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

UNITED STATES OF AMERICA, Plaintiff, v. COMMONWEALTH OF VIRGINIA, Defendant, and PEGGY WOOD, *et al.*, Intervenor-Defendants.	)	CIVIL ACTION NO: 3:12cv59-JAG

UNITED STATES' OPPOSITION TO INTERVENORS' MOTION TO DISMISS

The United States brought this action to address serious and long-standing violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq.*, by the Commonwealth of Virginia. The United States and the Commonwealth have agreed to a comprehensive remedy to ensure that there are high quality community services so that people with intellectual and developmental disabilities are not subjected to unnecessary institutionalization and segregation, in violation of the ADA, in order to obtain the supports and services that they need. Intervenors have challenged the authority of the United States to address these civil rights violations and moved to dismiss this action. Intervenors do not have standing to raise these challenges, and their assertions of jurisdictional limitations do not have merit. Their motion should be denied.

Intervenors' Motion to Dismiss [Dkt. No. 66] fails for the following reasons: (1) the ADA authorizes the United States Department of Justice ("Department of Justice" or "the Department") to bring suit to remedy violations of the statute; (2) this action is not brought pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 *et seq.*, and thus Intervenors' assertions of a violation of CRIPA procedures are irrelevant; (3) the allegations contained in the Complaint meet the requirements of the ADA and the Federal Rules of Civil Procedure; and (4) Intervenors' arguments regarding the Center for Medicaid and Medicare Services ("CMS") regulations are not a grounds for dismissal and are incorrect. More fundamentally, Intervenors lack standing to pursue dismissal of the Complaint because the Complaint advances no claims against them.

I. FACTUAL BACKGROUND

On August 21, 2008, the United States notified the Commonwealth that it was commencing a CRIPA investigation of the Central Virginia Training Center ("CVTC"). Complaint [Dkt. No. 1] at ¶ 11. On April 23, 2010, the United States notified the Commonwealth that it was expanding the investigation to focus on the Commonwealth's compliance with the ADA and *Olmstead v. L.C.*, 527 U.S. 581 (1999), with respect to individuals at CVTC. *Id.* at ¶ 12.

During the course of the expanded investigation, the United States determined that an examination of the Commonwealth's measures to address the rights of individuals at CVTC under the ADA and *Olmstead* implicated the statewide system and required a broader scope of review. *Id.* at ¶ 13. Accordingly, the United States examined statewide policies and practices and met with and collected information from individuals throughout the Commonwealth,

including persons in statewide leadership positions, providers of community services, and individuals with intellectual and developmental disabilities ("ID/DD") receiving services in a variety of settings throughout Virginia. *Id.*

On February 10, 2011, the United States sent a letter of findings notifying the Commonwealth that it was violating the ADA by unnecessarily institutionalizing, and placing at risk of unnecessary institutionalization, individuals with ID/DD throughout Virginia. *Id.* at ¶ 14. The 20-page letter reported in detail the findings of the United States' investigation, provided the Commonwealth notice of its failure to comply with the ADA, and outlined the specific steps necessary for the Commonwealth to meet its obligations under the ADA. *Id.* at ¶ 14. The Commonwealth and the United States subsequently entered into negotiations to resolve the violations identified in the letter of findings. After approximately one year of negotiations, the Parties reached a settlement agreement to resolve these claims and simultaneously filed with this Court the proposed settlement agreement ("Agreement"), a Joint Motion for Entry of Settlement Agreement and Brief in Support Thereof [Dkt. No. 2], and the Complaint. *Id.* at ¶ 15. The Court provisionally approved the Agreement on March 6, 2012. March 6, 2012 Order [Dkt. No. 22] at 5. On March 2, 2012, Intervenors filed a Motion to Intervene [Dkt. No. 19] with the Motion to Dismiss [Dkt. No. 19-1] attached as Exhibit A. The Court deemed the Motion to Dismiss filed on May 9, 2012. May 9, 2012 Order [Dkt. No. 65] at 5; Intervenors' Motion to Dismiss [Dkt. No. 66].

II. ARGUMENT

A. The ADA Gives the United States Authority to Bring This Claim

The ADA empowers the Department of Justice to bring suit to remedy violations of Title

II of the ADA, and Intervenors' arguments to the contrary must be rejected. In enacting the ADA, Congress set forth a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Specifically, Congress sought to create strong national standards to address discrimination and to ensure that the federal government played a "central role" in creating and enforcing those standards. 42 U.S.C. § 12101(b)(2) & (3). As directed by Congress, 42 U.S.C. § 12134, the Attorney General promulgated the regulations under Title II of the ADA, which, among other things, require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.103(d). The Department of Justice's prominent enforcement role is reflected in the authorization given to the Attorney General to commence a legal action when discrimination prohibited by the ADA takes place. 42 U.S.C. § 12133; 28 C.F.R. Pt. 35, App. B, subpts. F, G.

Courts have routinely recognized the Department of Justice's authority to bring such claims. *See, e.g., United States v. City of Baltimore*, Nos. JFM-09-1049, JFM-09-1766, 2012 WL 662172, *1 (D. Md. Feb. 29, 2012) (granting Department of Justice's Motion for Summary Judgment in Title II claim); *United States. v. City and Cnty. of Denver*, 927 F. Supp. 1396, 1399 (D. Colo. 1996) (finding that the Department of Justice had met the requirements necessary to bring a Title II claim); *McCachren v. Blacklick Valley Sch. Dist.*, 217 F. Supp. 2d 594, 600 (W.D. Pa. 2002).

Also, federal courts have approved settlement agreements between the Department of Justice and states resolving statewide, systemic ADA violations, similar to the provisionally-approved Agreement before the Court in this matter. *See, e.g., United States v. Georgia*, No.

1:10cv00249 (N.D. Ga. Filed Jan. 28, 2010) (Dkt. Nos. 112 (Settlement Agreement) and 115 (Court Order)); *United States v. Delaware*, No. 1:11cv00591 (D. Del. Filed July 6, 2011) (Dkt. Nos. 5 (Settlement Agreement) and 6 (Court Order)). Federal courts have also recognized the Department of Justice's authority to intervene in ADA matters brought by private parties regarding claims under Title II. *See, e.g., Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living*, 675 F.3d 149, 162 (2d Cir. 2012) (Department of Justice's standing in ADA/*Olmstead* matter "not disputed"); *Lynn E. v. Lynch*, 1:12-cv-53-LM, (D.N.H. Apr. 4, 2012) (granting Department of Justice's Motion for Intervention in case regarding statewide violations of Title II of the ADA); *Smith v. City of Philadelphia*, 345 F. Supp. 2d 482, 490 (E.D. Pa. 2004) (holding that Department of Justice had "separate and independent basis" supporting its motion to intervene in private ADA lawsuit).

Title II of the ADA imported the remedial provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 700 *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*, ("Title VI"): "The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133. The Rehabilitation Act in turn incorporates the enforcement mechanism of Title VI. 29 U.S.C. § 794a. Title VI states that "Compliance with any requirement adopted pursuant to this section may be effected . . . by any other means authorized by law." 42 U.S.C. § 2000d-1; *see McCachren,* 217 F. Supp. 2d at 600 (holding that "the enforcement mechanism for Title II of the ADA is Section 505 of the Rehabilitation Act, and therefore derivatively Title VI of the Civil Rights Act"). The "other means" referenced in Title VI – and incorporated into the ADA

through Section 504 – include the right of the United States to bring suit for violations of the law. *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984) (recognizing United States' authority to sue to enforce Section 504 of the Rehabilitation Act, which incorporates the remedies of Title VI); *Nat'l Black Police Ass'n v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) ("Title VI clearly tolerates other enforcement schemes . . . [including] referral of cases to the Attorney General, who may bring an action against the [federal fund] recipient.").

The legislative history of the ADA is also instructive:

> The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local government. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, the Federal government would use the enforcement sanctions of section 505 of the Rehabilitation Act of 1973. . . . *The Department of Justice may then proceed to file suits in Federal District Court.*

S. Rep. No. 101-116, at 57-58 (1989) (describing enforcement under Title II of the proposed legislation) (emphasis added); *see also* H. Rep. No. 101-485, at 98 (1990) (same).

In summary, as confirmed by federal courts nationwide, Title II of the ADA authorizes the Department of Justice to enforce the statute. The ADA's legislative history reinforces this conclusion. As this ADA claim is a federal question, this Court has subject matter jurisdiction to hear the Complaint. *See* 28 U.S.C. § 1331.

B. The United States Has Complied With the Procedural Requirements of the ADA

The Intervenors argue that the United States has failed to comply with Title II's requirement that "no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." Intervenors' Memorandum

of Law In Support of Their Motion to Dismiss (Int. Mem.) [Dkt. No. 67] at 9-12; 42 U.S.C. § 2000d-1; 42 U.S.C. § 12133; 29 U.S.C. § 794(a)(2).[1] Intervenors' argument must fail. The United States complied with this requirement by providing clear notice of the ADA violations to the Commonwealth in the form of a 20-page findings letter, by negotiating in good faith with the Commonwealth over the course of 11 months, and by submitting with the Commonwealth the Settlement Agreement to this Court as a proposed order after determining that compliance could not be secured short of a court-enforceable agreement.

Misapplying this provision to force the Parties into unnecessary litigation would fly in the face of the provision's obvious purpose and common sense. The provision is designed to prevent a federal agency from initiating an adversarial proceeding against a public entity without first providing notice and attempting to resolve the matter. It is intended to avoid unnecessary litigation and encourage settlement agreements. That is exactly what happened in this case.[2] Intervenors' reading of the statute also would deny the Department of Justice, which is charged with enforcing the ADA, 42 U.S.C. § 12133, a remedy available to any private plaintiff pursuing a Title II claim: the ability to settle that claim through a court-enforceable agreement without contested litigation.

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[1] Contrary to the Intervenors' assertion, Int. Mem. at 1, the Department of Justice has the discretion to investigate ADA violations by a public entity without referral from another federal agency. 28 C.F.R. § 35.190(e) (Department of Justice may "exercise its discretion to retain [a] complaint for investigation under [Title II]" even if another agency also has jurisdiction); *see also* 28 C.F.R. § 35.172(b) (federal agencies, including the Department of Justice, may conduct "compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part").

[2] These provisions are intended to protect the Commonwealth, not Intervenors. Yet the Commonwealth agreed that this Court had jurisdiction in the Settlement Agreement itself, *see* Agreement at ¶ I.H. and when it jointly with the United States sought the Settlement Agreement to be entered as an order of the Court. [Dkt. No. 2.]

As noted above, on February 10, 2011, the United States sent a formal 20-page letter of findings to the Commonwealth of Virginia "notifying the Commonwealth that it was violating the ADA by unnecessarily institutionalizing, and placing at risk of unnecessary institutionalization, individuals with ID/DD throughout Virginia." Complaint at ¶¶ 13-14. The letter reported in detail the findings of the Department's investigation, provided the Commonwealth notice of its failure to comply with the ADA, and outlined the specific steps necessary for the Commonwealth to meet its obligations under the ADA. *Id.* Those findings are described in detail in the Complaint. *Id.* at ¶¶ 11-40. The United States, thus, properly informed the Commonwealth, in detail, of the violations. The United States then engaged in nearly a year of negotiations with the Commonwealth.

Further, although the voluntary compliance determination applies to circumstances where the United States has not secured a settlement, the United States nevertheless did determine that compliance cannot be secured voluntarily here. Throughout the two and a half-year investigation by the Department of Justice and the 11-month negotiations, at no time did the Commonwealth demonstrate that it was in compliance with the ADA or could achieve compliance without a court-enforceable agreement. Nor would the United States be required to accept a representation of intent to comply as sufficient to demonstrate voluntary compliance. The fact that the Commonwealth will require nearly 10 years to achieve compliance, by necessity spanning three gubernatorial administrations, demonstrates that voluntary compliance in the absence of a court order cannot be assured, as the Commonwealth has acknowledged. Agreement at VII.B; Hearing Transcript [Dkt. No. 54-4] (Feb. 23, 2012) at 45:15-23; *accord* Agreement I.F. ("The Parties acknowledge that the Court has jurisdiction over this case and

authority to enter this Settlement Agreement"). In fact, it is a virtual certainty that the Commonwealth officials who agreed to these extensive reforms will not be the individuals responsible for completing their implementation. Hearing Transcript (Feb. 23, 2012) at 42:1-13. Consequently, while the United States need not put on evidence validating its determination that voluntary compliance without a court-enforceable agreement could not be secured, the record clearly reflects and validates that determination. As a result, the United States has met the requirements of 42 U.S.C. § 2000d-1 and 28 C.F.R. § 35.174.[3]

C. Intervenors' Objections Regarding CRIPA Are Inapplicable

This action was brought pursuant to the ADA and not CRIPA. Intervenors' arguments that the CRIPA rules were not followed are irrelevant to this case and not grounds for dismissal. The United States' Complaint in this matter and the proposed Agreement are exclusively focused on the Commonwealth's compliance with Title II of the ADA and serving individuals with developmental disabilities in the most integrated setting appropriate to their needs. Complaint at ¶¶ 5-10. CRIPA gives the United States the authority to investigate and litigate violations of the Constitution and other federal law in institutions such as prisons, jails, juvenile detention centers, and certain treatment facilities. 42 U.S.C. § 1997. CRIPA describes the process by which the United States may investigate institutional conditions, provide notice to a state regarding findings, and litigate any violations. The Complaint does not bring claims regarding conditions of confinement in the Commonwealth's Training Centers or other institutional facilities, nor does

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[3] Intervenors also make an uncited reference to additional requirements regarding an "individual complainant" and "informal resolution" of the matters complained of in the lawsuit. Int. Mem. at 11. These are not requirements to bringing suit under Title II of the ADA. *See* 42 U.S.C. § 12133.

it invoke CRIPA as a basis for the United States' standing to bring suit. As a result, the CRIPA procedural requirements are not applicable to this proceeding.

The United States originally opened this investigation regarding the Central Virginia Training Center pursuant to CRIPA. Complaint at ¶ 11. However, in 2010, the United States expanded its investigation pursuant to the ADA. It is this expanded investigation upon which the United States' 2011 findings letter and Complaint are based. Complaint at ¶ 14.

D. The Allegations Contained Within the Complaint are Sufficient and Intervenors Lack Standing to Challenge them.

Intervenors have no right or justiciable interest in this issue. All claims asserted in the Complaint are against the Commonwealth. None are asserted against the Intervenors and the Intervenors do not stand in the shoes of the Commonwealth. The Federal Rules protect defendants from being subjected to discovery and litigation when a complaint pleads no plausible basis for a claim. *Iqbal*, 556 U.S. at 678-79. The Commonwealth has not asserted a deficiency in the pleadings, rather it has joined the motion to enter the consent decree.

Only the party against which a claim is asserted can move to dismiss the claim; a party cannot move to dismiss a claim on behalf of another party. *See Mantin v. Broad. Music*, 248 F.2d 530, 531 (9th Cir. 1957) (reversing district court's dismissal because "the moving defendants, obviously, had no standing to seek dismissal of the action as to the nonmoving defendants"); *see also Ohio Cas. Ins. Co. v. Mohan*, 350 F.2d 54, 57 (3d Cir. 1965) ("Ordinarily a motion to dismiss is taken as running only in favor of the party who makes the motion to dismiss."); *Quest Corp. v. Ariz. Corp. Comm'n*, No. CV 08-2374, 2009 WL 3059127, at *5 (D. Ariz. Sept. 23, 2009) ("The Court simply does not believe that a non-party to a claim can move to dismiss that claim on behalf of the actual, non-moving party to the claim."); *E.E.O.C. v.*

Brooks Run Mining Co., No. 5:08-CV-08071, 2008 WL 2543545, at *3 (S.D.W. Va. June 23, 2008). Here, the moving party is the Intervenors, but the United States has no claims against the Intervenors. The only claims pending in this litigation are the United States' claims against the Commonwealth of Virginia, and the United States cannot expand any of its existing claims against the Commonwealth to include the Intervenors. Those claims include Title II of the ADA, which can only be asserted against a public entity, and Section 504 of the Rehabilitation Act, which can only be asserted against a recipient of federal financial assistance. Thus, the Intervenors have no standing to seek dismissal of this action on behalf of the Commonwealth, and their motion should be denied on these grounds.

Nevertheless, the claims of the United States have been adequately pled. Federal Rule of Civil Procedure 12(b)(6) allows dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure 8(a) provides that a complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In deciding a motion to dismiss, the court takes the allegations of the complaint as true and construes them in a manner favorable to the plaintiffs. *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). To survive a motion to dismiss, the factual allegations in a complaint need only "be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic v. Twombley*, 550 U.S. 544, 555 (2007). A complaint that "states a plausible claim for relief" will survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

In *Olmstead*, the Supreme Court held that a violation of Title II's "integration mandate"

is a form of discrimination that violates the statute. *Olmstead*, 527 U.S. at 597. Specifically, under Title II of the ADA, states are required to provide community-based treatment for persons with mental disabilities when such treatment 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. *Id. at* 607.

The United States' Complaint sets forth a valid claim that the Commonwealth of Virginia violates *Olmstead* and the ADA by unnecessarily institutionalizing, and placing at risk of unnecessary institutionalization, individuals with ID/DD. The Complaint is based on the findings of a thorough investigation and examination of Virginia's policies and practices, which included the collection of information from individuals in State leadership positions, providers of community services, and individuals with ID/DD receiving services in Virginia. Complaint at ¶ 13. The Complaint sets forth a facially plausible claim that, with respect to both the 7,000 individuals with ID/DD in Virginia that are on waitlists for Home and Community-Based Services ("HCBS") Waivers, and the 1,100 individuals institutionalized in its five State-operated Training Centers, Virginia fails to operate its service system for people with ID/DD in compliance with the ADA and *Olmstead* requirements. *Id.* at ¶¶ 20-23.

Intervenors challenge the sufficiency of the Complaint regarding its claim that individuals currently being served in Virginia's Training Centers and other institutional settings remain unnecessarily segregated in institutions in violation of the ADA.[4] The Complaint avers that Virginia's Training Centers are "institutions that segregate individuals with ID/DD and do not 'enable individuals with disabilities to interact with nondisabled persons to the fullest extent

[4] Intervenors do not challenge the United States claim regarding individuals at risk of institutionalization.

possible.'" *Id.* at ¶ 36 (citing 28 C.F.R. § 35.130(d)). The Complaint alleges that "the vast majority, and likely all, of the individuals at the Training Centers can benefit from community settings with appropriate community-based services," and alleges that individuals at Training Centers have needs that "are similar to the needs of individuals who currently are being served in the community." *Id.* at ¶ 37. Moreover, the Complaint alleges that "Commonwealth officials have acknowledged that nearly all of [these individuals] could be served in the community." *Id.* The Complaint further alleges that many individuals "do not object to receiving services in a more integrated setting but remain in the Training Centers due to the lack of appropriate community services and supports, a flawed discharge planning process, and deficient coordination with community providers." *Id.* at ¶ 38. These factual allegations adequately plead the elements of an ADA integration mandate claim, *see Olmstead*, 527 U.S. at 607, and are sufficient "to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555. *See Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 292 (E.D.N.Y. 2008) ("Plaintiffs' allegations that individuals with mental illness are unnecessarily segregated in highly restrictive nursing homes, even though their needs could be met in a more integrated setting, and that these individuals desire to reside in a more integrated setting, are adequate to state violations of the ADA and Section 504 under *Olmstead* and meet *Twombly's* plausibility standard.").

Intervenors nonetheless argue that the Complaint fails to state a plausible claim for relief because it does not allege "that any treating professional has recommended discharge for any resident of Virginia's Training Centers." Int. Mem. at 16. The argument is without merit, as nothing in the ADA or its implementing regulations requires a plaintiff to show a determination by a state treatment professional as to whether community care is appropriate in order to make a

prima facie ADA claim. A plaintiff may rely on a variety of evidence to establish the appropriateness of an integrated setting, and a reasonable, objective assessment by a public entity's treatment professional is only one way of doing so. *See Joseph S.*, 561 F. Supp. at 290-91 (rejecting the argument that the state's treatment professionals must be the ones to make an appropriateness determination). If the Intervenors' position were correct, a public entity would be able to indefinitely retain individuals with disabilities in institutions by either failing to evaluate them for community placement or by refusing to recommend community placement. Allowing the public entity to hold ultimate control over individuals' rights would contradict the spirit and purpose of the *Olmstead* decision and the ADA.[5] *See, e.g.*, *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009) (subsequently dismissed on other grounds) (finding that plaintiffs need not provide determinations from state treatment professionals to demonstrate that they are qualified for community placement and noting that holding otherwise would "eviscerate the integration mandate"); *Long v. Benson*, No. 4:08cv26, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the right to receive services in the community would become illusory if the state could deny the right by refusing to acknowledge the appropriateness of community placement); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001) (finding that states cannot avoid the

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[5] *Olmstead*'s statements on this issue do not mandate a different result. *See* 527 U.S. at 602, 607 (noting that "the State generally may rely on the reasonable assessments of its own professionals" in determining whether community placement is appropriate and stating that community-based treatment is required when "the State's treatment professionals determine that such placement is appropriate"). The *Olmstead* Court did not need to address this issue because, as it noted, in that case the State's treatment professionals had already determined that community placement would be appropriate for those plaintiffs. *Id.* at 602-03. Thus, the Court in *Olmstead* simply acknowledged one set of facts, but did not establish a legal standard that was confined solely to those facts.

integration mandate by failing to make recommendations for community placement). The Complaint alleges that "the vast majority, and likely all, of the individuals at the training centers can benefit from community settings," that the Commonwealth has itself acknowledged that "nearly all of the individuals in its training centers could be served in the community," and that individuals currently served in the Training Centers have needs comparable to those being served in the community already. Complaint at ¶ 37. These allegations are sufficient to survive the Motion to Dismiss.

The Motion to Dismiss also attacks the sufficiency of the Complaint on the grounds that it fails to allege that Training Center residents favor discharge, and that the Complaint actually seeks to nullify residents' choice and require the "deinstitutionalization or the closure of residential facilities." Int. Mem. at 17-18. However, the Complaint explicitly alleges that many individuals residing in Virginia's Training Centers "do not object to receiving services in a more integrated setting" but nonetheless remain institutionalized because of the inadequacies of Virginia's community services system. The Complaint also alleges that Virginia's lack of a comprehensive oversight and quality assurance system is itself the reason why some individuals are reluctant to seek community-based services. Complaint at ¶¶ 38, 40.

Finally, Intervenors invite the Court to consider the "competing claims on limited State resources," even though Virginia has not raised a "fundamental alteration" affirmative defense under 28 C.F.R. § 35.150.[6] Int. Mem. at 18-19. It is the defendant's burden to demonstrate that the requested relief would fundamentally alter its system of services. *Olmstead*, 527 U.S. at 603-

[6] 28 C.F.R. § 35.150(a)(3) exempts any state from having to take "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."

06; *Frederick L.*, 364 F.3d at 492 n.4. Further, even if Virginia had raised the affirmative defense, dismissal at this stage would still be inappropriate. *Martin v. Taft*, 222 F. Supp. 2d 940, 972 (S.D. Ohio 2002) ("[W]hether [the] requested relief would entail a fundamental alteration is a question that cannot be answered in the context of a motion to dismiss.").

D. Remedying ADA violations does not violate the Center for Medicaid and Medicare Services' Regulations

Intervenors' arguments that the Complaint conflicts with CMS regulations are substantively divorced from its Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguments and are not a basis for dismissal. Int. Mem. at 19; *see* Fed. R. Civ. P. 12(b)(1); 12(b)(6).[7] Because Intervenors' contentions are not related to standing or the sufficiency of the pleadings in the Complaint, they should be disregarded.[8]

Nonetheless, there is no conflict between the Complaint and the ICF-MR regulations. Intervenors incorrectly claim that the Complaint conflicts with the ICF-MR regulations because "the relief sought by DOJ in this matter is 'discharge' of residents from Virginia's Training Centers," or, in other words, the Agreement will force Training Centers to close. Int. Mem. at 19.[9] First, this Court has already stated that the "agreement does not force the closing of any

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[7] A CMS certified Intermediate Care Facility for the Mentally Retarded ("ICF-MR") has met the conditions necessary to receive Medicaid funding. 42 C.F.R. § 483.400-480. The certification process does not examine whether individuals are in the most integrated setting appropriate to their needs.

[8] While Intervenors' arguments are incorrect on the merits, this Court need not address their arguments now. Their claim is not ripe because the Agreement does not require closure, and they can raise their arguments in a separate proceeding should the Commonwealth decide to close a Training Center.

[9] Intervenors also argue that "The Complaint fails to even acknowledge the existence of these [ICF-MR] regulations." Int. Mem. at 20. This is not relevant to a motion to dismiss under 12(b)(1) or 12(b)(6). The Complaint does not, and need not, cite the myriad of statutes and regulations that are relevant to the lives of individuals with ID/DD. The Complaint cites the

institution or Training Center in Virginia." March 6, 2012 Order [Dkt. No. 22] at 2.[10] Moreover, even if the Commonwealth decides to close a facility, that does not violate the ICF-MR regulations. The ICF-MR regulations state that a person living in an ICF-MR may be discharged for "good cause." 42 CFR § 483.440 (b)(4-5). Further, the ICF-MR regulations do not bar people who live in an ICF-MR from being discharged, provided that the facility follows proper discharge procedure. *Id.*[11] Should the Commonwealth de-certify and close a Training Center, that would qualify as good cause. *Cf. O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775, 785-86 (1980) (no right to remain in decertified facility). The vast efforts states have undertaken during the last 40 years to expand community-based service opportunities, which have reduced institutional populations and increased facility closures, were not carried out in violation of the ICF-MR regulations.[12]

Furthermore, the ICF-MR regulations cannot justify discrimination against people with disabilities. Once a state has elected to provide services to individuals with ID/DD, the state

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statutes and regulations that the United States alleges the Commonwealth is violating.

[10] *See also* May 9, 2012 Order [Dkt. No. 65] at 3 ("While it does not explicitly require the closing of the Training Centers, the Agreement may inevitably lead to that result.").

[11] Intervenors also invoke discharge provisions from a CMS guidebook, the "State Operations Manual," but these are not part of the federal regulations. Int. Mem., at 19-10. These are interpretive guidelines created by CMS for surveyors who inspect ICF-MRs to determine if they meet the conditions for continued funding from CMS. *See* CMS, "State Operations Manual: Appendix J – Guidance for Surveyors: Intermediate Care Facilities for Persons With Mental Retardation," *available at* http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads//som107ap_j_intermcare.pdf (last checked April 29, 2012).

[12] *See* Decl. of Robert Gettings [Dkt. No. 52-1]. Between 1960 and 1979, the states, collectively, closed twelve large, public residential facilities for persons with ID/DD. In contrast, 155 state institutions or special units were closed between 1980 and 2003. *Id.* at 3. Thirteen states have no large state operated ICF-MRs, and two states have no ICF-MRs at all. *Id.* at 4.

must administer those services in accordance with the ADA. *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1302 (M.D. Fla. 2010); *see also Doe v. Chiles*, 136 F.3d 709, 714 (11th Cir. 1998) (when a state chooses to provide an optional Medicaid service, it must do so in accordance with the requirements of federal law); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (even though a waiver program is optional, a state may not, under Title II of the ADA, amend optional programs in such a way as to violate the integration mandate).

IV. CONCLUSION

This Court should deny Intervenors' Motion to Dismiss because: (1) the ADA and its interpreting case law set out the United States' standing to bring an ADA claim; (2) this matter was sufficiently pled pursuant to the ADA, and, as a result, Intervenors' CRIPA related arguments are inapplicable; (3) the United States has complied with all of the ADA's statutory prerequisites; (4) Intervenors' arguments regarding the ICF-MR regulations are not a grounds for dismissal and are incorrect; and (5) Intervenors lack standing to challenge the Complaint. For the foregoing reasons, the United States respectfully requests that this Court deny Intervenors' Motion to Dismiss.

Dated: May 21, 2012

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Respectfully submitted,

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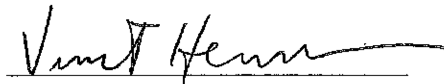

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CERTIFICATE OF SERVICE

I hereby certify that on the _21st_ day of _May_, 2012, I will electronically file the foregoing THE UNITED STATES' OPPOSITION TO PROPOSED INTERVENORS' MOTION FOR INTERVENTION with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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And I hereby certify that I will mail the document by U.S. mail to the following non-filing user(s):

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