UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

COMMONWEALTH OF KENTUCKY, *ex rel.* MATTHEW G. BEVIN, GOVERNOR, *et al.*,	)	
PLAINTIFFS,	)	
	)	Civil Action No. 3:18-00008-GFVT
v.	)	
RONNIE MAURICE STEWART, *et al.*,	)	
DEFENDANTS.	)	

* * * * * *

THE KENTUCKY HOSPITAL ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE

Defendants' arguments opposing the Kentucky Hospital Association's ("the KHA") motion to intervene wilt under the slightest examination and fail to establish a reasonable basis to deny the KHA intervention of right or the exercise of discretion to permit invention. Instead, the substance of Defendants' response turns upon Defendants' mistaken position that Kentucky's hospitals and health systems are mere "bystanders" to the Medicaid policy litigation and that, as such, the KHA's interests can be adequately protected by the Commonwealth. The Defendants' positions cannot withstand any reasonable scrutiny.

I. Defendants' arguments against permissive intervention exaggerate the perceived burdens.

Defendants' arguments against permissive intervention under Federal Rule 24(b) are twofold and can be dismissed summarily. First, Defendants assert that the KHA will merely be "affected by" a decision in the case and permitting its intervention opens wide the door for copycat intervention pleas in future cases. (D.E. 26, Defendants' Resp. to the KHA's Motion to Intervene ("Resp.") at 10.)

Next, Defendants argue that the KHA's participation in the case "will only bog down this litigation." (*Id.*) Such arguments inappropriately minimize the integral role of health care providers in providing Medicaid services, underscore precisely why the KHA seeks to intervene, and actually supports the Court's exercise of discretion to permit the KHA's intervention.

Health care providers are not merely one of "any number of parties affected by" the Kentucky HEALTH Medicaid waiver. (Resp. at 10.) As explained in the KHA's motion, Kentucky's hospitals and health systems will be responsible for providing the services to the persons covered by the waiver. A common pitfall in Medicaid policy debates is that only the positions of beneficiaries and government payors are assigned value at the expense of health care providers who actually provide the covered services. In short, the KHA's participation in this lawsuit will not "bog down" the issues in litigation. Instead, the KHA will be able to provide clarity to the issues with a finer focus on the operational realities for implementing the Medicaid waiver. Conversely, the absence of health care providers in the litigation invites additional litigation on Medicaid theory and implementation.

Importantly, Defendants concede that the KHA has met the required elements for permissive intervention (Resp. at 9), but then proceed to repeat the same arguments as they presented against the KHA's intervention as of right. For instance, even if standing is a factor in considering a right to intervene under 24(a) – and which the KHA does not concede it lacks – if the same factors are also required for permissive intervention, there would be no point of including the discretionary means of intervention under 24(b). Similarly, Defendants concede the KHA's motion to intervene was timely, but then make the contradictory assertion that "unwarranted delay" will result from the KHA's intervention. As this case is in its earliest stages, the KHA's intervention will not result in delay.

As for Defendants' misguided attempt to compare the present situation to that addressed by this Court in *Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414 (E.D. Ky. 2015), that case is inapposite to the case at hand except to the extent that its contrast with this one supports the KHA's intervention

here. The issue in *Ark Encounter* was that of taxpayer standing – specifically, whether four individuals who believed their tax dollars were being used in an impermissible manner under the Kentucky Constitution had a sufficient legal interest to intervene. 311 F.R.D. at 418-19. Because the Court found that, based on their own description, the proposed intervenors' alleged interest in the litigation was "directly rooted in their status as Kentucky taxpayers," such a "generalized concern about the use of their tax dollars" was not substantial enough to warrant intervention. *Id.* at 419. In direct contrast, the case at hand does not concern constitutional issues or taxpayer standing, nor is the KHA an entity that is no different from any other "concerned" citizen. As the KHA's motion explains, KHA members are health care providers who will be providing (and currently provide) the services covered by Medicaid, and therefore its interest is not based on any characteristic that it shares with the existing parties, all Kentucky taxpayers, concerned citizens, or indeed with any other large group that could potentially "flood the federal courts" with additional intervenors. *Id.* at 424. Rather, KHA members will be directly and uniquely impacted by their role in implementing the Medicaid waiver provisions, and the KHA's articulated interest in this suit is restricted to the operational realities of doing so.

Defendants also selectively quote from *Ark Encounter* while ignoring the reasoning on which this Court based its conclusions. For instance, when read in context, the "strains on judicial economy and the inevitable delays, confusion, and prejudice" (Resp. at 10 (quoting in part 311 F.R.D. at 425)) with which this Court was concerned were directly related to the fact that proposed intervenors could not differentiate themselves from any other taxpayers in Kentucky, nor could they show how the outcome of the litigation would affect them any differently. Accordingly, had the proposed intervenors in *Ark Encounter* been allowed to intervene, there would be no discernible limits on any other concerned taxpayer intervening in that same case or other cases in the future. *See, e.g.*, 311 F.R.D. at 419 ("if any taxpayer's generalized concern about the use of their tax dollars" is sufficient to intervene, "what is to prevent all Kentucky taxpayers from intervening in a suit such as this one?"); *id.*

at 423, 425. In contrast, the KHA's interests are unique to health care *providers* who provide Medicaid services, and because the KHA as an association represents them, allowing the KHA's intervention actually will streamline litigation and conserve judicial resources by including multiple providers simultaneously and avoiding the potential for expanding future litigation.[1] (D.E. 7, KHA's Mot. to Intervene ("Mot.") at 9-10, 15-16.)

Accordingly, even in the context of considering permissive intervention, concerns about potentially "unrestricted" intervention are not at issue here because the KHA represents health care providers whose interests not only differ significantly from the Commonwealth's but also are unique to its membership and not shared by other Kentucky residents. Therefore, allowing the KHA to intervene will not expand the intervention doctrine in any discernible measure. As explained above, the factual circumstances at issue in the "narrow instance" of *Ark Encounter* simply are not at issue here, and Defendants have not shown otherwise. 311 F.R.D. at 425 (concluding that "in this narrow instance permissive intervention should not be permitted.").

II. The Commonwealth cannot adequately represent the KHA's interests.

Defendants' opposition to the KHA's intervention of right continues their central theme of casting the KHA as a mere spectator to Medicaid policy in which the KHA's "interests will be adequately represented by the Commonwealth." (Resp. at 3.) Yet Defendants' description of the KHA as having a nominal role in the litigation contrasts remarkably from Defendants' acknowledgement that the KHA's interests and positions "appear prominently" in the administrative process leading up to the approval of Kentucky HEALTH. (Resp. at 7.) Defendants' arguments highlight another fundamental contradiction within their opposition: the KHA's interests in Kentucky HEALTH were important enough for the association to be actively engaged in the Medicaid policy

[1] In contrast, the putative intervenors in *Ark Encounter* were "not even members of a particular organization but are simply individual taxpayer residents interested in the 'zealous' enforcement of Section 5 of the Kentucky Constitution." *Id.* at 420.

debate, yet the KHA's interests are unimportant in the context of litigation regarding the same Medicaid policy.[2]

Defendants also misconstrue the KHA's explanation of its interest in this lawsuit. The KHA has nowhere stated that it seeks to intervene because of merely a "simple difference of opinion regarding litigation tactics." (Resp. at 3-4.) Rather, crucial to the KHA's motion and arguments supporting it is the fact that the KHA is uniquely situated in, and affected by, this lawsuit. As explained in its motion to intervene, the KHA represents the third component of the "three-legged stool," so to speak, that comprises the nature of Medicaid services. (Mot. at 9-10.) Litigation affecting how those services are provided necessarily and significantly affects the KHA's interests, and does so in a way that is completely different from how the Commonwealth's interests will be affected.[3] As explained above, unlike in *Ark Encounter*, the KHA's interests in this suit are not generalized and shared by innumerable other parties, but rather are *unique* to *health care providers* and based on the unique role of health care providers in the Medicaid program. (Mot. at 10-14.) The Commonwealth simply does not and cannot represent those interests.

Nevertheless, Defendants' primary argument for why the KHA should not intervene appears to be that, in Defendants' opinion, the KHA has not sufficiently overcome a presumption of adequate representation that may arise when the potential intervenor shares the same objective or seeks the same relief as an existing party. (Resp. at 3-9.) Defendants, however, either misunderstand or

[2] Defendants also offer a disingenuous description of the D.C. litigation as a mere technical challenge that "turns on the validity of a particular executive action…pursuant to the Administrative Procedure Act ('Act')." In reality, however, Defendants' complaint in the D.C. litigation makes abundantly clear that their challenge relates to the substance and factual underpinnings of the Medicaid policy that is intended with Kentucky HEALTH – the very topics upon which the KHA commented and engaged the government agencies as part of the administrative deliberations of Medicaid policy.

[3] Additionally, the KHA disagrees with Defendants' interpretation of the Supreme Court's use of the phrase "at the least" in the case *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 1651 (2017), not only because of the context in which it is used but also because the Court in *Chester* remanded the case for a determination of whether the proposed intervenor was in fact requesting additional relief beyond that of the plaintiff, thereby implying that if Article III standing were necessary regardless of the relief sought, then remand on that issue would have been unnecessary.

mischaracterize the KHA's arguments. First, Defendants gloss over the abundant caselaw confirming that the burden of showing inadequate representation is "minimal," even where such a presumption applies. *Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 495 (6th Cir. 2014) (citations omitted). Instead, Defendants rely upon an incorrect standard for which they cite no authority in support – that the KHA must "provid[e] concrete evidence demonstrating that the Commonwealth will provide inadequate representation of its views." (Resp. at 9.) On the contrary, the KHA "is not required to show that the representation *will in fact* be inadequate," *Michigan State v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (emphasis added), but "only that there is a *potential* for inadequate representation." *Davis*, 560 F. App'x at 495 (emphasis in original) (citation omitted); *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006). As explained above, any honest reflection upon the nature of Medicaid policy and the role KHA members play in implementing it plainly shows that there is at least "a potential for inadequate representation" sufficient to meet this minimal standard.

Second, the KHA has demonstrated much more than a potential for inadequate representation. The KHA has shown why and how the Commonwealth does not represent its unique interests in this litigation. Defendants' accusations that the KHA "does not even acknowledge the presumption" of adequate representation and "does not even try" to rebut it are wholly untrue. The KHA's motion not only acknowledged the presumption (Mot. at 18), but also spent over three pages specifically rebutting it. (Mot. at 18-21.) In doing so, the KHA explained the presumption can be overcome in a number of ways including, for example, where the existing parties' interests are "not identical" to the proposed intervenor, *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991); where the proposed intervenor's interest "is not represented at all" by existing parties, *Grubbs v. Norris*, 870 F.2d 343, 347 (6th Cir. 1989); and where the existing party acts as a regulator of the proposed intervenor, *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1319-20 (6th Cir. 1992). The KHA also explained why each of those situations applies here, as well as why, because of its members' unique position in

any litigation about Medicaid policy, the Commonwealth would not be able "to present those separate arguments to the court" (Resp. at 5 (citation omitted)). (Mot. at 10-14, 17-21.) Defendants, however, ignore those points, presumably in the hope that the Court will too.[4]

In *Invesco*, another case the KHA cited, the proposed intervenors successfully rebutted the presumption of adequate representation by arguing that "as the developer and owner of the software at issue," their "interests at stake [were] different and broader" than those of the existing party; that it "would suffer harms that are different in kind and greater in degree" in the event of an adverse ruling; and that because of the difference in interests, the existing party was "not capable of making all of the same arguments" as it lacked the particularized knowledge of the subject matter concerning the proposed intervenors' business. (Mot. at 20 (quoting *Invesco Institutional, Inc. v. Paas,* 2008 U.S. Dist. LEXIS 90891, *22 (W.D. Ky. Nov. 6, 2008)). Despite the opposing party's assertion that the proposed intervenor had not yet "actually taken any position that is different from that of defendants," the court allowed intervention because even though the proposed intervenors sought the same ultimate objective as an existing party, "their interests do not align entirely" and therefore it was "*possible*" that they may be inadequately represented. *Id.*, at *22-23 (emphasis added).

Third, Defendants' misperceptions about the necessity of health care providers to the implementation of the Medicaid waiver is further revealed by their incorrect assumption that the Commonwealth in this case is "acting on behalf of a constituency it represents" with regard to the KHA. (Resp. at 6.) Such a mischaracterization overlooks the reality of the situation. As acknowledged in the KHA's motion, Defendants are correct to note that when a government entity is an existing party in a lawsuit, a presumption of adequate representation may be strengthened in certain

[4] Defendants inexplicably and mistakenly assert that the KHA only cited two cases in support of its position on inadequate representation. (Resp. at 8.) In reality, the KHA cited no fewer than ten cases in support of its position on this point. (*See* Mot. at 18-20.)

circumstances. (Mot. at 20.) Those circumstances, however, do not exist here. For instance, the KHA noted that when a portion of the general public contends their constitutional rights have been violated or express interest in seeing the laws enforced in a particular way, the government generally is "well able" to represent such interests. (Mot. at 20 (quoting *Ark. Encounter*, 311 F.R.D. at 423).) Defendants, however, appear perhaps to confuse the relief sought with the parties' interests.[5] The KHA and the Commonwealth may seek similar relief, but as explained in the KHA's motion, their interests are distinct because of the different roles they play in implementation of the waiver.[6]

Here, contrary to the Defendants' misguided and inexplicable assertion that the KHA is "no different from any other constituent impacted by the validity of a challenged law" (Resp. at 6), the KHA is not merely asserting some generalized interest in the enforcement of a law that could be shared by any other citizen. Rather, the KHA represents the providers who are one of the three crucial components of which the Medicaid structure is comprised. (*See* Mot. at 9-10.) Importantly, the Commonwealth, through the Cabinet, is one of the other two of those three components. While all three are necessary to Medicaid, they are distinct from one another, their interests are unique, and they cannot substitute for or represent each other in this litigation.

Fourth, Defendants attempt to distract the Court from this distinction by their assertion that adequacy of representation should be assumed whenever a government entity is the existing party. (Resp. at 6-8.) However, the cases Defendants cite where intervention was denied on that basis (*see*

[5] For instance, Defendants focus on the language in *Ark. Encounter* noting that the government's *interests* in defending the case were not noticeably different from that of the proposed intervenors, and that the interests of the proposed intervenors must be at least somewhat different for inadequate representation. 311 F.R.D. at 425. Yet here, the KHA has repeatedly explained why its interests are in fact different, despite seeking the same relief.

[6] This possible confusion between interests and relief sought may also be the reason for Defendants' misplaced reliance on *Reliastar Life Insurance Co. v. MKP Investments*. *Reliastar* is one of a line of cases within the Sixth Circuit, several others of which Defendants also cite, involving third party (usually banks) financial interests in declaratory judgment actions concerning coverage under insurance contracts – a factual scenario readily distinguishable from this one. As is typical in such cases, the court in *Reliastar* denied the bank's motion to intervene because its interests were "identical" to those of an existing party. 565 F. App'x 369, 374 (6th Cir. 2014); *see also id.* at 372. As explained above, the interests of KHA members in this lawsuit are unique and are not identical to those of the Commonwealth.

Resp. at 6) are distinguishable because they involved government entities such as a state Attorney General, a legislature, or a township, acting in their representative capacities on behalf of a constituency that included the proposed intervenor. Here, the Commonwealth (specifically the executive agency of the Cabinet) is not acting on behalf of Kentucky's health care providers.[7] To assume otherwise merely displays a lack of understanding about how Medicaid operates in general.

While Defendants may be correct that the "mere fact" that regulation by an existing party does not by itself mean that representation automatically will be inadequate, that does not mean that the converse is equally true. *Blount-Hill v. Board of Educ. of Ohio*, 195 F. App'x 482, 490 (6th Cir. 2006). Defendants' reliance on *Blount-Hill* overlooks the court's emphasis on the application of its holding to the specific facts of that particular case. *See id.* at 489 (acknowledging that although divergent interests based on the relationship of regulator and regulated entity "could carry force in a different context, they are unpersuasive as applied to the facts of this case."). There, the court denied intervention because the proposed intervenor's interests were "necessarily identical" to those of the government entity's and related only to purely financial interests in a particular funding scheme, which it could alternatively protect by means other than intervention. *Id.* at 490. While something more than a regulatory relationship alone is required, the KHA has met that requirement: the KHA's interests are not identical to those of the Commonwealth, its interests pertain to delivery of services pursuant to the Medicaid waiver, and it does not have an alternative means of protecting those interests.

Defendants summarily dismiss *Linton*, another case the KHA cited, as "wholly inapposite" (Resp. at 9), when in fact it is directly on point. There, the Sixth Circuit reversed the district court's denial of intervention to certain nursing homes who provided health care to Medicaid beneficiaries because it recognized the uniqueness of their interests as providers could not be adequately

[7] To be clear, this is not a criticism of the Cabinet – it is a regulatory body that is not designed or intended to represent the interests of particular groups.

represented by the state agency responsible for administration of Tennessee's Medicaid program. 973 F.2d at 1319-20. *Linton* supports the KHA's position that government entities are not necessarily presumed to adequately represent the proposed intervenor's interests where, as here, the government entity "act[s] as both a regulator and purchaser of movants' services thereby creating inherent inconsistencies between movants' interests and those of the State sufficient to warrant a finding" of inadequate representation. *Id.* at 1320.

The KHA also cited *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999), in which the Sixth Circuit addressed the very question of whether "a stronger showing of inadequacy is required" of putative intervenors when a government agency is an existing party in the lawsuit, and in doing so, it concluded that "this circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved." 188 F.3d at 400. The court's discussion included a citation to *Miller*, also cited in the KHA's motion, noting that *despite* the presence of a government agency in the case, proposed intervenors "were required only to show that the representation *might* be inadequate" and emphasized their "minimal" burden in this regard. *Id.* (citing *Miller*, 103 F.3d at 1247) (emphasis in original).

In sum, to the extent that seeking the same relief gives rise to a presumption of adequate representation, the KHA has rebutted that presumption by explaining why its interests in the practicalities of providing the health care services at issue diverge from those of the Commonwealth, why they will not be adequately represented by existing parties, and why those interests will be impaired apart from intervention. This is not a case in which the government is defending a question about the KHA's legal or constitutional rights, and the KHA is not merely a group of disgruntled citizens or even a special interest group concerned about the enforcement of laws it lobbied for or against. Rather, the KHA members make up the essential third component by which Medicaid operates. Because other members of the general public will not share those same interests, allowing the KHA's participation will not expand the role of intervention.

Finally, Defendants overlook the well-accepted standard that "rules governing intervention are construed broadly in favor of the applicants." *Northland Family Planning Clinic*, 487 F.3d at 344; *see also Purnell*, 925 F.2d at 950 ("Rule 24 is broadly construed in favor of potential intervenors …. 'If an [applicant] would be substantially affected in a practical sense by the determination made in an action, [the applicant] should, as a general rule, be entitled to intervene….'") (citation omitted). At the very least, this Court has discretion to allow for permissive intervention, and even could limit such intervention in whatever manner it deems necessary. *See United States v. City of Detroit*, 712 F.3d 925, 931-32 (6th Cir. 2013). For these reasons, the KHA requests that its motion to intervene be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 23, 2018, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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