IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE ARC OF VIRGINIA, INC.,	)	
Plaintiff,	)	
	)	
	)	**Civil Action No.: 3:09cv686**
v.	)	
	)	
TIMOTHY M. KAINE,	)	
Governor of Virginia, et al.,	)	
Defendants,	)	

MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants Governor Kaine, Secretary Baskerville, Secretary Tavenner, Commissioner Reinhard and Director Sliwoski, by counsel, submit this memorandum of law in opposition to Plaintiff's motion for preliminary injunction. Plaintiff, The Arc of Virginia, Incorporated ("Arc"), an organization purporting to represent unidentified citizens with intellectual and developmental disabilities, seeks to enjoin these government officials from implementing a budget bill item enacted by the 2009 Virginia General Assembly, which directs Commissioner Reinhard and Director Sliwoski, as heads of two state agencies, to build a new, state-of-the-art facility to accommodate the needs of seventy-five (75) individuals with intellectual disabilities.

For the reasons set forth below, Defendants ask this Court to deny Plaintiff's Motion for Preliminary Injunction on the following grounds:

1) Arc does not have standing to file this lawsuit or to request a preliminary injunction;

2) Even if Arc had standing to properly request an injunction, this case is not yet ripe for adjudication on its merits;

3) Because Arc has no standing to file this lawsuit and because this case is not ripe for adjudication on its merits, Arc cannot provide any evidence, much less a "clear showing that it is likely to succeed on the merits and likely to be irreparably harmed," warranting an injunction.

I. FACTS

The Southeastern Virginia Training Center ("SEVTC"), built in 1975, is one of five regional facilities operated by the Virginia Department of Behavioral Health and Developmental Services (DBHDS) that serves individuals with intellectual disabilities.[1] The facility provides rehabilitative, educational and health services to the individuals residing there, as well as respite and emergency care to individuals with intellectual disabilities residing in the community. Commissioner Reinhard is the head of DBHDS. Compl. ¶ 21.

Given the age of the facility and its current physical condition, SEVTC is in dire need of maintenance and repairs that are essential to meet life safety standards and the needs of its residents. The 20 cottages comprising SEVTC, each of which houses eight to ten residents, require a complete overhaul with replacement of mechanical systems including heating, ventilation and air conditioning, plumbing fixtures, kitchens equipment, and renovations to make the cottages more accessible to residents with physical limitations. *See* Department of Behavioral Health and Developmental Services,

[1] *See* "Community Living Services," Report to House and Human Services Subcommittee of House Appropriations, January 19, 2009, found at: http://hac.virginia.gov/subcommittee/health_human_resources/files/01-19-09/SEVTC--01-19-09--print.pdf.

Second Advisory Committee Meeting at SEVTC Gym, Questions Posed by Parents & Friends of SEVTC Presented by Ann Marie Sivertson 1-2 (February 26, 2009), attached as Exhibit A.

In the fall of 2008, faced with a huge budget shortfall, Governor Kaine instructed all state agencies to submit plans to reduce their budgets. Realizing that the costs to repair and maintain SEVTC were greater than at other training centers, DBHDS proposed the closure of the facility and Governor Kaine included the closure in his budget plan presented to the General Assembly. As the General Assembly considered closing SEVTC, it heard arguments for and against that proposal. *See, e.g.*, Tim Early, *Petition Against Closure of SEVTC*, available at http://www.petitiononline.com/SVETC/petition.html, attached as Exhibit B. Out of this passionate debate, the General Assembly crafted Budget Bill Item 103.05. Plaintiff's Exhibit C.

This compromise legislation directs the Virginia Department of General Services ("DGS"), with the cooperation and support of DBHDS, to rebuild and resize SEVTC to a 75-bed facility (Compl. ¶ 44) to serve clients with profound and severe intellectual disabilities and to build, acquire, or renovate twelve community-based intermediate care facilities (ICF-MR) and six MR homes (for individuals with intellectual disabilities) (Compl. ¶¶ 45, 71). The result of this compromise is that individuals with intellectual disabilities and their families will have more options available and greater choice in determining where they wish to live. The legislature appropriated nearly $24 million for this new facility to be built on the same land as SEVTC. Compl. ¶¶ 45, 63.

The proposed new, downsized training center will be built on the portion of the existing SEVTC campus next to a residential neighborhood. The proposed training center will consist of fifteen individual homes that will each house no more than five individuals. All of the homes will have their own driveway, mailbox, garage, and yard. *See* Letter from Marilyn Tavenner, Secretary of Health and Human Resources, to Carter Harrison, Chair, Community Integration Advisory Commission 2 (October 28, 2009), attached as Exhibit C. According to the Complaint, the contract for the new facility will be awarded in December 2009 and construction of the new facility is to begin in August 2010. Compl. ¶ 88.

With this downsizing, SEVTC's purpose and role will also change. Under Budget Item 315.CC.1, set out more fully below the Commissioner of DBHDS established the SEVTC Advisory Committee, a state and community planning team to develop a plan for the rebuilding and resizing of SEVTC. This Committee considered what the future role and purpose of SEVTC should be and determined that the new SEVTC will provide services and support for: (1) individuals presenting complex medical and/or behavioral needs that cannot currently be met in the community with the goal to attain appropriate community services; (2) individuals with behavioral challenges that require short-term, intensive intervention to return to the community; (3) individuals that require short-term respite or stabilization; (4) individuals that require short-term medication stabilization; and (5) facility residents and individuals living in the community through the Regional Community Support Center. *See* SEVTC Advisory Committee, Future Role/Purpose of SEVTC (May 26, 2009), attached as Exhibit D.

Given this directive, SEVTC's role will shift from long-term to short-term residential and non-residential services designed to help individuals move to and remain in the community. The long-term goal is for all state training centers to be regional safety nets for Virginia's most vulnerable citizens in need of intensive services, allowing those individuals to return to the community. *See* Department of Behavioral Health and Developmental Services, Item 315CC.1 – A Preliminary Plan and Timeline for Downsizing Southeastern Virginia Training Center (July 1, 2009), p. 2, attached as Exhibit E.

The centers will also serve as resources to the community to provide care for individuals with intellectual disabilities who are experiencing behavioral problems, need additional medical oversight and supervision, or need services that will allow them to return to the community within 90 to 360 days. *Id.* With the increase in community residential options made possible by Budget Bill Item 103.105, current residents of the SEVTC will have greater choice to decide if they wish to reside in the resized SEVTC or in a community home.

Notably, at this time, no one has been selected to reside in the new SEVTC. *See* Letter from James S. Reinhard, Commissioner, DBHDS, to Jonathan Martinis, Managing Attorney, VOPA (July 6, 2009), attached as Exhibit F. The process to determine which current residents may continue to reside at the new SEVTC will involve a thorough needs assessment of each individual using a variety of tools such as the Supports Intensity Scale ("SIS") assessment,[2] service treatment plans, and medical history. *See* Ex. E at 2.

[2] The Supports Intensity Scale is an assessment used to quantify the support needs of people with disabilities.

A study conducted by Human Services Research Institute (HSRI) comparing the SIS assessments of the residents of SEVTC with those of individuals living in the community receiving services through Virginia's comprehensive Medicaid waiver found that although SEVTC residents are eligible for waiver services, their needs are statistically higher in the key areas of home living activities, community living activities, and health and safety activities than those of individuals currently living in the community, but it did not determine where the needs of SEVTC residents could best be met, nor did it take into account the residents' choices and preferences regarding where they live and receive services. *See* Plaintiff's Exhibit D. Determinations of where an individual resides will be made based on the individual's choice, his medical and support needs, the availability of family supports and the availability of an appropriate community bed. In no circumstance will an individual who chooses to reside in the community be forced to move to the new SEVTC. *See* Exhibit C.

Indeed, legislation passed at the same time as Budget Bill Item 103.05 states expressly that resident choice will guide the placement of the citizens in question:

> CC.1. Notwithstanding the provisions of Section 37.2-316, the Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services shall establish a state and community planning team for the purpose of developing a plan for the rebuilding and resizing of Southeastern Virginia Training Center (SEVTC)...The state and community planning team, under the direction of the commissioner, shall develop a timeline to appropriately transition 88 state facility consumers beginning in fiscal year 2010 to community services in the locality of their residence prior to admission or the locality of their choice after discharge or to another state facility if individual assessments and service plans have been completed, appropriate community housing is available *and consumer choice has been considered.*

> The commissioner shall provide the preliminary plan and timeline to the Governor and the General Assembly by July 1, 2009 and a progress report regarding the plan for resizing and rebuilding the facility by October 1, 2009 and quarterly thereafter until the new facility and community facilities have been constructed and are complete. The final report shall outline the location where patients are discharged and any cost savings associated with the facility resizing and community transition.

2009 Appropriation Act, Item 315 (CC.1), p. 5 (emphasis added), attached as Exhibit G.[3]

In fact, through working with the current residents and their families, it has become evident that the biggest challenge DBHDS faces is accommodating those individuals who wish to remain at the new training center. *See* Exhibit C. Because it is expected that there will be more than 75 current residents of SEVTC who choose to stay, DBHDS has focused efforts on educating individuals and their family members regarding community options.[4]

II. LEGAL STANDARD

The decision to grant a preliminary injunction is discretionary with the district court. *Winter v. Natural Resource Defense Council, Inc.*, 129 S.Ct. 365, 374-76 (2008). A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief *pendente lite* of the type available after the trial. *In re Microsoft Antitrust Litig.*, 333 F.3d 517, 524-26 (4th Cir. 2003). In each case,

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[3] This document is available online at: http://leg1.state.va.us/cgi-bin/legp504.exe?091+bud+21-315.

[4] Two other disability rights organizations, Voices of the Retarded ("VOR") and Parents and Friends of SEVTC, strongly support the construction of the new facility. See Letter from Peter Kinzler, Chair of VOR's Legislative Committee and Jane Anthony, VOR Virginia State Coordinator to Governor Timothy Kaine (October 23, 3009) attached as Exhibit H; and Letter to Commissioner Reinhard Re: "Arc and VOPA SEVTC Advisory Committee Membership" (October 24, 2009), attached as Exhibit I. Arc by no means speaks for all of the current residents at SEVTC.

courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter* at 376.

Under current Fourth Circuit law, a plaintiff seeking preliminary injunctive relief must allege facts, not just cursory statements or legal conclusions, establishing the following in order to obtain a preliminary injunction: (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Real Truth About Obama v. Federal Election Commission*, 575 F.3d 342, 346-47 (2009); *Winter* at 374. Additionally, the *Winter* decision requires that the plaintiff make a "clear showing" that it is likely to succeed and likely to be irreparably harmed. *Id.* at 375.

III. ARGUMENT

A. Plaintiff Has No Standing to Bring These Claims

1. Individual Standing

A threshold question this Court must consider is whether Arc has standing to sue the Defendants. The irreducible constitutional minimum of standing in federal court is composed of three elements. First, the plaintiff must have suffered injury in fact. Second, there must be a genuine nexus between a plaintiff's injury and a defendant's illegal conduct. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Friends of the Earth v. Gaston Copper*, 204 F.3d 149 (2000); *Allen v. Wright*, 468 U.S. 767, 750-51 (1984).

Arc's allegations do not suffice to satisfy any of these three elements in a standing inquiry. First, while individual, named plaintiffs may allege potential harm in the future

when the new SEVTC building is built if they are not provided with a choice of whether or not to live in the facility or in a community setting, without knowing who any of these individuals are, if and how they are being harmed, and without any injury in fact, Arc in and of itself cannot claim to have suffered any injury. "Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin,* 422 U.S. 490, 502 (1975).

Second, the Defendants in this case are merely charged with carrying out the Acts of the General Assembly, which is presumed to have acted constitutionally,[5] and they have been directed to construct a facility to care for persons with intellectual disabilities, an act that is not unconstitutional or discriminatory under the Americans with Disabilities Act (ADA) or the Rehabilitation Act.[6] Moreover, the Supreme Court in *Olmstead,* which has been cited as Arc's authority for a violation of the ADA and the Rehabilitation Act in this case, specifically stated, "We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Olmstead v. L.C.*, 527 U.S. 581, 601-02 (1999). Therefore, Arc cannot properly claim that the Defendants have engaged in any illegal conduct, and because Arc has not articulated any injury to itself due to the Defendants' conduct or actions, the constitutional nexus requirement of standing is fatally lacking in Arc's allegations.

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[5] Laws enacted by the state legislatures are presumptively constitutional. *Kennedy v. Louisiana,* 128 S.Ct. 2641, 2675 (2008).

[6] Absent a qualification by treatment professionals, it would be inappropriate to remove a patient from a more restrictive setting. 28 C.F.R § 35.130(d); *Olmstead* at 602.

Finally, this Court cannot redress any injury that has not yet occurred to Arc, and Arc literally cannot provide a shred of evidence that it has been or is being harmed by unknown, future actions of the Defendants. Without "an invasion of a legally protected right which is a) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical," a plaintiff has no standing to sue in a federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *See also L.A. v. Lyons*, 461 U.S. 95 (1983). Not only is Arc not a proper party to this suit, its allegations are replete with nothing more than conjecture and hypotheticals.

Arc's only argument appears to be that it has expended some resources opposing the construction of the new facility, based on the Affidavit of Jamie Trosclair, Executive Director of the Arc of Virginia. That affidavit provides no details (in dollars or number of hours spent) on the alleged "expenditures." It states that Arc has engaged in advocacy on this issue, started work to form a new chapter near the facility, met with SEVTC residents and their families, and met with policy makers. Trosclair Aff. ¶ 59. The law is clear, however, that organizations cannot point to litigation-related activities to support standing. *Maryland Minority Contractors Assoc., Inc. v. Lynch*, Record Nos. 98-2655 and 99-1272, 2000 U.S. App. LEXIS 1636, *14 (4th Cir. Feb. 7, 2000)(citing *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Dir. 1990)).

Arc relies on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) to support its contention that it has standing to sue the Defendants. However, in *Havens*, the Court found that HOME, the plaintiff organization, had standing to sue because the racially discriminatory actions of the defendants had "perceptibly impaired" HOME's ability to provide counseling and referral services to its clients. *Id.* at 379. Additionally, HOME

spent significant resources to counteract the defendant's discriminatory practices. Not only has there been no discernable discrimination causing Arc any "perceptible impairment" in this case, as supported by the findings in the *Olmstead* case, as more fully set out below, Arc has not alleged that its advocacy for persons with intellectual disabilities has been hindered in any fashion due to the actions of the Defendants in carrying out the orders of the General Assembly. Therefore, Arc's contention that the *Havens* case supports its having standing in this case is too broad.

2. Associational Standing

In a representative capacity, an organization or association may have standing to redress its members' injuries when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *United Food and Commercial Workers Union v. Brown Group*, 517 U.S. 544, 545 (1996) (*citing Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)). Arc has failed to meet the first and third prongs of the associational standing analysis.

Regarding the first prong, while Arc alleges that it is an organization whose purpose is to advocate for persons with intellectual disabilities and that eight of its members are current residents at SEVTC, it fails to identify any of these members. Moreover, it fails to allege facts to establish that any of its members have standing to sue as individuals. The Fourth Circuit has rejected generalized references to associations with persons with disabilities or to advocacy groups for persons with disabilities alleging

discrimination under the ADA. *See Freilich v. Upper Chesapeake Health Inc.*, 313 F.3d. 205, 216 (2002).

The relief requested by Arc in this case requires the participation of its purported members. Without the participation of its members, Arc cannot allege any harm subject to redress by this Court. Therefore it must associate with known members who have allegedly suffered concrete harm before it can properly maintain this lawsuit. *See Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.*, 24 F.Supp. 2d 808, 815-16 (M.D. Tenn. 1998); *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d. 803, 809-12 (8th Cir. 2007). *See also A Helping Hand, LLC v. Baltimore County*, 515 F.2d 356, 363 n.3 (4th Cir. 2008)(associational standing requires showing of injury done, not just feared, by one or more members of that association).

B. Arc's Claims Are Not Ripe

The question of standing bears close affinity to questions of ripeness: whether the harm asserted has matured sufficiently to warrant judicial intervention. *Warth,* 422 U.S at 499. The facts set forth above show that this matter is not ripe because there has been no assignment of individuals in the current SEVTC for placement in the new planned facility. *See* Exhibit C.

Arc argues in its Motion for Preliminary Injunction at 14-15 that it should be allowed to sue before the new facility is built in order to avoid unnecessary expenditures on that building. However, none of its purported members has yet been assigned to the not-yet-built facility, and its claims are therefore premature. *See Lyons* 461 U.S. at 102-05. Moreover, because residents will voluntarily choose to live in the facility, there is no "harm" to which Arc can point. *See* Exhibits C and G; *Texas v. United States,* 523 U.S.

296 (1998) (affirming dismissal of declaratory relief action due to lack of ripeness). In *Olmstead*, as more fully set out below, known plaintiffs suffered a definitive harm, the harm was concrete and without conjecture, and an appropriate redress was available. *Olmstead v. L.C.*, 527 U.S. 581 (1999). None of that exists here. Arc's unripe allegations are based on tenuous, unknown fears and its claims should be dismissed.[7]

C. The Arc's Claims Do Not Meet the Standard for Injunctive Relief

A federal court will not issue an injunction unless the right to relief is clear and ripe, and a plaintiff cannot establish a right to a federal remedy without meeting the requirement of standing. *Hoepfl v. Barlow*, 906 F. Supp. 317, 320 (E.D. Va. 1995). A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief *pendente lite* of the type available after the trial. *In re Microsoft Antitrust Litig.*, 333 F.3d 517, 524-26 (4th Cir. 2003). In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter* 129 S.Ct. at 376.

Arc contends that the future harm it may endure when the new facility is built meets the criteria set forth in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1976). However, the Fourth Circuit's *Blackwelder* "balance-of-hardship" test is no longer the acceptable analysis with which this Court can evaluate a motion for a preliminary injunction. The Supreme Court's decision in *Winter* articulates

[7] Arc contends that the *Friends of the Earth* case supports its position regarding the ripeness of a threatened injury, but in that case the Fourth Circuit found there was an actual injury to one of the named plaintiffs when they lost the enjoyment of their lake, which included the reduced enjoyment of fishing from, swimming in and boating on the lake. While the actual extent of the environmental damage from the defendant recycling company's chemical discharge into the lake was not known, the harm to the named family in the loss of their enjoyment of the property did indeed exist and was sufficient to the court. 204 F.3d. at 152-53.

a different, stricter standard for injunctive relief which the Fourth Circuit has now adopted in *Real Truth About Obama*, 575 F.3d at 346-47, and *Winter* at 374-76.

The *Winter* and *Real Truth About Obama* cases require a plaintiff to establish the following in order to obtain a preliminary injunction: (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Winter* at 374; *Real Truth About Obama* at 345-46. Additionally, the *Winter* decision requires that the plaintiff make a "clear showing" that it is likely to succeed and likely to be irreparably harmed. *Winter* at 375.

This requirement differs substantially from the *Blackwelder* test, which permitted the plaintiff to demonstrate only a "possibility" of success and the "possibility" of irreparable injury. *Real Truth About Obama* at 346-47. The *Winter* case eliminates a federal court's ability to grant injunctive relief based upon unripe, speculative claims of events that may or may not occur in the future. *Winter* at 375-76; *Real Truth About Obama* at 347. Finally, *Winter* emphasizes that all four of these elements must be present, and it rejects the theory of a "flexible interplay" of the four elements under the *Blackwelder* test. *Winter* at 374; *Blackwelder* at 196. Under this standard, Arc's demands for injunctive relief fail.

1. Arc Is Unlikely to Succeed on the Merits

Arc cannot succeed on the merits of this case. Not only is Arc without standing in this case, Arc's motion is replete with unripe and unfounded allegations that current SEVTC residents will be forced at some point in the future against their will to live at the new facility. Arc argues that these acts of the Defendants would be a violation of the

ADA and the Rehabilitation Act as interpreted in *Olmstead v. L.C.*, 527 U.S. 581 (1999). However, nothing in the ADA or the Rehabilitation Act prohibits the construction of a new facility. *Olmstead* at 601-02. Moreover, Arc alleges no factual basis of a current or ongoing injury, and Arc cannot produce a shred of evidence to support it. In fact, all of the individuals currently at SEVTC will be evaluated, and those who wish to live in the community may, while those who desire to remain in the new facility will be considered for placement there. Indeed, after working with the current residents and their families, DBHDS believes that more than seventy-five (75) current residents of SEVTC will choose to live in the new facility.

The *Olmstead* decision specifically held that the proscription of a placement for a person with mental disabilities in a facility rather than in a community setting is a violation of the anti-discrimination provision of Title II of the ADA if the following three events have occurred: (1) the state's treatment professionals have determined that community placement is appropriate, (2) the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and (3) the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities. *Olmstead* at 587.

Not only is the first element of the *Olmstead* analysis above missing from Arc's argument (because it has not yet occurred and is not ripe for adjudication), Arc has audaciously and quite unfortunately failed to take into account the second most critical element of the *Olmstead* analysis: the choice of the individuals to live in a community-based setting or to continue to reside at a state-operated ICF/MR facility. Without facts to support a current or immediate threat that SEVTC residents will be deprived of a lack

of choice, Arc's allegations on behalf of the residents are not ripe and cannot succeed on the merits.

2. Arc Cannot Establish Irreparable Harm

Regarding the second element of injunctive relief, Arc alleges that its members "will" be harmed and that there is a "threat of harm" if the new facility is constructed. Conspicuously, Arc does not allege any present or ongoing harm to the individuals who are currently residing at SEVTC in an old and deteriorating building. Arc further alleges that when the new facility is built, Defendants will be in violation of the ADA, the Rehabilitation Act and the *Olmstead* decision.

While Arc attempts to draw a parallel between the facts of the present case and those of the *Olmstead* case, Arc's allegations could not be more unlike those in the *Olmstead* case. In *Olmstead*, two disabled women were determined by their treatment teams to be better suited for community living than for an institutional setting. The State of Georgia failed to afford the women the least restrictive environment long after the treatment team's determination and kept the women in an institutional setting. As a result of the failure of Georgia to move the women to a community setting, the Court found that the state had discriminated against them in violation of the ADA. *Olmstead,* 527 U.S. at 587-88.

In *Olmstead*, a definitive harm had been committed to known plaintiffs; the harm was concrete and without conjecture; and an appropriate redress was available. None of that exists in this case. Here, Arc's unripe allegations are based on tenuous, unknown fears about the future, a harm that is not currently occurring, and a harm that is not likely to be committed against Arc or any unnamed plaintiffs. In the *Winter* case, as in the

present matter, Arc's allegations are merely speculative, and the *Winter* case specifically rejects granting injunctive relief to prevent the possibility of some remote future injury. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter,* 129 S.Ct. at 375-76. Because Arc bases its request for injunctive relief on a remote, future activity that may or may not harm unnamed individuals, its motion for an injunction should be denied.

3. The Balancing of the Equities and the Public Interest Favor the Defendants

Arc also fails to satisfy the third and fourth elements of the *Winter* analysis. A balancing of the equities clearly favors the Defendants as a result of the analysis of the first two elements above. Equity should favor the residents of SEVTC, not Arc's unmistakable mission to derail the rebuilding of SEVTC, thus causing irreparable harm to the residents who will be forced to live in an old and deteriorating building. Moreover, the individuals for whom SEVTC provides care will be irreparably harmed if they are denied their choice to live in the community or to continue to reside in an institutional setting. Equity should favor the provision of community settings for those who can and do want them; equity should not reward the salacious yet unfounded allegations of discrimination that has not yet occurred and that is not likely to occur.

Moreover, the public interest is not served by granting this injunction. The General Assembly allocated almost $24 million of the Commonwealth's budget to accommodate the needs and critical choices of current SEVTC residents. The General Assembly, as the public's elected representatives, balanced the public policy and

economic needs of the Commonwealth in deciding whether to close SEVTC, an old and deteriorating facility, or to build a smaller, community-focused state-of-the-art replacement facility and 18 additional community facilities and homes to provide a broader choice of service settings to persons with intellectual disabilities. The public interest in upholding the laws enacted by its representatives, who have closely examined the policy choices about how best to meet the needs of its citizens with disabilities, outweighs any remote or speculative interest on the part of Arc. Furthermore, in purporting to represent itself and eight other unnamed individuals at SEVTC, Arc ignores the interests of the other 147 SEVTC residents, many of whom may choose to reside in the rebuilt facility. The public interest demands that their interests also be considered.

Arc's motion for preliminary injunction fails on each of the four required elements under the *Winter* analysis, and the Court should deny the injunction.

IV. CONCLUSION

For the reasons stated above, Defendants Governor Kaine, Secretary Baskerville, Secretary Tavenner, Commissioner Reinhard and Director Sliwoski respectfully request this Court to deny Plaintiff Arc's motion for preliminary injunction. The Defendants reserve the right to introduce factual testimony and exhibits as may be necessary.

Respectfully submitted,

By /s/
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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