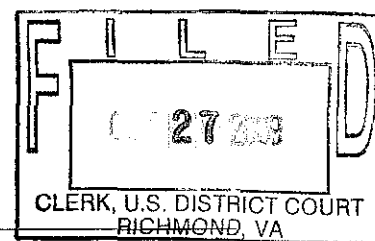


IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division



THE ARC OF VIRGINIA, INC.,

Plaintiff,

v.

TIMOTHY M. KAINE, in his official capacity :  
as Governor of the Commonwealth of Virginia, :  
*et al.*, :

Defendants. :

MEMORANDUM OF LAW

Case No.: 3:09cv686

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S**  
**MOTION FOR A PRELIMINARY INJUNCTION**

**I. INTRODUCTION**

This Motion asks the Court to enter a Preliminary Injunction prohibiting the Defendants from building and fully populating an unwarranted and unlawfully segregated institution.

Federal law gives people with disabilities a right to be free from discrimination in the provision of government services, including the right to receive those services "in the most integrated setting" appropriate to their needs. *See*, The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d); Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794; 28 C.F.R. § 41.51. This right led the Supreme Court to conclude that "unjustified institutional isolation of persons with disabilities is a form of discrimination." *Olmstead, et al. v. L.C., et al.*, 527 U.S. 581, 600 (1999).

In defiance of the ADA, Section 504 and the *Olmstead* decision, Defendants plan to build a new segregated institution and fully populate it with 75 residents of Southeastern Virginia Training Center ("SEVTC"), a state institution for people with intellectual disabilities. Defendants are taking this action without conducting appropriate individual assessments to determine if a new segregated institution is necessary to serve SEVTC residents or conducting assessments to determine how many, if any, SEVTC residents require institutional services at all. Even worse, they are doing so in the face of a state-sponsored survey concluding that all SEVTC residents can be served in integrated community settings.

Instead of individually assessing and determining the needs of SEVTC residents and finding ways to meet those needs in the most integrated setting possible, as required by federal law, Defendants' plan calls for them to choose 75 SEVTC residents - an arbitrary number that even a Defendant concedes is not the product of any "science or study" - and institutionalize them, regardless of whether they actually "need" institutional care.

Plaintiff, The Arc of Virginia, Inc. ("the Arc") filed this action on behalf of its members and in its own right, asking the Court to enter a Declaratory Judgment that Defendants' plan, and/or the Virginia Budget Bill Item that precipitated it, violate its members' rights under the ADA and Section 504 and are preempted by those Acts. The Arc also seeks an Injunction prohibiting Defendants from implementing their plan and building a segregated institution.

In this Motion, the Arc asks this Court to enter a Preliminary Injunction prohibiting the Defendants from implementing their plan during the pendency of this action. Doing so will prevent the Arc and its members from suffering irreparable harm and "preserve the *status quo* until the rights of the parties can be fairly and fully investigated and determined by strictly legal

proofs and according to the principals of equity.” *Wetzel v. Edwards*, 635 F.2d 283, 286 (4<sup>th</sup> Cir. 1980) (citation omitted).

## **II. RELEVANT FACTUAL BACKGROUND**

### **A. Southeastern Virginia Training Center**

SEVTC is located on a 120 acre compound in an isolated section of Chesapeake, Virginia. *See*, Affidavit of Mark Stevens (hereinafter “Stevens Affidavit”), attached hereto and made a part of this Memorandum as Exhibit A, ¶ 8. To enter SEVTC by car, one must turn off of Military Highway 13 onto Smith Avenue and then snake through an industrial park, past “No Trespassing” signs. Stevens Affidavit, ¶¶ 9-10

The SEVTC compound is segregated from the residential community on all sides:

- SEVTC is segregated from the residential community on its Eastern border by a trench that is approximately one quarter mile long, five feet wide and two feet deep. Where the trench ends, SEVTC is segregated from that community by an approximately six foot high fence. It is also segregated from that community by multiple “No Trespassing” signs. All of the “No Trespassing” signs face the community, telling community members that they are not welcome at SEVTC.
- The SEVTC compound is segregated from the industrial park along its Northern border by “No Trespassing” signs.
- The SEVTC compound is segregated from the community along its Southern border by Interstate 64.

- The SEVTC compound is segregated from the business development along its Western border by a six foot high fence.

Stevens Affidavit, ¶¶ 12-15

If visitors from the community can ford these boundaries, they then must report to SEVTC's main office to request admission. Under SEVTC's visitation policy, it can deny any person or organization access to the compound, at its discretion.<sup>1</sup> This is true even if an SEVTC resident has never been declared incompetent by a Court and wants to see the visitor. Stevens Affidavit, ¶¶ 15-17.

SEVTC has used this authority to restrict residents' contacts with organizations it does not approve of. For example, when the Arc formed a Chesapeake chapter to advocate for the rights of its members and other SEVTC residents, its self-advocate went to SEVTC to give residents information about the Arc and about their rights. The self-advocate also offered SEVTC residents membership in the Arc. Stevens Affidavit, ¶ 19; Affidavit of Jamie Trosclair (hereinafter "Trosclair Affidavit"), attached and made a part of this Memorandum as Exhibit B, ¶¶ 19-21 .

When SEVTC's director, Robert D. Shrewsberry, Ph.D., found out about the Arc's visit, he responded by barring the Arc and its staff from doing so. However, SEVTC allows members of other groups - presumably ones that have Dr. Shrewsberry approval - to visit SEVTC, solicit membership, distribute information and conduct meetings on the SEVTC compound. SEVTC even provides advertising for one such group, known as "Parents and Friends of SEVTC." Stevens Affidavit, ¶¶ 19-21.

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<sup>1</sup> SEVTC cannot deny access to organizations that have a statutory right to visit the compound, such as the Virginia Office for Protection and Advocacy (VOPA).

When Dr. Shrewsberry was asked why SEVTC provides such support to that group, he replied in a letter, “we see [Parents and Friends of SEVTC] as having a direct interest in the operation of the Center. The Arc does not enjoy such status.” Stevens Affidavit, ¶ 22.

SEVTC also restricts residents’ ability to leave the compound. For example, under SEVTC policy, it can, in its discretion, determine that a resident is not “competent” to leave the compound and deny him or her the opportunity to see or mingle with members of the community at large. SEVTC can do so even when a person has not been found incompetent by a court of law. Stevens Affidavit, ¶¶ 23-24.

B. Facts Leading to This Action

Approximately 150 Virginians with intellectual disabilities (formerly known as “mental retardation”) live at SEVTC. There are members of the Arc who live at SEVTC and Arc members living in the community who are at risk of being admitted to SEVTC. Trosclair Affidavit, ¶¶ 11-12.

In his proposed budget for 2010, Defendant, Timothy M. Kaine (“the Governor”), proposed closing SEVTC. In an interview, the Governor stated that money spent on that institution should be put “into community services to treat people with mental illness and mental retardation.” The Governor further stated that SEVTC residents “don’t need to be institutionalized.” See, WAVY-TV, “Kaine on the economy and ‘going green,’” available at [http://www.wavy.com/dpp/news/local\\_wavy\\_kaine\\_budget\\_update\\_southeastern\\_20090112](http://www.wavy.com/dpp/news/local_wavy_kaine_budget_update_southeastern_20090112)

After the Governor announced his desire to close SEVTC and serve its residents in integrated community settings, Defendants James S. Reinhard (“the Commissioner”) and

Marilyn B. Tavenner (“The Secretary of Health and Human Resources”) testified to the Virginia General Assembly and spoke publicly about the need to and benefits of closing that institution.

However, instead of closing SEVTC, the Virginia General Assembly passed Budget Bill Item 103.05(A)(1), which ordered that a new 75-bed “facility” be built. A copy of Budget Bill Item 103.05, which contains Item 103.05(A)(1), is attached to and made a part of this Memorandum as Exhibit C.

Budget Bill Item 103.05(A)(1) directs the Department of Mental Health, Mental Retardation and Substance Abuse Services (“DMHRMSAS,” now known as the Department of Behavioral Health and Developmental Services (“DBHDS”)) and the Department of General Services (“DGS”) to “rebuild and resize the Southeastern Virginia Training Center to a 75-bed facility to serve profound and severely disabled clients” and allots \$23,768,000.00 for construction.

The Commissioner and Deputy Commissioner of DMHRMSAS/DBHDS have publicly stated that they do not know how the General Assembly came up with the 75-bed census for the new institution. For example, Deputy Commissioner Heidi Dix publicly stated that the Department felt that number is “arbitrary,” not based on the needs of any SEVTC residents and was chosen because the General Assembly thought it was a “nice, round number.” Trosclair Affidavit, ¶¶ 51-55. The Commissioner publicly stated that the number was not the result of any “science or study.” Trosclair Affidavit. ¶30-33.

The General Assembly also passed Budget Bill Item 103.05(A)(3), which directs DGS and DMHRMSAS/DBHDS to “build, acquire or renovate 12 community based Intermediate Care Facilities (ICF-MR) and 6 MR Homes” for people with intellectual disabilities.

Despite his previously stated opposition to building a facility, and without having conducted or reviewed any individualized assessments concluding that a new segregated institution was necessary or appropriate, the Governor approved and signed the Commonwealth's budget for 2010, including Budget Bill Item 103.05(A)(1) and Budget Bill Item 103.05(A)(3). The Governor could have exercised his "line item veto" power to remove Budget Bill Item 103.05(A)(1), but chose not to do so.

Since that time, each of the Defendants – the Governor, the Commissioner, the Secretary of Health and Human Resources, Secretary of Administration Viola O. Baskerville ("the Secretary of Administration") and Director of DGS Richard F. Sliwoski ("the Director") - have been implementing or working to implement Budget Bill Item 103.05(A)(1).

Two months after the Governor signed the Commonwealth's budget, the Governor received a study removing any justification for building a new institution. In June of 2009, a state-sponsored study concluded that all SEVTC residents "Can Be Served in the Community," confirming the Governor's belief that SEVTC residents "don't need to be institutionalized." The study was performed by the Human Services Resource Institute, pursuant to a contract with DMHMRSAS/DBHDS (hereinafter "DBHDS"), and was based on medical records and evaluation data collected and kept by DBHDS. A copy of the study is attached to and made a part of this Memorandum as Exhibit D.

Despite having access to a report flatly stating that no SEVTC residents required institutionalization, Defendants continued to work on a plan to ensure that 75 SEVTC residents will be forced to live in the new segregated institution. Defendants also refused the Arc's request to suspend construction to further examine the issue in light of the study, its conclusions and recommendations. Trosclair Affidavit, ¶¶ 26-28.

Indeed, Defendants moved to implement Budget Bill Item 103.05(A)(1) despite having no idea how many SEVTC residents, if any, actually required services in an institutional setting. For example, on 6 July 2009, the Commissioner responded to a request for information asking whether current SEVTC residents will make up the population of the new institution. The Commissioner stated “[T]he process for determining the identity of the individuals who will be offered SEVTC beds is currently in development. No one has yet been selected as a candidate for an SEVTC bed at this date.” A copy of the Commissioner’s letter is attached to and made a part of this Memorandum as Exhibit E.

Similarly, on 19 August 2009, counsel for the Governor responded to a request for information by admitting that the Defendants did not have any “assessments, evaluations, studies or documents that were created or reviewed prior to or leading to the conclusion that a new 75 bed institution is needed or appropriate.” Counsel also admitted that the Defendants did not have “any individualized assessments . . . indicating that a new institution is required to house people with disabilities” or any documents “indicating how, specifically, the 75 bed census was determined.” A copy of counsel’s letter is attached to and made a part of this Memorandum as Exhibit F.

Instead of performing such evaluations or assessments to determine the actual needs of SEVTC residents and forming a plan to meet those needs in the most integrated setting appropriate to them, as required by the ADA, Section 504 and *Olmstead*, the Defendants simply created a plan that will result in 75 people being placed in a new segregated institution. The Commissioner announced Defendants’ plan on 13 August 2009, at a meeting of the SEVTC Advisory Council.



Under the Defendants' plan, a new segregated 75-bed institution will be built on the SEVTC compound, under the auspices of DGS and DBHDS. Trosclair Affidavit, ¶ 31. In response to a question, the Commissioner admitted that the 75-bed census for the new institution was not arrived at through any "science or study." Trosclair Affidavit, ¶ 33.

The Commissioner further stated that, under the Defendants' plan, all SEVTC residents will be evaluated. Based on the evaluations, the 65 that score the "lowest" will be placed in the new institution.<sup>2</sup> The other 10 beds in the new institution will be used by SEVTC residents who are transitioning from or to community settings. Trosclair Affidavit, ¶¶ 34-36.

Under the Defendants' plan, the remaining SEVTC residents will be permitted to live in the community-based Intermediate Care Facilities for the Mentally Retarded ("ICF-MRs") and MR homes provided for in Budget Bill Item 103.05(A)(3). *Id.* at \_\_\_\_.

Subsequently, a DBHDS representative publicly admitted that there will be "very little" to no difference between the service needs of the residents forced to live in the new institution and the needs of those permitted to live in the community settings. *Id.* at \_\_\_\_.

Under Defendants' plan, they will sign a contract for the construction in December of 2009 and construction on the new institution will begin in August 2010. Trosclair Affidavit, ¶ 46.

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<sup>2</sup> Having a "lower" score in relation to other individuals is not an accepted way of determining whether an individual requires institutional services.

**III. ARGUMENT: THIS COURT SHOULD ENJOIN THE DEFENDANTS FROM IMPLEMENTING THEIR PLAN AND BUILDING A SEGREGATED INSTITUTION DURING THE PENDENCY OF THIS CASE.**

A. Standard of Review

Prohibitory Injunctions, like the one sought by the Arc, are aimed at “preserving the *status quo* so that the court can render a meaningful decision after a trial on the merits.” *Rum Creek Coal Sales, Inc. v. Caperton, et al.*, 926 F.2d 353, 359 (4<sup>th</sup> Cir. 1991). To that end, the Fourth Circuit has held “where serious issues are before the court, it is a sound idea to maintain the *status quo ante litem*.” *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 194-195 (4<sup>th</sup> Cir. 1976).

*Blackwelder* sets out the four factors a Court must consider when reviewing a Motion for a Preliminary Injunction:

- (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
  - (2) the likelihood of irreparable harm to the defendant if the requested relief is granted;
  - (3) the likelihood that the plaintiff will succeed on the merits; and
  - (4) the public interest
- Blackwelder*, 550 F.2d at 195-196.

The Court should first compare the harms suffered by the parties. If the “balance is struck in favor of the plaintiff,” the Court should grant the Motion if “grave or serious questions are presented.” Otherwise, the Court should grant the Motion if the plaintiff has shown a “likelihood of success” on the merits. *Id.* at 196.

B. The Arc's Motion Satisfies the *Blackwelder* Criteria and Should be Granted.

1. The Arc will suffer irreparable harm if its Motion is denied.

Both the Arc and its members will suffer irreparable harm if this Motion is denied. If Defendants are permitted to implement their plan and build a segregated institution, Arc members living at SEVTC or at risk of being admitted to SEVTC will face the imminent threat of "unjustified institutional isolation," in violation of their ADA and Section 504 rights. *See, e.g., Olmstead*, 527 U.S. at 600. As the Fourth Circuit has held, "a constitutional or federal statutory violation creates a special harm." *Rum Creek*, 926 F.2d at 361.

Similarly, as shall be seen in section 2, below, Defendants will suffer little or no harm if this Motion is granted. Therefore, this Court should be more likely to find that the Arc will suffer irreparable harm if its Motion is denied. *Blackwelder*, 550 F.2d at 196 ("the decision to grant preliminary relief cannot be intelligently made unless the trial court knows how much the precaution will cost the defendant. If it costs very little, the trial court should be more apt to decide that the threatened injury is "irreparable" for purposes of interlocutory relief.").

a. Arc members will suffer irreparable harm if this Motion is denied.

It is undeniable that a state-sponsored study found that each and every SEVTC resident, necessarily including the Arc members at SEVTC, can be served in the community. Exhibit D. Therefore, SEVTC residents forced to live in the new segregated institution, by definition, will suffer irreparable harm because they will not be served in the most integrated setting consistent with his or her needs in violation of their rights under the ADA and Section 504. *See*, 28 C.F.R. § 35.130(d) (ADA), 28 C.F.R. § 41.51 (Section 504). As the Commissioner has admitted, Defendants have not yet determined which SEVTC residents will be placed in the new

institution. Exhibit E. Therefore, all SEVTC residents have a real, imminent and equal chance of being unnecessarily institutionalized, in violation of their federal rights.<sup>3</sup>

As set forth in section 4, below, this threat of unnecessary institutionalization violates the ADA and Section 504 rights of the Arc members at SEVTC, including their right to be served in the “most integrated setting.” The *Olmstead* Court aptly describes the irreparable harm people with disabilities suffer when they can live in the community but are forced to live in institutions: a life that is “severely diminished” in areas including “family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment.” 527 U.S. at 600. For these, among other, reasons, the Court concluded that “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Id.*

Arc members forced to live in the new segregated institution will also suffer the “special harm” of additional violations of their rights under the ADA and Section 504. While 75 SEVTC residents will be placed in the segregated institution, all other SEVTC residents will be placed in the more integrated, community based ICF-MRs and MR Homes called for by Budget Bill Item 103.05(A)(3).

However, as a DBHDS representative stated, there is “very little” to no difference between the service needs of the residents who will be placed in the institution and those who

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<sup>3</sup> If Defendants argue that this case is not ripe because they have not finally selected the SEVTC residents who will be placed in the new institution, that argument is without merit. “One does not have to await the consummation of threatened injury to obtain preventative relief.” *Friends of the Earth v. Gaston Cooper Recycling Corp.*, 204 F.3d 149, 160 (4<sup>th</sup> Cir. 2000) (citations omitted). Furthermore, because the Arc seeks to prevent Defendants from constructing a new building, it must do so with “haste and dispatch.” *Quince Orchard Valley Citizens Association, Inc. v. Hodel, et al.*, 872 F.2d 75, 80 (4<sup>th</sup> Cir. 1989). If the Arc were to wait to file suit until the new segregated institution was completed and the people forced to live in it were chosen, it could harm the Defendants and the taxpaying citizens of the Commonwealth by causing costly “disruptions of ongoing public planning and construction.” *Id.* By taking action now, based upon the very real threat of institutionalization facing its members, the Arc is attempting to minimize the harm to the people it represents and to the Commonwealth.

will live in community-based settings. Trosclair Affidavit, ¶ 47. Therefore, Defendants' plan creates an unlawful disparity in services between those residents, including Arc members, who will be forced to live in the segregated institution and those that will be permitted to live in the community settings. This disparity irreparably harms those SEVTC residents, including Arc members, in violation of their rights under the ADA and Section 504. *See*, 28 C.F.R. § 35.130(b)(1)-(8) (detailing prohibited acts of discrimination under the ADA, including "Provid[ing] different or separate aids, benefits, or services than is provided to others when such action is not necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others."); 29 U.S.C. § 794 (detailing prohibited acts of discrimination under Section 504).

b. The Arc itself will suffer irreparable harm if this Motion is denied.

In addition, the Arc, as an entity, will suffer irreparable harm if its Motion is denied. As is more fully described in the Trosclair Affidavit, the Arc has been forced to divert staff and monetary resources from previously planned projects and actions in order to oppose the Defendants' plan and Budget Bill Item 103.05(A)(1). This diversion of resources, and concomitant reduction of other work, will continue if this Motion is denied. The Fourth Circuit has held that organizations suffer irreparable harm when they "devote[] significant resources identifying and counteracting the defendant's . . . discriminatory . . . practices." *Coles v. Havens Realty Corporation, et al.*, 633 F.2d. 384, 390 (4<sup>th</sup> Cir. 1980) *affirmed sub nom Havens Realty Corporation, et al. v. Coleman*, 455 U.S. 363 (1982).

As set forth in the Trosclair Affidavit, the Arc has taken specific steps to oppose Defendants' plan and Budget Bill item 103.05(A)(1). To do so, the Arc has expended resources to advocate to the SEVTC Advisory Council that a segregated institution should not be built; to

form a new chapter to serve members and other people in or at risk of being admitted to SEVTC; to issue oral and written statements opposing the new institution; and to advocate to policymakers, including some of the Defendants, that a segregated institution should not be built; Trosclair Affidavit, ¶¶ 59-64.

So that it could take these steps, the Arc has diverted resources from previously planned advocacy work including advocating for an end to the waiting list for Medicaid services for its members; educating policymakers about issues important to its members; and upgrading its internet site to provide more information to its members. Trosclair Affidavit, ¶¶ 59-64. If this Motion is denied, the Arc will be forced to continue diverting its scarce resources in order to educate its members and other residents about their right to live in the most integrated setting, as opposed to the new institution, and to advocate that those residents should not be among the 75 placed in the new institution. Trosclair Affidavit, ¶¶ 59-64.

Consequently, "there can be no question" that Arc has and will be irreparably harmed if Defendants are permitted to implement their plan to build and fully populate a new segregated institution. "Such concrete and demonstrable injury to the organization's activities - with the consequent drain on the organization's resources - constituted far more than simply a setback to the organizations social interests." *Havens Realty*, 455 U.S. at 379. Unless this Court grants the Arc's Motion, these injuries, which affect people with intellectual disabilities and the Arc's efforts on their behalf, will continue throughout the pendency of this action.

2. Defendants will not suffer irreparable harm if the Arc's Motion is granted.

The Defendants will suffer little or no harm if the Arc's Motion is granted. At worst, the Defendants will have to delay spending \$23,768,000.00 of taxpayer funds on a new segregated institution. Given that the Defendants intend to build the new segregated institution on the

SEVTC compound, they will not incur any financial harm from the delay because they already own the property that is the intended site of the construction. Similarly, this delay will not harm anyone at SEVTC - SEVTC residents can remain at SEVTC or be discharged through DBHDS' normal process. Finally, Defendants will also be able to build or acquire the community ICF-MRs and MR Waiver homes called for by Budget Bill Item 103.05(A)(3) because the Arc is not seeking an Injunction preventing the Defendants from expanding community housing for SEVTC residents.

Indeed, Defendants and the citizens of this Commonwealth face a far greater threat of harm if this Court denies the Arc's Motion and the Arc subsequently prevails at trial. In that instance, Defendants will spend millions of taxpayer dollars to begin building the institution only to have the work stopped - and the money wasted - when the Court finds for the Arc on the merits. *See, e.g., Pacific Gas and Electric v. State Energy Resources Conservation Development Commission*, 461 U.S. 190, 201 (1983) (allowing a state agency to build a new facility without knowing if it would later be Ordered to stop construction "would pose a palpable and considerable hardship" on the agency "and may ultimately work harm on the citizens .").

If Defendants argue that granting the Arc's Motion will harm them by impairing their ability to enter into or fulfill a contract with one of the corporations bidding to build the new segregated institution, such an argument is without merit. First, an Injunction forbidding Defendants from entering into or complying with such a contract will protect Defendants from any claim by the bidders. "After all, the defendants could hardly be punished for complying with a federal Court Order." *Wisconsin Coalition for Advocacy, Inc. v. Czaplewski*, 131 F.Supp.2d 1039, 1052 (D.Wis. 2001).

Second, and more importantly, while Defendants certainly have a right to contract, they do not have a right to enter into contracts that violate federal law. *See, e.g., Ewing v. National Airport Corporation*, 115 F.2d 859, 860 (4<sup>th</sup> Cir. 1940) (“no court will lend its assistance in anyway toward carrying out the terms of an illegal contract.”). Therefore, they will not be harmed if this Court prevents them from doing so.

3. The balance of hardships favors of the Arc. Therefore, the Arc need only show “grave or serious questions” in order to prevail in this Motion.

Based on the above, the balance of “the probable irreparable injury to [the Arc] without a decree and of likely harm to [Defendants] with a decree . . . is struck in favor of the plaintiff.” *Blackwelder*, 550 F.2d at 196. Therefore, in order to prevail on its Motion, the Arc need not show that it is likely to succeed on the merits of its case. Rather, “it is enough that grave or serious questions are presented.” *Id.*

“Grave or serious questions” are present when “resolution is not immediately apparent. That is enough to say that [plaintiffs] have not embarked on frivolous litigation and thus interlocutory relief is not improper if [plaintiffs] can show a need for protection which outweighs any probable injury (to the defendant).” *Blackwelder*, 550 F.2d at 195-196 (quoting *West Virginia Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (1971)). *See, also, Bernhardt v. Los Angeles County*, 339 F.3d 920, 926-927 (9<sup>th</sup> Cir. 2003) (“serious questions are those which cannot be resolved one way or the other at the hearing on the injunction; they need not promise a certainty of success nor even present a probability of success.”) (internal punctuation and citation omitted).



4. The Arc presents “grave and serious questions” and/or is likely to succeed on the merits.

The Arc presents “grave and serious questions” and, to the extent it is required to do so, establishes that it is likely to succeed on the merits of this action. The Arc is prosecuting this case on behalf of its members, alleging that Defendants have violated its members’ rights, and in its own right, alleging that Defendants’ plan and Budget Bill Item 103.05(A)(1), as passed or as implemented by Defendants’ plan, violate and are preempted by federal law.<sup>4</sup> In each instance, the Arc can more than meet the *Blackwelder* standard.

- a. On behalf of its members, the Arc presents “grave and serious questions” and/or is likely to succeed on the merits.

The Arc’s cause of action on behalf of its members raises “grave and serious questions for litigation” that merit this Court entering an Injunction “preserving the *status quo* so that the court can render a meaningful decision after a trial on the merits.” *Rum Creek*, 926 F.2d at 359. The Arc asks this Court to enter a Declaratory Judgment that Defendants’ plan and/or Budget Bill Item 103.05(A)(1) violate or unlawfully threaten Arc members’ rights under the ADA and

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<sup>4</sup> It is worth noting that this Court need not find that Budget Bill Item 103.05(A)(1), as passed, violates or is preempted by the ADA or Section 504 in order to grant the Arc’s Motion or rule in the Arc’s favor on the merits. The Budget Bill does not specifically call for the creation of a segregated institution, stating only that a “facility” should be built. A “facility” can be many things: for example, the current SEVTC is a “facility” made up of several buildings spread out over a large area. The “facility” called for in Budget Bill Item 103.05(A)(1) could just as easily be several buildings spread out over a large area located in a neighborhood or other community setting, as required by the ADA and Section 504. Only Defendants’ plan to implement the Budget Bill Item specifically calls for the construction of a segregated institution. Hence, this Court can hold that it is Defendants’ plan and the way it implements the Budget Bill Item that violates and is preempted by federal law - *i.e.* that the Budget Bill Item is unconstitutional “as applied” rather than as written. *See, Anderson v. Babb*, 632 F.2d 300, 308 (4<sup>th</sup> Cir. 1980) (“a court should avoid, if possible, that construction of a statute that would result in its constitutional invalidation.”) (citing *Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962)).

Section 504. The Arc also asks for Preliminary and Permanent Injunctions prohibiting Defendants' from implementing their plan to build and fully populate the segregated institution.

In this Motion, the Arc asks that the Court enter a Preliminary Injunction prohibiting Defendants from implementing their plan to build and fully populate a segregated institution. Given Congress' finding that people with disabilities are often unjustly or unnecessarily institutionalized, 42 U.S.C. § 12101(a)(3), and the *Olmstead* Court's determination that "unjust institutionalized isolation . . . is a form of discrimination," 527 U.S. at 600, the Arc's case and Motion raise "serious, substantial and worthy issues for litigation." *Rum Creek*, 926 F.2d at 366.

In addition, the Arc is more than likely to prevail on the merits of this action. Under the ADA and Section 504, the Arc members in or at risk of being admitted to SEVTC, like all SEVTC residents, have a right to receive services "in the most integrated setting" appropriate to their needs. *See*, 28 C.F.R. § 35.130(d) (ADA); 28 C.F.R. § 41.51 (Section 504). Therefore, Defendants must make an individualized assessment to determine what services they need and which, if any, require services in a segregated institution. *See e.g.*, United States Department of Justice Commentary to 28 C.F.R. § 35.130 (Under the ADA, "public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals can or cannot do."); *See, also, PGA Tour v. Martin*, 532 U.S. 661 (2001) (Under the ADA, "an individualized inquiry must be made to determine" whether a particular person requires a particular service); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (Section 504 requires an individualized inquiry into a person with a disabilities need for services).

Defendants' plan and Budget Bill 103.05(A)(1), to the extent it requires such a plan, do the very thing forbidden by the ADA and Section 504: they predetermine that 75 SEVTC

residents will live in a new segregated institution - based not on the individual needs of those residents, but on their desire to fully populate the 75-bed institution they want to build. This scheme not only flies in the face of the ADA<sup>5</sup> and Section 504, but is diametrically opposed to a state-sponsored survey finding that all SEVTC residents can be served in the community.

Exhibit D.

Even the Defendants seem to realize the wrong-headedness of their plan and the Budget Bill Item. For example, the Governor stated that SEVTC residents “don’t need to be institutionalized” and admitted that he the other Defendants do not possess any studies or individualized assessments showing that SEVTC residents require services in a new segregated institution. Exhibit F. Similarly, the Commissioner publicly admitted that the 75-bed census for the new institution was not based on any “science or study” while his Deputy publicly stated that it was “arbitrary” and not based on the individual needs of SEVTC residents. Trosclair Affidavit at ¶¶ 33, 53-54.

To make matters worse for the 75 people forced to live in the new segregated institution, the Defendants intend to provide services to the remaining SEVTC residents in more integrated settings such as the community ICF-MRs and MR Homes provided for by Budget Bill Item 103.05(A)(3). However, as DBHDS personnel have admitted, that there will be “very little” or no difference between the service needs of the people forced to live in the institution and those who will be discharged to more integrated settings. Trosclair Affidavit, ¶ 47.

As a result, Defendants’ plan and Budget Bill Item 103.05(A)(1), to the extent it requires such a plan, create an unlawful disparity in treatment between the SEVTC residents who will be forced to live in the segregated institution and those permitted to live in the community ICF-MRs

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<sup>5</sup> In fact, the *Olmstead* Court held that a state violates the ADA when it has a plan “controlled by the state’s endeavors to keep its institutions fully populated.” 527 U.S. at 605-606.

and MR Homes. This disparity violates the ADA rights of the SEVTC residents who will be institutionalized by:

- (i) Denying them appropriate, individualized assessments to determine their needs - including which, if any, require services in a new segregated institution that cannot be provided in more integrated, community-based settings - before deciding to build and place them in a new, segregated institution;
  - (ii) Denying them the opportunity to participate in or benefit from an aid, benefit, or service including, but not limited to, services in a more integrated, community-based setting;
  - (iii) Affording them an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
  - (iv) Providing them with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
  - (v) Providing them with different or separate aids, benefits, or services than is provided to others when such action is not necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;
  - (vi) Otherwise limiting them in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service;
  - (vii) Utilizing criteria or methods of administration that have the effect of subjecting them to discrimination on the basis of disability; and
  - (viii) Imposing or applying eligibility criteria that screen out or tend to screen them out from fully and equally enjoying any service, program, or activity, without showing that such criteria can be shown to be necessary for the provision of the service, program, or activity being offered; and.
  - (ix) Denying them a full and equal opportunity to interact with nondisabled people due to the segregated and restricted nature of the new institution.
- See, e.g., 28 C.F.R. § 35.130(b) (detailing prohibited acts of discrimination under the ADA).*

By the same token, Defendants' plan and Budget Bill Item 103.05(A)(1) violate the Section 504 rights of the SEVTC residents who will be institutionalized by:

- (i) Denying them appropriate, individualized assessments to determine their needs - including which, if any, require services in a new segregated institution that cannot be provided in more integrated, community-based settings - before deciding to build and place them in a new, segregated institution;
- (ii) Excluding them, solely by reason of their disabilities, from services provided to others in a program receiving federal financial assistance including, but not limited to, services and treatment provided in more integrated, community-based settings;
- (iii) Denying them, solely by reason of their disabilities, the benefits of services provided to others in a program receiving federal financial assistance; and
- (iv) Subjecting them, solely by reason of their disabilities, to discrimination under a program receiving federal financial assistance.
- (v) Denying them a full and equal opportunity to interact with nondisabled people due to the segregated and restricted nature of the new institution. *See, e.g., 29 U.S.C. 794* (detailing prohibited acts of discrimination under Section 504).

- b. On its own behalf, the Arc presents "grave and serious questions" and/or is likely to succeed on the merits.

The Arc's cause of action on its own behalf also raises "grave and serious questions." That action asks this Court to enter a Declaratory Judgment that Defendants' plan and Budget Bill Item 103.05(A)(1), as passed or as implemented by Defendants' plan, violate and are preempted by the ADA and Section 504. The Arc also asks the Court to enter Preliminary and Permanent Injunctions forbidding Defendants from implementing their plan and building a segregated institution.

Specifically, the Arc alleges that Defendants' plan and/or the Budget Bill stand as an obstacle to the accomplishment of the full purposes and objectives of the ADA and Section 504,

including, but not limited to, the objective of ensuring that people with disabilities receive services in the most integrated setting appropriate to their needs. Consequently, they are preempted by the ADA and Section 504, pursuant to the Supremacy Clause of the Constitution of the United States. U.S. Const. art. VI, cl. 2. *See, e.g., Verizon Maryland v. Public Ser. Comm'n of Md.*, 535 U.S. 635, 642-646 (2002) (discussing preemption); *Equal Access Educ. v. Merten*, 305 F.Supp.2d 585, 601 (E.D.Va. 2004) (“In assessing a Supremacy Clause challenge... courts must determine whether a particular state law or action is preempted by the Constitution itself or by a federal statute or regulation.”).

It is undeniable that Congress and the Supreme Court - in the ADA, Section 504 and *Olmstead* - identified a statutory right to be free from “unjustified institutional isolation.” Therefore, the Arc’s cause of action and this Motion, which allege that the Defendants’ plan and Budget Bill Item 103.05(A)(1) violate and are preempted by that right, raise “serious, substantial, and worthy issues for litigation.” *Rum Creek*, 926 F.2d at 366.<sup>6</sup>

In addition, the Arc is likely to prevail on its Supremacy Clause challenge to Defendants’ plan and Budget Bill 103.05(A)(1). The Supremacy Clause “provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land.” *Merten*, 305 F.Supp. 2d at 601. Therefore, any state law, policy or action “however clearly within a State’s acknowledged power, which interferes with or is contrary to a federal law, must yield.” *Id.* (citing and quoting *Gade v. Nat’l Solid Wastes Management Assoc.*, 505 U.S. 88, 108 (1992)); *See, also, Bernhardt v. Los Angeles County*, 339 F.3d 920, 929 (9<sup>th</sup> Cir. 2003) (government policy conflicting with federal law is preempted and unconstitutional).

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<sup>6</sup> Indeed, *Rum Creek* itself dealt with a Motion for a Preliminary Injunction raising a Supremacy Clause challenge to state action. There, the Fourth Circuit held that the Plaintiff’s challenge presented “grave or serious questions for litigation” and, accordingly, held that the Plaintiff’s Motion for a Preliminary Injunction should have been granted. *Id.* at 363.

Defendants' plan and Budget Bill Item 103.05(A)(1), to the extent it requires such a plan, are preempted because they "stand as an obstacle" to accomplishing the purposes and objectives of the ADA and Section 504. *See, e.g., Brinn v. Tidewater Transportation District Commission*, 42 F.3d 227, 232-233 (4th Cir. 2001). When Congress passed the ADA, it found that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." 42 U.S.C. 12101(a)(3). Congress stated that the purpose of the ADA is to "invoke the sweep of congressional authority . . . to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

Defendants' plan and the Budget Bill Item are diametrically opposed to this purpose because, rather than addressing and decreasing unnecessary institutionalization, they increase it. As the Governor stated and the state-sponsored study found, not one SEVTC resident "needs" to be in an institution – and if no SEVTC resident "needs" services in an institution, it is a violation of the ADA and Section 504 to force them to live in a new segregated institution. Nevertheless, the plan and Item mandate that 75 residents be chosen to live in the new segregated institution, in an open-ended state of "unjustified institutional isolation."

Moreover, the Defendants' plan and the Budget Bill Item require this result without conducting appropriate individualized assessments to determine the true needs of SEVTC residents, in direct conflict with the ADA and Section 504's purpose of requiring individualized assessments of people with disabilities before making such decisions. *See, Commentary to 28 C.F.R. § 35.130* ("public entities are required to ensure that their actions are based on facts applicable to individuals"); *PGA Tour v. Martin*, 532 U.S. 661 (2001) (Under the ADA, "an individualized inquiry must be made to determine" whether a particular person requires a particular service); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987)

(Under Section 504, recipients of federal funding must make individualized inquiries into the needs of people with disabilities when making decisions or taking actions impacting those needs). As the Commissioner and his Deputy stated, the 75-bed census for the new segregated institution is “arbitrary,” not based on any “science or study,” and not “related to the needs of SEVTC residents.” Trosclair Affidavit, ¶¶ 33, 53-55.

Similarly, Defendants’ plan and Budget Bill Item 103.05(A)(1) “stand as an obstacle” to the ADA and Section 504’s purpose of ensuring that people with disabilities receive services in the “most integrated setting” appropriate to their needs. 28 C.F.R. § 35.130(d) (ADA); 28 C.F.R. § 41.51 (Section 504). Under the express terms of Defendants’ plan, 75 SEVTC residents must now live in the new segregated institution – no matter what the “most integrated setting” for them may be.

Finally, the Defendants’ Plan and Budget Bill Item 103.05(A)(1) create an unlawful disparity in treatment between the SEVTC residents who will be forced to live in the segregated institution and those that will be discharged to community-based settings, in contravention of the purpose of the ADA and Section 504, which require equal treatment for people with disabilities. Even though a DBHDS representative stated that there is “very little” or no difference between the service needs of the two groups, Trosclair Affidavit, ¶ 47, the Defendants’ plan and Budget Bill Item allow one group to live in the “most integrated setting” while the other is forced to live in the segregated institution.

5. The public interest will be served by granting the Arc’s Motion.

Finally, if this Court grants the Arc’s Motion it will serve the public’s interest in “the full participation of the disabled in the economic, social and recreational life of the community.”

*Martin v. Metropolitan Atlanta Rapid Transit Authority*, 225 F. Supp. 2d 1362, 1383 (N.D. Ga



2002). It will also serve the public's interest, as identified by Congress and the Supreme Court, in reducing unnecessary institutionalization of people with disabilities. 42 U.S.C. 12101(a)(3); *Olmstead*.

Moreover, as the *Blackwelder* Court held, the “public interest is further enhanced where, as here, the private controversy may possibly vindicate public policy.” 550 F.2d at 197. Here, the Arc's Motion, like its Complaint, seeks to vindicate the policies underlying the ADA, Section 504 and *Olmstead* against the Defendants' attempt to require institutionalization of people who do not, or at worst may not, require it. For that reason, “the presence of a federal statute both prohibiting the alleged acts of the defendant and supplying the gravamen of the complaint aligns [the Arc] . . . on the side of the public interest.” *Id.*

### III. CONCLUSION

For the reasons set forth above, the Arc respectfully requests that this Court:

1. Grant its Motion and enter a Preliminary Injunction prohibiting Defendants from implementing their plan and from building a new segregated institution;
2. Grant its Motion and enter a Preliminary Injunction prohibiting the Defendants from otherwise implementing Budget Bill Item 103.05(A)(1);
3. Grant the Arc its attorneys' fees and costs, to the extent permitted by law; and
4. Grant it such other and further relief that to this Court seems just and proper.

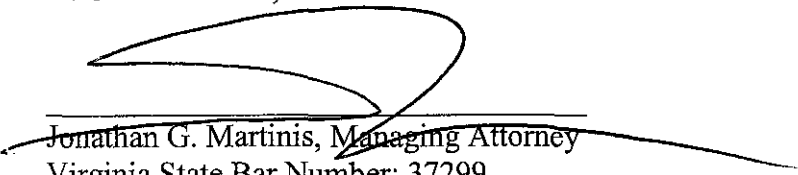
Dated: 27 October 2009

Respectfully Submitted:

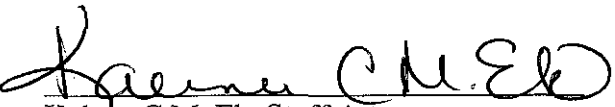
The Arc of Virginia, Inc.  
by counsel

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## **EXHIBIT A**

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

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THE ARC OF VIRGINIA, INC.,	:	
	:	
Plaintiff,	:	AFFIDAVIT
v.	:	
	:	Case No.:
TIMOTHY M. Kaine, in his official capacity	:	
as Governor of the Commonwealth of Virginia,	:	
<i>et al.</i> ,	:	
	:	
Defendants.	:	

**AFFIDAVIT OF MARK STEVENS, IN SUPPORT OF PLAINTIFF'S**  
**MOTION FOR A PRELIMINARY INJUNCTION**

1. My name is Mark Stevens. I am a resident and domiciliary of the Commonwealth of Virginia.
2. I am employed as a Disability Rights Advocate by the Virginia Office for Protection and Advocacy. I have been so employed since September of 2006.
3. My office address is 1910 Byrd Avenue, Suite 5, Richmond, VA 23230
4. I offer this affidavit in support of Plaintiff's Motion for a Preliminary Injunction.
5. As part of my job, I provide information and referral, investigation and advocacy services to residents of Southeastern Virginia Training Center (SEVTC). I visit SEVTC approximately two times per month. I last visited SEVTC on September 14, 2009. I am next scheduled to visit SEVTC on October 27, 2009.
6. As a result, I am familiar with SEVTC and its compound.
7. As a part of my job, I am also required to review SEVTC policies. As a result, I am familiar with many of those policies.

8. SEVTC is located on a 120 acre compound in an isolated section of Chesapeake, Virginia.
9. One can only enter SEVTC by car by turning off of Military Highway 13 onto Smith Avenue and then snaking through an industrial office park.
10. As I drive down Smith Avenue to enter SEVTC this way, I am confronted by signs saying "No Trespassing."
11. The SEVTC compound is further segregated, on all sides, from the community at large.
12. SEVTC is segregated from the residential community on its Eastern border by a long trench, that I estimate to be a quarter mile long, five feet wide and two feet deep. Where the trench ends, SEVTC is segregated from that community by a fence that I estimate to be six feet high. It is also segregated from that community by multiple "No Trespassing" signs. All of the "No Trespassing" signs face the community, which I believe would give a community member the feeling that he or she is not welcome at SEVTC.
13. The SEVTC compound is segregated from the industrial park along its Northern border by "No Trespassing" signs.
14. The SEVTC compound is segregated from the community along its Southern border by Interstate 64.
15. The SEVTC compound is segregated from the business development along its Western border by a fence that I estimate to be six feet high.
16. If people who wish to visit the compound can get past these boundaries, SEVTC policy then requires them to report to SEVTC's main office to request admission.


17. Under its visitation policy, SEVTC can deny access to the compound, at its discretion, to any person or organization that does not have a statutory right to be there. This is true even if the SEVTC resident they wish to meet has never been declared incompetent and, in some circumstances, even if the resident has stated he or she wants to meet with that person or organization. *See*, SEVTC Instruction Number 2130, attached and made a part of this Affidavit as Exhibit A .
18. I believe that SEVTC has used this authority to restrict its residents' contacts with organizations it presumably does not approve of.
19. For example, when the Arc formed a new chapter to advocate for the rights of its members and other SEVTC residents, its self-advocate visited SEVTC to give residents information about the Arc and about their rights. I accompanied the self advocate on this visit.
20. The Director of SEVTC, Robert D. Shrewsberry, Ph.D., responded by telling me that the Arc was not allowed to provide brochures or other literature or to solicit membership at SEVTC.
21. This was surprising to me because SEVTC allows members of other groups to visit the compound, solicit membership at SEVTC and conduct meetings on the compound. SEVTC even provides advertising for one such group, known as "Parents and Friends of SEVTC."
22. I asked Dr. Shrewsberry why SEVTC provides support to that group but refused to let the Arc have similar access to the SEVTC compound. He replied in a letter, "we see [Parents and Friends of SEVTC] as having a direct interest in the operation of the

Center. The Arc does not enjoy such status." A copy of Dr. Shrewsberry's letter is attached and made a part of this Affidavit as Exhibit B.

23. SEVTC also restricts residents' rights to travel off of the compound and interact with nondisabled people.

24. Under SEVTC policy, it can, in its discretion, determine that a resident is not "competent" to leave the compound - even if that resident has never been adjudicated by a Court or given a legal guardian. See, SEVTC Instruction Number 2060, attached and made a part of this Affidavit as Exhibit C.

25. I swear that the foregoing, consisting of twenty-five (25) paragraphs, including this one, is true and accurate to the best of my knowledge.

  
Mark Stevens

10/24/09  
DATE

COMMONWEALTH OF VIRGINIA  
CITY OF RICHMOND

Sworn to before me this 26 day of October, 2009.

  
Notary Public

10/26/2009  
Date

Notary Number: 352272

My commission expires: February 29, 2012

## **EXHIBIT A**



**SOUTHEASTERN VIRGINIA TRAINING CENTER  
Chesapeake, Virginia**

**September 26, 2008**

**SEVTC INSTRUCTION NUMBER 2130**

**SUBJECT: On-Grounds Visitors**

**1. Purpose:**

To maintain policies and procedures regarding on-grounds visitors for residents and employees.

**2. Applicability:**

All SEVTC Employees

**3. Reference:**

Rules And Regulations To Assure The Rights Of Individuals Receiving Services From Providers Licensed, Funded Or Operated By The Department Of Mental Health, Mental Retardation And Substance Abuse Services .

**4. General:**

It is essential that a cordial ~~business-like atmosphere~~ be maintained throughout the Center, and particularly at the Reception Office, where visitors are received and greeted. All visitors are asked to check-in at the Reception Office unless indicated otherwise in this instruction.

The Virginia Human Rights regulations guarantee individuals the right to have or refuse visitors. 12 VAC 35-115-50 C 8. This right may be restricted by the individual, or under circumstances specified in the regulations 12 VAC 35-115-50.C 8 a,b. An individual's visitation may be limited when, in the judgment of a licensed professional(physician, licensed clinical psychologist, licensed clinical social worker) the visits may result in demonstrable harm to the individual or negatively impact the individual's treatment; or when the visitors are suspected of bringing contraband or are threatening harm to the individual in any other way. The merits of such requests will be discussed with the individual by the director or his designee and the human rights advocate will be informed of the reasons for any restriction prior to implementation. The restriction shall be reviewed by the Interdisciplinary Team on a monthly basis and documented in the individual service record. The individual always has the right to refuse visitors. The guardian, AR, and the resident will be asked to complete the Visitor Authorization form (SEVTC 57A) on admission and it will be reviewed at the time of the annual review for any changes with the guardian/AR and resident by the social worker., The Visitor Authorization form can be updated at any time changes are indicated. ~~If there are discrepancies between the resident's wishes and the AR/guardian, the advocate will be notified by the social worker.~~

## SEVTC INSTRUCTION NUMBER 2130

Page 2

### 5. Visitors for Staff Members:

- A. Employees may have visitors as permitted by the policies and procedures of their work area and individual supervisors. Employees are responsible for compliance with the instructions of supervisors and with all written policies and procedures regarding visitation. ~~Employees may not have visitors in residential cottages without the specific approval of a supervisor.~~
- B. The Reception Office will assist visitors as necessary. When an individual comes to the Reception office to visit an employee, the clerk will notify the employee. The Reception Clerk will follow the staff member's instructions in directing the visitors.
- C. Employees are expected to guide visitors in compliance with Center policies and procedures. Any visitor who fails to comply with Center policies and procedures or who behaves in a disruptive or inappropriate manner will be asked to leave.
- D. Former employees who have left employment with the agency involuntarily are not permitted on SEVTC grounds without the expressed consent of the Facility Director.

### 6. Visitors for Residents:

The following procedures will be utilized when someone's parent/relative, visitor, friend, or volunteer presents himself/herself, requesting a pass to visit a resident on-campus. **If the visitor is unfamiliar to the Reception Clerk, the visitor must be asked to present identification.**

- A. If a volunteer is on-campus for a SEVTC sanctioned group activity (for example, a party that a volunteer is assisting with), an on-grounds pass is not necessary. However, if a volunteer is on-grounds to visit with a specific individual, then an on-grounds pass is to be obtained prior to the visit and the steps listed below must be followed.
- B. Once the visitor presents to the Reception Office, the Reception Clerk will ask the visitor to wait, preferably in the lobby, while they confirm the individual resides here, if there are any visitor restrictions, and a resident visitation form is completed prior to preparing and issuing the on-grounds visit form.
- C. **If the individual resides here, has no restrictions, and the visitor is on the list,** the clerk will notify the cottage to which the person resides of the visitor's name and the name of the person that they are requesting to visit to see if the resident would like to visit with them. If they want to visit, the Reception Clerk will prepare SEVTC Form No. 47, including the authorizing staff's name, position title, and the Reception Clerk's signature. The Reception Office will retain the copy of the two part form and forward the original with the visitor to the cottage. The visitor will present the on-grounds pass to the cottage staff, who will record the visit in the ID notes of the Resident Record and then the pass is to be destroyed. If the resident does not want to visit at that time the visitor will be notified.

**SEVTC INSTRUCTION NUMBER 2130**

**Page 3**

**If the visitor is not on the visitor authorization list for the person,** no information may be released to the visitor—including the fact that the person lives at SEVTC. The Reception Clerk should ask the visitor to continue to wait in the lobby and determine if the person has any restrictions in place and whether they have been determined to have the capacity to disclose confidential information. If he/she does have capacity, the Reception Clerk should contact the cottage the individual resides in and see if the person would like to visit and proceed according to his or her wishes. If the individual has been determined not to have capacity to disclose protected health information (name and location) the Social Worker must be contacted. The Social Worker must contact the AR/guardian to determine if the information may be disclosed to the visitor. If allowed to disclose the information the Form SEVTC 57A should be updated and signed and the person should be contacted to see if he or she would like to visit. If a social worker is not available, the Reception Clerk will offer to have the social worker contact the visitor as soon as possible. If the visitor is not satisfied with these steps, the Reception Clerk may contact the team leader, assistant program manager, shift supervisor, supervisor-on-call, or Assistant Director, Residential Services or Director to talk with the visitor.

Based upon the supervisor's judgment and without confirming that the resident resides at SEVTC, the supervisor may:

- A. Again inform the visitor that the visit cannot be permitted and offer to have a social worker contact the visitor as soon as possible; or,
- B. Contact the AR/guardian and determine whether he or she will authorize the disclosure of protected health information (name and location). The supervisor may request that the AR talk with the visitor. If disclosure is authorized the SEVTC 57A must be updated and signed. The resident will be contacted to determine if he/she would like to visit with the visitor.
- C. If, at any time, a staff member questions the safety or well-being of the person during a visit, the above procedures should not prohibit staff from stopping, intervening, or requesting a supervised visit. A licensed professional (physician, licensed clinical psychologist, licensed clinical social worker) and the advocate should be notified as soon as possible of the restriction request so that proper procedures concerning restrictions can be followed.

**7. Originator:**

Resident Records Director

**8. Recision:**

**SEVTC INSTRUCTION NUMBER 2130**

**Page 4**

SEVTC Instruction Number 2130, July 6, 2007

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Robert D. Shrewsberry, Ph.D.  
Director

Distribution: A, B, D, E, F  
Resident Records

Computer Network File: i:\sevtc\inst2130

## **EXHIBIT B**



## COMMONWEALTH of VIRGINIA

2100 Stepplegate Square  
Chesapeake, Virginia 23320-2591  
(757) 424-8240 Voice  
(757) 424-8380 TDD  
(757) 424-8348 FAX  
[www.sevtc.dbhhs.virginia.gov](http://www.sevtc.dbhhs.virginia.gov)

*Department of Behavioral Health  
and Developmental Services*

Robert D. Shrewsbury, Ph.D.  
Director

SOUTHEASTERN VIRGINIA TRAINING CENTER

September 29, 2009

Mark Stevens  
Disability Rights Advocate  
Virginia Office for Protection and Advocacy  
1910 Byrd Avenue, Suite 5  
Richmond, VA 23230

Dear Mr. Stevens,

I want to clarify what I said to you on the phone yesterday regarding your contact with [REDACTED]. I did not say that the Center did not allow taxi cabs on the campus. I don't recall having said anything remotely close to such a statement. We have staff and relatives arriving in taxi cabs quite frequently.

As to whether visitors are allowed on the campus, we do require that all be registered at the reception office as a security measure, and we maintain a list of people whom the authorized representatives or guardians have approved to visit their relative. It is our policy to inform AR's and guardians of any visitors who may wish to visit one of the residents.

The self-advocate, Ms. Olson, was not challenged because she was with you and I was informed by the Attorney General's office that it was permitted. What is not permitted is for her to solicit residents or staff by passing out literature as she was observed to be doing. As to our hosting the SEVTC Parent and Friends on our website we see them has having a direct interest in the operation of the Center. The ARC does not enjoy such status.

I have sent Ms. Trosclair an e-mail regarding the self advocate and the interaction with [REDACTED] as the father asked me to do.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Shrewsbury".  
Robert D. Shrewsbury, Ph.D.  
Director

## **EXHIBIT C**

**SOUTHEASTERN VIRGINIA TRAINING CENTER**  
**Chesapeake, Virginia**

**July 11, 2008**

**SEVTC INSTRUCTION NUMBER 2060**

**SUBJECT: Off Grounds Visit Pass**

**1. Purpose:**

To prescribe policies and procedures to be followed when a resident will be away from SEVTC campus for a period of time less than 24 hours.

**2. Applicability:**

All SEVTC Employees

**3. General:**

It is essential that a cordial business like atmosphere be maintained throughout the Center, and particularly at the Reception/Information Office, where most visitors are received and greeted.

In accordance with HIPAA Regulations, no information may be disclosed (including the admission and location of the resident) without authorization from a resident with capacity to consent to release of protected health information or guardian/AR with the exception of disclosure for treatment, payment, healthcare operations and other exceptions as indicated in the regulation. To ensure confidentiality is maintained, all residents in coordination with their AR/guardian will be required to complete a Visitor Authorization Form (Form 57A) on admission, which authorizes disclosure of their presence and location at SEVTC.

The Virginia Human Rights regulations guarantee residents the right to visit with others of their choosing (12 VAC 35-115-100.A.1.b). This right may be restricted by the resident, or under circumstances specified in the regulations (12 VAC 35-115-50.C.8), by the Center. An individual's visitation may be limited when, in the judgment of a licensed physician or doctoral level psychologist, the visits result in demonstrable harm to the individual and sympathy impacts the individual's treatment; or when the visitors are suspected of bringing contraband or in any other way are threatening harm to the individual. Occasionally, parents or other interested parties request that the Center place restrictions on visitation rights. The merits of such requests will be considered by the resident or, the Center Director, as applicable. The Director will determine whether the request is consistent with facility policy and human rights regulations and act accordingly.

Authorization from the guardian/AR must be obtained for **off campus** visitation for all residents unless they are considered competent. This will be obtained using Form 57A-SEVTC Visitor Authorization.



**SEVTC INSTRUCTION NUMBER 2060**

**Page 2**

If a resident lacks capacity to consent to the release of protected health information, is not competent and/or does not have an authorized representative or guardian, the Interdisciplinary Team and the resident shall meet and complete the SEVTC Visitor Authorization Form 57A, using its knowledge of past visiting for residents and others as they deem appropriate and not harmful to the residents well being. The Social Worker shall forward the completed form to Resident Records, who will then distribute it to the Reception Office and to the cottage.

**4. Off Grounds Visit:**

An off grounds visit pass is an authorized pass, without a staff escort, which generally occurs during the day but does not extend to overnight (DI 105).

**5. Procedures:**

If a resident's parent/relative, visitor, friend, or volunteer, presents himself/herself, requesting permission to take a resident off campus, on a day pass, the following procedures will be applied:

- A. If the requester is unfamiliar to the reception clerk, the requester will be asked to present identification.
- B. The reception clerk will check the resident's Visitor Authorization Form 57A for all authorized visitors and authorized off campus visits prior to preparing and issuing the off-campus pass.
- C. If **authorized**, the reception clerk will prepare SEVTC Form No. 75, Off-Grounds Pass. The form will include the name of the cottage staff, Team Leader, or the Shift Supervisor who authorized the leave, the signature of the reception clerk who released the pass, and the signature of the person taking the resident off campus. The OTC nurse will request the pass and pull the medications prepared by the pharmacy. An extra set of medication labels will be in the medication bag. The OTC staff will review the medication container with the medication labels for accuracy and apply the labels to the medication section of the pass. If treatments/supplies need to be picked up from the cottage, the OTC nurse will place those labels in that section of the pass to inform the staff of the specific items to give to the AR/Visitor. Once completed, the OTC staff will have the AR/Visitor sign the pass. Once signed, the OTC STAFF will place the original pass on the Risk Manager clip board and give a copy of the pass to the AR/Visitor. The AR/Visitor will take the copy of the pass to the cottage. Cottage staff will check the pass and provide the indicated items. Cottage staff will document in the record the time the visit begins and ends. If no medications/supplies are needed, Reception staff will check the no column for LOA medication and mark through the remainder of the pass. The AR/Visitor will sign only the signature of Escort section if no medications/supplies are needed.
- D. The Team Leader/cottage staff should notify the Reception Office in advance of any scheduled resident off-campus visits. The AR/guardian/family

**SEVTC INSTRUCTION NUMBER 2060**

**Page 3**

member may also call the Reception Office in advance to request that a pass be prepared.

E. A staff member (**on duty**) requesting to take a resident(s) off-campus must request an Off-Grounds Pass and sign as the escort. Staff members will document medication administration in the "medication passport" and staff member will apply the labels to the medication passport. Medication labels will not need to be applied to the off grounds pass.

F. **If the visit is not authorized or restrictions are indicated**, the requester will be informed accordingly and referred to the Team Leader, Social Worker or Shift Supervisor. The Team Leader/Social Worker/Shift Supervisor should notify the requester that the AR will be contacted by the Social Worker of the visitor's request and will take appropriate measures if authorized for future requests.

6. The Social Worker will review the authorized visitors and off campus authorization at the time of the annual review with the resident and AR for any changes or updates to the list. Changes will be sent to Resident Records once updated.

7. **Medical Emergencies (Off-Campus Visits):**

In case of a medical emergency, the resident should be returned to SEVTC or, if that is not possible, taken to the closest emergency room with notification to SEVTC as soon as possible.

8. **Originator:**

Resident Records Director

9. **Recision:**

SEVTC Instruction Number 2060, dated November 22, 2006

---

Robert D. Shrewsberry, Ph.D.  
Director

Distribution: A, B, F,  
M: Resident Records (5)  
Social Workers (4)  
Joanne Houck

Computer Network File: i:\sevtc\inst2060

## **EXHIBIT B**

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

---

THE ARC OF VIRGINIA, INC.,	:	
	:	
Plaintiff,	:	AFFIDAVIT
v.	:	
	:	Case No.:
TIMOTHY M. Kaine, in his official capacity :	:	
as Governor of the Commonwealth of Virginia, :	:	
<i>et al.</i> ,	:	
	:	
Defendants.	:	

**AFFIDAVIT OF JAMIE TROSCLAIR, IN SUPPORT OF PLAINTIFF'S**  
**MOTION FOR A PRELIMINARY INJUNCTION**

1. My name is Jamie Trosclair. I am a resident and domiciliary of the Commonwealth of Virginia.
2. I offer this Affidavit in Support of Plaintiff's Motion for Preliminary Injunction.
3. I am the Executive Director of the Arc of Virginia, Inc. The Arc's offices are located at 2025 East Main Street, Suite 107, Richmond, Virginia 23223.

The Arc

4. The Arc of Virginia, Inc. ("the Arc"), is a not-for-profit corporation. The Arc is the Virginia state Chapter of The Arc of the United States, the world's largest community-based organization of and for people with intellectual and developmental disabilities. Along with the Arc of the United States and its over 780 state and local chapters, we are devoted to promoting and improving supports and services for all people with intellectual and developmental disabilities.

5. The Arc's membership is comprised of people with intellectual disabilities, people with developmental disabilities, their family members other concerned citizens.
6. The Arc is governed by a Board of Directors, three of whom are people with intellectual disabilities. The Arc's Board of Directors meets at least four times each year.
7. Each local chapter has a representative on the Board. Local chapter representatives are selected by the local chapter's Board of Directors, many of which have members with intellectual disabilities. Each local chapter's Board is elected by its members.
8. The Arc's Mission Statement is "The Arc of Virginia advocates for the rights and full participation of all children and adults with intellectual and developmental disabilities. Together with our network of members and affiliated chapters, we improve systems of supports and services; connect families; inspire communities and influence public policy."
9. To fulfill our mission, we engage in activities including, but not limited to: advocating for changes to law and public policy to benefit people with intellectual and developmental disabilities; organizing and collaborating with individuals and organizations that advocate for changes to law and public policy to benefit people with intellectual and developmental disabilities; providing information to people with intellectual and developmental disabilities, their families and advocates about important issues; providing training for people with intellectual and developmental disabilities to become self-advocates for issues important to them; providing information to the public, government and policymakers about issues that are important to people with intellectual and developmental disabilities; and holding an annual conference bringing together people with intellectual and developmental disabilities, family members, advocates and

policymakers from across the state to discuss and influence issue important to our members and other people with intellectual and developmental disabilities.

10. In the recent past, we have focused our efforts on advocating for the end of the waiting list for Medicaid Waiver services for our members and other people with intellectual and developmental disabilities. We have also advocated for the retention and/or restoration of services that had been affected by state budget cuts. We have also advocated for increased community housing for our members and other people with intellectual and developmental disabilities. This year, we also planned to upgrade our internet so that we can provide more information and resources to our members, people with intellectual and developmental disabilities, family members, advocates and policymakers.
11. There are Arc members living at SEVTC.
12. There are also Arc members at risk of being admitted to SEVTC. These members are on the Commonwealth's waiting list for Medicaid services. Each of them has been found, by representatives of the Commonwealth, to meet the criteria for institutionalization. Some have been found at "urgent" need of services in order to avoid institutionalization. If these individuals do not receive community-based services, they are at risk of being institutionalized and admitted to SEVTC.

Facts Leading Up to this Action

13. We were excited when Governor Kaine, in his proposed budget for 2010, proposed closing SEVTC. We agree with Governor Kaine's comments that SEVTC residents do not need to be institutionalized and the money spent to operate SEVTC should be spent providing community based services for people with intellectual disabilities. We did, along with other advocates, contact the Governor with concerns about the speed with which he intended to close SEVTC, but fully supported his intention to close that institution.
14. We advocated that the General Assembly approve and implement the closure of SEVTC.
15. We were disappointed when the General Assembly proposed building a new "facility" to replace SEVTC. We advocated to support closure of the institution and opposed the creation of a new institution in its place. In doing so, we diverted resources from our work advocating for the end of the waiting list, opposing and preventing reductions in service for our members due to budget cuts; and advocating for increased community housing. We also deferred work upgrading our internet site, which would have provided more information and resources for our members, people with intellectual and developmental disabilities, their family members, advocates and policymakers.
16. We were pleased that our advocacy on behalf of our members and other people with intellectual and developmental disabilities led to us being included on the SEVTC Advisory Committee created and chaired by the Department of Mental Health, Mental Retardation and Substance Abuse Services ("DMHMRSAS," now known as the Department of Behavioral Health and Developmental Services ("DBHDS")).
17. Although we had to reduce our other work to do so, we took part in SEVTC Advisory

Committee meetings, expending staff and monetary resources. We have consistently opposed, as members of the Committee, the creation of a new segregated institution to serve SEVTC residents.

18. So that we can serve SEVTC residents better, and advocate that they be served in the most integrated setting consistent with their needs, we initiated efforts to form a new Arc chapter in Tidewater to serve Chesapeake, Virginia, where SEVTC is located. This Chapter also will serve people at risk of being admitted to SEVTC and other people with intellectual and developmental disabilities in the area.

19. Forming the new Chapter required us to expend and divert additional resources, and decrease our other advocacy work accordingly. We are continuing to divert resources to organize and support the new Chapter.

20. So that we could better understand the issues facing SEVTC residents, and to help them know their rights, our self advocate toured SEVTC, giving information about the Arc to SEVTC residents. We offered Arc membership to residents who expressed an interest in our work.

21. Nine SEVTC residents asked to become Arc members, and have been granted membership in the Arc. We waived the membership fee for them because we did not want put a financial burden on them for joining the Arc. One has since withdrawn her membership. Therefore, there are currently eight members of the Arc living at SEVTC.

22. After our second trip to SEVTC, we were informed by SEVTC Director Dr. Shrewsberry that we were not permitted to give written information to SEVTC residents or to solicit membership at SEVTC.

23. Being essentially barred from going to the SEVTC compound to give information to our



members and other SEVTC residents is very troubling to us because we believe it violates the rights of our members and of other SEVTC residents. Also, we know that other organizations are given access to the compound and SEVTC residents. For example, we know that one group, known as SEVTC Parents and Friends, is even allowed to meet on the SEVTC compound and that SEVTC provides advertising for it.

24. I have reviewed a letter where Dr. Shrewsberry defends this unequal treatment by saying "we see [Parents and Friends] as having a direct interest in the operation of the Center. The Arc does not enjoy such status."

25. Needless to say, this was very disappointing to us because we have an interest in SEVTC's operation insofar as it affects our members who are SEVTC residents. Also, we have an interest in advocating for the rights of each and every SEVTC resident, including their right to be served in the most integrated setting appropriate to their needs.

26. I have reviewed the state-sponsored study of SEVTC residents that concluded that they all "Can Be Served in the Community," confirming the Governor's belief that SEVTC residents "don't need to be institutionalized."

27. After we reviewed the study, our President, Howard Cullum, wrote the Governor on behalf of the Arc and our members, asking him to defer construction on the new institution so that he could review the study and its recommendations. A copy of the letter, dated June 29, 2009, is attached to and made a part of this Affidavit as Exhibit A.

28. On or about July 9, 2009, the Secretary Marilyn Tavenner responded on behalf of the Governor. She stated that the Governor would not delay building the new institution. A copy of the letter is attached to and made a part of this Affidavit as Exhibit B.

29. On August 13, 2009, I attended and participated in a meeting of the SEVTC Advisory

Committee. At that meeting, the Commissioner Reinhard announced the Defendants' plan for implementing Budget Bill Item 103.05(A)(1) and took questions about it.

30. Approximately 50 other people attended the meeting and heard the Commissioner discuss the plan.

31. The Commissioner stated that under Defendants' plan, a 75-bed institution will be built by DBHD and DGS.

32. The Commissioner was asked how the 75-bed number was determined.

33. The Commissioner responded that the 75-bed number was not the product of any "science or study."

34. The Commissioner said that, in order to find 75 people to live in the new institution, all SEVTC residents will be evaluated using a number of factors.

35. He stated that 65 residents would be placed in the new institution while the other 10 beds would be used by SEVTC residents who were either transitioning to or from community placements. .

36. The Commissioner was asked if the process would result in the 65 residents who score the "lowest" being put in the new institution.

37. The Commissioner agreed that the process would be carried out in that way.

38. We were especially concerned by this answer, because the evaluation and factors the Commissioner discussed did not appear to be related to whether a person actually requires institutionalization in a segregated facility. For example, one of the factors was whether a person had limited use of their upper and lower extremities. This was disconcerting because there are many people with intellectual and developmental disabilities who also have quadriplegia and live successfully in community settings.

39. We were further concerned because the Commissioner flatly stated that DBHDS would not use the Supports Intensity Scale (SIS) to determine whether any SEVTC residents would be put in the new institution. This was especially troubling to me because SIS is a nationally recognized assessment tool to determine people's needs for support and services.
40. The Commissioner indicated that, after 75 SEVTC residents were chosen to live in the new institution, the remaining SEVTC residents would live in the community ICF/MR and MR Home placements called for in the budget.
41. The Commissioner stated that the community ICF/MRs would provide the same level and type of care as the new institution.
42. I also attended a meeting of the SEVTC Advisory Committee on September 24, 2009.
43. Approximately 50 other people attended the meeting.
44. At that meeting, DBHDS gave an update on the selection process.
45. The DBHDS representative repeated that SEVTC residents would be evaluated and the ones that score the "lowest" will be placed in the new institution.
46. The DBHDS representative also said that the new institution would be built on the SEVTC compound. He stated that DBHDS and DGS had received bids from two firms to construct the new facility. He said that each bid called for construction on the SEVTC compound. He stated that a contract with a bidder would be signed in December of 2009 and that construction was scheduled to begin in August of 2010.
47. In response to a question, the DBHDS representative stated that there would be "very little" to no difference between the needs of people who would be placed in the new institution and the needs of the people put in the community-based placements.

48. On October 13, 2009, I attended a meeting of Virginia's Community Integration Advisory Committee.
49. Approximately 15 other people attended the meeting.
50. At the meeting, DBHDS' Deputy Commissioner, Heidi Dix, gave a presentation on Defendants' plan to build a new institution.
51. After her presentation, she was asked why the new institution would have 75 beds.
52. Deputy Commissioner Dix said that DBHDS had "the same question."
53. Deputy Commissioner Dix said that the 75-bed number seemed "arbitrary" to DBHDS.
54. Deputy Commissioner Dix said that the 75-bed number was not based on the actual needs of SEVTC residents.
55. Deputy Commissioner Dix stated that a member of the Virginia General Assembly told her "off the record" that the number was based on the number of beds in Saint Mary's, an institution for children. She said that the General Assembly member told her that 75-beds seemed like "a nice round number."
56. On October 14, 2009, we had our attorneys send a letter to the Defendants giving them notice that we believe that their plan and Budget Bill Item 103.05(A)(1) violate federal law and the rights of our members. We told them that we would file a Complaint in Federal Court if we could not resolve this matter on or before October 26, 2009.
57. On October 21, 2009, our attorneys met with representatives of the Defendants. We were unable to resolve this matter. We offered to have another meeting but did not receive a response.

The Arc's Actions to Oppose the Defendants' Plan and Budget Bill Item 103.05(A)(1)

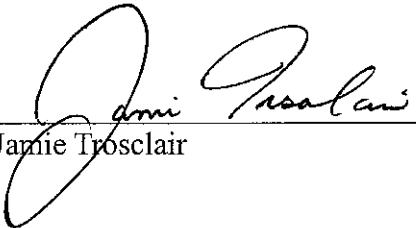
58. We have opposed the Defendants' plan to build a new institution and Budget Bill Item 103.05(A)(1) since we first learned of them.
59. We have diverted resources from our other work in order to oppose the plan and Budget Bill Item. Our work to oppose the plan and Item has included, but is not limited to: advocating to the SEVTC Advisory Committee that a segregated institution should not be built; forming a new chapter to serve people in or at risk of being admitted to SEVTC; engaging in advocacy designed to prevent Defendants from building the new institution; issuing public statements, orally and in writing, opposing the construction of a new segregated institution; meeting with SEVTC residents who are Arc members; meeting with family members of SEVTC; and meeting with policymakers, including some of the Defendants, to educate them about the rights of Arc members and other people with intellectual disabilities to live in the most integrated setting and to urge them not to build a new segregated institution.
60. The work we have done to oppose the plan and Budget Bill has resulted in us having less staff and monetary resources to do work we planned to do this year. As a result, we have not been able to accomplish all of our goals for this year and have done less advocating on other issues important to our members and other people with intellectual and developmental disabilities.
61. For example, we have done less advocating for the reduction or elimination of the waiting list for Medicaid services for our members and other people with intellectual and developmental disabilities. We have done less advocating for the retention or restoration of services to our members and other people with intellectual and developmental

disabilities; less advocating for and monitoring of the development of community housing for our members and other people with intellectual and developmental disabilities. We have also been unable to upgrade our internet site, because of our decreased resources. We had intended to improve the site so that it could provide more and more useful information to our members and their families, as well as other people with intellectual disabilities, their advocates and policymakers.

62. If Defendants are allowed to implement their plan and build a new institution, we will be forced to continue to divert our resources in order to provide advocacy and services to residents of the new institution and those at risk of being placed in the new institution. This is especially true because we understand that the SEVTC process is or will serve as a "template" for the rebuilding of other institutions. I have been told that Northern Virginia Training Center (NVTC) is already developing plans for a rebuilding project.
63. We hope that, if Defendants are permitted to implement their plan and build a new institution, our work will minimize the damages that the new institution will cause. We hope to educate our members and residents about their right to live in most integrated setting and to advocate for this right for themselves. We intend to advocate for our members to be discharged from the institution and into more integrated, community based settings. We intend to educate the public, including employees of DBHDS and the new institution, about the benefits to our members and to the community at large if our members can live in community settings.
64. However, this work will further lessen the resources we have to do other work, including our advocacy to end the waiting list; our defending of existing community-based services from budget cuts; and our advocacy for more community housing. In preparation of

having to divert resources, we have already indefinitely deferred the work on upgrading our internet site.

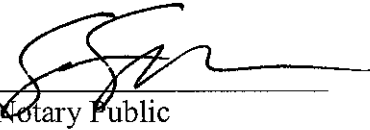
65. I swear that the foregoing, consisting of sixty-five (65) paragraphs, including this one, is true and accurate to the best of my knowledge.

  
\_\_\_\_\_  
Jamie Trosclair

10/26/09  
DATE

COMMONWEALTH OF VIRGINIA  
CITY OF RICHMOND

Sworn to before me this 26 day of October, 2009.

  
\_\_\_\_\_  
Notary Public

10/26/2009  
Date

Notary Number: 352272

My commission expires: February 29, 2012

## **EXHIBIT A**



# The Arc

## The Arc of Virginia

*Advocating for people with intellectual and developmental disabilities and their families*

### *Officers*

*Howard Cullum, President  
Sue Sargeant, President-Elect  
Amy Yarcich, Vice President  
Barbara Barrett, Secretary  
Jeannia Cummins, Treasurer  
Nita Grignol, Past-President*

### *Local Chapters*

*The Arc of Augusta  
The Arc of Central Virginia  
Danville Arc  
The Arc of Eastern Shore  
The Arc of Halifax  
Hanover Arc  
The Arc of Harrisonburg/Rockingham  
The Arc of Loudoun County  
The Arc of Loudoun County  
The Arc of Northern Shenandoah Valley  
The Arc of Northern Virginia  
The Arc of Virginia Peninsula  
The Arc of the Piedmont  
The Arc of Greater Prince William  
The Arc of Rappahannock  
The Greater Richmond Arc  
The Arc of Greater Roanoke Valley  
The Arc of Rockbridge  
Smyth County Arc  
The Arc of Warren County  
The Arc of Greater Williamsburg*

June 29, 2009

The Honorable Timothy M. Kaine  
Patrick Henry Building, 3rd Floor  
1111 East Broad Street  
Richmond, Virginia 23219

Re: Southeastern Virginia Training Center

Dear Governor Kaine:

The Arc of Virginia requests that you take the necessary actions to defer the rebuilding of the proposed 75-bed facility at the Southeastern Virginia Training Center (SEVTC) in Chesapeake. The Arc's call for a deferral of the 75-bed facility is based on the just released detailed study of the needs of current SEVTC residents. The study concluded that all SEVTC residents could be served in small, community settings.

These study results represent important new information that was not available when you and the General Assembly approved the 75-bed rebuild plan. The Arc believes the study results demand our Commonwealth step back and review how Virginia will meet the needs of its citizens with intellectual disabilities.

As you know, the 2009 session's final state budget included funding to replace the SEVTC's current facility, now at a census of 156, with a 75-bed replacement at the Chesapeake site along with a series of small community homes. The community homes would be scattered throughout the Tidewater and Peninsula areas to serve residents with intellectual disabilities who would be discharged from SEVTC over the next year.

Your Administration has been undertaking a systematic process to implement the 75-bed facility rebuild and has made a significant effort to include all parties impacted in this planning process. However, in light of the Human Services Research Institute (HSRI) findings it would appear prudent from a public policy, fiscal and legal standpoint to step back and review the on-site 75-bed rebuild approach (nothing in the HSRI study suggests a delay of capital investments to community-housing).

HSRI is a nationally recognized research group with broad expertise in intellectual and developmental disabilities. It compared SEVTC residents with

The Arc of Virginia  
Letter to Governor Kaine

June 29, 2009  
Page 2 of 2

persons now being served by Virginia's community waiver program. The comparison used an assessment instrument called the Supports Intensity Scale (SIS). The SIS is a widely used method of determining how much support persons with intellectual disabilities require in terms of activities of daily living (dressing, eating, bathing, etc.) as well as their medical and behavioral needs.

In view of the Olmstead decision direction, of the higher cost of institutional care, and of the MR waiver wait list that has now grown to 4,800 persons, The Arc believes it would be a policy mistake and fiscal folly to build a 75 bed state institution for persons who can be successfully served in the community. We ask you to initiate the necessary actions with the legislature to defer the rebuild concept at SEVTC.

Thank you,



Howard Cullum  
President, The Arc of Virginia

CC: The Honorable Lacey Putney, Chairman, House Appropriations Committee  
The Honorable Charles Colgan, Chairman, Senate Finance Committee  
The Honorable Marilyn Tavenner, Secretary of Health and Human Resources  
The Honorable Viola Baskerville, Secretary of Administration  
Commissioner James Reinhard, Department of Behavioral Health and Developmental Services  
Mr. Richard Sliwoski, Director, Department of General Services  
Mr. Mark Rubin, Counselor to the Governor  
Mr. Stephen Harms, Deputy Chief of Staff, Office of the Governor

## **EXHIBIT B**



## COMMONWEALTH of VIRGINIA

Office of the Governor

Marilyn B. Tavenner  
Secretary of Health and Human Resources

July 9, 2009

Mr. Howard Cullum, President  
The Arc of Virginia  
2025 East Main Street, Suite 107  
Richmond, Virginia 23223

Dear Mr. Cullum:

This is in reply to your letter to Governor Kaine requesting that he act to defer rebuilding the proposed 75-bed facility at the Southeastern Virginia Training Center (SEVTC) in Chesapeake. You have cited the findings of the HSRI report on the results of the Supports Intensity Scale comparisons of residents at SEVTC and a sample of individuals living in community settings.

While we know that the Home and Community Based Medicaid Waiver is serving some individuals with high needs, we are also very much aware that there is a requirement to offer a choice of environments to individuals who qualify for ICF/MR. Many Virginians still choose the ICF/MR as the best place to meet their needs as opposed to the community waiver. The General Assembly has acted, and post-session, members and staff have affirmed that they want us to build a 75-bed facility. We have received a proposal to build multiple cottages with 75 beds on a campus-like setting at the current site. We have no authority to delay or change this project.

I appreciate your advocacy on behalf of the individuals in Virginia with intellectual disabilities. We look forward to continuing our work with you as we struggle to meet the needs of Virginia's citizens.

Sincerely,

A handwritten signature in cursive script that reads "Marilyn B. Tavenner".

Marilyn B. Tavenner

MBT/clp

## **EXHIBIT C**

[pdf view](#)

Department of Mental Health, Mental Retardation and Substance Abuse Services (720)

103.05 (language only)

*A. Notwithstanding any other provision of law, the following provisions shall be implemented:*

*1. The Department of General Services (DGS), with the cooperation and support of the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), shall rebuild and resize the Southeastern Virginia Training Center to a 75-bed facility to serve profound and severely disabled clients;*

*2. The Director, Department of Planning and Budget, shall transfer \$23,768,000 of the amount appropriated in Chapter 1 and Chapter 2, 2008 Acts of Assembly, Special Session I for project 17458 (Repair/Replace Southeastern Virginia Training Center) for the purpose stated in paragraph A.1. of this item;*

*3. The Department of General Services, with the cooperation and support of the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), shall build, acquire, or renovate 12 community-based Intermediate Care Facilities (ICF-MR) and 6 MR Homes in Health Planning Region V. Priority should be given to projects which can be completed on existing state-owned property within Health Planning Region V;*

*4. The Director, Department of Planning and Budget shall transfer \$8,438,160 of the amount appropriated in Chapter 1 and Chapter 2, 2008 Acts of Assembly, Special Session I for project 17457, (Repair/Replace Central Virginia Training Center) for the purpose stated in paragraph A.3. of this item.*

*5. Of the remaining appropriation in Chapter 1 and Chapter 2, 2008 Acts of Assembly, Special Session I for project 17457, (Repair/Replace Central Virginia Training Center), \$10,061,840 is designated for project 17733, (Construction of Community Housing for Central Virginia).*

*6. The Governor, the Director, Department of Planning and Budget and the Director, Department of General Services, shall suspend the regular capital outlay process and initiate an expedited, fast track capital outlay process to ensure the timely availability of both the rebuilt and resized Southeastern Virginia Training Center and the 12 community-based Intermediate Care Facilities (ICF-MR) and 6 Mental Retardation Homes in Health Planning Region V. The Governor's expedited process shall be submitted to the Chairmen of the House Appropriations and Senate Finance Committees for approval by July 15, 2009.*

*B. The Department of General Services (DGS), with the cooperation and support of the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), shall examine the potential uses for the Southeastern Virginia Training Center property and report on such uses to Chairmen of the House Appropriations and Senate Finance Committees by November 1, 2009.*

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## **EXHIBIT D**



# INFORMATION BRIEF

## Virginia SIS Comparisons for SEVTC and Comprehensive Community Waiver Populations

June 23, 2009

### Prepared by:

Jon Fortune Ed.D. & Karen J. Auerbach Ph.D.  
Human Services Research Institute  
Developmental Services  
7420 SW Bridgeport Road (#210)  
Developmental Services  
Portland, OR 97224

### On Behalf of:

C. Lee Price, Director  
Office of

The Department of Behavioral Health and

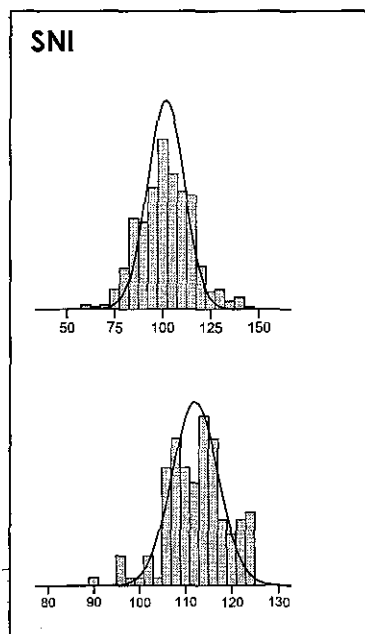
PO Box 1707  
Richmond, VA 23218-1797

### Introduction

Virginia has used the Supports Intensity Scale (SIS) for years to write better individual service plans for people in the community and to describe the support needs of the individuals being served. In this HSRI Information Brief the results from the SIS assessments are described and compared for individuals from Southeastern Virginia Training Center (SEVTC) and individuals being served statewide by the state's comprehensive waiver.

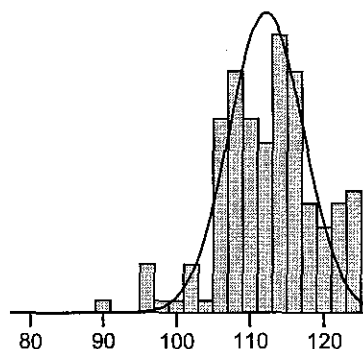
### Results – 1. All Individuals Can Be Served in the Community

Overall, the 156 people at SEVTC and a sample group of 521 people in the Virginia comprehensive waiver have SIS results that can be easily compared. One main conclusion is that these individuals with developmental disabilities are all clinically eligible for Medicaid and each person can be served by the Virginia community comprehensive waiver. The Virginia community ranges of scores for (1) the SIS Support Needs Index (SNI), (2) the sum of Section 1 ABE standard scores (A is Home Living Activities, B is Community Living Activities, and E is Health and Safety Activities) capturing key support needs, (3) the total Medical problems, and (4) the total Behavioral problems for the individuals in the community encompass the range of scores for all of the people at SEVTC. This means that there are people being successfully served with community who are like the people facing these challenges at SEVTC.





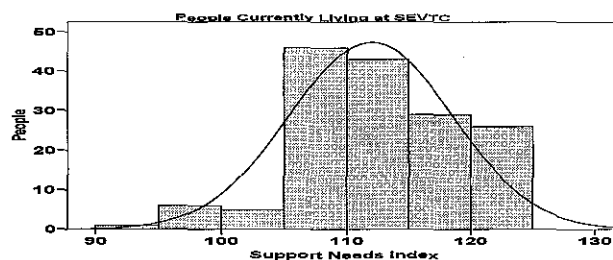
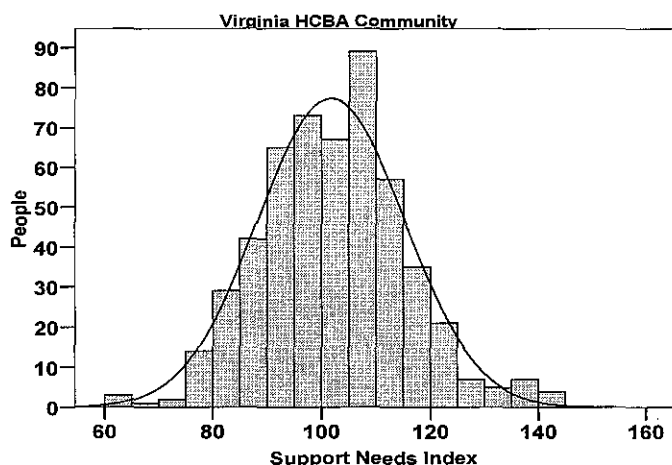
## Comparison of Virginia SIS Results for SEVTC and the Comprehensive Waiver



The 521 people being served in the community include people with the same support needs, behavioral challenges, and medical problems -

Community	Minimum	Maximum
ABE	12	52
Medical	0	22
Behavior	0	20
SNI	60	143
<b>SEVTC</b>		
ABE	27	42
Medical	0	22
Behavior	0	20
SNI	90	124

as the 156 people living at  
**Results - 2. People Currently Living at SEVTC have Considerable Needs for Support**



The 156 individuals currently living at the SEVTC have considerable needs for support and are depicted on the graph on the right. Though smaller than the sample group from the community, the 156 people from SEVTC have a higher need for general support needs that staff members, family, and friends can help with. They have statistically higher needs in the key areas of Home Living Activities, Community Living Activities, and Health and Safety Activities and more medical problems than the community sample. The behavioral problems measured by the SIS are statistically the same for the community sample and the people currently living at SEVTC. In the following summary table the SIS results for people from SEVTC represent the greatest needs of all the various comparison groups offered.

**SIS Norm Group and State Waiver SIS Results**

Group or State	People	Total Support	ABE	Medical	Behavioral
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## Comparison of Virginia SIS Results for SEVTC and the Comprehensive Waiver

		<b>Needs Index</b> (Range 38-143)	<b>Support Needs</b> (8-52)	<b>Support</b> (Range 0-32)	<b>Support</b> (Range 0-26)
SIS Norms	1,306	100.00	30.00	2.47	4.99
<b>SE Virginia Training Center (SEVTC)</b>	<b>156</b>	<b>111.96</b>	<b>35.37</b>	<b>6.32</b>	<b>5.25</b>
Sample from the Central Virginia Training Center	75	108.95	34.73	3.72	3.80
<b>Comprehensive Adult HCBS Waivers</b>					
<b>Virginia Waiver</b>	<b>521</b>	<b>101.74</b>	<b>30.56</b>	<b>2.43</b>	<b>4.77</b>
Oregon	401	101.00	29.95	3.27	4.98
Colorado	3,631	99.88	29.14	2.83	6.13
Georgia	5,206	98.20	28.72	1.95	3.79
Nebraska	288	100.42	30.11	3.23	4.81
Utah	3,759	100.09	29.96	2.29	4.36

## Comparison of Virginia SIS Results for SEVTC and the Comprehensive Waiver

### Technical Notes

The SIS Support Needs Index (SNI) is an IQ like score representing support needs with an average of 100 and a standard deviation of 15. The sum of Section 1 ABE standard scores capturing key support needs is normed with the combined standard score of 30. The total Medical problems and total Behavioral problems are weighted-counts of the challenges people face in those important areas. The following tables provide more detailed comparisons of the SIS results from people at SEVTC and people using the Virginia community comprehensive waiver.

The range of these four SIS scores for the SEVTC institution group break into 3 roughly equal groups and the majority of scores of individuals in the Community group also fall into these 3 groups. These findings indicate that there are people in the Community with the same challenges as those faced by the people at SEVTC.

### Support Needs Index Scores

<b>SNI SCORES</b>	90 to 108	109 to 114	115 to 124	TOTAL
Institution Group	30%	34%	36%	100%
Community Group	52%	15%	11%	78%

### Sum of Section 1 ABE Scores

<b>SUM ABE SCORES</b>	27 to 33	34 to 36	37 to 42	TOTAL
Institution Group	30%	31%	39%	100%
Community Group	42%	18%	10%	70%

### Section 3a Medical Scores

<b>MEDICAL SCORES</b>	0 to 2	3 to 7	8 to 22	TOTAL
Institution Group	28%	39%	33%	100%
Community Group	68%	26%	6%	100%

### Section 3b Behavioral Scores

<b>BEHAVIORAL SCORES</b>	0 to 2	3 to 7	8 to 20	TOTAL
Institution Group	35%	35%	30%	100%
Community Group	41%	36%	23%	100%

## Comparison of Virginia SIS Results for SEVTC and the Comprehensive Waiver

## Virginia Descriptive Statistics

Groups from Virginia		People	Minimum	Maximum	Average	Std. Deviation
community	Sum ABE Stand SUM of ABE Standard Score	521	12	52	30.56	6.406
	Section3aTotal Section 3a Medical Total	521	0	22	2.43	3.138
	Section3bTotal Section 3b Behavior Total	521	0	20	4.77	4.592
	Supports Needs Index	521	60	143	101.74	13.441
leaving institution	Sum ABE Stand SUM of ABE Standard Score	156	27	42	35.37	3.283
	Section3aTotal Section 3a Medical Total	156	0	22	6.32	5.284
	Section3bTotal Section 3b Behavior Total	156	0	20	5.27	4.697
	Support Needs Index	156	90	124	111.96	6.569

## Virginia Group Statistics

Groups from Virginia		People	Average	Std. Deviation	Std. Error Mean
Sum ABE Stand SUM of ABE Standard Score	community	521	30.56	6.406	.281
	leaving institution	156	35.37	3.283	.259
Section3aTotal	community	521	2.43	3.138	.137

## Comparison of Virginia SIS Results for SEVTC and the Comprehensive Waiver

	leaving institution	156	6.32	5.284	.425
Section3bTotal	community	521	4.77	4.592	.201
Section 3b Behavior Total	leaving institution	156	5.25	4.697	.378
Support Needs Index	community group	521	101.74	13.441	.589
	leaving institution	156	111.96	6.569	.519

## Virginia Independent Samples Test

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. 2-tailed	Mean Difference	Std. Error Difference	Lower	Upper
Sum ABE Stand SUM of ABE Standard Score	Equal variances assumed	48.888	.000	-9.109	674	.000	-4.862	.534	-5.909	-3.814
	Equal variances not assumed			-12.733	517.088	.000	-4.862	.382	-5.612	-4.111
Section3aT otal Section 3a Medical	Equal variances assumed	95.227	.000	-11.449	674	.000	-3.918	.342	-4.590	-3.246

## Comparison of Virginia SIS Results for SEVTC and the Comprehensive Waiver

	Equal variances not assumed			-8.774	187.33 4	.000	-3.918	.447	-4.799	-3.037
Section3b Total	Equal variances assumed	.508	.476	-1.191	674	.234	-.503	.423	-1.333	.326
Section 3b Behavior Total	Equal variances not assumed			-1.175	247.77 1	.241	-.503	.428	-1.346	.340
Support Needs Index	Equal variances assumed	63.371	.000	-9.246	674	.000	- 10.324	1.117	- 12.516	-8.131
	Equal variances not assumed			-13.152	540.38 2	.000	- 10.324	.785	- 11.866	-8.782

**Appendix: Validity Results of the SIS**

- ✓ Face Validity. Developed to measure the construct of supports, the SIS has greater face validity than the ICAP or other traditional assessments. The assessment of support needs using the SIS is done directly by persons with first-hand knowledge of the individual. The SIS directly measures the level of supports needed to enable an individual to participate successfully in the life of his or her community. It necessarily looks at more than skills and deficits, considering motivation, health, etiology, problem behavior, environment and other variables influencing the need for supports. By measuring individual support needs directly, it avoids the error inherent in inferring support needs statistically based on adaptive and maladaptive behavior scales. It is transparent. The SIS assessment of needed supports is more explicit and straightforward than other traditional instruments, and hence is a more open platform for the stakeholder deliberation and decision-making that attends individual resource allocation and payment processes. The SIS uses multi-point scales to rate the type (monitoring – full physical assistance), frequency (none to hourly) and intensity (no time to more than 4 hours in a 24 hour period) of supports needed by an individual to participate in 57 distinct aspects of life in their communities. Behavioral, health and other factors affecting support needs are considered.
- ✓ Content Validity. To assure its content validity, the SIS was constructs were tested by 74 professionals working in the field of developmental disabilities. Using a Q-sort methodology, they narrowed the 130 candidate support indicators to 57, and reduced the 12 domains containing these indicators to seven. This makes the instrument more concise while still

### Comparison of Virginia SIS Results for SEVTC and the Comprehensive Waiver

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asking the right questions. Efforts have been made to see the efficacy of the SIS in predicting extraordinary support needs (N=274)<sup>1</sup>.

- ✓ Internal Consistency. The SIS is internally consistent<sup>2</sup>. It has good inter-item reliability (all items or subscales in the measure are measuring the same construct). The internal consistency reliability coefficients for all the SIS subscales, computed using Cronbach's Alpha method<sup>3</sup>, exceeded .90, which is the level widely accepted as demonstrating an acceptable level of internal consistency in assessment scales. The SIS also has a high degree of inter-rater reliability<sup>4</sup>: the SIS Index (total score) correlation coefficient was .87 (same interviewer, different respondent), .90 (different interviewer, same respondents), and .85 (different interviewer and different respondents) (N=40).
- ✓ Construct and criterion validity. The high correlation of SIS subscale scores with one another shows that the SIS measure has good construct validity, meaning that scores on the SIS are highly correlated with scores on measures of other constructs (for example, adaptive behavior and intelligence) that are believed to be correlated with the construct measured by the SIS. To establish its criterion validity, the SIS measures of support needs were correlated with an independently constructed "criterion measure" - a Likert-type scale of support needs. All correlation coefficients exceeded the .35 minimum level required to demonstrate criterion-related validity<sup>5</sup>. Support for the construct validity of the Supports Intensity Scale based on clinician rankings of need (N=50) was explored in Ontario Canada in 2009.<sup>6</sup>

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<sup>1</sup> Wehmeyer, M., Chapman, T. E., Little, T.D., Thompson, J. R., Shalock, R., and Tassé, M. J. Efficacy of the Supports Intensity Scale (SIS) to Predict Extraordinary Support Needs. *American Journal of Intellectual and Developmental Disabilities*, 114(1), 3-14.

<sup>2</sup> Tassé, M. J. Thompson, J. R. & McLaughlin, C. (2006). *Inter-interviewer and inter-respondent concordance on the Supports Intensity Scale*. Poster presentation at the International Summit for the Alliance on Social Inclusion. May 3-5. Montreal, Canada.

<sup>3</sup> Cronbach, L.J. (1951). Coefficient alpha and the internal structure of tests. *Psychometrika*, 16(3), 297-334.

<sup>4</sup> Thompson, J. (Feb 21, 2006). SIS reliability: preliminary findings and procedures. Email from J. Thompson to J. Ashbaugh.

<sup>5</sup> Hammill, D.D., Brown, L., and Bryant, B.R. (1992). *A consumer guide to tests in print*. Austin, TX: Pro-Ed.

<sup>6</sup> Weiss, J. A., Lunskey, Y., Tassé, M. J., & Durbin, J. (2009). Support for the construct validity of the Supports Intensity Scale based on clinician rankings of need. *Research in Developmental Disabilities*, 30, 933-941.

## **EXHIBIT E**





## COMMONWEALTH of VIRGINIA

### DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

Post Office Box 1797  
Richmond, Virginia 23218-1797

JAMES S. REINHARD, M.D.  
COMMISSIONER

Telephone (804) 786-3921  
Voice/TDD (804) 371-8977  
[www.dbhds.virginia.gov](http://www.dbhds.virginia.gov)

July 6, 2009

Jonathan G. Martinis, Managing Attorney  
Virginia Office for Protection and Advocacy  
1910 Byrd Avenue, Suite 5  
Richmond, Virginia 23230

Dear Mr. Martinis:

I am responding to your information request submitted via facsimile on June 26, 2009. I trust my response finds you well, too. Your letter requested the following information:

[T]he committee agreed to the following wording for the first statement:

Provide services and supports for individuals who present complex medical and/or behavioral needs that cannot be met in traditional community homes, with goals and efforts to attain appropriate community services.

Will you please identify who these "individuals" are anticipated to be and from where they will come? In other words, will current SEVTC residents make up this group or will the "individuals" be drawn from other institutions/the community?

*The answer to this question is that the process for determining the identity of the individuals who will be offered SEVTC beds is currently under development. No one has yet been selected as a candidate for an SEVTC bed at this date.*

You asked us to provide you with a copy of the "purpose statement" discussed in the Summary. Attached is a copy of the statement "Future Role/Purpose of SEVTC."

Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "James Reinhard".

James S. Reinhard, M.D

### **SEVTC Advisory Committee – May 26, 2009**

Final Approved by Committee 5/26/09

#### **Future Role/Purpose of SEVTC**

- Provide services and supports for individuals who present complex medical and/or behavioral needs that cannot currently be met in traditional community homes, with goals and efforts to attain appropriate community services.
- Provide services and supports for individuals who present behavioral challenges that require short-term, intensive intervention to return to the community
- Provide services and supports for individuals that require short-term respite and/or stabilization
- Provide services and supports for individuals that require short-term medication stabilization
- Provide services and supports for facility and community residents through the Regional Community Support Center



# COMMONWEALTH of VIRGINIA

Toll Free Assistance  
1-800-552-3962  
(TTY or Voice)

Virginia Office for Protection and Advocacy  
1910 Byrd Avenue, Suite 5  
Richmond, VA 23230

(804) 225-2042  
FAX (804) 662-7057  
www.vopa.state.va.us

25 June 2009

Dr. James Reinhard, Commissioner  
Virginia Department of Mental Health, Mental Retardation  
And Substance Abuse Services  
1220 Bank Street  
Richmond, VA 23219

Dear Dr. Reinhard:

I hope this letter finds you well. I am writing to request information about the 75 bed institution your Department plans to build as a replacement for Southeastern Virginia Training Center (SEVTC).

I have reviewed the SEVTC Advisory Committee Meeting Summary for the May 26, 2009 meeting (copy attached). Page three of the Summary references the "Updated Statement on the Future Role/Purpose of SEVTC." The document states:

[T]he committee agreed to the following wording for the first statement:

Provide services and supports for individuals who present complex medical and/or behavioral needs that cannot be met in traditional community homes, with goals and efforts to attain appropriate community services.

Will you please identify who these "individuals" are anticipated to be and from where they will come? In other words, will current SEVTC residents make up this group or will the "individuals" be drawn from other institutions/the community? Finally, please provide me with a copy of the "purpose statement" discussed in the Summary. If the statement is only a draft, please so state.

Thank you for your courtesy and cooperation with regard to this matter. If you have any questions concerning this request, please feel free to contact me at (804) 662-7306.

Very truly yours,

Jonathan G. Martinis  
Managing Attorney

*Virginia's Protection and Advocacy System  
Serving Persons with Disabilities*

## **EXHIBIT F**



**COMMONWEALTH of VIRGINIA**  
*Office of the Governor*

Mark E. Rubin  
Counselor to the Governor

August 18, 2009

V. Colleen Miller, Esquire  
Executive Director  
Virginia Office for Protection and Advocacy  
1910 Byrd Avenue, Suite 5  
Richmond, VA 23230

Dear Ms. Miller:

Governor Kaine is in receipt of your request for records made to him as well as Secretaries Tavenner and Baskerville made in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

Your request for information is as follows:

"...we ask that you, Secretary Tavenner and Secretary Baskerville forward us copies of all assessments, evaluations, studies or documents that were created or reviewed prior -to or leading to the conclusion that a new 75 bed institution is needed or appropriate. These should include any individualized assessments (please redact the names or personal identifying information of any persons with disabilities) indicating that a new institution is required to house people with disabilities and any documents indicating how, specifically, the 75 bed census was determined."

We completed a thorough search of our records, including those within the Department of General Services and the Department of Behavioral Health and Developmental Services. There are no documents in the possession of the Governor's office, Secretary Tavenner or Secretary Baskerville that are responsive to your request.

As you are aware, Governor Kaine proposed to close Southeastern Virginia Training Center (SEVTC) by June 30, 2009 in the budget he submitted to the 2009 General Assembly. It was the General Assembly that established the Appropriations Act

V. Colleen Miller, Esquire  
August 18, 2009  
Page 2

language to construct a new 75 bed facility at SEVTC. Should you have any questions or would like to discuss this matter further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark', with a stylized flourish extending from the end.

Mark E. Rubin

c: The Honorable Marilyn B. Tavenner, Secretary of Health and Human Resources  
The Honorable Viola O. Baskerville, Secretary of Administration  
James B. Reinhard, MD, Commissioner, Department of Behavioral Health &  
Developmental Services  
Rich Sliwoski, Director, Department of General Services