COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss

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

JUDGE ROTENBERG EDUCATIONAL CENTER, INC., et al.,[1]
Plaintiffs,
v.

COMMISSIONERS of the DEPARTMENT OF DEVELOPMENTAL SERVICES and the DEPARTMENT OF EARLY EDUCATION AND CARE,[2]
Defendants.

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

Over 25 years ago, the Director of the former Office for Children ("OFC") issued a series of emergency orders and took other actions designed to suspend, without hearing, the license of JRC, a residential facility in Canton that provides services to individuals with intellectual and developmental disabilities. After JRC filed this lawsuit challenging the Director's actions, the

[1] When the complaint was filed, the Judge Rotenberg Educational Center was known as the Behavior Research Institute. Second Am. Compl. (May 27, 1986) ("Compl.") at 1 (attached as Exh. 1 to Affidavit of Yolanda Hales ("Hales Aff."), which is attached as Exh. A). For convenience, this memorandum will refer to the facility exclusively as "JRC." The other plaintiffs were Dr. Matthew L. Israel, JRC's Executive Director; Leo Soucy, individually and as parent and next friend of Brendon Soucy; Peter Biscardi, individually and as parent and next friend of P.J. Biscardi; and a class of all parents and guardians of students at JRC, on behalf of themselves, their children, and wards. Id.

[2] The original defendant was Mary Kay Leonard, the Director of the former Office for Children. Compl. at 1. The agencies currently bound by the consent decree are the Department of Developmental Services ("DDS") and the Department of Early Education and Care ("DEEC"). DDS is successor to the Department of Mental Retardation ("DMR"), which in 1988 assumed the obligations under the decree previously assigned to the Department of Mental Health ("DMH"). Judge Rotenberg Educ. Ctr. v. Comm'r of Dep't of Mental Retardation, 424 Mass. 430, 432 n.3 (1997) ("JRC"). DEEC is successor to the Office for Children, renamed the Office of Child Care Services in 1997. See G.L. c. 15D, § 2 (2012); G.L. c. 28A § 3 (2007).

parties entered into a settlement agreement, which became a consent decree after it was incorporated as an order of this Court in January 1987. The plain language of the agreement contemplated termination within approximately one year, but in 1988 this Court extended the agreement because, at the time, JRC was not fully licensed. JRC has long since been operating with a full license, but the consent decree has remained in place to this date.

Today, over 25 years after the decree was entered, significant changes in circumstances have come to pass that warrant vacatur of the decree because prospective application "is no longer equitable." Mass. R. Civ. P. 60(b)(5). First, both the terms of the decree and the current facts demonstrate that the purpose of the decree was long ago achieved. The plain intent of the parties was that the decree would terminate after approximately one year—i.e., the time necessary to remedy JRC for OFC's past bad acts. The defendant agencies have already complied with the decree for a much longer period than the parties intended, including ten years during which DMR was under receivership. It has now been over six years since the receivership was terminated, and, since that time, the defendants have continued to fulfill their obligations under the decree both by complying with its terms and exercising regulatory authority over JRC with fairness and transparency. Vacatur of the decree is thus not only equitable, it is required under the doctrine of separation of powers, which prohibits a court from enforcing a judgment concerning the exercise of executive functions absent evidence that the agency has refused to comply with the judgment or has broadly abrogated its statutory duties. That doctrine has particular force here because the decree has for some time granted JRC remedies not available to any other provider in the Commonwealth.

Second, current clinical and empirical evidence, which was not available when the decree was entered, reflects an overwhelming professional consensus that the aversive, punitive interventions now used by JRC—primarily, contingent electric skin shock—do not conform to the accepted standard of care for treatment of individuals with intellectual and developmental disability. This change in the standard of care, which DDS has recently incorporated in its

regulations to apply on a prospective basis, is in inherent conflict with JRC's position that the decree affirmatively authorizes those procedures and that DDS has no authority to regulate their use. JRC's position, and its related claim that it is entitled to arbitrate any disputes with DDS before a court monitor, have hampered DDS's efforts to ensure that JRC is complying with the accepted standard of practice in the field of behavioral treatment. Continued enforcement of the decree would therefore be contrary to the public interest, warranting relief under Rule 60(b)(5).

For these reasons and those below, the decree should be vacated in its entirety.

BACKGROUND[3]

I. THE UNDERLYING COMPLAINT AND DECREE

A. The Allegations of the Complaint

JRC filed this action in 1986 seeking injunctive relief based on a series of events that occurred over the course of approximately seven months the previous year. In particular, JRC claimed that OFC, through its Director, had engaged in bad-faith regulatory and licensing activities in an attempt to prevent JRC from using "professionally appropriate" aversive interventions[4] on its students. Compl. ¶ 86. At the time the aversive techniques being used by JRC consisted of water sprays, taste aversives, and muscle squeezes, in conjunction with mechanical restraints. Id. ¶ 16. JRC used these techniques "in lieu of anti-psychotic medication and other more restrictive procedures such as seclusion and electroshock." Id.

In early to mid-1985, an OFC employee conducted a licensing restudy of JRC and concluded that its techniques were clinically appropriate and conformed to the standards recommended by professionals in the field. Id. ¶¶ 17, 23-24. Despite this conclusion, a few months later, OFC's Director sent JRC a "Notice of Emergency Suspension" and an "Order to

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[3] These facts are derived from court documents or from the attached affidavits, which are signed under the penalties of perjury, in compliance with Probate Court Standing Order 2-99.

[4] An aversive intervention is a "procedure[] involving things or events that, when presented contingent upon some specified target behavior(s), have a decelerating effect upon that behavior." 115 C.M.R. 5.14(2).

Show Cause," mandating that JRC "'cease all group care or be subject to prosecution.'" Id. ¶ 26. The Director also sent an "Emergency Order to Correct Deficiencies" requiring JRC to "cease the use of any physical aversives, cease the use of all contingent food programs, and cease intake of new students." Id. ¶ 27. OFC took these actions without giving JRC notice or an opportunity to make alternative arrangements for treatment. Id. Further, OFC did not offer any "medical, psychological or psychiatric evidence" suggesting the existence of an emergency or of "alternative procedures or placements" that would serve the needs of the students. Id. ¶¶ 38-39.

JRC immediately appealed the emergency suspension to the Division of Administrative Law Appeals ("DALA"), which found that, contrary to OFC's determination, there was no emergency and that JRC's license should remain active pending a hearing on the merits. Id. ¶ 42. Shortly thereafter, in December 1985, the parties entered into an Interim Agreement in which they agreed to stay the DALA proceedings so that JRC could apply for variances with OFC. Id. ¶ 51. OFC failed to comply with the Interim Agreement in several respects, including by assembling what JRC believed to be a biased panel of individuals to review JRC's variance requests. Id. ¶¶ 53-62. OFC also asserted that JRC could not appeal that portion of its order barring intake of new students, and it refused to participate in the DALA hearing that was convened for that purpose. Id. ¶¶ 82-83.

In March 1986 the parties entered into another agreement, which provided for a team to be assembled to evaluate the treatment plans for 18 of the most handicapped students then enrolled at JRC. Id. ¶ 65. The parties agreed that the team would have full authority to design plans for those students and that its authority would not be affected by any decision made on JRC's variance requests. Id. ¶¶ 67-68, 73. The team proceeded to issue plans that included a contingent-food program, physical aversives, and an automatic vapor-spray feature. Id. ¶ 70. Two days later, however, the Director denied JRC's variance applications and, contrary to the plans designed by the team, banned the use of contingent-food programs, physical aversives, water-vapor aversives, helmets, and taste aversives. Id. ¶¶ 74-78. The Director also barred JRC

from resuming intake of new students and made JRC's relicensing contingent on its agreement to radically change its approach to treatment. Id. ¶¶ 80-81. Moreover, before affording JRC a hearing on the license suspension, OFC contacted state and local educational agencies, stating that JRC would close and urging them to withdraw their students. Id. ¶¶ 91-92.

According to JRC all of these alleged acts showed that OFC "ha[d] abandoned its proper monitoring and licensing review of [JRC]." Id. ¶ 86. JRC asserted that the then Director, in particular, "ha[d] demonstrated through her actions that she [was] completely incapable of fairly and impartially exercising monitoring, regulatory and licensing functions or acting in the best interests of [JRC] students." Id. ¶ 99.

B. The Class and Claims

Based on the above allegations, JRC and the parents of two students sought equitable relief on behalf of a class of the approximately 60 students then attending JRC, their parents, and their guardians. Id. ¶ 7. The proposed class did not include future students. Id.

The complaint raised eight claims, three of which pertained to JRC. Those three claims did not assert any ongoing wrong but, rather, sought relief solely to remedy OFC's—especially, the Director's—past conduct:

- Count IV alleged that OFC violated JRC's and the class plaintiffs' due-process rights under the Declaration of Rights, Articles X and XII, when it "engaged in a series of actions which [were] arbitrary, irrational and unrelated to any legitimate state purpose" and "outside of [OFC's] statutory mandate," id. ¶¶ 112-14;

- Count VII alleged that the Director violated JRC's rights under the Civil Rights Act, G.L. c. 12, §§ 11H, 11I, by depriving JRC of due process through threats, coercion, and intimidation, id. ¶¶ 117-18; and

- Count VIII alleged that OFC violated the Administrative Procedures Act, G.L. c. 30A, because the Director's various orders were not based on substantial evidence and because OFC failed to provide for an adjudicatory hearing for JRC to contest the closure of intake of new students, id. ¶¶ 123-27.

The remaining five claims, brought on behalf of the class plaintiffs only, likewise sought relief based on the discrete, past acts of OFC and the Director:

- Count I alleged that "OFC's Emergency Order to Correct Deficiencies and other OFC actions" interfered with the students' rights under the Declaration of Rights, Articles X, XI and XII, to "habilitation and a 'right not to regress as a result of state action,' " id. ¶¶ 101-05;

- Count II alleged that OFC interfered with the students' rights under G.L. c. 71B, §§ 1, et seq., to educational services designed to ensure their "'maximum possible development,'" id. ¶¶ 106-08;

- Count III alleged that, "[a]s a result of [OFC's] actions," the students "have not been assured the sound and coordinated development of services" and the parents "have not been able to play a decisive role in the planning, operation and evaluation of programs for the care of their children," in violation of former G.L. c. 28A, § 1,[5] id. ¶¶ 109-11; and

- Counts V and VI alleged that the Director violated the parents' and students' respective rights under the state Civil Rights Act, id. ¶¶ 115-18.

C. The Consent Decree and Extension Order

In June 1986 this Court (Rotenberg, J.) entered a preliminary injunction barring enforcement of OFC's orders, finding that "the director of OFC had engaged in bad faith regulation of JRC, and that her termination of JRC's treatment procedures was without medical support." JRC, 424 Mass. at 433. A few months later, the parties entered into a settlement agreement, which the judge approved on January 7, 1987, and incorporated as an order of the Court. Id. at 433-34.

The agreement's core provision, Part A, provides that "aversive procedures are permitted for use at [JRC] only when authorized as part of a court-ordered 'substituted judgment' treatment plan for an individual client." Settlement Agreement & Order (attached as Exh. 2 to Hales Aff.) ("Decree") at 2; see id. at 3-6. Part B provides in turn that, "[o]n each occasion when the Court issues a substituted judgment treatment plan, the Court shall also appoint a monitor who will report to the Court." Id. at 6. The monitor is not only empowered to oversee issues regarding individual plans, but also has general authority to oversee JRC's "treatment and educational program[s]." Id. at 7. In addition, if any disputes arise under the agreement, the parties must bring them to the monitor for arbitration. Id.

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[5] Now incorporated in G.L. c. 15D, § 3.

By its terms the agreement was "made for this case only," and the "sole intent of each party" was "simply to resolve this case and the other administrative and judicial cases which [were then] pending between O.F.C., [JRC] and the parents." Id. at 2. Consistent with this limited intent, Part K of the agreement provides for termination after approximately one year:

> The Probate Court shall conduct a hearing at six-month intervals in order to review the parties' adherence to the provisions of this agreement. This agreement shall be automatically extended at the first six month review unless the Court, upon motion by any party, orders otherwise. This agreement shall automatically terminate at the second review unless the Court, for good cause shown related to the terms or substance of this agreement, orders otherwise.

Id. at 13-14, Part K (emphasis added). Likewise, the agreement provides that the term of the court monitor "shall be for a period of six months unless extended by the Court in accordance with the provisions of Paragraph K." Id. at 7.

In July 1988, after the second six-month review, this Court (Rotenberg, J.) extended the agreement "until . . . further order." Order (July 7, 1988) (attached as Exh. 3 to Hales Aff.); see JRC, 424 Mass. at 434 n.6. The sole reason for the extension was that, at the time of the hearing, JRC was "not fully licensed." Order (July 7, 1988).

II. THE CONTEMPT PROCEEDINGS AND RECEIVERSHIP

In the mid-1990s, JRC brought a contempt action against DMR claiming that it had violated the consent decree by refusing in bad faith to grant JRC's request for recertification to use "Level III" aversive interventions.[6] JRC, 424 Mass. at 432, 434. Among other things JRC

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[6] Under previous and current regulations, "[n]o Behavior Modification plans employing Level III Interventions may be implemented except in a program or a distinct part of a program that . . . is . . . specially certified by the Department as having authority to administer such treatment." 115 C.M.R. 5.14(4)(f); JRC, 424 Mass. at 434 n.8. A "Level III" intervention is defined as "[a]ny Intervention which involves the contingent application of physical contact aversive stimuli," "Time Out wherein an individual is placed in a room alone for a period of time exceeding 15 minutes," "[a]ny intervention not listed . . . as a Level I or Level II Intervention which is highly intrusive and/or highly restrictive of freedom of movement," or "[a]ny Intervention which alone, in combination with other Interventions, or as a result of multiple applications of the same Intervention poses a significant risk of physical or psychological harm to the individual." 115 C.M.R. 5.14(3)(d); JRC, 424 Mass. at 434 n.8.

alleged that DMR—acting under the direction of its then Commissioner—had refused to arbitrate disputes as required by the decree, attempted to disrupt JRC's relationships with funding agencies and clients, and directly contradicted outstanding court orders by conditioning JRC's recertification on its agreement to stop using certain aversive procedures. Id. at 436-42.

This Court (LaStaiti, J.) found DMR in contempt and, as a result, issued an order incorporating the consent decree and appointing a receiver to manage the agency in all of its relationships with JRC. Id. at 463.[7] The receivership was in place from 1996 to April 2006, during which time DMR fully cooperated with the receiver in issuing licenses and certifications to JRC. Affidavit of Elin M. Howe ("Howe Aff.") (attached as Exh. B) ¶¶ 18, 33, 61-68. This included JRC's Level III aversive-intervention program, which was certified several times after review by various DMR Level III certification teams. Id. ¶¶ 63-68. In addition, DMR's commissioner and senior staff met quarterly with the receiver and JRC representatives to resolve any disputes concerning JRC's programs. Id. ¶ 18.

In 2003, based on DMR's compliance with the receivership order, the receiver submitted a report opining that "the relief ordered by the Judgment and Order ha[d] been accomplished." Special Report of Receiver re Plan for Winding Down the Receivership (May 19, 2003) (attached as Exh. 4 to Hales Aff.) at 11. The receiver thus recommended return of regulatory authority to DMR, followed by transfer to the Office of Child Care Services ("OCCS") of the authority to license JRC's programs for children. Id. at 2-3. Notably, although JRC objected to OCCS's assuming licensing authority, the receiver rejected those objections on grounds that they were based on "historic concerns arising from the actions of . . . OFC," which could not be attributed to its successor agency:

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[7] Although the SJC affirmed the finding of contempt, it did so by applying a preponderance-of-the-evidence standard, which the Court has since clarified does not "adequately characterize[] the level of certainty appropriate to justify civil contempt sanctions." In re Birchall, 454 Mass. 837, 852 (2009) (abrogating JRC). Under the current rule, the complainant bears the burden of proving contempt by clear and convincing evidence. Id.

> More than sixteen years have passed since Judge Rotenberg approved the terms of the Settlement Agreement between JRC and OFC. Since that time, a new agency, DMR, was constituted and OFC was reconstituted into today's OCCS. Agency regulations have changed, as have commissioners and staff. The actions of OFC in the 1980's, however improper, should not forever preclude OCCS . . . from licensing JRC's programs . . . .

Id. at 7.

In September 2003 many regulatory functions were returned to DMR, pursuant to an order entered by this Court. Behavioral Research Inst. v. Philip Campbell, Order of Bristol County Probate Court (Sept. 4, 2003) (LaStaiti, J.) (attached as Exh. 5 to Hales Aff.). Then, in April 2006, after a decade, the receivership was formally terminated. Behavioral Research Inst. v. Philip Campbell, Order of Bristol County Probate Court (Apr. 16, 2006) (LaStaiti, J.) (attached as Exh. 6 to Hales Aff.).

III. CURRENT FACTUAL SITUATION

A. Defendants' Compliance with the Decree

In the over six years since the receivership ended, the Commonwealth's agencies have consistently complied with their obligations under the decree. Upon termination of the receivership, all administrative and regulatory functions were returned to DMR, and then its successor DDS. These functions have included certifying and licensing programs for adults with intellectual and developmental disability; granting approval to occupy and licensing residences occupied by adults with intellectual and developmental disability; investigating and disposing of abuse complaints; appointing independent clinicians to review court-approved treatment plans; developing individual support plans; reviewing proposals and contracts between DDS and JRC; and reviewing restraint forms. Howe Aff. ¶ 21.

Since 2006, DDS has regulated JRC in a transparent manner in all these areas. It has granted licenses to JRC to operate its residences and day programs, investigated complaints of abuse with impartiality, monitored restraint use, certified JRC's Level III program based on comprehensive and impartial review by a team of experts, and, when necessary, engaged in arbitration before the court monitor. Howe Aff. ¶¶ 22-84. Thus, in stark contrast to the conduct

of OFC that led to filing of this case in the 1980s, DDS has worked with JRC to license and regulate its programs with transparency and in compliance with the decree. See id. ¶¶ 18-21, 52; see generally id. ¶¶ 22-84.

B. Professional Consensus Opposing the Types of Aversive Interventions Currently Used by JRC

The types of aversive interventions used at JRC have changed significantly since this action was filed over 25 years ago. Now, JRC's primary technique is the graduated electronic decelerator ("GED" or "contingent skin shock"), which is used to administer an electric skin shock when a client engages in maladaptive behavior. Howe Aff. ¶¶ 34. The GED is a more recent intervention that was not in use in the 1980s, Howe Aff. ¶ 34; Compl. ¶ 16, and is deemed a "Level III" aversive under DDS regulations. See 115 C.M.R. 5.14(3)(d) (defining "Level III Interventions" to include "[a]ny Intervention which involves the contingent application of physical contact aversive stimuli such as . . . contingent skin shock").[8]

Contrary to JRC's practices, the overwhelming weight of professional opinion opposes the use of Level III interventions such as the GED. Dr. Gary LaVigna, Clinical Director of the Institute for Applied Behavior Analysis in Los Angeles, states that, since 1985, clinical and empirical research has developed such that there is now a "consensus" professional opinion that positive behavior supports ("PBS")—applied behavior analysis without punishment—can be used to effectively treat people with challenging behaviors. Affidavit of Dr. Gary LaVigna ("LaVigna Aff.") (attached as Exh. C) ¶¶ 4-16. While PBS was still in its infancy in the mid-1980s, numerous studies over the past 25 years have established its effectiveness, even in cases where punishment has failed. Id. ¶¶ 5-6. Thus, given the ethical principle and legal requirements that treatment must be accomplished by the least restrictive means possible, and in

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[8] The Food and Drug Administration ("FDA") has recently raised questions concerning whether JRC has obtained necessary approvals for the current versions of the GED device that it is using at its facility. Specifically, in December 2012, the FDA sent a letter to JRC stating that it had violated federal law by failing to get preapproval or clearance to use its GED3A and GED4 devices. See Dec. 6, 2012, Warning Letter (CMS # 367480), located at http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2012/ucm331291.htm.

contrast to the professional opinion that may have prevailed when the decree was entered in the 1980s, the current consensus is that punitive procedures are "professionally unnecessary and inappropriate" and " not ethical." Id. ¶¶ 4, 9. Instead, "PBS has reached the point where it is the generally accepted standard of care in the relevant treatment community." Id. ¶ 60.

With respect to contingent skin shock specifically, given its severity, there is "near-universal agreement" that it is "professionally unnecessary and inappropriate because there are other, far less restrictive methods available to treat challenging behaviors." LaVigna Aff. ¶ 15. Dr. LaVigna describes contingent skin shock as a "much more intrusive and restrictive intervention" than any of the aversive procedures listed in the complaint or in the decree (water sprays, taste aversives, muscle squeezes, spanks, pinches, and restrained time out). Id. ¶ 14; see Compl. ¶ 16; Decree at 2-3.

Dr. LaVigna's opinions are consistent with the position statements of virtually every major professional and advocacy organization for disability rights. For example, the American Association on Intellectual and Developmental Disabilities ("AAIDD"), a leading national professional organization, has stated that "[r]esearch indicates that aversive procedures such as deprivation, physical restraint and seclusion do not reduce challenging behaviors, and in fact can inhibit the development of appropriate skills and behaviors. These practices are dangerous, dehumanizing, result in a loss of dignity, and are unacceptable in a civilized society. . . . The MA Chapter of AAIDD and the Region X Board of AAIDD fully support . . . efforts to eradicate aversives from future behavioral plans." Howe Aff. ¶ 88 & Exh. 8 at 597, 599. The Arc, a national advocacy organization, has also issued a position statement in favor of using PBS for treatment of individuals with intellectual and developmental disability. Id. ¶ 88 & Exh. 8 at 314-15. Similarly, TASH, another national advocacy organization, has concluded that, "[a]lthough it has been believed that [aversive] . . . procedures are necessary to control dangerous or disruptive behaviors, it has now been irrefutably proven that a wide range of methods are available that are not only more effective in managing dangerous or disruptive behaviors, but do not inflict pain

on, humiliate, dehumanize or overly control or manipulate individuals with disabilities. . . . Therefore, TASH affirms the right of all persons with disability to freedom from overly restrictive procedures and from aversive or coercive procedures of any kind. TASH is unequivocally opposed to the inappropriate use of restraint and to the use of overly restrictive and aversive procedures under any circumstances and calls for the cessation of the use of all such procedures." Id. ¶ 88 & Exh. 8 at 590-91.[9]

Moreover, numerous settlement agreements and remedies obtained by the U.S. Department of Justice ("DOJ") in major civil-rights cases regarding systems of care for persons with intellectual and developmental disabilities reflect an emphasis on PBS and prohibitions on aversive interventions. Howe Aff. ¶¶ 14-17.[10] And a similar result was reached in a recent federal class action against the Minnesota Department of Human Services, in which the parties entered into a settlement agreement that prohibited the use of aversives for persons in the state's care and established a statewide acceptance of positive behavioral supports. Id. ¶ 17.

Finally, these standards are reflected in the laws and practices of the majority of other states. DDS is unaware of any other state that has authorized the use of aversives such as contingent skin shock. Id. ¶ 89. Further, 21 states have affirmatively banned aversives through

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[9] Many other organizations have issued similar statements, as described in the Howe affidavit at ¶ 88 and the attached exhibits.

[10] Consistent with the remedies in those cases, DOJ sent the Commonwealth a letter in May 2011 informing it of an investigation regarding whether its use of JRC as a service setting violated the federal Americans with Disabilities Act and Rehabilitation Act. Howe Aff. ¶ 117. Likewise, in July 2012, the Centers for Medicare and Medicaid Services ("CMS") sent a letter raising "serious concerns" about whether the Commonwealth was complying with the requirement that it "protect the health and welfare of" certain Medicaid participants with mental retardation. Id. ¶ 118. The letter observed that "[p]ublished descriptions of aversive interventions and deprivation procedures [at JRC] provide a picture of residential settings which cannot be characterized as 'home-like.' Aversive and intrusive interventions reportedly include repeated and painful electric shock, potentially unnecessary restraint and seclusion, and meal deprivation." Id. ¶ 118. In December 2012 CMS sent another letter stating that, after review, it had determined that the Commonwealth had failed to assure the "health and welfare" of certain Medicaid recipients, as required by federal law, because they were receiving Level III interventions at JRC. Id. ¶ 119.

statute, regulation, or policy, and many others have banned their use in practice. Id. This includes New York, which has placed students at JRC as authorized by that state's law. Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 208 (2d Cir. 2012), petition for cert. filed, (U.S. Jan. 2, 2013) (No. 12-932). In 2006 New York's education agency repudiated the practices used by JRC by promulgating a regulation "prohibiting schools, including 'approved out-of-state day or residential schools' (such as JRC), from using aversive interventions." Id. at 209. That regulation was recently upheld by the Second Circuit against challenges under the Individuals with Disabilities Education Act, the Rehabilitation Act, and the federal and New York constitutions. See id. at 212-19.

C. DDS's Recent Regulation Banning Level III Aversives and the Testimony and Comments in Support of the Ban

In line with this professional consensus, in October 2011, DDS amended its "Behavior Modification" regulation to provide that "[n]o program which is operated, funded or licensed by [DDS] shall employ the use of Level III Aversive Interventions." 115 C.M.R. 5.14(4)(b)(3). Exceptions may be granted only on an "individual-specific" basis to people "who, as of September 1, 2011, have an existing court-approved treatment plan which includes the use of Level III Aversive Interventions; provided further that any such exception may be granted each year thereafter if the exception is contained in the behavior treatment plan that has been approved by the court prior to September 1, 2011." Id. 5.14(4)(b)(4). As of January 17, 2013, 86 individuals at JRC had court-approved treatment plans that authorized the use of Level III aversives. Howe Aff. ¶ 103. These are the only individuals who fall within the exception contained in the new regulation. Id. ¶¶ 102-03.

DDS promulgated the regulation after fully complying with the requirements of chapter 30A. In June 2011 DDS issued a notice of its intent to amend the regulation to ban the use of Level III aversives. Id. ¶ 85. It then held two full days of public hearings on the proposed amendment and reviewed and considered the testimony and comments of hundreds of interested parties including human-rights organizations; clinicians and professionals serving individuals

with disabilities and severe behavioral challenges; provider organizations; a union whose members serve individuals with disabilities; family members of individuals with intellectual disabilities, autism, and other disabilities with challenging behaviors; attorneys representing such individuals; and national, state, and local disability organizations, including the Massachusetts chapter of AAIDD, the Arc of Massachusetts, TASH, the President's National Council on Disabilities, the National Association of State Directors of Developmental Disability Services, the Association of Developmental Disability Providers, the Massachusetts Developmental Disabilities Council, and many others. Id. ¶¶ 86-88. Further, JRC itself participated in the public hearings by offering oral and written comments. Id. ¶ 87.

The comments received by DDS overwhelmingly supported adoption of the proposed regulation. Id. ¶¶ 87-88. In fact, no one outside the JRC community spoke in favor of the continued use of Level III aversives. Id. Out of 360 combined written and oral comments, almost 300 supported the proposed ban. Id. ¶ 87. And all of the comments in opposition were submitted by people affiliated with JRC, including 59 JRC employees. Id.

D. The Impediment Posed by the Decree to Proper Regulation of JRC and Its Use of Level III Aversives

In conflict with this near-universal agreement outside the JRC community that PBS should be used in place of aversive interventions, the decree has constrained DDS from ensuring that JRC is practicing the "least restrictive" and "least intrusive" treatment methods, as required by the regulations. 115 C.M.R. 5.14(1)(c); see id. 5.14(4)(b), 5.14(4)(c). As mentioned, JRC is the sole provider in the state that is certified to use and is currently using Level III aversives. Howe Aff. ¶ 102. With all other providers, DDS conducts surveys to ensure that they are using the least restrictive and least intrusive treatments and are complying with all other DDS regulations. 115 C.M.R. 8.04(4). If DDS sees any deficiencies, it will order corrective action, and providers can lose their license or certification if they do not comply. Id. 5.14(4)(f)(1), 8.04(6), 8.04(7), 8.33. In such an event, the provider has a right of appeal through ordinary administrative channels. Id. 5.14(4)(f)(8), 8.34.

Because of the decree, DDS has been hamstrung in its attempts to apply these established regulatory procedures to JRC. This is because JRC has consistently taken the position that the decree gives it the affirmative right to use aversives, in perpetuity, and that DDS has no authority to regulate in this area. E.g., JRC's Demand for Arbitration (July 6, 2011) (Howe Aff. ¶ 85, Exh. 7 at 187) ("In accordance with the Settlement Agreement, DDS may not prohibit the use of aversives."). Since the receivership ended in 2006, DDS has repeatedly identified serious issues relating to JRC's use of Level III aversives and has imposed conditions in an attempt to bring JRC's programs into compliance with the regulations. E.g., Howe Aff. ¶¶ 53-55, 67-69, 73-77. Normally, failure to comply with such conditions would result in decertification. 115 C.M.R. 5.14(4)(f)(1), 8.33; Howe Aff. ¶¶ 72, 80. But unlike other providers, JRC has claimed a right not to comply with DDS's orders, asserting that the agency was violating the decree by seeking to enforce its regulations. Howe Aff. ¶¶ 77, 80. And when DDS has expressed disagreement or tried to institute administrative action, JRC has responded by demanding arbitration before the court monitor—a remedy that is unavailable to every other provider in the Commonwealth. Id. ¶¶ 77-80 & Exhs. 7, 16, 17.

JRC's actions during the 2011 rulemaking further demonstrate how the decree has distorted the regulatory relationship. Despite the complete transparency of the process and DDS's full compliance with chapter 30A, when DDS issued notice of the proposed amendment, JRC responded with a demand for arbitration, asserting that DDS was violating the decree by engaging in rulemaking, even though it is indisputably authorized to do so under its enabling statute. See G.L. c. 19B, § 1 (granting broad power to Commissioner of DDS to supervise "all matters affecting the welfare of . . . persons with an intellectual disability" and "all private facilities for such persons"); id. § 14 (granting broad rulemaking power to Commissioner). In its letter JRC demanded that DDS "immediately withdraw the Proposed Amendments and cancel any public hearings about same as they constitute acts of contempt subjecting DDS, the Commonwealth, and responsible parties to contempt sanctions and penalties." Howe Aff. ¶ 85,

Exh. 7 at 185. Alternatively, JRC demanded "immediate arbitration" under the decree, claiming that it would otherwise "seek relief from the court, including contempt proceedings against DDS and all other responsible parties." Id. Although it ultimately did not file a contempt action, JRC has maintained repeatedly that, because of the decree, DDS has no authority to either limit or eliminate its use of aversive interventions. Howe Aff. ¶¶ 77-80, 85.

ARGUMENT

I. THE DECREE SHOULD BE VACATED UNDER MASS. R. CIV. P. 60(b)(5) BECAUSE INTERVENING CHANGES IN FACT AND LAW HAVE RENDERED CONTINUED APPLICATION "NO LONGER EQUITABLE."

A. A Flexible, Equitable Standard, Informed by Separation-of-Powers Principles, Governs Motions to Vacate Consent Decrees in Institutional Reform Litigation.

Mass. R. Civ. P. 60(b)(5) permits relief from a judgment where "it is no longer equitable that the judgment should have prospective application." This Rule "derives from the traditional power of a court of equity to modify its decree in light of changed circumstances." Mitchell v. Mitchell, 62 Mass. App. Ct. 769, 778 (2005). Although there is little caselaw discussing a party's precise burden under the Rule, the few courts that have considered the issue have uniformly concluded that these motions should be governed by the flexible standard set forth in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).[11] Under Rufo, modification of a consent decree is warranted if the moving party shows that there has been "a significant change either in factual conditions or in law." Id. at 384. Changes that justify relief include "when enforcement of the decree without modification would be detrimental to the public interest,"

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[11] Mitchell, 62 Mass. App. Ct. at 778-80 (applying Rufo to motion to vacate abuse-prevention order); Mass. Port. Auth. v. City of Boston, No. 012731BLS2, 2003 WL 23163113, at *12-*13 (Mass. Super. Ct. Nov. 18, 2003) (Botsford, J.) (applying Rufo to motion to vacate injunction barring construction of runway at Logan Airport); see Am. Venture 594 Corp. v. A. Russo & Sons, Inc., 79 Mass. App. Ct. 770, 775 n.8 (2011) (assuming in dicta that Rufo applied to motion to declare consent judgment no longer enforceable); Bilingual Master Parents Advisory Council v. Boston Sch. Comm., No. 01-1826-F, 2002 WL 992541, at *13, *17 (Mass. Super. Ct. May 15, 2002) (Gants, J.) (stating in dicta that Rufo governs motions to modify consent judgments).

"when a decree proves to be unworkable because of unforeseen obstacles," and when there is intervening law that conflicts with the requirements of the decree. Id. at 384, 388.

If the moving party makes this initial showing, the court must then determine "whether the proposed modification is suitably tailored to the changed circumstance." Id. at 391. Complete dissolution of a decree is warranted under this standard if the moving party "'show[s] that the decree has served its purpose, and there is no longer any need for the injunction.'" Mitchell, 62 Mass. App. Ct. at 779 (quoting Moore's Federal Practice § 60.47[2][c] (2004)); accord Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., 466 F.3d 391, 395 (6th Cir. 2006).

Recently, the Supreme Court has emphasized that Rufo's flexible approach "serves a particularly important function in . . . 'institutional reform litigation.'" Horne v. Flores, 557 U.S. 433, 447 (2009). This is due in large part to the fundamental separation-of-powers principles that are implicated in such cases. As the Court observed, "[i]njunctions of this sort bind state . . . officials to the policy preferences of their predecessors"; yet "the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." Id. at 447-48. Enforcing an outdated decree thus runs the risk of "improperly depriv[ing] future officials of their designated legislative and executive powers." Id. at 449 (quotations marks omitted); see Rufo, 502 U.S. at 381 ("the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions").[12]

[12] Although federalism concerns are also implicated when a decree is entered by a federal court against a state agency, the analyses in Horne and Rufo make clear that separation of powers is an equally important consideration in determining whether Rule 60(b)(5) relief should be granted. See Horne, 557 U.S. at 447-50; Rufo, 502 U.S. at 381, 392-93; see also Glisson v. U.S. Forest Serv., No. 99-cv-4189-JPG, 2008 WL 5156274, at *3 (S.D. Ill. Dec. 8, 2008) (vacating injunction against federal agency on grounds that continued judicial oversight was no longer necessary and would thus violate separation of powers).

Although the SJC has not had occasion to apply these principles in the consent-decree context, it has consistently held that, in general, injunctive relief against a public agency must be narrowly tailored so as not to "infringe[] too drastically on the [agency's] authority to administer its program as it chooses." Correia v. Dep't of Pub. Welfare, 414 Mass. 157, 169 (1993); see Guardianship of Anthony, 402 Mass. 723, 726 (1988); Bradley v. Comm'r of Mental Health, 386 Mass. 363, 365 (1982). By necessary extension a consent decree that encroaches on executive functions must be vacated where the agency demonstrates that circumstances have changed since entry of the decree such that judicial oversight is no longer necessary. See Horne, 557 U.S. at 447 (once a state agency shows that factual or legal changes render continued enforcement of a consent decree contrary to the public interest, "a court abuses its discretion when it refuses to modify . . . [the] consent decree in light of such changes") (quotation marks omitted). Indeed, were the rule otherwise, the agency will be perpetually subject to the jurisdiction of the court even absent any ongoing violation of the law. This would an unlawful usurpation of executive functions because "[t]he determination of where and how [an agency] will carry out its statutory, regulatory, and any constitutional obligations is . . . for it to decide." In re McKnight, 406 Mass. 787 (1990); see Correia, 402 Mass. at 169-70 ("[g]iven the defendant's status as a public agency," it was "inappropriate" for lower court to enter injunction that specified procedures agency must follow to discharge its regulatory functions; instead, court "must allow the agency to exercise its discretion" to decide how to bring its practices within requirements of the law).

Here, two significant changes in circumstances require vacatur of the consent decree under Rule 60(b)(5). First, the purpose of the decree has been fulfilled, as the parties intended that it last for only as long as needed to remedy JRC for OFC's past bad acts. Because judicial supervision is thus no longer necessary, and indeed improper, the appropriate modification under Rufo is vacatur of the decree in its entirety. See Mitchell, 62 Mass. App. Ct. at 779. Second, at a minimum, Part A of the decree should be vacated because current clinical evidence shows that use of Level III aversives no longer conforms to the accepted professional standard of care, and

DDS has amended its regulations to incorporate this new standard. It would therefore be detrimental to the public interest for the decree to have continued application.

B. The Decree Should Be Vacated in Its Entirety Because Its Purpose Has Been Fulfilled.

When the facts demonstrate that a decree entered against a public agency has substantially served its objective, vacatur is required because prospective application would no longer meet the requirements of equity. Separation of powers mandates this result because, otherwise, the agency would be improperly "condemn[ed]" by the acts of its predecessors "to judicial tutelage for the indefinite future." Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 249 (1991); see Horne, 557 U.S. at 450 (if objective of injunction has been achieved, continued enforcement against a state agency "is not only unnecessary, but improper"); King v. Greenblatt, 52 F.3d 1, 4 (1st Cir. 1995) ("King I") ("In institutional reform litigation, injunctions should not operate inviolate in perpetuity.") (quotation marks omitted).

The decree here should be vacated because it has served its ultimate purpose—to remedy the acts taken by OFC in the 1980s and which were repeated to some extent by OFC's successor, DMR, in the mid-1990s. Both the complaint and the settlement agreement demonstrate the parties' intent that the decree endure for only as long as necessary for JRC to be remedied for those discrete acts. The claims and allegations of the complaint were plainly directed at OFC's—and in particular, the Director's—past conduct. See generally Compl. Consistent with the complaint, the agreement states that it was "made for this case only" and that the "sole intent of each party" was "simply to resolve this case and the other administrative and judicial cases which [were then] pending between O.F.C., [JRC] and the parents." Decree at 2. And most importantly, the agreement provides that it would "automatically terminate at the second [six-month] review unless the Court, for good cause shown related to the terms or substance of [the] agreement, orders otherwise." Id. at 13.

This termination provision shows that the parties contemplated that judicial oversight would last for approximately one year, at which point JRC would be fully remedied for OFC's

past acts. This Court did not, and could not, alter the parties' intent by extending the decree "until . . . further order." Order (July 7, 1988). The extension does not mean that the decree operates in perpetuity; rather, the sole basis for the Court's order was that, at the time of the hearing in 1988, JRC was "not fully licensed." Id. JRC has long since been operating with a full license, both before and after the receivership, and so there is no longer a reason for the extension. See Consumer Advisory Bd. v. Harvey, 697 F. Supp. 2d 131, 137 (D. Me. 2010) (terminating consent decree where State satisfied benchmarks delineated in decree, which "contemplate[d] the potential for termination within a year of the closing of [the institution] if [those] benchmarks [were] met"); Basel v. Bielaczyz, No. 74-40135-BC, 2009 WL 2843906, at *7 (E.D. Mich. Sept. 1, 2009) (vacating 30-year-old consent judgment where its terms suggested that it would only last for three years).

Separation-of-powers principles compel this conclusion. Courts lack the authority to enforce an order "concerning the carrying out of an executive function" unless there is a "demonstrated basis for concluding that the [agency] has broadly abrogated its statutory duties in the face of a judicial direction to fulfil[l] them." Bradley, 386 Mass. at 365; see McKnight, 406 Mass. at 801 ("In the absence of [an agency's] abdication of its function, it is not . . . appropriate for a judge to exercise the [agency's] executive functions."). Here, it has been over 25 years since the decree was entered and over six years since the receivership was terminated. Since 1995 no agency has been held in contempt for failure to comply with the decree. Moreover, once the receivership ended, DDS has continued to work cooperatively with JRC: it engaged in arbitration before the court monitor; extended JRC's Level III certification several times; and complied with all the requirements of chapter 30A before promulgating the 2011 regulation, giving JRC a full opportunity to submit testimony and written comments. Howe Aff. ¶¶ 18-21, 52, 85-87; see generally id. ¶¶ 22-87. In short, there is no indication that the defendant agencies have "broadly abrogated" their duties under the decree so as to authorize the Court to continue to intervene in the exercise of their executive functions. Bradley, 386 Mass. at 365. The

defendants' years of compliance, and the terms of the decree itself, show that the decree is no longer necessary and that prospective application would be not only inequitable, but inappropriate. See Mass Port. Auth., 2003 WL 23163113, at *17 n.52 ("The amount of time a party has been 'burdened' by the injunction and the prospect of its continuing are factors that courts have weighed in evaluating a request for relief under Rule 60(b)(5)."") (citing Rufo, 502 U.S. at 380-81); Horne, 557 U.S. at 453 ("[T]he longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic processes.").

Numerous federal courts have reached the same outcome in analogous circumstances. For example, in the desegregation context, the Supreme Court has consistently held that judicial oversight should "not extend beyond the time required to remedy the effects of past intentional discrimination," and so a decree must be dissolved after the agency has complied with it for a period of time sufficient to eliminate, "to the extent practicable," the vestiges of the discrimination. Bd. of Educ. of Okla. City, 498 U.S. at 248, 250. Applying similar rationale, the Eleventh Circuit in R.C. v. Walley, No. 07-10667, 2008 WL 816679 (11th Cir. Mar. 27, 2008),[13] upheld the district court's decision to terminate an 18-year-old decree that required a state agency to implement reforms to its child-welfare system. Termination was warranted, in the court's view, because the agency had demonstrated a history of compliance and the system, though "not yet perfect," "had undergone radical changes and was on secure footing to continue its progress in the years to come, without court supervision." Id. at *2. Other lower federal courts have regularly vacated judgments on the same basis.[14]

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[13] Citable as persuasive authority under Fed. R. App. P. 32.1 and 11th Cir. R. 36-3.

[14] Berne Corp. v. Gov't of the Virgin Islands, No. 2000-141, 2011 WL 182862, at *7-*8 (D.V.I. Jan. 20, 2011) ("inequitable" to preserve injunction where government's "recent performance" showed that it cured due-process deficiencies that were reason for the injunction); Consumer Advisory Bd., 697 F. Supp. 2d at 138 ("inequitable" to continue to monitor State's compliance with decree where it already complied for a decade and had "the commitment and mechanisms to continue to provide a system that will protect the class members' rights under the Constitution and federal law"); Basel, 2009 WL 2843906, at *7 (state's history of compliance showed that "the need for the injunction passed" and the "responsibility for discharging the State's

This Court should hold likewise. As the receiver observed in 2003, the Commonwealth's current agencies cannot be forever held to the past bad acts of their predecessors because of "historic concerns arising from the actions of . . . OFC." Hales Aff., Exh. 4 at 7. "Agency regulations have changed, as have commissioners and staff," id., and the public "[depends] upon successor officials . . . to bring new insights and solutions to problems" within their area of expertise. Horne, 557 U.S. at 449 (quotation marks omitted). So where, as here, the officials "inherit overbroad or outdated consent decrees," it is the public who suffers because the officials "are constrained in their ability to fulfill their duties." Id. (quotation marks omitted). For all these reasons, the time has come, after over two decades, to return full regulatory authority to the defendant agencies and allow them to restore a normal regulatory relationship with JRC. In the future JRC can protect its rights through the same administrative-appeal processes afforded to all other providers in the Commonwealth. See Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1257 (9th Cir. 1999) (equities "clearly" tipped in favor of vacating injunction against federal agency where continued enforcement would allow plaintiffs to receive "unfair preferential treatment" over other program participants); Consumer Advisory Bd., 697 F. Supp. 2d at 138-39 (equities required vacatur where State had mechanisms in place to protect plaintiffs' rights and so any future grievances could be "presented in the appropriate state forum").

C. Alternatively, Part A of the Decree Should Be Vacated Because Significant Factual and Legal Changes Relating to the Standard of Care Render Prospective Enforcement Inequitable.

1. The Current Clinical Approach to Behavior Modification Is a Significant Factual Change Warranting Relief.

At a minimum Part A of the decree should be vacated or stricken from the decree because the clinical evidence has evolved such that use of Level III aversives can no longer be said to

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obligations was long ago ripe to be returned to the State") (quotation marks omitted); Glisson, 2008 WL 5156274, at *3 (injunction was "no longer needed because the facts on the ground [had] vastly changed for the better" and so judicial oversight would be "inappropriate in light of the [federal agency's] independent responsibility as a part of the Executive Branch to manage its affairs without undue interference from the Judicial Branch").

meet the accepted standard of care for treatment of individuals with intellectual and developmental disability. Continued enforcement of Part A, which JRC maintains gives it the affirmative right to use aversives, would therefore be "detrimental to the public interest" and "unworkable," warranting relief under Rule 60(b)(5). Rufo, 502 U.S. at 384; see Horne, 557 U.S. at 467 (finding relevant factual change where "weight of research" suggested that structural reforms, not increased funding mandated by the injunction, would "lead to improved educational opportunities").

As discussed above, the overwhelming professional consensus is that PBS is more effective and less intrusive than Level III aversives and should be used in their place. Since the decree was entered in the mid-1980s, clinical and empirical research has developed and now demonstrates that PBS is an effective method of treating people with intellectual and developmental disability, rendering punitive procedures "professionally unnecessary" and "unethical." LaVigna Aff. ¶¶ 4-16, 60. And with respect to contingent skin shock, there is "near-universal agreement" that it is "professionally unnecessary and inappropriate because there are other, far less restrictive methods available to treat challenging behaviors." Id. ¶ 15. This professional consensus is reflected in the policy statements of leading disability-rights organizations, the testimony and comments that DDS received during the public-comment period, and by the laws and practices of other states banning aversive interventions. Given this volume of evidence, JRC has no reasonable claim that Part A of the decree is consistent with the public interest, and so the equities mandate that it be vacated. See Rufo, 502 U.S. at 384.

The First Circuit's decision in King v. Greenblatt, 149 F.3d 9 (1st Cir. 1998) ("King III"), supports this result. At issue there was a 24-year-old consent decree governing the treatment of sexually dangerous persons civilly committed to the Treatment Center at the Massachusetts Correctional Institute in Bridgewater ("Center"). Id. at 12; see King I, 52 F.3d at 2. The relevant portion of the decree prohibited the Department of Corrections ("DOC") from using the Center's solitary-confinement unit for purposes of punishment, on the theory that "'disciplinary and

punitive procedures [had] no place in the care and treatment of civilly committed patients.'" King III, 149 F.3d at 19. The First Circuit affirmed the allowance of DOC's motion to strike this prohibition, holding that such relief was warranted by "a significant change in the philosophical approach to treatment of civilly committed sex offenders in programs operated by correctional departments." Id. Specifically, although there had not been "a complete reversal of position," the court found that "the monolithic acceptance of the mental health approach that existed a quarter of a century ago [when the decree was entered] had yielded to the acknowledgment that there is no royal road to treatment and cure." Id. As a result, most other states had repealed their laws to no longer bar imposing discipline on sex offenders—a fact that the court found "[i]ndicative of some kind of sea change." Id. The court also found it significant that various professional associations had recommended repeal on the ground that "the assumption that mental disability underlay sexual offenses in general was no longer viewed as clinically valid." Id. at 20 (emphasis omitted). All of this evidence led the court in the end "to accept as a significant change of fact the adoption of a new treatment approach," entitling DOC to modification of the decree. Id. at 21.

The circumstances of King are strikingly similar to those here. The decree in this case has also been in place for over two decades, and, during that time, there has been a significant change in the accepted approach to treatment of people with intellectual and developmental disability. When the complaint was filed, the techniques being used by JRC—water sprays, taste aversives, and muscle squeezes—were "accepted" as "clinical[ly]" and "professionally appropriate" and "conform[ed] to the standards" of the professional field. Compl. ¶¶ 17, 86. OFC apparently had no evidence that these techniques were harmful to the students or that there were alternative treatments that would serve them adequately. Id. ¶¶ 38-39. But currently, some 25 years later, JRC is using an intervention that is "much more intrusive and restrictive" than any of the aversive procedures listed in the consent decree, and there is "near-universal agreement" that its practices are "professionally unnecessary and inappropriate." LaVigna Aff. ¶¶ 14-15; see

King III, 149 F.3d at 21-22 (trial court properly considered "'vastly different' conditions of confinement in the [Center's seclusion] unit today compared to those described in the [original] complaint" in determining whether modification of the decree was warranted).

Moreover, it is "[i]ndicative of some kind of sea change" that DDS's current ban on Level III aversives is "consistent with standards found in . . . programs nationwide" and with recommendations of major professional organizations. King III, 149 F.3d at 19-20 (quotation marks omitted). As those organizations have concluded, aversives are not consistent with best practices and should be eliminated as an acceptable method for behavior modification. Howe Aff. ¶ 88. Thus, as in King, the evidence here shows that there has been a significant change in facts—namely, "the adoption of a new treatment approach"—that warrants vacating or striking Part A of the decree as contrary to the public interest. King III, 149 F.3d at 21; see Reynolds v. McInnes, 338 F.3d 1221, 1229 (11th Cir. 2003) (lower court properly removed provision of consent decree that restricted State's use of certain employment-testing methods where experts testified that the restriction "was novel or unusual in the field of employment testing" and "almost preclude[d] best professional practices"); United States v. S. Fla. Water Mgmt. Dist., No. 88-1886-CIV, 2011 WL 1099865, at *4 (S.D. Fla. Mar. 22, 2011) (State was entitled to relief from provision of decree that required it to construct a reservoir to achieve environmental restoration where "evolving scientific evidence led almost every expert to agree that the . . . reservoir [was] not the best course of action to achieve restoration").

2. DDS's 2011 Regulation Banning Level III Aversives Is a Significant Factual and Legal Change Warranting Relief.

Intervening law that conflicts with the requirements of a decree constitutes a significant change, which courts have characterized as both legal and factual, justifying modification under Rule 60(b)(5). See Horne, 557 U.S. at 459-468; Rufo, 502 U.S. at 388. DDS's 2011 regulation qualifies as a relevant change under this standard.

As mentioned, JRC has consistently taken the position that Part A of the decree gives it the affirmative right to use aversives, irrespective of DDS regulations. Howe Aff. ¶ 80. That

position cannot, however, be reconciled with the new regulation, which affirmatively bans the use of aversives on a prospective basis. 115 C.M.R. 5.14. Nor can the regulation be reconciled with JRC's position that it has the right to arbitrate any dispute concerning the availability of aversives. Howe Aff. ¶¶ 77, 80. Because the regulation is consistent with accepted professional practices, neither the court monitor, nor the Court itself, has the authority to prohibit DDS from enforcing the regulation against JRC. See McKnight, 406 Mass. at 798-801 (probate court lacked authority to issue permanent injunction directing that aversives be available for use by JRC because, "[i]f accepted professional practices would tolerate the unavailability or the nonuse of aversives . . . and the department elects to follow that professional practice, the courts must respect that judgment"); Guardianship of Anthony, 402 Mass. at 727 (probate court "impermissibl[y] poach[ed] . . . on executive and legislative territories" when it ordered AIDS tests on residents of DMH-regulated facility in absence of evidence "that testing for AIDS [was] an appropriate, let alone the only, means by which" DMH could fulfill its statutory duties).[15]

Accordingly, the decree, as historically interpreted and invoked by JRC, presents an inherent conflict with the regulation, which was promulgated in full compliance with chapter 30A. For this additional reason, Part A of the decree should be stricken or vacated. See Horne, 557 U.S. at 461-64 (remanding for consideration of new statute that marked shift in federal education policy, which Court found could warrant modification of injunction that conflicted with that policy); Calderon v. Wambua, No. 74 Civ. 4868, 2012 WL 1075840, at *4-*6 (S.D.N.Y. Mar. 28, 2012) (vacating parts of decree that mandated procedures that City had to follow before promulgating regulations, where City later adopted an administrative-procedure statute that made compliance with the decree substantially more onerous).

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[15] Were any of the remaining student class plaintiffs to assert a constitutional right to aversive treatment, the law is now clear that no such right exists. McKnight, 406 Mass. at 801 (there is no "constitutional right to elect (pursuant to substituted judgment principles) among placements and treatment procedures that are acceptable to qualified professionals").

II. IN THE ALTERNATIVE THE DECREE SHOULD BE VACATED UNDER MASS. R. CIV. P. 60(b)(5) BECAUSE IT HAS BEEN "SATISFIED."

Rule 60(b)(5) also authorizes relief from judgment if "the judgment has been satisfied, released, or discharged." Vacatur of the decree is warranted on this alternative basis. As discussed above in Part I.B, the decree provides for termination after the second six-month review, and the sole basis for the extension order was that, at the time, JRC was not fully licensed. JRC has been licensed and certified at least as of the mid-1990s and has been recertified numerous times thereafter. Thus, under the plain language of the decree and the extension order, the decree has been satisfied and should be vacated. See Consumer Advisory Bd., 697 F. Supp. 2d at 135-37 (consent decree was "satisfied" under Rule 60(b)(5) where state substantially complied with its benchmarks).

CONCLUSION

For the above reasons, this Court should enter judgment vacating the consent decree and terminating its jurisdiction over this case.

Respectfully submitted,

COMMISSIONERS OF THE DEPARTMENT OF DEVELOPMENTAL SERVICES and DEPARTMENT OF EARLY EDUCATION AND CARE

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February 14, 2013

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss

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

JUDGE ROTENBERG EDUCATIONAL CENTER, INC., et al.,
Plaintiffs,
v.

COMMISSIONERS of the DEPARTMENT OF DEVELOPMENTAL SERVICES and the DEPARTMENT OF EARLY EDUCATION AND CARE,
Defendants.

CERTIFICATE OF SERVICE

I, Sookyoung Shin, Assistant Attorney General, hereby certify that I have on this day served:

1) Defendants' Motion Under Probate and Family Court Rule 60 and Mass. R. Civ. P. 60(b)(5) to Vacate Consent Decree;
2) 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; and
3) Defendants' Motion for Leave to File Memorandum of Law in Excess of Five Pages

on plaintiff the Judge Rotenberg Educational Center by causing one copy to be hand delivered to:

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February 14, 2013