COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

PROBATE AND FAMILY COURT
DEPARTMENT
NO. 86E-0018-G1

JUDGE ROTENBERG EDUCATIONAL CENTER, INC., f/k/a BEHAVIOR RESEARCH INSTITUTE, et al.,

Plaintiffs,

v.

COMMISSIONERS OF THE DEPARTMENT OF DEVELOPMENTAL SERVICES, f/k/a DEPARTMENT OF MENTAL RETARDATION, AND THE DEPARTMENT OF EARLY EDUCATION CARE, f/k/a OFFICE OF CHILD CARE SERVICES f/k/a OFFICE FOR CHILDREN,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' PROPOSED ORDER FOR DISCOVERY

I. INTRODUCTION

Defendants[1] have moved to vacate the consent decree ordered by this Court on January 7, 1987, incorporating as part of the Order the terms of a settlement agreement between Plaintiffs and Defendants, dated December 12, 1986 (the "Consent Decree"). This memorandum is in support of the accompanying Plaintiffs' Proposed Order for Discovery, submitted by Plaintiffs

[1] The original Defendant in the above-captioned action was Mary K. Leonard, the Director of the Massachusetts Office for Children ("OFC"). Later, OFC changed its name to the Office of Child Care Services ("OCCS") and then to its current name, the Department of Early Education and Care ("EEC"). In 1988, the Massachusetts Department of Developmental Services ("DDS"), f/k/a the Department of Mental Retardation ("DMR"), intervened in this action and became a party under the 1986 settlement agreement between the parties. *See* December 29, 1988 Order (Rotenberg, J.), attached hereto at Exhibit 1. For clarity, we refer to all such entities interchangeably as "Defendants."

the Judge Rotenberg Educational Center, Inc. ("JRC"), f/k/a Behavior Research Institute, and the class of all students at JRC, their parents, and guardians as of September 26, 1985 (collectively, "Plaintiffs"), in response to this Court's Order, dated March 27, 2013, requiring all parties to submit to the Court proposed orders for discovery within thirty days. Because Defendants propose a piecemeal approach to discovery (and in particular suggest that their motion can be granted based on facts already in the record, as the Consent Decree has "fulfilled" its purpose), it is necessary to consider both the legal issues raised by their motion and the existing record to determine an appropriate scope for initial discovery. We therefore set forth: (1) an overview of the JRC program; (2) the history of the litigation and the purposes now served by the Consent Decree; (3) the standard of review; (4) factual issues in dispute; and (5) the accompanying Plaintiffs' Proposed Order for Discovery.

The Consent Decree mandates that treatment decisions involving clients at JRC – including decisions as to whether aversive treatments should be used – are ultimately committed to this Court in substituted judgment proceedings. It also has several provisions designed to prevent Defendants from utilizing their regulatory powers in bad faith against JRC. Defendants have moved to vacate the Consent Decree in its entirety for two reasons. First, they contend that the sole purpose of the Consent Decree was to remedy Defendants' bad faith use of regulatory powers to deny licensure to JRC in 1986; that it was intended to terminate in a year; that it was extended in 1988 only because JRC had not yet been fully licensed; and that it has been improperly extended since JRC has "long since" been fully licensed and Defendants have ceased to be in bad faith. Accordingly, they argue, the purpose of the Consent Decree has been fulfilled, and prospective application is "no longer equitable." Defendants assert that this argument can be

decided on the basis of the record alone, without the taking of evidence, and since that will be conclusive, it should be resolved first, by motion, without any discovery at all.

Defendants apparently concede that their second claim does require the presentation of evidence, and discovery. Their claim is that, even if the purpose of the Consent Decree has not been fulfilled, aversive treatments no longer conform to the accepted standard of care for treatment of individuals with intellectual and developmental disability and they are unnecessary and unethical. Defendant DDS has thus adopted new regulations to prohibit aversive treatments in all cases (except for those currently receiving them) and should therefore be allowed to apply these regulations to JRC and any new candidates for the treatment. In addition, Defendant DDS should be allowed to make further amendments to the regulations, including banning aversive treatment completely for all, including the members of the class, without constraint by the Consent Decree.

Defendants' approach to discovery (first deciding whether the purposes of the Consent Decree are fulfilled, and only then taking evidence on the standard of care) is flawed for two reasons. In the first place, the Consent Decree has *two* essential purposes, of which protection from Defendants' bad faith is only one. The other purpose – and the foundational core of the relief, according not only to Plaintiffs, but the Supreme Judicial Court of Massachusetts ("SJC") – was to protect Plaintiffs' substantive right to effective education and treatment, by creating an enforceable means to secure aversive treatment if it can be established, in a substitute judgment proceeding in this Court, that this is the least restrictive means to meeting their health, educational, and safety needs. *See Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. 489 (1983). If Plaintiffs are correct in this view – and the review of the history of this case below will demonstrate that we are – then evidence, preceded by discovery, cannot be avoided.

Moreover, even the claim that Plaintiffs are no longer at risk of harm from future bad faith regulatory conduct cannot be resolved without evidentiary hearing. As will be discussed below, the case arises from a very pointed history involving two different commissioners in two different decades, in which Defendants, or their predecessors, went to enormous lengths to prevent the use of aversive treatments at JRC, driven not by the treatment interests of JRC's clients but by ideological belief and the fear of negative media attention. Failing in their effort to accomplish this end overtly, they abused their regulatory powers in a series of pretextual – even dishonest – steps designed to destroy JRC, and with it the aversive treatments. The Consent Decree addresses this conduct both by committing the individual treatment decision to this Court and by protecting against regulatory abuse. Thus, even if it were true that the prevention of bad faith was the sole purpose of the Consent Decree, given the troubling evidence produced in this Court in the past, and the previous findings as to serious misconduct by Defendants in the past, including deliberate attempts to mislead this Court, Defendants cannot expect the Court to simply accept their current *ipse dixit* that "that was then, this is now," and that their motives are today entirely pure. Evidence is required on that issue as well.

Thus, as is shown below, there is no avoiding the presentation of evidence and the pre-hearing taking of discovery. Given that, no purpose would be served by a piecemeal approach to this litigation. The parties should be allowed to discover and present all the facts they need to make their case at a hearing on all issues before the Court.

II. FACTS AND PRIOR PROCEEDINGS

A. Overview of the JRC Program

JRC provides intensive behavioral treatment to children and adults with multiple disabilities, including the most dangerous forms of behavior disorders in the nation. JRC's clients have multiple diagnoses such as mental retardation, pervasive developmental disorder,

autism, intermittent explosive disorder, schizophrenia, attention deficit disorder, attention deficit hyperactivity disorder, bipolar disorder, oppositional defiant disorder, and a severe behavior disorder. The JRC clients have caused life-threatening injury to themselves and permanent disfigurement through their uncontrollable behaviors such as head banging, eye gouging, tearing their own flesh, biting off body parts, pulling out their own adult teeth, destroying furniture and school equipment, punching their fists through glass windows, running into traffic, jumping out of windows, and violently attacking family members, teachers, staff and others with punches, kicks, bites and sharp objects such as razor blades and eating utensils.

The JRC clients come to JRC from some of the best treatment facilities in the nation where they could not be effectively treated with all forms of treatment, including psychotherapy, positive behavior supports and massive dosages and combinations (cocktails) of powerful anti-psychotic medication which have dangerous and sometimes permanent side-effects such as major weight gain, severe sedation, acute and chronic extrapyramidal syndromes (e.g., tardive dyskinesia, akathisia, dystonia, parkinsonism), neuroleptic malignant syndrome, sexual dysfunction, prolactin elevation, sudden cardiac death, nocturnal enuresis, addiction, increased likelihood of diabetes, and/or life-shortening metabolic changes. New clients continue to arrive at JRC severely injured and in immense pain from their self-mutilation and without any prospect for education or rehabilitation because they are so heavily sedated and in a near comatose state from the cocktails of anti-psychotic drugs that their previous programs prescribed for them because the program could not stop their dangerous behaviors.

JRC successfully treats these unfortunate, desperate people with its intensive behavioral treatment program both without aversive interventions and, when necessary, with aversive interventions as approved by a Massachusetts Probate and Family Court, utilizing the substituted

judgment criteria set forth in the Consent Decree. JRC's treatment and education program often acts as a placement of last resort for children and adults with severe behavior disorders who have been resistant to all other forms of psychological and psychiatric treatment, including the prescription of antipsychotic medications. Clients are sent to JRC by school districts and state agencies when the client cannot be effectively treated and educated by other programs, including residential schools (such as the May Institute and the New England Center for Children) and psychiatric hospitals (such as Bellevue Hospital and McLean Hospital). Impartial Hearing Officers appointed to hear special education appeals pursuant to the federal Individuals with Disabilities Education Act continue to order that the aversive interventions used at JRC be included in the clients' individualized education programs.

Defendant DDS itself places and funds thirty-eight clients at JRC. Twenty-seven of these clients receive treatment with aversive inventions as approved by the Massachusetts Probate and Family Court. Other programs in Massachusetts (including DDS-operated facilities) were unable to effectively treat their behavior disorders and keep them safe from harm. In over eighty cases each year, the Probate and Family Courts of Bristol, Norfolk, and Suffolk Counties enter substituted judgment orders and findings authorizing the use of aversive interventions for JRC clients and specifically find that the aversive interventions are highly effective, safe and are the least restrictive treatment available to save the client from severe and permanent harm.

Although the Consent Decree allows DDS to intervene in the JRC substituted judgment proceedings, it has not offered any evidence in any of the proceedings that positive behavior supports or any other treatment would be an effective alternative, or that aversive interventions are not the least restrictive treatment. On the contrary, as required by the Consent Decree, DDS

hires independent psychologists to evaluate the JRC clients receiving aversive interventions every three years who consistently report that the clients continue to need the aversive treatment.

B. History of the Litigation and Purposes now Served by the Consent Decree

Defendants' first argument for modification of the Consent Decree is that it should be disbanded entirely because its "purpose has been fulfilled." At the hearing on March 27, 2013, Defendants suggested that this issue could be decided in their favor on the basis of facts already in the record. But a review of the record shows two purposes for the Consent Decree: to ensure that JRC is able to provide necessary treatment to its clients on an ongoing basis, and to protect Plaintiffs from future acts of bad faith. Both purposes remain relevant and important, and require discovery before any proposed modification.

Defendants argue, essentially, that the Consent Decree is "fulfilled" because: its sole purpose was to "remedy" JRC for "discrete acts" by OFC and DMR taken prior to the 1986 lawsuit; this remediation was intended to last approximately one year; and the Consent Decree was extended in 1988 solely so that JRC could be licensed. Once licensing was completed in 1989, Defendants conclude, the Consent Decree was at an end; "[t]his Court did not, and could not, alter the parties' intent by extending the decree 'until ... further order.'" Defendants' Memorandum of Law in Support of Motion under Probate and Family Court Rule 60 and Mass. R. Civ. P. 60(b)(5) to Vacate Consent Decree ("Memorandum") at 20.

It would be remarkable if, as Defendants suggest, this Court had entered a finding of contempt in 1995 based on a consent decree that ended by its terms in 1989. And indeed that is not the case. Prior rulings by this Court and the SJC — and Defendants' own recent stipulations — make clear that the Consent Decree remains valid and continues to serve its purposes.

1. Complaint.

The 1986 complaint in this case alleged that Defendants had acted in bad faith by precipitously forbidding aversive behavioral therapy at JRC without medical basis, and thereby endangered the clients' lives and safety. *See* Third Amended Complaint ("Complaint") at 11-14, attached hereto at Exhibit 2 (without exhibits). The Complaint asserted distinct claims both substantively for a right to effective treatment and education and procedurally for a right to good-faith regulation. Complaint at 37-46.[2]

2. Preliminary Injunction.

A Request for Preliminary Injunction accompanied the Complaint. This Court held a lengthy evidentiary hearing on Plaintiff's Request for Preliminary Injunction and, on June 4, 1986, granted Plaintiffs a preliminary injunction (enjoining OFC from ordering the termination of operations of JRC's treatment facilities, and prohibiting OFC from banning the use of aversive interventions that had already been authorized for use with five JRC clients by substituted judgment orders of this Court), focusing primarily on Plaintiffs' demonstrated need for aversive treatment and the lack of scientific support for Defendants' regulatory actions. The Court found that JRC's overall treatment was "vastly superior to any other known program for this particular population," and that aversive interventions were used only when they were the least restrictive means of treatment that allowed JRC clients to have a dramatically improved quality of life. *See* June 4, 1986 Findings in Support of Preliminary Injunctive Relief (Rotenberg, J.) ("Findings in Supp. of Prel. Inj."), attached hereto at Exhibit 3, at 12-15.[3] The orders of the Commissioner of

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[2] In particular, the Complaint alleged that Defendants violated both constitutional and statutory rights of JRC and its clients, including Articles X, XI and XII of the Massachusetts Declaration of Rights, and statutory educational rights pursuant to G.L. c. 71B and 28A.

[3] The Court wrote that the improvement allowed only by aversives was "so basic and essential to [the students] that it literally involves their opportunity to enjoy blessings of humanity that other individuals are likely to take for granted." Findings in Supp. of Prel. Inj. at 15.

OFC to cease aversive interventions were "in effect, *treatment* decisions" without medical foundation, causing serious practical harm.[4] *Id.* at 16 (emphasis in original). Defendants had then altered their own internal documents and appointed an intentionally biased panel to retroactively justify their decisions. *Id.* at 23-27.[5] The Court's extensive Findings included many findings of bad faith conduct including a finding that OFC wanted to ban aversive interventions but had not offered "one scintilla of affirmative evidence" at the five substituted judgment trials conducted by the Court thus far "even though the agency [OFC] was requested by the Court to produce any reasonable available alternative or less intrusive treatment that might be adopted." *Id.* at 4.

3. Settlement Agreement and Consent Decree.

In December of 1986 the parties executed a settlement agreement, providing in most substantial part that JRC would continue to develop treatment plans for clients based on the least restrictive treatments appropriate; that where those plans called for aversive therapy and the client lacked capacity, this Court would review the evidence showing that aversive therapy was the least intrusive method available, and approve or reject the plan with input from Defendants; and that the Court would monitor those treatment plans on an ongoing basis. *See* Consent Decree, attached hereto at Exhibit 4, Part A. The parties' settlement agreement specifically allowed for JRC's continued use of aversive interventions with current and "new" clients, and this right was specifically intended to be a permanent guarantee; paragraph K of the parties'

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[4] The Court found that the Commissioner of OFC's treatment decisions were "arbitrary, capricious and beyond the scope of her authority." Findings in Supp. of Prel. Inj. at 27-28 ("By ... [the Commissioner's] own testimony she is not permitted to make treatment decisions").

[5] In particular, counsel for Defendants had "deliberate[ly] attempt[ed] to alter a document," a comprehensive review of JRC's program that was "laudatory to [JRC] in all substantial respects[.]" Findings in Supp. of Prel. Inj. at 23-24. This Court observed that the Director of the Office For Children had never met those children "whose lives she affects with the stroke of a pen," and that her orders "'play[ed] Russian Roulette' with the lives and safety of the students[.]" *Id.* at 15, 27.

settlement agreement states: "Upon termination of this agreement, BRI shall continue to employ substituted judgment procedures as ordered by the court."[6] *See id.*, Parts A(4), A(5), K.[7]

This Court made the parties' settlement agreement an Order of the Court and incorporated the terms into the Consent Decree, holding that the parties' settlement agreement ensured that the treatments would be safe, effective, professionally acceptable, and extensively supervised. *See* January 7, 1987 Findings of Fact and Conclusions of Law in Support of Approval of Settlement Agreement Pursuant to Mass. R. Civ. P. 23(c) (Rotenberg, J.) ("Findings in Support"), attached hereto at Exhibit 5, at 3.[8] Eighteen months later, this Court ordered that the Consent Decree would remain in effect until further order, without objection of any party. *See* July 7, 1988 Order (Rotenberg, J.), attached hereto at Exhibit 6.

4. Contempt Action.

In 1993, Plaintiffs filed a contempt action alleging that Defendants were in violation of the Consent Decree. This Court agreed, finding that Defendants, motivated by negative media attention and unable to ban aversive interventions directly, had embarked on a wide-ranging campaign seeking to put JRC out of business. *See* October 6, 1995 Findings of Fact (LaStaiti, J.) ("Findings of Fact"), a true and accurate copy of which is attached hereto at Exhibit 7, at 18.

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[6] In this respect, the Settlement Agreement was intended to be consistent with Massachusetts law on the process for securing extraordinary but necessary treatment for those who are incapacitated, wherein a court, not an executive agency, maintains responsibility for authorizing such treatment by determining whether the incapacitated person would consent to the treatment if s/he had capacity to do so. *See Rogers v. Comm'r of Dep't of Mental Health*, 390 Mass. 489, 500 (1983).

[7] In addition, the Settlement Agreement required Defendants to act in good faith in their regulatory dealings with JRC. *See* Settlement Agreement, Part L. Moreover, the Settlement Agreement imposed dispute resolution obligations on the parties so that disputes could be resolved quickly by those who are familiar with the parties and the complicated issues that may arise, to avoid potentially irreparable harm to the severely disabled people that rely on aversive treatment for their very existence. *See* Consent Decree, Part B(2).

[8] The Court also observed that the settlement avoided some 60 days of hearings that would be required to conduct a trial, with substantial expense to all parties. Findings in Support at 2. As to a single client who objected, the Court observed that his "particular concerns ... will adequately be addressed through the vehicle of the substituted judgment procedure." *Id.* at 5.

This Court found Defendants in contempt of the Consent Decree, finding that DDS "imposed a severe and essentially constant burden on the JRC staff by having to respond to an unrelenting stream of bad faith regulatory demands and other bad faith conduct over twenty-two months." October 6, 1995 Conclusions of Law (LaStaiti, J.) ("Concl. of Law"), attached hereto at Exhibit 8, at 9; Findings of Fact at 70. Their tactics included once again suppressing or ignoring their own reports complimentary of JRC, improperly procuring negative reports, spreading false information, and in attempting to conceal their scheme, "repeatedly and without hesitation l[ying] to this Court." Findings of Fact at 43.[9] The Court referred two DMR officials for prosecution for perjury and criminal contempt (Concl. of Law at 16), and referred the Assistant Attorney General representing DMR to the Board of Bar Overseers for endorsing false testimony and helping to perpetrate a fraud on the court. *See* Findings of Fact at 84-87. The Court enjoined regulatory orders and decisions concerning JRC and appointed a Receiver, among other purposes, to ensure "that DMR will continue to maintain and fulfill its responsibilities in substantial compliance ... with the Settlement Agreement after the termination of the Receivership." Concl. of Law at 81, 84; October 5, 1995 Judgment and Order (LaStaiti, J.) ("Judg. and Order"), attached hereto at Exhibit 9, at 5.

In resolving the contempt action this Court construed the purposes of the Consent Decree, holding that "[t]he settlement agreement was designed to protect JRC, the Students and their

[9] More specifically, the Court found that Defendants had suppressed or ignored internal reports (Findings of Fact at 16, 69); acted in order to avoid negative media attention rather than for the welfare of JRC clients (*id.* at 18); engaged in a series of improper actions designed to put JRC out of business (*id.*), including by knowingly or recklessly making false public statements calculated to put JRC in a false and negative light (*id.* at 19, 35, 57); denied the efficacy of JRC's program "without factual basis and in deliberate ignorance" of their own records (*id.* at 20, 27, 36); attempted to intimidate and harass the court monitor (*id.* at 24); required JRC to make public statements "purposely designed to alarm funding agencies" (*id.* at 30); acted in total disregard for the concerns expressed by parents about the best interests of their children (*id.* at 31); secured an intentionally biased review of JRC and then had the report modified to conceal its bias (*id.* at 37-39); investigated issues unrelated to their regulatory mission (*id.* at 47); met with officials at other agencies as part of their "campaign of interfering with JRC's relationship with its funding agencies" (*id.* at 60); and in attempting to conceal all of the above, "repeatedly and without hesitation lied to this Court." (*id.* at 43).

families from *future* bad faith conduct by state officials while safeguarding the state's interest in the welfare of children." Findings of Fact at 5 (emphasis added). On appeal the SJC, as ultimate arbiter of the Consent Decree's intent, further clarified the two purposes served by the Consent Decree:

> The action that resulted in the settlement agreement was brought because the parents and guardians of JRC patients alleged that OFC was [1] *denying individual patients their constitutional rights to certain treatments* and [2] *was not regulating JRC in good faith.* The settlement agreement sought to remedy this situation while allowing the department to continue to fulfil its statutory duties to regulate mental health facilities.

Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dept. of Mental Retardation, 424 Mass. 430, 450 (1997) (emphasis added).

5. Termination of the Receivership and Post-Receivership Years.

The receivership lasted more than ten years. In 2003, the Receiver recommended transferring regulatory authority back to DMR and OCCS — not, as Defendants suggest, because the Consent Decree's purpose had been fulfilled or completed, but to the contrary, because the "protections of the Settlement Agreement concerning aversive therapy and substituted judgment proceedings [would] not be disturbed" by the transfer. *See* May 19, 2003 Special Report of Receiver Re Plan for Winding Down the Receivership, attached hereto at Exhibit 10, at 8. All of the parties (including DMR and OCCS) stipulated that the Consent Decree would remain in effect unless and until one of the parties sought and obtained a "modification of their obligations" under the decree. *See* September 4, 2003 Stipulation, attached hereto at Exhibit 11, at 2. The receivership ended in April 2006.

Since the receivership ended, Defendants have attempted to interfere with Court-approved aversive treatment at JRC and have violated the Consent Decree, including, but not limited to: dramatically changing their interpretation of DDS' regulations on the use of aversive

interventions to make it difficult, if not impossible, for JRC to comply; and amending its behavior modification regulations to ban aversive treatment for those who did not have Court-approval for such treatment as of September 1, 2011.[10] Also, Defendants have made a series of arbitrary findings of non-compliance with conditions of JRC's Level III Certification (the certification necessary under DDS' regulations for a facility to administer Level III aversive interventions), thus threatening to restrict Plaintiffs' access to treatment and causing the need for arbitration under the Consent Decree in 2011 and 2012.

On February 14, 2013, Defendants served JRC[11] with Defendants' Motion under Probate and Family Court Rule 60 and Mass. R. Civ. P. 60(b)(5) to Vacate Consent Decree.

III. ARGUMENT

A. The Consent Decree Remains Legally Effective and Continues to Serve its Purpose

As a preliminary matter, Defendants have argued essentially that the Consent Decree ended by its terms long ago (i.e., was "fulfilled") and that it can be dispensed with because it no longer serves any purpose. In light of the above history, Defendants' argument that the Consent Decree should have expired in 1989 when JRC was fully licensed, and that "[t]his Court did not, and could not, alter the parties' intent by extending the decree 'until ... further order[,]'" is simply absurd. The Court did in fact extend the decree until further order without objection of any party. The Court then *enforced* the order in a contempt action filed in 1993, and was upheld by the SJC in 1997, without objection that the decree should have expired. Defendants then *stipulated* as a condition of terminating the receivership that the decree remained in effect in

[10] DDS did not seek to modify, clarify or dissolve the Consent Decree before amending the behavior modification regulations.

[11] Defendants did not serve the other parties until on or about March 15, 2013.

2003, and that it would remain in effect until "modification." *See* September 4, 2003 Stipulation (LaStaiti, J.) at 2.

It is thus clear, as law of the case, that the Consent Decree remains lawfully in effect and will remain so until modified; it has not ceased operation by its terms. Nor has it ceased to serve its purpose. It continues to this day to serve the two purposes identified by the SJC — purposes very different from the sole purpose retroactively suggested by Defendants.

First, the Consent Decree continues to ensure that individual patients are not "den[ied] … their constitutional rights to certain treatments," *Judge Rotenberg Educ. Ctr., Inc.*, 424 Mass. at 450, treatments which allow them "to enjoy blessings of humanity that other individuals are likely to take for granted." Findings in Supp. of Prel. Inj. at 15. In over eighty cases each year, the Probate and Family Courts of Bristol, Norfolk, and Suffolk Counties enter substituted judgment orders and findings authorizing the use of aversive interventions for JRC clients and specifically find that the aversive interventions are highly effective, safe and are the least restrictive treatment available to save the client from severe and permanent harm.

Second, the Consent Decree continues, in the words of this Court, to "protect JRC, the Students and their families from *future* bad faith conduct by state officials[.]" Findings of Fact at 5 (emphasis added). In both 1986 and 1995, this Court discovered that Defendants had sought to ban aversive treatment at JRC on facially valid pretexts, but against the medical evidence, the best interests of the clients and in defiance of their own internal documents, for undisclosed reasons and by biased and bad faith means. Now, just six years after regaining full regulatory authority, Defendants are yet again seeking to ban aversive treatment at JRC, again despite the reports of their own independent clinicians (and the yearly findings of the Probate and Family Courts) that the treatment remains necessary and ethical. It is hard to fathom from the facts

already in the record how Defendants can argue that the Consent Decree no longer serves its purpose of protecting Plaintiffs from Defendants' bad faith regulation.

In sum, both of the Consent Decree's purposes recognized by the SJC — ensuring Plaintiffs' access to treatment they require, and restraining bad faith conduct by Defendants — remain in effect and remain important. If Defendants wish to abolish the Consent Decree instead of working within its terms, they cannot rely on their narrow reading of this Court's 1988 order. They must meet the standard set in *Rufo v. Inmates of Suffolk Cnty. Jail* to show that a substantial change in circumstances warrants such a modification. 502 U.S. 367 (1992). We therefore turn to that standard.

B. Standard of Review

"Consent decrees have elements of both contracts and judicial decrees." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). "A consent decree 'embodies an agreement of the parties' and is also 'an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.'" *Id., quoting Rufo*, 502 U.S. at 378. "[A] party seeking modification of a consent decree bears the burden of establishing [1] that a significant change in circumstances [2] warrants revision of the decree. If the moving party meets this standard, the court should consider [3] whether the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 383.

As to the first element, "[a] party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law." *Id.* at 384. The change must be unanticipated; "modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385.

As to the second element, the party seeking a modification must show that the significant change it has identified warrants modification. "Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous[,] ... when a decree proves to be unworkable because of unforeseen obstacles, ... or when enforcement of the decree without modification would be detrimental to the public interest[.]" *Id.* at 384 (citations omitted).

As to the third element, "[o]nce a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the [court] should determine whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 391. "Of course, a modification must not create or perpetuate a constitutional violation." *Id.* at 391. And it must not deprive the parties of the benefit of their bargain by rewriting the consent decree "so that it conforms to the constitutional floor. ... [T]he focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Id.* at 391.

Adopting *Rufo* in Massachusetts, the Appeals Court observed that it is a "flexible standard" based on "the umbrella concept of 'equitable'[.]" *Mitchell v. Mitchell*, 62 Mass. App. Ct. 769, 779 (2005), *quoting Alexis Lichine & Cie. v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995). "[F]actors to be considered in determining whether there is a 'significant change in circumstances' vary with type of case and whether complete dissolution of an injunction is sought or only a modification; 'if a party seeks to have a decree set aside entirely, he or she has to show that the decree has served its purpose, and there is no longer any need for the injunction[.]'" *Id.*, *quoting* Moore's Federal Practice § 60.47(2)(c) (2004). "The

greater the likelihood that the safety of the protected party may be put at risk by a modification, the more substantial the showing the party seeking relief must make." *Id.* at 780. Thus "a defendant's request to terminate an abuse prevention order *in its entirety*" should be granted "only in the most extraordinary circumstances and where it has been clearly and convincingly established that the order is no longer needed to protect the victim from harm[.]" *Id.* at 780-781 (emphasis in original). Even a fully satisfied decree may persist "[w]hen dissolution would reinstate the harm prohibited by the decree[.]" *Fortin v. Comm'r of Massachusetts Dep't of Pub. Welfare*, 692 F.2d 790, 800 n.13 (1st Cir. 1982).

C. **Factual Issues in Dispute**

Under *Rufo,* Defendants must prove: first, that there has been a significant, unexpected change of circumstances since entry of the Consent Decree; second, that the changes warrant modification; and third, that their proposed modification is suitably tailored to remedy the problems caused by the change. Since Defendants seek complete vacatur of the Consent Decree which was entered for the safety of Plaintiffs in this action, Defendants will have to prove by clear and convincing evidence that the Consent Decree is no longer needed to protect Plaintiffs from harm. At a minimum, that standard raises the following contested factual issues:

1. **Whether the Purposes of the Consent Decree Have Been Fulfilled.**

As explained above, Plaintiffs believe that the procedural record is dispositive on this issue. To the extend the Court disagrees, Plaintiffs are entitled to factual discovery as to the purposes of the Consent Decree and whether they have been fulfilled.

2. Whether Defendants Have Regulated JRC in Good Faith, and Whether Plaintiffs Are Still at Risk of Harm from Future Bad Faith Conduct.

A major issue is whether Defendants, as they claim, have regulated JRC in good faith since regaining receivership, and can be expected to continue doing so such that the Consent Decree's purpose of preventing "future bad faith conduct" is now superfluous. [12]

Plaintiffs dispute, among others, Defendants' factual claims that Plaintiffs are no longer at risk of serious or irreparable harm from Defendants denying Plaintiffs access to effective treatment and other bad faith actions of Defendants; that Defendants have treated Plaintiffs with fairness and such treatment has been transparent since the end of the receivership; and that Plaintiffs can adequately protect their rights through the existing administrative appeals process. Given the variety and ingenuity of Defendants' previous bad faith conduct, and their elaborate attempts to conceal that conduct from this Court, Plaintiffs are entitled to discovery to test Defendants' present representations of good faith. As a partial list, Plaintiffs will seek document discovery and depositions regarding Defendants': internal communications, decision-making process, and future plans in regulating JRC; draft and final reviews of JRC programs; selection of teams to conduct such reviews; findings of independent psychologists retained by DDS and the disposition of said findings; changes in policy toward JRC and aversive interventions after termination of the receivership; findings and decisions alleging that JRC is not in complete compliance with conditions of Level III Certification and threats to deny Level III Certification; and communications with other regulatory bodies, private entities, individuals, and media organizations.

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[12] Defendants allege as separate change in circumstances that they themselves have passed a regulation banning aversives. Memorandum at 25. This is primarily a legal argument, and one which the SJC has rejected. *See Judge Rotenberg Educ. Ctr., Inc.*, 424 Mass. at 447 (a judge's order "cannot be unilaterally overridden by an executive agency"). Factually speaking, the argument is subsumed in the question of whether Defendants have regulated in good faith.

3. Whether the State of Scientific Knowledge Has Shifted such that Substituted Judgment Proceedings Are Never Necessary to Ensure Plaintiffs' Access to Effective Treatment such as Aversive Interventions.

The next factual question is whether there has been a significant, unanticipated change in the state of scientific knowledge as to treatment of disabled clients, such that it will never be appropriate for the Probate and Family Court to consider by means of a substituted judgment proceeding whether a particular client requires aversive treatment.

Plaintiffs dispute, among others, Defendants' factual claims that aversive interventions are professionally unnecessary and unethical and do not conform to the current standard of care; that positive behavior supports is the generally accepted standard of care in the relevant treatment community; that there are effective alternative treatments for *all* people with severe behavior disorders; that other programs do not use aversive interventions to treat severe behavior disorders in people with developmental disabilities; and that DDS has identified serious issues related to JRC's use of aversive interventions since the receivership ended. To the contrary, Plaintiffs anticipate the evidence will show that the standard of care remains essentially the same now as it was in 1986: the least restrictive means of treatment should be used for each individual; the best available positive interventions should be tried before any aversive interventions; and if positive interventions fail, it is appropriate to consider more restrictive alternatives including aversive interventions. While the particular treatments available have changed, that change was not unanticipated, and the overall framework for selecting a treatment remains the same.

Regarding the particular individuals in this case, Plaintiffs anticipate discovery will show that they remain at risk of serious and/or irreparable harm from a loss of effective treatment if aversive interventions are denied, and that aversive interventions remain their least restrictive means of treatment for cases of severe behavior disorders, as has been found each year by the

courts. Importantly, discovery will include the findings of the independent psychologists retained by DDS to evaluate JRC clients as to their need for aversive treatments.

4. Whether there Have Been Any Other Substantial Changes of Circumstance.

Though Defendants have not articulated the relevance to their motion, the affidavit of Commissioner Howe includes a wide variety of factual allegations, such as alleged communications with the Department of Justice and the Centers for Medicare and Medicaid Services. Plaintiffs dispute many of the facts attached to Defendants' motion but not directly relied on in their Memorandum; to the extent Defendants intend to rely on those allegations, Plaintiffs are entitled to investigate through discovery.

5. Whether Any Changes that Have Occurred Make the Consent Decree Substantially More Onerous, Unworkable Because of Unforeseen Obstacles, or Detrimental to the Public Interest; and if so, Whether Dismissal of the Consent Decree is Suitably Tailored to Correct the Problem.

The final factual issue is whether any changes demonstrated by Defendants actually make the current operation of the Consent Decree "substantially more onerous," "unworkable because of unforeseen obstacles," or "detrimental to the public interest"; and if so, whether termination of the decree is a suitably tailored remedy.

Plaintiffs dispute, among others, Defendants' factual allegations that the Consent Decree hampers DDS' efforts to regulate JRC or constrains DDS from ensuring that JRC is employing the least restrictive, most effective treatment. Factual questions relevant to this issue include, without limitation: whether any changes in the state of scientific knowledge regarding treatment of disabled clients can be adequately addressed by Defendants' participation in the substituted judgment proceedings pursuant to the Consent Decree; why Defendants have not availed themselves of the ability to participate in those proceedings before moving to dismiss the decree; whether the decree interferes with Defendants' ability to regulate JRC as a general matter,

despite the SJC's finding that substituted judgment proceedings did not interfere with Defendants' general regulatory duties; and the nature of any obstacles allegedly imposed on Defendants by federal agencies.

6. The Factual Allegations in the Memorandum and the Affidavits of Gary W. LaVigna, Ph.D., BDBA-D and Elin M. Howe.

Finally (to the extent they are not covered above), Plaintiffs are entitled to discovery regarding the various facts alleged in Defendants' Memorandum and voluminous affidavits, on which Defendants presumably intend to rely in this proceeding.

IV. PROPOSED DISCOVERY ORDER

A. Scope of Discovery

In light of the above, any piecemeal approach to discovery in this case will be counterproductive. The Court will not be able to rule on Defendants' motion under *Rufo's* equitable standard without considering issues such as Plaintiffs' ongoing need for aversive treatment; the ongoing risk to Plaintiffs of Defendants' bad faith regulation; and the practical regulatory issues, if any, which the decree might be modified to address. (Indeed, Defendants would hardly have bothered to preemptively prepare and file "expert" affidavits totaling over 1200 pages to address those contested issues if they believed the issues could be avoided.) In addition, given the likelihood of appeal by one party or the other, it is also prudent to decide the case on a full record.

Plaintiffs propose that discovery be conducted according to the Civil Rules without further limitation at this time, a procedure consistent with the law in Massachusetts and other jurisdictions.[13] It is too early, for example, to limit discovery to particular documents or

[13] Trial courts in Massachusetts routinely allow meaningful discovery in such matters. *See e.g. Bilingual Master Parents Advisory Counsel v. Boston Sch. Comm.*, 14 Mass. L. Rep. 612 (Mass. Super. Ct. 2002) (Gants, J.) (trial court orders discovery in action regarding consent decree in bilingual education); *Mass. Port Auth. v. City of*

depositions of named individuals. The particular documents and witnesses necessary to address the above questions will emerge only through initial discovery. Nor is a narrow definition necessary to orderly resolution of this case; any party can of course seek protection from discovery that is irrelevant, overbroad, or abusive in the ordinary course of civil procedure. If the Court is inclined to define the scope of discovery at this stage beyond what is already defined by the Civil Rules, then the scope of discovery is best outlined as follows, and is included in the Proposed Order for Discovery in the alternative:

1. Whether the purposes of the Consent Decree have been fulfilled;
2. Whether Defendants have regulated JRC in good faith, and whether Plaintiffs are still at risk of harm from future bad faith conduct;
3. Whether the state of scientific knowledge has shifted such that substituted judgment proceedings are never necessary to ensure Plaintiffs' access to effective treatment such as aversive interventions;
4. Whether there have been any other substantial changes of circumstance;
5. Whether any changes that have occurred make the Consent Decree substantially more onerous, unworkable because of unforeseen obstacles, or detrimental to the public interest;
6. Whether dismissal of the Consent Decree is suitably tailored to correct any such problems; and
7. The factual allegations in the Memorandum and the Affidavits of Gary W. LaVigna, Ph.D., BCBA-D and Elin M. Howe.

Boston, 17 Mass. L. Rep. 125 (Mass. Super. Ct. 2003) (court ordered discovery in plaintiff's motion to vacate permanent injunction). Courts throughout the nation routinely allow such discovery as well. *See, e.g., John B. v. Goetz*, 2010 U.S. App. LEXIS 25589 (6th Cir. 2010) (trial court allows discovery in action against consent decree); *Gonzalez v. Galvin*, 151 F.3d 526 (6th Cir. 1998) (court reverses vacatur of consent decree where affidavits alone were insufficient to provide requisite factual record); *U.S. v. Montrose*, 980 F. Supp. 1112 (C.D. Cal. 1997) (parties entitled to broad factual discovery, including "matters underlying the Amended Consent Decree").

CERTIFICATE OF SERVICE

I, Devorah A. Levine, Esq., hereby certify that the within document was served via first-class on the following on April 26, 2013:

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