IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANKLIN BENJAMIN, by and through his next friend, Andreé Yock; RICHARD GROGG and FRANK EDGETT, by and through their next friend, Joyce McCarthy; SYLVIA BALDWIN, by and through her next friend, Shirl Meyers; ANTHONY BEARD, by and through his next friend, Nicole Turman, on behalf of themselves and all others similarly situated,	Filed via ECF System Civil Action No. 1:09-cv-1182-JEJ Class Action Complaint Filed June 22, 2009
Plaintiffs,	Judge Jones
v.	
DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA and ESTELLE B. RICHMAN, in her official capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,	

PLAINTIFFS' BRIEF IN OPPOSITION TO
MOTION FOR INTERENTION PURSUANT TO FED. R. CIV. P. 24

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COUNTERSTATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are individuals with mental retardation who are institutionalized in intermediate care facilities for persons with mental retardation (ICFs/MR) operated by Defendants Department of Public Welfare and Estelle B. Richman (collectively, DPW). Am. Compl. ¶¶ 1, 8-14, 55. Plaintiffs, who are appropriate for discharge to the community and not opposed to discharge, filed this lawsuit in June 2009 to challenge DPW's failure to offer them appropriate community supports and services. *See id.* ¶¶ 2, 4, 23-26, 29-32, 35-37, 41-43, 46-49, 72, 86, 92.

There currently are approximately 1,272 individuals residing in five state-operated ICFs/MR in Pennsylvania. Am. Compl. ¶¶ 54-55. All of these individuals, with appropriate services and supports, could live in more integrated community settings. *Id.* ¶ 65. Many, although not all, residents of state-operated ICFs/MR and their families are not opposed to discharge, provided that appropriate and adequate community supports and services are offered. *See id.* ¶¶ 69, 70. Some residents or family members who may currently be opposed to discharge might change their minds if they were provided with information about the types of community services and supports that would be made available to them. *Id.* ¶ 70. Indeed, many former residents who had lived for years in now-closed state ICFs/MR and who were discharged by DPW to small, community-based placements over their or their family members' initial opposition now are happy

with the community supports and services they receive, as are their families. *Id.* ¶ 71.

Plaintiffs allege that DPW violates the integration mandates of the Americans with Disabilities Act (ADA) and Rehabilitation Act (RA) by "unnecessarily segregating Plaintiffs and putative class members in institutions, by failing to offer them mental retardation services in the community, ... and *by failing to provide such services to Plaintiffs and those putative class members who are not opposed to discharge*." Am. Compl. ¶¶ 86, 92 (emphasis added). Plaintiffs seek declaratory and injunctive relief, *id.* ¶ 94, on behalf of a class of similarly situated individuals. *Id.*

Following briefing by the Plaintiffs, the Court issued an Order that certified this case pursuant to Federal Rule of Civil Procedure 23(b)(2) to proceed on behalf of the following class:

> All persons who: (1) currently or in the future will reside in one of Pennsylvania's state-operated intermediate care facilities for persons with mental retardation; (2) could reside in the community with appropriate services and supports; and (3) *do not or would not oppose community placement*.

Order dated Sept. 2, 2009 at 4 (emphasis added) (Docket # 17).

Although DPW did not oppose Plaintiffs' class certification motion, it certainly has not conceded defeat in this case. To the contrary, DPW filed a Motion to Dismiss the Amended Complaint in its entirety.[1]

Nine residents of the state ICF/MR institutions (Movants) have now filed a Motion for Intervention to intervene on the side of DPW. These residents, through their guardians or next friends, state that they are opposed to discharge from the ICFs/MR. The Movants assert no claims against DPW nor does their Response to Plaintiffs' Amended Complaint assert any counterclaims against the Plaintiffs. Instead, they apparently seek to have this Court decertify the Class and to require the Plaintiffs to proceed only on an individual basis. Movants' Response at 33.

The Movants fail to satisfy the criteria for intervention as a matter of right. Since the Movants are opposed to discharge, they are not members of the Class. By definition, then, they have no direct, specific interest that is threatened by this litigation. Any interest the Movants might have already is represented by the existing parties. In addition, permissive intervention would be inappropriate. The Movants have asserted neither claims nor defenses, and their "interest" in the scope of the class has nothing in common with this case since the Class has already been defined to exclude all persons, like Movants, who are opposed to community

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[1] Given the complexity of this case, the parties have agreed to proceed with discovery while the Motion to Dismiss is pending.

placement. Moreover, intervention woul d prejudice absent class mem bers, who would be deprived of the right to m ake an informed choice about comm unity placement, and would potentially prejudice even the named Plaintiffs.

STATEMENT OF THE QUESTIONS INVOLVED

1. Do the Movants have a right to intervene in this lawsuit when they are explicitly excluded from the class definitio n and, thus, have no direct, specific interest which can be jeopardized by the litigation and w hen any interest they might have already is represented by existing parties?

2. Should the Court exercise its di scretion to permit the Movants to intervene when the class definition' s exclusion of persons opposed to comm unity placement eviscerates any potential shared questions of law and fact between the Movants' purported "interests" and this lawsuit and when intervention would be highly prejudicial to absent class members and potentially the named Plaintiffs?

ARGUMENT

I. THE MOVANTS HAVE FAILED TO MEET THEIR BURDEN TO PROVE THAT THEY HAVE A RIGHT TO INTERVENE UNDER RULE UNDER RULE 24(a).

A person who seeks to interve ne as a matter of right under Federal Rule of Civil Procedure 24(a) must establish:

> 1) a tim ely application for leave to intervene, 2) a sufficient interest in the underl ying litigation, 3) a threat that the interest will be im paired or affected by the disposition of the underlying action, and 4) tha t the

> existing parties to the action do not adequately represent the prospective intervenors' interests.

Liberty Mutual Ins. Co. v. Treesdale, Inc., 419 F.3d 216, 220 (3d Cir. 2005). "'Each of these requirements must be met to intervene as of right.'" *Id.* (citations omitted).

Although the Motion is not untimely,[2] it fails to satisfy every other criterion for intervention. Despite the Movants' hyperbolic and mostly irrelevant assertions about the Plaintiffs and their alleged *sub rosa* "agenda," the Movants have no direct, legally protectible interest that is jeopardized by this litigation since they are excluded from the Class. Even assuming *arguendo* that the Movants' interests suffice to satisfy the second and third prongs of the test, those interests are amply represented by the existing parties.

A. Since They Are Explicitly Excluded From the Class Definition, the Movants Have No Significantly Protectible Interest.

"To justify intervention as of right, the applicant must have an interest 'relating to the property or transaction which is the subject of the action' that is 'significantly protectible.'" *Kleissler v. United States Forest Service*, 157 F.3d 964, 969 (3d Cir. 1998). "[T]he polestar for evaluating a claim for intervention is whether the proposed intervenors' interest is direct or remote." *Id.* at 972; *see also*

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[2] Plaintiffs do not challenge the timeliness of the Motion for Intervention since the Movants indicate that they would not need to change the current schedule if intervention is permitted. *See* Movants' Br. at 7.

Liberty Mutual Ins. Co., 419 F.3d at 220 (a "significantly protectible interest" is one that is not "of a general and indefinite character.").

The Movants state that they have an interest in "choice," *i.e.*, choice between institutional and community services. Movants' Br. at 11. The class definition approved by this Court has transformed any interest the Movants might have had from one that could be significant and legally protectible to one that is, at best, general and remote, if not purely illusory. The class definition preserves the very choice that the Movants seek to protect by including in the Class only those state ICF/MR residents who "do not or would not oppose community placement" and, conversely, excluding those individuals -- including the Movants -- who are opposed to community services. The class definition is consistent with the scope of Plaintiffs' ADA and RA claims, which are based on the failure of DPW to provide community alternatives to those individuals who are not opposed to discharge. Am. Compl. ¶¶ 86, 92. Indeed, Plaintiffs formulated the case in this narrow way in recognition that the right to community services afforded by the ADA and RA has been limited to those individuals who are not opposed to such services. *Olmstead v. L.C.*, 527 U.S. 581, 602, 607 (1999).

Put simply, since the Movants are opposed to community placement, they are not members of the Class and will not be subject to any relief. Contrary to the Movants' claims, Plaintiffs -- as evidenced by the Amended Complaint and the

class definition -- do not have some nefarious plan to secure relief to "force" or "require" the Movants to leave state ICFs/MR. *See* Movants' Br. at 10, 12. To the contrary, the class definition and the scope of the Amended Complaint reveal that the Plaintiffs have carefully circumscribed their claims in accordance with *Olmstead* to assure that community services will be provided only to those who desire such services.

The Movants' contention that they will be bound by a settlement or judgment, thus giving rise to a legally protectible interest, Movants' Br. at 11, is untenable. The Movants are not class members and, thus, are not parties to this case. As such, they cannot be bound by any potential settlement between the Plaintiffs and DPW. A settlement agreement is a contract, *Flemming ex rel. Estate of Flemming v. Air Sunshine, Inc.*, 311 F.3d 282, 289 (3d Cir. 2002), and "[i]t goes without saying that a contract cannot bind a non-party." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). Nor would a judgment on the merits in this case preclude any claims that the Movants might have since one of the elements of claim preclusion or res judicata is identity of the parties or their privities. *See Churchill v. Star Enterprises*, 183 F.3d 184, 194 (3d Cir. 1999).

In sum, the Movants' purported significantly protectible interest rests on a fallacy, *i.e.*, that they are Class members who will be bound by a judgment or settlement. Such a fallacy can not give rise to an interest that justifies intervention

as a matter of right. *See* *Liberty Mutual Ins. Co.*, 419 F.3d at 225-26 (finding that proposed intervenors did not have a legally protectible interest since the premise of that interest -- *i.e.*, that one of the parties was insolvent -- was "baseless").[3]

B. Even Assuming that the Movants Have a Significantly Protectible Interest, the Scope of the Class Definition and Lawsuit Assures that Their Interest Is Not In Jeopardy.

Even assuming *arguendo* that the Movants have some sort of significantly protectible legal interest in this action, intervention as a matter of right is warranted only if they can show that their claim "'is in jeopardy.'" *Liberty Mutual Ins. Co.*, 419 F.3d at 226 (citation omitted). The Movants "'must demonstrate that their legal interests may be affected or impaired, as a practical matter, by the disposition of the action.'" *Id.* (citation omitted). This requires the Court to determine whether the litigation will have "'any *significant legal effect* on the [Movants'] interest.'" *Id.* (emphasis added; citation omitted). "'It is not sufficient that the

[3] The Movants also imply that they have a legally protectible interest in proving that, contrary to Plaintiffs' claims, some state ICF/MR residents require an institutional level of care. *See* Movants' Br. at 9. Since individuals, such as the Movants, who are opposed to community placement are not members of the Class, their ability to remain in the state ICFs/MR is not affected by this case regardless of whether an institution is the most integrated setting appropriate to meet their needs. The Movants' interest in the propriety of community placement is merely academic and cannot rise to a significant, direct, legally protectible interest. In essence, it merely wants the Court to issue an improper advisory opinion on that issue.

claim be incidentally affected; rather, there must be a *tangible threat* to the applicant's legal interest.'" *Id.* at 226-27 (emphasis added; citation omitted).

Once again, the premise of the Movants' argument that their interests will be jeopardized rests on an invisible foundation, *i.e.*, that the Movants are members of the Class who will be bound by a settlement or judgment that resolves the Class's claims. But the Movants are not members of the Class, and they cannot be bound by any judgment or settlement. *See* discussion, *supra*, at 7. As outsiders to this case, the Movants' interests cannot be tangibly threatened by this litigation.

The Seventh Circuit rejected an intervention motion in virtually identical circumstances. In *Ligas ex rel. Foster v. Maram*, 478 F.3d 771 (7th Cir. 2007), individuals with developmental disabilities brought a class action lawsuit under the ADA to challenge their unnecessary institutionalization. Individuals who opposed community placement sought to intervene "to ensure that the disabled would still retain a choice of where they lived." *Id.* at 773. The district court held that any interest of the proposed intervenors would not be threatened or impaired by the lawsuit, and the Court of Appeals agreed. *Id.* at 774.[4] Reviewing the language in the complaint, the appellate court reasoned that the lawsuit would not leave the

[4] Notably, the Movants here are represented by the same counsel as the unsuccessful movants in the *Ligas* intervention motion, yet they failed to bring this decision to the Court's attention.

proposed intervenors without a choice of institutional care. *Id.* The court explained:

> [T]he complaint is "replete with language on choice." Nothing in the complaint, either on its face or as correctly construed by the district court, would require the state to force those who desire institutional care to move out.

Id. Like the *Ligas* case, the Plaintiffs in this case have assured -- through the class definition and the framing of the claim -- that people who are opposed to discharge will not be required by the lawsuit to leave an institutional setting. Since the Movants' choices are, indeed, respected by the Plaintiffs' claims, they cannot establish that their interest in choice is at risk in this case.

The Movants' reliance on the later history of the *Ligas* case to establish a risk to their purported interest, Movants' Br. at 15-16, is unavailing. In *Ligas*, the district court in 2006 certified a class similar to the one in this case, consisting of Illinois residents with mental retardation or other developmental disabilities who: lived in privately-run institutions or were at risk of institutionalization; qualified for long-term care; could live in the community with appropriate supports and services; and "*would not oppose community placement*.". *Ligas ex rel. Foster v. Maram*, Civil Action No. 1:05-cv-4331, 2006 WL 644474 at *5 (N.D. Ill. Mar. 7, 2006) (emphasis added) (Att. A).

After this *Ligas* class was certified and the Seventh Circuit denied the intervention motion by individuals opposed to community placement, the parties

entered into a consent decree. *See Ligas ex rel. Foster v. Maram*, Civil Action No. 1:05-cv-4331, slip op. (N.D. Ill. July 7, 2009) (submitted as Attachment B to Motion for Intervention). The proposed consent decree changed the definition of the class in a way that would include all persons living in private institutions *regardless of whether they are opposed to community placement*. *Id.* at 1-2.[5] As the court correctly observed, the consent decree's class definition was "considerably broader than the class contemplated by the plaintiffs' lawsuit." *Id.* at 2. In response to the class notice, more than 2,500 objections were filed, and more than 240 people attended the fairness hearing to oppose the consent decree. *Id.* In light of the markedly expanded class definition and the opposition to the consent decree, the court rejected the settlement and decertified the class. The court noted, *inter alia*, that commonality and typicality were no longer satisfied because the proposed settlement class, unlike the previously-certified class, would include individuals who were opposed to community placement. *Id.*[6]

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[5] It appears that the district court -- at some point prior to its certification of the class and the appeal of the intervention motion -- dismissed a previously-proposed class definition and "instruct[ed] ... the plaintiffs to ensure that parties such as [the proposed intervenors who were opposed to community placement] not be included in a future request to certify a class ...." *Ligas*, 478 F.3d at 776.

[6] Contrary to the Movants' implication, Movants' Br. at 16, the *Ligas* Court's criticism of the "class definition" related to the revised class definition in the proposed consent decree -- not the original class definition.

Far from demonstrating that intervention is needed to protect the Movants' alleged interests, the *Ligas* case demonstrates that intervention was not necessary to do so. The individuals opposed to community placement were not allowed to intervene in *Ligas*. Yet, when the plaintiffs in that case sought to enter into a settlement that would amend the class definition to include individuals regardless of opposition to community placement and that would bind those individuals, the Court correctly used the well-established class actions procedures of Rule 23(e) to provide those opposing community placement with notice and an opportunity to be heard. They were heard, and their position prevailed. In this litigation, Plaintiffs have specifically excluded opponents of community placement from the Class. Accordingly, there is no risk that they will be bound by any judgment or settlement, and thus the *Ligas* Court's decertification decision does not support the Movants' contention that they have interests placed in jeopardy by this case.

In lieu of dealing with the realities of this lawsuit as it has been framed and actually litigated, the Movants rely on fantasy to establish the risk of harm necessary to justify intervention as of right. The Movants assert that the class definition's exclusion of people who are opposed to community placement does not matter because the Movants are "class members by the objective standards," and they will thus be bound by any settlement or judgment since there is no right to opt out of a Rule 23(b)(2) class. Movants' Br. at 13. The "objective standards" of the

class definition, though, *explicitly exclude* the Movants based on their opposition to community placement and, as such, they will not be bound by any judgment or settlement. *See* discussion, *supra*, at 7. The Movants' assertion that they are class members, despite the express and "objective" terms of the class definition, is meritless.

Contrary to the Movants' protests that they respect the rights of Plaintiffs and others who want to live in the community to "choose their own destiny," *see* Movants' Br. at 2, the Movants are effectively seeking to strip other state ICF/MR residents from exercising the very choice that they want for themselves. Plaintiffs are asking for relief that would allow state ICF/MR residents to make informed choices and be provided with appropriate options. The Movants, on the other hand, would foreclose the Court (if it finds DPW violated the ADA and RA) from affording other state ICF/MR residents and their families the information they need to make informed decisions about community placement. The Movants' opposition to the provision of accurate information to state ICF/MR residents and their families about community alternatives is incomprehensible.

Finally, the Movants' assertion that the litigation poses a risk of harm to their interests because it is merely a smokescreen to allow "so-called 'advocates' to strike the fatal blow to ICF/MR care in this Commonwealth," Movants Br. at 14, is not credible. There simply is no basis for this allegation and Movants offer none.

The limited scope of the class definition and the Complaint make clear that this lawsuit is not about outlawing ICFs/MR in Pennsylvania, but, rather, about assuring that people are provided with appropriate community alternatives when they choose them. The Movants' exaggerated claims to transform this case into something it is not should not be permitted to obscure the basic issue, which is that the Movants have no interests that will be harmed in this case because they are not members of the Class.[7]

C. The Movants' Rights Are Adequately Represented by the Existing Parties in the Litigation.

To justify intervention as a matter of right, the Movants also must demonstrate that their interest in the litigation is not adequately represented by an existing party. Absent collusion or a failure to prosecute, a potential intervenor can establish this element only by showing that his interests "diverge sufficiently [from the party's interests] that the existing party cannot devote proper attention to the applicant's interests." *Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1122-23 (3d Cir. 1992). The burden, "however minimal" rests with the Movant to satisfy this criterion. *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982). Here,

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[7] In fact, this lawsuit could not be the death knell of ICFs/MR in Pennsylvania since this lawsuit only involves state-operated ICFs/MR. As the Movants admit, there also are numerous privately-operated ICFs/MR in the Commonwealth, Am. Compl. & Movants' Resp. ¶ 52, and this case would not preclude the Movants or others who seek institutional care from using such options.

whatever interests the Movants might have are adequately represented by the Plaintiffs and DPW.

The Plaintiffs have, in fact, represented the Movants' interests by carefully framing this lawsuit and the class definition to exclude from the Class those individuals, like Movants, who are opposed to community placement. Contrary to the Movants' assertions, the Plaintiffs are not seeking to "litigate the case against [the Movants'] interests, but in their name" nor are they "openly antagonistic of [their] wishes." Movants' Br. at 4, 17. Indeed, the Plaintiffs have been cognizant and extremely respectful of the Movants' ability under *Olmstead* to oppose community placement. The Plaintiffs already have made clear to this Court that the relief they seek will not apply to those opposed to community placement. The Movants' intervention would do nothing more than reiterate this point.

DPW, as well, has proved itself able to represent the Movants' interests. "[W]hen a representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith." *Ligas*, 478 F.3d at 774; *accord United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986). In *Ligas*, the Seventh Circuit held that the proposed intervenors, individuals opposed to community placement, failed to overcome the presumption that the government defendants adequately represented

their interests since there was no evidence that the defendants were grossly negligent or acted in bad faith. *Ligas ex rel. Foster*, 478 F.3d at 774.

The Movants contend that DPW's failure to oppose class certification demonstrates a conflict. Movants' Br. at 19. It does not. It merely suggests a difference in litigation tactics. DPW has vigorously defended this action and, indeed, has filed a Motion to Dismiss the Plaintiffs' claims in their entirety. The decision by DPW not to oppose class certification, but rather to seek to defeat the claims and thereby bind all class members to the decision and preclude relitigation, is a reasonable strategic choice. The Movants thus "fail to appreciate the difference between an intervenor's interest in the litigation and an intervenor's interest in litigation strategy." *Estate of Kelly ex rel. Gafni v. Multiethnic Behavioral Heath, Inc.*, Civil Action No. 05-3700, 2009 WL 2902350 at *8 (E.D. Pa. Sept. 9, 2009) (Att. B). A mere disagreement with litigation strategy is not sufficient to conclude that DPW cannot represent the Movants' interest capably. *See* *CSX Transp. v. City of Philadelphia*, Civil Action No. 04-cv-5023, 2005 WL 1677975 at *5 (E.D. Pa. July 15, 2005) (the government adequately represented the proposed intervenors' interest, even though it adopted a narrower defense than that preferred by the

proposed intervenors and sought slightly different relief since "these superficial differences do not reflect any true divergence of interests") (Att. C).[8]

II. PERMISSIVE INTERVENTION IS NOT JUSTIFIED.

When, as here, there is no right to intervene, the Court may nevertheless grant permission to intervene to a person who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *accord* *Liberty Mutual Ins. Co.*, 419 F.3d at 227. The Court must consider, as well, "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(c); *accord* *Estate of Kelly ex rel. Gafni*, 2009 WL 2902350 at *8. The decision whether to permit intervention is "highly discretionary." *Liberty Mutual Ins. Co.*, 419 F.3d at 227.

Here, the Movants have no "claim or defense" that share common questions with the main lawsuit since they have asserted neither a claim nor a defense. Instead, they assert an amorphous "interest" in questions presented in the case and,

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[8] The Movants' challenge to the adequacy of DPW's representation is based on the assertion that DPW's general interest in the "public welfare" could lead it to enter into a settlement that would adversely impact the Movants. Movants' Br. at 18-19. The cases cited by the Movants, however, were not class actions so that the proposed intervenors would have no protection if the government defendants made an agreement contrary to their interests. Since this is a class action, the Movants would be entitled to notice of any potential settlement if it impacted their rights, and they would be provided with an opportunity to object to such a settlement and participate in a fairness hearing. *See* Fed. R. Civ. P. 23(e). At this juncture, though, there is no reason to anticipate a conflict between the Movants and DPW.

specifically, in the certification of the class and whether all class members are appropriate for or desire community placement. Movants' Br. at 20. Even assuming that such vague "interests" rise to a legal claim or defense, they are not sufficient to justify permissive intervention. In *Ligas*, the Seventh Circuit upheld the denial of permissive intervention based on these precise "interests." *Ligas*, 478 F.3d at 775-76. The court noted that those interests were addressed by the district court's "instructions to the plaintiffs to ensure that parties such as [the proposed intervenors who were opposed to community placement] not be included in a future request to certify a class ...." *Id.* at 776.

In addition, the Court should not permit intervention because doing so would prejudice the adjudication of the parties' rights. Most absent class members are isolated, have limited resources, and have disabilities that prevent them from bringing individual lawsuits. Thus, intervention to decertify the class and exclude other state ICF/MR residents who seek community placement or who, after receipt of appropriate information, might opt for community placement would prejudice the rights of those absent class members by effectively foreclosing their ability to secure relief.

Moreover, decertification of the class might prejudice the named Plaintiffs. *Olmstead* strongly suggests that ADA integration mandate cases should proceed on a class basis. The Court was concerned about individuals who, by commencing

civil actions, can effectively displace others in institutions who are waiting for and desire community services. *See* *Olmstead*, 527 U.S. at 606. If this case is limited to five individuals who desire and are appropriate for community services, DPW will no doubt challenge their right to secure community services ahead of other state ICF/MR residents who are also waiting for community placements.

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that this Court deny the Motion for Intervention.

Respectfully submitted,

Dated: November 23, 2009

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LOCAL RULE 7.8(b)(2) CERTIFICATE

I certify under penalty of perjury that Plaintiffs' Brief in Opposition to the Proposed Intervenors' Motion for Intervention Pursuant to Federal Rule of Civil Procedure 24 complies with Local Rule 7.8(b)(2) because it contains 4,583 words (excluding the Table of Contents and Table of Citations) based on the word processing system used to prepare the Brief (Word 2003).

/s/ *Robert W. Meek*
Robert W. Meek

CERTIFICATE OF SERVICE

I, Robert W. Meek, hereby certify that Plaintiffs' Brief in Opposition to the Proposed Intervenors' Motion for Intervention Pursuant to Federal Rule of Civil Procedure 24, Attachments, and proposed Order were filed with the Court's ECF system on November 23, 2009 and are available for viewing and downloading from the ECF system by the following counsel who consented to electronic service:

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