EXHIBIT A

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

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	
and	:	
	:	**CIVIL ACTION NO: 3:12-cv-059**
COMMONWEALTH OF VIRGINIA,	:	
Defendant,	:	
	:	
against	:	
	:	
PEGGY WOOD, by and through her father, Wriley Wood, et al.	:	
Intervenors.	:	

INTERVENORS' MOTION TO DISMISS

Intervenors, by and through their counsel, move, pursuant to Fed.R. Civ. 12 (b)(1) and 12(b)(6) to dismiss the Complaint for Declaratory and Injunctive Relief on the grounds that this Court lacks subject matter jurisdiction to entertain this claim and on the grounds that the Department of Justice has failed to state a claim upon which relief can be granted. In support, the Intervenors respectfully refer this Honorable Court to the accompanying Memorandum of Law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on the 2nd day of March, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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INTERVENORS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

Intervenors, by and through their attorneys, move this Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for an Order dismissing the Complaint.

INTRODUCTION

The United States Department of Justice (hereinafter referred to as the "DOJ") initiated this matter by filing a Complaint on January 26, 2012. [Dkt. #1]. Simultaneously, the DOJ filed a proposed settlement agreement, and sought this Court's binding enforcement of that settlement agreement as a Court Order. [Dkt. # 2]. The only Defendant identified in this matter is the Commonwealth of Virginia, which appears to have been served with the Complaint subsequent to the DOJ filing a proposed settlement agreement. No Commonwealth agencies or officials have been identified as Defendants. The simultaneous filing of the Complaint and proposed settlement agreement appears to be an attempt by the DOJ and the Commonwealth to force the Court to address their proposed resolution of this matter without allowing proper consideration

of the Federal Rules of Civil Procedure and the substantive rights of the Intervenors. By separate Motion to Intervene and Memorandum of Law in Support, Intervenors have asked this Court to acknowledge their significant interests in this matter and grant them the opportunity to protect their rights. Intervenors' Motion to Dismiss and Memorandum of Law in Support are being filed simultaneously with Intervenors' Motion to Intervene and accompanying Memorandum of Law, as required by Federal Rule of Civil Procedure 24.

ARGUMENT

Generally a Motion to Dismiss must be presented within twenty-one (21) days of being served with a Complaint. Fed.R.Civ.P. 12(a)(1)(A). However, Intervenors have not been served with the Complaint in this matter. If the Court grants Intervenors the opportunity to resolve their claims in this matter, this Motion to Dismiss is timely, as Intervenors' right to file this motion only arises subsequent to their Motion to Intervene being granted.

I. THE DEPARTMENT OF JUSTICE DOES NOT HAVE STANDING TO PURSUE ITS CLAIMS BECAUSE IT CAN ONLY PURSUE THE CLAIMS ASSERTED IN ITS COMPLAINT WHEN CONGRESS EXPRESSLY GRANTS IT PERMISSION TO DO SO

The DOJ's Complaint must be dismissed for lack of subject matter jurisdiction because the DOJ does not have general standing to assert the claims alleged in its Complaint. Pursuant to Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed for lack of subject matter jurisdiction. FED.R.CIV.P. 12(b)(1). Subject matter jurisdiction may be challenged in two ways. First, a party may contend that the complaint fails to allege facts upon which subject matter jurisdiction may be based. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982); King v. Riverside Reg'l Med. Ctr., 211 F. Supp. 2d 779, 780 (E.D. Va. 2002). In such instances, all facts

alleged in the complaint are presumed to be true. Adams, 697 F.2d at 1219; Virginia v. United States, 926 F. Supp. 537, 540 (E.D. Va. 1995).

Alternatively, a party may argue that the jurisdictional facts alleged in the complaint are untrue. Adams, 697 F.2d at 1219; King, 211 F. Supp. 2d at 780. In this situation, "the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" Virginia v. United States, 926 F. Supp. at 540 (quoting Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993)); See also Velasco v. Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004) (holding that "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment") (citations omitted).

In either circumstance, the burden of proving subject matter jurisdiction falls on the plaintiff. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Adams, 697 F.2d at 1219; Johnson v. Portfolio Recovery Assocs., 682 F. Supp. 2d 560, 566 (E.D. Va. 2009) (holding that "having filed this suit and thereby seeking to invoke the jurisdiction of the Court, Plaintiff bears the burden of proving that this Court has subject matter jurisdiction").

The DOJ also bears the burden of establishing jurisdiction where, as here in this case, lack of standing is asserted as a basis for lack of subject matter jurisdiction. Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). Because standing elements are "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof...." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561.

Federal subject matter jurisdiction may exist if there is either a "federal question," pursuant to 28 U.S.C. § 1331 or complete diversity of citizenship between the parties and more than $75,000 in controversy pursuant to 28 U.S.C. § 1332. With respect to subject matter jurisdiction in this matter, the Complaint claims to assert a "federal question." [Dkt. # 1, ¶ 1]. The only basis alleged in the Complaint that would give rise to federal question jurisdiction is the DOJ's inadequate passing references to the Americans with Disabilities Act ("ADA").

II. THE DEPARTMENT OF JUSTICE DOES NOT HAVE STANDING TO ENFORCE THE AMERICANS WITH DISABILITIES ACT

The DOJ inappropriately initiated this matter under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131-12132 ("ADA"). [Dkt. # 1, ¶ 1]. The DOJ does not have standing to enforce the ADA, unless it brings such claims pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j ("CRIPA").

The Fourth Circuit has expressly precluded the DOJ from initiating litigation in the manner it has pled in this case. See U.S. v. Solomon, et al., 563 F.2d 1121 (4th Cir. 1977). In Solomon, the Fourth Circuit affirmed the district court's dismissal of the DOJ action, holding that the DOJ could only maintain an action against the State of Maryland and the state's operation of the Rosewood State Hospital if Congress expressly granted the DOJ such authority through statute. Id. at 1129.

Two years later, the DOJ tried to bring the same type of action on behalf of residents of a developmental disability facility in Montana, alleging that federal rights had been violated. See U.S. v. Mattson, 600 F.2d 1295 (9th Cir. 1979). The District Court dismissed that complaint and the Ninth Circuit affirmed that decision. Id. Like the Fourth Circuit, the Ninth Circuit held that

"the United States may not bring suit to protect the constitutional rights of the mentally retarded without express statutory approval." U.S. v. Mattson, 600 F.2d 1295, 1297.

In 1980, the DOJ received limited authority from Congress in the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997a; United States v. City of Philadelphia, 644 F.2d 187, 201 (3d Cir. 1980) (making clear that the Department of Justice's only standing was by virtue of CRIPA.) Although the DOJ may have standing to enforce the ADA if that enforcement is brought through the agency's limited statutory authority provided by CRIPA, any action by the DOJ implicating the rights of residents of a state-operated facility and alleging violations of the ADA must be initiated through that express Congressional authority. The CRIPA statute did not create any substantive rights. The sole purpose of CRIPA was to give the DOJ standing to enforce existing federal rights.

CRIPA provides that the DOJ may initiate an action only for "such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment" of federal constitutional or statutory rights, privileges, and immunities. 42 U.S.C. § 1997a(a) (emphasis added); See also Messier v. Southbury Training Sch., 916 F. Supp. 133, 137-38 (D. Conn. 1996) (contrasting the types of relief available to private plaintiffs with the Attorney General's right under CRIPA to seek only "minimum corrective measures").

Without CRIPA, the DOJ has no standing to enforce a claim under Americans with Disabilities Act, 42 U.S.C. §§12101-12213 ("ADA").

> Prior to the enactment of CRIPA in 1980, controlling precedents dictated that the Justice Department had no authority to sue on behalf of institutionalized persons. See, e.g. United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir.1979). Under CRIPA, however, the Attorney General may bring suit for equitable relief to ensure the "minimum corrective measures" necessary to remediate "egregious or flagrant conditions which deprive [institutional residents] of any [federally protected] rights, privileges, or immunities," provided the Attorney General finds that such

> deprivations occur "pursuant to a pattern or practice of resistance." 42 U.S.C. § 1997a. Thus, the Justice Department may only sue on behalf of institutionalized persons if the strict requirements of CRIPA are satisfied, and may only seek "minimum corrective measures."

Messier v. STS, 562 F. Supp. 2d 294, 137.

Congress specifically delineated the limits of the DOJ's authority to pursue claims that implicate the rights of residents of state-operated facilities, such as the Commonwealth's Training Centers. Congress did not give the DOJ general authority, which is how the Complaint in this matter is presented. If Congress had done so, there would be no distinction between the relief available to the DOJ and a private plaintiff. The statutory language of CRIPA and its legislative history make clear that the DOJ does not represent private plaintiffs and cannot be granted relief as if it was a private plaintiff. The statute provides that "[t]he provisions of this [Act] shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons." 42 U.S.C. § 1997j.

The House Conference Report on CRIPA stated that:

> [I]t should be emphasized that . . . the Attorney General's authority extends to initiating suit "for or in the name of the United States," in order to represent the national interest in securing constitutionally adequate care for institutionalized citizens. As a representative of the United States, the Attorney General does not directly represent any institutionalized plaintiffs, and the authority granted him is in no way intended to preclude, delay or prejudice private litigants from enforcing any cause of action they may have under . . . law.

(emphasis added) H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 13, reprinted in 1980 USCCAN 837.

If the DOJ is permitted to proceed on the Complaint that it has filed in this matter, it will render meaningless the clear distinctions that Congress made between the DOJ's limited

authority to enforce only specific rights for the government and a private party's broad authority to enforce his or her rights generally. The DOJ cannot impinge on the ability of private parties to enforce their rights, which is precisely what the current Complaint seeks to do.

The ADA does not give the DOJ any standing, general or specific, to enforce its provisions. The ADA was enacted so private citizens, like the Intervenors, could ensure that their rights are protected. Title II expressly provides that "[t]he remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) (hereinafter "Rehab Act") shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202." See 42 USC § 12133.

Courts have uniformly recognized the private right of action under the Rehab Act and the ADA. Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Meiner v. State of Missouri, 673 F.2d 969, 973 (8th Cir. 1982), Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1376-80 (10th Cir. 1981); Kling v. Cty of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980); Weinreich v. Los Angeles Cty Metro. Transp. Auth., 114 F.3d 976 (9th Cir. 1997); Camenisch v. Univ. of Texas, 616 F.2d 127, 131 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981); NAACP v. Medical Center, 599 F.2d 1247, 1258 (3d Cir. 1979); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2nd Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284 (7th Cir. 1977); Schonfeld v. City of Carlsbad, 978 F. Supp. 1329, 1333 (S.D. Cal. 1997); Dominguez v. City of Council Bluffs, 974 F. Supp. 732 (S.D. Iowa W.D. 1997); Davoll v. City of Denver, 943 F. Supp. 1289, 1297 (D. Colo. 1996); Benedrum v. Franklin Recycling, 1996 WL 679402 (W.D. Pa. 1996); Wagner v. Texas A&M Univ., 939 F. Supp. 1297 (S.D. Tex. 1996); Roe v. County of Monongohela, 926 F. Supp. 74 (N.D. W.Va. 1996); Dertz v. City of Chicago, 912 F. Supp. 319 (N.D. Ill. 1995);

Etheridge v. State of Alabama, 847 F. Supp. 903 (M.D. Ala. 1993); Finlay v. Giacobbe, 827 F. Supp. 215 (S.D.N.Y. 1993); Peterson v. Univ. of Wisconsin, 818 F. Supp. 1276 (W.D. Wisc. 1993). The DOJ and the Commonwealth of Virginia likely do not dispute the existence of a private right of action under the ADA and Rehab Act, but the Department of Justice's Complaint risks interference with that right, which right Congress largely reserved for private parties, including the Intervenors in this matter.

The DOJ impliedly acknowledges that it does not have general authority to bring an action pursuant to the ADA by referencing the statute that gives it limited authority to pursue claims involving the rights of institutionalized persons. The DOJ alleges that it conducted an extensive investigation pursuant to authority that it was given only by virtue of CRIPA. [Dkt. # 1, Complaint ¶¶ 11-13]. Yet, the DOJ has not pled this matter pursuant to the requirements of CRIPA.

Although the DOJ has feigned some compliance with the pre-complaint requirements of CRIPA, it has failed to meet the requisite standards for pleading its claims in its Complaint. CRIPA requires the United States Attorney General to personally execute a specific form, certifying that the DOJ has complied with all pre-Complaint sections of CRIPA. 42 U.S.C. §§ 1997a(c), 1997b(b). A copy of a Certification filed with a recently litigated CRIPA matter is attached as Exhibit A. No such certification has been given in this matter. If this Complaint were properly brought before this Court, it would also reference the Attorney General's certification in the Complaint and specifically indicate that the DOJ is authorized to bring the matter pursuant to CRIPA. A copy of a Complaint that arguably meets the minimum pleading requirements for a CRIPA action is attached as Exhibit B.

The DOJ has ignored well-settled case law and Congress' authority to grant the DOJ only limited standing in these matters. U.S. v. Solomon, et al., 563 F.2d 1121 (4th Cir. 1977); U.S. v. Mattson, 600 F.2d 1295 (9th Cir. 1979); U. S. v. Elrod, 627 F.2d 813 (7th Cir. 1980); United States v. City of Philadelphia, 644 F.2d 187, 201 (3d Cir. 1980) ("[T]he district court held that the Attorney General had no standing to sue to protect the constitutional rights of local prisoners. The Court of Appeals reversed and remanded because intervening legislation, the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 3, 94 Stat. 350 (1980), provided explicit statutory authority for the action."); Messier v. Southbury Training Sch., 916 F. Supp. 133, 137-38 (D. Conn. 1996); Santana v. Collazo, 89 F.R.D. 369, 373 (D. P.R. 1981) ("while we have no doubts as to the correctness of our earlier decision denying Plaintiff-Intervenor the right to intervene, the passage of the 'Civil Rights for Institutionalized Persons Act' together with the Attorney General's compliance with the procedural and certification requirements of Section 5 of the Act compels us to reconsider and thus to GRANT United States' Motion to intervene as Plaintiff in this action."). By filing its Complaint in this matter, the DOJ has ignored the limited grant of authority under CRIPA, while risking significant interference with the rights of private parties like the Intervenors.

III. THE DEPARTMENT OF JUSTICE HAS NOT MET THE PROCEDURAL PREREQUISITES TO BRING A TITLE II CLAIM.

In the present case, the DOJ has not pled sufficient facts to establish that it has met the procedural prerequisites to bring a Title II claim and, therefore, it cannot be entitled to relief. Title II prohibits discrimination against individuals with disabilities with regard to participation in, or benefits of, programs, services, or activities of a public entity. 42 USC § 12132. The enforcement provision of Title II provides that the "remedies, procedures and rights" of the

Rehabilitation Act, 29 U.S.C. § 794a, apply to violations of section 12132. 42 U.S.C. § 12133. Section 794a, in turn, refers to the "remedies, procedures and rights" of Title VI of the Civil Rights Act. 29 U.S.C. § 794a. Title VI of the Civil Rights Act states:

> Compliance . . . may be effected (1) by the termination of or refusal to grant or to continue [federal financial] assistance . . . or (2) by any other means authorized by law: Provided, however, 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.

(emphasis added) 42 U.S.C. § 2000d-1.

Even if the DOJ has authority to bring the claims that it has alleged in the Complaint, Title VI requires that it notify the Commonwealth and its officials of the alleged non-compliance with federal law and give the Commonwealth an opportunity to correct the non-compliance voluntarily prior to filing a lawsuit. The DOJ has failed to allege that it complied with those requirements. Nowhere in its Complaint does the DOJ refer to giving the Commonwealth the opportunity for voluntary compliance or the results of voluntary compliance efforts.

The DOJ was specifically admonished from filing this type of Complaint. In 2010, it attempted to file a virtually identical Complaint against the State of Arkansas, which the district court appropriately dismissed. See U.S. v. Arkansas, et al., 4:10-cv-00327 (E.D. Ark.) 2011 U.S. Dist. LEXIS 7231. That Court did not even address the DOJ's attempt to assert general standing to enforce the ADA because it found that:

> Because the Department of Justice has not made allegations in the complaint sufficient to indicate that it has complied with the statutory prerequisites to suit, the complaint fails to comply with the requirements of Rule 8(a) and therefore should be dismissed without prejudice. [fn 9 Accordingly, the Court need not and does not reach the issue of whether the Department of Justice must comply with 28 C.F.R. § 35.170 et seq., before commencing legal action.] Moreover, even considering the facts outside the pleadings submitted by the Department of Justice, those facts are insufficient to show that the Department of Justice has complied with

> the prerequisites to filing suit as stated in 42 U.S.C. § 2000d-1. Accordingly, the complaint is dismissed without prejudice.

(footnote in original) Arkansas, 2011 U.S. Dist. LEXIS 7231 at 22.

In this matter, even if the DOJ had general authority to enforce the ADA in the manner it has pled, it has still failed to allege that it has given an opportunity for the Commonwealth to voluntarily comply with the alleged violations of the ADA.

Even if the ADA had given the DOJ general authority to bring this action, the matter may only be referred to the Attorney General for a recommendation for legal action if the public entity refuses to enter into voluntary compliance negotiations or if such negotiations are unsuccessful. 28 CFR § 35.174. Nowhere in Title II of the ADA or its implementing regulations is authority given to the DOJ to initiate a lawsuit without meeting these procedural requirements. The DOJ has not complied with the necessary procedural requirements to file suit against the Commonwealth, even if it had the authority to do so, pursuant to Title II of the ADA. Instead, the DOJ filed this lawsuit based only on its theory that individuals with developmental disabilities would necessarily be better served in a community setting as opposed to a training center, and that thus, in its ideological opinion, the State must be violating the ADA. The DOJ cites no authority that allows it to bypass the procedural requirements of the Title II regulations. There is no individual complainant identified in the lawsuit and no indication that the DOJ received a complaint of discrimination under Title II from anyone with regard to the claims raised in the lawsuit. Additionally, the DOJ has not alleged that it attempted informal resolution of any matter complained of in the lawsuit.

Because the DOJ has not complied with these requirements prior to filing an ADA lawsuit, the case is not ripe for this Court's consideration. Currently, there is only a theoretical disagreement between the parties. The Complaint does not allege that the Commonwealth was

notified of any complaint, had an opportunity to engage in informal resolution, and had an opportunity to consider voluntary compliance. The DOJ has not demonstrated that there is an actual complainant who has asserted any harm that would merit the exercise of this Court's authority. As a result, the case is not ripe for judicial review and this Court does not have subject matter jurisdiction of the lawsuit, and it should be dismissed. Arc of Virginia, Inc. v. Kaine, 2009 U.S. Dist. LEXIS 117677, 10-12 (E.D. Va. 2009) (citing Warth v. Seldin, 422 U.S. 490, 498, (1975); Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003); Pacific Gas and Electric Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 200 (1983); 15 MOORE'S FEDERAL PRACTICE § 101.70).

IV. EVEN IF PROVEN, THE ALLEGATIONS IN THE COMPLAINT WILL NOT ENTITLE THE DEPARTMENT OF JUSTICE TO RELIEF

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve any contested facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) (citing 5A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1356 (1990)). In considering a motion to dismiss for failure to state a claim, a plaintiff's well-pled allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993); See also Martin, 980 F.2d at 952. This principle applies only to factual allegations, however, and "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Ashcroft v. Iqbal, 556 U.S. 662 (2009).

The Federal Rules of Civil Procedure "require[ ] only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of

what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (second alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). The DOJ cannot satisfy this standard with allegations containing only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." Id. at 555 (citations omitted). Instead, a plaintiff must allege facts sufficient "to raise a right to relief above the speculative level," Id. (citation omitted), stating a claim that is "plausible on its face," rather than merely "conceivable." Id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Bell Atl. Corp., 550 U.S. at 556). Therefore, in order for a claim or complaint to survive dismissal for failure to state a claim, the plaintiff must "allege facts sufficient to state all the elements of [his or] her claim." Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003) (citing Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir. 2002); Iodice v. United States, 289 F.3d 270, 281 (4th Cir. 2002)).

The DOJ has failed to allege facts to support its claim for relief. The DOJ has failed to allege any facts that constitute violations of the ADA or the United States Supreme Court's interpretation of the ADA in Olmstead. See Olmstead v. Zimring, et al., 527 U.S. 581 (1999). In an effort to manufacture support for its allegations, the DOJ has falsely represented the holding in Olmstead. For instance, the DOJ inaccurately alleges that:

> Under *Olmstead*, public entities are required to provide community-based services when (a) such services are appropriate, (b) the affected persons do not oppose community-based treatment, and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id.* at 607.

[Dkt. # 1, Complaint at ¶ 10].

This rendition of the holding in Olmstead, which the Commonwealth has impliedly endorsed, misstates the Court's first prerequisite to discharge from an institutional setting, that "the State's treatment professionals have determined that community placement is appropriate." Id. at 587. The DOJ's application of the other two prongs of the three-part test in this case also misrepresents Olmstead. In Olmstead, an action was filed on behalf of two women with mental retardation and co-morbid psychiatric disorders, known by their initials, L.C. and E.W. After being admitted voluntarily to the Georgia Regional Hospital in Atlanta in May 1992, L.C.'s schizophrenia was treated and stabilized. By May 1993, L.C. expressed a desire to leave the Georgia Regional Hospital and her treating professionals at the facility agreed that she could have her needs met in a state-supported community treatment program. However, L.C. remained in the Georgia Regional Hospital for nearly three more years. Plaintiff E.W. was voluntarily hospitalized at the Georgia Regional Hospital in February 1995 with a diagnosis of personality disorder. By 1996, E.W. expressed a desire to leave the facility and her therapist concluded that she could be treated in a community-based treatment program. E.W. was not discharged, however, after legal action had been brought. Both women argued that the state's failure to discharge them to a community-based treatment program violated Title II of the ADA.

Finding that L.C.'s and E.W.'s continued treatment at the Georgia Regional Hospital against their wishes violated the ADA, the Olmstead Court developed a three-prong test to determine when the ADA "require[s] placement of persons with mental disabilities in community settings rather than in institutions." Olmstead, 527 U.S. at 587. The Court instructed that community placement is required only when:

> the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, 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.

In interpreting the ADA and the DOJ's regulations issued under it, Olmstead emphasized that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." Id. at 602. The DOJ's allegations in the instant matter are inconsistent with this proposition. Olmstead further stressed that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." Id. at 601-02. "[T]he ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." Id. at 605. In fact, the Court recognized that "for [some] individuals, no placement outside the institution may ever be appropriate." Id. (citing and quoting Brief for American Psychiatric Association et al. as *Amici Curiae* at 22-23 ("Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times—perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings"); Brief for Voice of the Retarded et al. as *Amici Curiae* 11 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution"); Youngberg v. Romeo, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) ("For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know")).

The residents of the training centers may, in fact, have more involvement with non-disabled people than similar individuals living in their own or community homes. Many center residents go out daily to work programs and attend concerts, sporting events and restaurants. In addition, hundreds of people volunteer thousands of hours at the centers each year.

In the instant matter, The DOJ has not alleged that any treating professional has recommended discharge for any resident of Virginia's Training Centers. Indeed, each resident is evaluated annually to determine treatment needs and whether the Training Center remains the most appropriate home. These annual evaluations by the residents' treating professionals have been ignored by DOJ in its Complaint. The DOJ has also failed to allege that any resident or guardian of an individual residing at one of Virginia's Training Centers has not opposed a transfer recommendation made by a treating professional. By virtue of the ADA and Olmstead, Intervenors have a federally protected right to receive recommendations from treating professionals as to whether community placement is appropriate and to oppose that transfer, even if the proposed transfer is from institutional care to an appropriate community setting. In fact, the Virginia Code incorporates this federal right: "Pursuant to regulations of the Centers for Medicare & Medicaid Services and the Department of Medical Assistance Services, no consumer at a training center who is enrolled in Medicaid shall be discharged if the consumer or his legally authorized representative on his behalf chooses to continue receiving services in a training center." Va. Code. Ann. § 37.2- 837(A)(3).

The DOJ has failed to allege facts that would allow them to challenge the discharge procedures presently in place at the Commonwealth's Training Centers or to otherwise seek relief regarding that process. Plaintiff cannot meet its burden of proof by merely assuming that current residents of the Commonwealth's Training Centers should necessarily be served in alternative settings. Olmstead dictates that residents of the Commonwealth's Training Centers and their guardians have the benefit of treating professionals' judgments regarding the most appropriate place to receive services. Only after they have the benefit of that information are residents and guardians required to oppose or consent to transfer or discharge to an alternative

setting. See U.S. v. Arkansas, 794 F. Supp. 2d 935, 982 (E.D. Ark. 2011) (In a CRIPA case brought by the DOJ the district court concluded that the DOJ failed to meet its burden pursuant to Olmstead because "[n]o person determined by the State's treatment professionals to be appropriate for community placement has been denied community placement.")

The Complaint ignores Intervenors' right to have treating professionals render judgments as to where Intervenors should receive services most appropriate to their needs. The Complaint does not allege that treating professionals fail to render such judgments, that treating professionals disagree in their recommendations about where residents should receive services, or that treating professionals fail to communicate those judgments to residents and guardians, but, rather, the Complaint is silent on the rights of residents to receive professional judgments as to where appropriate services should be provided. The DOJ's silence on a major premise on which Olmstead is based, renders its Complaint defective. See Olmstead, 527 U.S. at 602; See also School Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 288 (1987) ("courts normally should defer to the reasonable medical judgments of public health officials"); Hanson By and Through Hanson v. Clarke County, Iowa, 867 F.2d 1115 (8th Cir. 1989).

Likewise, the DOJ's allegations and claims for relief largely ignore the rights of residents of Virginia's Training Centers and their guardians, as recognized by Olmstead, to oppose discharge from a Training Center. Interpreting Olmstead, the district court in U.S. v. Arkansas, et al., concluded that the DOJ failed to meet its burden because "[n]o resident of [the facility] has been denied community placement when a parent or guardian has requested such a placement." Arkansas, 794 F. Supp. 2d at 982. In this matter, the DOJ has failed to even make such an allegation, proof of which would be required to obtain relief under Olmstead.

Olmstead should not be twisted to require deinstitutionalization or the closure of residential facilities like the Commonwealth's Training Centers. See Olmstead at 605. Federal courts reached the same conclusion prior to Olmstead. In Conner v. Branstad, a district court soundly reasoned that "if Congress had actually intended to require states to provide community based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so." Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); See also U.S. v. Oregon, 782 F. Supp. 502, 514 (D. Or. 1991) ("[P]remature or inappropriate community placements would result in a much higher risk of potential harm than residents are exposed to at [the facility].").

The requirement of Olmstead that the court consider the needs of other individuals with mental disabilities must be read in its full, intended context. Ligas v. Maram, et al., 2010 U.S. Dist. LEXIS 34122, 13 (N.D. Ill. Apr. 7, 2010). The relevant portions of Olmstead include the government officials' potential affirmative defense – that providing the community-based services requested by the plaintiffs would "fundamentally alter" the nature of the services provided by the State to individuals with mental disabilities. Id. at 4 (citing Olmstead at 594-95); See also 28 CFR § 35.130(b)(7). The Supreme Court's instruction in Olmstead that the district court "consider [on remand], in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably" applies because the district court was charged with "evaluating [the] State's fundamental-alteration defense." Olmstead, 527 U.S. at 597.

Regardless of whether the Commonwealth of Virginia in this case raises a fundamental alteration defense, this Court should consider that throughout Olmstead, the Supreme Court

acknowledged the competing claims on limited State resources. Ligas, 2010 U.S. Dist. LEXIS 34122. For example, Justice Ginsburg's plurality opinion noted the States' obligation "[t]o maintain a range of facilities and to administer services with an even hand." Id. at 605. Similarly, Justice Kennedy's concurring opinion recognized the "continuing challenge" that States face "to provide . . . care in an effective and humane way," and it is in this context that he stresses the "central importance" of deferring to decisions made by State policymakers. Id. at 608-10. Accordingly, the Olmstead Court directed the lower courts to "tak[e] into account the resources available to the State and the needs of others with mental disabilities" if the fundamental-alteration defense is raised. Olmstead, 527 U.S. at 607.

V. THE DEPARTMENT OF JUSTICE'S COMPLAINT SEEKS TO ABROGATE THE CENTERS FOR MEDICARE AND MEDICAID SERVICES REGULATION OF THE COMMONWEALTH'S TRAINING CENTERS AND THE PROTECTIONS THOSE REGULATIONS PROVIDE FOR INTERVENORS

Consistent with Olmstead, the Centers for Medicare and Medicaid Services ("CMS") has promulgated ICF/MR regulations that only permit the discharge of residents from Virginia's Training Centers under specific conditions. 42 CFR § 483.440(b)(4). All of Virginia's Training Centers are currently licensed by CMS and the Virginia Department of Health.[1] The relief sought by the DOJ in this matter is "discharge" of residents from Virginia's Training Centers, as that term is used in the federal regulations. See Guideline to 42 CFR § 483.440(b)(4)(i) ("'Discharge' means the permanent movement of an individual to another facility or setting which operates independently from the ICF/MR."). CMS's regulations, which are exclusively for CMS to enforce, dictate the only circumstances under which such action can occur. They only allow

[1] See 42 CFR § 440.150 and 42 CFR §§ 483.400-483.480 for the definition of and regulations pertaining to an intermediate care facility for the mentally retarded.

discharge when a facility cannot meet an individual's needs, the individual no longer requires an active treatment program in an ICF/MR setting, the individual or guardian chooses to reside elsewhere, or when a determination is made that another level of service or living situation, either internal or external, would be more beneficial, or for any other good cause, including any reason that is in the best interest of the individual. 42 CFR § 483.440(b)(4)(i).

The Complaint fails to even acknowledge the existence of these regulations. The relief sought by the DOJ ignores these regulations. Also, the proposed settlement would have this Court abrogate those lawfully enacted and enforceable regulations. It is illogical for the DOJ to ask this Court to reach the conclusion that residents must be moved in accordance with an arbitrary schedule in a proposed settlement while another agency of the United States (CMS) simultaneously has concluded that those facilities meet all of the requirements of the federal regulations, certifies it as eligible for federal funds, and continues to provide federal funding for those facilities. The DOJ wrongly seeks to usurp federal regulations without even a single example of an inappropriate placement in an ICF/MR. Instead, the DOJ would have its own highly subjective, but factually and legally inaccurate, philosophical viewpoint, that all residents must be moved from ICFs/MR, replace these federal regulations. In doing so, the DOJ inappropriately and dangerously seeks to have the individual needs and wishes of residents ignored to accomplish an ideological goal of closing larger ICFs/MR.

CONCLUSION

For all the reasons identified above, Intervenors move, pursuant to Fed.R. Civ. 12 (b)(1) and 12(b)(6), to dismiss the Complaint for Declaratory and Injunctive Relief on the grounds that this Court lacks subject matter jurisdiction to entertain this claim and on the grounds that the

DOJ has failed to state a claim upon which relief can be granted. The Intervenors respectfully request that this Honorable Court dismiss the Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on the 2nd day of March, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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EXHIBIT A

Office of the Attorney General
Washington, D. C. 20530

CERTIFICATE OF THE ATTORNEY GENERAL

I, MICHAEL B. MUKASEY, Attorney General of the United States, certify that with regard to the foregoing Complaint, United States v. State of Arkansas, I have complied with all subsections of 42 U.S.C. § 1997b(a)(1). I certify as well that I have complied with all subsections of 42 U.S.C. § 1997b(a)(2). I further certify, pursuant to 42 U.S.C. § 1997b(a)(3), my belief that this action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.

In addition, I certify that I have the "reasonable cause to believe," set forth in 42 U.S.C. § 1997a, to initiate this action. Finally, I certify that all prerequisites to the initiation of this suit under 42 U.S.C. § 1997 have been met.

Pursuant to 42 U.S.C. § 1997a(c), I have personally signed the foregoing Complaint. Pursuant to 42 U.S.C.§ 1997b(b), I am personally signing this Certificate.

Signed this 15th day of January, 2008, at Washington, D.C.

MICHAEL B. MUKASEY
Attorney General of the United States

42 U.S.C. § 1997

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF ARKANSAS; THE HONORABLE MIKE BEEBE, Governor of the State of Arkansas, in his official capacity only; JOHN M. SELIG, Director of the Arkansas Department of Human Services, in his official capacity only; JAMES C. GREEN, Ph.D, Director of the Arkansas Division of Developmental Disabilities Services, in his official capacity only; CALVIN PRICE, Superintendent of the Conway Human Development Center, in his official capacity only, Defendants.	CASE NO. CV- 4:09CV00033WRW COMPLAINT FOR: 1. VIOLATIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; 2. VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT; 3. VIOLATIONS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT This case assigned to District Judge Wilson and to Magistrate Judge Jones

COMPLAINT

PLAINTIFF, THE UNITED STATES OF AMERICA ("Plaintiff"), by its undersigned attorneys, hereby alleges upon information and belief:

1. The Attorney General files this Complaint on behalf of the United States of America pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (2000), to enjoin the named Defendants from egregiously and flagrantly depriving

individuals housed in Conway Human Development Center (the "Center") of rights, privileges, or immunities secured and protected by the Constitution and laws of the United States.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1345 (2000).

3. The United States is authorized to initiate this action pursuant to 42 U.S.C. § 1997a.

4. The Attorney General has certified that all pre-filing requirements specified in 42 U.S.C. § 1997b have been met. The Certificate of the Attorney General is appended to this Complaint and is incorporated herein.

5. Venue in the Eastern District of Arkansas is proper pursuant to 28 U.S.C. § 1391 (2000).

DEFENDANTS

6. Defendant State of Arkansas owns and operates the Center, and as such has responsibility for the services and supports provided to residents at the Center.

7. The Center is a State facility for individuals with developmental disabilities.

8. Defendant Mike Beebe is the Governor of the State of Arkansas, and in that capacity, he has responsibility for the operation of the Center.

9. Defendant John M. Selig is the Director of the Department of Human Services, which has responsibility for overseeing the operation of the Center.

10. Defendant Dr. James C. Green is the Director of the Division of Developmental Disabilities Services, which has responsibility for overseeing the operation of the Center.

11. Defendant Calvin Price is the Superintendent of the Center.

12. The individual Defendants named in paragraphs 8 through 11 are officers of the State of Arkansas and are sued in their official capacity only.

FACTUAL ALLEGATIONS

13. Defendants are legally responsible, in whole or in part, for the operation of the Center and for the health and safety of the persons residing in the Center.

14. The Center is an institution within the meaning of 42 U.S.C. §§ 1997(1). The Center provides care to individuals with developmental disabilities.

15. Defendants are obligated to operate the Center in a manner that does not infringe upon the federal rights, as protected by the Fourteenth Amendment to the Constitution of the United States and by other federal law, of individuals residing at the Center.

16. Defendants are obligated to provide treatment, supports, and services to individuals residing in the Center consistent with the Americans with Disabilities Act and implementing regulations. 42 U.S.C. §§ 12101-12213; 28 C.F.R. pt. 35 (2006).

17. Also residing at the Center are persons considered a "child with a disability" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1401(3)(A)(i) and 3(A)(ii)(West 2000 & Supp. 2006), and Defendants are obligated to provide such persons a free and appropriate public education in the least restrictive setting, with necessary supports and services consistent with the IDEA and implementing regulations. 20 U.S.C.A. §§ 1400-1482; 32 C.F.R. pt. 300 (2006).

18. At all relevant times, Defendants have acted or failed to act, as alleged herein, under color of state law.

19. Individuals reside at the Center because they have been determined by Defendants to have developmental disabilities requiring treatment, supports, and services.

20. Defendants have failed and are continuing to fail to provide reasonably safe conditions and to ensure the reasonable safety and personal security of the Center residents.

21. Defendants have failed and are continuing to fail to provide the Center residents with that level of habilitation and training, including behavioral and related training programs,

necessary to protect the residents' liberty interests and to ensure their safety and freedom from undue or unreasonable restraint.

22. Defendants have failed and are continuing to fail to ensure that restraints are administered to residents by appropriately qualified professionals in keeping with accepted professional standards, and are not used as punishment, in lieu of treatment, or for the convenience of staff. Defendants have failed and are continuing to fail to supervise adequately residents in restraints to protect them from harm.

23. The Center's treatment, supports, and services substantially depart from generally accepted professional standards of care, thereby exposing individuals residing in the Center to significant risk and, in some cases, to actual harm.

24. The Center's treatment, supports, and services substantially depart from generally accepted professional standards of care in the following specific respects, among others:

a. the provision of adequate psychological, and behavioral services;

b. the provision of adequate medical, neurological, and nursing services;

c. the provision of adequate psychiatric services;

d. the provision of adequate habilitation and therapy services, including physical therapy, occupational therapy, speech and language therapy, and other forms of therapy, physical management, nutritional services and related services; and

e. the provision of adequate protections from harm.

25. Defendants have failed and are continuing to fail to adequately assess individuals residing in the Center to ascertain whether these individuals are receiving adequate treatment, supports, and services in the most integrated setting appropriate for their individual needs; to ensure that those individuals whom professionals determine should be placed in the community, and who do not oppose such placement, are placed there; and to ensure that the Center's residents are served in the most integrated setting appropriate for each resident's individual needs;

26. Defendants have failed and are continuing to fail to ensure that individuals with disabilities are adequately evaluated and provided the necessary supports and services to receive a free and appropriate public education in the least restrictive environment as required by United States laws and regulations.

VIOLATIONS ALLEGED

COUNT ONE:

Violations of the Due Process Protections of the Fourteenth Amendment to the United States Constitution

27. The United States incorporates by reference the allegations set forth in paragraphs 13 through 26 as if fully set forth herein.

28. The egregious and flagrant acts and omissions alleged in paragraphs 13 through 26 constitute a pattern or practice that violates the federal rights, as protected by the Fourteenth Amendment to the Constitution of the United States and by other federal law, of individuals residing in the Center.

29. Unless restrained by this Court, Defendants will continue to engage in the egregious and flagrant acts and omissions set forth in paragraphs 13 through 26 that deprive the Center's residents of rights, privileges, or immunities secured or protected by the Constitution of the United States and federal law, and will cause irreparable harm to these residents.

COUNT TWO:

Violations of the Americans with Disabilities Act

30. The United States incorporates by reference the allegations set forth in paragraphs 13 through 26 as if fully set forth herein.

31. The egregious and flagrant acts and omissions alleged in paragraph 26 violate the ADA and implementing regulations. 42 U.S.C. §§ 12101-12213, 28 C.F.R. pt. 35.

32. Unless restrained by this Court, Defendants will continue to engage in the egregious and flagrant acts and omissions set forth in paragraphs 13 through 26 that deprive the Center's residents of rights, privileges, or immunities secured or protected by federal law, and will cause irreparable harm to these residents.

COUNT THREE:

Violations of the Individuals with Disabilities Education Act

33. The United States incorporates by reference the allegations set forth in paragraphs 13 through 26 as if fully set forth herein.

34. The acts and omissions alleged in paragraphs 13 through 26 violate the IDEA and implementing regulations. 20 U.S.C.A. §§ 1400-1482; 32 C.F.R. pt. 300.

35. Unless restrained by this Court, Defendants will continue to engage in the conduct and practices set forth in paragraphs 13 through 26 that deprive residents of the Center of rights, privileges, or immunities secured or protected by federal law, and will cause irreparable harm to these residents.

PRAYER FOR RELIEF

36. The Attorney General is authorized under 42 U.S.C. § 1997a to seek equitable and declaratory relief.

WHEREFORE, the United States prays that this Court enter an order:

a. Permanently enjoining Defendants, their officers, agents, employees, subordinates, successors in office, and all those acting in concert or participation with them from continuing the acts, omissions, and practices set forth in paragraphs 13 through 26 above, and that this Court require Defendants to take such actions as will ensure lawful conditions of institutionalization are afforded to residents of the Center, including the provision of adequate treatment in the most integrated setting appropriate to their individualized needs;

b. Declaring that the acts, omissions, and practices set forth in paragraphs 13 through 26 above constitute a pattern or practice of resistance to Center residents' rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, and that those acts, omissions, and practices violate the Constitution and laws of the United States; and

c. Granting such other and further equitable relief as the Court may deem just and proper.

Respectfully submitted,

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