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

CALVARY CHRISTIAN CENTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil No. 3:11-cv-00342
CITY OF FREDERICKSBURG,	)	
	)	
Defendant.	)	
	)	
	)	

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.,
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Amicus curiae, American Civil Liberties Union of Virginia, Inc., by counsel, respectfully submits this Brief in opposition to the Defendant's motion to dismiss.

INTEREST OF *AMICUS CURIAE*

The ACLU of Virginia (ACLU) is the local affiliate of the American Civil Liberties Union, a nationwide, non-profit membership organization with more than half a million members that, from its founding in 1920, has been devoted to protecting and defending the constitutional and civil rights of Americans. Among the top priorities of the ACLU is equal treatment under the law, including equal treatment of persons with disabilities. The ACLU has frequently appeared before Virginia's state and federal courts in cases arising under the Constitution and civil rights statutes, either as counsel for parties or as *amicus curiae.*[1]

[1] This Brief addresses only defendant's Motion to Dismiss the plaintiff's claims under the Americans with Disabilities Act and the Rehabilitation Act.

FACTS

Cavalry Christian Center ("Cavalry" or "the Church") is a church in Fredericksburg, Virginia. (Compl. at 3, ¶ 17.)[2] The Church believes that it has been called by God to care for and minister to children, and for that reason operates a daycare before and after school hours. (Compl. at 4, ¶¶ 28-29.) The Church also feels a special calling, based in scripture, to minister to children with mental and emotional disabilities. (Compl. at 6, ¶¶ 41-42.) It seeks to operate as an integral place of learning with an integrated on-site ministry to children with emotional or mental disabilities. (Compl. at 6, ¶ 42.)

To achieve its religious mission, the Church has developed a relationship with Fairwinds Day School, a school for children with disabilities. To be enrolled at Fairwinds, a student must have an Individual Education Plan that specifies the child's qualifying disability and states that the child shall attend a private day school. (Compl. at 7, ¶ 48.) Fairwinds seeks to move to the Church's building, with the Church operating the school as a ministry of the Church. (Compl. at 7, ¶ 46.) The school would operate from 8:30 a.m. to 3:00 p.m., when the day care is not in session. (Compl. at 7, ¶ 50.)

The Church passed inspections by the Fredericksburg Fire Department and the Virginia Department of Social Services, and the Virginia Department of Education issued the Church a license to operate the day school. (Compl. at 8, ¶¶ 56-58.) The Church sought a special use permit from the City of Fredericksburg ("City"). The Director of Planning and Development submitted a memorandum recommending that the permit be granted, as the proposed use would be in harmony with zoning regulations and consistent with existing uses in the area. (Compl. at

[2] "When ruling on a Rule 12(b)(6) motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc*. 637 F.3d 435, 440 (4th Cir. 2011) (internal quotation marks and citation omitted). Additionally, "[]for purposes of ruling on a motion to dismiss

8-9, ¶¶ 59-67.) The Planning Commission then unanimously approved the requested permit. (Compl. at 9, ¶ 72.)

The Fredericksburg City Council considered the special use permit application over the course of three meetings. During the meetings, council members made a number of remarks indicating that there were already too many persons with disabilities in the City and/or that students with disabilities would be unsafe for the children in the Church's day school. For example, referring to a map of homes and facilities serving persons with disabilities in Fredericksburg, councilwoman Kerry Devine stated, "Fredericksburg City is struggling, I think, at being the host to what may be an abundance of group homes and group facilities . . ." (Compl. at 10, ¶ 76-77.) Councilman Bradford Ellis said, referring to the same map, "We just don't have a lot of space and, in my opinion, we're kind of saturated with this sort of . . . ." (Compl. at 11, ¶ 81.) Councilman Ellis further stated that the issue was "whether or not it is safe to operate a special needs day school within the same facility as a daycare," and that "Kids from these backgrounds can often have significant outbursts that can greatly disturb or even harm the younger children in the daycare setting." (Compl. at 12, ¶ 91-92.) At the third meeting, on November 23, 2010, the Council denied the motion to grant the special use permit by a vote of 3-3. (Compl. at 14, ¶¶ 110-11.) Because of the denial of the special use permit, the Church will be unable to exercise its sincerely held religious belief in ministering to children with disabilities. (Compl. at 14, ¶¶ 114, 118.)

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for want of standing, . . . the trial . . . court[] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

ARGUMENT

I. PLAINTIFF HAS STANDING TO RAISE ITS AMERICANS WITH DISABILITIES ACT AND REHABILITATION ACT CLAIMS.

Defendant's claim that the plaintiff lacks standing to sue based on its association with its potential students is without merit. Courts have consistently held that entities providing services to persons with disabilities may sue when they are injured by discrimination based on their clients' disabilities. *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356 (2008); *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399 (3rd Cir. 2005); *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002); *Turner v. City of Englewood*, 195 Fed.Appx. 346 (6th Cir 2006) (unpublished opinion); *RHJ Medical Center, Inc. v. City of DuBois*, 754 F.Supp.2d 723 (W.D. Pa. 2010); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 27 (2nd Cir 1997); *Hispanic Counseling Center, Inc. v. Village of Hempstead*, 237 F.Supp.2d 284 (E.D.N.Y. 2002).

A Helping Hand is on all fours with the present case. There, the operator of a methadone clinic challenged an ordinance that prohibited it from operating in its chosen location. As in this case, the plaintiff sued on its own behalf. 515 F.3d at 361. Relying on statutory construction, legislative history, and case law, the court held unequivocally that Title II of the ADA, 42 U.S.C. 12132, allows a cause of action for a person or entity associated with a person with a disability. The court explained that the enforcement provision of Title II, 42 U.S.C. § 12133, "expressly provides a remedy to '*any person* alleging discrimination on the behalf on the basis of disability in violation of" Title II, rather than limiting the remedy to persons with disabilities. 515 F.3d at 363. This linguistic choice "evinces a congressional intention to define standing to bring a private action . . . as broadly as is permitted by article III of the Constitution." (quoting *MX Group,* 293 F.3d at 334).

Further, the court noted that Title II is written differently from Titles I and III. The latter two provisions list many specific actions that constitute unlawful discrimination, including discrimination based on the disability of a person with whom the aggrieved entity has an association. *Id.* at 364. By contrast, "Title II simply provides a blanket prohibition on discrimination without listing any specific acts that are proscribed." *Id.* The House Committee on Education and Welfare made clear that despite the lack of a laundry list in Title II, "[t]he Committee intends, however, that the forms of discrimination prohibited by [Title II] be identical to those set out in the applicable provisions of titles I and II of this legislation." *Id.* (quoting H.R.Rep. No. 101-485(II), at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 367).

Additionally, the Attorney General, whose views "warrant respect," *Id.* at 362, promulgated regulations under Title II that "explicitly prohibit local governments from discriminating against entities because of the disability of individuals with whom the entity associates." *Id.* at 364 (quoting 28 C.F.R. § 35, 130(g)). The appendix to the regulations states that this rule is "intended to ensure that entities such as health care providers . . . *and others who provide professional services to persons with disabilities* are not subjected to discrimination because of their professional association with persons with disabilities." *Id.* (quoting 28 C.F.R. § 35, 130(g) app. A) (emphasis added).

Finally, the court pointed out that all of the circuits considering such cases had found that methadone clinics have standing to raise ADA claims for discrimination based on the disabilities of their clients. *Id.*, citing *Addiction Specialists*, *Inc.*, *MX Group,* and *Innotvative Health Sys.*

Structurally, the ADA claim in the instant case is identical to the one in *A Helping Hand.* Like A Helping Hand, Calvary is an entity providing professional services, i.e., education, to a

group of disabled individuals. Like A Helping Hand, Calvary has been denied a zoning permit because of the disabilities of those it seeks to help, and now seeks redress under the ADA.

The City acknowledges the existence of *A Helping Hand*, but claims that it is distinguishable, and that the present case is more like *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002). But the City provides no coherent basis for distinguishing this case from *A Helping Hand* and affiliating it with *Freilich*.

In *Freilich* a doctor who had been denied privileges at a hospital brought two distinct types of ADA claims. The first was a Title II claim that Freilich brought *on behalf of* dialysis patients, claiming third-party standing. That claim was rejected because the plaintiff failed to meet the requirement that the injured persons could not adequately represent themselves. 313 F.3d at 215. That claim was rejected because the plaintiff could not show that the dialysis patients were unable to bring their own claims. *Id.* The second was a Title III claim based on ADA associational discrimination, which "permits a plaintiff to bring suit on its own behalf *for injury it itself suffers* because of its association with an ADA-protected third party." *A Helping Hand*, 515 F.3d at 363 n.3. That claim was rejected because the plaintiff did not allege a close enough association with the dialysis patients. *Frelich*, 313 F.3d at 216.

In this case, the Church has stated a claim for ADA associational discrimination, because it has pled that it suffered injury, the denial of a special use permit, because it seeks to open a school for (i.e., associate with) children with disabilities. The City insists that the Church does not "allege any unlawful discriminatory effect under the ADA or Rehabilitation Act that the Church itself has suffered as a result of its association with the disabled students." Mem. Supp. Mot. to Dismiss at 5. This is simply not true. The plaintiff clearly alleges that it is injured by reason of the denial of the special use permit. *See* Compl. At 4 ¶ 114 ("Because of Council's

denial of the special use permit, the Church is unable to minister to the children in the day school and will have to forego those ministry opportunities in the future"); § 18 ("If the day school cannot move into the Church, Calvary will be prohibited from exercising its religious beliefs in ministering to children with disabilities.") Further, these injuries occurred by reason of its association with children with disabilities: "Defendant's decision to deny Plaintiff's request for a special use permit was a direct result of animus towards children at the day school." (Compl. at 15, ¶ 130, 17, ¶ 146.) What these allegations amount to is that Cavalry was denied a special use permit because it sought to educate children with disabilities; had it sought to open a school for non-disabled children, the permit would not have been denied.

Because the plaintiffs state a claim for associational discrimination, it does not matter whether they meet the requirements for third-party standing as set forth in *Freilich*.[3] Nor does for the court's the denial of ADA associational standing in *Frelich* bear on this case. Freilich based her claim of associational standing on her advocacy for the rights of dialysis patients. The court held that "such generalized references to association with disabled persons or to advocacy for a group of disabled persons are not sufficient to state a claim for associational discrimination under the ADA. Every hospital employee can allege at least a loose association with disabled patients." 313 F.3d at 216. By contrast, the Church asserts a direct association with individuals with disabilities: It seeks to minister to children with disabilities by running a school for them. As noted above, this puts the Church in the same relation to its students as A Helping Hand to its clients.

Finally, the City contends that if anyone has associational standing, it is Fairwinds, rather than Cavalry, because "Fairwinds is the entity that will operate the school and have the disabled

students as its students." This claim ignores the clear allegations of the complaint. Cavalry alleges that "Fairwinds desires to move to the Church's location and *the Church will operate Fairwinds as a ministry of the Church*." Compl. at 7 ¶ 46 (emphasis added). The City may not contest the truth of this allegation on a motion to dismiss. Cavalry has alleged a close association with its students with disabilities.

II. PLAINTIFF STATES A CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT.

The City says that Cavalry has not stated a claim under the ADA or the Rehabilitation Act because the City had a legitimate nondiscriminatory reason – the safety of the children in the Church's daycare center – for denying the special use permit. But the Church had pled sufficient facts to demonstrate that the City's "safety" rationale is actually based on assumptions and stereotypes about children with disabilities. The City is free to try to prove that its safety concerns are well-founded, but it may not do so on a motion to dismiss.

The Fourth Circuit has interpreted the ADA's phrase "qualified person with a disability," 42 U.S.C.A. § 12131 to exclude persons who pose "a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation." *Doe v. Univ. of Md. Med. Sys. Corp.,* 50 F.3d 1261, 1264-65 (4th Cir. 1995). But the "significant risk" test is a "fact-intensive determination," particularly unsuited to decision on motion to dismiss. *Start, Inc. v. Baltimore County, Md.*, 295 F.Supp.2d 569, 578 (D.Md. 2003) (declining to grant a motion to dismiss based on "significant risk.") Moreover, "the entity asserting a 'direct threat' as a basis for excluding an individual bears a heavy burden of demonstrating that

[3] This is not to say that plaintiff could not meet those requirements. To the extent that plaintiffs do claim third-party standing, *amicus* supports, but does not address here, the claim.

the individual poses a significant risk to the health and safety of others." *Lockett v. Catalina Channel Exp., Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007).

In *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court considered whether a teacher who was susceptible to tuberculosis was "otherwise qualified" under the Rehabilitation Act. The Court emphasized the fact-intensive nature of the inquiry. A public employer could not simply ban all employees deemed "contagious" without an evidence-based examination of the nature of the risk.

> To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if [the Rehabilitation Act] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 (1987). Specifically, with respect to contagious individuals, the inquiry should include:

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

Id. at 288. The Court ultimately declined to decide whether the plaintiff was "otherwise qualified" "[b]ecause of the paucity of factual findings by the District Court."

Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999), on which the City relies, is instructive on the degree of scrutiny required when a defendant claims that a person's disability disqualifies him from a benefit because of "safety" concerns. In *Montalvo*, the court considered whether a martial arts school could refuse to admit a child with AIDS. The Court noted that

> When determining whether an individual poses a "direct threat," a place of public accommodation must not base its calculus on stereotypes or generalizations about the effects of a disability but rather must make "an individualized assessment, based on

> reasonable judgment that relies on current medical knowledge or on the best available objective evidence."

167 F.3d at 876-77 (quoting 28 C.F.R. § 36.208(c)). After a bench trial, the district court had made numerous detailed findings of fact concerning the risk of transmission of HIV, based on testimony about the karate program at issue and expert testimony about the nature of HIV transmission. The Fourth Circuit considered all of the evidence adduced at trial before concluding that the boy posed a significant risk. *See also Breece v. Alliance Tractor-Trailer Training II, Inc., Breece v. Alliance Tractor-Trailer Training II, Inc.,* 824 F.Supp. 576 (E.D.Va. 1993.) (Making a determination of "significant risk" only after a bench trial and detailed findings of fact.)

Although it is an Equal Protection, rather than an ADA or Rehabilitation Act case, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), illustrates the difference between a zoning decision made based on genuine safety issues and one based on unfounded stereotypes about persons with mental disabilities. In *Cleburne*, an organization that intended to open a group home for developmentally disabled adults challenged an ordinance that required a special use permit for any "hospital for the feebleminded," although such a permit was not required for nursing homes or other group living arrangements. The Court rejected each of the city's reasons for its differential treatment of the developmentally disabled. First, the city's argument that neighbors objected to the proposed facility was inadequate because "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." 473 U.S. at 448. Second, and most pertinent to this case, the Court held that the city's concern "that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the" group home was

based on "vague, undifferentiated fears." *Id.* at 449. The city's other two concerns, that the home would be located in a floodplain and that it would contribute to overcrowding, were insufficient to distinguish the group home from permitted uses such as nursing homes. *Id.* at 449-450. *Cleburne* makes clear that when a public entity seeks to deny a benefit to individuals based on their disabilities, it must support its decision with actual evidence.

In the present case, the City appears to think that it may avoid ADA and Rehabilitation Act liability by couching its concerns in terms of "safety." But the mere invocation of a "safety" rationale cannot be determinative where, as here, city council members make remarks demonstrating that they view the potential day school students as "unsafe" or undesirable *because of* their disabilities. *See*, *e.g.,* Compl. at 10, ¶ 77 ("Fredericksburg City is struggling, I think, at being the host to what may be an abundance of group homes and group facilities . . . ."); *Id.* at 12, ¶ 92 ("Kids from these backgrounds can often have significant outbursts that can greatly disturb or even harm younger children in the daycare setting.") Otherwise, the ADA's and Rehabilitation Act's purpose "of protecting handicapped individuals from deprivations based n prejudice, stereotypes, or unfounded fear," *Arline*, 480 U.S. at 287, would be easily thwarted. Accordingly, the question of whether the City's discrimination based on disability is justified by safety issues is for the Court to determine, based on evidence of whether there is a "substantial risk." Because it is fact-intensive and evidence-based, this analysis cannot be undertaken on motion to dismiss.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges the Court to deny the defendant's Motion to Dismiss.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA, INC.

_____________/s/_________________

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2011, I filed the foregoing document using the Court's CM/ECF system, which will send an electronic copy to each of the following:

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