). Agreement, Section I.A. As more fully described in the Oppositions of the Commonwealth (Doc. 27) and the United States (Doc. 28), the Agreement provides a wide range of new services and supports for residents of the five state Training Centers, as well as for individuals living in the community who meet the criteria for – or are currently on – the waiting list for the Commonwealth's Medicaid Home and Community-based Services Waiver (HCBS) and for those who reside in a nursing facility or in a private Intermediate Care Facility for Persons with Mental Retardation (ICF/MR). Agreement, Section III.B.1. The Agreement also guarantees family involvement in the development of service and discharge plans, in all decisions concerning the range and location of needed services, and in the implementation of the expanded community service system in the Commonwealth. Agreement, Section IV.B.9. Finally, the Agreement provides for significant safeguards for individuals moving to the community, including post-move monitoring, quality assurance, and the appointment of an independent reviewer. Agreement, Section IV.C.3, V, VI.

Significantly, although the Agreement broadly expands the community-based services and supports available to all individuals with ID/DD in Virginia, it does not

mandate the restriction, closure or elimination of any facilities or services that are currently available.

A. *The Court Has Afforded Families a Broad Opportunity to Express Any Concerns with the Settlement Agreement.*

As this Court has acknowledged in its March 6, 2012 Order, it is important that all interested persons and groups have an opportunity to present their views regarding the Agreement. *See* 03/06/12 Order, Doc. 22 ("Order"). Ensuring that interested parties, such as the proposed intervenors, have an opportunity to be heard with regard to the Agreement, does not, however, require intervention. Rather, the Court has adopted a comprehensive process in this case similar to that required for approval of a class action settlement under Fed. R. Civ. P. 23(e) that affords interested parties a meaningful opportunity to be heard.

This process includes allowing individuals or groups of individuals to submit written formal or informal comments to the Court. Order at 3. Additionally, the Court will accept *amicus curiae* briefs and will consider allowing representatives of sufficiently large groups of interested people to speak at a settlement hearing. *Id.* The Court also has required the defendants to post a copy of the Agreement and the Court's March 6 Order on their website, and to mail a copy of the Order to parent and family groups who are associated with the Training Centers, to members of The Arc throughout Virginia, to the Virginia Association of Community Services Boards, and to a listed of interested persons provided to it by the Court. *Id*. at 5. Defendants must certify compliance with the Order. *Id.*

B. *The Agreement Itself Affords Families Multiple Opportunities and Forums for Expressing Concerns with All Aspects of the Service System, Transitions, or the Implementation of the Agreement.*

In addition to the extensive process afforded by the Court for families to express concerns with the content of the Agreement, numerous provisions of the Agreement also afford a wide range of opportunities and forums for families to participate in all aspects of its implementation, including decisions concerning the type, intensity, and location of needed services. As a result, concerns of families about whether, where, and how support services should be provided can be fully considered, on an ongoing basis, through the procedures and protections established by the Agreement.

First, the Agreement contains seven-pages exclusively devoted to discharge planning and transition from the Training Centers to the community. Agreement, Section IV. The Commonwealth must offer each individual a discharge planning and transition process that includes, among other things: provision to individuals of "necessary support to ensure that they have a meaningful role in the process", and the development of discharge and transition plans that are "*consistent with informed individual choice*." Agreement, Section IV.B.3, 4, and 5 (emphasis added). Discharge planning must include both the individual consumer and his or her authorized representative and anyone else whom the consumer elects to participate, such as a family member. Agreement. Section IV.B.6. The Agreement requires that an individualized process must be available to address any concerns and/or objections by the individual or his or her authorized representative to community placement. Agreement., Section IV.B.11.

The Agreement provides for individualized professional assessments, service planning, discharge planning, and quality assurance and risk management provisions to ensure safety in the community. *See* Agreement, Sections IV.B, & V. Discharge plans must be developed in collaboration with a Community Service Board ("CSB") case

manager, who "shall provide to individuals, and where applicable, their authorized representatives, specific options for types of community placements, services and supports based on the discharge plan…and the opportunity to discuss and meaningfully consider those options." Agreement, Section IV.B.9. Training will be provided to the Person Support Teams ("PST") to ensure that they can answer the families' questions about community living. Agreement, Section IV.B.10. The Commonwealth also must create family-to-family and peer-to-peer programs to facilitate opportunities to exercise choice regarding community-based services.[1] Agreement, Section IV.B.9.

Second, the Commonwealth will create Community Integration Managers at each Training Center who will "facilitate communication and planning with individuals residing in the Training Centers, their families, the PST, and private providers about all aspects of an individual's transition, and will address identified barriers to discharge," including if the individual or his or her authorized representative opposes discharge or refuses to participate in the discharge planning process. Agreement, Section IV.D.1. If, after the process of evaluating and discussing discharge, an individual, or his or her authorized representative, still opposes the PST's proposed options for placement in a more integrated setting, the Commonwealth will ensure that PSTs: "a. identify and seek to resolve the concerns of individuals and/or their authorized representatives with regard to community placement; b. [d]evelop and implement individualized strategies to address concerns and objections to community placement; and c [d]ocument the steps taken to

[1] Moreover, "The individual shall be offered a choice of providers consistent with the individual's identified needs and preferences," and "PSTs and the CSB case managers shall assist the individual and, where applicable, their authorized representative in choosing a provider . . . and ensure that providers are timely identified and engaged in preparing for the individual's transition." Agreement, Section IV.B.9.a, c.

resolve the concerns of individuals and/or their authorized representatives and provide information about community placement." Agreement, Section IV.B.11.

Finally, the Agreement establishes an independent expert to monitor its implementation and make regular reports to the Court. Agreement, Section VI.C. Families have broad access to the monitor and can express concerns to him, and through him to the Court, on any aspect of implementation.

Thus, the Agreement itself ensures that there are extensive opportunities afforded to families to meaningfully participate in its implementation, and specifically in any transition from a Training Center to the community. These opportunities, coupled with the process established by the Court's March 6, 2012 Order, together provide families with ample opportunity to express their views and preferences at every juncture of this Agreement.

C. *Consumers and Families Can Invoke an Administrative Fair Hearing Process, With Full Due Process Protections, to Challenge A Discharge or Transfer Decision to Which They Object.*

In addition to the process and content of the Agreement, families have access to a state administrative procedure to challenge any service or discharge decision with which they disagree. This state process provides ample procedural protections and more than adequately ensures that the proposed intervenors' concerns with procedural rights and the exercise of professional judgment are adequately safeguarded. *See* Memorandum of Law in Support of Motion for Intervention by Proposed Intervenors ("Mem.") at 20-21 (Doc. 20 (claiming that the Agreement "ignores existing recommendations and does not allow for recommendations from treating professionals or for the residents' and guardians' possible opposition to transfer or discharge").

State and federal law set forth a comprehensive, individualized discharge planning process to be completed by mental health professionals to assess and ensure that the needs of all residents of the ICF/MRs are met. *See* 42 C.F.R.§ 488.483.12. Moreover, if consumers and families are dissatisfied with the recommendations of the treatment professionals, they can appeal pursuant to the fair hearing regulations of the Virginia Administrative Code ("VAC"). 12 VAC § 30-110-90 (stating that consumers have "the right to file an appeal when an individual's request for a particular medical service is denied, suspended, reduced, or terminated, in whole or in part"); *see generally* 12 VAC §§ 30-110-10 – 30-110-370; *see also* 42 C.F.R.§ 431.222 (a)(2). The appeals process provides a range of due process protections, including a formal administrative hearing, with adequate notice and a right to representation, where a hearing officer hears testimony, evaluates evidence, and then issues a written decision. 12 VAC § 30-110-220. If still dissatisfied, families may seek judicial review, pursuant to the Administrative Process Act and the rules of the Virginia Supreme Court. 12 VAC § 30-110-40.; *see Roanoke v. Finnerty*, 692 S.E. 2d 277, 280 (Va. App. 2010)(Citing VAC § 2.2-4027); *School Bd. v Nicely*, 408 S.E. 2d 545, 551 (Va. App. 1991)("[T]he circuit court's role in an appeal from an agency decision is equivalent to an appellate court's role in an appeal from trial court.")

In addition to this formal administrative procedure, which indisputably comports with due process, the Commonwealth also provides an accessible complaint procedure whereby any individual, or someone acting on her behalf, can demand a timely and fair review of a complaint that the provider has violated a right afforded through the Department's regulations, including a right to appropriate services. 12 VAC § 35-115-

140; *see also* §§ 35-115-50, 150, 170. Finally, residents of a hospital, Training Center, or other facility or program operated, funded, or licensed by the Department, have the right to "an impartial review of violations of the rights assured under this section and the right of access to legal counsel," which includes the right to "[b]e treated under the least restrictive conditions consistent with his condition and not be subjected to unnecessary physical restraint and isolation." VAC § 37.2-400. This review presumably applies to discharge or transfer decisions that a family member believes are inconsistent with the individual's condition.

These multiple administrative and state adjudicatory processes are readily available, individualized, and comport with constitutional requirements of procedural due process. These processes supplement those discharge and transition planning provisions of the Agreement, and ensure multiple opportunities for families to challenge service decisions. As the First Circuit noted, disagreements about the adequacy of individual assessments, service, and placement decisions are properly resolved in state proceedings, rather by federal courts. *Ricci v. Patrick*, 544 F.3d 8, 20 (1st Cir. 2008).

II. The Standards For Intervention Of Right Are Not Satisfied.

A. *The Standards for Intervention of Right*

Under Fed. R. Civ. P. 24(a)(2), a proposed intervenor must: "(1) claim an interest relating to the property or transaction that is the subject of the action;" (2) show that he or she "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interests;" and (3) demonstrate that his or interests "are not adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). A general interest in the pending litigation does not meet the requirements for intervention under

the Rule – it must be a "legal interest" in a "definite legal right[]." *Radford Iron Co., Inc. v. Appalachian Electric Power Co.,* 62 F.2d 940, 942 (4th Cir. 1933) ; *see also Dairy Maid Dairy, Inc. v. United States,* 147 F.R.D. 109 (E.D. Va. 1993) *citing Donaldson v. U.S.*, 400 U.S. 517 (1971). Although not specifically defined under Rule 24(a)(2), "[c]ourts have required an intervenor's claim to 'bear a close relationship to the dispute between the existing litigants and[] be direct, rather than remote or contingent." *School Board of the City of Newport News v. T.R. Driscoll, Inc.* 2011 WL 3809216 (E.D. Va. July 29, 2011) *3, *quoting Cooper Technologies v. Dudas*, 247 F.R.D. 501, 514 (E.D. Va 2007), *citing Dairy Maid Dairy, supra*.

The proposed intervenors have not articulated a significantly protected interest or a right that the parties will not adequately represent.[2] The rights at stake in this case are those guaranteed by the ADA, since the Department of Justice's Complaint asserts only ADA claims. The proposed intervenors contend that absent intervention their interests under the ADA will be impaired in the following ways: (1) that they need, but will be denied an ICF/MR, facility; (2) that they may not be able to remain in their current ICF/MR; and (3) that they will be harmed by transfer to the community. *See* Mem. at 3-5, 8-18. However, the proposed intervenors mischaracterize the provisions of the Agreement, misconstrue the requirements of the ADA and the Supreme Court's decision in *Olmstead*, and misunderstand the role of the parties. Consequently, they have not articulated a protected right that will not be adequately represented by the existing parties to the litigation.

B. Consumers and Families Will Not Be Denied ICF/MR Services by the Agreement, Since They Can Continue to Live in an ICF/MR.

[2] *Amici* do not contest the timeliness of the Motion to Intervene.

Pursuant to its State Medicaid Plan, the Commonwealth has opted to provide a Medicaid funded service, called Intermediate Care Facilities for Persons with Mental Retardation ("ICF/MR"). 12 VAC § 30-50-240. The Commonwealth offers this level of care through publicly-operated and privately-operated ICF/MR facilities. Five of the publicly-operated ICF/MR facilities are the state Training Centers, where the thirteen proposed intervenors reside. But the Commonwealth also provides eight other ICF/MRs operated by public entities that have 221 beds, and 26 ICF/MRs operated by private entities, with 273 beds. *See* Declaration of Jamie Liban, attached as Exhibit 1 and Spreadsheet listing ICF/MRs excluding the Training Centers, attached as Exhibit 2. Since 2000, the number of admissions to the training centers has dropped by 42% and is continuing to decline. *See* 2012 Power Point Presentation to House Appropriations by Dr. Bill Hazel, Secretary of Health and Human Services, attached as Exhibit 3.

The proposed intervenors misunderstand the Agreement to require the closure of the four of the five Training Centers. However, as the Court has already recognized, the Agreement does no such thing. Order at 2. It does not mandate the closure of any institution, but instead, leaves it to Virginia to determine the future of the Commonwealth's public facilities. Agreement, Section III.C.9.

Moreover, as the Court also noted, and the Supreme Court has acknowledged, state and federal officials have broad discretion to determine what public facilities they should operate, where they should be located, how much funding they should be allocated, how they should be staffed, and, most importantly, how their limited resources should be allocated between various publicly-funded programs. Order at 2; *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993); *see also Ricci,* 544 F.3d at 21.

Finally, the Agreement has no impact on the large number of other publicly and privately operated ICF/MR facilities. In fact, regardless of the outcome of the Executive and Legislature's deliberations and decisions concerning four Training Centers, there will remain a significant number of other ICF/MR facilities. The facilities must provide the same level of care, are required to serve the same level of need, and are subject to the same federal regulations as are the Training Centers. *See* 42 C.F.R. § 400 *et seq.* Nothing in the Agreement alters the availability of ICF services in these other facilities.

Nevertheless, proposed intervenors contend their intervention is necessary to protect their rights and interests under the ADA in continuing to receive ICF/MR services. Mem. at 18. Specifically, they assert that they will be denied an ICF/MR level of care that they need if the Agreement is approved. *Id*. As already noted, and as described below, this assertion is entirely incorrect.

First, even if the plans for the four Training Centers mentioned by the Agreement are eventually approved by the General Assembly, consumers and their families will still have the opportunity to continue to live in an ICF/MR and received ICF level of services if it is determined that such services are needed. *See* Agreement § IV.C ¶ 6, p. at 18. As the proposed intervenors acknowledge, Mem. at 10, one of the Training Centers, the Southeast Virginia Training Center (SEVTC), will remain open.[3] *See* Exhibit 2; *see also*

[3] Without any support, the proposed intervenors claim that "The Commonwealth's plan with regard to Southeastern Virginia is to reconstitute the facility to accommodate 75 residents at a time for short-term, 30 day placements. Current residents will be displaced, which implicates their rights in the very same way as the rights of the residents of the training centers which will be closing due to the settlement." Mem. at 10, n. 3. The Agreement does not contain any requirement to transform SEVTC into a facility for short-term (*e.g*, 30-day) admissions. Moreover, this assertion is inconsistent with Virginia's stated plans which are that SEVTC will remain open and will have a capacity of 75 beds. *See* January 26, 2012 Letter to the General Assembly from Governor McDonnell, attached as Exhibit 4, and January 30, 2012 Power Point Presentation to House Appropriations by Dr. Bill Hazel, Secretary of Health and Human Services, attached as Exhibit. 3.

Agreement, Section III.C. ¶ 9.

Finally, there are a significant number of privately operated ICF/MRs for adults throughout the Commonwealth of Virginia, with between four and 28 beds, and the number of IFCs have recently increased.[4] *See* Exhibit 2. Thus, many of the current residents of each Training Center who qualify for and request ICF/MR services will be able to receive them in an ICF/MR facility in their area. Therefore, the proposed intervenors cannot reasonably argue that their rights to receive the ICF/MR services or an ICR/MR level of require intervention.

C. *While Families Have Rights Under Federal Law to Quality Care, They Do Not Have a Right Under the ADA to Remain in an Institution of Their Choice.*

1. The proposed intervenors misstate the holding in *Olmstead.*

The proposed intervenors argue that ADA, as interpreted by the Supreme Court in *Olmstead,* conveys a right to remain in a segregated institution, as opposed to a right to live in the community.[5] *See* Mem. at 7. No case supports this novel interpretation of the ADA's integration mandate and its prohibition on segregation. Rather, the *Olmstead* Court concluded that the unjustified institutionalization and isolation of persons with

[4] An ICF for children (St. Mary's Home for the Disabled) has 92 beds. Exhibit 2.

[5] Pursuant to the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The corresponding Attorney General regulations further require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," which is defined as " a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible. " 28 C.F.R. pt. 35, App. A, p. 450 & §35.130(d). Consistent with these statutory mandates, a public entity must make "reasonable modifications in policies, practices, or procedures" in order to avoid discrimination on the basis of disability, unless the public entity can "demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7).

mental disabilities violates the ADA.[6] 527 U.S. 581, 597 (1999). The Supreme Court reached this conclusion based upon two factors. First, the Court observed 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." *Id*. at 600. Second, the Court noted 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." *Id*. at 601.

More recently, the Ninth Circuit explained that states must now:

> Provide care in integrated environments for as many disabled persons as is reasonably feasible, so long as such an environment is appropriate to their mental-health needs…This requirement serves as one of the principal purposes of Title II of the ADA; ending the isolation and segregation of disabled persons…(citations omitted).

Arc of Washington, Inc. v. Braddock, 427 F.3d 617, 618 (9th Cir. 2005).

Numerous other courts have construed to ADA to prevent unnecessary institutionalization, *not* to require continued institutionalization simply because an individual opposes moving, at least where the state appropriately exercises its discretion to reduce the capacity or close the particular institution where the individual currently resides. *Richard C. v. Houstoun,* 196 F.R.D. 288 (W.D. Pa. 1999) (rejecting parents' interpretation of *Olmstead* to require continued institutionalization and denying intervention)*; Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 338 (D. Conn.

[6] This statement represents the holding of a majority of the Court. In Justice Ginsburg's plurality opinion, the Court went on to hold that "under Title II of the ADA, States are required to provided community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 607.

2008); *see also Benjamin v. Dept. of Public. Welfare of Commonwealth*, 267 F.R.D. 456 (M.D. Pa. 2010) *aff'd* 432 Fed. Appx. 94 (3d Cir. 2011).

2. Families do not have a right to have their family members remain in the institution of their choice.

The basic legal interest asserted by the proposed intervenors -- as opposed to their general concern with quality services and apprehension about changes to the Commonwealth's developmental disability service system – is their claim of a right to remain in the Training Center where they currently reside.[7] They garner that "right" by translating *Olmstead* into a rationale for perpetuating institutionalization, and even for continuing institutionalization in an individual's current facility, based solely on the person or family member's opposition to leaving. Mem. at 12-14. This misconstruction of the ADA's integration mandate is inconsistent with the purpose and history of the statute, is not supported by the case law, and effectively converts a safeguard identified by the *Olmstead* plurality into an individual veto over the lawful exercise of executive discretion concerning the operation of state facilities. To the contrary, there is no obligation for the Commonwealth to continue to operate a specific institution. Numerous courts have concluded that states have broad discretion to close public facilities, that residents have no right to remain in a particular facility, and that federal courts have no role in requiring states to maintain specific facilities.

[7] The thirteen families assert that intervention is necessary to protect their interests under the ADA in having their individual needs assessed to determine their appropriateness for discharge, and in protecting them from harm resulting from any discharge from a training center. Mem. at 11-15. They rely, in part, on a state law, Va. Code Ann. § 37.2-837(A)(3), to argue that they have a *federally-protected right* to "receive recommendations from treating professionals as to whether community placement is appropriate and to oppose the transfer, even if the proposed transfer is from institutional care to an appropriate setting." Mem. at 12. This argument is plainly overbroad, since the ADA's integration mandate is not triggered exclusively by treating professionals, does not guarantee that an individual can remain in her current facility, and does not bar states from transferring persons to other facilities, when necessary.

The Fifth Circuit Court of Appeals has recognized that "the state reserves the right to unilaterally close a state school [for people with mental retardation] for administrative or financial reasons, even if it means that certain residents will have to relocate as a result." *Baccus v. Parrish*, 45 F. 3d 958, 961 (5th Cir. 1995); *see also*, *Alexander v. Rendell*, U.S. Dist. LEXIS 3378, at *18-19 (W.D. Pa. Jan. 30, 2006)(Add. 47, 56)("The Court concludes that the Defendant' closing the Altoona Center and its plans for transfer of its residents serves both the public policy of the ADA, Rehabilitation Act, and the applicable Medicaid statutes and proper judicial deference to the discretion of the state in determining the manner in which it allocates its resources."). In *Lelsz v. Kavangauh*, the court addressed a challenge to the closure of a state school and explained:

> It is certainly true that closing a school may cause some residents deemed Inappropriate for community placement to be relocated to one of the remaining Eleven state schools. The Court recognizes in some cases hardship will result. The reality is, however, that the State has always possessed the power and frequently exercises the power to relocate its residents for its own administrative needs. If it is so desired, the State could unilaterally close any of the State schools, for economic reasons or otherwise. The ability of individual residents and parents to fight closure of their own school would likely be limited to political means.

783 F. Supp. 296, 298 (N.D. Tex. 1991), *aff'd* 983 F. 2d 1061 (5th Cir.), cert. denied, 510 U.S. 906 (1993). The Seventh Circuit reached a similar conclusion in a case where plaintiffs claimed a right to have institutional services provided a short distance from their homes. *Bruggerman ex. rel. Bruggeman v. Blagojevich*, 324 F. 2d 906, 910-11 (7th Cir. 2003). The Supreme Court also rejected nursing home residents' claim of right under the ADA and the Medicaid Act to challenge their transfer to another nursing facility,

noting that the Medicaid Act "does not confer a right to continued residence in the home of one's choice." *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980).

As these cases demonstrate, the proposed intervenors have no basis to assert a right under the ADA to remain in an institution of their choice, or a right not to be transferred to another, similar facility providing the same level of services, if the state appropriately determines to phase down or close a specific institution.

3. Family members do not have a right to compel an institution to remain open when the state executive branch or the legislative branch decides to close it.

Similarly, there is no right under the ADA for persons with disabilities, or their families, to require that the state maintain a specific institution, once the state executive or legislative branch decides to close it. The Supreme Court in *Olmstead* noted that states must be accorded leeway to operate a range of facilities and programs. 527 U.S. at 605. The exact blend of institutions and community settings is properly left to the state, provided that persons with disabilities are not forced to endure unnecessary segregation or isolation as a result of the State's decision to maintain its institutions. *Id*. at 601-602, 605. The Court also afforded states a broad flexibility to manage and distribute those resources to achieve the goal of nondiscrimination. *Id.* at 605.

The proposed intervenors' interpretation of *Olmstead* would effectively allow them to assume for themselves the power of the legislative and executive branches of Virginia concerning the operation, location, and funding of public facilities, and as well as the allocation of resources for developmental disability services. It would also afford them a virtual veto over decisions to reduce state reliance on large institutions, even when necessary to comply with federal law or to obtain additional federal funding to expand

community services. Such a result would effectively preclude the Commonwealth, quite apart from any Agreement, from implementing its executive decision to alter or phase down any of the five Training Centers, even though the state has determined that maintaining all current is not financially feasible in light of the dwindling admissions and concurrent growing demand for community based services.[8] *See* Exhibit. 4. To allow proposed intervenors such a veto power plainly contravenes the proper authority of the Executive branch and the Department to allocate funds and formulate budgets, as well as public policy and common sense. *See* Va. Code Ann. § 2.2-103.C ("The Governor shall be the chief planning and budget office for the Commonwealth of Virginia."); *see also* Va. Code Ann. § 37.2.-509 (giving authority and responsibility to determine the allocation of funds for services, including developmental disability services, to community services boards). Such an interpretation of the ADA cannot serve as a basis for a protected interest that supports intervention.[9]

D. The Commonwealth Should Equitably Allocate Its Resources to All Persons with Disabilities.

Olmstead requires that states consider the needs of all their citizens with disabilities and allocate resources equitably. 527 U.S. at 604. As both the Commonwealth and the United States have recognized, the current allocation of resources for people with intellectual or developmental disabilities in Virginia is significantly imbalanced, tipping sharply in favor of funding institutions over services in

[8] The Governor, in his 1/26/12 letter to the Virginia General Assembly, stated "the continued operation of residential service in current levels, in five centers is unsustainable due to the significant and ongoing population. While the demand for community is growing (as is evidenced by the waiver waiting list), only about 13 families per year statewide are choosing to live long-term in a training center." Exhibit 4.

[9] The proposed intervenors also allege that living in the community is unsafe. Mem. at 15-18. This assertion is contradicted by the vast body of professional literature as well as the experience of many states that have successfully and safely closed some or all of their large institutions. See section IV, *infra.*

the community. *See* DOJ Findings Letter at 4, 16-18; *see also* Agreement, Section III. C, ¶ 9, p. 11; Exhibit 3.

In order to serve some of the needs of individuals with ID/DD in the community, the Commonwealth, as an alternative to ICF/MR placements, has created three different Medicaid waiver programs, with the approval of CMS, to serve these individuals. These programs, frequently referred to as "HCBS waivers," include: the Intellectual Disability ("ID") Waiver, Individual and Family Developmental Disabilities Support (IFDDS) Waiver, and the Day Support ("DS") Waiver. *See* Exhibit. 3; August 29, 2011 "Department of Medical Assistance Services: A Comparison of Medicaid Waivers for Persons with Developmental Disabilities" Presented to Senate Finance Committee HHR Subcommittee by Terry A. Smith, Director Division, LTC, August 29, 2011, attached as Exhibit 6, *see also* Exhibit 4. Currently, more than 8,600 persons are being served by the ID waiver (*see* Exhibit 3) and, the State reports, it has a waiting list of 6,074. Statewide ID Waiting List as of March 13, 2012, attached as Exhibit 5. Approximately 800 people are being served on the DD Waiver and the state reports a waiting list of approximately 1,012 persons. *See* Exhibit 3. The IFDDS serves up to 300 individuals. Exhibit 6. Thus, there are currently over 7,000 individuals who are waiting for waiver services. Exhibits 3, 4. 5. All 7,000 persons who are waiting for waiver services are eligible for these services, need these services, and have a compelling interest in receiving these services.

Moreover, the waiting lists are growing rapidly, at a pace approximating 800 per year. *See* Chart from Lee Price, Director of the Office of Developmental Services of DBHDS received by Jamie Liban on January 31, 2012, attached as Exhibit 7. The average waiting time for the ID waiver is 3-7 years, while the average waiting period for

the DD waiver is 3-5 years. Ex. 6. Of the 6074 people on the ID waitlist, 3,427 have been deemed to be at "urgent" need of services. *See* Ex. 5. It is further estimated that approximately 1500 people have been waiting to get on to the ID waiver for four years. Email from Rupinder Kaur at the Department to Jamie Liban dated March 15, 2012, attached as Exhibit 8.

While there are over 9,000 individuals served in the community through one of the three waiver programs, and 7,000 more who are waiting for services, there are only approximately 1,000 individuals currently residing at the Training Centers. *See* Exhibit 3. Even though the Commonwealth reports that residents of the Training Centers account for only 15.6% of the overall number of individuals with ID served by the Commonwealth , Training Center costs make up 63.8% of all of the legislative appropriations for services for people with ID. *Id*. This gross discrepancy is not logically related to need, since the average annual cost of serving an individual in a Training Center is $216,000, while the Commonwealth has reported that the average cost of serving a person with comparable needs in the community is only $138,000. *Id*.

In order to remedy these glaring inequities and to ensure an even distribution of resources for people with disabilities, as is required by the ADA and *Olmstead,* the Commonwealth has determined that it must reduce the costs of operating the Training Centers and, therefore, has made the executive decision to close four of its five Training Centers over ten years, reallocating these institutional resources to support community-based services. Agreement Section III. C.9; Exhibit 4. If the Commonwealth is prohibited from exercising its discretion to close antiquated institutions – as the proposed intervenors claim they have a right to do and intend to do if allowed to intervene in this

litigation – Virginia's efforts to equitably allocate its resources will be seriously stymied. Concomitantly, its efforts to comply with the ADA will be thwarted, as it will be forced to devote a disproportionately large percentage of its resources to a disproportionately small percentage of the individuals it is required to serve, leaving the rest with no assurance that any of their needs ever will be met.

Indeed, if the Court were to heed the proposed intervenors' interpretation of the ADA, it would *exacerbate* the current inequity in allocation of funding of services for individuals with ID/DD, in direct violation of the ADA and *Olmstead*.[10] Since the waiting list is growing at a rate of approximately 800 persons annually, if its disproportionate allocation of resources remains unchecked, the list will continue grow exponentially. In turn, the number of people who are deemed to be at "urgent" need of services also is likely increase substantially. This would place thousands of individuals who are currently in the community and are waiting for services at risk of unnecessary institutionalization in violation of the ADA. *M.R.* v. *Dreyfus*, 663 F.3d 1100 (9th Cir. 2011) (right under the ADA to avoid risk of institutionalization due to loss of Medicaid home services), *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) (the ADA applies to individual risk of institutionalization in a long-term care facility), *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003) (the ADA applies to individual risk of institutionalization in nursing homes); *see also* DOJ Findings Letter at 4 (finding that the "quantity of available services in the community is deficient, preventing individuals from being discharged from CVTC and other institutions and placing others at risk of unnecessary institutionalization") and at 16-18 (extensively discussing the

[10] Congress has recently recognized the imbalance between institutional and community-based care and has provided States with significant financial incentives to increase community-based resources. Patient Protection and Affordable Care Act, Pub.L. No.111-148, § 12202 (Mar. 23, 2010).

significant risk of "unnecessary and costly institutionalization" of individuals currently residing in the community who are waiting for services, particularly those deemed to be in urgent need of services, as a result of the "inadequate slots and the inflexibility of the waiver").

E. The Proposed Intervenors' Interests Are Adequately Protected by the Commonwealth and the United States.

A government entity charged by law with representing a national policy is presumed adequate for the task. *Brody v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992). Therefore, the United States, charged with protecting the constitutional and statutory rights of all citizens with intellectual and developmental disabilities, including the rights and national policies that are embodied in the ADA, presumably adequately protects the rights and the interests of the proposed intervenors. Likewise, the Commonwealth is responsible for administering Virginia's Medicaid and disabilities programs and, therefore, is presumed to be adequately protecting the interests of all its citizens who are recipients of those programs.

Courts have denied intervention in similar ADA cases, even when the plaintiff is a class rather than a government agency. The Third Circuit affirmed the trial court's denial of intervention, discussing the alleged unrepresented interests:

> It is sufficient to hold 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. In virtually every suit successfully prosecuted against a governmental entity, the judgment will occasion some reallocation of limited public resources. Every competitor for those limited resources has an interest that potentially may be adversely affected by that reallocation.

Benjamin, 432 F. App'x at 98-99; 2011); see also *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) ("The governmental parties to this litigation share

appellants' concerns about safety and cost and their representation is not inadequate simply because they have different ideas about how best to achieve these goals").

The sole "significant interest" that the proposed intervenors assert is their interest in remaining in the Training Center where they current reside, and preventing the closure of any of these institutions. But as the Court has noted, no decision has been made to close any of the Training Centers. That decision is rightfully in the hands of the Virginia General Assembly, not this Court. Moreover, its outcome is entirely speculative. Accordingly, since the proposed intervenors' core complaint is hypothetical, conjectural, and outside of the scope of this litigation, they have no direct, concrete, and legally protectable interest in this action, or at least in the future use of the Training Centers.

The proposed intervenors also lack standing to assert any protected interest in the possible closure of a Training Center. Where, as here, the proposed intervenors seek to advance a position that is not aligned with the – but instead is directly contrary to – the position of the parties, they must satisfy Article III standing requirements. *City of Chicago v. Federal Emergency Management Agency*, 660 F.3d 980, 984-85 (7th Cir. 2011); *City of Cleveland, Ohio v. Nuclear Regulatory Comm'n,* 17 F.3d 1515, 1516-17 (D.C. Cir. 1994); *Southern Christian Leadership Conference v. Kelley,* 747 F.2d 777, 779 (D.C. Cir. 1984). Under well established standing law, a person with only a hypothetical or contingent interest in the subject matter of a case lacks standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-06 (1983). Since the proposed intervenors' primary concern is that some of the Training Centers may be closed – something that the Agreement does not require and is contingent upon future actions by the Virginia Executive and Legislative Branches – the proposed intervenors have neither Article III standing nor a

protected interest sufficient to support intervention. *See United States v. City of New York*, 179 F.R.D. 379 (Denying intervention because "An interest that is ... contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy [Rule 24]." (quoting *Washington Elec., Inc. v. Mass. Municipal Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990)).

Finally, if the proposed intervenors believe that they have an enforceable right to the services of the public entity, they may bring their own lawsuits. *Benjamin*, 432 F. App'x at 99.

III. The Proposed Intervenors Have Not Satisfied the Standards for Permissive Intervention.

In the alternative, but with little discussion, the proposed intervenors also argue that they satisfy the standards for permissive intervention. Such intervention is discretionary if the proposed intervenors have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Pro. 24(b). As more described *supra,* the proposed intervenors concerns about the potential closure of some Training Centers is entirely conjectural, and not an issue that is part of the subject matter of this case. Furthermore, they do not have a legal right or interest in remaining in their current institution, nor a right to prevent institutional closure, should the Executive and Legislative Branches determine this is appropriate. As a result, they do not share a legal claim or question with the parties.

Even if there is a shared question, it would not be an abuse of discretion to deny permissive intervention. Allowing this motion will almost certainly invite others to seek formal party status. *See Wyatt v. Hanan*, 170 F.R.D. 189, 194 (M.D. Ala. 1995) ("To allow representatives of all residents who have an interest in this litigation—that is, all

representatives—to intervene would render this lawsuit more unmanageable and unnecessarily confusing than it already is"). Given the legal interests of thousands of families in various Virginia *amici* organizations that are safeguarded by the Agreement, affording party status to the proposed intervenors without doing so to other, similarly impacted families, would be unfair and inequitable. And since the proposed intervenors are seeking intervention not only to oppose the Agreement but also to dismiss the case, the impact on thousands of other families is plainly significant.

Like all persons and organizations with an interest in the litigation, the proposed intervenors will have an opportunity to make their views known to the Court. Moreover, as is argued in Section I *supra*, the proposed intervenors have several other adequate forums in which to address their concerns. Accordingly, the Court should exercise its discretion and deny permissive intervention. *Brody,* 957 F.2d at 1124 ("[I]f intervention of right is not available, the same reasoning would indicate that it would not be an abuse of discretion to deny permissive intervention").

IV. Many States Have Demonstrated the Ability to Accommodate Concerns from Families and to Safely Transition Individuals from Institutions to Community Programs.

A. States Have a Successful Record of Safely Transitioning Individuals with Disabilities from Segregated Institutions to Integrated Settings.

Many states have substantial positive experience in implementing systems to integrate individuals with intellectual disabilities into community-based settings. Since the mid-1960s, every state has reduced the numbers of individuals in institutions. For example, from 1967 to 2009, the population of state institutions decreased from 194,650 to 33,732. David Braddock *et al*., The State of the States in Developmental Disabilities 2011 (2011), 50-57. Indeed, community living for people with intellectual and

developmental disabilities is undisputedly the norm. In fact, a 2005 study reported that 92% of individuals with intellectual disabilities then lived with family or alone; 6% lived in community-supported living; 1% lived in nursing homes and only 1% lived in institutions. Bonnie Shoultz, et al, *Policy Research Brief: Status of Institutional Closure Efforts in 2005*, University of Minnesota, 2 (2005). The percentage of person in community supported living may have increased since 2005 because of the increase in Medicaid waiver funding.

New Hampshire was the first state to operate an "institution-free" system, which has been followed by at least eleven other states and the District of Columbia, including, most recently, Indiana and in December 2011, Alabama. *Id*. at 51-52. Dana Beyerle, "Paltrow Center Closes After 88 Years," Tuscaloosa News, Dec. 29, 2011, available at http://www.tuscaloosanews.com/article/201112. Virginia is one of only twelve states that has not closed a institution for people with intellectual disabilities since 1970 and is only one of six states with more than one such facility that has not yet closed even one. *Id.* at 52.

In most of the states where there have been institutional closures, some families have expressed understandable concerns, fears, and sometimes resistance. State officials have become increasingly adept in addressing those concerns, through outreach and education about community options; providing opportunities for families to visit and learn about community living arrangements; offering support from other families who are familiar with community services and positive about community living; including families in every aspect of the service planning and transition process; affording families avenues to question, or even appeal, discharge decisions; developing effective monitoring

and oversight programs that promote quality community services; and, most importantly, respecting family preferences, views, and choices. As a result of these approaches, state officials have successfully transitioned thousands of individuals with ID/DD from large institutions to the community, have closed numerous segregated facilities, and have achieved significant savings that then are devoted to expanding community services.

B. The Professional Literature Demonstrates that ID/DD Can Be Safely and Appropriately Transitioned to the Community, Regardless of the Extent of their Disabilities.

The advantages of community living are powerfully and convincingly supported by a large body of professional literature. As described in the literature, these proven benefits have been demonstrated in a range of community settings, and regardless of the degree of the individual's disability. Importantly, gains from community living are achieved whether the move is voluntary or involuntary. Individuals with intellectual and developmental disabilities show gains and improvements in adaptive behavior, independence, self-care skills, social skills and vocational skills when they are transferred to the community. While there may be an initial adjustment period, transition to the community presents individuals with opportunities unavailable in institutional settings. If transitions follow well laid-out standards, policies and clinical guidelines that make transitions as easy as possible, the research clearly shows that individuals who leave institutions and move to the community experience fuller lives from increased family contact and community integration.

The first major research data was reported in the seminal *Pennhurst Longitudinal Study*, in which researchers assessed more than 1,100 individuals over five years as they moved into the community from the Pennhurst State School and Hospital in

Pennsylvania. The study found that people who moved into the community were more independent and showed improvements in adaptive behavior. James W. Conroy & Valerie J. Bradley, *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis*, 314-15 (1985)(hereafter "*Pennhurst Study*"). This report unequivocally shows that gains were largely due to community placement, rather than aging or natural development, and all occurred notwithstanding the involuntary nature of the transfers.

Thereafter, an overwhelming number of research studies corroborated the *Pennhurst Study's* results. There have been at least two surveys of the relevant research data. In a 1989 survey of 18 studies of 1,358 subjects from 13 states, the authors concluded that institutions were "consistently less effective than community-based settings in promoting growth, particularly among individuals diagnosed as severely or profoundly retarded." Sheryl A. Larson & K. Charles Lakin, "Deinstitutionalization of Persons with Mental Retardation: Behavior Outcomes," 14 *J. of the Ass'n for Persons with Severe Handicaps* 324-32 (1989). Based on these findings, the authors concluded that "it must be recognized that based on a substantial and remarkably consistent body of research, placing people from institutions into small, community-based facilities is a predictable way of increasing their capacity to adapt to the community and culture." *Id.* at 331. In a later review of 33 more research evaluations, the authors found that the literature continued to support their earlier findings that improvements in adaptive behaviors are consistently found in individuals who are transferred to the community. *See* Shannon Kim, *et a*l., "Behavioral Outcomes of Deinstitutionalization for People with Intellectual Disabilities: A Review of Studies Conducted between 1980 and 1999," 26 *J.*

of Intellectual and Developmental Disability, 35 (2001). Subsequent research continues to confirm these conclusions. *See* Marguerite Brown *et al*., "Eight Years Later: The Lives of People who Moved from Institutions to Communities in California. Year 2001 Report of the Quality of Life Evaluation of People with Developmental Disabilities Moving from Developmental Centers into the Community ('The Quality Tracking Project'), Final Report (Year 2)" (2001) (families were "unexpectedly and overwhelmingly happy with community living, even those who formerly opposed the change").

Moreover, the research also consistently has found that integration and community orientation significantly improve upon transfer to the community. Those who moved to the community greatly increased their opportunities to go places and interact with non-disabled citizens. *See* Brown, *et al*. at 31. Significantly, community living also has been found to diminish challenging behavior. *See* Kim at 45.

Finally, the professional research consistently and unequivocally shows that families of individuals relocated from institutional into community placement are overwhelmingly satisfied with the results of that relocation. Notably, even where families initially opposed the transfer, the great majority ultimately become supporters of community placement. *See* Braddock at 11; *see also Pennhurst Study* at 177. These changes in family attitudes were highly statistically significant. *Pennhurst Study* at 178. Brown at 125-26. Families' positive attitudes about community living grow stronger the longer their relatives are out of institutions. *Id*. at 127. Interestingly, family members are often surprised by their own change in feelings and report unexpected changes for the better in their own lives, and in the lives of their disabled relatives. *Pennhurst* at 188.

While family worries over transfer and change often lead to initial opposition to community placement, they ultimately do not play a role in long-term reactions. Brown, *et al*. at 127-128.

V. Conclusion

For the reasons cited above, the Motion to Intervene should be denied.

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Respectfully submitted,

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APPENDIX A

AMICI ORGANIZATIONS

The Arc of Virginia ("The Arc of VA") is a state chapter of The Arc of the United States, the world's largest grassroots organization of and for people with intellectual and developmental disabilities. Established in 1955, The Arc of VA has fought for decades to improve Virginia's services for all children and adults disabilities. The Arc of VA's mission is to promote and protect the human rights of people with intellectual and developmental disabilities and actively support their full inclusion and participation in the community throughout their lifetimes. The Arc of VA is comprised of 25 local chapters from across the Commonwealth. The Arc of VA has 3,704 members, including many individuals and families who are on a waiting list for services.

The **Autism Society of Central Virginia** ("ASCV"), a local chapter of the Autism Society, has over 25 years of non-profit services, advocacy, and support to children, youth and adults, their families and providers. The mission of the Central Virginia chapter is to improve the lives of all affected by autism by promoting lifelong access and opportunities for persons within the autism spectrum and their families, to be fully included, participating members of their communities through advocacy, public awareness, education and research related to autism. Four hundred seventeen individuals and families are members of the ASCV.

The **Autism Society of Northern Virginia** ("ASNV"), a local chapter of the Autism Society, is an organization that promotes the general welfare of children and adults with autism. ASNV provides support for their families, including educational support, vocational training and recreation of those with autism. The chapter also aids in the collection and dissemination of information to parents, professionals and the general public.

The **Autism Society, Tidewater Virginia** ("AS Tidewater"), a local chapter of the oldest and largest international autism-specific member organization, The Autism Society, is a grassroots organization established to help improve the lives of all affected by autism. AS-Tidewater does this by increasing public awareness, advocating for appropriate services for individuals across the lifespan, and providing the latest information on treatment, education, research and advocacy. Formed in 1981, AS Tidewater's mission includes creating a world where persons within the autism spectrum disorder are fully included, participating members of their communities.

The **Virginia Down Syndrome Alliance** (VDSA) is dedicated to improving the quality of life for individuals with Down syndrome and other intellectual and developmental disabilities by effecting positive systems change at the federal, state and local levels of government. The VDSA is a coalition comprised of representatives from: Down Syndrome Association of Fredericksburg, Down Syndrome Association of Greater Richmond, Down Syndrome Association of Hampton Roads, Down Syndrome

Association of Northern Virginia, and the Down Syndrome Association of Roanoke. All of the associations that comprise the VDSA envision individuals with Down syndrome as fully included and valued members of society. The associations provide education, family support and public awareness in order to empower individuals with Down syndrome to lead fulfilling lives. Membership among these five Down Syndrome Associations of Virginia totals more than 1500 families. The VDSA affords the Down syndrome associations of Virginia the ability to coordinate involvement in legislative matters affecting individuals with Down syndrome and their families.

The **Peninsula Autism Society**'s mission is to provide information to individuals with autism and their families, friends, educators and professionals in the Virginia Peninsula area. The Society strives to educate the community about autism, inform parents and professionals about the available resources in the community, and to serve as a support system, advocating for those with autism. The Society has approximately 350 affiliates and family members.

The Arc of the United States (The Arc) promotes and protects the human rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc consists of more than 700 state and local chapters across the United States, whose 140,000 members include people with intellectual and developmental disabilities, their families, and professionals in the field. The Arc believes that people with intellectual and developmental disabilities belong in the community and have fundamental moral, civil, and constitutional rights to be fully included and actively participate in all aspects of society.

The **Association of University Centers on Disabilities** ("AUCD") is comprised of a network of interdisciplinary centers advancing policy and practice for and with individuals with developmental and other disabilities, their families, and communities. Based in Maryland, AUCD currently represents 67 University Centers for Excellence in Developmental Disabilities Education, Research, and Service ("UCEDD") with at least one center in every state. AUCD's mission is to advance policy and practice for and with people with developmental and other disabilities, their families, and their communities via supportive research, education, and service activities. AUCD sees a future in which everyone, including people living with developmental and other disabilities, are fully integrated, participating members of their communities. AUCD is striving for a time in which culturally appropriate supports lead to independence, productivity and a satisfying quality of life universally available to all those with developmental and other disabilities.

TASH is an international leader in disability advocacy, based in Washington, D.C. Founded in 1975, TASH advocates for human rights and inclusion for people with significant disabilities and support needs, particularly those vulnerable to segregation and institutionalization. TASH works to advance inclusive communities through advocacy, research, professional development, policy, and information and resources for parents, families and self-advocates. TASH members include a diverse array of individuals and

perspectives, including researchers, professionals, direct service workers, family members and people with disabilities.