

# Limiting the Use of Aversives at the Judge Rotenberg Center under the Federal Civil Rights Act Shain Neumeier<sup>1</sup>

## Introduction

At a private residential school in Massachusetts, a student was tied face-down to a four-point board, his arms and legs restrained by straps.<sup>2</sup> The student was hooked to a device capable of administering an electric shock several times more powerful than the shock inflicted by most stun guns, lasting for up to two seconds.<sup>3</sup> A member of the school's staff jabbed a pencil in the direction of the student's mouth, goading him to try and eat it.<sup>4</sup> If the student refused to misbehave as instructed and pulled away, he would receive a shock from the device attached to him.<sup>5</sup> However, when the student obeyed the command, the device administered several electric shocks at closer intervals.<sup>6</sup> This student may well have had to go through this exercise numerous times over a period of months as a form of behavior modification in order to prevent him from engaging the target behavior of trying to eat sharp objects.<sup>7</sup>

The private residential school in question is the Judge Rotenberg Center (JRC), which puts itself forward as an alternative to heavy medication and long-term institutionalization for children with severe developmental disabilities and behavioral problems.<sup>8</sup> It attempts to alter its students' dangerous, inappropriate and noncompliant behaviors in large part through punishment,

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<sup>2</sup> N.Y. STATE EDUC. DEP'T, OBSERVATIONS AND FINDINGS OF OUT-OF-STATE PROGRAM VISITATION: JUDGE ROTENBERG EDUCATIONAL CENTER 9 (2006), available at <http://www.arcmass.org/Portals/0/NYJRCReport.pdf>. The residential school in question is the Judge Rotenberg Educational Center, which is a private school in Canton, Massachusetts for children with developmental and psychiatric disabilities. *Id.* at 1. The Judge Rotenberg Center uses mechanical restraints such as straps on four point boards as a form of punishment by itself, or in conjunction with other forms of aversives such as contingent electric shock. *Id.* at 8-9. *See also* MENTAL DISABILITY RIGHTS INT'L, TORTURE NOT TREATMENT: ELECTRIC SHOCK AND LONG-TERM RESTRAINT IN THE UNITED STATES ON CHILDREN AND ADULTS WITH DISABILITIES AT THE JUDGE ROTENBERG CENTER 15-16, 18 (2010), available at <http://www.mdri.org/PDFs/USReportandUrgentAppeal.pdf> [hereinafter MDRI] (describing the use of mechanical restraint on students, sometimes in conjunction with contingent electric shock).

<sup>3</sup> *See* MDRI, *supra* note 2, at 13, 14 (describing the Graduated Electronic Decelerator, a device which administers electric shocks to students as a form of punishments for targeted behaviors). The standard Graduated Electronic Decelerator administers a shock of 15.5 milliamps, while a more powerful version of the device, the GED-4, administers a shock of 45 milliamps. *Id.* at 12, 13. For comparison purposes, a typical stun gun inflicts a shock of only 1-2 milliamps. *Id.* at 13, citing Stun Gun Information, <http://www.selfdefenseproducts.com/Stun-Gun-Information-sp-5.html> (last visited Nov. 24, 2010).

<sup>4</sup> N.Y. STATE EDUC. DEP'T, *supra* note 2, at 19. In their report on their investigation of the Judge Rotenberg Center, the review team from the New York State Education Department discussed what the Judge Rotenberg Center calls a behavior rehearsal lesson, in which a member of staff forces a student, who is restrained and attached to the Graduated Electronic Decelerator, to act in a way that he or she is not supposed to and then shocking him or her when he engages in the forbidden behavior. *Id.* One such behavior rehearsal lesson that the investigators learned about while interviewing members of staff involved staff holding a student's face and threatening to stab him in the mouth with a pencil while repeatedly yelling at the student to goad him into trying to eat it. *Id.*

<sup>5</sup> *Id.* (explaining how, during behavior rehearsal lessons, students are still shocked for exhibiting an appropriate behavior, but are shocked less than they are when they exhibit the targeted inappropriate behavior they are forced to perform).

<sup>6</sup> *Id.*

<sup>7</sup> N.Y. STATE EDUC. DEP'T, *supra* note 2, at 19; MDRI, *supra* note 2, at 18 (quoting a former student who described going through behavior rehearsal lessons several times a week over a period of six months or more).

<sup>8</sup> *See* Judge Rotenberg Center, Brief Description of JRC, <http://www.judgerc.org/progdescbrief.html> (last visited February 14, 2011) (stating that the JRC works with severely self-injurious children with some of the most treatment-resistant behavior disorders in the country).

called aversive therapy (“aversives”), which includes the use of contingent electric shock, food deprivation and prolonged restraint.<sup>9</sup>

The JRC is far from the only facility in the United States to use aversives on children with severe behavioral problems.<sup>10</sup> There are and have been hundreds of private residential behavioral modification facilities across the United States and abroad that seek to treat everything from drug addiction to defiance in American teenagers through the use of humiliation, fear and pain.<sup>11</sup> However, some students have sued the behavioral modification facilities in which they were placed, relying on federal civil rights law in order to get compensation for the physical or emotional abuse they suffered and to enjoin the use of harmful aversives that these institutions have practiced under the color of state law.<sup>12</sup> In some of the cases, courts have held that the nature of the aversives used and the level of state involvement amounted or could amount to a denial of students’ constitutional rights, and have awarded damages, granted the requested injunctions or done both.<sup>13</sup>

This note will argue that courts can and should enforce the constitutional rights of children with disabilities who are sent to the Judge Rotenberg Center for education and treatment by enjoining it from using aversives to control its students to the extent possible under federal civil rights law. Part I will provide an overview of the Judge Rotenberg Center’s practices and history, including the controversy and extensive legal battles surrounding it. Part II will examine how the federal civil rights statute has been applied in the context of residential mental health and behavioral modification facilities. Finally, Part III will discuss how Massachusetts and other states’ regulation and funding of the Judge Rotenberg Center render the facility subject to injunctions under this statute that would prevent the use of unnecessary and harmful aversives on its students.

### *Part I: The Judge Rotenberg Center*

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<sup>9</sup> See *infra* notes 18-20.

<sup>10</sup> See generally *Residential Treatment Programs, Concerns Regarding Abuse and Death in Certain Programs for Troubled Youth: Testimony before the Comm. on Educ. And Labor, H.R.*, 111th Cong. 4 (statement of Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations, and Andy O’Connell, Assistant Director of Forensic Audits and Special Investigations, Gov’t Accountability Office) (hereinafter *Residential Treatment Programs*) (stating that there are hundreds of residential behavioral modification facilities across the country); Maia Szalavitz, *Help At Any Cost: How the Troubled-Teen Industry Cons Parents and Hurts Kids* (2006) (describing the use of aversives such as food deprivation, sleep deprivation, restraint and forced labor in residential facilities for troubled teens); Alexia Parks, *American Gulag: Secret P.O.W. Camps for Teens* (2000) (providing examples of practices in behavioral modification facilities). See also *infra* notes 41, 42 (discussing other behavioral modification facilities and comparing their programs and practices to those of the JRC).

<sup>11</sup> See generally Szalavitz, *supra* note 10 (describing the use of different types of aversives in private behavioral modification facilities across the country and offshore, and the state of the troubled teen industry in general); Parks, *supra* note 10 (discussing policies and practices of select behavioral modification facilities).

<sup>12</sup> See *infra* notes 44-61 and accompanying text. Students at behavioral modification facilities have also sued under a number of other legal theories, such as intentional torts and medical malpractice. See Szalavitz, *supra* note 10, at 47-51 (describing the civil trial in which a student who was placed in a residential “tough love” drug treatment program was suing for assault, battery, intentional infliction of emotional distress and false imprisonment); *Id.* at 189-246 (detailing the trial of a medical malpractice case against a behavioral modification program). See also *infra* note 43 (discussing court cases involving behavior modification facilities and their outcomes).

<sup>13</sup> See *infra* notes 50-54, 65-69 and accompanying text. See also note 58 (mentioning a case in which a trial court concluded that a residential treatment facility could have been acting under the color of state law by failing to prevent a student from being molested).

The Judge Rotenberg Center presents itself as a school and treatment center for children and adults with severe psychiatric and developmental disabilities that manifest themselves in dangerous and destructive behaviors.<sup>14</sup> In order to accomplish this, the JRC uses a system of rewards and punishments to the almost complete exclusion of more traditional therapies such as counseling and psychiatric treatment.<sup>15</sup> Throughout its forty-year history, the JRC has been the subject of numerous investigations and lawsuits because of the nature of the punishments it uses and the manner in which they are used.<sup>16</sup> Despite this, students from nine states, including

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<sup>14</sup> See, e.g., The Judge Rotenberg Center, [www.judgerc.org](http://www.judgerc.org) (last visited on February 14, 2011) (hereinafter “Judge Rotenberg Center Homepage”) (“The Judge Rotenberg Center (JRC) is a special needs school in Canton, Massachusetts serving ages 3-adult. For 39 years JRC has provided very effective education and treatment to both emotionally disturbed students with conduct, behavior, emotional, and/or psychiatric problems and developmentally delayed students with autistic-like behaviors.”). The Judge Rotenberg Center holds itself open to accepting and treating students with a wide variety of disorders and problem behaviors, including “aggression, persistent noncompliance, psychosis, bipolar disorder, conduct disorders, suicidal behaviors, runaways, fire-setting and depression.” The Judge Rotenberg Center, Introduction to JRC, <http://www.judgerc.org/introtojrc.html> (last visited February 15, 2011) (hereinafter “Introduction to JRC”). In defending its use of aversives, however, it primarily relies on examples of the most treatment-resistant self-injurious and assaultive student behavior to show why such practices are necessary. See, e.g., Matthew L. Israel, Ph.D., Aversives at JRC: A Better Alternative to the Use of Drugs, Restraint, Isolation, Warehousing or Expulsion in the Treatment of Severe Behavior Disorders 1-2, <http://www.judgerc.org/SummaryStatementAversives.pdf> (last visited February 15, 2011) (hereinafter “Aversives at JRC”) (establishing the context for the use of aversives such as contingent electric shock by discussing the dangerous and assaultive behaviors of students who have been placed at the JRC); Matthew L. Israel, Ph.D., Behavioral Skin Shock Saves Individuals with Severe Behavior Disorders from a Life of Seclusion, Restraint and/or Warehousing As Well as the Ravages of Psychotropic Medication: Reply to the MDRI Appeal to the U.N. Special Rapporteur on Torture 3 (2010) (hereinafter “Response to MDRI Report”) (beginning the 115-page response to MDRI’s report to the U.N. on the use of aversives at the JRC with a description of the destructive and self-injurious behaviors that students exhibited before being placed there).

<sup>15</sup> See, e.g., Introduction to JRC, *supra* note 14 (explaining that the JRC reduces or eliminates their students’ prescription drug treatment and replaces it with a “consistent program of behavioral modification therapy”). While one-on-one counseling is available at the JRC, it is still based in behaviorism, and students must either earn or specifically request these counseling sessions rather than receiving them regularly. The Judge Rotenberg Center, Behavioral Counseling, [http://www.judgerc.org/Key\\_Features/behcounsel.html](http://www.judgerc.org/Key_Features/behcounsel.html) (last visited February 15, 2011). The JRC’s website states that “Parents who believe that a more traditional counseling approach is an essential feature of the program they are seeking for their son or daughter should consider enrolling their child in programs that provide such traditional counseling.” *Id.*

Aside from the use of aversives, the JRC uses behavioral contracts and rewards as part of its behavioral program. See Introduction to JRC, *supra* note 14. Rewards for fulfilling behavioral contracts by exhibiting appropriate behaviors and refraining from target behaviors include the opportunity to purchase items such as toys and mp3 players from in-school “stores,” the ability to socialize with peers and the ability move into less restrictive educational and residential settings. See *id.*; The Judge Rotenberg Center, Medium Length Description of JRC: A Description of the Treatment and Education Plans at JRC, <http://www.judgerc.org/progdescmed.html> (last visited February 16, 2011). See also *infra* note 19 (describing the use of social deprivation as a behavioral consequence).

<sup>16</sup> See generally N.Y. STATE EDUC. DEP’T., *supra* note 2 (reporting the results of an investigation of the JRC performed by psychologists sent by the New York State Education Department, especially with regards to the use of aversives); Complainant’s First Amended Accusation/Statement of the Issues, In the Matter of the Accusations Against the Behavioral Research Institute of California, No. L230-1278 (Dep’t of Soc. Serv., State of Cal. Jan. 29, 1982), available at [http://motherjones.com/files/legacy/news/feature/2007/09/ca\\_investigation\\_1982.pdf](http://motherjones.com/files/legacy/news/feature/2007/09/ca_investigation_1982.pdf) (hereinafter “Cal. Dep’t of Soc. Serv. Complaint”) (laying out the findings of a state investigation of the use of aversives at JRC’s California site); The Comm. Of Mass. Dep’t of Early Education and Care, Investigation Report on JRC – 66 Kevin Clancy Way (2007), available at <http://www.arcmass.org/Portals/0/DocumentDepot/GovernmentAffairs/Reports/DEEC%20JRC%20report%2011-1-07.pdf> (hereinafter “Massachusetts Dep’t of Early Education and Care Investigation Report”) (investigation conducted by a Massachusetts state agency into an incident at a JRC-run group home where two students had been

Massachusetts and New York, continue to receive state-funded treatment and education at the facility.<sup>17</sup>

The JRC is most infamous for its use of contingent electric shock, which involves punishing a student for targeted behaviors by administering electric shocks lasting up to two seconds to his or her arms, legs or torso through a device called a Graduated Electronic Decelerator (GED).<sup>18</sup> However, the JRC uses a number of other types of aversives as well,

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given contingent electric shocks, one 29 times and the other 77 times, at the instruction of a prank caller, finding evidence of abuse and neglect); MDRI, *supra* note 2 (explaining the use of aversives, especially restraint and electric shock, at the JRC as obtained from prior investigations and interviews with former students and their parents in an attempt to get the United Nations to denounce such techniques as torture); Judge Rotenberg Educ. Center, Inc. v. Comm’r of Dep’t of Mental Retardation, 677 N.E.2d 127 (Mass. 1997) (holding that the Massachusetts Department of Mental Retardation (DMR) had acted in contempt of a settlement agreement that its predecessor had entered into with the JRC and preventing the Department from refusing to recertify the JRC on the basis of its use of aversives); Guardianship of Brandon, 677 N.E.2d 114 (Mass. 1997) (upholding the use of contingent electric shock on a JRC student against DMR opposition); Nicholson v. Freeport Union Free School Dist., 902 N.Y.S. 192 (2010) (dismissing student’s case against New York school district for placing him at the JRC and allowing it to use aversives in his treatment, on the grounds that his mother had earlier consented to the use of contingent electric shock and because he had failed to exhaust all other administrative remedies before filing suit as was required under the Individuals with Disabilities Education Act); Alleyne v. N. Y. State Educ. Dep’t, 516 F.3d 96 (2nd Cir. 2008) (vacating injunction granted in favor of JRC students’ parents by New York federal district court judge that had prevented the New York State Education Department from enforcing an emergency regulation that restricted the use and availability of aversives). *See also infra* notes 31-32 and accompanying text (citing to and discussing the settlement agreement between Massachusetts government agencies and the JRC allowing the latter to use particularly restrictive and intrusive aversives).

The Judge Rotenberg Center first opened in Rhode Island in 1971 under the name of the Behavioral Research Institute (BRI). Jennifer Gonnerman, *School of Shock, Mother Jones*, August 19, 2007, at 2. It only moved to Massachusetts and change its name to honor the judge that allowed it to stay open against the wishes of state agencies in later years. *Id.* The BRI opened a second location in Southern California in 1977. *Id.* Several years later, the state of California was able to force the Behavioral Research Institute to stop using physical punishments on students in the aftermath of an investigation by the state’s Department of Social Services (DSS). *Id.* at 3. The investigation was conducted after a student died at the facility while being restrained. *Id.* at 2. Although at this point the BRI had not begun using contingent electric shock at the time of this investigation, the DSS’s complaint against it alleged the use of many techniques that are still used at the JRC today, such as food deprivation, sensory deprivation and long-term restraint, as well as corporal punishment such as pinching and spanking. *See Cal. Dep’t. of Soc. Serv. Complaint at 15-58* (detailing the excessive and harmful use of aversives observed and reported at the BRI for behaviors ranging from self-abuse to crying in violation of California law). More recent investigations of the JRC’s Massachusetts facilities revealing similar conduct have not been so effective in convincing states to limit or prohibit the use of aversives. *See MDRI, supra* note 2, at 33-41.

<sup>17</sup> *Id.* at 6. The cost for an individual student to attend the JRC was approximately \$220,000 per year as of 2010. *Id.* This amount is paid by state and local school districts and by state agencies that provide persons with disabilities with services. *Id.*

<sup>18</sup> *See, e.g., id.* at 13, 14; N.Y. STATE EDUC. DEP’T, *supra* note 2, at 6-8 (describing the use of contingent electric shock at the JRC). The JRC is the only school or mental health facility in the country that uses contingent electric shock. MDRI, *supra* note 2, at 1. It relies on contingent electric shock more than any of the other highly intrusive techniques classified as “Level III aversives,” which include restraint, food deprivation and sensory deprivation. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 6.

The JRC manufactures the GED and more powerful variants thereof itself. *Id.* at 7. It originally used a less powerful device called the Self-Injurious Behavior Inhibition System (SIBIS). Gonnerman, *supra* note 16, at 3. However, students eventually became inured to the pain it inflicted. *Id.* When the JRC attempted to get the manufacturers of SIBIS to create a more powerful device, they refused to do so. *Id.* The GED delivers 15.5 milliamps of electricity, with a peak intensity of 30 milliamps. MDRI, *supra* note 2, at 8. Its shock is twice as powerful and last ten times as long as that of other comparable devices, and it is many times more powerful than the average stun gun. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 7 (comparing the GED’s power to that of “other

which include food deprivation, long periods of restraint, sensory deprivation and social isolation.<sup>19</sup> It uses these techniques in response to behaviors ranging from the seriously

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similar devices on the market”); MDRI, *supra* note 2, at 14 (comparing the amperage of the GED to that of stun guns). Though the Food and Drug Administration (FDA) has cleared the GED for marketing, it has not officially approved the device either, and has forbidden the JRC from representing that the GED is FDA-approved. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 7. Since the invention and introduction of the GED, some students have become inured to the pain it inflicts because of its repeated use. *See* MDRI, *supra* note 2, at 8. As a result, the JRC has created and now uses an even stronger device, the GED-4, which can inflict up to 45 milliamps of electricity, with a peak intensity of 91 milliamps. *Id.* The JRC is currently designing an even more powerful and more painful version of the device. MDRI, *supra* note 2, at 14.

Before using the GED on a student, the JRC must get approval from a probate court in a substituted judgment hearing. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 6. *See also infra* notes 37-39 and accompanying text (describing the process by which the JRC obtains permission to use contingent electric shock on students in more depth). Students are made to carry the device in a backpack or a fanny pack, with its electrodes attached to their arms, legs and torso. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 7. Students can be shocked through several of these electrodes at once. Dina A. Traniello and Matthew Engel, *Advocacy to Stop the use of Contingent Electric Shock: Where do We Go from Here?* 1 (2010). They can be made to wear the GED throughout the day, including while sleeping. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 7. Members of JRC staff deliver shocks through the GED by means of a remote transmitter. *Id.* at 6-7. Punishments for target behaviors can be delayed for anywhere from 30 seconds to hours after they are exhibited. *Id.* at 18-19. The JRC also allows family members to take home and use the GED when students visit home. *Id.* at 12. The JRC also uses automatic shock devices, namely GED “cushions” that will shock students sitting on them if they try to get up, and “holsters” that will shock a student if he or she attempts to remove his or her hands from the device. *Id.* at 8. These devices have not approved or cleared for marketing by the FDA, even though the FDA requires aversive conditioning devices to be at least cleared. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 8.

The JRC claims that students receiving contingent electric shock treatment receive on median one shock a week. The Judge Rotenberg Center, *What is GED Treatment?: Fact Sheet on GED Treatment*, <http://www.judgerc.org/whatisged.html> (last visited February 19, 2011). However, students sometimes receive far more than that. *See* MDRI, *supra* note 2, at 36 (stating that student received 5,000 shocks in one day from a SIBIS device); *id.* at 14 (quoting an interview with former JRC employees in which they said that a student had received 350 GED shocks in a single day). Students sometimes receive multiple applications of the GED for a single targeted behavior. N.Y. STATE EDUC. DEP’T, *supra* note 2, at 18.

The JRC asserts that the shock from the GED is relatively painless, and comparable to a hard pinch. *See* Introduction to JRC, *supra* note 14. However, former students and outside investigators have reported that that the shock is more painful than the JRC suggests. *See* MDRI, *supra* note 2, at 13 (quoting a former student, who told the interviewer “It is the worst pain, like a third-degree burn. They tell people it feels like a bee sting but they lie.”); *id.* at 14 (quoting an investigator who visited the school on behalf of the New York State Department of Education, who said that “[t]he level of shock is unbelievable, very painful.”). Furthermore, the GED can and has caused burns. *See id.* at 15; N.Y. STATE EDUC. DEP’T, *supra* note 2, at 8, 16, 22. *See also* Introduction to JRC, *supra* note 14 (mentioning that use of the GED can cause “temporary reddening” that can last for hours or days, but denying that this constitutes a burn).

<sup>19</sup> *See* N.Y. STATE EDUC. DEP’T, *supra* note 2, at 8-9 (restraint use); N.Y. STATE EDUC. DEP’T, *supra* note 2, at 10-12 (food deprivation); N.Y. STATE EDUC. DEP’T, *supra* note 2, at 8 (use of helmets that limit student’s ability to see and hear as part of restraint use); N.Y. STATE EDUC. DEP’T, *supra* note 2, at 24-25 (social isolation as behavioral modification); MDRI, *supra* note 2, at 15-18 (use of restraint); MDRI, *supra* note 2, at 19 (food deprivation).

Despite claiming that its treatment reduces or eliminates the need for restraint, the JRC uses it as part of its program, and has been at least since the BRI was operating in California. *Contrast* Response to MDRI Report, *supra* note 14, at 11 (“JRC has a 39-year history of freeing hundreds of children and adults from the deadly grip of sedatives, *restraint*, seclusion and institutional warehousing” [emphasis added]) *with id.* at 8 (“JRC has to keep [a current student] in a helmet and partial mechanical restraints to keep him from engaging in further forceful head-hits.”). *See also* N.Y. STATE EDUC. DEP’T, *supra* note 2 at 8-9 (describing JRC’s current restraint practices in general); Cal. Dep’t of Soc. Serv. Complaint, *supra* note 16, at 8-12 (reporting the frequent use of mechanical restraints at the BRI of California). Restraints are often used for long periods of time, sometimes intermittently for a

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period of days, weeks or even months. See N.Y. STATE EDUC. DEP'T, *supra* note 2, at 8; MDRI, *supra* note 2, at 15-16 (quoting interviews with and statements by former students, their parents and an attorney regarding the use of long-term restraint). The JRC will in some cases use a helmet that blocks the student's vision and hearing in conjunction with restraints. N.Y. STATE EDUC. DEP'T, *supra* note 2, at 8. Mechanical restraints are used in conjunction with electric shock, both for the purpose of punishment and as part of behavior rehearsal lessons, in which a student is restrained, prompted to misbehave and punished with contingent electric shock for refusing to do so or for obeying the instruction. *Id.* at 9 ("In instances where this combined aversive approach is used, the student, over a period of time specified on his or her behavior program, is mechanically restrained on a platform and GED shocks are applied at varying intervals."); *id.* (describing forced provocation of student misbehavior with combination of restraint and contingent electric shock). See also *supra* notes 1-7 and accompanying text (describing a behavior rehearsal lesson); *infra* note 20 (discussing "behavioral research lessons" and the JRC's justifications for using them).

The JRC uses two forms of food deprivation as consequences for target behavior in the form of separate "programs." N.Y. STATE EDUC. DEP'T, *supra* note 2, at 10. Under one of these programs, the Contingent Food Program, a student must earn small meals throughout the day by adhering through "behavioral contracts" set up between him or her and school personnel. *Id.* If a student fails to earn these meals throughout the day, he or she can be given a larger meal at the end of the day. *Id.* Under the more severe Specialized Food Program, a student who does not meet his or her behavioral contracts throughout the day can be made to go without the meal at the end of the day, and can be given as little as 20% of what the school determines to be his or her appropriate amount of caloric intake per day based on his or her weight and Body Mass Index. *Id.* at 10, 16.

While not used as an aversive in the way that techniques such as contingent electric shock and food deprivation are, social isolation is used by the JRC in order to influence student behavior. Students are not generally allowed to interact freely with staff or peers. See N.Y. STATE EDUC. DEP'T, *supra* note 2, at 24-25. Opportunities for social interaction are "earned" as a privilege through compliance with behavioral contracts imposed by the school. *Id.* at 25. Investigators who have talked with JRC personnel have learned that this policy is at least in part to keep students from plotting against the staff together. See *id.* at 25. The JRC also has rationalized the lack of socializing between peers and between staff and students on the basis that such interactions could prove to be disruptive and that the staff would become too emotionally involved with the students. See Response to MDRI Report, *supra* note 14, at 87. Also, although they are not necessarily intended for the purposes of creating social isolation, some of the other policies and practices of the JRC have the effect of preventing students from becoming too close to one another. See N.Y. STATE EDUC. DEP'T, *supra* note 2, at 26 (student's behavior plan called for the student to be rewarded for not reacting when a staff member administers or prepares to administer contingent electric shock to another student). In addition, the program lacks a social skills curriculum to teach appropriate social interactions with peers and authority figures. *Id.* at 24.

The JRC does not use seclusion as defined by Massachusetts regulations. See 115 Mass. Code Regs. 5.11(1) (2009) ("Seclusion shall mean the placement of an individual alone in a room or other area from which egress is prevented"); Response to MDRI Report, *supra* note 14, at 58 ("Unlike most other schools, JRC makes no use of seclusion or time-out rooms. If a student ever has to be removed from his/her classroom to a different room for reasons of safety, a staff member always accompanies the student and continues the student's program in that room."). That being said, students can be taken out of the general classroom and placed in more restrictive classroom settings away from their peers, with sometimes only aides to help them continue their learning. N.Y. STATE EDUC. DEP'T, *supra* note 2, at 5. This is often done when students are first placed at the JRC. *Id.* Once placed in such a setting, students must earn the opportunity to go back to a more normal classroom environment. JRC Responses to Allegations in NYSED June 6, 2006 Report 9, available at <http://www.judgerc.org/ReplytoJuneReport.pdf> (last visited February 20, 2011) (Hereinafter "Response to NYSED Report"). However, students' problem behaviors increase, or are recorded as increasing, in these isolated settings. See, e.g., N.Y. STATE EDUC. DEP'T, *supra* note 2, at 6 (providing an example of a student whose total number of reported inappropriate behaviors showed an increase from 800 per week during the first few weeks to an average of 12,000 per week, without any educational progress or positive behaviors documented, in the more restricted classroom setting while the JRC was waiting for the court to approve GED treatment). This increase is documented and used as evidence in obtaining court permission to use contingent electric shock and other highly intrusive "Level III" aversives. *Id.* at 5-6. The combination of this type of isolation with the use of prolonged restraint leading up to a decision to seek contingent electric shock treatment for students raises some concern over whether they are being used in order to coerce students and their parents into consenting to its use. See MDRI, *supra* note 2, at 17-18 (relying on parent and student testimonials regarding their giving consent to the use of contingent electric shock

dangerous to the merely annoying to the completely harmless.<sup>20</sup> In some cases, students attending the JRC remain there and continue receive contingent electric shock or other aversives for years.<sup>21</sup> The psychological and health risks of aversives as used at the JRC, including the possibility that they contributed to the deaths of several students in the program, are disputed.<sup>22</sup>

Disability rights advocates claim that the use of aversives at the JRC amount to a violation of civil and human rights.<sup>23</sup> A number of state agencies, both in Massachusetts and in

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after prolonged use of aversives including restraint and food deprivation in coming to this conclusion). In attempting to refute these claims, the JRC does not examine the possibility that the use of restraint and more restrictive learning environments may be causing the increased incidents of problem behaviors, pointing instead to the decrease in (perceived) need for these techniques once they start receiving contingent electric shock. *See* Response to MDRI Report, *supra* note 14, at 65-67.

<sup>20</sup> *Compare* Response to MDRI Report, *supra* note 14, at 3 (discussing how the JRC uses aversives to treat suicidal or extreme self-injuring and aggressive behaviors) *with, e.g.*, N.Y. STATE EDUC. DEP'T, *supra* note 2, at 3 (students shocked for "nagging, swearing and failing to maintain a neat appearance"); N.Y. STATE EDUC. DEP'T, *supra* note 2, at 18 (students punished for using the JRC's grievance process to complain about intentionally unfair uses of aversives by staff); MDRI, *supra* note 2, at 18-19 (describing the use of "behavioral rehearsal lessons" in which students are restrained without provocation, forced to misbehave by staff and then punished with electric shock for doing so). *See also generally* Cal. Dep't of Soc. Serv. Complaint, *supra* note 16 (describing how the JRC's California facility would use corporal punishment, restraint and sensory deprivation for behaviors ranging from attempting to gouge out their own eyes and starting fires to crying and running around). The investigators from the New York Department of Education noted that many of the students observed at the JRC, including some of those receiving contingent electric shock, were not observed to be engaging in self-injurious behavior, nor did their individualized education plans mention that they ever had been. N.Y. STATE EDUC. DEP'T, *supra* note 2, at 13.

The JRC defends its use of aversives for reasons other than in response to an immediate threat of harm a student poses to him or herself or to others in part by saying that applying aversives to "antecedent" behaviors that lead up to the actually dangerous behaviors is necessary in order to both protect other people in the facility and to effectively deter students from engaging in target behaviors. *See* Response to NYSED Report, *supra* note 19, at 23-24. Regarding the use of behavior rehearsal lessons in particular, the JRC has defended this technique as being necessary in order to deter students from engaging in highly dangerous forms of self-injury before they actually attempt it, or if a student is known to engage in such behavior very infrequently. *Id.* at 42. It also places defiant and disruptive behaviors on the level of destructive behaviors, and claims that the use of aversives can be necessary for students' educational and social development. *See* Matthew L. Israel, Primer on Aversives 17 (2008), *available at* <http://www.judgerc.org/AversivesPrimer.pdf>.

<sup>21</sup> *See, e.g.*, Gonnerman, *supra* note 16, at 4 (describing a student who had been at the JRC and receiving contingent electric shock treatment for 16 years as of 2007); N.Y. STATE EDUC. DEP'T, *supra* note 2, at 24 (noting that several students had been at the JRC and on the GED for upwards of five years as of 2006). The JRC's policy is that students must not exhibit any major problem behaviors for one year before they will be "faded" from the GED and no longer receive contingent electric shock. N.Y. STATE EDUC. DEP'T, *supra* note 2, at 23-24. Even after students have been faded, they can be placed on the GED again at a later time for demonstrating the same inappropriate target behaviors. *Id.* at 24. The JRC has in the past acknowledged that the effects of the use of aversives cannot be expected to last long term, and it has not recommended that students transition to less restrictive settings. *See* MDRI *supra* note 2, at 11; Traniello & Engel, *supra* note 18, at 2.

<sup>22</sup> *Contrast* N.Y. STATE EDUC. DEP'T, *supra* note 2, at 15-17, 25-26 (warning of risks to the physical and mental health and safety of students caused by the use of aversives, especially contingent electric shock and food deprivation, at the JRC) *with* Response to NYSED Report, *supra* note 19, at 32-34 (claiming that the JRC food programs, including the contingent food program and specialized food program, actually improve student health); Response to MDRI Report, *supra* note 2, at 67 (asserting that the use of contingent electric shock has no long term side effects). *See also* Gonnerman, *supra* note 16, at 3 (stating that two students died at the JRC following the use of aversives caused the deaths, but that state agencies had declined to press charges or were unable to prove that aversives had caused the deaths).

<sup>23</sup> *See generally* MDRI, *supra* note 2 (arguing that the use of aversives at JRC constitutes torture under the definition provided in the United Nations Convention Against Torture); Letter from the American Association on Intellectual and Developmental Disabilities et al. to the Office of Disability, Department of Health and Human Services et al.

other states, have investigated the JRC and found its practices to be ineffective, unsafe, inhumane and, in some cases, illegal under existing laws and regulations.<sup>24</sup> In general, research and investigations have revealed aversives used in school and treatment settings to be dangerous and, when misapplied, possibly fatal.<sup>25</sup> However, the JRC has strong support from parents, and in some cases former students, who assert that its use of aversives have saved lives and prevented students from causing serious harm to themselves and others.<sup>26</sup> Parents and other supporters argue that there are no other schools or facilities that are able and willing to provide the students attending the JRC with education or treatment.<sup>27</sup> According to the JRC and its supporters, behavioral modification regimes that do not include the use of aversives are ineffective in treating the most dangerous behavior problems, and the programs that adhere to them tend to expel students with the most severe manifestations of psychiatric and developmental disabilities.<sup>28</sup>

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(Sept. 30, 2009), available at [http://www.disabilityscoop.com/reports/090930\\_Judge\\_Rotenberg\\_letter.pdf](http://www.disabilityscoop.com/reports/090930_Judge_Rotenberg_letter.pdf) (asking various federal agencies and international human rights organizations to take action to end the use of aversives at the JRC on the basis that their use is unnecessary and inhumane). The U.S. Department of Justice has recently decided to investigate the JRC and its practices for violations of Title III of the Americans with Disabilities Act. See Letter from Renee Wohlenhaus, Deputy Chief, Disability Rights Section, U.S. Department of Justice Civil Rights Division, to Nancy Weiss, Professor, University of Delaware (February 18, 2010), available at <http://leftbrainrightbrain.co.uk/wp-content/uploads/2010/02/US-Dept.-of-Justice-JRC-Investigation-Feb.10.pdf>.

<sup>24</sup> See sources cited *supra* note 16. See also MDRI, *supra* note 2, at 39-40 (summarizing the findings made by the Massachusetts Department of Mental Retardation in 2009 during its process of recertifying the JRC, including long term use of highly intrusive Level III aversives with insufficient oversight and approval of the type mandated by the settlement agreement); Gonnerman, *supra* note 16, at 3 (mentioning a DMR report on the death of a student which resulted in a finding that the JRC's use of aversives on the deceased "violated the most basic codes and standards of decency and humane treatment.").

<sup>25</sup> See generally, e.g., NAT'L DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS 5 (2009) (describing deaths, physical injury and psychological trauma resulting from the use and misuse of restraints and seclusion in schools); *Seclusions and Restraints, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers: Testimony Before the Comm. on Educ. and Labor, H.R.*, 111th Cong. (statement of Gregory D. Kutz, Managing Director of Forensic Audits and Special Investigations, Gov't Accountability Office) (showing the harm caused by a lack of federal legislation restricting the use of restraint and seclusion in schools and private facilities). See also *Residential Treatment Programs*, *supra* note 10 (reporting on deaths and abuse at residential behavioral modification facilities that use aversives such as restraint, forced exercise and food deprivation).

<sup>26</sup> See, e.g., Letter from Laurie Robinson, parent, to Dr. Matthew L. Israel, Executive Director, Judge Rotenberg Center (April 24, 2002), available at <http://www.judgerc.org/comments/robinsonltr.html> ("JRC has given [my daughter] back her life, [ ] as well as a real future."). However, when asked to explain their support for the JRC and its use of aversives, parents often provide examples in the form of how it has made their child act in a more compliant or socially acceptable, rather than safe or peaceful, manner. See Gonnerman, *supra* note 16, at 2 (quoting a parent: "He'll automatically comply to whatever my signal command may be, whether it is 'Put on your seatbelt,' or 'Hand me that apple,' or 'Sit appropriately and eat your food[ ]... It's made him a human being, a civilized human being."); Response to MDRI Report, *supra* note 14, at 86 (quoting parent testimony in favor of GED use: "At home she doesn't wear the GED. It's there in the house and I remind her, that if I see the antecedents, I tell her, 'You're going to have to wear the GED.' She's fine with it. *She has to dress well to go to school.*" [emphasis added]).

<sup>27</sup> See, e.g., BETTY FRY WILLIAMS & RANDY LEE WILLIAMS, EFFECTIVE PROGRAMS FOR TREATING AUTISM SPECTRUM DISORDER: APPLIED BEHAVIOR ANALYSIS MODELS 240 (2010) (explaining how JRC students whose dangerous or violent behaviors have not responded to positive or otherwise non-aversive behavioral interventions are often expelled from programs that only use non-aversive behavioral approaches).

<sup>28</sup> See *id.* See also generally Matthew L. Israel et al., Positive-Only Programs Expel Their Difficult-to-Treat Students, Many of Whom are Then Referred to JRC for Successful Treatment (2007) (using case studies of ten JRC students to show that certain students could only be treated at the JRC because programs that did not use aversives would reject students with severe behavioral problems). JRC supporters claim that people with disabilities have a



There have been many attempts to pass legislation in Massachusetts that would have limited or prohibited the use of aversives at the JRC and elsewhere, but they have repeatedly failed due to parental and political opposition.<sup>29</sup> For their part, state agencies have repeatedly been unable to restrict or close the JRC through litigation despite the results of their investigations.<sup>30</sup> In fact, in 1985, the Massachusetts Office for Children entered into a settlement agreement with the JRC, which at the time was known as the Behavioral Research Institute, that allowed it to continue to operate and use aversives and prohibited the state from limiting or interfering with the Judge Rotenberg Center's operations.<sup>31</sup> This settlement agreement has been

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right to effective treatment, and that effective treatment may in some cases include aversives. *See WILLIAMS & WILLIAMS, supra* note 27, at 226-227. The JRC has gone on to claim that denying people with severe disabilities the opportunity to receive treatment in the form of aversives as used at the JRC constitutes discrimination on the basis of disability. *See* Response to MDRI Report, *supra* note 14, at 48-50.

<sup>29</sup> *See* MDRI, *supra* note 2, at 36 stating that disability advocates have repeatedly filed legislation that would limit the use of aversives from 1987 to 2009, without success, and that a Massachusetts state representative whose nephew attends and receives contingent electric shock at the JRC has been a major source of political opposition to such attempts); Traniello and Engel, *supra* note 18, at 3 (describing how parent testimony has been instrumental in preventing the state from passing legislation that would ban or limit the use of aversives). *See also, e.g.*, H. 109, 186th Gen. Ct. Reg. Sess. (Mass. 2009) (an example of an anti-aversives bill that did not pass, which would have prohibited "any procedure which causes obvious signs of physical pain, including, but not limited to, hitting, pinching, and electric shock for the purposes of changing the behavior of the person," "any form of physical contact or punishment that is otherwise prohibited by law, or would be prohibited if used on a non-disabled person," and "any procedure which denies a person with a physical or mental disability adequate sleep, food, shelter, bedding or bathroom facilities"). Another bill with language identical to the 2009 version was filed this year. H. 77, 187th Gen. Ct. Reg. Sess. (Mass. 2011), available at <http://malegislature.gov/Bills/187/House/H00077>.

<sup>30</sup> *See supra* notes 16, 24 (listing and describing investigations of the JRC by various state agencies, in Massachusetts and elsewhere, that have been unsuccessful in limiting its practices or shutting it down). *See also* Traniello & Engel, *supra* note 18, at 3 (stating that aggressive litigation and parent advocacy has created a "culture of fear" in which state agencies to the point where they are unwilling to step in to stop the JRC's use of aversives).

<sup>31</sup> *See generally* Settlement Agreement, *Behavioral Research Inst. v. Leonard*, No. 86E-0018-GI (Mass. Sup. Ct. Dec. 12, 1985). The settlement agreement resulted from a lawsuit against the Commonwealth of Massachusetts by the JRC, at that time still known as the Behavioral Research Institute, in 1985, when the Massachusetts Office for Children attempted to close it because of treatment and human rights concerns and the violation of state regulations. Traniello & Engel, *supra* note 18, at 3-4. The settlement agreement requires that the JRC propose to use the least restrictive and intrusive means of treatment possible for a given student. Settlement Agreement at 2. The agreement provided that the JRC could continue to use aversives, but required that the client, or his or her parents or guardian, give informed consent, and that a probate court approve their use through a substituted judgment proceeding, before it could do so. *Id.* at 3-6. While the JRC was not using contingent electric shock at the time the settlement agreement was made, it must obtain parental consent and court approval through a substituted judgment proceeding before using it on a student. N.Y. STATE EDUC. DEP'T, *supra* note 2, at 6. In return, it prevented the Office for Children (and, later, other state agencies) from revoking the JRC's license or obstructing its intake process without court approval. Settlement Agreement at 8.

The Supreme Judicial Court established substituted judgment proceedings as a way to balance individual constitutionally guaranteed rights to privacy and bodily integrity against the state's interest in preserving life, protecting children and mental incompetents, and preserving the ethical integrity of the medical profession. *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 373 Mass. 728, 738-745 (1977). In a substituted judgment proceeding, the court decides whether an incompetent person would consent to treatment, such as the use of aversives, if he or she had the capacity to do so. *See id.* at 752-753. In a case involving a student at the JRC, a court must consider evidence regarding a student's target behaviors, including why other treatments have not been able to effectively address them and what the impact will be on the student and his or her family will be if they go untreated in deciding whether or not he or she should receive aversive therapy. Settlement Agreement at 5. The court must also consider the aversives that the JRC proposes to use on the student, along with the supervision over how they are used, any side effects that can be expected from their use, and what the expected outcome of using them will be. *Id.* Finally, it must take into account other information such as the opinions and concerns of the

the basis upon which the JRC has since been able to prevent other Massachusetts state agencies from closing it down for its use of aversives.<sup>32</sup>

Currently, students are referred to the JRC by individuals or state agencies.<sup>33</sup> Their placement is funded by local school districts and state agencies.<sup>34</sup> These government entities can monitor students' programs and progress at the JRC through its website, which allows them to look at behavioral charts, report cards, wellness reports and other information pertaining to individual students.<sup>35</sup> The 1987 settlement agreement and Massachusetts Department of Developmental Services regulations govern the procedure by which the JRC can get approval to use aversives and the ways in which it may use aversives on students.<sup>36</sup> Under the settlement agreement, a probate court must approve the use of intrusive and potentially dangerous aversives on a student attending the JRC in a substituted judgment hearing, in which it considers whether the student would consent to treatment if he or she were competent to do so.<sup>37</sup> The JRC must have individualized plans regarding the use of aversives on each student that are available for review by doctors, peer review committees and human rights committees as well as the court.<sup>38</sup> A court monitor must keep track of and report back to the probate court on students' conditions

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student's family, any information submitted by the Massachusetts Department of Mental Health about the student's clinical circumstances, the student's individualized education plan or individualized service plan, and how a student's positive behaviors will be reinforced. *Id.*

The settlement agreement also provided for the appointment of a court monitor to oversee and report to the probate court on the use of aversives on students. *Id.* Furthermore, it required that the JRC require with state regulations, including those regarding having human rights and expert review committees to assist in oversight of the JRC's treatment. *Id.* at 7-10.

Although JRC students are represented in substituted judgment hearings, these hearings are merely a formality by this point, as the state courts rarely refuse to let the JRC use aversives on a given student. MDRI, *supra* note 2, at 45.

<sup>32</sup> See generally Settlement Agreement at 7-10. (allowing for the use of aversives at the JRC within certain limits). When the Massachusetts Department of Mental Retardation (DMR), which replaced the Office for Children in licensing the JRC, attempted to revoke its license, the JRC sued. Traniello & Engel, *supra* note 18, at 4. This resulted in a decision that the DMR had been acting in bad faith in attempting to revoke the JRC's license, and was thus in contempt of the settlement agreement between the JRC and the Office for Children. *Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dep't of Mental Retardation*, 677 N.E.2d 127, 137 (1997). The court imposed attorney fees on the DMR and appointed a temporary receiver to take over its licensing functions relating to the JRC. *Id.* at 131. This was appealed up to the Supreme Judicial Court of Massachusetts, which affirmed the lower court's decision on all issues but the imposition of attorney fees. *Id.* at 139-153. This failure has deterred the DMR and other state agencies from making further attempts to close or restrict the JRC, even when investigations and recertification reviews have made clear that it is not following state regulations. See Traniello & Engel, *supra* note 18, at 4; MDRI, *supra* note 2, at 39-40 (discussing how the DMR recertified the JRC in spite of its findings that it was in violation of regulations, including failure to have the oversight committees review the use of aversives on students as provided for in the settlement agreement and failure to document the use of restraint).

<sup>33</sup> See The Judge Rotenberg Center, Admissions/Programs, <http://www.judgerc.org/admissions.html> (last visited on February 24, 2011).

<sup>34</sup> See *id.* See also *supra* note 17 (state agencies and state and local school districts pay the JRC \$220,000 per student in tuition).

<sup>35</sup> See The Judge Rotenberg Center, JRC Parent/Agency Website: How to Use This Site, *available at* <http://dotnet.judgerc.org/studentportal/instructions.pdf> (last visited on February 24, 2011) (explaining how government agencies as well as parents can use the JRC's website to monitor individual students' behavioral and educational progress).

<sup>36</sup> See Settlement Agreement, *supra* note 32; 115 Mass. Code Regs. 5.14 (2009) (regulating the use of behavioral modification practices, including aversives).

<sup>37</sup> See *supra* note 31 (describing the substituted judgment proceeding mandated by the settlement agreement between the Massachusetts Office for Children and the JRC).

<sup>38</sup> Settlement Agreement, *supra* note 32, at 5, 7, 9.

and progress, the JRC's compliance with court orders and any suggested revisions to individual treatment plans.<sup>39</sup> Massachusetts state regulations mandate that facilities use the least restrictive and most appropriate behavioral interventions to address difficult behavior, and prohibit facilities from using aversives in ways that deprive students of some of their most basic needs.<sup>40</sup>

### *Part II: § 1983 and residential treatment facilities*

The Judge Rotenberg Center is only one of a large number of residential behavioral modification facilities for youth.<sup>41</sup> Like the JRC, such facilities rely on rewards and punishments, including the use of aversives, as the primary or only means of treatment for behavioral problems.<sup>42</sup> Many of these facilities have also been sources of controversy, investigations and lawsuits because of their reliance on punishment as a means of treatment.<sup>43</sup>

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<sup>39</sup> *Id.* at 6-7.

<sup>40</sup> 115 Mass. Code Regs. 5.14(b)(1)-5.14(b)(5). In particular, the regulations mandate that Level III aversives, which include contingent electric shock, restraint and the use of a helmet during restraint, be used only to address "extraordinarily difficult or dangerous behavioral problems that significantly interfere with appropriate behavior and or the learning of appropriate and useful skills and that have seriously harmed or are likely to seriously harm the individual or others." *Id.* at 5.14(b)(5).

<sup>41</sup> See generally Szalavitz, *supra* note 10 (discussing the history, common practices and legal status of residential behavioral modification facilities for troubled teens); Parks, *supra* note 10 (describing the setup of and conditions in residential behavioral modification programs for teenagers and providing first person accounts from former students and their family members). The JRC is somewhat different from these facilities in several key respects. While many other behavioral modification facilities work with teenagers with problems or perceived problems ranging from actual learning and psychiatric disorders to criminal activity to simple disobedience against adults, the Judge Rotenberg Center primarily seeks to treat students with severe developmental and psychiatric disabilities. See The Judge Rotenberg Center, *supra* note 14 (the JRC treats "emotionally disturbed students with conduct, behavior, emotional, and/or psychiatric problems and developmentally delayed students with autistic-like behaviors"); Szalavitz, *supra* note 10, at 5. Furthermore, the type of treatment varies depending on the facility, with the Judge Rotenberg Center relying heavily on individualized behavioral treatment as opposed to, for example, forced exercise or group "confrontation therapy" the way some programs do. Compare *supra* notes 18-19 (describing the JRC's use of aversives such as contingent electric shock, food deprivation and restraint to address students' problem behaviors) with *infra* note 42 (providing examples of punishments used at other behavioral modification facilities). Finally, whereas some facilities rely on students' parents paying tuition out of pocket, the JRC is one of the facilities that rely on school district and state agency funding. See Szalavitz, *supra* note 10, at 5; *supra* note 17 (state agencies and school districts pay the JRC's tuition costs). However, the JRC is similar to these facilities in its reliance on imposing rewards and consequences for behavior as the primary means of treatment. See Response to MDRI Report, *supra* note 14, at 7; Szalavitz, *supra* note 10, at 5.

<sup>42</sup> See, e.g., Szalavitz, *supra* note 10, at 137-141 (American-run residential program in Samoa used seclusion, corporal punishment, forced exercise, social isolation and forced verbal abuse by other students in the form of "confrontation therapy" as forms of behavioral modification); Parks, *supra* note 10, at 204-214 (practices at behavioral modification facilities for teens have included forced exercise, corporal punishment, denial of medical care, seclusion, being forced to eat one's own vomit and carrying one's own excrement in one's pockets).

<sup>43</sup> See Szalavitz, *supra* note 10, at 47-51 (teen sent to behavioral modification facility sued for false imprisonment, intentional infliction of emotional distress, assault and battery); *id.* at 103-118 (investigation and criminal and civil trials result from teen's death from starvation and medical complications at wilderness experience program); *id.* at 189-246 (describing a trial for a case in which individual who had been sent to a behavioral modification program as a teen sued for medical malpractice); Parks, *supra* note 10, at 204-214 (describing deaths and serious injuries resulting from the use of punishments at behavioral modification facilities that have resulted in investigations by state authorities). In a number of these cases, investigations and lawsuits have been successful in closing these facilities. See, e.g., Parks, *supra* note 10, at 204-214; Szalavitz, *supra* note 12, at 103-105 (deaths at wilderness experience programs resulted in child abuse prosecutions and program bankruptcy). See also *infra* notes 44-69 (discussing lawsuits in which youth and their families sued the behavioral modification facilities and other residential treatment facilities in which the youth were placed under § 1983).

In one such lawsuit, *Milonas v. Williams*,<sup>44</sup> two students placed at a behavioral modification facility for troubled teenagers called Provo Canyon School for Boys (“Provo Canyon”) sued the owners of the facility under the federal civil rights statute<sup>45</sup> (“§ 1983”) in a class action suit on behalf of all the youth who had been placed there, seeking damages and declaratory and injunctive relief.<sup>46</sup> Under § 1983, an individual or entity who deprives another of his or her rights under federal law or the Constitution of the United States while acting under the color of state law is liable to the injured person, whether in law, in equity or otherwise.<sup>47</sup> Its purpose is to punish private actors whose violations of others’ civil rights is allowed and encouraged by state authorities.<sup>48</sup> The plaintiffs in *Milonas* alleged that Provo Canyon had violated students’ constitutional rights to due process of law, to freedom from cruel and unusual punishment, and to freedom from antitherapeutic and inhumane treatment through its use of mail censorship, corporal punishment, seclusion and mandatory polygraph tests.<sup>49</sup> A federal district

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<sup>44</sup> 691 F.2d 931 (10th Cir. 1982).

<sup>45</sup> 42 U.S.C. § 1983 (2010).

<sup>46</sup> *Milonas*, 691 F.2d at 934. The youth sent to Provo Canyon for Boys were young men with severe physical, emotional and psychological problems. *Id.* at 935. One of the plaintiffs representing the class of students who had been or would be placed at Provo Canyon, Timothy Milonas, had been sent to the facility from Nevada as a condition of his juvenile probation. *Id.* at 936. The other, Kenneth Rice, had been sent to the school from Alaska under the terms of his juvenile probation. *Id.* The plaintiffs sought compensation for injuries, attorney fees and permanent injunctions against several of the school’s policies and practices. *Id.* at 935. They also sought damages under the Education for All Handicapped Children Act, which was the precursor to the Individuals with Disabilities Education Act and the Rehabilitation Act of 1973 for allegedly denying them a free and appropriate public education. *Milonas*, 691 F.2d at 934. At trial, the jury declined to award any damages, but the judge had granted the requested injunctions and held that, as the prevailing party, the plaintiffs were entitled to attorney fees. *Id.* at 935.

<sup>47</sup> 42 U.S.C. § 1983.

<sup>48</sup> *See Wilson v. Garcia*, 471 U.S. 261, 277 (1985). § 1983 was put into place in the aftermath of the Civil War, when state authorities in the South were refusing to enforce the law in order to protect African Americans from racial violence. *Id.* It was intended to remedy this situation by imposing federal civil liability on individuals who violated other people’s rights when the state tacitly encouraged their actions by refusing to punish them with criminal sanctions. *See id.* at 276.

<sup>49</sup> *Milonas*, 691 F.2d at 934. The district court found that Provo Canyon used polygraph tests on juveniles to test their adherence to school rules and to make sure that they were not talking disparagingly about the program to other people. *Id.* at 941. Students whose polygraph tests revealed that they had broken school rules, were engaging in “negative thinking” about the school, or intended to speak ill of it after they left could be held at the school longer as a form of punishment, as could students who refused to be tested. *Id.* Additionally, school therapists would read students’ mail, and make the students rewrite letters they felt were “untrue,” “manipulative,” or “negative.” *Id.*

Provo Canyon confined students who violated school rules or who were perceived to be dangerous in small, unfurnished isolation rooms for up to 24 hours. *Id.* In terms of corporal punishment, school staff used a technique known as the “hair dance” to control students, which involved restraining a student by the arm with one hand and by pulling on his hair with the other. *Id.* at 942. While the school claimed that restraint and seclusion of these kinds were only used in response to physical violence or physical resistance by out of control students, the district court found that “the use of the term ‘out of control’ as a justification for the basically uncontrolled discretion in subjecting juveniles to the [isolation] room and hair dance permitted unreasonably harsh school responses to the conduct of disturbed boys.” *Milonas*, 691 F.2d at 942.

The Fourteenth Amendment of the U.S. Constitution does not protect minor from being committed to inpatient or otherwise residential treatment facilities by their parents. *Parham v. J.R.*, 442 U.S. 584, 603-605 (1979). Children committed to institutions do not have a right to a due process hearing before a jury or judge on the issue of their commitment, and all that is constitutionally required for a commitment to be upheld is that a neutral factfinder agrees that he or she requires inpatient treatment after an independent evaluation. *Id.* at 606-608. The Supreme Court has defined “neutral factfinder” rather broadly, including members of staff at residential facilities within the definition. *Id.* at 607. However, all people who are involuntarily confined to institutions by the state retain certain

court in Utah granted injunctions under § 1983 prohibiting mail censorship and the use of polygraph tests, limiting the use of seclusion to its use in containing physically violent students, and restricting the use of physical force to restraining students who were “either physically violent and immediately dangerous to [themselves] or others, or physically resisting institutional rules.”<sup>50</sup> The Tenth Circuit Court of Appeals upheld the district court’s decision.<sup>51</sup> It concluded that the lower court had been correct to find that Provo Canyon had been acting under the color of state law based on state regulation of, funding of, and placement of juveniles at the school.<sup>52</sup> It further held that the enjoined practices as used at the Provo Canyon School had not been reasonably related to the educational program, and thus had violated its students’ constitutional rights to reasonably safe conditions of confinement, to be free of unreasonable bodily restraints, to be free from censorship of their correspondences and to the privacy of their own thoughts, warranting injunctions under § 1983.<sup>53</sup> In fact, it went so far as to hold that parental consent to

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liberty interests under the Fourteenth Amendment. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (cited by *Milonas*, 691 F.2d at 942). These include the right to reasonably safe conditions of confinement, the right to be free from unreasonable bodily restraints, and the right to minimally adequate training that is necessary to protect these other liberty interests. *Youngberg*, 457 U.S. at 324. In general, institutional restrictions on a person’s liberty must be reasonably and rationally related to legitimate concerns relating to administration, security and other important and legitimate objectives. *See Bell v. Wolfish*, 441 U.S. 520, 538-539 (1979) (cited by *Milonas*, 691 F.2d at 942).

With regards to children’s rights to be free of corporal punishment and restraint in public school, the Supreme Court has held that such forms of discipline are not prohibited by the Eighth Amendment. *Ingraham v. Wright*, 430 U.S. 669, 671 (1977). Furthermore, the due process clause of the Fourteenth Amendment does not require that children be given a hearing before certain forms of corporal punishment, such as paddling, are imposed. *Id.* at 674-675. While recognizing that children did have certain liberty interests in being free of excessive corporal punishment or restraint, the Court has concluded that these interests are adequately protected by state tort and criminal law protections, and has declined to ban corporal punishment on constitutional grounds. *Id.* at 673-674, 678, 681.

<sup>50</sup> *Milonas*, 691 F.2d at 935. In particular, the district court found that the use of polygraph testing was inherently coercive, and that the use of the “hair dance” as a means of restraint often caused the very physical injuries it was supposed to prevent. *Id.* at 941, 942.

<sup>51</sup> *Id.* at 939, 942-943.

<sup>52</sup> *Id.* at 939. Though privately owned and operated, Provo Canyon received students through local school districts and juvenile courts throughout the United States. *Id.* at 935 n. 4, 936. In particular, there were “detailed contracts” between school districts and Provo Canyon regarding individual students’ education and treatment at the latter. *Id.* at 940. It was also subject to extensive state regulation. *Milonas*, 691 F.2d at 940. Finally, federal and state governments paid much of the \$1,600 per month tuition for students attending with special education funds, and the school in fact advertised this fact in its brochures. *Id.* at 935 n.4, 940.

The Tenth Circuit Court found that these factors led to the conclusion that “the state [had] so insinuated itself with Provo Canyon as to be considered a joint participant in the offending actions.” *Id.* at 940. In particular, it relied on the precedent cited by the defendant, *Rendell-Baker v. Kohn*, 641 F.2d 14 (1st Cir. 1981). *Milonas*, 691 F.2d at 940. It discussed how the case before the court in this instance was distinct from *Rendell-Baker*, in that it dealt with students, who were the intended beneficiaries of state funding and regulations, as opposed to school personnel, who were not. *Id.* It also noted how the First Circuit Court in *Rendell-Baker* had stated that students at the defendant facility in that case would have a more persuasive argument that the school’s conduct constituted state action for the purposes of a § 1983 claim than the plaintiff teacher did. *Id.* Based on this, the court concluded that the *Rendell-Baker* decision did not preclude it from holding that Provo Canyon had acted under the color of state law. *Id.* *See also infra* notes 59, 61-64 and accompanying text (discussing the facts and holdings of *Rendell-Baker* and how the Second Circuit Court of Appeals interpreted its holding differently than the court in *Milonas*).

<sup>53</sup> *Milonas*, 691 F.2d at 942-943. The court concluded that the district court had properly applied a balancing test “to determine whether the challenged disciplinary practices were so onerous as to overcome the legitimate administrative and security interests of the school,” holding that its conclusions were both supported by the record and existing case law. *Id.* *See supra* notes 48-49 and accompanying text (describing the practices at Provo Canyon and the district court’s holdings on them).

the behavioral modification practices used at the Provo Canyon School did not prevent the court from enjoining their use on the grounds that they violated students' constitutionally-guaranteed liberty interests.<sup>54</sup>

Since *Milonas*, other youth have sued the residential treatment facilities where they were placed under § 1983.<sup>55</sup> However, courts have generally found that the plaintiffs in these cases are unable to establish that the inhumane and antitherapeutic nature of the practices or amount of state involvement within the facilities in which they were placed reaches the level of that in *Milonas*.<sup>56</sup> For instance, in *Robertson v. Red Rock Canyon School, LLC*,<sup>57</sup> the federal court for the district of Utah refused to grant the plaintiffs relief under § 1983 for sexual assault committed against their son by another student in the behavioral modification facility in which he had been placed, on the grounds that the state did not "direct, control or influence" the facility's policies or actions that allowed the assault to happen.<sup>58</sup> In another case, *Robert S. v. Stetson School, Inc.*,<sup>59</sup> the Third Circuit Court called the Tenth Circuit Court's reasoning in *Milonas* into question entirely, ruling that state funding and regulation of a residential treatment facility alone was not enough to render it liable under § 1983 for physical abuse of a student by staff.<sup>60</sup> The Third

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<sup>54</sup> *Milonas*, 691 F.2d at 943. The defendants argued that the district court did not give proper weight to the fact that parents had consented to the behavioral modification practices used at Provo Canyon in deciding whether those practices bore a reasonable and rational relationship to the school's legitimate needs and goals. *Id.* The Tenth Circuit Court held that, while courts should consider parents' judgments relating to restrictions on their institutionalized children's rights under the Fourteenth Amendment, parents cannot simply let the state limit these rights without good cause to do so. *Id.*

<sup>55</sup> See *infra* notes 56-60.

<sup>56</sup> *Id.*

<sup>57</sup> No. 2:05-CV-758 TC, 2006 WL 3041469 (D. Utah Oct. 24, 2006).

<sup>58</sup> *Id.* at \*5. The plaintiffs, the parents of a student at a private "specialized boarding school for 'at-risk' youths," sued under § 1983 and a number of state tort law doctrines after their son, "CR," was molested by another boy in the program's student housing. *Id.* at \*2. The school, Red Rock, had explicitly promised CR's parents that none of its students were sexually deviant before they enrolled him in the program. *Id.* After placing CR in a housing unit where other students physically and emotionally abused him and subjected him to sexual humiliation for a month, Red Rock transferred him to another unit inhabited by two older students that staff knew were sexual predators. *Id.* The very night that CR was moved to the new unit, he was molested by one of the older students living there. Red Rock attempted to cover up what happened, and delayed notifying both CR's parents and the authorities. *Robertson*, 2006 WL at 3041469, at \*2.

While Red Rock received significant amounts of state funding, the plaintiffs were not able to show any other kind of connection between the school and the state. *Id.* at \*3. The court held, based on clear precedent, that funding alone was not sufficient to establish state action. *Id.* at \*4 (citing *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451 (10th Cir. 1995)). Furthermore, it concluded that Red Rock was not liable under § 1983 because no governmental entity had "directed, controlled or influenced" the school's decisions to house CR with sexual predators and to cover up the fact that he had been molested by another student. *Id.* But see *C.K. v. Northwestern Human Services*, 255 F.Supp.2d 447 (E.D. Penn. 2003) (mem.) (motion to dismiss § 1983 action against private school and facility for delinquent youth by girl who had been committed to the program by a court and subsequently molested by a member of program staff denied, on the grounds that such a facility was similar to an adult prison and thus that state functions and state action were involved).

<sup>59</sup> 256 F.3d 159 (2001).

<sup>60</sup> *Id.* at 165-168. The plaintiff was a minor who had been committed to the custody of the Pennsylvania Department of Human Services (DHS). *Id.* at 161-162. The DHS, with the plaintiff's mother's consent, placed the plaintiff at the Stetson School, a private residential facility in Massachusetts that specialized in the treatment and education of juvenile sex offenders. *Id.* at 162. While he was there, staff at the school subjected the plaintiff to kicking, punching and wrestling, in violation of the school's policy against "horseplay." *Id.* at 163. The plaintiff sued under § 1983 and a number of state law claims. *Id.* at 161.

The Third Circuit Court concluded that the Stetson School's receipt of government funds was not enough to equate its actions with those of the state. *Robert S.*, 256 F.3d at 165. It also held that the DHS's contracts with

Circuit Court also held that, even if the plaintiff had been able to establish state action, he would not have been able to show that his rights had been violated to an extent that would merit relief under § 1983.<sup>61</sup>

On the other hand, the First Circuit Court of Appeals and Massachusetts courts have produced decisions on the use of § 1983 in cases involving residential treatment facilities with language suggesting that they would follow the persuasive precedent set by *Milonas* if given the opportunity to do so. In *Rendell-Baker v. Kohn*,<sup>62</sup> the First Circuit Court declined to grant relief under § 1983 to a staff member at a private school for troubled youth for the school's alleged violation of her constitutional rights, holding that the plaintiff had not established that the school had acted under the color of state law with regards to the conduct complained of.<sup>63</sup> However, the

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the Stetson School did not establish state action for the purposes of § 1983, as these contracts did not compel or influence the conduct at issue in the lawsuit. *Id.* Finally, it rejected the plaintiff's assertion that the educational and treatment services offered by the Stetson School were traditional state functions that would make the school a state actor for the purposes of § 1983. *Id.* at 165-166. In particular, it said that the bar for establishing that something constituted a traditional state function was very high, and that, historically, most facilities that offered similar services had been private schools anyways. *Id.*

In response to the plaintiff's attempt to analogize the facts of his case to those of *Milonas*, the Third Circuit Court not only pointed out the many differences between Provo Canyon and the Stetson School, but also called the reasoning into *Milonas* into question. *Id.* at 167-169. *See also infra* note 61 and accompanying text. Specifically, the court disagreed with how *Milonas* court distinguished the facts of the case before it from those of *Rendell-Baker* on the basis that the plaintiff in *Rendell-Baker* was a teacher rather than a student. Robert S., 256 F.3d at 168. According to the Third Circuit Court, the facts that the plaintiffs in *Milonas* were students and thus the intended beneficiaries of state regulations and that the state was "aware of, and approved of" the practices at Provo Canyon, were not necessarily enough to establish state action. *Id.* (citing *Milonas*, 691 F.2d at 940). In fact, it noted that the Tenth Circuit Court's reasoning was contradictory to other established case law that mere governmental "approval of or acquiescence in" private activity does not constitute state action. *Id.*, n. 10 (citing *San Francisco Arts & Athletics v. U.S.O.C.*, 483 U.S. 522, 547).

The Third Circuit Court also distinguished this case from *Milonas* by emphasizing that the plaintiff was placed at the Stetson School by his legal guardian and with the consent of his mother, rather than by "state officials" of the type that had placed the plaintiffs in *Milonas* at Provo Canyon. *Id.* at 168. In doing so, it considered the DHS, which had custody over the plaintiff, to be acting as a parent rather than a governmental body. Robert S., 256 F.3d at 168.

<sup>61</sup> *Id.* at 168-169. The court held that the conditions at the Stetson School, which did not use seclusion, prevent students from seeing visitors, use polygraph tests or censor students' mail, were not at all comparable to those of Provo Canyon, and thus that the case before it was not analogous to *Milonas* anyways. *Id.*

<sup>62</sup> 641 F.2d 14 (1st Cir. 1981).

<sup>63</sup> *See id.* at 27 ("[The school's funding, regulation and function], together, as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state."). The plaintiff, Sheila Rendell-Baker, had been fired from her position as a vocational counselor at the New Perspectives School, which served youth with drug, alcohol and behavioral problems, after she sided with a group of students in a controversy between the students and the school's director. *Id.* at 16-17, 19. She sued the school and its director under § 1983, alleging that her discharge had been a violation of her First Amendment and due process rights. *Id.*

The court noted that the New Perspectives School received state funding from agencies and other sources related to special education, youth services, family services mental health treatment and law enforcement. *Id.* at 17. It also discussed how the school was bound by governmental regulations and guidelines on matters including but not limited to staff training, student discipline, nutrition, student medical care and educational standards. *Rendell-Baker*, 641 F.2d at 17-18. However, it mentioned specifically that there was much less regulation of personnel matters, requiring only that the school maintain written job descriptions and employment policies. *Id.* at 18. Finally, it mentioned the fact that the school had contracted with several governmental entities to provide special education, counseling and job placement services to certain youth populations, but that these contracts had very little if anything to do with personnel matters. *Id.* at 18-19.

court did note that state regulation of the school's practices and the school's receipt of funds from state agencies may render the school liable to students under § 1983, as the students were the ones who were the intended beneficiaries of the school's services.<sup>64</sup>

In a more recent, albeit nonbinding, decision, *Doe v. Westlake Academy*,<sup>65</sup> a Massachusetts trial court concluded that Westlake Academy (Westlake), a private residential psychiatric treatment program for youth that was funded and regulated by the state, could be liable to a student under § 1983 for its staff member's sexually assaulting her.<sup>66</sup> Distinguishing the situation in the case before it from that in *Rendell-Baker*, the court held that treatment of the indigent mentally ill was traditionally an exclusive state function, while private school education was not.<sup>67</sup> It further held that the fact that the state civilly committed mentally individuals to and regulated their treatment at Westlake meant that the facility was acting on behalf of the state with regards to the treatment of its patients.<sup>68</sup> On this basis, the court denied the defendant institution's motion to dismiss the case.<sup>69</sup>

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The court recognized a significant amount of state involvement with the New Perspectives School, particularly in the form of funding. *Id.* at 24. However, it held that even a significant amount state funding – showing the ability of the state to influence a private actor's decisions – was not enough to establish that a private actor was in fact acting under the color of state law. *Rendell-Baker*, 641 F.2d at 25. Because the state had not regulated the school's handling of personnel matter, the court concluded that the plaintiff had failed to establish state action sufficient to merit relief under § 1983. *Id.* The court also did not agree with the plaintiff's argument that her dismissal was done under the color of state law based on the fact that the school was performing a traditional state function, holding that special education has historically been handled by private schools. *Id.* at 26. Finally, the court concluded that the state and the school did not have a "symbiotic relationship" of the kind necessary to establish state action for the purposes of § 1983, as there was no evidence that the state benefited from the conduct at issue in the case. *Id.* at 26-27.

<sup>64</sup> *Id.* at 26. On appeal, the Supreme Court affirmed the First Circuit Court's decision refusing to grant the plaintiff relief, but left open the question of whether a student suing the school under § 1983 could have successfully shown that its actions were carried out under the color of state law. *See generally* *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

The Tenth Circuit Court relied heavily on the First Circuit Court's dictum regarding the school's possible liability to student plaintiffs under § 1983 in reaching its decision in *Milonas v. Williams*. 691 F.2d 931, 940 (1982). *See also supra* note 52. In *Robert S. v. Stetson School*, the Third Circuit Court asserted that the Tenth Circuit Court had misread *Rendell-Baker* in doing so, and that the decision in *Rendell-Baker* would not necessarily allow a student in such a facility to prevail under § 1983. 256 F.3d at 167-169. *See also supra* note 60 and accompanying text.

<sup>65</sup> 2000 WL 1724887 (Mass.Super.) (mem.).

<sup>66</sup> *Id.* at \*4-5. The plaintiff in *Doe* was a mentally ill teenager from Maine who had been committed to Westlake, a private residential psychiatric program in Massachusetts. *Id.* at \*1. A male counselor escorted her, alone, on her visits home to Maine and molested her on these trips. *Id.* She became pregnant, and suffered further psychiatric problems as a result. *Id.* at \*1-2. She sued Westlake under the federal and Massachusetts civil rights statutes, as well as a number of other, state based tort claims. *Doe*, 2000 WL 1724887 at \*2.

<sup>67</sup> *Id.* at \*5. The court distinguished Westlake, a "lock-down facility for civilly committed mentally ill adolescents," from both a prison and a private alternative high school like the defendant program in *Rendell-Baker v. Kohn*. *Id.* In reaching its decision that this type of facility performed a traditional and exclusive state function, it noted that, historically, the state had provided care for its indigent mentally ill citizens in inpatient facilities. *Id.* Because the plaintiff was both indigent and mentally ill, the court concluded that Westlake had been performing a state function in providing her with treatment. *Id.* at \*5.

<sup>68</sup> *Doe*, 2000 WL 1724887 at \*5. The court recognized that *Rendell-Baker v. Kohn* had established that extensive state regulation of a facility by itself did not establish that it was acting under color of state law. *Id.* at \*4. However, because the plaintiff was a patient at Westlake, and was thus the intended beneficiary of court-ordered treatment there and regulations related to it, the court held that Westlake could fairly be considered a state actor for the purposes of the case before it. *Id.* at \*5.

<sup>69</sup> *Id.* at \*5. The trial court also discussed, but in the end dismissed, the plaintiff's claim under the Massachusetts Civil Rights Statute. *Id.* at \*2-3. Unlike the federal civil rights statute, the Massachusetts Civil Rights Statute does



### *Part III: Using civil rights laws to prevent the misuse of aversives at the Judge Rotenberg Center*

The state-sanctioned use of aversives at the Judge Rotenberg Center is exactly the kind of rights violation that § 1983 was designed to protect against.<sup>70</sup> § 1983 was passed in order to impose liability on a federal level on private actors for harming members of a marginalized group, African Americans in the post-Civil War South, because state authorities were tacitly encouraging such conduct by refusing to put a stop to it.<sup>71</sup> While done in the name of treatment, the way in which the JRC treats people with developmental and psychiatric disabilities for behaviors that directly result from their conditions amounts to a similar violation of the civil and in fact human rights of some of society's most disadvantaged and disenfranchised people.<sup>72</sup> The state has compounded the problem by funding students' placement at the school and enshrining the JRC's use of aversives into its laws and policies.<sup>73</sup> This is in spite of the fact that numerous state investigations have revealed that these practices are both dangerous to students and in violation of state law.<sup>74</sup>

Because of this longstanding history of state acquiescence to and complicity in the JRC's deprivations of its students' rights, JRC students and disability rights advocates should put forth and prevail on a theory that the facility should be enjoined from using aversives for punitive or coercive purposes, and from using some types of aversives in any circumstance, under § 1983. Both the amount of state involvement with and conditions at the JRC are analogous to those in *Milonas v. Williams* to the extent that a federal district court – or a state court, for that matter – could and should rely on that case as persuasive authority in reaching its decision.

#### A. State involvement with the Judge Rotenberg Center

There is a “sufficiently close nexus” between the (use of aversives at the) JRC and the state of Massachusetts to establish a claim under § 1983. The JRC receives significant amounts of funding from the state that covers its students' tuition.<sup>75</sup> It is also subject to Massachusetts state regulations, including ones that are directly related to the use of highly intrusive aversives on students with severe disabilities.<sup>76</sup> Furthermore, students are referred to and placed at the

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not require a plaintiff to show that a private actor's conduct was carried out under color of state law. *See* M.G.L. ch. 12, § 11H (2008). Instead, plaintiffs must show that a private actor interfered with his or her enjoyment or exercise of federal or state constitutional or statutory rights by means of threats, intimidation or coercion. *Id.* Although this note will not discuss the Judge Rotenberg Center's liability under the Massachusetts Civil Rights Statute in any depth, that statute may provide another way for plaintiffs and disability rights advocates to limit the JRC's use of aversives.

<sup>70</sup>*See* *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (explaining the purpose behind § 1983).

<sup>71</sup>*See id.* at 277.

<sup>72</sup>*See supra* notes 8-9 and accompanying text (the JRC uses aversive behavioral modification as a form of treatment); sources cited *supra* note 23 (making a case for why the use of aversives at the JRC violates the rights of people with disabilities). *See also* discussion *infra* Part III.B (arguing that the use of aversives at the JRC violates students' Fourteenth Amendment rights to be free of unnecessary restraint and of unsafe conditions of confinement).

<sup>73</sup>*See supra* notes 29-39 and accompanying text (describing state involvement with the JRC).

<sup>74</sup>*See supra* note 16, 24 (investigations by state agencies in Massachusetts, New York and California have revealed physical abuse and neglect and have called the treatment and education provided by the JRC into question).

<sup>75</sup>*See note* 34 and accompanying text (state agencies and local school districts pay for students' placement at the JRC).

<sup>76</sup>*See supra* note 40 and accompanying text (Massachusetts regulations on the use of aversives require facilities to use the least restrictive and most appropriate means of addressing difficult behavior, and prohibit them from depriving students of their basic needs).

JRC by local public school districts and state agencies.<sup>77</sup> In all of these ways, the amount and types of state involvement in this situation are analogous to those presented by the facts of *Milonas v. Williams*, and could easily be enough for a willing court to consider the JRC a state actor.<sup>78</sup>

The state of Massachusetts's involvement with the JRC in fact goes beyond that which had existed between the state of Utah and the Provo Canyon School for Boys, as state agencies have entered into and subsequently been subject to an agreement with the JRC that specifically allows it to use certain aversives through special substituted judgment proceedings.<sup>79</sup> This settlement agreement, while intended in part to protect JRC students from the misuse of aversives, actually has the effect of legitimizing and in some ways encouraging their use.<sup>80</sup> In this way, it could be said that the state has, if not directed or controlled, at least influenced the JRC's actions with regards to these practices.<sup>81</sup> Furthermore, the courts' authorization of the JRC's use of highly intrusive aversive procedures on individual students through these substituted judgment proceedings is itself yet another form of state action.<sup>82</sup>

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<sup>77</sup>See *supra* note 33 and accompanying text.

<sup>78</sup>Compare *supra* text accompanying notes 75-77 (state agencies regulate the use of aversives at, place students at and pay tuition for the JRC) with *Milonas v. Williams*, 691 F.2d 931, 939-940 (10th Cir. 1982) (court found that Provo Canyon School for Boys was acting under the color of state law where there was extensive funding and regulation of the facility by state agencies and where students were placed at the facility by state agencies and juvenile courts).

<sup>79</sup>See *supra* notes 31-32, 36-39 and accompanying text (describing how Massachusetts state agencies came to enter into an agreement with the state of Massachusetts regarding the continued use of aversives and what that agreement involves). This might be considered comparable to the "detailed contracts" that states entered into with the Provo Canyon School in *Milonas v. Williams*. See *Milonas*, 691 F.2d at 940. Without knowing what these contracts specifically contained, however, it is hard to know the extent to which these contracts addressed Provo Canyon's use of behavioral modification practices. See *id.* The settlement agreement between the JRC and Massachusetts dealt almost exclusively with the former's continued use of aversives. See generally Settlement Agreement, *supra* note 31. If it were to be shown that the contracts between states and the Provo Canyon School for Boys dealt with other aspects of student placement there besides or in addition to behavioral modification, this analogy would work in favor of considering the settlement agreement to be a form of state action with regards to the JRC's use of aversives. Cf. *Rendell-Baker v. Kohn*, 641 F.2d 14, 26 (1st Cir. 1981) (court noted that it would be more likely to find state action on the part of a private alternative school with regards to conduct that was the subject of extensive state regulation).

<sup>80</sup>See Settlement Agreement, *supra* note 31, at 2-7 (establishing court hearings and oversight for the use of aversives on individual JRC students); N.Y. State Educ. Dep't, *supra* note 2, at 5 (the JRC places students awaiting substituted judgment proceedings for the use of Level III aversives in isolated and restrictive classroom settings and uses the students' increased number of problem behaviors in these settings as proof of their need for such behavioral interventions in these hearings). The settlement agreement also has the effect of legitimizing the use of aversives, and has in fact prevented state agencies from prohibiting or limiting their use. See *supra* note 32; Traniello & Engel, *supra* note 18, at 3 (the settlement agreement, and the JRC's success in convincing courts in subsequent litigation to rely on it, has made state agencies reluctant to try to interfere with the JRC's practices). While JRC students receive representation at these proceedings, the hearings are at this point all but a formality in allowing the JRC to use aversives. See MDRI, *supra* note 2, at 45.

<sup>81</sup>See *Robertson v. Red Rock Canyon School, LLC*, No. 2:05-CV-758 TC, 2006 WL 3041469 at \*4 (D. Utah Oct. 24, 2006) (for a court to find state action by a private entity, the state must have "directed, controlled or influenced" its conduct).

<sup>82</sup>Cf. *Milonas*, 691 F.2d at 940 (the fact that juvenile courts had placed youth at Provo Canyon had contributed to a finding that Provo Canyon had acted under the color of state law in its use of aversives). If anything, Massachusetts state courts have contributed more to the use of aversives at the JRC than the courts referenced in *Milonas* did, as the former are responsible for allowing the JRC to use Level III aversives on individual students as opposed to merely placing students at the JRC. Compare *id.* with Settlement Agreement, *supra* note 31, at 2-7. This weighs in favor of considering the substituted judgment proceedings to be state action. See *Rendell-Baker*, 641 F.2d at 26

A plaintiff could also establish that the JRC's actions are attributable to the state on the basis that the services it is supposed to provide are traditional state functions. Admittedly, the JRC is somewhat distinct from other behavioral modification facilities and youth detention centers such as Provo Canyon, both in the population it serves and the methods it uses.<sup>83</sup> That being said, an analogy between the JRC and private alternative schools like the New Perspectives School in *Rendell-Baker v. Kohn* would be imperfect as well.<sup>84</sup> While the JRC does provide special education services, it primarily presents itself as and is known for providing behavioral treatment.<sup>85</sup> If anything, based on its own self-description, it would seem that the function that the JRC serves is similar to that which state-run psychiatric facilities used to, in that it houses and ostensibly provides treatment to children and other dependents whose mental disturbances are so severe that their caretakers do not know how to care for them.<sup>86</sup> In general, inpatient treatment of the mentally ill has been a traditional and exclusive state function.<sup>87</sup>

A court hearing a lawsuit against the JRC arising under § 1983 could not find the state's involvement with the facility's use of aversives in particular to be lacking for the purposes of establishing state action. The facts here are distinct from those of *Robertson v. Red Rock Canyon School, LLC*, in which the state was not aware of, let alone responsible for, the program's decisions regarding individual students' housing.<sup>88</sup> State agencies and courts have been aware of how the JRC treats its students for decades, and have in fact been instrumental in allowing it to continue in this way, by entering into and upholding the 1986 settlement agreement and by failing to enforce existing restrictions on the use of aversives in the face of known violations.<sup>89</sup> Because of the existence of these restrictions and the settlement agreement both, this situation is also dissimilar from the one presented in *Rendell-Baker v. Kohn*, where the state's involvement was considerable but did not extend to the conduct at issue in the case.<sup>90</sup> The state of

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(state involvement in the conduct complained of is more likely to be considered state action for the purposes of § 1983 than is general involvement with a private entity).

<sup>83</sup>Compare Judge Rotenberg Center Homepage, *supra* note 14 ("JRC [provides] very effective education and treatment to both emotionally disturbed students with conduct, behavior, emotional, and/or psychiatric problems and developmentally delayed students with autistic-like behaviors.") *with* Milonas, 691 F.2d at 935 (Provo Canyon was both a school for youth with serious disabilities and behavioral problems, and a juvenile detention and correctional facility). *See also generally* Szalavitz, *supra* note 10 (many behavioral modification facilities address rebellious or dangerous teenage behavior through a combination of confrontational talk therapy and punishment).

<sup>84</sup>Compare Introduction to JRC, *supra* note 14 (The JRC's program uses an almost exclusively behavioral approach in providing treatment and education to children with severe developmental and psychiatric disabilities) *with* *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982) (the New Perspectives School was a private high school for teens who could not complete a more standard high school program because of their substance abuse, behavioral or other problems).

<sup>85</sup>*See, e.g.*, Introduction to JRC, *supra* note 14; Williams & Williams, *supra* note 27 (describing the JRC's behavioral treatment program).

<sup>86</sup>Compare Introduction to JRC, *supra* note 14 (JRC provides residential treatment to people with severe developmental and psychiatric disorders that have not been successfully addressed within the community) *with* *Parham v. J.R.*, 442 U.S. 584, 597 (1979) (state institutions have provided specialized care for seriously disturbed children whose parents cannot, or cannot afford to, do so).

<sup>87</sup>*See, e.g.*, *Doe v. Westlake Academy*, 2000 WL 1724887 at \*5 (Mass.Super.) (mem.). *See also* *Parham*, 442 U.S. at 597 (briefly describing how the state has historically provided treatment as well as shelter to people with serious mental illness through psychiatric hospitals).

<sup>88</sup>*See* *Robertson v. Red Rock Canyon School, LLC*, No. 2:05-CV-758 TC, 2006 WL 3041469 at \*2, \*5.

<sup>89</sup>*See supra* notes 29-40 and accompanying text; discussion *supra* pp. 18-19.

<sup>90</sup>Compare Settlement Agreement, *supra* note 31 (establishing procedures for approving the use of aversives on JRC students); 115 Mass. Code Regs. 5.14(b)(1)-5.14(b)(5) (imposing restrictions on the manner in which facilities can use aversives) *with* *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (although the state of Massachusetts had

Massachusetts does not monitor or approve every single decision to use an aversive consequence on a student at the JRC.<sup>91</sup> However, this should not bar a court from finding that the JRC's use of aversives in general has been carried out under the color of state law, nor would it were a court to follow the precedent set by *Milonas*.<sup>92</sup>

Admittedly, while *Milonas* is still considered good law, it has not gone unchallenged.<sup>93</sup> In particular, the Third Circuit Court's decision in *Robert S. v. Stetson School, Inc.* provides an alternative view on the level of state action necessary to establish a claim under § 1983, setting the bar higher than the Tenth Circuit Court did.<sup>94</sup> However, the Third Circuit Court did not specify what kind or amount of state action would rise to that level, nor does it deny that the actions of a residential treatment facility could ever reach it for the purposes of such a claim.<sup>95</sup> Because of this lack of a concrete alternative test or standard for what constitutes state action, a court faced with deciding whether the JRC has acted under the color of state law should look to policy implications in deciding which authority to follow.

With regards to the JRC itself, finding that state involvement with the facility has been sufficient for the purposes of § 1983 would be the best decision for policy reasons. It is clear that the state of Massachusetts – its legislature, its courts and its executive agencies – has involved itself with the JRC repeatedly and consistently throughout the last few decades, in such a way that largely perpetuates rather than restricts the use of aversives.<sup>96</sup> The state's consistently permissive attitude towards the JRC's practices is in fact the reason that disability and human rights advocates are now pursuing solutions on a federal (and even an international) level in the

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regulated the New Perspectives School extensively, the regulations did not address personnel matters in any great detail).

<sup>91</sup> See, e.g., Settlement Agreement, *supra* note 31, at 6-7 (requiring only that a court monitor report back to the court on the general efficacy of the use of aversives on individual students). But see *supra* text accompanying note 35 (state agencies can sign into the JRC's website to monitor individual students' educational and behavioral progress, including behavioral charts tracking treatment).

<sup>92</sup> See *Milonas v. Williams*, 691 F.2d 931, 940 (10th Cir. 1982) (state action found on the part of behavioral modification facility where students had been "involuntarily placed in the school by state officials who were aware of, and approved of," its use of aversives without directly controlling when and how they were used).

<sup>93</sup> See *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 167-168 (3rd Cir. 2001).

<sup>94</sup> *Id.* See also *supra* note 60 and accompanying text.

<sup>95</sup> *Robert S.*, 256 F.3d at 164-169. *Robert S.* merely reaffirmed that extensive state funding of a private entity was not enough to establish state action and that private alternative schools did not serve a traditional and exclusive state function. *Id.* at 164-165. Its main objections to *Milonas* was the perceived overemphasis that the Tenth Circuit Court had placed on state funding, and that it did not understand why the Tenth Circuit Court had considered it so important that the state regulation of Provo Canyon addressed its treatment of students in distinguishing the case before it from *Rendell-Baker*. *Id.* at 168. See also *supra* note 52 (explaining the relevance of the Tenth Circuit Court's distinction based on the intended beneficiary of state regulation). Many of the court's other conclusions about what constitutes or falls short of state action were fact-specific, and do not either directly contradict *Milonas* nor set a general standard for when a facility can be considered to be acting under the color of state law. Compare *Robert S.*, 256 F.3d at 164 (contracts between state agency and Stetson School did not "compel or even influence" the school's conduct in the case before the court); *id.* at 165-166 (state agency's placement of plaintiff at Stetson School did not establish state action, as state was acting in the capacity of student's legal guardian) with *Milonas*, 691 F.2d at 940 (state agencies and courts which were "aware of[] and approved of" Provo Canyon's behavioral modification practices placed students at the school with consent of their parents and entered into contracts with the school).

<sup>96</sup> See *supra* notes 29-39 and accompanying text (state involvement with the JRC allowing its use of aversives); *supra* note 80 and accompanying text (state involvement legitimizes and encourages the use of aversives).

first place.<sup>97</sup> In light of these facts, a decision to consider the JRC a state actor under § 1983 would be in line with the purpose of that statute – that is, to provide protection of an individual’s rights on a federal level when they have been denied on a state level.<sup>98</sup>

In terms of the precedential value of a decision that the JRC’s actions had acted under the color of state law, such a holding would probably apply to only a very limited set of circumstances. The JRC is, if not unique, then at least distinguishable from many if not most other behavioral modification facilities, both in terms of its actual program and the sheer amount of state involvement with its use of aversives.<sup>99</sup> That being said, the possibility that attorneys and courts may use such a decision to further rein in the practices at private residential treatment facilities should, if anything, weigh in favor of finding state action. These facilities often serve as alternatives to or replacements more traditionally public institutions such as prisons and psychiatric hospitals.<sup>100</sup> Existing case law clearly establishes that people involuntarily held in such public institutions are still guaranteed certain rights, such as freedom from unreasonable restraint, under the Constitution.<sup>101</sup> Allowing state governments (as well as parents, guardians and treatment providers) to circumvent these protections simply by placing youth and people with disabilities in private facilities essentially strips them of any real meaning.<sup>102</sup> A court’s holding that one particular behavioral modification facility, namely the JRC, was acting under the color of state law and thus was bound to respect these rights could possibly serve as the basis for forcing other, similar facilities to do so as well, which could only be a good thing given these concerns.

#### B. The Judge Rotenberg Center’s violation of constitutionally-protected liberty interests

A court should grant permanent injunctions against the use of aversives at the Judge Rotenberg Center under § 1983, on the basis that such techniques amount to unnecessary restraint, unsafe conditions of confinement and overall “antitherapeutic and inhumane” treatment that violate its students rights under the Fourteenth Amendment’s Due Process Clause.<sup>103</sup> In

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<sup>97</sup> See sources cited *supra* note 23 (disability rights advocates seek to end the JRC’s use of aversives under the Americans with Disabilities Act and through United Nations interventions against the use of torture).

<sup>98</sup> See *supra* notes 70-72 and accompanying text.

<sup>99</sup> See *supra* note 41. Compare *supra* notes 29-39 (amount of state involvement with the Judge Rotenberg Center) with *Residential Treatment Programs*, *supra* note 10, at 2 (some private residential treatment programs are not regulated, licensed or funded by the state); Szalavitz, *supra* note 10, at 5 (“states often have little or no oversight” of behavioral modification facilities).

<sup>100</sup> See Szalavitz, *supra* note 10, at 2-3 (parents turn to behavioral modification programs as an alternative to more traditional forms of mental health treatment for their children); *id.* at 63-64 (programs modeled loosely off of addiction treatment such as those at many behavioral modification facilities have taken the place of more traditional forms of treatment); *Milonas v. Williams*, 691 F.2d 931, 935 (10th Cir. 1982) (Provo Canyon was both an inpatient treatment center for youth with severe behavioral problems and a correctional and detention center); *Doe v. Westlake Academy*, 2000 WL 1724887 at \*5 (Mass.Super.) (mem.) (private residential treatment center held to be performing a traditional and exclusive state function of providing treatment to the indigent mentally ill).

<sup>101</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 315, 318-320, 324 (1982).

<sup>102</sup> See Szalavitz, *supra* note 10, at 6 (“abusive, dehumanizing practices that reformers of mental hospitals and prisons have attempted to stamp out for centuries have been repackaged and are currently being sold... as essential and beneficial for kids.”); *Milonas*, 691 F.2d at 942-943 (enjoining private behavioral modification facility from using behavioral modification practices that violated students’ constitutional rights even though state officials and parents had allowed and approved of their use).

<sup>103</sup> See *Milonas*, 691 F.2d 934, 940-943 (court enjoined behavioral modification facility’s use of restraint and seclusion for coercive purposes as violative of its students rights under the constitution to be free of “cruel and unusual punishment, antitherapeutic and inhumane treatment, and denial of due process of law.”); *Youngberg*, 457

particular, the use of contingent electric shock, food deprivation, and sensory deprivation as part of restraint should be prohibited under all circumstances.<sup>104</sup> Additionally, a court should limit the use of restraint, social deprivation and placement in more isolated and restrictive classroom settings to the extent necessary to protect students, staff members and others from imminent physical harm.<sup>105</sup>

A court could not refuse to grant the injunctions on the grounds that the nature of the aversives used at the JRC fails to rise to the level of those at a facility like the Provo Canyon School for Boys.<sup>106</sup> Unlike, for instance, the defendant facility in *Robert S. v. Stetson School, Inc.*, which had an explicit policy against staff so much as engaging in physical “horseplay” with students, the JRC uses highly restrictive and painful forms of behavioral modification as part of its program.<sup>107</sup> However, neither the laws of Massachusetts nor the United States Constitution would require the JRC to discontinue the use of all aversives in all circumstances just by virtue of their being unpleasant or invasive.<sup>108</sup> After all, in school settings, the Constitution does not prohibit the use of corporal punishment.<sup>109</sup> Furthermore, it allows institutions to restrict the liberty of those confined in them when doing so is reasonable and rationally related to institutional security, administrative needs or other legitimate objectives.<sup>110</sup>

The argument against enjoining the JRC from continuing to use aversives as it does would be that these practices, as used, do in fact serve legitimate institutional objectives.<sup>111</sup> Using contingent electric shock, restraint and placement in restrictive and isolated classroom settings to prevent and possibly deter students from harming themselves, each other or members of staff would ensure security, which is one such legitimate goal.<sup>112</sup> Additionally, the JRC and its supporters claim that its use of aversives is the only effective treatment available for students with severe developmental and psychiatric disabilities that manifest themselves in highly dangerous self-injuring or assaultive behavior.<sup>113</sup> On this basis, the JRC might defend against possible injunctions by saying that providing lifesaving treatment of severe behavioral problems

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U.S. at 324 (people confined to inpatient institutions have rights under the Fourteenth Amendment to reasonably safe conditions of confinement, to be free from unreasonable bodily restraints, and to minimally adequate training that is necessary to protect these other liberty interests). *See also infra* pp. 28-37.

<sup>104</sup> *See infra* notes 137-149 and accompanying text.

<sup>105</sup> *See infra* notes 132-136 and accompanying text.

<sup>106</sup> *Compare* notes 18-20 and accompanying text (describing the use of aversives, including contingent electric shock, food deprivation, social deprivation, sensory deprivation, long term restraint, and placement in restrictive isolated classroom settings at the JRC) *with* *Milonas*, 619 F.2d at 941-942 (behavioral modification facility used restraint and seclusion on students for punitive and coercive purposes).

<sup>107</sup> *Compare* notes 18-20 and accompanying text *with* *Robert S. v. Stetson School*, 256 F.3d 159, 163-164, 168 (3rd Cir. 2001) (conditions at defendant residential alternative school were not comparable in severity to those of the behavioral modification facility in *Milonas*, as they did not include the use of seclusion, corporal punishment, polygraph testing, mail censorship or other similarly restrictive policies).

<sup>108</sup> *See supra* note 49 (discussing precedent related to the use of corporal punishment and restraint in institutional settings).

<sup>109</sup> *See* *Ingraham v. Wright*, 430 U.S. 669, 671, 674-675 (1977) (neither the Due Process Clause of the Fourteenth Amendment nor the Eighth Amendment prohibit all uses of corporal punishment or restraint on children in public school).

<sup>110</sup> *See* *Bell v. Wolfish*, 441 U.S. 520, 538-539 (1979). *See also* *Youngberg v. Romeo*, 457 U.S. 307, 319-320 (1982) (the Constitution only protects institutionalized persons against the unreasonable use of restraint).

<sup>111</sup> *See, e.g.*, sources cited at note 28 (asserting that aversives are the only effective way to control self-injurious and assaultive behaviors in the case of some people with severe psychiatric and developmental disabilities).

<sup>112</sup> *See* Response to MDRI Report, *supra* note 14, at 55, 58, 61.

<sup>113</sup> *See supra* notes 27-28 and accompanying text.

constitutes a legitimate institutional goal, and that its use of aversives is both reasonable and rationally related to this goal.<sup>114</sup>

These arguments would not provide adequate justification for the JRC's use of aversives. First of all, the JRC is not in fact using aversives for their stated purpose of preventing students from engaging in dangerous behaviors, or at least not solely for that reason.<sup>115</sup> In fact, if the numerous reports of students being shocked or otherwise punished for merely annoying or noncompliant behaviors such as "nagging, swearing, and failing to maintain a neat appearance" are to be believed, the JRC is not even using these techniques to treat symptoms of developmental or psychiatric disorders at all in some cases.<sup>116</sup> The JRC may claim that such punishments teach students valuable skills that will allow them to function in society by forcing them to abide by social norms.<sup>117</sup> However, even assuming that this would be a legitimate institutional goal on the level of ensuring institutional security, and even if the use of aversives are rationally related to achieving these goals, their use is surely not a *reasonable* response to such behaviors in light of how much it restricts students' rights.<sup>118</sup> There is also cause for concern that aversives are being used for purely coercive purposes.<sup>119</sup> Such punishments are, if anything, analogous to the use of polygraph testing to root out negative and rebellious thinking at Provo Canyon in how unjustifiably coercive they are.<sup>120</sup>

It could also be argued that providing effective treatment of severe behavioral problems is not a legitimate institutional goal in the same way that security is. Put another way, an individual's treatment should not be an "institutional need" that is weighed against the

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<sup>114</sup> See generally Response to MDRI Report, *supra* note 14 (defending the JRC's use of aversives as being effective, necessary and lifesaving in responding to student behaviors); *Milonas v. Williams*, 691 F.2d 931, 942 (1982) (Provo Canyon defended its use of restraint and seclusion on the grounds that it was "rationally directed toward the realization of legitimate and important objectives of education, therapy, and social rehabilitation"). This position is supported by the fact that the JRC is, or presents itself as being, a "school of last resort" for children and adults with severe disabilities who have been expelled from or unsuccessfully treated in other programs. See Gonnerman, *supra* note 16, at 2; Response to MDRI Report, *supra* note 14, at 7-8, 10-12. The JRC attributes its ability to successfully treat the most severe behavioral problems to its use of aversives, particularly contingent electric shock. See, e.g., Response to MDRI Report, *supra* note 14, at 3-4.

<sup>115</sup> See note 20 and accompanying text (the JRC uses aversives in response to annoying or noncompliant behaviors and sets students up to be punished).

<sup>116</sup> See *id.*

<sup>117</sup> See, e.g., *Israel*, *supra* note 20, at 17; Response to MDRI Report, *supra* note 14, at 61.

<sup>118</sup> See *Bell v. Wolfish*, 441 U.S. 520, 538-539 (1979) (in order for a restriction on a person's liberties to be constitutionally valid, it must not be imposed for punitive purposes nor excessive in relation to a non-punitive purpose); *Youngberg v. Romeo*, 457 U.S. 307, 321-322 (1982) (*Bell* framework applies in the case of people confined to institutions); *Milonas v. Williams*, 691 F.2d 931, 942 (1982) (applying the balancing test set out in *Bell*, the use of restraint, seclusion, polygraph testing and mail censorship for the purpose of forcing student compliance at Provo Canyon was "so onerous as to overcome the legitimate administrative and security interests of the school.").

<sup>119</sup> See, e.g., N.Y. STATE EDUC. DEP'T, *supra* note 2, at 18 (students punished for making complaints through the official school grievance policy about situations that staff set up to be purposely unfair); MDRI, *supra* note 2, at 17-18 (the JRC's use of prolonged restraint on new students and its frequent placement in isolated and restrictive classroom settings raises concerns as to whether such practices are being used to pressure parents or students into consenting to contingent electric shock).

<sup>120</sup> Compare *supra* note 20 (the JRC uses aversives to punish merely noncompliant or annoying behavior, to punish students from making complaints of unfair treatment, and to deter students from possible future misbehavior) with *Milonas*, 691 F.2d at 941, 942-943 (court found that making student's advancement in and discharge from Provo Canyon contingent on taking polygraph tests to determine whether one was having "negative thoughts" about the school or intending to break school rules was coercive and unconstitutional).

importance of his or her rights, but should be considered a right itself. The law has in fact taken this position, guaranteeing the right of institutionalized person to have “minimally adequate care and training.”<sup>121</sup> It would be perverse and in fact antithetical to the purpose of patients’ rights for institutions to be able to appropriate this right as being their need, and thus use it to heavily restrict patients’ other constitutional rights.<sup>122</sup> The fact that the JRC treats particularly severely affected individuals and bases its program on a unique method of treatment does not and should not change the fact that treatment is the right of its students and must be weighed against other institutional goals.<sup>123</sup>

Even if treatment of severe behavioral disorders was a legitimate institutional need on in the same way ensuring institutional security is, it is questionable at best as to whether the use of aversives accomplishes this goal.<sup>124</sup> The JRC’s own literature acknowledges that some aversives such as long-term restraint are ineffective and harmful even as it makes use of them.<sup>125</sup> As far as other aversives, such as contingent electric shock, are concerned, the JRC relies on anecdotal evidence to prove their effectiveness.<sup>126</sup> This evidence can easily be countered by other examples of students who have been receiving aversive “treatment” for years – up to and including all of their adult lives – without lasting, or even any, success.<sup>127</sup> Meanwhile, most experts in the education and mental health treatment communities have turned away from the use of aversives, especially when used for purely punitive purposes rather than for ensuring people’s immediate safety.<sup>128</sup> In fact, many experts – as well as disability rights advocates – argue that

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<sup>121</sup> Youngberg, 457 U.S. at 318-319.

<sup>122</sup> Cf. *id.* In the *Youngberg* case, it was the patient who was asserting “a constitutional right to minimally adequate habilitation” in the first place. *Id.* at 316. In particular, the patient asserted that such treatment and training should be guaranteed so that, eventually, he would be free of restrictions on his other liberties such as bodily security and freedom from restraint. *Id.* at 317. The Supreme Court agreed that such a right should exist, on the basis that the state (and thus, state actors) had a duty to provide institutionalized persons with this kind of care and training by virtue of its institutionalizing them in the first place. *Id.* at 317. Furthermore, it held that the right to such care and training includes within it both the right to be free of unreasonable restraint and the right to safe conditions of confinement. *Id.* at 318-319.

<sup>123</sup> See *supra* note 114; Youngberg, 457 U.S. at 318-319.

<sup>124</sup> See sources cited *supra* notes 16, 24 (a number of government agencies have concluded that the JRC’s use of aversives to be unsafe and ineffective); sources cited *supra* note 25 (the risks of aversives include psychological trauma, physical injury and death, and less intrusive positive behavioral interventions are more effective in addressing difficult behavior). *But see* WILLIAMS & WILLIAMS, *supra* note 27, at 226-227 (aversives can constitute effective treatment for people with severe developmental disabilities).

<sup>125</sup> See, e.g., Response to MDRI Report, *supra* note 14, at 11 (“JRC has a 39-year history of freeing hundreds of children and adults from the deadly grip of sedatives, restraint, seclusion and institutional warehousing.”)

<sup>126</sup> See *supra* note 26 and accompanying text (the JRC relies heavily on testimonials from parents and former students about how well its methods have worked in order to counter claims that its treatment is ineffective or abusive). See also generally Response to MDRI Report (using letters written by parents and students to illustrate the effectiveness of aversives). It is common for behavioral modification facilities to rely on anecdotal, rather than empirical, evidence like this. See Szalavitz, *supra* note 10, at 12-13.

The JRC cites to scholarly pieces on the use of aversives on its website and in its literature, but many of these are case studies rather than empirical studies. See, e.g., sources cited in Response to MDRI Report, *supra* note 14. Furthermore, many of them are co-authored by Dr. Matthew Israel, the JRC’s executive director, and some of the studies involved were conducted at the JRC itself. *Id.*

<sup>127</sup> See *supra* note 21 and accompanying text.

<sup>128</sup> See Szalavitz, *supra* note 10, at 12-13 (research shows that “tough love” programs are ineffective and often make things worse); Gonnerman, *supra* note 16, at “Experts on Self-Injurious Kids Challenge Dr. Israel’s Methods” (experts on treating people with severe behavioral problems, including the developers of the JRC’s first contingent electric shock device, have moved away from the use of aversives since the 1990s); NAT’L DISABILITY RIGHTS



aversives actually harm children with disabilities and cause them to develop more problems.<sup>129</sup> While a restriction on an institutionalized person's liberties that was reasonable and rationally related to the effective treatment of a severe behavioral disorder would be constitutionally permitted if such treatment was considered a legitimate institutional need, a treatment that was ineffective and even harmful to the person could not be justified as such.<sup>130</sup>

Admittedly, these arguments do not address the argument that aversives may be used ensure the safety of students and program staff, either by preventing a student from carrying out a violent or self-destructive act or by discouraging him or her from doing so again in the future.<sup>131</sup> Existing case law, including the *Milonas* decision, makes it seem unlikely that a court would completely enjoin the JRC from using aversives for these purposes.<sup>132</sup> That being said, the JRC's use of restraint, social isolation and placement of students in restrictive settings for extended periods of time suggests that such techniques are not being used for the sole purposes of preventing students from causing imminent physical harm.<sup>133</sup> Investigations have revealed that these techniques are instead being used for punitive and even coercive purposes.<sup>134</sup> It is constitutionally impermissible for institutions to restrict the liberty of people confined in them for such purposes.<sup>135</sup> Thus, even if a court is unwilling or unable to completely prohibit the JRC from restraining and isolating its students, it could rely on precedent to enjoin the use of these practices for any purposes other than preventing imminent physical harm to oneself or others.<sup>136</sup>

A court should enjoin the use of three aversives – namely sensory deprivation, food deprivation and contingent electric shock – completely based on how disproportionately burdensome they are on JRC students' constitutional rights. Depriving a student of his or her hearing and sight by means of a helmet while he or she is being mechanically restrained is perhaps the most literal violation of students' rights to be free of unreasonable restraint. Sensory deprivation is comparable to seclusion, in that it cuts a student off from (being able to interact

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NETWORK, *supra* note 25, at 35-37 (positive behavioral interventions have proven to be much more effective than the use of aversives such as restraint and seclusion in addressing difficult student behaviors).

<sup>129</sup> See *supra* note 25 and accompanying text.

<sup>130</sup> See *Bell v. Wolfish*, 441 U.S. 520, 538-539 (1979) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)) (constitutionality of restrictions on the liberties of people in confinement depends on "whether an alternative [non-punitive] purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].")

<sup>131</sup> See Response to MDRI Report, *supra* note 14, at 55, 58, 61. See also *id.* at 87; N.Y. STATE EDUC. DEP'T, *supra* note 2, at 25 (the JRC justifies the use of social deprivation as preventing disruption and student plots against staff).

<sup>132</sup> See *Bell*, 441 U.S. at 540 (security is a legitimate institutional interest that justifies reasonable and rationally related restrictions on the liberties of people confined in institutional settings); *Youngberg v. Romeo*, 457 U.S. 307, 319-322 (1982) (the Constitution only protects people with disabilities confined to institutions against the unreasonable use of restraint, and the *Bell* framework of balancing individual liberty interests against legitimate institutional interests applies); *Milonas v. Williams*, 691 F.2d 931, 935 (1982) (restricting the use of restraint and seclusion to those instances where it became necessary to contain a physically violent and immediately dangerous juvenile, or, in the case of restraint, a juvenile who was physically resisting institutional rules).

<sup>133</sup> See *supra* note 19 (discussing the ways in which the JRC uses long-term restraint and isolation).

<sup>134</sup> See sources cited *supra* notes 16, 19.

<sup>135</sup> *Bell*, 441 U.S. at 538-539. See also *Milonas*, 619 F.2d at 941, 942-943 (district court enjoined, and Tenth Circuit upheld injunction of, the use of polygraph testing on Provo Canyon students, because it was "inherently coercive... [and] was certainly used in a coercive manner").

<sup>136</sup> See *id.* at 935, 942 (enjoining the use of restraint and seclusion for any purpose besides containing physically violent and immediately dangerous students or, in the case of restraint, students who were physically resisting school rules at the time).

with) his or her environment.<sup>137</sup> However, given that the JRC uses sensory deprivation only in conjunction with other types of restraint, it lacks even so much as the possible justification that isolation rooms have of containing violent students so as to prevent them from causing others harm.<sup>138</sup> Meanwhile, food deprivation constitutes a denial of a student's right to reasonably safe conditions of confinement.<sup>139</sup> This is particularly obvious in the case of students being given as little as 20% of the amount of calories that the school determines they need per day under the JRC's most restrictive food program.<sup>140</sup> However, even the less restrictive Contingent Food Program, under which misbehaving students' meals can be withheld until the end of the day, raises significant health and safety concerns.<sup>141</sup> Food deprivation, like sensory deprivation, is used to punish students who misbehave after the fact rather than to protect students and staff against imminent harm, and thus cannot be justified on the grounds of its safeguarding the immediate safety of students and staff.<sup>142</sup> Thus, it is possible that there is no legitimate institutional need against to weigh the restrictions that these practices impose on students' rights.<sup>143</sup> Even if treatment was considered to be an institutional need rather than a right of institutionalized persons, their use is clearly not reasonable in how it attempts to meet this need, in that they are excessive and, in the case of food deprivation, unsafe.<sup>144</sup>

Contingent electric shock should no longer be permitted as a form of behavioral modification under any circumstances. Admittedly, contingent electric shock is somewhat different from either sensory deprivation or food deprivation, in that it could conceivably be used to stop a student from causing immediate harm to him or herself or others.<sup>145</sup> That being said, its use is inherently excessive and unreasonable as a means of responding to dangerous behaviors by virtue of how powerful the Graduated Electronic Decelerator is and thus how much pain it can cause.<sup>146</sup> It is also used in ways that are both unreasonable and unrelated to the goal of institutional security, such as how shocks are sometimes inflicted minutes or hours after a student has exhibited a target behavior or how they can be used in conjunction with mechanical

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<sup>137</sup> Compare N.Y. STATE EDUC. DEP'T, *supra* note 2, at 8 (helmet used at the JRC restricts students' sight and hearing) with NAT'L DISABILITY RIGHTS NETWORK, *supra* note 25, at 6-7 (describing the use of seclusion as involving placing children alone in rooms, closets, cells and boxes in response to difficult behavior).

<sup>138</sup> N.Y. STATE EDUC. DEP'T, *supra* note 2, at 8 (helmets used in conjunction with restraint); Milonas, 691 F.2d at 935 (seclusion permissible to the extent that it is used to contain physically violent students whose actions pose an immediate threat to themselves or others).

<sup>139</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (institutionalized persons have right to adequate food, among other basic life necessities); *id.* at 315-316 (institutionalized persons have a general right to safe conditions of confinement).

<sup>140</sup> See N.Y. STATE EDUC. DEP'T, *supra* note 2, at 10, 16.

<sup>141</sup> See *id.* at 10, 16-17.

<sup>142</sup> See *id.* at 10.

<sup>143</sup> See *Bell v. Wolfish*, 441 U.S. 520, 538-539 (1979) (restricting institutionalized person's rights for reasons of punishment alone is inherently unconstitutional).

<sup>144</sup> See *id.* (the means of achieving a legitimate institutional goal must not be excessive when it restricts the rights of institutionalized persons); *Youngberg*, 457 U.S. at 315 (guaranteeing the right to adequate food); *Youngberg*, 457 U.S. at 319-320 (protecting against the unreasonable use of restraint in institutions); N.Y. STATE EDUC. DEP'T, *supra* note 2, at 16-17 (discussing health and safety risks posed by the JRC's use of food deprivation). See also *supra* note 138 and accompanying text.

<sup>145</sup> See Response to MDRI Report, *supra* note 14, at 3-4.

<sup>146</sup> See *Bell*, 441, U.S. 538-539 (use of excessively restrictive means of achieving legitimate institutional goals is unconstitutional); *supra* note 18 (describing how powerful and painful the GED and GED-4 devices are).

restraint.<sup>147</sup> Assuming that the JRC would even be able to establish that providing treatment constitutes an institutional need rather than a patient's right, the use of contingent electric shock is still disproportionately burdensome on students' rights because of the restrictions and risks it imposes.<sup>148</sup> The combination of these risks and the lack of conclusive, empirical evidence showing that contingent electric shock is an effective form of treatment undermines the argument that it is rationally related to the goal of treatment at all.<sup>149</sup>

Finally, a court faced with deciding whether to enjoin the use of aversives at the JRC under § 1983 should hold that a parent or guardian's consent to the use of aversives on a JRC student is not dispositive on the issue of whether his or her constitutional rights have been violated, and thus should not prevent the court from enjoining these practices.<sup>150</sup> Courts have recognized that institutionalized children have liberty interests of their own, separate from those of their parents, and that a parent cannot authorize restrictions on their child's liberties without good cause.<sup>151</sup> Even in light of the severity of the conditions the JRC claims to treat, the necessity of the kind of behavioral treatment it provides is questionable at best.<sup>152</sup> On the other hand, the burden it imposes on students' liberty is significant.<sup>153</sup> Thus, the use of aversives is just as much a violation of the rights of JRC students under this balancing test as it is under one that considers the JRC's institutional interests.<sup>154</sup>

#### *Part IV: Conclusion*

For decades, Massachusetts and other states have sent people with severe developmental and psychiatric disabilities to the Judge Rotenberg Center, a residential treatment facility which attempts to modify its students' dangerous and socially unacceptable behavior by such means as electric shock, food deprivation and long-term restraint and isolation.<sup>155</sup> State legislatures, agencies and courts have been repeatedly unwilling to protect students from harmful uses of what the JRC calls "aversive therapy," even when their own laws and the United States Constitution would require it.<sup>156</sup> The state of Massachusetts has in fact enshrined the use of aversives in its law and policy, and has provided the JRC with nearly all of the funding that allows the school to continue such practices.<sup>157</sup>

Because of this, and because of the dangerous and overly-restrictive ways in which the JRC uses aversives, courts should follow the precedent set by the Tenth Circuit Court of Appeals' decision in *Milonas v. Williams* to enjoin the use of aversives at the JRC to the extent

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<sup>147</sup> See Bell, 441, U.S. 538-539 (restrictions on institutionalized persons' liberties must be rationally related to a legitimate institutional goal and not punitive in nature); N.Y. STATE EDUC. DEP'T, *supra* note 2, at 9, 18-19 (students are sometimes electrically shocked in conjunction with restraints or hours after misbehaving).

<sup>148</sup> See N.Y. STATE EDUC. DEP'T, *supra* note 2, at 15-16, 25-26.

<sup>149</sup> See *id.*; *supra* notes 126-130 and accompanying text.

<sup>150</sup> See *Parham v. J.R.*, 442 U.S. 584, 601 (1977) (children as well as adults have rights in the context of inpatient mental health treatment under the Fourteenth Amendment); *Milonas v. Williams*, 691 F.2d 931, 943 (parental consent to behavioral modification practices at Provo Canyon did not change the fact that these practices violated students' rights).

<sup>151</sup> See *Parham*, 442 U.S. at 602-605; *Milonas*, 691 F.2d at 943.

<sup>152</sup> See *supra* notes 124-130 and accompanying text.

<sup>153</sup> See *supra* notes 18-20 and accompanying text.

<sup>154</sup> See *supra* pp. 30-36; *Milonas*, 691 F.2d at 943 (the behavioral modification practices at Provo Canyon were too unnecessarily burdensome on the constitutional rights of students to be justified by parental consent).

<sup>155</sup> See *supra* notes 14-19 and accompanying text.

<sup>156</sup> See *supra* notes 29-32 and accompanying text.

<sup>157</sup> See *supra* notes 31-32 and accompanying text.

possible under the federal civil rights statute, 42 U.S.C. § 1983. In particular, a court should use § 1983 to limit the use of restraint, isolated classroom settings and social deprivation to the extent and for the length of time necessary to safeguard staff and students against imminent physical danger posed by a student's behavior.<sup>158</sup> It should also prohibit contingent electric shock, food deprivation and sensory deprivation entirely as being unjustifiably burdensome on the rights of students under the Fourteenth Amendment of the Constitution to be free of unreasonable restraint and to have minimally safe conditions of confinement.<sup>159</sup>

The existing case law concerning the use of § 1983 in the context of behavioral modification and other residential treatment facilities makes it rather difficult for plaintiffs to establish either state action or the violation of constitutionally protected rights.<sup>160</sup> However, the extent to which the state of Massachusetts has involved itself with the JRC and the nature of the JRC's practices more than rise to the level where injunctions under § 1983 would be warranted.<sup>161</sup> Enjoining the JRC's use of aversives under § 1983 would in fact be in line with the law's original purpose of remedying violations of a vulnerable and marginalized group's rights on a federal level where the state has failed to do so.<sup>162</sup> Injunctions against the JRC's current use of aversives would serve to safeguard and give meaning to the civil and in fact human rights of children and people with developmental and psychiatric disabilities in residential treatment facilities, both in this case and perhaps in future ones as well.<sup>163</sup>

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<sup>158</sup> See *supra* notes 132-136 and accompanying text.

<sup>159</sup> See *supra* notes 137-149 and accompanying text.

<sup>160</sup> See *supra* note 48; notes 55-61 and accompanying text.

<sup>161</sup> See discussion *supra* Part III.A.

<sup>162</sup> See notes 70-72 and accompanying text.

<sup>163</sup> See *supra* pp. 26-28. JRC students and disability rights advocates should also consider pursuing remedies under state civil rights statutes, which may have different and possibly more lenient requirements. See, e.g., *supra* note 69 (discussing the Massachusetts civil rights statute).