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

THE ARC OF VIRGINIA, INC.

Plaintiff,

v. Civil No. 3:09cv686

TIMOTHY M. KAINE, et al.

Defendants.

**MEMORANDUM OPINION**

This matter is before the Court on Plaintiff's MOTION FOR PRELIMINARY INJUNCTION and Defendants' MOTION TO DISMISS. For the reasons set forth below, the MOTION TO DISMISS (Docket No. 10) will be granted and the MOTION FOR PRELIMINARY INJUNCTION (Docket No. 2) will be denied.

**BACKGROUND**

The Plaintiff, The Arc of Virginia, Inc. ("The ARC" or "ARC") is a not-for-profit corporation of and for people with intellectual and developmental disabilities. (Compl. at ¶ 6.) ARC's mission is to advocate for "the rights and full participation of all children and adults with intellectual and developmental disabilities." (Id. at ¶ 10.) To fulfill this mission, ARC advocates for changes in public policy, provides training to its members, and

provides information to the public about issues important to people with intellectual and developmental disabilities. (Id. at ¶ 11.)

The Southeastern Virginia Training Center ("SEVTC") is a state institution which provides housing and services for Virginians with intellectual disabilities. SEVTC is located on a 120 acre compound in Chesapeake, Virginia and is segregated from the community on all sides of the compound. (Id. at ¶¶ 25, 27.) In his proposed 2010 budget, Governor Timothy M. Kaine ("Governor Kaine") proposed closing SEVTC, stating that SEVTC residents "don't need to be institutionalized." (Id. at ¶ 41.) Governor Kaine's proposed 2010 budget redirected funds earmarked for SEVTC to build community-based housing for people with intellectual disabilities. (Id. at ¶ 42.) Secretary of Health and Human Services Marilyn B. Tavenner ("Secretary Tavenner") and Commissioner of the Department of Behavioral Health and Developmental Services ("DBHDS") James Reinhard ("Commissioner Reinhard") supported Governor Kaine's plan to close SEVTC and build community-based housing. (Id. at ¶ 43.)

Instead of closing SEVTC, the General Assembly, after hearing from thousands of citizens who were, or were related to, individuals with disabilities, passed Budget

Bill Item 103.05(A)(1) (the "Budget Bill Item"), which allotted $23,768,000.00 to rebuild and resize SEVTC to a 75-bed facility. (Id. at ¶¶ 44-45.) At the same time, the General Assembly also passed Budget Bill Item 103.05(A)(3) which directs the Department of General Services (DGS) and the Department of Mental Health, Mental Retardation and Substance Abuse Services ("DMHMRSAS") to build 12 community-based Intermediate Care Facilities (ICF-MR) and 6 MR homes. (Id. at ¶ 49.) In April 2009, Governor Kaine approved and signed the budget, including Budget Bill Items 103.05(A)(1) and 103.05(A)(3). (Id. at ¶ 50.)

In June 2009 a state-sponsored study of SEVTC residents concluded that, under certain circumstances, all residents could be served in the community. (Id. at ¶ 53.) The 2009 study conditioned its conclusion on the assumption that a variety of services necessary for the care of the persons relocated to community-based facilities would be available. Contrary to the assertions of ARC, the 2009 study did not establish that those necessary services would be available either generally or for the specific individuals then residing at the SEVTC. (See Compl. at Ex. B.)

DBHDS headed an Advisory Committee of stakeholders, of which ARC was a member, to discuss ways to implement the

Budget Bill Item. (Id. at ¶¶ 58-59.) On August 13, 2009, Commissioner Reinhard presented a summary of the implementation plan to the Advisory Committee. (Id. at ¶ 60.) According to Commissioner Reinhard, it is expected that some of the current SEVTC residents will reside in the new facility but will be evaluated by trained professionals before they are deemed qualified for residency there. (Id. at ¶ 67.) Other individuals, including people who hereafter come to live at SEVTC before the new facility is completed, will be eligible to live there. They too will have to be evaluated for eligibility. Based on these yet to be performed evaluations, DBHDS will identify 65 individuals who are qualified to live in the new institution. Those who are not eligible to live in the replacement facility will be relocated to the community-based facilities which are to be built as instructed under Budget Bill Item 103.05(A)(3), if, of course, they are capable of living in such a setting. (Id. at ¶¶ 69, 71.)

Commissioner Reinhard has stated that "[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." (Id. at ¶ 57.) Additionally, in an October 28, 2009 letter, Secretary Tavenner wrote that "individual

choice is a hallmark of this entire project. No one will be forced to transfer to these new homes on the training center campus if they would prefer to live in another community location." (Def. Opp'n at Ex. C.) (emphasis added)

In sum, the Complaint alleges that Virginia is developing a plan for housing and serving its citizens with disabilities in several different settings, one of which is a facility to replace the inadequate SEVTC facility with a similar facility that provides institutional rather than community-based living arrangements and related services. Sixty-five people will be able to live at the new facility if they are qualified to do so and if they, or their lawful representatives, make the choice to live there. The plan also provides for the building of more community-based living facilities for those, including current residents of SEVTC, who can function in such facilities and choose to do so.

The plan which is the subject of this action is but one part of Virginia's program to provide living arrangements and other services to its citizens with disabilities. The particular aspect of the plan at issue here was created by Virginia's legislature after hearing from many of its citizens with disabilities, their lawful

representatives, and groups, including ARC, that advocate for the disabled. Thereafter, the administrative agencies charged with implementing the Budget Bill Items and integrating the new program with the Commonwealth's existing programs set to work on planning how best to achieve implementation of the new and integrating it with existing programs. That work was still underway when this action was filed.

On October 27, 2009, eight months after the Budget Bill Item was passed and two months after the outlines of Virginia's proposed plan was announced, ARC filed this action against Governor Kaine, Secretary of Administration Viola O. Baskerville ("Secretary Baskerville"), Secretary Tavenner, Commissioner Reinhard, and Director of the Department of General Services Richard F. Sliwoski ("Director Sliwoski") (collectively the "Defendants"). All of the Defendants are sued in their official capacities. ARC seeks a declaratory judgment against the Defendants, alleging that the allocation of money to build the new facility violates the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act ("§ 504") and the Supremacy Clause. The ARC also seeks to enjoin the Defendants from building the new facility.

In the Complaint, the ARC refers to its claims as "Causes of Action" and designates them as "First" through "Sixth," respectively. For ease of reference, those designations will be referred to as Counts 1 through 6.

In Counts 1 and 2, ARC sues in its organizational capacity, seeking declaratory relief that the Budget Bills Item and the plan to build the facility to replace SEVTC violates its members' rights under the ADA and § 504, respectively. In Counts 4 and 5, ARC sues in its organizational capacity to enjoin the violations of ADA and § 504 rights that are sought to be declared in Counts 1 and 2. In each instance, the parallel claims for injunction and declaratory relief are substantively the same and are based on the assertion that the Budget Bill Item and the plan to build the replacement facility violate the ADA and § 504, respectively, and for the same reason. In Counts 3 and 6, ARC sues in its own right seeking, respectively, declaratory relief (Count 3) and injunctive relief (Count 6) on the theory that the Budget Bill Item and the plan to build the replacement facility violate the ADA and § 504 and hence the Supremacy Clause.

At the core of all six counts of the Complaint is the allegation that Virginia is discriminating against persons with disabilities by replacing a dilapidated 120 room

institution with a new one about half that size as part of a plan which involves building that facility as well as community-based facilities. The linchpin of ARC's claim, in each count, is that the "unjustified institutional isolation of persons with disabilities is a form of discrimination . . .," citing Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 600 (1999).

Because there is no case or controversy that is ripe for decision, the Court has no jurisdiction to decide the subject matter of this action and thus it must be dismissed.

**DISCUSSION**

**I. The Legal Standard**

A motion to dismiss for lack of subject matter jurisdiction under the doctrine of ripeness is assessed pursuant to the principles of Fed. R. Civ. P. 12(b)(1). Of course, it is the burden of the party bringing a case to prove the existence of subject matter jurisdiction. Richmond, Fredericksburg & Potomac Railroad Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). Where, as here, documents are referred to in, and incorporated in, the Complaint, the Court can consider all of those documents when deciding the matter of subject matter jurisdiction. See id. Here, the defendants assert that the lack of

jurisdiction appears on the face of the Complaint considered in perspective of the documents to which it refers, which it incorporates by reference, and which are attached to it as exhibits.

Accordingly, Rule 12(b)(1) will serve as the guidepost for the assessment of the issue of ripeness which is asserted as the predicate for the motion to dismiss the Complaint for lack of subject matter jurisdiction. In this case, the principles of justiciability control the analysis and that concept is discussed briefly below before assessing the details of the ripeness argument.

**II. Justiciability**

Article III of the United States Constitution limits the jurisdiction of the federal courts to actions which present actual cases and controversies. U.S. CONST., Art. III, § 2. Thus, the threshold question in every action is whether the court has the power to entertain the action, i.e. whether "the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Art. III." Warth v. Seldin, 422 U.S. 490, 498 (1975).

**III. Ripeness**

As one commentator has aptly put it:

> The ripeness doctrine concerns the timing of the suit. It asks whether the case has been brought at a point so early that it is not yet clear whether a real dispute to be resolved exists between the parties.

15 Moore's Federal Practice § 101.70[2] (Matthew Bender 3d ed.) Of course, "[t]he question of ripeness goes to whether the district court has subject matter jurisdiction." Id. at § 101.70[1].

Ripeness is a justiciability doctrine "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003). It must be remembered that:

> [T]he ripeness requirement furthers the interests of judicial restraint by avoiding possible judicial interference with the other branches of government that would ultimately prove unnecessary if a live dispute were never to develop. Moreover, unless a case is ripe, a court cannot be assured that the facts have been sufficiently developed and the matter sufficiently concrete for the court to render a decision that will resolve the dispute and affect the conduct of the parties. The ripeness doctrine therefore prevents the courts from becoming entangled in purely abstract or theoretical disagreements.

15 Moore's Federal Practice § 101.70[2] (Matthew Bender 3d ed.)

When a case presents issues arising out of actions taken by administrative agencies, the doctrine serves to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 200 (1983). Likewise, where a case presents a constitutional question, the ripeness doctrine helps to make sure that there is a genuine constitutional issue that necessarily must be decided and, therefore, the ripeness doctrine helps to avoid premature or unnecessary constitutional adjudications.

The concept of ripeness is a central guiding precept in the "case - or - controversy" requirement of Article III of the Constitution which, of course, is "equated with a prohibition on the issuance of advisory opinions, decisions based on hypothetical facts, or attempts to address

abstract issues that lack a concrete basis." 15 Moore's Federal Practice § 101.75 (Matthew Bender 3d ed.)

As the treatise puts it:

> Three basic factors are required for the matter to constitute a controversy:
>
> - A legal dispute that is real and not hypothetical;
> - A concrete factual predicate so as to allow for a reasoned adjudication; and
> - A legal controversy that can sharpen the issues for judicial resolution.
>
> A hypothetical or underdeveloped set of facts or an abstract issue without a concrete dispute that affects the individual parties in a specific manner will not satisfy these criteria.

Id.

Ripeness requires consideration of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Texas v. United States, 523 U.S. 296, 300-01 (1998) (internal citations omitted). The burden of demonstrating that an action is ripe for adjudication falls on the party asserting the existence of jurisdiction. Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006).

**A. Fitness**

Fitness is a most important jurisdictional assessment because, unless an issue is "fit" for judicial review, there is no actual case or controversy. As explained in an authoritative practice treatise, "[t]he critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." 15 Moore's Federal Practice § 101.76 (Matthew Bender 3d ed.) Accordingly, the examination of fitness requires consideration of such factors as:

> finality of the issue presented for review, definiteness of the threat of harm, and the extent to which resolution of the matter depends on facts not yet developed. An underlying consideration is whether putting off a decision may avoid the need to make a decision altogether, preserving judicial resources and comporting with the court's role as the governmental branch of last resort, which should not make unnecessary decisions.

Id.

It also is true that "[a] case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." Miller, 462 F.3d at 319. The foregoing principles guide the fitness inquiry here.

In each count of the Complaint, ARC asserts that the Budget Bill Item authorizing and funding the building of the replacement facility,[1] offends federal law. In Counts 1 and 4, the ADA rights of ARC's members are allegedly violated by that bill. In Counts 2 and 5, the § 504 rights of ARC's members are allegedly violated by that bill. In Counts 3 and 6, it is alleged that the Budget Bill Item violates the ADA and § 504 and, in so doing, offends the Supremacy Clause. In addressing the fitness issue, ARC asserts that whether the authorization and funding provision, i.e., the Budget Bill Item itself, violates the ADA, §504 or the Supremacy Clause present a purely legal question that is fit for judicial review.

However, those assertions ignore the text of the Complaint and the core position being asserted in it. Throughout the Complaint, ARC asserts that the implementation of the Virginia plan, of which the building of the facility is a part, is the conduct that offends the ADA and § 504, and by offending those statutes also violates the Supremacy Clause. Although it is true that the Complaint, on occasion, attacks the Budget Bill Item

[1] ARC does not attack the other Budget Bill Item (Item 103.05(A)(3)) which authorizes and funds the building of the other facilities that are to be part of Virginia's expanded program to serve the mentally disabled.

"and/or" the plan, the substance of the Complaint reveals the obvious reality that it is the plan to place people in the building that lies at the substantive heart of the Complaint.

That is underscored by the legal precepts on which the Complaint is based and which are repeated in all the briefs as the legal predicate of the claims. Specifically, the core legal principles on which each count of the Complaint rests are the statutory and regulatory provisions[2] which disfavor institutionalizing persons with disabilities and the part of the decision in Olmstead that defines discrimination to include unwarranted, unsupported institutionalization of the mentally disabled. As the Complaint makes clear, it is Virginia's plan which allegedly achieves that result, not the Budget Bill which authorizes, and funds the building of, the replacement facility. Hence, upon consideration of the substantive allegations of the Complaint and the documents that are attached to it or incorporated in it by reference, the

[2] 42 U.S.C. § 12132; 29 U.S.C. § 794; 28 C.F.R. § 35.130; 28 C.F.R. § 35.130(d); 28 C.F.R. § 41.51.

Court concludes that the attack on the Budget Bill Item is not a purely legal issue.[3]

In the Complaint, ARC asserts that, by planning to place any current or future resident of SEVTC in the replacement facility, the Virginia plan will offend Olmstead and the cited statutes and regulations. And, says ARC, that plan will be made possible of achievement if the replacement facility is built. ARC's case is centered on the following cite from Olmstead: "[u]njustified isolation [of persons with mental disabilities], we hold, is properly regarded as discrimination based on disability" 527 U.S. at 597. However, the Complaint, and all of ARC's papers ignore the sentence in Olmstead that follows the part of Olmstead on which ARC relies. In that sentence, the Supreme Court held:

> But, we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand.

Id.

[3] As explained later in the opinion, to the extent that the attack on the Budget Bill Item could be regarded as a purely legal issue, ARC has nonetheless failed to satisfy the hardship facet of the ripeness analysis.

That passage is important in deciding the fitness issue presented in this case because, in that part of its opinion, the Supreme Court recognized the inevitability that States are obligated to maintain facilities that enable them to provide care and services for a diverse population of persons with mental disabilities and to do so on the basis of the particular disability and the needs thereby presented.

Later, in the opinion, the Supreme Court made clear that the placement decision must be made on the basis of determination of the States' treatment professionals and in perspective of the affected person's choice, all to be accomplished after "taking into account the resources available to the State and the needs of others with mental disabilities." Id. at 587. The statutes which the ARC asserts are violated by the plan contain essentially the same requirements. This ensures that individuals are placed in the most appropriate setting available. To achieve that result federal law obligates the States to make a variety of carefully informed decisions in making placement decisions and those decisions involve individual assessments of each individual's needs and wishes, as well as the needs of other persons with mental disabilities to which the States have similar obligations.

The record here establishes that those decisions have not yet been made as to ARC members in SEVTC or any other residents there. To begin, not a single person currently residing at SEVTC has been selected for placement at the new facility. In fact, the process by which residents will be selected has just begun. Significantly, individual assessments have not yet been undertaken. The 2009 study simply did not do that. It made conclusions based on the assumption that the current residents could be accommodated in community-based facilities while Olmstead requires that the States' professionals conclude that such a placement actually can be reasonably accommodated. Id. And, that decision has not been made yet either.

A reading of the Complaint and other properly considerable documents show, without doubt, that Virginia is in the process of making placement decisions and is doing so, at least as of now, in the mode required by Olmstead and federal law. The record also is clear that no person will be required to live in the replacement facility unless that person, or his or her lawful representative, chooses to do so.

Of course, it is possible that the placement decisions, when made, may offend federal law. But, that will depend on future actions and there is no indication

now that Virginia's decisional process is unlawful or that persons will be placed in settings that are inappropriate to their individual needs or at odds with their choice.

The record also shows that Virginia's plan contemplates converting the replacement facility to one that can provide other services when, and if, it is possible to make community-based accommodations available to those who want them (of course, assuming that institutionalized living is not necessary). There is no way now to tell whether those pending decisions will offend the ADA, § 504, or the rule of Olmstead.

Finally, the reality of fiscal circumstances may intercede and affect Virginia's plan, including whether the replacement facility is built and, if so, what its capacity may be. Like almost all States, Virginia is suffering great economic distress. Its income is declining and it even now is considering more reductions in State services. In the General Assembly session that begins in January, decisions will be made on a wide range of fiscal issues.

Although Virginia does not now intend to abandon plans to build the replacement facility and is now in the process of contracting to that end, it would be unrealistic not to recognize that the Commonwealth's fiscal circumstances

could precipitate a change that could render it unnecessary to decide the issues raised in ARC's Complaint.

In sum, all of ARC's claims involve "uncertain and contingent events that may not occur as anticipated or may not occur at all." 15 Moore's Federal Practice § 101.76 (Matthew Bender 3d ed.) There is no definite threat of harm. And, putting off a decision may, and indeed, likely will, avoid the need to entangle the federal judiciary in affairs entrusted to the State government and its administrative agencies.

It also will avoid lending a judicial hand to the real objective behind the action which, as ARC's counsel expressed at oral argument, is to eliminate all institutional housing of persons with mental disabilities anywhere. Whether that is, or is not, a desirable goal is beyond the purview of the courts. And, the Supreme Court has held 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, 527 U.S. at 601-02. Indeed, throughout the remainder of the opinion, the Supreme Court acknowledged that such facilities likely would continue to be required. Those teachings of Olmstead also counsel in favor of the conclusion that the action is not now fit for

judicial review where, as here, a litigant seeks a premature judicial intervention in aid of an objective not yet subscribed to by Congress or the Supreme Court.

The United States, through the Department of Justice, moved for leave to intervene to file a brief amicus curiae in support of ARC. The United States posits two arguments to support its contention that the action is not based on mere contingencies and thus is fit for review. First, the United States argues that the mere risk of institutionalization creates the basis for impending injury and, therefore, a ripe claim. (United States' Mem. at 14.) ARC echoed that argument at oral argument on the motions, stating that the Defendants plan calls for 65 beds in the new facility to be filled by current SEVTC residents. (See Trosclair Aff. At ¶¶ 35, 40). According to the United States, this shows that there is a real risk of institutionalization, creating a ripe claim. ARC shares that view.

In Fisher v. Oklahoma Health Care Authority, the Tenth Circuit held that an individual need not be institutionalized before he could challenge a discriminatory law or policy. 335 F.3d 1175, 1181 (10th Cir. 2003). In that case, the plaintiffs argued that a change in law regarding access to free prescription

medications violated the ADA and § 504 because it effectively forced them out of their communities and into nursing homes in order to receive the free prescriptions that they needed. Id. at 1179. Fisher is distinct from this case, however, because there, the plaintiffs stated that they would "rather die" than reside in a nursing home. Id. at 1184. Here, there is evidence that shows that many individuals will choose to live in the new facility. In fact, at least 84 of the 155 legal representatives of the current SEVTC residents have made formal pleas to permit their loved ones to remain in the new facility rather than be placed in community housing. (Shrewsberry Declaration at ¶ 7; Dix Declaration at ¶¶ 7-10.) Thus, the argument made by ARC and the United States regarding the risk of institutionalization fails to account for a key principle in the Olmstead decision: personal choice. And here, where more residents desire to remain in institutional care than the new facility can provide for, there is little to no risk of institutionalization for those whose needs do not require it and who do not desire it.

The United States also argues that a mere allocation of resources favoring institutional settings over community-based settings is actionable, and renders this action fit for adjudication. (United States' Mem. at 11.)

In support of this contention, the United States cites Disability Advocates, Inc. v. Paterson, 598 F.Supp.2d 289 (E.D.N.Y 2009), where the court held that "unjustified segregation of individuals with disabilities in institutions is [] prohibited in the *administration* of state programs," including allocation of state resources. 598 F. Supp. 2d 289, 317-18 (E.D.N.Y. 2009). However, in Disability Advocates, the plaintiff sued on behalf of individuals currently residing in institutions. Thus, that case dealt with a current injury which resulted from the allocation of resources in respect of the extant housing of the plaintiffs and is simply inapposite to the facts in this case.

More importantly, in Disability Advocates, the "administration" of state services at issue was the State's past supervision of state-licensed adult homes and whether the State was assuring that the homes were being operated in a way that complied with the "most integrated setting" requirements of the ADA and with Olmstead. Thus, Disability Advocates did not involve a challenge to the validity of a plan that was still in the making, nor to a legislative enactment authorizing the funding for or the building of a facility that was but one part of the plan.

And, the case did not even address the fitness component of the ripeness doctrine.[4]

The United States and ARC seek to extend the decision in Disability Advocates and, in so doing, they distort its holding and ignore the context in which the case was decided. The invitation to make the requested extension is declined.

For the foregoing reasons, the allegations of the Complaint and the documents attached to it and incorporated by reference in it make clear that the claims here presented are not yet fit for judicial decision.

**B. Hardship**

Having thusly decided the fitness issue, it arguably is not necessary to assess the "hardship" facet of the ripeness doctrine. However, it is possible to consider that, to the extent the Complaint challenges the validity of the Budget Bill Item, it presents a purely legal question. If that be the case (which, for reasons previously explained, it does not), then the fitness component would be satisfied. It thus would be necessary to examine the question of hardship because both the fitness and hardship components ordinarily must be

[4] Disability Advocates did address associational standing. And, on occasion, standing and ripeness are related but that was not the case in Disability Advocates.

satisfied to establish ripeness. 15 Moore's Federal Practice § 101.76[3] (Matthew Bender 3d ed.)

To decide the ripeness question, it is necessary to consider the hardship that would be created if decision of the issue was withheld because it was not ripe for decision. To assess hardship:

> [t]he court must inquire whether the subject of the challenge presents a true dilemma for the parties, or whether their course of action would be unlikely to be altered regardless of any decision that the court could render.
>
> The hallmark of cognizable hardship is usually direct and immediate harm. The hardship analysis is unconcerned with wholly contingent harm. The greater the anticipated harm, the more likely the court will deem the matter ripe for resolution.

Id. at § 101.76[2].

The hardship facet of the ripeness analysis is measured by "the immediacy of the threat and the burden imposed" on the plaintiff. Miller, 462 F.3d at 319.

> "Because the hardship factor requires a threat of direct and immediate harm, a mere uneasiness on the part of the plaintiff about potential implications of an anticipated action is not sufficient to establish a ripe controversy. The fact that an action, if taken, could possibly produce a harm, or that a regulation or ordinance could be interpreted in such a way as to cause hardship is insufficient to warrant judicial review if there is no indication that the action is, in fact, about to be taken, or that the regulation will be

> interpreted or implemented in the manner feared by the plaintiff.

15 Moore's Federal Practice § 101.76[2] (Matthew Bender 3d ed.) ARC posits several arguments directed to the type of hardship that it, its members, and the public will suffer if the Court declines to decide this action now. None of those arguments actually establish hardship.

First, ARC argues that it will suffer harm if this case is not decided because it will be required to continue to devote resources to advocating against the construction of the new facility.[5] This argument is of little moment because it is ARC's very mission and function to advocate for the rights of persons with intellectual and developmental disabilities. Indeed, ARC's mission statement reads: "The Arc of Virginia advocates for the rights and full participation of all children and adults with intellectual and developmental disabilities." (Compl. at ¶ 10.) Because ARC functions in large measure to

[5] ARC's argument that this constitutes a burden is distinct from the type of burden usually considered by courts during a ripeness analysis. See e.g. Texas, 523 U.S. at 301 (finding no hardship where the parties were not "required to engage in, or to refrain from, any conduct"); Retail Industry Leaders Ass'n v. Fielder, 475 F.3d 180, 188 (4th Cir. 2007) (finding a case ripe because the challenged law subjected a party to new reporting requirements, requiring it to change its internal accounting procedures and spending immediately in order to comply with the law).

advocate, it cannot be heard to assert that engaging in advocacy is a burden.

Second, ARC asserts that its members face a threat because of the risk that they will be placed in the new facility. (Pl. Opp'n at 14.) This threat is not immediate because the Defendants have not yet chosen any individuals for placement in the new facility. Furthermore, there is no indication in the record that any of ARC's members do not wish to live in the replacement facility. In fact, while the desires of ARC's members are unknown, the record shows that more residents wish to remain at SEVTC then there will be space to accommodate. Moreover, the record shows that those who are determined to be eligible to live in the new facility will be given a choice in the matter. Thus, it is not possible to find that ARC members face any hardship.

Finally, ARC argues that the citizens of Virginia face a hardship should the Court decline to decide this case and the Defendants continue to move forward with their plan.[6]

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[6] Whether the Court should even consider this argument is unclear as courts have consistently framed this analysis in terms of hardship to the *parties*. See Texas, 523 U.S. at 300-01 ("Ripeness requires us to evaluate both the fitness of the issues for judicial decision and the hardship to the *parties* of withholding court consideration.") (emphasis added); see also Devia v. Nuclear Regulatory Comm'n, 492 F.3d 421, 427 (D.C. Cir. 2007) (questioning whether an

In that case, ARC argues, the Defendants will be permitted to spend millions of dollars on a facility that they will later be forbidden to use. This argument distorts the Supreme Court's holding in Olmstead. While ARC would seemingly prefer the Olmstead decision to hold that institutional care is never allowed, the Court's holding, in fact, held that institutional care was inappropriate only in certain instances, leaving no question that institutions still serve an important need. See Olmstead, 527 U.S. 581, 601-02. Thus, under the current law, no blanket prohibition on populating the facility could be issued even if the case is decided now.

Of course, it is distantly possible that the Defendants will build a new facility and individuals will not be placed there because they do not need or desire institutional care under Olmstead. The record, however, indicates that more current SEVTC residents desire to reside in the replacement facility than there will be space for once the facility is completed. This alleviates any fears that millions of taxpayers dollars will be expended on a facility that will not be used even if that is a

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intervenor may assert hardship for purposes of ripeness); but see Pacific Gas & Electric Co., 461 U.S. at 201-02 (finding that there was hardship to the parties in delaying adjudication of the case but also noting that delaying a decision may "work harm on the citizens of California.")

legally cognizable basis for a finding of hardship. It also is important to note that Virginia plans to design the facility so that it can be converted readily to alternate uses as needed. That rather completely forecloses the argument that building the facility will waste money.

Because ARC has not met its burden of showing hardship, none of ARC's claims are ripe for adjudication, even if Counts 3 and 6 are considered to present purely legal issues and thus satisfy the fitness aspect of the ripeness doctrine. Because the action is not ripe, the Court does not have subject matter jurisdiction over this action.

**CONCLUSION**

For the reasons set forth above, the MOTION TO DISMISS (Docket No. 10) will be granted and the MOTION FOR PRELIMINARY INJUNCTION (Docket No. 2) will be denied as moot. The action will be dismissed without prejudice.

It is so ORDERED.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: December 16, 2009