No. 00-5342

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PEOPLE FIRST, et al.,

Plaintiffs-Appellees

and

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CLOVER BOTTOM DEVELOPMENTAL CENTER, et al.,

Defendants-Appellants

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

FINAL BRIEF OF THE UNITED STATES AS APPELLEE

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STATEMENT SUPPORTING ORAL ARGUMENT

While the United States does not oppose oral argument if this Court considers it beneficial, we believe that the Court could readily dispose of this appeal on the briefs submitted by the parties.

STATEMENT OF ISSUES

1. Whether an entity may intervene as of right, under Fed. R. Civ. P. 24(a), solely to participate in discussions regarding implementation of a final consent decree.

2. 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. The Original Litigation And Settlement

In November 1996, the district court consolidated two separate actions, one filed by the United States and the other by plaintiff People First of Tennessee, against the State of Tennessee regarding the treatment of residents in several of the State's mental retardation facilities. At the time of consolidation, the parties submitted to the court a consent decree to settle both actions (R. 166, 167: Memorandum Opinion and Order, J.A. 249, 269).

This settlement required, among other things, that the State place in the community those residents of its institutions whom treating professionals determined could be integrated into the community. It also required the State to ensure that residents put in community placements are given sufficient services and supports to ensure their safety and treatment in compliance with the substantive requirements of the settlement agreement (R. 349: Memorandum Opinion at 2-3, J.A. 570-571). Under the settlement, the State could accomplish this by providing community services itself or by contracting with private service providers in the community (see, e.g., R. 327: Consent Decree at ¶¶ V(A)(5), V(D)(1), J.A. 488, 503).

To this end, the consent decree required the State to develop a "Community Development Plan" addressing the details of how services in the community would be delivered, including "[i]nfrastructure" issues such as "resource development"

(R. 327: Consent Decree at ¶ V(C)(1)(a), J.A. 499). The decree specifically provided that the Community Development Plan would be developed in consultation with all relevant "stakeholders," including contract service providers (R. 327: Consent Decree at ¶ V(C)(1), J.A. 499). Moreover, the State was also required to create a "Communications System" to inform all stakeholders regarding implementation of the consent decree (R. 327: Consent Decree at ¶ V(C)(5), J.A. 502).

On January 27, 1997, the district court held a fairness hearing to hear objections to the settlement (R. 137: Clerk's Resume; R. 349: Memorandum Opinion at 2, J.A. 570). The Parent Guardian Association (PGA), which represents parents and guardians of residents in the institutions and community placements, moved to intervene in the consolidated case and to participate in the fairness hearing (R. 61: Mot. to Intervene, J.A. 244). In July of 1997, the court granted PGA's intervention motion and conditionally approved the settlement, contingent upon completion and acceptance of the Community Development Plan (R. 349: Memorandum Opinion at 2, J.A. 570; R. 166, 167: Memorandum Opinion and Order, J.A. 249, 269). The State then began work on the Community Development Plan with the involvement of more than 2,100 stakeholders, including many community service providers (R. 349: Memorandum Opinion at 4, J.A. 572). The Community Development Plan included a survey of available resources in the community and a process to determine what additional services would be required to meet the needs of

residents who would be placed in the community from the institutions (R. 349: Memorandum Opinion at 4, J.A. 572). On January 13, 1998, the parties agreed upon the contents of the Community Development Plan and presented it to the court (R. 189: Community Development Plan, J.A. 703). At this point, the consent decree required no further substantive submissions from the parties and the State proceeded with implementation of the decree and the Community Development Plan.

During this implementation period, the State renegotiated contracts with community service providers. Some of the terms the providers agreed to were those that the consent decree required the State to include in any future contracts, such as training requirements for provider staff (see R. 311: Memorandum in Support of Mot. to Intervene, Exh. A at ¶ E(9), J.A. 384; R. 327: Consent Decree at ¶¶ V(A)(7), (D), J.A. 489, 503-505). Many of the terms were not required by the consent decree, including terms regarding liability insurance, the billing process, rates of compensation, billing dispute resolution, etc. (see R. 311: Memorandum in Support of Mot. to Intervene, Exh. A at ¶¶ D(9), B, J.A. 379-382). In the contract, the providers agreed to comply with all future revisions of the State's regulations and were given a right to notice and comment upon any proposed regulatory changes (R. 311: Memorandum in Support of Mot. to Intervene, Exh. A at ¶ A(1), J.A. 377). Another provision required a provider to continue services to certain clients until it receives permission from the State to discharge

the individual (R. 311: Memorandum in Support of Mot. to Intervene, Exh. A at ¶ E(17), J.A. 386). In the event that either the State or the contract provider no longer wishes to continue the contract, either party may terminate the contract for convenience upon 30 days written notice (R. 311: Memorandum in Support of Mot. to Intervene, Exh. A at ¶ D(3), J.A. 381).

In June 1999, the parties requested final, unconditional approval of the consent decree (R. 280: Joint Mot. for Approval of Settlement Agreement, J.A. 345). While that motion was pending, the State, United States, and People First agreed to make the PGA a signatory to the settlement. On September 20, 1999, the court approved modifications to the decree to make PGA a party to the settlement (R. 299: Agreed Order, J.A. 353). On November 23, 1999, the court gave final approval to the consent decree (R. 326, 327: Order and Consent Decree, J.A. 472, 473). From that point on, there were no further substantive proceedings contemplated by the court; only implementation by the State and compliance monitoring remained.[1]

B. CMRA's Motion To Intervene

On October 28, 1999, Community Rehabilitation Agencies of Tennessee, Inc. (CMRA), a trade group for private contract

[1] The parties and the court did contemplate that the court would monitor compliance with its orders and that the magistrate judge would hold periodic status conferences at which the parties could discuss issues relating to implementation (see R. 327: Consent Decree at ¶ X(B)(3), J.A. 537). However, it was not contemplated that any of these activities would result in further court orders absent a motion for further relief or enforcement by one of the parties (see R. 327: Consent Decree at ¶¶ X(B)(1), (2), (10), J.A. 536-537, 539).

providers of community services, requested to intervene as a plaintiff in the action as of right and by permission. CMRA stated that:

> [t]he purpose for intervention by CMRA is simple, to participate in the implementation of the remedial plan, to advocate and protect the regulatory and economic interests of community providers and to assure that sufficient other resources (including qualified professionals) are provided in the community in a timely manner to insure that individuals receive timely and appropriate services.

(R. 311, Memorandum in Support of Mot. to Intervene at 5, J.A. 367).

CMRA also attached to its motion a "Consent to Settlement Agreement," (R. 314: Consent to Settlement Agreement, J.A. 390), and an affidavit from its executive director setting forth specific complaints providers had with the State (R. 312: Affidavit of Mindy Schuster, J.A. 387). The affidavit alleged that: (1) the State had failed to develop a payment methodology; (2) the State had failed to negotiate a memorandum of understanding with providers; (3) the State was not paying CMRA members enough in light of increased costs associated with a change in the level of needs of residents now served by CMRA members; (4) the State had not created additional resources in the community that CMRA believes are necessary; and (5) the State was imposing regulatory mandates on providers that the providers considered illogical or burdensome (R. 312: Affidavit of Mindy Schuster at 2-3, J.A. 388-384).

C. District Court Decision

The district court denied CMRA's motion on February 16, 2000. The court held that it was CMRA's burden to demonstrate that its application was timely, that the disposition of the litigation threatened to impair its ability to protect substantial, significantly protectable interests, and that the other parties would not adequately protect those interests in the course of the litigation (R. 349: Memorandum Opinion at 6, J.A. 574 (citing Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997)).

The court first held that the motion was untimely, as it came "nearly five years after the suit was filed, more than three years after the Settlement Agreement was signed, and more than two years after the Agreement was conditionally approved by the Court" (R. 349: Memorandum Opinion at 7, J.A. 575). The court noted that CMRA had long been aware of the case and its impact upon its members. The court found that CMRA had known for at least two years (since the signing of the settlement agreement) that its members would have to abide by many of the substantive terms of the settlement (R. 349: Memorandum Opinion at 8, J.A. 576). The court also noted that to the extent CMRA was dissatisfied by the terms of the agreement, it could have presented those views at the fairness hearing but chose not to participate (R. 349: Memorandum Opinion at 10, J.A. 578).

The district court further rejected CMRA's claim that it only recently had reason to suspect that the State might not

adequately reimburse contractors for the services required by their contracts. The court found this assertion "unsupported by explanations of what new events have transpired and how these events affect the implementation of the Agreement" (R. 349: Memorandum Opinion at 8, J.A. 576). It also rejected CMRA's contention that until recently it believed that its interests were adequately protected by the State and PGA (R. 349: Memorandum Opinion at 10, J.A. 578).

The court next held that even if the application had been timely, it did not provide a basis for intervention as of right or by permission. The court concluded that the interests CMRA sought to advance were not sufficiently direct, substantial, or significantly protectable to warrant intervention, as they mainly involved state law contract disputes over which the federal district court lacked jurisdiction (R. 349: Memorandum Opinion at 9, 11, J.A. 577, 579).[2]

The court then held that even if CMRA's motion had been timely and even if its "regulatory and economic interests" were sufficient to support intervention, those interests were not at risk of impairment by the disposition of this litigation. In particular, the court noted that the consent decree did not impose obligations upon providers and did not prevent those

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[2] The district court also rejected CMRA's argument that by agreeing to a provision in its contract requiring providers to obtain permission from the State before discharging certain residents, the providers had created a basis for intervention in the litigation (R. 349: Memorandum Opinion at 12-13, J.A. 580-581).

providers from advancing their economic and regulatory interests through ordinary contract negotiations with the State (R. 349: Memorandum Opinion at 13-14, J.A. 581-582).

Finally, the court held that any direct and substantial interest CMRA had in the litigation was adequately protected by the parties. The court concluded that the United States, the class of affected residents, and the organization representing their parents and guardians would adequately ensure that the State provides adequate resources to implement its responsibilities under the decree (R. 349: Memorandum Opinion at 14, J.A. 582). The court also held that the State, which is itself a service provider, adequately represented any other interests the CMRA members might have as providers of services.[3]

SUMMARY OF ARGUMENT

The district court correctly concluded that CMRA failed to demonstrate its right to intervene in this action.

First, CMRA does not appear to seek intervention in order to put forward legal claims or seek judicial relief to vindicate its interests. Instead, it appears to seek intervention solely in order to participate in post-judgment discussions and negotiations among the parties concerning the implementation of the consent decree, in order to press for higher reimbursement rates, a new payment methodology and other proprietary concerns. Intervention, however, is appropriate only when an applicant has

[3] The district court also denied CMRA's request for permissive intervention under Fed. R. Civ. P. 24(b), a ruling CMRA does not appeal.

a legal claim to make in the course of litigation before a court. It is not a vehicle by which a stranger to the litigation may insinuate itself into the private discussions of the present parties in order to lobby for changes in its contractual relationship with the government.

Second, because CMRA seeks the status of a full party intervenor, it was required to show that its application was timely and met the other requirements of Rule 24(a). The district court did not abuse its discretion in concluding, based on factual findings, that CMRA lacked any legitimate excuse for waiting for almost three years after the settlement was presented to the court before attempting to intervene. CMRA's only excuse for its delay is its assertion that until very recently it reasonably believed that the other parties were adequately representing its interests. However, the district court properly concluded that this assertion was not substantiated.

Third, even if its motion had been timely, CMRA has not identified any substantial, significantly protectable interest that may be impaired by the "disposition of the action." Fed. R. Civ. P. 24(a). By waiting to bring its motion until the consent decree was finalized — years after the terms of the decree were known to its members — CMRA can no longer seek intervention to raise objections to the substance of the decree. In recognition of this, CMRA has specifically disavowed any intent to appeal or otherwise challenge the settlement. The result, however, is that CMRA cannot show that absent intervention its ability to protect

its interests will be impaired by "the disposition of the action," given that the only "disposition of the action" is the settlement agreement that CMRA cannot challenge.

In attempting to thread its way through this dilemma, CMRA argues that the threat to its interest is not the prior court orders, but the actions the State has taken, or refused to take, in implementing those orders. In particular, CMRA relies on recent events that show that the State is unlikely, absent judicial coercion, to give CMRA's members certain contractual benefits they would like, such as a new payment methodology and higher reimbursement rates. But CMRA is not entitled to intervene in this case in order to protect itself from the independent decisions the State has made regarding contractual and regulatory issues that the consent decree leaves to the discretion of the State. Intervention as of right is permitted only when necessary to protect the intervenor's interest from impairment by the court's orders, not the independent actions of the parties.

Finally, to the extent CMRA bases its request in part on an asserted interest in the adequacy of the care and treatment provided to members of the plaintiff class, that interest does not belong to CMRA and is adequately protected by the existing parties.

STANDARD OF REVIEW

The district court's conclusion that CRMA'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 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 made in the course of either decision are reviewed for clear error. See Glover v. Johnson, 198 F.3d 557, 560 (6th Cir. 1999)

ARGUMENT

I. CMRA IS NOT ENTITLED TO INTERVENE SIMPLY TO PARTICIPATE IN IMPLEMENTATION DISCUSSIONS AMONG THE PARTIES

The federal rules provide a number of avenues for non-parties to participate in litigation in which they have an interest. 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, Int'l 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.

The Federal Rules set forth the requirements for intervention of right, as follows:

> 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.

Fed. R. Civ. P. 24(a). 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."

Thus, 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., Linton v. Commissioner of Health & Env't, 30 F.3d 55, 57 (6th Cir. 1994) ("[A]n intervenor must prove standing for each claim."); 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 (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).[4] 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 grievances in some detail, it has completely failed to identify any legal claim that provides a basis for judicial redress of these grievances. CMRA's Rule 24(c) "pleading" fails to comply with the requirements of the rule[5] and, in the process, illuminates the inappropriateness of its request for intervention generally. Although CMRA seeks the status of a plaintiff-intervenor (R. 315: Amendment to Mot. to Intervene, J.A. 391), it did not attach a complaint in intervention to its motion. Instead, it attached a "Consent to Settlement Agreement," which states, in full:

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[4] 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) (emphasis added).

[5] Although People First raised the adequacy of this pleading in its opposition to CMRA's motion to intervene, the United States did not argue to the district court that this procedural failure was, in itself, a basis for denial of the motion. Nor do we argue in this Court that this procedural defect, in itself, is a basis for affirming the denial of intervention. Instead, the failure to attach the pleading simply illustrates the broader deficiencies in MPRA's intervention motion.

> Comes now the Community Rehabilitation Agencies of Tennessee ("CMRA") and submits its Consent to the Settlement Agreement negotiated by the parties. Should the Court grant CMRA's Motion to Intervene filed this same date, the parties and the Court may rely upon this consent as CMRA's approval of the Settlement Agreement.

(R. 314: Consent to Settlement Agreement, J.A. 390). This document failed to identify any legal claim CMRA wished to pursue through intervention, the legal basis for any such claim, or any specific action it wishes the court to take, or refrain from taking, to protect its interests.

It appears that CMRA did not provide a complaint or other appropriate pleading because it does not, in fact, have any legal claims to present to the court. CMRA cannot seek redress based on the terms of the consent decree. The settlement agreement does not address the issues that are the subject of CMRA's grievances. And even it if did, the providers have no right to "enforce their understanding of [the] terms" of a consent decree to which they are not a party or an intended beneficiary. Aiken v. City of Memphis, 37 F.3d 1155, 1167 (6th Cir. 1994).[6] If there is a state-law basis for requesting modifications to CMRA's

[6] Moreover, even if intervention were granted, CMRA would not be entitled to enforce the consent decree. Once intervention is granted, the intervenor is entitled to pursue its claims even if the original parties settle. See Local 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 529 (1986). Conversely, the original parties cannot be forced to settle with an intervenor, or to make the intervenor a signatory or beneficiary of their prior settlement, simply because the court has permitted the intervention. See id. at 528-529. Absent an agreement from the original parties, the intervenor who desires the benefit of court orders must obtain them as any party would, by making and prevailing upon legal claims within the jurisdiction of the federal court. See ibid.; Kentucky Home Mut. Life Ins. Co. v. Duling, 190 F.2d 797, 803 (6th Cir. 1951).

contractual relationship with the State, CMRA has yet to identify it or explain how the district court has jurisdiction to entertain such claims.

Another reason CMRA has not identified a legal basis for its grievances appears to be that CMRA does not actually seek any judicial redress for them. Instead, CMRA's motion and brief seem to indicate that it does not seek any court orders at all, only a chance to participate in discussions with the parties during the course of implementation of the consent decree (see, e.g., R. 311: Memorandum in Support of Mot. to Intervene at 5-6, J.A. 367-368) (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"); Appellant Br. 19 ("CMRA determined that its interests were not being protected, and that, in order to protect its interests, it needed to be heard during the remedial stage negotiations.") (emphasis added); Appellant Br. 27 ("Clearly the contractual rights of CMRA's constituent members may be impaired by the ongoing remedial negotiations.") (emphasis added)).

But Rule 24(a) authorizes 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) (emphasis added), not to provide a mediation service for the settlement of grievances not based in alleged violations of legal rights.

Thus, if CMRA seeks some status short of plaintiff-intervenor, the district court properly denied CMRA's request to intervene as a full party.[7]

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.[8] Thus, if CMRA is to

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[7] As this Court has observed, it is an open question of whether courts may place limitations on the role of intervenors under Rule 24(a). See Linton, 30 F.3d at 56-57; 7C Charles Alan Wright et al., Federal Practice and Procedure § 1922, at 505-507 (1986). In any event, CMRA has not asked that any limits be placed on its powers as an intervenor.

[8] Many of CMRA's statements seem to indicate that it would leave open the possibility of seeking modification of the consent decree or requesting additional orders if its negotiations fail. For example, CMRA implies at times that it would possibly seek dispensation from some state regulations issued to implement the decree, perhaps on the ground that the State and the present

(continued...)

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.

The criteria for intervention as of right are well-established. An application must be timely. NAACP v. New York, 413 U.S. 345, 365-366 (1973). The applicant must have an interest in the litigation that is "substantial," "direct," and "significantly protectable." Donaldson v. United States, 400 U.S. 517, 531 (1971); Grubbs v. Norris, 870 F.2d 343, 346 (6th Cir. 1989). Moreover, an applicant only has a right to intervene if its ability to protect that interest is "impaired" by the disposition of the action. See Fed. R. Civ. P. 24(a); Grubbs, 870 F.2d at 347. That is, an applicant may not intervene in a case simply because doing so would be an advantageous means to promote its interests. See, e.g., Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 542 (8th Cir. 1970); Kamerman v. Steinberg, 681 F. Supp. 206, 211 (S.D.N.Y. 1988). And this impairment must be caused by the court's "disposition of the action" not by other causes, such as the independent out-of-court

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[8](...continued)
parties misunderstand what is actually necessary to implement the court order (see R. 312, Schuster Affidavit at 3, J.A. 389). It also implies that it believes that the Community Development Plan, already accepted by the parties and the Court, failed to comply with a provision of the consent decree requiring the plan to address resource issues (Appellant Br. 21). It may well consider a motion to enforce that provision according to its understanding to be within the limitations it has set for itself in its application.

action of the parties. See, e.g., Hawaii-Pacific Venture Capital Corp. v. Rothbard, 564 F.2d 1343, 1345-1346 (9th Cir. 1977).

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. This Court has suggested several relevant factors for the district court to consider:

> (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 intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989) (citations omitted).

Because the district court is uniquely situated to find the relevant facts and evaluate the competing interests involved, 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." NAACP v. New York, 413 U.S. at 366.

1. Stage Of The Proceedings

Ordinarily, an intervenor joins a 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 rightly notes 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. v. TRW, Inc., 724 F.2d 1224, 1228 (6th Cir. 1984). But all of the cases relied upon by CMRA permit intervention for the purpose of seeking some judicial action. See Linton v. Commissioner of Health & Env't, 973 F.2d 1311, 1316 (6th Cir. 1992) ("appellant nursing homes moved to intervene and appeal the [remedial] order"); Grubbs v. Norris, 870 F.2d 343, 344 (6th Cir. 1989) (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 the consent decree or seek modification of it in light of changed circumstances. If, however, CMRA really is seeking relief from the effect of the consent decree, 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 a decree that has been finally entered or to seek its modification, directly or indirectly. 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, although CMRA is fairly clear about its goals—it wants higher reimbursement rates, less state regulation, a Memorandum of Agreement, etc.—how it intends to pursue those goals as an intervenor is undeclared. If CMRA's purpose is only to have informal, out-of-court discussions with the parties to discuss the manner in which implementation is progressing, this is not a basis for intervention. See pp. 12-17, supra. And if CMRA intends to act as a real intervenor, and wants the right to ask the court to give it relief from low reimbursement rates or burdensome state regulations, then this purpose is a reason to

conclude that intervention was untimely; as discussed below, CMRA should have intervened to play this role long before.

3. Delay In Seeking Intervention

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. 345, 367 (1973); Cuyahoga Valley Ry. Co. v. Tracy, 6 F.3d 389, 396 (6th Cir. 1993); Stotts v. Memphis Fire Dep't, 679 F.2d 579, 584 & n.3 (6th Cir. 1982) (applicants "should have attempted to intervene when they first became aware of the action, rather than adopting a 'wait-and-see' approach"). In this case, CMRA not only waited to see how the litigation would turn out, it also waited almost three years after the terms of the decree were made public to see whether the practical impact of the court orders would be worth complaining about. Any impact the decree has had was easily foreseeable when its terms were settled. And, in any event, CMRA's obligation was to intervene when it became apparent that its ability to protect its interests was subject to impairment, not when such an impairment eventually 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 consent decree requirements, it could have brought those complaints to the court's attention long ago. The district court found that CMRA has long been aware of "the

lawsuit, [and] the time-consuming negotiations between the parties and interest groups" (R. 349: Memorandum Opinion at 7, J.A. 575). It was clear from the filing of the lawsuit that the disposition of the case would have a significant impact on the operation of state programs for people with mental retardation throughout Tennessee. The ways providers would feel this impact was made particularly clear when the parties filed the detailed terms of the settlement agreement with the district court in November 1996, almost three years before CMRA's intervention motion. CMRA had an opportunity to address any concerns it had about the impact of those terms during the fairness hearing, but chose not to participate. Nor did CMRA attempt to intervene at that time, even though another interested party, the Parent Guardian Association, had recently moved to intervene to protect its interests.

To the extent that CMRA is now complaining about activities that are required to implement the consent decree, this is no different than attacking the decree itself. For example, CMRA complains (Appellant Br. 20) that the State recently has required providers to agree to abide by any future orders in this case, even while acknowledging that "[t]hese contractual provisions are required by the Settlement Agreement." If CMRA found this requirement of the agreement objectionable, it should have sought intervention almost three years earlier when that term included in the settlement. In other examples, CMRA argues (Appellant Br. 10) that the implementation "has significant financial and

programmatic impact on [CMRA's] members, such as training requirements." CMRA's executive director also complains that the State has arbitrarily imposed "mandates on community agencies that either conflict with logical delivery of services or do not recognize the cost of the mandate. Often CMRA was told that the basis of the mandate was a court order in * * * this matter" (R. 312: Schuster Affidavit at 3, J.A. 389). Given that the consent decree specifically addressed training and the delivery of services in the community, "it would not have required unusual prescience on the part of the intervenors to recognize that their interests were implicated" when the decree was first proposed. 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 decree (such as an order requiring the State to enter into a memorandum of understanding with providers, increase its rates, or revise its payment methodology). But it has been clear since the agreement was negotiated that nothing in the consent decree would require the State to enter into a memorandum of understanding with 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

sought intervention to make this request before the decree was first approved.

Even if CMRA only wishes to become entitled to enforce the settlement agreement as it stands for its own benefit, it should have attempted to intervene to secure such a right for itself soon after the settlement agreement was submitted to the court. Again, it was clear at that point that the settlement agreement would only be enforceable by the signatories (R. 327: Consent Decree at ¶I(C), J.A. 478). 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").

b. CMRA's Purported Reliance On Others To Protect Its Interests Is No Excuse

CMRA attempts to excuse its tardiness by claiming (Appellant Br. 17-21) that until recently it relied upon the parties to the case to protect providers' proprietary interests, and presumed that 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 v. City of Cincinnati, 904 F.2d 336, 340-341 (6th Cir. 1990); Triax Co. v. TRW, Inc., 724 F.2d 1224, 1228 (6th Cir. 1984). 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. The district court properly found, as a matter of fact, that CMRA's claims of reliance and recent surprise were not credible (R. 349: Memorandum Opinion at 10, J.A. 578). It is easy to see why. CMRA argues intervention is necessary because the State, which is both a regulator and purchaser of CMRA's services, cannot represent its interests, citing the "inherent inconsistencies between movants' interests and those of the State" (Appellant Br. 28 (quoting Linton, 973 F.2d at 1319-1320)).[9] 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 an interest in protecting CMRA's economic and other proprietary interests. This is not a case about the interests of service

[9] This is clearly correct. The State's interest is in minimizing cost and retaining its regulatory flexibility, while CMRA has just as clearly stated its interest in increasing reimbursement rates and easing regulatory burdens.

providers, but about the civil rights of Tennessee citizens with mental retardation. As discussed below, the plaintiffs' interest in protecting those rights will have the necessary effect of protecting any interest CMRA may have in assuring resources adequate to provide the services the consent decree requires. However, none of the parties have ever had an interest in maximizing CMRA members' reimbursement rates, minimizing providers' regulatory burdens, or pursuing such proprietary interests as securing a memorandum of understanding for the benefit of providers.[10]

In fact, CMRA itself now argues that it is obvious that none of the parties can protect its interests (see Appellant Br. 29 ("Obviously, the state does not stand ready to represent CMRA's concerns as a provider of services."); Appellant Br. 29 ("It is clear that the Parent Guardian Association cannot represent CMRA's interests.")). The question is why CMRA would ever have thought that the parties that now so clearly do not represent its economic and regulatory interests in the litigation ever did.

In response, CMRA seems to argue that even if it could not count on the parties to the litigation to promote its interests in court, it reasonably believed that the State would ultimately reach reasonable financial and other arrangements with the providers in out-of-court negotiations (see R. 312: Schuster

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[10] Certainly it was clear when the settlement agreement was presented to the court that none of the parties was going to ask the district court to require higher reimbursement rates, create a new payment methodology, or enter into a memorandum of understanding with the providers.

Affidavit at 1-2, J.A. 387-388). But reliance of 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 interests in court. In its capacity as a litigant, the adequacy of the State's representation of CMRA's interests have 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 (intervention permitted when original party unexpectedly submitted a proposed remedial order to the court that impaired 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.

4. Prejudice To The Parties

By failing to identify what, exactly, it would have the district court do on its behalf, CMRA obscures the prejudice its late intervention would create for the parties. To the extent CMRA seeks to engage in litigation over reimbursement rates, payment methodologies, or any of the other items on its list of grievances, 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).

But 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 detailed consent decree and Community Development Plan. 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 consent decree—ensuring the safety and proper treatment of residents in the State's care—the parties have shown themselves willing to consider providers' complaints (see, e.g., R. 215: Transcript of Status Conference of Feb. 12, 1998, Vol. I, at 138, J.A. 299 (CMRA allowed to make presentation of complaints at a status conference); R. 318: Letter dated Nov. 4, 1999, J.A. 393 (CMRA permitted to submit report requesting additional resources for behavioral support services)). 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.

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 application were considered timely, CMRA has failed to identify any substantial, significantly protectable interest that is directly implicated in this case. Although CMRA may have economic and other interests affected by the decree, it does not challenge the content of the decree. Instead, it challenges other State decisions that are left by the settlement to the State's discretion. 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 impeded 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. Instead, that interest must be directly at issue in the litigation in which the intervenor seeks to participate. See Grubbs v. Norris, 870 F.2d 343, 346 (6th Cir. 1989) ("[T]he proposed intervenor must have a direct and substantial interest in the litigation.") (emphasis added).

Here, CMRA's interests could only have been affected by the "disposition of the action" through the consent decree, which is the court's final disposition of the case. But CMRA does not, and cannot, complain about the substance of that disposition now. Instead, CMRA's complaints are with the decisions which the consent decree has left to the State's discretion. For example, the consent decree neither requires nor prohibits the State from developing a new payment methodology or increasing payment rates or negotiating a memorandum of understanding with providers. The court orders simply require the State to provide certain services and treatment to the residents in its care and leaves such administrative details to the State's discretion (R. 349: Memorandum Opinion at 11-12, J.A. 579-580). To the extent CMRA complains about burdensome regulations that the decree itself does not require,[11] these regulations are not a result of the

[11] If CMRA intends to complain about regulations required to implement the decree, it would be attacking the decree itself, which it has promised not to do, and cannot do at this late date (continued...)

litigation but rather the State's traditional state-law authority to promulgate regulatory requirements and impose them upon providers.[12] CMRA may have a substantial interest in these issues, but that does not amount to a direct interest in this litigation, since the consent decree resulting from the litigation has nothing to say about these issues.

Nor can CMRA claim to have a direct interest in the case based on the terms of the contract its members have negotiated with the State. CMRA argues that its interests are directly affected by this case because its members agreed to a term in their contracts which requires them to continue to provide services to certain recipients until the provider receives State approval to discharge the resident (Appellant Br. 25-27). CMRA argues 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 to the 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 1315.

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[11](...continued)
in any event. See pp. 23-24, supra.

[12] It is difficult to see what basis the providers have for complaining that the State is imposing new regulations upon them. They specifically agreed to abide by such regulations in their contracts (see R. 311: Memorandum in Support of Mot. to Intervene, Exh. A at ¶ A(1), J.A. 377).

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.") (emphasis added). In this case, however, any impairment of interests caused by the purported "lock-in" provision[13] is not a result of any court order—the consent decree does not require this contractual term and, in any event, CMRA has promised not to challenge the requirements of the consent decree—but rather by the contract the providers negotiated with the State themselves. 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.

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

[13] As the district court also observed, the purported "lock-in" provision in this case has a significantly less substantial effect on providers' interests because it permits providers to cease services with permission from the State (and CMRA does not allege that the State has ever withheld this permission or will likely do so in the future) and because this provision must be read in context with the providers' right to terminate the contract for convenience upon 30 days notice (R. 311: Memorandum in Support of Mot. to Intervene, Exh. A at ¶¶ D(3), E(17), J.A. 381, 386).

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.

For purposes of Rule 24, the "disposition of the action" has already occurred and is embodied in the consent decree.[14] CMRA does not even claim that the court's entry of the consent decree has impaired its interests or otherwise provides a basis for intervention. Instead, it has candidly admitted that its interests "only become impaired because of the actions of the State during implementation" (R. 336: Response to Opposition to Intervention at 3, J.A. 553 (emphasis added); see also Appellant Br. 15 ("It was only at the point when remedial phase negotiations required services * * * but did not provide

[14] There are no other pending judicial proceedings that could impair any interests applicants may have. A final judgment has been entered. The time to appeal it has passed and, in any event, applicants state that they have no interest in appealing the judgment or consent decree (R. 311: Memorandum in Support of Mot. to Intervene at 6, J.A. 368; R. 314: Consent to Settlement Agreement, J.A. 390). Moreover, there are no outstanding motions to modify the decree or issue further orders or other relief.

sufficient funding, * * * that CMRA had an independent interest in the proceeding") (emphasis added); Appellant Br. 27 ("Clearly the contractual rights of CMRA's constituent members may be impaired by the ongoing remedial negotiations.") (emphasis added)).

But, as discussed above, see pp. 12-17, supra, Rule 24(a) authorizes intervention into the litigation, not the private negotiations of some or all of the present parties. See Dodson v. Salvitti, 77 F.R.D. 674, 676 n.1 (E.D. Pa. 1977). 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.

It does not matter that these compliance discussions are sometimes conducted during the course of the periodic status conferences with the court. These conferences simply provide a forum at which the parties discuss the State's progress and additional steps the State should undertake to promote compliance with the decrees. The status conferences do not result in any new court orders, only a "Status Conference Report" which memorializes the voluntary undertakings of the parties (see, e.g., R. 392: Status Conference Report No. 15 (describing presentations by parties and stakeholders and noting that "[b]ased on concerns or issues raised during this status conference, the parties have agreed to the following actions") (emphasis added); R. 387: Status Conference Report No. 14 (same); R. 375: Status Conference Report No. 13 (same)). The consent

decree sets forth separate and distinct mechanisms for seeking judicial relief (see R. 327: Consent Decree at ¶ X(B)(1), J.A. 536 (except in exigent circumstances, the parties will privately confer over any compliance disputes, then seek mediation with the magistrate judge, prior to "bringing an enforcement action"); ¶ X(B)(2), J.A. 536-537 (if conciliation and mediation are unsuccessful, a party may "seek[] redress with the Court" including "further injunctive relief" or "additional relief"); ¶ X(B)(11), J.A. 539 (parties may seek modification of decree by motion)). Thus, to the extent these status conferences result in changes in the State's behavior, some of which may affect CMRA's interests, those changes are not a result of "the disposition of the action" within the meaning of Rule 24(a).

Put another way, 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's motion to intervene simply leaves the providers 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 Agreement, 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 Terms Of The Consent Decree

Finally, CMRA's brief suggests 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 (see Appellant Br. 16 (CMRA proposes to

intervene to "insure that individuals receive timely and appropriate services.")). CMRA suggests that it was only recently that it became clear that these interests were being endangered by the State's refusal to increase reimbursement rates and provide additional community resources. Despite providers' concerns about the welfare of their clients, this is not an interest that supports intervention by CMRA.

"The 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. 1985) (same). 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 plaintiffs 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.

CMRA does not contest that all of these parties share the common goal of ensuring that class members in community placements receive the care required by the consent decree and that adequate resources are available to ensure compliance with the settlement agreement (see, e.g., Appellant Br. 29 n.8 ("CMRA and the Parent Guardian Association agree * * * that placement must be accompanied by sufficient resources to protect the individual.")). For this reason, CMRA must overcome "the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit . . . have the same ultimate objective." Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987) (citation and internal quotation marks omitted).

In this case the district court correctly concluded that CMRA did not meet this burden (R. 349: Memorandum Opinion at 14, J.A. 582). There are sound reasons to believe that the present parties will adequately protect the class members from inadequate care in community caused by lack of resources. The consent decree negotiated by these parties specifically requires the State to "ensure that the community placement for each and every citizen meets the individual needs of the citizen" (R. 327: Consent Decree at ¶ V(A)(9), J.A. 490; see also R. 349: Memorandum Opinion at 4, J.A. 572). The decree creates extensive reporting and monitoring mechanisms to ensure the adequacy of care and to identify the causes of any inadequacy when it occurs (R. 327: Consent Decree at ¶ X , J.A. 529-540). For example, the decree created a Quality Review Panel, composed of expert

professionals, that is charged with monitoring implementation of the decree (R. 327: Consent Decree at ¶ X(A)(1)-(2), J.A. 529-531). The Panel systematically reviews conditions and care of individuals within the community placements on a regular basis and submits the results of its reviews to the parties and the court (R. 327: Consent Decree at ¶ X(A)(3)(d), J.A. 534-535). Parents of the class members, who have frequent contact with their children in the community settings and a compelling interest in their care, are full parties to this case and are empowered to bring any problems regarding the adequacy of resources to the attention of the other parties and the court (see R. 327: Consent Decree at ¶¶ X(B)(1),(2), J.A. 536-537). The United States and its expert consultants also monitor conditions in the community and have extensive experience in similar cases from which to judge the adequacy of resources.

To rebut the presumption of adequate representation, and to counter the evidence of adequate representation in the context of this case, CMRA presented no evidence other than the vague, unsupported assertions of its executive director that "rates continue to be paid on an arbitrary basis," that "the state would not properly recognize the additional legitimate cost of providing services to these individuals," and that "[t]he state has failed to employ, contract for or otherwise provide an adequate amount of [needed] resources" (R. 312: Schuster Affidavit at 2, J.A. 388). But CMRA acknowledges that the parties have considered its complaints as part of the informal

implementation process (see Appellant Br. 6 (CMRA permitted to participate in a status conference to discuss its funding concerns); Appellant Br. 6 (CMRA permitted to file a "lengthy document with the court regarding behavioral support")). That the parties have not granted CMRA all the access to these proceedings that it would like demonstrates that the parties understand that CMRA has interests to promote beyond the welfare of its clients. That the parties have not agreed with all of its complaints simply shows that the parties may not agree with CMRA's view that problems existing with the community services are caused by insufficient reimbursement rates or tied to CMRA's other complaints. But nothing CMRA presented to the district court demonstrated that these disagreements amounted to an abdication of the parties' responsibility to protect the interests of the class members.

The district court, which was intimately familiar with the ability of the present parties to evaluate conditions and the diligence with which they have fulfilled their monitoring duties, did not error in concluding that the present parties adequately represented any interest in assuring adequate resources to provide for the care of the class members.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The attached brief contains 10,602 words and 1159 lines of monospaced text.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Final Brief of the United States as Appellee were sent by first class mail postage prepaid this 30th day of June, 2000, to the following counsel of record:

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