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, et al.,	)	
Defendants,	)	

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS

In this suit, Plaintiff, The Arc of Virginia ("Arc"), an organization purporting to represent unidentified citizens with intellectual disabilities, seeks to enjoin several state government officials from implementing a law which requires the construction of a state-of-the-art facility to accommodate 75 such individuals. Arc alleges that the new facility, to be placed at the same location as the current facility housing these citizens, will impermissibly "segregate" those people in violation of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act.

For the reasons stated below, Defendants Governor Kaine, Secretary of Administration Baskerville, Secretary of Health and Human Resources Tavenner, Commissioner Reinhard and Department of General Services ("DGS") Director Sliwoski, by counsel, ask the Court to dismiss this action under Rule 12[1] because: (1) Arc has no standing either by itself or in a representative capacity; (2) this matter is not ripe for adjudication because nobody has been chosen to live in the new facility, let alone any Arc member; (3) the only persons who will reside at the new

[1] If the Court decides it must convert this to a Rule 56 motion on the issues of ripeness and standing, the Defendants would ask for leave to file a subsequent Rule 56 motion on other matters following discovery, if that is needed.

facility are persons who choose to live there after they are properly evaluated, undermining this entire suit under *Olmstead v. L.C. by Zimring,* 527 U.S. 581 (1999)(lack of choice critical factor in finding ADA violation); (4) because of these defects in Arc's claims, Arc fails to state proper claims under *Ex Parte Young;* and (5) *Ex Parte Young* claims against Governor Kaine and Secretary Baskerville are otherwise improper because those Defendants lack the necessary relationship to the decision being challenged here.

Put simply, because Arc cannot allege that any of its members have been selected to live in the new facility, and nobody will be selected who does not want to live there, there is now, and will be, no controversy over which Arc can sue. This means that this entire suit is without merit. The facts establishing these simple points can be established without discovery through the attachments here or, if necessary, through affidavits.

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.[2] 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.

In addition, the SEVTC operates a Regional Community Support Center which provides community support services, such as psychological consultation and dental services, for individuals with intellectual disabilities who live in the community. According to the Complaint,

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

SEVTC is located on a 120 acre campus in Chesapeake, Virginia. Compl. ¶ 25. The facility maintains 200 beds but has a current census of 155. Compl. ¶ 61.

Given the age of the facility and its current physical condition, SEVTC is in dire need of maintenance and repairs. 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, kitchen equipment, and renovations to make the cottages more accessible to residents with physical limitations. *See* Department of Behavioral Health and Developmental Services, Second Advisory Committee Meeting at SEVTC Gym, *Questions Posed by Parents & Friends of SEVTC* at 1-2 (February 26, 2009), attached as Exhibit A. This document and others cited herein are publically available and relate to Arc's claims and allegations. Therefore, they can be considered under Rule 12 without converting this to a motion for summary judgment. *See Gasner v. County of Dinwiddie*, 162 F.R.D. 280, 282 (E.D. Va. 1995).

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 A.

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 the 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, 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, 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* at 2 (July 1, 2009), 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,[3] service treatment plans, and medical history. *See* Ex. E at page 2.

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 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. Plaintiff's Exhibit B. 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. <u>In no circumstance will an individual who chooses to reside in the community be forced to move to the new SEVTC</u>. *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:

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

> 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.[4]

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.

II. LEGAL STANDARD

Under Rule 12(b)(1), jurisdiction once challenged by the Defendant must be proven by the proponent of jurisdiction. *Marks v. United States Social Security Administration*, 906 F. Supp. 1017 (E.D. Va. 1995), *aff'd in part and vacated in part*, 92 F.3d 1180 (4th Cir. 1996). A trial court may go beyond the allegations of the complaint and consider additional evidence necessary to determine if there is in fact jurisdiction. *See Adams v. Bain*, 697 F.2d 1213 (4th Cir. 1982). A Rule 12(b)(1) motion may contend either that the complaint fails to allege facts sufficient to establish jurisdiction, or that the alleged jurisdictional facts are untrue. *Id.* at 1219.

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

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007)(internal citations omitted). "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558 (internal citations omitted).

The Supreme Court's decision in *Twombly* was explained further by that Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009), where the Court noted that there were two working principles set forth in *Twombly*: "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . . Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss . . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' -- 'that the pleader is entitled to relief.'" (Emphasis added).

A court may consider matters of public record without converting the motion to one for summary judgment and can take judicial notice of pleadings in its own records. *Papasan v. Allain*, 478 U.S. 265, 286 n.15 (1986). Non-judicial records outside the complaint may also be considered under Rule 12(b)(6). "[W]hen a plaintiff fails to introduce a pertinent document as part of his complaint, the defendant may attach the document to a motion to dismiss the

complaint . . . not only documents quoted, relied upon, or incorporated by reference in the complaint, but also official public records pertinent to the plaintiffs' claims." *Gasner*, 162 F.R.D. at 282.

III. ARGUMENT

A. Arc Has No Standing on Its Own or in a Representative Capacity

1. Arc Has No Standing on Its Own

A threshold question this Court must consider is whether Arc has standing on its own to sue the Defendants. The irreducible constitutional minimum of standing in federal court is composed of three elements: (1) the plaintiff must have suffered injury in fact; (2) there must be a genuine nexus between a plaintiff's injury and a defendant's illegal conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000); *Allen v. Wright*, 468 U.S. 737, 750-51 (1984).

Arc's allegations do not suffice to satisfy these three elements. First, while individual, named plaintiffs may allege potential harm 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, Arc 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

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

directed to construct a facility to care for the intellectually disabled, an act that is not unconstitutional or discriminatory under the ADA or the Rehabilitation Act.[6] Therefore, Arc cannot properly claim that the Defendants have engaged in any illegal conduct. This is particularly so where, as permitted by law, transfers to institutional care are not opposed by the affected individuals and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities. *Olmstead,* 527 U.S. at 587. (The High Court in *Olmstead* also 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." *Id.* at 601-02. That is the case here, although the fact that all new facility residents will be there voluntarily should make inquiry on this point unnecessary.)

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 interest 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)(internal citations omitted). *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 ultimately merely hypotheticals.

Arc relies on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) to argue that it has standing in its own right simply because it has expended resources opposing the new facility. A plaintiff cannot refer to resources expended on the case at bar to support standing, and must show a "sufficiently concrete injury." *Maryland Minority Contractors Association, Inc. v.*

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[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.

Lynch, Record Nos. 98-2655 and 99-1272, 2000 U.S. App. LEXIS 1636, *12, *14 (4th Cir. 2000)(citing *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)).

In support of this argument, Arc relies upon the Affidavit of Jamie Trosclair, Executive Director of Arc of Virginia, attached as Exhibit B to ARC's Motion. That Affidavit provides no details (in dollars or number of hours spent) on the alleged "expenditures" involved. It states that Arc has engaged in advocacy on this issue, started work to form a new chapter near the current and proposed facility, met with SEVTC residents and their families, and met with policy makers. Trosclair Aff. ¶ 59.

In order for these efforts to support standing, the Court would have to find that they were not related to the instant litigation. *Lynch*, 2000 U.S. App. LEXIS at * 14 (citing *Spann*). Even if the Court finds as such, an organization's unnecessary and misdirected advocacy does not give it standing to sue. This is especially true where none of its members can claim harm by this decision now, and where the only residents who will reside in the new facility will be there by choice, undermining Arc's claims under *Olmstead*. Otherwise, any organization whose members experience no harm and cannot claim harm later could still have standing. This would leave the door opened in *Havens Realty* open too wide.

2. Arc Has No 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 Local 751 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 this test.

Regarding the first prong, while Arc alleges that it advocates for the disabled 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 establishing that any of its members have standing to sue as individuals. The Fourth Circuit has rejected generalized references to associations with disabled persons or to advocacy groups of disabled persons for discrimination under the ADA. *See Freilich v. Upper Chesapeake Health Inc.*, 313 F.3d 205, 216 (4th Cir. 2002). Without alleging specific facts about Arc members, Arc states nothing more than an impermissible legal conclusion when it comes to associational standing, in violation of the pleading standard in *Twombly* and *Iqbal.*

The relief requested by Arc in this case requires some harm to its purpose. Without facts showing actual harm to its members, Arc cannot obtain redress by this Court. It must associate with known members who have allegedly suffered concrete harm before it can maintain this lawsuit. *See Tennessee Protection & Advocacy, Inc. v. Board. of Educ.*, 24 F.Supp. 2d 808, 815-16 (M.D. Tenn. 1998); *Mo. Prot. & Advocacy Servs., v. Carnahan*, 499 F.3d 803, 809-12 (8th Cir. 2007). Because Arc alleges no facts showing that any of its members will be harmed by the new facility, since nobody has been selected for that facility and only people who want to be there will be placed there, Arc cannot establish associational standing. *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 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 v. Seldin,* 422 U.S. 490, 499 (1975). The facts set forth above show that this matter is not ripe because there has been no assignment of persons in the current SEVTC for placement in the new planned facility. *See* Exhibit F.

Plaintiff tries to argue 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. But given none of its members has been assigned to that facility, its claims are premature. *See id.* Moreover, since residing in the new facility will be voluntary, there is and will be no "harm" to which Arc can point. This makes this suit subject to dismissal on ripeness grounds. *See Texas v. United States,* 523 U.S. 296 (1998) (affirming dismissal of declaratory relief action due to lack of ripeness).

Arc tries to rely on *Olmstead* for much of its case, but in *Olmstead,* a known plaintiff suffered a definitive harm, the harm was concrete and without conjecture, and an appropriate redress was available. 527 U.S. at 593-607. None of that exists here. Arc's unripe allegations are based on tenuous, unknown fears and its claims should be dismissed.[7]

C. Arc Fails to State Claims under *Olmstead*

Not only is Arc without standing, Arc's suit is premised upon unfounded allegations that current SEVTC residents will be forced against their will to live at the new facility. But that is

[7] *Friends of the Earth,* cited by Arc, does not support its position regarding the ripeness of a threatened injury. There, 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 confer standing. 204 F.3d. at 152-53.

flatly inaccurate as shown by Exhibits C and G, which show that the only people who will reside in this new facility are persons choosing to do so.

The *Olmstead* decision holds that placing a person with intellectual disabilities in a facility rather than in a community setting is not a violation 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,* 527 U.S. at 587, 607. In other words, an individualized assessment can permit placement in a facility. And facilities are necessary for persons in that situation. Arc's request for a "one size fits all" court-ordered mandate is unsupported by *Olmstead.*

The first element of the *Olmstead* analysis is missing from Arc's argument because it has not yet occurred and is not ripe for adjudication. Moreover, Arc has failed to take into account the second, very critical piece of the decision: the choice of the individuals and their families or guardians. Without facts to support a current or immediate threat of institutionalization and lack of individual choice, Arc's allegations on behalf of the residents are not ripe and cannot succeed, supporting dismissal.

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 *Olmstead.* 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. Because of Georgia's failure 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.

D. Because of Ripeness, Standing and Other Infirmities, These *Ex Parte Young* Claims Should Be Dismissed

Generally speaking, the Eleventh Amendment bars suits against a state government in federal court. It provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

U.S. Const. Amend. XI. "Although by its terms the [Eleventh] Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States." *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). In short, "[t]he ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Id.* (internal citation omitted).

Moreover, "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury;' it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (citations omitted). As such, a suit against state officials or state agencies that, in fact, is a suit against the state is barred regardless of whether it seeks damages or injunctive relief. *Id.*; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101-02 (1984).

At a minimum, however, the *Ex Parte Young* exception to Eleventh Amendment immunity requires that the case be free from other procedural defects. In *United States v.*

Georgia, 546 U.S. 151, 159 (2006), the High Court held that before a court addresses questions of sovereign immunity, the court should determine whether litigant has stated a proper claim. *See also Haas v. Quest Recovery Servs.*, 549 U.S. 1163, 1164 (2007) (Ginsburg, J., concurring in the decision and suggesting that the lower court should not have addressed the sovereign immunity issue after concluding that litigant failed to state a claim).

In other words, to invoke *Ex Parte Young*, it must be appropriate for this Court to entertain the Plaintiff's action, and the Plaintiff must state a claim for which relief can be granted. Resolution of these issues is a necessary component of *Ex Parte Young* analysis. Because of the standing, ripeness and other infirmities set forth above, Arc cannot state claims under *Ex Parte Young*.

E. Plaintiff Otherwise Fails to State Proper *Ex Parte Young* Claims against Governor Kaine and Secretary Baskerville

Under the *Ex Parte Young* doctrine, federal courts generally may enjoin individual state officers, in their official capacities, to conform their conduct to federal law. *See Frew v. Hawkins*, 540 U.S. 431, 437 (2004). The *Ex Parte Young* doctrine ensures "that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). However, that doctrine applies only where there is an on-going violation of federal law. *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). It does not apply when the alleged violation of federal law occurred entirely in the past. *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Moreover, the *Ex Parte Young* exception to Eleventh Amendment immunity is limited to suits against individual state officials who have a specific duty to enforce the statute or program at issue. *See Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). "*Ex Parte Young* requires a 'special relation' between the state officer sued and the challenged

statute to avoid the Eleventh Amendment's bar." *Id.* (citing *Ex Parte Young*, 209 U.S. 123, 157 (1908)). "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Id.* (quoting *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996)) (internal quotation marks omitted). "Thus, the mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Id.* (citing *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)).

1. *Ex Parte Young* Claims against the Governor Are Improper

In *Waste Management*, the Fourth Circuit applied these principles where the plaintiffs challenged the constitutionality of state statutes and named the Governor of Virginia as a defendant in their federal court action. The Court vacated a judgment against the Governor and remanded the matter with instructions that the district court dismiss him as a defendant. According to the Court:

> Although Governor Gilmore is under a general duty to enforce the laws of Virginia by virtue of his position as the top official of the state's executive branch, he lacks a specific duty to enforce the challenged statutes. . . . The fact that he has publicly endorsed and defended the challenged statutes does not alter our analysis. The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute.

Id. (emphasis added).

The *Waste Management* decision mandates dismissal of Governor Kaine as a defendant in this suit. The challenged statute does not impose any specific duty on Governor Kaine to enforce its provisions. Plaintiff's argument that the Governor's failure to exercise his line-item veto makes him culpable is meritless, since under that reasoning, any statute not edited by that veto would still leave the Governor as a proper party defendant. Such an exclusion (from the

rule in *Gilmore*) would swallow the rule. Under the *Waste Management* decision, Governor Kaine should be dismissed.

2. *Ex Parte Young* Claims against Secretary Baskerville Are Also Improper

In addition to the Governor, Secretary of Administration Baskerville is not a proper party under the *Ex Parte Young* doctrine because she lacks the required "special relation" to the alleged violation of federal law. *See Ex Parte Young*, 209 U.S. at 157; *Waste Management*, 252 F.3d at 331. As noted, where a state law is challenged as unconstitutional, a defendant must have "some connection with the enforcement of the act" in order to properly be a party to the suit. *Lytle v. Griffith*, 240 F.3d 404, 409 (4th Cir. 2001) (quoting *Ex Parte Young*, 209 U.S. at 157). State officials sued under *Ex Parte Young* have to have proximity to and responsibility for the challenged state action. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008). Plaintiff alleges no facts establishing a nexus between Secretary Baskerville and the actions challenged here, supporting dismissal of claims against her.[8]

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[8] The Defendants also question whether DGS Director Sliwoski is a proper defendant under *Ex Parte Young*. DGS, like the federal General Services Administration, builds and maintains state facilities as requested by other departments. *See* Va. Code §§ 2.2-1100 *et seq*. DGS's functions are "primarily for the support of other state agencies in carrying out their programs." Va. Code § 2.2-1100(B). This includes responsibility to maintain state buildings. Va. Code § 2.2-1129. But DGS Director Sliwoski is not responsible for the decision regarding the planned location of the challenged facility. The Complaint alleges no facts establishing otherwise. Compl. ¶¶ 17, 23. Simply because DGS must execute the law authorizing the construction of the new facility does not make DGS or Secretary Baskerville proper parties under *Ex Parte Young*. The First Circuit in *Deters* (a decision cited by the Fourth Circuit in *Waste Management*) stated: "Holding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend *Young* beyond what the Supreme Court has intended and held." *Deters*, 92 F.3d at 1416 (citation omitted). Any ruling striking down or suspending part of Budget Bill Item 103.05(A)(1), will stop construction of the new facility, so dismissing claims against Director Sliwoski should not prejudice the Plaintiff.

IV. CONCLUSION

For the reasons stated above, Defendants Governor Kaine, Secretary Baskerville, Secretary Tavenner, Commissioner Reinhard and Director Sliwoski respectfully request this Court to dismiss all claims against them.

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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