No. 00-6514

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

COMMUNITY REHABILITATION AGENCIES
OF TENNESSEE, INC.,

Proposed Intervenor-Appellant

PEOPLE FIRST OF TENNESSEE,

Intervenor-Appellee

v.

STATE OF TENNESSEE,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

FINAL BRIEF OF THE UNITED STATES AS APPELLEE

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1345. A timely notice of appeal from the district court's order of September 29, 2000 was filed by the Community Rehabilitation Agencies of Tennessee, Inc. (CMRA). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose proposed-intervenor-appellant's request for oral argument, but believes that the Court can readily dispose of this appeal on the briefs submitted by the parties. In the event that this Court does hold argument, pending before this Court is a motion to consolidate argument in this case with the argument in *People First* v. *Clover Bottom Developmental Center*, No. 00-5342 (6th Cir.). In the *Clover Bottom* case, CMRA appeals the district court's decision denying its intervention. The *Clover Bottom* case was brought under the Civil Rights for Institutionalized Persons Act, 42 U.S.C. 1997, against the State of Tennessee alleging unconstitutional conditions of confinement at Clover Bottom Developmental Center, a state-operated facility in Nashville, and two other such facilities in the middle district of Tennessee that house persons with mental retardation. This case challenges the constitutionality of the level of care for persons at Arlington Developmental Center, a state-run facility in Arlington, Tennessee. CMRA raises nearly identical issues in the *Clover Bottom* case as it does in this case in its challenge to the district court's decision also denying CMRA's intervention.

ISSUE PRESENTED

Whether the district court properly denied appellant's motion to intervene for failing to satisfy the requirements for intervention as of right pursuant to Fed. R. Civ. P. 24(a).

STATEMENT OF THE CASE

A. *Procedural History*

On January 21, 1992, the United States brought this suit against the State of Tennessee pursuant to the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. 1997, alleging unconstitutional conditions of confinement and federal statutory violations at Arlington Developmental Center (R.1, Complaint, Apx. 369).[1] The Arlington Developmental Center (ADC) is a state-operated residential facility in Arlington, Tennessee, housing persons with mental retardation. *United States* v. *Tennessee*, 925 F. Supp. 1292, 1296 (W.D. Tenn. 1995). ADC residents are persons "severely or profoundly retarded or developmentally disabled, some of whom have associated physical handicaps, and mental or behavioral problems." *Ibid.*

The district court entered a Remedial Order on September 2, 1994, setting out procedures for bringing ADC into constitutional and statutory compliance (R. 338, Remedial Order, Apx. 429). Following the entry of various remedial and emergency orders, the district court ordered the State to develop comprehensive plans for bringing ADC into constitutional compliance, including a plan for placing ADC patients into appropriate, quality community placements (R. 589, Stipulation and Order, Apx. 489). The State proposed a Community Plan, and after a hearing

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[1] "R. __" refers to the record number assigned to documents listed on the district court's docket sheet in this case, the document name, and pages within the document. "Br. __" refers to pages in the proof brief filed by proposed intervenor-appellant CMRA. "Apx. __" refers to pages in the Joint Appendix filed by CMRA.

the district court approved the plan on August 21, 1997 (R. 753, Order on Community Plan, Apx. 499). Since approving the Community Plan, the district court has ordered the creation of workgroups to further facilitate implementation of the remedy (although the district court subsequently suspended the workgroups temporarily) and provided clarification as to the persons "at risk" for placement into ADC who are entitled to relief (R. 1116, Agreed Order, Apx. 516; R. 1302, Order, Apx. 665). The orders suspending the workgroups and clarifying the "at risk" class members are on appeal before this Court (see *United States* v. *Tennessee*, Case Nos. 00-6120, 00-6265, 00-6476).

On January 24, 2000, the Community Rehabilitation Agencies of Tennessee, Inc. (CMRA) moved to intervene in the case (R. 1171, CMRA Motion, Apx. 528). After a hearing, the district court denied CMRA's motion (R. 1374, Order, Apx. 737).

B. *Underlying Litigation*

1. *Liability findings and remedial order in United States v. Tennessee*

On November 22, 1993, the district court held that the State violated the constitutional and statutory rights of persons living at ADC (R. 224, Prelim. Inj. and Order, Apx. 376). The district court issued a preliminary injunction ordering the State to correct certain life-threatening conditions (R. 224, Prelim. Inj. and Order, Apx. 376). The district court supplemented this liability ruling with additional findings of fact on February 18, 1994 (R. 251, Supplemental Findings, Apx. 381). On September 2, 1994, the district court entered a Remedial Order

setting out procedures for the State to follow to remedy the constitutional and statutory deficiencies identified in the district court's liability findings (R. 338, Remedial Order, Apx. 429). The Remedial Order required the State to, *inter alia*, ensure that ADC residents are "placed in an appropriate and safe manner and that placements in the community are adequate to meet the needs of [those] individuals" (R. 338, Remedial Order at 42, Apx. 471).

2. *People First case*

In a separate action, People First of Tennessee (People First) brought suit against the State and ADC seeking injunctive and declaratory relief on behalf of ADC residents. See *People First* v. *Arlington Developmental Center*, Civ. No. 92-2213 (W.D. Tenn.) (Apx. 48). People First is a non-profit advocacy organization advancing the rights of persons with disabilities. The *People First* suit asserted nearly identical constitutional and statutory claims as the suit brought against Tennessee by the United States. Acting on behalf of relatives and guardians of ADC residents, the Parent-Guardian Association (PGA) moved to intervene in the *People First* case. On January 26, 1993, the district court granted PGA's motion to intervene (Apx. 122).

On September 26, 1995, after entry of the Remedial Order in the *United States* v. *Tennessee* case, the district court adopted the findings from the *United States* v. *Tennessee* case as findings in the *People First* case, and certified a class including all past present, and future residents (the *People First* class) (Apx. 124,

205).[2] The district court also entered the Remedial Order from the *United States* v. *Tennessee* case as the remedy in the *People First* case, and permitted People First and PGA to intervene in *United States* v. *Tennessee* (Apx. 210-212). On appeal, this Court affirmed the district court's rulings (see *People First* v. *Arlington Developmental Center*, 145 F.3d 1332, 1998 WL 246146 (6th Cir. May 7) (unpublished), cert. denied, 525 U.S. 1001 (1998)).

3. *State's plan for community placements*

The United States filed various motions for contempt against the State alleging that the State failed to satisfy its remedial obligations to come into compliance with the Remedial Order. Acknowledging deficiencies in various compliance areas, the State agreed to the entry of a Stipulation and Order, which the district court adopted on June 24, 1996 (R. 589, Stipulation and Order, Apx. 489). The Stipulation and Order required the State to develop comprehensive plans for bringing ADC into compliance with the terms of the Remedial Order, including a plan to place ADC residents into community placements (R. 589, Stipulation and Order, Apx. 489). Pursuant to the Stipulation and Order, the State proposed a

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[2] The district court certified the class of persons represented by People First as

> all persons who on or after December 12, 1989, have resided, or are residing at the Arlington Developmental Center; all persons who have been transferred from Arlington Developmental Center to other settings such as intermediate care facilities or skilled nursing facilities but remain defendants' responsibility; and all persons at risk of being placed in Arlington Developmental Center

(*People First*, 1998 WL 246146, *2, Apx. 146).

community placement plan (R. 708, State's Community Plan, Apx. 759). The district court held a hearing on the State's Community Plan on May 9 and 13, 1997 (R. 720, 721, Transcript of Hearings, May 9 and 13, 1997). On August 21, 1997, the district court adopted the State's Community Plan, and made it an enforceable court order (R. 753, Order, Apx. 499). The district court ordered that the Community Plan apply to all members of the class certified in *People First* (R. 753, Order, Apx. 502-505).

On appeal, this Court affirmed the district court's judgment on May 14, 1999. *United States* v. *Tennessee*, 181 F.3d 105, 1999 WL 357785, (unpublished). This Court held that the State was collaterally estopped from contesting the application of the relief to the *People First* class. The Court held that the district court's order on the remedial plan was not an abuse of discretion, and that the district court did not err by enforcing the Community Plan as an order of the court.

Following another finding of contempt against the State (R. 1088, Memo. Opinion and Order), the district court, on August 11, 1999, entered an order agreed to by the parties (Agreed Order) that, *inter alia*, establishes workgroups, composed of representatives of the parties, to facilitate the implementation of the Community Plan in the areas of Independent Support Coordination, Supported Employment, Direct Care Staffing, and Quality Assurance (R. 1116, Agreed Order, Apx. 516). In addition, the Agreed Order requires the State to file a new proposed Home and Community Based Waiver (1915c Waiver) with the Health Care Financing Administration, and draft a Developmental Disabilities Demonstration Waiver (1115 Waiver). The district court ordered the State

> [to fund] appropriate services not otherwise covered by the current 1115 or 1915c Waivers, including []"special medical or laboratory procedures, prescription or non-prescription medical supplies, over the counter medications, expanded physical services, non-formulary pharmaceuticals, nutritional supplements, dental services, adaptive equipment, therapy services, and behavioral health services

(R. 1116, Agreed Order at 2-3, Apx. 517-518). On August 24, 2000, following a status conference on various matters in the case, the district court granted the State's motion to suspend workgroup activity for a period of three months (R. 1342, Order, Apx. 678, 679). The United States and People First appealed the district court's order.

On March 7, 2000, the district court ordered the parties to submit briefs on the scope of the "at risk" portion of the class certified in *People First,* Civ. No. 92-2213, and adopted in this case (R. 1214, Order, Apx. 658). The district court requested briefing as to the scope of persons who would fall within the third component of the class definition – "all persons at risk of being placed at Arlington Developmental Center" (R. 1214, Order, Apx. 658). On July 17, 2000, the district court held that the class definition would rely on "objective medical criteria to identify class members on the basis of demonstrated medical need" (R. 1302, Order at 7, Apx. 671). The district court stated that

> the appropriate medical criteria is the "institutional level of care" test for eligibility under a Home and Community Based Waiver. See 42 U.S.C. ¶1396n(c)(1); 42 C.F.R. ¶430.25(c)(2). Under this needs-based test, individuals are members of the at risk population if but for the provision of [home or community based] services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded.[] 42 U.S.C. ¶1396n(c)(1).

(R. 1302, Order at 7, Apx. 671). The district court determined that this "needs

based definition requires a procedure" for qualifying individuals into the third component of the class definition, and ordered the parties to come up with procedures for implementing this formula (R. 1302, Order at 7, Apx. 671).

The State moved to alter or amend the district court's July 17, 2000, order, and moved for a stay pending appeal. The district court denied the State's motions (R. 1343, Order, Apx. 700). The State appealed, and moved this Court to stay the district court's order. This Court granted the State's motion on September 25, 2000 (R. 1372, Order, Apx. 733, 735).

C. *CMRA's Motion To Intervene*

On January 21, 2000, CMRA moved to intervene in this case (R. 1171, CMRA Motion, Apx. 528; R. 1172, CMRA Memo. Supporting Motion, Apx. 531). CMRA is a nonprofit trade association that comprises twenty community rehabilitation agencies in Tennessee (R. 1172, CMRA Memo at 1, Apx. 531). The community agencies represented by CMRA provide services to mentally retarded and disabled individuals pursuant to Provider Agreements with the State. CMRA sought to intervene to participate in the implementation of relief (R. 1172, CMRA Memo at 2, Apx. 532). CMRA asserted that it had substantial interests in the case since the State contracts with community agencies to provide ADC and other qualifying "individual[s] with the appropriate services furnished by qualified and trained personnel" and that it wanted to "assur[e] that sufficient resources and

funding are available to meet this obligation" (R. 1172, CMRA Memo at 11, Apx.

541). CMRA also asserted that its twenty member agencies have "regulatory" interests in avoiding sanctions for violating the Provider Agreement – the contract that the State enters into with local agencies that secure medical, therapeutic, supported living and other services to persons transferred to community placements by the State pursuant to the State's obligations under the Community Plan (R. 1172, CMRA Memo. at 11-13, Apx. 541-543). CMRA asserts that, under the Provider Agreement, its community agency members cannot transfer or discharge class members from the service arrangement without approval from the State (R. 1172, CMRA Memo at 11-13, Apx. 541-543). The Provider Agreement states, specifically,

> Once a contractor is serving a person on the supported living medical, supported living enhanced, or supported living behavior rates, the Contractor must continue to provide services and may not discharge or deny services to that person without permission of the State pursuant to TCA 33-1-202(c).

(R. 1172, CMRA Memo. at Exh. A, ¶ E-17, Apx. 556).[3]

CMRA consented to all prior proceedings, stating that it would not seek to relitigate any issue previously resolved by the district court (R. 1174, CMRA Consent, Apx. 598). The United States, People First, and the State opposed

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[3] The Provider Agreement also states that contractors that "serve[] any member of the Class created by the Settlement Agreement for *People First* v. *Clover Bottom et. al.,* or certified in *United States* v. *Tennessee, et al.* (Arlington Developmental Center) * * * will comply with the terms stated in the Division of Mental Retardation Operations Manual, Information Bulletins, Policies, Procedures and Guidelines and any rules or regulations pursuant thereto, and will also comply with relevant terms of the Settlement Agreement or Remedial Order, Community Plans developed for the implementation of community services, and any subsequent orders of the Courts" (R. 1172, CMRA Memo. at Exh. A, ¶ E-8, Apx. 553).

intervention (R. 1184, Def. Response to Motion, Apx. 599; R. 1189, U.S. Memo. in Opposition, Apx. 609), and the district court held a hearing on CMRA's motion on September 25, 2000 (R. 1371, Transcript of Hearing, Sept. 25, 2000).

D. *District Court's Order On Intervention*

The district court denied CMRA intervention because CMRA "failed to state a substantial legal interest in the subject matter of the case" (R. 1374, Order at 4, Apx. 740). The district court held that CMRA's asserted interests "do not rise to the level of significant protectable interest required for intervention" (R. 1374, Order at 4, Apx. 740). The district court stated that the case is about bringing the State's care of ADC patients to a "constitutional level," and not about how the State "pays for that level of care" or how the State's requirements of the Remedial Order affect community service providers (R. 1374, Order at 4, Apx. 740). The district court stated that "[t]hose interests are better left to contract negotiations between the community service providers and the State * * * , not this lawsuit" (R. 1374, Order at 5, Apx. 741). The district court determined that the regulatory and economic interests asserted by CMRA "do not constitute substantial interests for the purpose of intervention in this case" (R. 1374, Order at 5, Apx. 741).

The district court further held that the terms of the Provider Agreement do not permanently bind community service providers to provide services to ADC patients. Distinguishing the "lock-in" component in *Linton* v. *Commissioner of Health and Environment*, 973 F.2d 1311 (6th Cir. 1992), the district court stated that the terms of the Provider Agreement "only ensure that the class member

continues to receive the required level of care until the State determines that the class member does not need that level or allows the contractor to transfer the individual to another provider that will provide the requisite level of care" (R. 1374, Order at 5, Apx. 741).

The district court also held that CMRA failed to show how its ability to protect its interests would be impaired absent intervention. The district court stated that CMRA "can continue to negotiate with the State * * * for higher rates and more resources" through "continued contract negotiation" as it "has always done, and just as all the other community providers that are not members of CMRA must" (R. 1374, Order at 6, Apx. 742).

Finally, the district court found that CMRA's motion does not meet the timeliness requirement for intervention (R. 1374, Order at 6, Apx. 742). First, the district court observed that the case was "well into the remedial stage" (R. 1374, Order at 7, Apx. 743). Second, the district court found that the State is ultimately responsible for ensuring that the regulatory and economic interests of community service providers are protected, and that "CMRA agencies are already participating in the implementation of the Remedial Order by providing services to class members" (R. 1374, Order at 7, Apx. 743). Third, the district court found that CMRA "knew of the issues in this litigation at all stages" (R. 1374, Order at 7, Apx. 743). Fourth, the district court stated any requirements stemming from either this case, the *Clover Bottom* proceeding (*People First* v. *Clover Bottom Developmental Center*, No. 3:95-1227 (M.D. Tenn.)), or a revised consent decree

in *Grier* v. *Wadley*, Civ. No. 79-3107 (M.D. Tenn.) do not warrant CMRA's intervention because the State remains fully "responsible for providing care to mentally retarded individuals in Tennessee and the State is aptly represented in this case," and any requirements from these cases are the responsibility of the State, not CMRA (R. 1374, Order at 8, Apx. 744).

The district court also denied CMRA permissive intervention under Fed. R. Civ. P. 24(b) (R. 1374, Order at 8-9, Apx. 744-745). The district court held that CMRA's intervention is untimely, and would also "unduly delay" and "prejudice" the rights of the original parties (R. 1374, Order at 9, Apx. 745). The district court stated that the case is "complicated" and "has been in litigation for many years" (R. 1374, Order at 9, Apx. 745). The district court stated that "[a]llowing CMRA to intervene at this point in the case will add another layer of consideration, quite outside the original question of the lawsuit, that will further complicate this important case" (R. 1374, Order at 9, Apx. 745). The district court observed that "[t]aking into consideration the method of payment and level of funding of the community agencies will take up considerable time and divert the Court's and the parties' attention from the principal issue, which is ensuring that the care of mentally retarded individuals in Western Tennessee meets constitutional standards" (R. 1374, Order at 9, Apx. 745). The district court stated that "CMRA's interests can be policed using other mechanisms that will not further complicate this case"

(R. 1374, Order at 9, Apx. 745).[4]

STANDARD OF REVIEW

The district court's conclusion that CMRA's motion to intervene was untimely is reviewed for abuse of discretion. *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). Its conclusion that the other requirements for intervention as of right have not been met is subject to *de novo* review. *Grutter* v. *Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999). The district court's factual determinations are reviewed for clear error. *Glover* v. *Johnson*, 198 F.3d 557, 560 (6th Cir. 1999).

SUMMARY OF ARGUMENT

This appeal derives from a suit brought in 1992 by the United States against the State of Tennessee alleging constitutional and statutory violations at the state-run Arlington Developmental Center (ADC). The case is in the remedial stages, and the parties are working towards implementing a plan for placing ADC residents into quality community placements. CMRA appeals the district court's order denying its motion to intervene in the case. CMRA seeks to intervene to participate in implementation discussions with the parties and ensure that the State adequately funds the services that its member agencies provide to ADC patients pursuant to contractual agreements that service providers enter into with the State.

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[4] On February 16, 2000, the district court in *People First* v. *Clover Bottom Developmental Center*, No. 3:95-1227 (M.D. Tenn.) denied CMRA's motion to intervene in that proceeding for reasons similar to those set forth by the district court in this case. CMRA's appeal of that order is pending with this Court and is docketed as Case No. 00-5342 (6th Cir.).

CMRA's interest in discussing implementation issues with the parties does not warrant its intervention in the case. Intervention is only proper when a proposed intervenor seeks to participate in legal proceedings before the court based on valid legal claims or defenses. CMRA asserts no legal claims or defenses, and in fact has consented to all prior orders in the case.

The district court correctly determined that CMRA did not satisfy the criteria for intervention as of right. CMRA's motion to intervene was untimely as it comes at the very late stages of the litigation and CMRA provides no legitimate excuse for its tardiness. CMRA's asserted interest in ensuring that its member agencies are adequately compensated is not directly implicated by the litigation in this case, and CMRA can protect its interest through other more appropriate forums. Finally, the present parties to the litigation adequately represent the class members' interests in ensuring that adequate resources are made available to implement the State's plan for placing ADC patients into appropriate, quality community placements.

ARGUMENT

I

CMRA'S INTEREST IN DISCUSSING IMPLEMENTATION ISSUES WITH THE PARTIES DOES NOT WARRANT ITS INTERVENTION IN THE CASE

CMRA seeks to intervene in the case principally to "participate in the implementation of the Remedial Order" (Br. 25). In district court, CMRA asserted that its purpose for intervention was to ensure its participation in "future decisions regarding implementation of the remedial plan" and so that it could be involved in

discussions affecting the provision of resources and payment to its member agencies (R. 1172, CMRA Memo. at 6-8, Apx. 536-538).

The federal rules provide a number of avenues for nonparties to participate in litigation in which they have an interest. For instance, those who have a generalized interest in the subject matter and wish to have their views considered by the court, may seek participation as *amicus*. See *Michigan State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *United States* v. *Michigan*, 940 F.2d 143, 164-165 (6th Cir. 1991). In institutional reform litigation, those with an interest in the collateral effects of a consent decree may participate in a hearing on the approval of the consent decree to make their views known. See *Local 93, In'tl Ass'n of Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986). However intervention as of right as a full party – with the right to take an appeal, move for contempt, or request modification of a decree – is reserved for those with a direct and substantial stake in the case. See *Michigan State AFL-CIO*, 103 F.3d at 1245.

CMRA sought intervention as of right under Fed. R. Civ. P. 24(a)(2). Rule 24 (a) provides:

> Upon timely application anyone shall be permitted to intervene in an action * * * when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately protected by existing parties.

Rule 24(c) further requires that the intervention motion "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

Intervention is permissible only when a proposed intervenor seeks to participate in legal proceedings before the court based on valid legal claims or defenses. Even though a proposed intervenor's interest in the litigation need not be based on a specific legal or equitable interest, see *Purnell* v. *City of Akron*, 925 F.2d 941, 947-948 (6th Cir. 1991), the applicant may protect its interest only by making legal claims or defenses. See, *e.g.*, *Rhode Island Fed'n of Teachers* v. *Norberg*, 630 F.2d 850, 854 (1st Cir. 1980) (unless the applicant is able to state a valid claim or defense that would entitle the movant to the relief it seeks to protect its interests, the intervention must be denied); *Williams & Humbert Ltd.* v. *W&H Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988) (same); *Pin* v. *Texaco, Inc.*, 793 F.2d 1448, 1450 (5th Cir. 1986) (same); 7C Charles Alan Wright, et al., Federal Practice and Procedure § 1914, at 416-417 (1986) ("The proposed pleading must state a good claim for relief or a good defense."); 3B James Wm. Moore et al., Moore's Federal Practice § 24.14, at 24-162 (1982) (same).[5] That is, although intervention is permitted in order to protect an array of interests, it is not a vehicle by which parties with no legal claims, desiring nothing from the court, may secure a forum for a generalized airing of grievances or lobbying of parties to the action.

In this case, although CMRA has identified its concerns, it has failed to identify any legal claim that derives from this action filed under CRIPA, 42 U.S.C.

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[5] Even permissive intervention is only permitted when "an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).

1997, against the State and ADC that provides a basis for judicial redress of those concerns. This action concerns whether the State is complying with constitutional standards and prior remedial orders. The consent filed by CMRA pursuant to Rule 24(c) fails to comply with the requirements of the rule, because it does not advance any similar legal claims to the court. CMRA does not seek redress based on the terms of the 1994 Remedial Order, the district court's 1997 order making the State's Community Plan an enforceable court order, the 1999 Agreed Order, or any other subsequent remedial orders entered by the district court. In fact, along with its motion to intervene, CMRA consented to all prior proceedings (R. 1174, CMRA Consent, Apx. 598). In the consent CMRA stated that it would not seek to "relitigate any issue previously resolved by the Court and the parties" and that its only desire in seeking to intervene is to "participate in proceedings in the future" (R. 1174, CMRA Consent, Apx. 598). CMRA's consent to the district court's prior orders does not identify any legal claim that CMRA wishes to pursue through intervention, the legal basis for any such claim, or any specific action it wishes the district court to take, or refrain from taking, to protect its interests.

Indeed, CMRA's failure to state a claim for relief underscores the fact that CMRA does not have any legal claims to present to the district court. Furthermore, even if CMRA did seek to modify the Remedial Order or any subsequent orders of the district court, it would have no right to "enforce [its] understanding of [the] terms" of any such orders since CMRA was not a party or an intended beneficiary. *Aiken* v. *City of Memphis*, 37 F.3d 1155, 1167 (6th Cir. 1994). None of the district

court's orders mandate a specific payment methodology or rates of pay that the State must make to the community service providers. If there is a state-law basis for CMRA to request modifications to the contractual agreements that its member agencies enter into with the State, CMRA has failed to identify it or explain how the district court has jurisdiction to entertain such claims. Indeed, this federal lawsuit is not the proper forum for CMRA to deal with those issues. See, *e.g.*, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994).

Another reason CMRA has not identified a legal basis for its grievances appears to be that CMRA does not actually seek any legal redress. The motion that CMRA filed in district court and its brief filed in this Court make clear that CMRA does not seek to modify or amend any court orders at all. CMRA seeks only to participate in discussions with the parties during the course of implementing the Remedial Order and Community Plan (see, *e.g.*, R. 1172, CMRA Memo. at 5-6, Apx. 535-536) (purpose of intervention is to "participate in the implementation of the remedial plan" and to "participate in future decisions regarding the implementation of the remedial plan"); CMRA Br. 25 (CMRA "simply requests the ability to be an active party in future proceedings").

But Rule 24(a) authorizes only intervention into the *litigation*, not the private negotiations of some or all of the present parties. See Fed. R. Civ. P. 24(a) ("Upon timely application anyone shall be permitted to intervene *in an action*") *(*emphasis added); Black's Law Dictionary 18 (6th ed. 1991) (term "action" "in its usual legal sense means a lawsuit brought in a court; a formal complaint within the jurisdiction

of a court of law"); *Dodson* v. *Salvitti*, 77 F.R.D. 674, 676 n.1 (E.D. Pa. 1977) (applicants' desire to obtain "the right to actively participate in the continuing settlement negotiations" is, by itself, "simply not a sufficient basis for permitting their intervention"). The purpose of intervention is to promote the efficient judicial settlement of "claims among a disparate group of affected persons," *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 339-340 (6th Cir. 1990), not to provide a mediation service for the settlement of grievances not based in alleged violations of legal rights.

Thus the district court's decision denying CMRA's request to intervene as a party was proper since CMRA did not, and cannot, articulate a legal claim or defense that would satisfy Rule 24.

II

CMRA DID NOT MEET THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT

Although CMRA often portrays its motion as seeking simply to participate in implementation discussions it is by no means clear that, if CMRA were permitted to intervene, it would limit its participation to informal negotiations. Thus, if CMRA is to be given all the rights of a proper intervenor, it must demonstrate that it meets the requirements for intervention under the federal rules and related case law. This, it has not done.

As proposed intervenor, CMRA must meet four criteria before intervention by right is permitted:

> (1) the application for intervention must be timely; (2) the applicant must have a substantial legal interest in the subject matter of the pending litigation; (3) the applicant's ability to protect that interest must be impaired; and (4) the present parties do not adequately represent the applicant's interest.

Linton v. *Commissioner of Health and the Environment*, 973 F.2d 1311, 1317 (6th Cir. 1992); see also *Stupak-Thrall* v. *Glickman*, 226 F.3d 467, 471 (6th Cir. 2000); *Michigan State AFL-CIO*, 103 F.3d at 1245. "The proposed intervenor must prove each of the four factors; failure to meet one of the criteria will require that the motion to intervene be denied." *Stupak-Thrall*, 226 F.3d at 471 (citations omitted); *Linton*, 973 F.2d at 1317. The district court found correctly that CMRA failed to satisfy the criteria for intervention as of right.[6]

A. *The District Court Did Not Abuse Its Discretion In Holding CMRA's Motion Untimely*

A motion to intervene must be denied if it is not timely. See *NAACP* v. *New York*, 413 U.S. 345, 365-366 (1973). "Timeliness is to be determined from all the circumstances." *Id*. at 366; *Stupak-Thrall*, 226 F.3d at 472-473. This Court has suggested several relevant factors for the district court to consider in assessing the timeliness of an intervention motion:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or reasonably should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the

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[6] In its brief CMRA does not challenge the district court's ruling denying it permissive intervention under Fed. R. Civ. P. 24(b).

> existence of unusual circumstances militating against or in favor of intervention.

Id. at 473; *Grubbs* v. *Norris*, 870 F.2d 343, 345 (6th Cir. 1989); *Triax* v. *TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984). After carefully weighing the facts of the case against these factors, the district court ruled that CMRA's motion to intervene was untimely (R. 1374, Order at 6-8, Apx. 742-744). The district court was well within its discretion in making that determination. *NAACP* v. *New York*, 413 U.S. at 366 (timeliness "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review").

1. *Stage of the proceedings*

The district court found that CMRA's intervention motion was untimely because it came so late in the litigation and that "this case is well into the remedial stage" (R. 1374, Order at 7, Apx. 743). The court observed that the suit was "filed in 1992, the Remedial Order was entered in 1994, People First and [PGA] were allowed to intervene in 1995, and the Community Plan was entered in 1997" (R. 1374, Order at 6-7, Apx. 742-743). CMRA argues (Br. 19), however, that even though the case is in the remedial stages, that it is still entitled to intervene. Ordinarily, an intervenor joins litigation in order to participate in the adjudication of the merits of the plaintiffs' complaint (or to bring a related complaint in intervention). "There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant." 7C Charles Alan Wright et al., Federal Practice and

Procedure, § 1916, at 444 (1986). See also *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982) ("We begin from the presumption that a motion to intervene after entry of a decree should be denied except in extraordinary circumstances.").

CMRA argues (Br. 19-21) that in some unusual cases intervention may be appropriate after judgment, for instance to take an appeal another party has decided to waive. See, *e.g.*, *Triax Co.,* 724 F.2d at 1228. But all of the cases relied upon by CMRA permit intervention for the purpose of seeking some *judicial* action. See *Linton,* 973 F.2d a 1316 ("appellant nursing homes moved to intervene and appeal the [remedial] order"); *Grubbs,* 870 F.2d at 344 (city intervened to seek modification of remedial order based on changed circumstances). In this case, CMRA appears not to be seeking judicial action of the sort permitted by these cases – it does not seek intervention to appeal or seek modification of the 1994 Remedial Order, the 1997 district court order making the Community Plan an enforceable order, or the 1999 Agreed Order. If, however, CMRA really is seeking relief from the effect of any of these orders, or additional relief that it could have asked for earlier in the case, then cases like *Linton* and *Grubbs* offer no assistance since both are fully consistent with the district court's conclusion that it is far too late for CMRA to come to court to complain about the substance of remedial orders that have been finally entered or seek to modify court orders, directly or indirectly.[7]

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[7] CMRA does not seek relief from the 1999 Agreed Order as it has expressly stated that it consents to that and all other orders in the case. In any event, the 1999

See *Michigan Ass'n for Retarded Citizens* v. *Smith*, 657 F.2d 102, 105 (6th Cir. 1981) (union of employees of mental retardation facility could not wait until a consent decree had been entered before attempting to intervene to protest likely layoffs that would result from the court order); *Cuyahoga Valley Ry. Co.* v. *Tracy*, 6 F.3d 389, 396 (6th Cir. 1993) (intervenors were not entitled to wait until final judgment had been entered and then "enter the proceedings after the case has been fully resolved, in an attempt to achieve a more satisfactory resolution" when "the interests of the * * * intervenors were implicated by [the] lawsuit from its inception").

2. *Purpose of the intervention*

As discussed above (pp. 15-20, *supra)*, the purpose articulated by CMRA to support its intervention – "to participate in the implementation of the Remedial Order" (Br. 25) – is not an appropriate basis for permitting it to become a party to this action. The district court determined that CMRA's stated purpose does not excuse its delay since ensuring the proper implementation of the Remedial Order falls squarely within the responsibility of the State, and CMRA member agencies "are already participating in the implementation of the Remedial Order by providing services to the class members" (R. 1374, Order at 7, Apx. 743).

3. *Delay in seeking intervention*

Agreed Order certainly contains no provision that explicitly impairs any rights of CMRA since it does nothing more than require the State to file for federal waivers with HCFA and once, and if, the suspension order is lifted, to work cooperatively with the parties in creating workgroups to facilitate quality community placements.

An entity that is aware that its interests may be impaired by the outcome of a litigation is obligated to seek intervention as soon as it is reasonably apparent that it is entitled to intervene. See *NAACP* v. *New York*, 413 U.S. at 367; *Cuyahoga Valley Ry. Co.*, 6 F.3d at 396; *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 579, 584 & n.3 (6th Cir.) (applicants "should have attempted to intervene when they first became aware of the action, rather than adopting a 'wait-and-see' approach"), cert. denied, 459 U.S. 969 (1982). The district court found that CMRA had no excuse for its delay in seeking intervention because it "knew of the issues in this litigation at all stages * * * and [that its interests developed] at the latest date, when the Community Plan was entered" (R. 1374, Order at 7, Apx. 743).

The district court was correct in finding that there was no excuse for CMRA to delay seeking intervention. It appears that CMRA not only waited to see how the litigation would turn out, it also waited six years after the district court's adoption of the Remedial Order, and three years after the court's adoption of the State's Community Plan to assess the impact of these remedial orders on its member agencies. Any impact the Remedial Order or Community Plan would have, or has had, was easily foreseeable when these remedies were presented to the district court in the context of the litigation. In any event, CMRA's obligation to seek to intervene was when it believed that its ability to protect its interests was subject to impairment – *i.e.*, at the onset of the district court's adoption of these remedies – not when such an impairment allegedly resulted in harm to its interests.

a. *Anything CMRA could ask for now, it could have asked*

for earlier in the case

Certainly, if CMRA wishes to seek court orders that have the effect of changing the requirements of the 1994 Remedial Order or the Community Plan, it could have brought those complaints to the court's attention at the onset of the court's adoption, or consideration, of these remedial measures. When this suit commenced in 1992, it was clear that the disposition of the case would have a significant impact on the operation of state programs for people with mental retardation throughout Tennessee. Alternatively, CMRA could have sought to intervene in the case brought against ADC by People First in 1991. See *People First*, Case No. 92-2213. Even PGA recognized that its interests may be affected by the *People First* litigation, and successfully intervened in that case in 1993 (see p. 5, *supra*; see also Apx. 122).

Even if CMRA's interests had not crystallized with filing of the lawsuit against ADC by the United States in 1992, the district court determined that CMRA's interests developed, at the latest, in 1997 when the Community Plan was adopted (R. 1374, Order at 7, Apx. 743). The State's Community Plan, adopted by the district court, provides a comprehensive approach for ensuring that class members placed into community settings receive adequate care and that their medical and developmental care is tailored to their individual needs. The district court held a hearing on the State's Community Plan on May 9 and 13, 1997, prior to its adoption (R. 720, 721, Transcript of Hearings, May 9 and 13, 1997). During this hearing the district court heard extensive testimony regarding the development

of the Community Plan and its various components, and the significant efforts and extensive involvement of interested persons and organizations that were involved in creating the plan. The primary architect of the State's Community Plan, Lynn Rucker, testified that the plan was prepared and evaluated with the assistance of various "stakeholders," or persons with a direct interest in facilitating quality community placements for the developmentally disabled (R. 720, Transcript of Hearing, May 9, 1997, at p. 20). Rucker stated that the "State in its various regional and state forms were also there as well" (*id*. at 20). Rucker stated that the plan management team

> would [] review and make comments and changes to each section [of the Community Plan], we would take that back and make the corrections, and then it also underwent a review within the commission itself. The parties met, I believe, four times and they also critique[d] and [would] make observations in terms of its completeness or lack thereof, and then this cycle kind of continued again until we got into final revisions and the final [Community] [P]lan being submitted

(*id.* at 20).

The district court also heard extensive testimony of various deficiencies existing in the State's current community placements, including testimony that patients were receiving inadequate medical care (*id.* at 214, 228, 232-234), that there was insufficient equipment for speech and occupational therapy (*id.* at 230-231), inadequate staff training (R. 721, Transcript of Hearing, May 13, 1997, at pp. 248-249, 300-302), inadequate individualized patient plans (*id.* at 299, 308-312), and a continuing need for nursing services at the community sites (*id.* at 249-250). CMRA could have sought to participate at the 1997 hearing as *amicus* to make its

views known about the State's funding of services for its member agencies, but did not do so.

To the extent that CMRA is now complaining about activities that are required to implement the 1994 Remedial Order and the 1997 Community Plan – although that does not appear to be the objective of CMRA's prospective purpose for intervening – this is no different than a facial attack on these two remedial measures. For example, CMRA complains (Br. 27) that the State requires community service providers to agree to abide by any future orders in this case. Citing to an affidavit by Mindy Schuster, CMRA asserts that the State has

> arbitrarily[] implemented mandates on community agencies that either conflict with logical delivery of services or do not recognize the cost of the mandate * * * [and that CMRA] was told that the basis of the mandate was a court order in either this case or the *Clover Bottom* * * * case

(Br. 27). CMRA also asserts, for example, that "if the class of 'at risk' persons is redefined, this would cause the number of persons served by one agency alone to increase from two * * * "to 84" (Br. 28, citing affidavit of Cathy Cate). To the extent that CMRA objects to any requirements set out in the remedial orders of this case, the *Clover Bottom* case, or the 1997 Community Plan it should have asserted these objections years ago. Indeed, "it would not have required unusual prescience on the part of the intervenors to recognize that their interests were implicated." *Cuyahoga Valley Ry. Co.*, 6 F.3d at 396. Any attack on state mandates that are based on a court order is an attack on that court order and should have been raised long ago.

Nor is CMRA's intervention motion timely even if it only intends to ask the court to impose additional obligations not required by the remedial orders (such as an order requiring the State to enter into a memorandum of understanding with providers, increase its rates, or revise its payment methodology). There is nothing in any order entered by the district court in this case that would require the State to enter into a memorandum of understanding with service providers, revise its payment methodology, or pay providers any particular rate. If CMRA believed that the district court should be involved in the internal contract negotiations of the State, and had some legal basis for insisting that the court orders contain such a requirement, it should have, at the latest, sought intervention to make this request before the 1997 Community Plan was approved by the district court.

Even if CMRA only wishes to become entitled to enforce the 1997 Community Plan, it should have attempted to intervene to secure such a right for itself soon after the State's Community Plan was submitted to the court. After the district court approved the Community Plan, made it an enforceable order of the court, and once this Court affirmed the district court's order (see p. 7, *supra*), it was clear at that the Plan would only be enforceable by the parties to the litigation. Cf. *Amati* v. *City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999) (noting that potential class members are barred from "waiting on the sidelines to see how the lawsuit turns out and, if a judgment for the class is entered, intervening to take advantage of the judgment"), cert. denied, 120 S. Ct. 445 (1999).

b. *CMRA's purported reliance on others to protect its interests is no excuse for its delay*

CMRA attempts to excuse its tardiness by claiming (Br. 26-27) that until only recently it "felt that its interests were being fully protected by the other parties" and that it presumed that in order to provide quality services to ADC patients the State would adequately increase its reimbursement rates to compensate for the additional burdens imposed on the providers.

CMRA is correct that an organization with an interest in a litigation may refrain from attempting to intervene so long as its interests are being adequately represented by the current parties. See, *e.g., Jansen,* 904 F.2d at 340-341; *Triax Co.*, 724 F.2d at 1228. In such cases, the applicant may intervene in the later stages of the case if the current parties' representation becomes inadequate, so long as it seeks intervention soon after this inadequacy becomes apparent. See, *e.g., United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977) ("The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly" after notice of inadequate representation); *Linton*, 973 F.2d at 1318; *Jansen*, 904 F.2d at 340-341. This line of cases, however, is no help to CMRA with respect to ensuring quality service to ADC patients. As the district court found, the State is ultimately responsible for ensuring, pursuant to the 1994 Remedial Order, that persons with mental retardation are provided adequate quality care and that sufficient resources are provided to the community service providers so that these individuals receive timely and appropriate services (R. 1374, Order at 7, Apx. 743).

CMRA seeks intervention not only to ensure quality care, but also to ensure that its member agencies will be adequately compensated for their services to the State. In her affidavit, CMRA Executive Director Mindy Schuster explained (R. 1172, CMRA Memo. at Exh. B, Apx. 557) that CMRA agencies and the State historically worked cooperatively in providing services to developmentally disabled individuals. Schuster explains that in January 1998, the State "promised to remedy provider concerns" about funding for services by "1) implementing the results of a rate study committee by developing a payment methodology for determining rates and 2) negotiating a Memorandum of Understanding to govern future relationships between the parties" (R. 1172, CMRA Memo. at Exh. B, p. 2, Apx. 558). Shuster states that these promises by the State remain unfulfilled, and that "[d]espite the best efforts by CMRA there is no Memorandum of Understanding * * * [and] currently rates continue to be paid on an arbitrary basis with no payment methodology" (R. 1172, CMRA Memo. at Exh. B, p. 2, Apx. 558). In view of these facts asserted by Shuster, CMRA insists that because the State is both a regulator and purchaser of CMRA's services, it cannot represent CMRA's interests, citing the "inherent inconsistencies between movants' interests and those of the State" (Br. 36 (quoting *Linton*, 973 F.2d at 1319-1320)).

But this "inherent inconsistency" caused by the dual nature of the State's relationship with CMRA has existed, and has been obvious, since the inception of this litigation. Similarly, it has been obvious since the beginning of the case that none of the plaintiffs has a direct interest in protecting CMRA's economic and

other proprietary interests.[8] This is not a case about the interests of service providers, but about the civil rights of Tennessee citizens with mental retardation. As discussed below (pp. 43-45, *infra*), the current parties' interest in protecting those rights will have the necessary effect of protecting any interest CMRA may have in assuring that resources and the funding of those resources are adequate to provide the services the remedy requires. However, none of the parties has ever had an exclusive and direct interest in *maximizing* CMRA members' reimbursement rates, *minimizing* providers' regulatory burdens, or pursuing such proprietary interests as securing a memorandum of understanding for the *sole* benefit of providers.

Moreover, reliance on the generosity of the State as a paternalistic purchasing agent or cooperative regulator is not a basis for delaying intervention when it was clear that neither the State nor any other party was protecting CMRA's proprietary interests in court. In its capacity as a litigant, the adequacy of the State's representation of CMRA's interests has not changed. Unlike the cases upon which CMRA relies, nothing in the State's conduct of the litigation has changed recently. See *Linton*, 973 F.2d at 1317-1318 (intervention permitted when original party unexpectedly submitted a proposed remedial order to the court that impaired

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[8] Indeed, when the State's Community Plan was being considered by the district court in 1997, none of the parties specifically sought higher reimbursement rates, a payment methodology, or the development of a Memorandum of Understanding for service providers.

proposed intervenors' interests); *Officers for Justice* v. *Civil Serv. Comm'n*, 934 F.2d 1092, 1095-1096 (9th Cir. 1991) (intervention permitted when original party changed its legal position on a central legal issue in the case and made argument contrary to interests of proposed intervenors). CMRA can point to no legal position, motion, or other legal action the State or any other party has taken in the case recently that is in any manner different than those taken throughout the history of this case. Therefore, there is no merit to its assertion that it has legitimately relied on other parties to protect its proprietary interests, or that other parties have suddenly abandoned previously-held positions that would warrant CMRA's intervention at this time.

4. *Prejudice to the parties*

CMRA argues (Br. 28-29) that its intervention in the case would not prejudice the parties since it has consented to all prior proceedings. For various reasons, however, CMRA's entry to the case at this late stage would significantly prejudice the parties.

As an initial matter, CMRA obscures the prejudice its late intervention would create for the parties due to its failure to identify what, exactly, it would have the district court do on its behalf. To the extent CMRA seeks to engage in litigation over reimbursement rates, payment methodologies, or the development of a Memorandum of Understanding with the State, the prejudice is clearly enormous, as such attempts will mire the parties in collateral litigation in a case that has

already settled the merits of plaintiffs' claims. See, *e.g.*, *Bradley* v. *Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987).

Furthermore, even if CMRA did not seek any court orders, but only wanted to participate informally in the on-going implementation discussions among the parties (a role for which intervention as a full party is not appropriate), such participation would be prejudicial to the parties to the extent CMRA intends to use these discussions as a forum for lobbying for changes in its contractual relationship with the State. The parties have enough to do in overseeing the implementation of the 1994 Remedial Order, the 1997 Community Plan, and monitoring the level of care at ADC and at its current community placements. The parties should not be forced to involve themselves in the details of CMRA's tangentially-related agenda (such as obtaining a written Memorandum of Understanding, increasing rates, or securing a particular payment methodology). To the extent these issues have a direct impact on the important purposes of the remedial orders in the case – ensuring the safety and proper treatment of residents in the State's care – the parties have demonstrated some willingness to assert the interests of the community service providers in the context of facilitating a remedy (R. 1189, U.S. Memo. at 11 n.5, Apx. 619 (Any "direct" interest asserted by CMRA "is already being adequately protected by other parties, including the United States, People First of Tennessee and the Parent Guardian Association of Arlington Developmental Center"). However, when the parties do not believe that CMRA's complaints have an important and direct impact on the civil rights of the class

members, requiring them to direct their attention to CMRA's concerns as a trade organization would severely prejudice the parties' ability to devote their time and resources to the central purposes of the decree.

5. *There are no unusual circumstances that support intervention at this late stage of the lawsuit*

CMRA argues (Br. 29-30) that the district court's orders establishing workgroups to effectuate the remedial orders, and defining the class of persons "at risk" for placement into ADC, create unusual circumstances that warrant its intervention into the remedial phase of the case. These arguments are without merit.

CMRA does not assert that it has any legal claims or defenses that emanate from the Agreed Order creating the workgroups.[9] The district court's order addressing the class of "at risk" persons entitled to the remedy also is not an unusual event that makes CMRA's intervention more compelling. Regardless of the number of persons who qualify as "at risk" under the district court's definition, the State bears the ultimate responsibility to ensure that all of these persons are provided the proper quality services pursuant to the Remedial Order. To the extent that CMRA's member agencies are unable to provide that level of care and services

[9] The 1999 Agreed Order established workgroups to develop recommendations for future relief. The portion of that order establishing the workgroups has been suspended temporarily by the district court, and that suspension order (R. 1342, Order, Apx. 678) is on appeal and pending before this Court. No workgroup activity is presently taking place. If and when the workgroups recommence, there is nothing in the district court's present orders that would preclude CMRA involvement in the workgroups with the consent of the parties.

for financial or any other reasons, the State will continue to bear the responsibility for providing services and would thus have to provide CMRA's members resources sufficient to carry out this responsibility or look at other options available for meeting their constitutional and statutory obligations to this class of individuals.

B. *CMRA's Interests Are Not Directly Implicated In This Case And Its Ability To Protect Those Interests Is Unaffected By The Court's Disposition Of This Action*

Even if CMRA's motion to intervene was timely, the district court found that CMRA failed to identify any substantial, significantly protectable interest that is directly implicated in this case (R. 1374, Order at 6, Apx. 742). This determination is clearly correct.

CMRA may have economic and other interests affected by the remedial orders in this case, but it does not challenge the content of any of the district court's orders. Instead, it intends to challenge decisions by the State which concern financing the relief. CMRA's interests in issues such as the State's payment methodology are not directly affected by any legal action in this case. That is, "disposition of the action" will not "as a practical matter impair or impede the applicant's ability to protect that interest." Fed. R. Civ. P. 24(a). CMRA's ability to protect its interests in the course of its contractual relationship with the State remains unaffected by the court's disposition of this case – it retains the same ability to negotiate with state agencies or lobby the state legislature as any other government contractor.

1. *CMRA does not have a direct and substantial economic or regulatory interest in this litigation*

It is not enough that a proposed intervenor have an interest in the business decisions of one of the parties. A proposed intervenor must assert an interest that is directly at issue in the litigation in which it seeks to participate. See *Grubbs*, 870 F.2d at 346 ("[T]he proposed intervenor must have a direct and substantial interest *in the litigation*.") (emphasis added).

The district court concluded that CMRA's asserted economic and regulatory interests in the case "do not rise to the level of significant protectable interest required for intervention" (R. 1374, Order at 4, Apx. 740). The court observed that the central issue in this litigation against the State

> concerns raising the level of care provided by the State of Tennessee to a constitutional level. It is not about how the State of Tennessee pays for that level of care. Nor is it about if and how the standards imposed on the State of Tennessee are passed through to community service providers should the State contract with community service providers to enact that part of the Remedial Order

(R. 1374, Order at 4-5, Apx. 740-741). The district court determined that CMRA's interests in securing payment from the State for its services "are better left to contract negotiations between the community service providers and the State of Tennessee, not this lawsuit" (R. 1374, Order at 5, Apx. 741).

CMRA does not directly dispute the correctness of the district court's determination that its regulatory and economic interests do not directly intersect with the central issue of the case – *i.e.*, the constitutional level of care that the State provides to persons with mental retardation. CMRA asserts (Br. 31-35) that its

interests are *affected* by the subject matter of the litigation. For various reasons this assertion has no merit.

First, CMRA's interests could only have been affected by the "disposition of the action" through the remedial orders in the case. But CMRA does not complain about the substance of the district court's remedies. Instead, CMRA's complaints are with the State's independent decisions as to how to fund the remedy – decisions that the remedial orders have, for the most part, left to the State and parties to work through independent of the court's intervention. For example, neither the 1994 Remedial Order nor any subsequent remedial order prohibits the State from developing a new payment methodology, increasing payment rates, or negotiating a memorandum of understanding with the community service providers. CMRA may have a substantial interest in these issues, but that does not amount to a direct interest in this litigation since the remedial orders resulting from the litigation have nothing specifically to say about these issues.

Second, CMRA's claim of having a direct interest based on the terms of the contract its members negotiated with the State is without merit. CMRA (Br. 32-33) argues that its interests are directly affected by this case because its members agreed to a term in their contracts that requires them to continue to provide services to certain recipients until the provider receives State approval to discharge the resident (see also R. 1172, CMRA Motion at Exh. A, ¶ E(17), Apx. 556). CMRA insists that this provision amounts to an impairment of a substantial interest of its members and, therefore, provides a basis for intervention. In support of this

argument, CRMA points (Br. 34-35) to this Court's decision in *Linton*, which held that a group of nursing homes could intervene to appeal an order imposing an extra-contractual obligation upon the homes to continue to provide Medicaid services to existing residents after the facility withdrew from the Medicaid program. 973 F.2d at 1319.

But CMRA's argument misses the crucial distinction – the "lock-in" provision in *Linton* was imposed by the court while the provision in this case was created by a contractual agreement between CMRA members and the State. The nursing homes' interests in *Linton* were clearly being impaired by the "disposition of the action." See 973 F.2d at 1319 ("[T]he district court's acceptance of the 1990 State plan allegedly altered the terms of the provider agreement between the State and the movants."). In this case, however, any impairment of interests caused by the purported "lock-in" provision is not a result of any court order. Neither the 1994 Remedial Order nor any subsequent remedial order in this case requires this contractual term. Rather, the community providers themselves negotiated this term into the contract with the State. CMRA cannot bootstrap its voluntarily assumed contractual obligations into a claim that its interests have been impaired by the court's disposition of the action in this case.

Moreover, as the district court pointed out, the Provider Agreement plainly is not "a permanent lock-in provision as in *Linton*" (R. 1374, Order at 5, Apx. 741). The district court found that ¶ E(17) of the Provider Agreement "only ensures that the class member continues to receive the required level of care until the State

determines that the class member does not need that level or allows the contractor to transfer the individual to another provider that will provide the requisite level of care" (R. 1374, Order at 5, Apx. 741). Thus, service providers are not locked into providing care to class members indefinitely. Instead, service providers must coordinate with the State in making decisions on transferring or discharging patients. In fact, the Provider Agreement gives service providers additional protection in that providers can terminate the contract for convenience upon 30 days notice (R. 1172, CMRA Memo. at Exh. A, ¶ D(3), Apx. 551).

Finally, CMRA misconstrues (Br. 33) the district court's Remedial Order in arguing that the court's July 17, 2000, order clarifying the definition of class members "at risk" for placement into ADC, and thus entitled to relief, creates an "expanded class" of individuals "who were not considered class members at the time the agencies instituted services to them." Contrary to CMRA's assertion, the July 17 order does nothing more than clarify the class of persons entitled to relief under the original "at risk" component of the class definition.

The "at risk" component of the class was certified in the original 1995 order in the *People First* case, when the district court certified the class to include "all persons at risk of being placed in [ADC]" (see p. 6 n.2, *supra*). Persons "at risk" have always been eligible for relief under the Remedial Order. The district court's July 17, 2000, order does not create a new class of persons entitled to relief; rather it clarifies the definition for determining the number of persons who fall within that third component of the pre-existing class definition (see R. 1302, Order at 6-7,

Apx. 670-671 (the "class must be defined in such a way [so that the] Court and the parties can determine, at any moment in time, who is in the class")). Thus the district court's July 17, 2000, order does not change the terms of the original class certification order of 1995. The effect of the July 17 order is to clarify that third component of the class so that the district court and the parties have a framework for determining what individuals fall into that third component of the class definition.

Even if CMRA was correct that the July 17, 2000, order expanded the class, that order does not impact any direct or substantial interest held by CMRA. Under the Remedial Order, the State is ultimately responsible for providing services to class members. CMRA, as a contractor to the State, can seek to renegotiate with the State for an increase in its fees if CMRA member agencies find that they are required to provide services to a greater number of people than they are presently able to handle.

2. *CMRA's ability to protect its interests is not impaired by the court's disposition of this case*

For the same reason CMRA cannot show a direct interest in the litigation, it cannot show that its ability to protect those interests has been impaired by the "disposition of the action." Fed. R. Civ. P. 24(a). The threat to the applicant's interests must come from the court's "disposition of the action," rather than from forces independent of the court. See, *e.g.*, *Hawaii-Pacific Venture Capital Corp.* v. *Rothbard*, 564 F.2d 1343, 1345 (9th Cir. 1977); *Babcock & Wilcox Co.* v. *Parsons*

Corp., 430 F.2d 531, 541 (8th Cir. 1970) (rule requires "that the intervenor be potentially disadvantaged by disposition of the main action"). Rule 24(c)'s requirement that the applicant attach a pleading also emphasizes that the purpose of intervention is to influence judicial orders that may affect the intervenor's interests.

CMRA does not claim, however, that the district court's remedial orders in this case have directly impaired its interests or otherwise provide a basis for intervention. In its response to oppositions filed to its motion to intervene in district court, CMRA stated that it "could not intervene in the pre-implementation phases of this case [because] its members had no claim of illegality to advance at that time" (R. 1201, CMRA Response at 3, Apx. 644). CMRA instead states that "it is the implementation phase that has raised the concerns of the community agencies" (R. 1201, CMRA Response at 3, Apx. 644). But, as discussed above, see pp. 15-20, *supra*, Rule 24(a) authorizes intervention into the litigation, not the private negotiations of some or all of the present parties. See *Dodson,* 77 F.R.D. at 676 n.1. Any threat posed by the current parties' private negotiations does not qualify as an impairment of interests caused by "the disposition of the action." *Id.* at 676.

CMRA's "ability to protect [its] interest" in receiving higher reimbursement rates or achieving its other goals is not impaired by the court's disposition of this case. CMRA's ability to protect its interests might arguably be enhanced by permitting intervention, but CMRA must show that absent intervention its ability to protect its interests may actually be impaired. See *Babcock & Wilcox Co.*, 430

F.2d at 542. It cannot make this showing because denying CMRA intervention simply leaves its member agencies in the same position as any other state contractor. To the extent CMRA believes that the State's failure to enter into a Memorandum of Understanding, or revamp its payment methodology, violates the legal rights of the providers, nothing in the court's disposition of this case impairs CMRA's ability to file a separate action (presumably in state court) to make those claims. See, *e.g.*, *Shea* v. *Angulo*, 19 F.3d 343, 347 (7th Cir. 1994) (ability to protect interests not impaired when proposed intervenor's ability to assert its claims in a separate proceeding is not impaired); *McClune* v. *Shamah*, 593 F.2d 482, 486 (3d Cir. 1979) (same); *SEC* v. *Everest Management Corp.*, 475 F.2d 1236, 1239 (2d Cir. 1972) (same); 7C Charles Alan Wright et al., Federal Practice and Procedure § 1908, at 305-312 (1986) (same). To the extent CMRA lacks a legal basis for its demands, it may still seek to advance its interests in the ordinary course of contract negotiations with the State or through lobbying efforts in the state capitol. See *Wade* v. *Goldschmidt*, 673 F.2d 182, 186 (7th Cir. 1982) ("The ability of applicants to assert the economic, safety, and environmental interests they allege is not impeded nor impaired by refusal to grant them intervention. Applicants can present these interests to the governmental bodies * * *. The defendants, governmental bodies, not the courts, are required by statute to evaluate and make decisions as to the priority of the various considerations.").

C. *The Present Parties Adequately Represent Any Interest In The Adequacy Of Resources To Comply With The Remedial Order*

Finally, CMRA argues (Br. 35-37) that it should be permitted to intervene in order to protect the class members' interest in making sure that adequate resources are available in the community for their care. CMRA states (Br. 36) that its intervention is necessary because the district court's order creating workgroups consisting of the parties, the Court Monitor, "and any individuals selected by those people to assist them" (R. 1116, Agreed Order at 4, Apx. 519) in improving the level of services provided to ADC class members in community placements, will also address the level of payment to service providers.

However, "[t]he interest required for intervention must belong to the intervenor rather than an existing party to the lawsuit; the presence of harm to a party does not permit him to assert the rights of third parties in order to obtain redress for himself." *Bush* v. *Viterna*, 740 F.2d 350, 355 n.9 (5th Cir. 1984). See also *Keith* v. *Daley*, 764 F.2d 1265, 1268 (7th Cir.) (same), cert. denied, 474 U.S. 980 (1985). Clearly, the interest in adequate care belongs to the class members. The class members' interests are more than adequately protected by the broad array of parties currently joined in the case. The class representatives are charged with the primary authority and duty to represent the interests of the class members. The United States is obligated, by statute, to prosecute this action to "insure the minimum corrective measures necessary to insure the full enjoyment" of the class members' federal rights. 42 U.S.C. 1997a(a). Finally, the Parent Guardian Association is also a party to the case and has a significant stake in ensuring the adequacy of community care for its members' children.

Likewise, in order to ensure adequate care to class members, it is by necessity that the parties would want to ensure that the services are adequately funded by the State. But the central issue in this case concerns raising the quality of care to class members, and that issue is more than adequately represented by the present parties to the action. To the extent that CMRA wishes to assert its contractual and funding concerns with the State it should do so in another forum.

CONCLUSION

For the reasons stated above, the district court's denial of appellant's motion to intervene should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6514

UNITED STATES OF AMERICA,

Plaintiff-Appellee

COMMUNITY REHABILITATION AGENCIES
OF TENNESSEE, INC.,

Proposed Intervenor-Appellant

PEOPLE FIRST OF TENNESSEE,

Intervenor-Appellee

v.

STATE OF TENNESSEE,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

UNITED STATES' CROSS-DESIGNATION OF APPENDIX

Pursuant to Sixth Circuit Rule 28(d), the United States designates the following items for the Joint Appendix. These appendix designations submitted by the United States are in addition to the items designated by CMRA in the designation appended to its brief.

United States v. Tennessee, Case No. 92-2062 (W.D. Tenn)

Document	Date Filed	Docket Entry

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Hearing Transcript (p. 20)	5/9/97	720
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CMRA Memo. Supporting Motion to Intervene and Accompanying Exhibits	1/24/00	1172
State's Response to Motion to Intervene	2/4/00	1184
United States' Opposition to Motion to Intervene	2/10/00	1189
CMRA's Response to Motions In Opposition	2/28/00	1201
District Court Order	3/7/00	1214
District Court Order	8/23/00	1343
Hearing Transcript	9/25/00	1371

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Lisa Wilson Edwards

A D D E N D U M

CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a), I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 7.0, and contains 12,042 words.

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CERTIFICATE OF SERVICE

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