

Nos. 07-2522 and 07-2523

United States Court of Appeals for the First Circuit

No. 07-2522

ROBERT SIMPSON RICCI, et al.,
Plaintiffs – Appellees

v.

DEVAL L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,
Defendants – Appellants

No. 07-2523

MASSACHUSETTS ASSOCIATION FOR RETARDED
CITIZENS, INC., a/k/a Arc/Massachusetts, Inc., et al.,
Plaintiffs – Appellants

v.

DEVAL L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,
Defendants – Appellants

ON APPEAL FROM ORDERS OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS IN
Nos. 72-0469-T, 74-2768-T, 75-3910-T, 75-5023-T & 75-5210-T

**REPLY BRIEF OF THE DEFENDANTS – APPELLANTS
THE HON. DEVAL L. PATRICK, ET AL.**

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July 3, 2008

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INTRODUCTORY STATEMENT

Both briefs filed by the Fernald and Wrentham appellees fail to rebut the central argument that the Commonwealth appellants have advanced in this appeal. That is, the evidence in this case does not evince a violation by any state defendant of the consent decree entered into by the parties in May of 1993 (the “Decree”). In the absence of a proven Decree violation, the District Court lacked jurisdiction and authority to enter the order it issued on August 14, 2007 (the “August Order”).

The 1993 Decree requires the Department of Mental Retardation (“DMR”) to follow its own well-established process for developing individualized service plans (“ISPs”) set forth in state regulations and then to satisfy *Ricci* class members’ need for various types of services.¹ The court-appointed Monitor found that DMR is providing the *Ricci* class members at the Fernald Developmental Center (“FDC”) with the services that are identified in the class members’ service plans. Add. 40. As long as that is the case, a federal court cannot direct how DMR is to interact with third parties (the residents’ guardians). The District Court cannot lawfully order DMR to offer the FDC as an available residential option; it cannot

¹ See paragraph 2 of the Decree, reproduced at pages 6-9 of the Addendum (“Add.”) of the defendants-appellants’ principal brief. The Commonwealth appellants will refer to this brief herein by the abbreviation “Com.Br.”; and to the Fernald and Wrentham appellees’ separate briefs by the abbreviations “Fer.Br.” and “Wr.Br.,” respectively. Citations to the Appellants’ Joint Appendix will be by the abbreviation “JA” followed by the volume and page number(s).

induce DMR to devote scarce resources to this particular outmoded facility; and it cannot dictate what DMR says in placement discussions with the guardians of FDC residents. Nor is the August Order, as the appellees claim, merely an attempt to encourage improved “listening” by DMR to Fernald guardians. A federal court order directing DMR to include the FDC as an option in placement discussions cannot reasonably be understood – and has not been understood by the great majority of FDC guardians – as anything but a directive to continue to offer services at the FDC until the last resident voluntarily elects placement elsewhere. Because the District Court has exceeded its jurisdiction and authority, the August Order must be vacated.

I. THE AUGUST ORDER DEPARTED MATERIALLY FROM THE DECREE’S TERMS.

Contrary to appellees’ argument, the August Order did more than elaborate upon the terms expressly contained in the Decree. It added a requirement that has no roots in the Decree itself. The August Order requires DMR to offer Fernald residents the FDC as an option in any placement communication initiated by DMR, despite the fact that the Decree contains no provision governing placement discussions. Nowhere in the Decree does it state that in all placement discussions DMR shall offer *Ricci* guardians opportunities to insist that their wards remain in their current placements. The District Court’s own words disprove the Fernald appellees’ claim (Fer.Br. 48) that “[t]he August 2007 order does not . . . alter [or]

modify . . . the 1993 order.” In its August 2007 memorandum, the District Court wrote that “[a]ll terms of the court’s [1993] Final Order, *in addition to* the order referred to above, remain in effect.” Add. 62 (emphasis added).

To the limited extent that the Decree touches upon placement of *Ricci* class members, it does so only to require, prior to the “transfer of any class member out of a state school [or intermediate care facility for the mentally retarded (“ICF/MR”)] into the community, or from one community residence to another[,]” Add. 9, that “the Superintendent of the transferring school . . . certif[y] that the individual to be transferred will receive equal or better services to meet their needs in the new location[.]” Add. 9-10. The Decree says nothing about soliciting the views of guardians or individuals regarding a proposed transfer or requiring DMR to include a particular facility as a residential option. Nor can the District Court bootstrap such a requirement through DMR’s ISP regulations, which require only individualized service planning, not the solicitation of preferences for a particular institution. That is not to say that DMR has not always recognized the need for individual and family input into transfer decisions, or that DMR has not regularly solicited such input, because the record establishes beyond doubt that it has,² but

² Appellees acknowledge that “DMR had been soliciting family preference information through placement profiles and in ISP meetings for some time.” Wr.Br. at 14. *See also* JA2:339-342; JA7:1952-1957.

the Decree contains no such requirement. The Monitor expressly found that DMR uniformly satisfied the Decree’s sole requirement relevant to transfers – that of certifying the existence of equal or better services in the new placement – in each and every transfer from the FDC over a three year period. Add. 40, 42. *See also* JA6:1583-84. The Monitor’s conclusion that there was no violation of the Decree, Add. 39-49, means that the prerequisites for reopening the case under paragraph 7(a) of the Decree were not satisfied, and thus the District Court lacks jurisdiction. Speculation concerning what might transpire if remaining residents eventually were moved from the FDC forms no basis for rewriting the Decree.

II. THE DISTRICT COURT’S CONCLUSION THAT DMR VIOLATED THE DECREE THROUGH ITS CLOSURE POLICY ANNOUNCEMENT IS CLEARLY ERRONEOUS AS A MATTER OF BOTH FACT AND LAW.

A. The Court’s Conclusion Has No Support in the Decree.

Neither set of appellees identifies what particular provision of the Decree the Commonwealth allegedly violated in announcing its closure policy judgment. Nor did the District Court in its August 2007 memorandum. The court merely stated, without further specification, that “administration of the ISP process [in the wake of the closure policy announcement] amount[ed] to a ‘systemic failure’ to provide

a compliant ISP process, within the meaning of the [Decree].” Add. 61.³ Moreover, the court identified no evidence – and none exists – to establish that DMR’s administration of the ISP process in fact had been deficient, let alone that it violated a term of the Decree. Indeed, the Monitor, after examining voluminous case files and ISP documentation for over 50 Fernald residents, and interviewing scores of witnesses, found that the ISP process undertaken with respect to every transfer from the FDC comported fully with the Decree. Add. 39-49.⁴

B. The Facts Fail to Establish a Decree Violation.

The Fernald appellees charge DMR with “a clear failure to follow the terms of the 1993 consent decree, as well as a violation of the constitutional rights of the residents and their guardians to participate in the ISP process in a meaningful way,” Fer.Br. 33, without pointing to any record evidence to support this claim. The Wrentham appellees make equally unsubstantiated charges of “intimidation”

³ As pointed out in the Commonwealth’s principal brief (at 31 n.31), the District Court misquoted the Decree in the above-quoted sentence; the Decree actually states that the appellees may seek enforcement of the Decree “[i]f the defendants *substantially* fail to provide a state ISP process in compliance with this Order[.]” Add. 11 (¶ 7(a), emphasis added).

⁴ Not only did the Monitor find that DMR’s transfer processes at the FDC comported fully with regulations requiring individualized service planning, the agency in fact took three full years following announcement of the closure policy decision to effectuate the transfers of what amounted to fewer than 25% of the individuals residing at Fernald in 2003. This hardly constitutes evidence of “global” action on DMR’s part.

and “coercion” of guardians by DMR staff. As support, they point only to the Fernald appellees’ initial 2004 motion to reopen the case, which the District Court denied, and the self-serving affidavit of a non-percipient witness that accompanied that motion. Wr.Br. 15-17. Because the court denied the Fernald motion, and held no evidentiary hearings in this matter, DMR never was afforded the opportunity to challenge these allegations or cross-examine the affiant. Accordingly, there is no admissible evidence to support the court’s conclusion that DMR violated the Decree.

Not only have the appellees failed to produce any admissible evidence that DMR excluded any FDC residents or guardians from the ISP process, there is no evidence that DMR prevented any guardian from expressing an opinion regarding placement issues. The Monitor found, after many interviews and careful research, that all of the guardians of the 49 individuals who transferred from the FDC between 2003 and 2006 had expressly consented to the transfers. Add. 48. The Monitor also specifically examined DMR’s compliance with both its ISP regulations (115 C.M.R. § 6.20) and its transfer regulations (115 C.M.R. § 6.63) – both of which allow guardians to object to placement plans – and found DMR in compliance. Add. 39-49. His findings, which the district court accepted (Add. 59), disprove the court’s suggestion that DMR effectively failed to “adequately assess” whether the proposed transfer was or was not opposed by the resident or

guardian. Add. 62 n.16. The Monitor’s Report, the accuracy of which both the District Court and the appellees accepted, provides no support for the appellees’ allegations of exclusion or coercion. The only relevant statement in the Monitor’s Report notes, in the context of describing very positive reactions to the first 49 moves, that “[m]any of the guardians stated that they decided to transfer their ward from Fernald based upon the announcement that Fernald will be closing.” Add. 48. Even taken out of context, this statement does not support any finding of coercion, intimidation, threats, or inappropriate behavior on the part of DMR staff.

C. The Court’s Decision Rests on a Misunderstanding Both of the ISP Process and DMR’s Intentions.

The District Court’s declaration that “the Commonwealth’s stated global policy judgment that Fernald should be closed has damaged the Commonwealth’s ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis,” Add. 60 (footnote omitted), is a logical non sequitur. It is entirely possible to develop an individualized ISP independently of any closure judgment because the ISP process does not focus on *where* services will be delivered. *See generally* 115 C.M.R. §§ 6.20-6.25 at JA10:2726-2735. Indeed, the District Court itself has recognized that a service planning process may be individualized (or “person-centered,” as required by DMR’s regulations) without addressing the location of service delivery. In describing the ISP process shortly before the Decree entered, the court wrote that “[r]ecommendation[s] as to

residential and program placement are based on evaluation of the actual needs of the resident or client rather than on what facilities and programs are currently available.” *Ricci v. Okin*, 781 F. Supp. 826, 827 n.4 (D. Mass. 1992).

Despite DMR’s closure policy decision, the Monitor found that DMR never made a transfer decision without first considering the service needs of the individual Fernald transferees. Add. 40. DMR had completed ISPs for all Fernald residents prior to the closure policy judgment, and then, for each transferee, completed an ISP modification prior to any transfer. JA2:345, 455; JA7:1953-1959. An ISP team reviewed and amended annually all ISPs of the transferred residents. *Id.* After scrutinizing five years’ worth of ISP documents for each transferee, the Monitor concluded that all transfers from Fernald had been preceded by a complete ISP-development process and a certification that the new setting would be ‘equal to or better than’ the Fernald placement. Add. 40. The District Court expressly accepted the Monitor’s conclusions. Add. 59.

By adhering to the ISP regulations, as the Monitor concluded DMR did, DMR ensured that no placement decision involving an FDC resident was -- or could be -- made on a “global” basis. Former Governor Romney made a policy decision in 2003 that the FDC should eventually be closed and removed from the menu of placement options for *Ricci* class members. Beyond that high-level policy decision, all placements have been and will be made solely based on the needs of

the affected individuals. Never has DMR acted to deprive any individual of the chance to remain in an ICF/MR. In fact, 35 of the first 49 individuals transferred from the FDC following the closure policy decision went to other ICF/MRs. Add. 27.⁵ There is no evidence in this record to contradict DMR's position that each current FDC resident can be cared for appropriately elsewhere (quite possibly in another ICF/MR).

D. The Court Failed to Construe the Decree Properly.

The District Court's implicit conclusion that DMR failed to maintain a Decree-compliant ISP process by withholding the FDC as a future placement option is erroneous both as a matter of law and fact. Because the Decree is "contractual in nature," *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 378 (1992), it must be construed strictly in accordance with its literal terms. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), and cases cited in Com.Br. at 25; *E.E.O.C. v. Local 40, Int'l Ass'n of Bridge Workers*, 76 F.3d 76, 80 (2nd Cir. 1996) (the language of the decree defines the obligations of the parties);

⁵ Indeed, these 49 individuals transferred to 18 different new residential settings, which further undercuts the District Court's conclusion that the "policy judgment that Fernald should be closed ha[d] damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." Add. 60.

Pigford v. Veneman, 292 F.3d 918, 924-25 (D.C. Cir. 2002).⁶ Nothing in the Decree, the regulations it references, or federal law requires DMR to offer services at a particular location.⁷ See Com.Br. at 40 n.47. DMR’s only relevant legal obligation under the Decree is to meet its individual clients’ service needs, as set forth in their official ISP documents; it is not to satisfy their guardians in all respects. The appellees’ belief that the District Court possessed “inherent authority” to enforce its judgment in this matter (and “broad discretion in fashioning decrees”), Wr.Br. at 2, is wrong as matter of law. *Pigford*, 292 F.3d at 924 (“district courts enjoy no free-ranging ‘ancillary’ jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order”).

E. There Was No Basis for the Court’s Exercise of Jurisdiction.

The Fernald appellees misstate the District Court’s decision by claiming repeatedly that the court found “a systemic failure to provide services” to FDC

⁶ Noting that recognizing a loose judicial authority to enforce a consent decree’s “overarching purposes,” rather than its literal terms, would deny a government defendant the benefit of its bargain and discourage settlements, the U.S. Court of Appeals for the District of Columbia Circuit asked: “Who would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree’s negotiated terms?” *Pigford*, 292 F.3d at 925.

⁷ Not only do the ISP regulations not require that the individually-determined needs of class members be serviced in a particular setting, or be addressed in accordance with the guardian’s “wishes” with regard to location, the regulations explicitly provide that developments will from time to time require changes in either provider or location. 115 C.M.R. § 6.63(1) at JA10:2738.

residents, as required by the Decree. *See* Fer.Br. at 17, 20, and 24. The District Court made no such finding. Nor is there any record evidence of any such failure. Rather, the Monitor found that DMR was providing all necessary services, Add. 40, and the court accepted the Monitor’s findings and conclusions.⁸ Add. 59.

Given the absence of any record evidence to support a finding of a Decree violation, paragraph 7 of the Decree, which authorizes reawakening of the District Court’s jurisdiction in limited circumstances, does not apply. Again, the court’s exercise of jurisdiction is only appropriate upon proof that DMR either (a) “substantially” abandoned the ISP process contemplated by the Decree, or (b) failed systemically to provide ISP-required services. Add. 11 (¶ 7(a)). Such proof does not exist in this record. The mere potential for noncompliance with Decree terms in connection with future transfers does not furnish a basis for the exercise of anticipatory ancillary jurisdiction. *Cotter v. City of Boston*, 323 F.3d 160, 173-174 (1st Cir. 2003). In the absence of jurisdiction, the District Court lacked the authority to rewrite the terms of the Decree, as it did in its August Order.

⁸ Nor will the Commonwealth linger over the Fernald appellees’ argument that the closure policy judgment, by eliminating FDC as a placement option, “failed to provide an opportunity to consider whether any proposed alternative placement would meet the equal or better standard and would provide all ISP mandated services.” Fer.Br. 30. The Monitor expressly found that all transfer certifications had properly issued and that appropriate services were in place in the transferees’ new homes. Add. 40. In any event, there is no link between the facility director’s determination regarding the availability of individually-tailored services in other settings and the high-level, gubernatorial policy judgment to phase out the FDC.

III. NO CHANGE OF CIRCUMSTANCE JUSTIFIED A MODIFICATION OF THE DECREE.

The Wrentham Association argues that a change of circumstances warranted the District Court's modification of the Decree. Wr.Br. 32. But their argument fails because the principal putative "changed circumstance" – that "DMR implemented the policy decision to close *all* ICFs/MR" (Wr.Br. 4, emphasis added) – plainly has not occurred. The District Court's memorandum identified only two relevant developments since entry of the Decree: (1) the announcement of plans to close the FDC (Add. 60 n.8), and (2) the transfer of (what amounted to a relatively small percentage of) *Ricci* class members out of the FDC (Add. 57). The decision prospectively to close one ICF/MR (the FDC) does not qualify as a changed circumstance, because DMR was in the process of closing other ICF/MRs (Belchertown and Dever) at the time the parties negotiated the consent decree. *See* Com.Br. 36-37. The District Court did not accept as a material change of circumstance any of the other "developments" specified in Wrentham's brief at page 32. *See* JA9:2565 (District Court's Order of June 7, 2006, denying Wrentham's motion to reopen case, which raised the issue of post-transfer deaths and generalized allegations of abuse in community homes); Add. 65 (District Court Order dated August 15, 2007, stating that "the facts do not, at this time, support a finding that the DMR has systematically failed to manage and oversee the

community residences”).⁹ Furthermore, modification of a consent decree must take place pursuant to Federal Rule of Civil Procedure 60(b), which by its express terms requires a motion. The docket in this case shows that no party filed such a motion. *See* Joint Appendix, volume 9.¹⁰

IV. THE FERNALD APPELLEES’ CONSTITUTIONAL ARGUMENT CANNOT JUSTIFY ISSUANCE OF THE AUGUST ORDER.

While conceding that the District Court never reached the issue, the Fernald appellees nonetheless argue that unspecified alleged “deficiencies in the ISP process” DMR followed at the FDC “violated constitutional principles.” Fer.Br. 24. This Court need not consider this argument in the first instance because the Fernald appellees never asserted this claim in the District Court and, thus, they have waived this argument. *See, e.g., United States v. Bongiorno*, 106 F.3d 1027,

⁹ The Monitor’s opinion regarding the potential harm that might flow from future transfers of current FDC residents does not constitute a “significant change in circumstances” that meets the Supreme Court’s *Rufo* test for modification of consent decrees. *See Rufo*, 502 U.S. at 383. The changed circumstances contemplated by *Rufo* include “unforeseen obstacles” that make a decree “unworkable.” *Id.* at 384.

¹⁰ The Fernald appellees filed only a motion to reopen the case (JA9:2555) and a one-sentence motion to continue the court's February 2006 order enjoining all transfers from the FDC (JA6:1648). The Fernald appellees’ statement that the District Court “allowed” their motion asking the court to exercise ancillary jurisdiction (Fer.Br. 20) is incorrect. In fact, as with the Wrentham class, the court denied their motion to reopen the case. *See* JA9:2558 (District Court order dated January 20, 2005). DMR waited until the court reopened the case *sua sponte* and issued a clear and final order before appealing. JA9:2474-2475.

1034 (1st Cir.1997) (constitutional arguments not raised in the lower court cannot be advanced on appeal). Second, the Monitor’s “responsibility [was] to advise the court as to whether [DMR’s] past and prospective transfer processes . . . comply with federal law,” Add. 25, and a transfer cannot occur without a proper ISP in place (a matter the Monitor verified). Add. 40. Accordingly, any evidence of a constitutional violation would have been reflected in the Monitor’s Report (prepared, as the District Court stated, “[a]fter more than a year of exhaustive and meticulous study,” Add. 59). Instead, the Monitor found no violation of federal law. Third, the Fernald appellees do not cite any record evidence in support of their argument. To the contrary, the Monitor documented the consent of the guardians of *all* transferees from the FDC. Add. 45. It is unclear, therefore, what constitutional right the Fernald appellees now seek to invoke.¹¹ The Fernald appellees appear to be arguing that DMR’s failure to include the FDC as an option in placement discussions with guardians violated the residents’ constitutional right to due process. This could only be so if the FDC residents had a constitutionally-protected right to reside specifically at the FDC. No appellate court in the country

¹¹ The right to due process, of the nature discussed in *Hanke v. Walters*, 740 F.2d 654 (8th Cir. 1984) (*i.e.*, notice to guardians, an opportunity for them to present information relevant to a proposed transfer, and the right to appeal a transfer decision), is presently guaranteed by M.G.L. c. 123B, § 3, and 115 C.M.R. § 6.63, and the Monitor found DMR in full compliance with those provisions. Add. 43-45.

has suggested such a proposition and all authority is directly to the contrary. *See* Com.Br. at 40-41 (citing *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980), and other cases).

V. THE AUGUST ORDER WAS INAPPROPRIATE, INCONSISTENT WITH THE LAW OF THE CASE, AND HARMFUL.

A. The District Court's Mandatory Injunction Was Both Unnecessary and Inappropriate.

Neither set of appellees has disputed the effect of the parties' December 2004 stipulation, which severed the ISP and transfer/closure processes, and thus prevented the closure policy decision from being the sole determinant of placement decisions at the FDC. *See* Com.Br. at 34-35; JA4:923. The appellees do not point to any documented instance, following execution of the stipulation, in which DMR staff raised the planned closure of the FDC and/or the need for a new placement at any ISP team meeting. Nor does the record reflect any occasion in which DMR discouraged a Fernald guardian or family member – even one who might have vociferously disagreed with the closure policy decision – from participating fully in an ISP team meeting. There is thus no basis for concluding, as the District Court did, that the closure announcement “damaged” DMR’s ability to “assess the needs” of FDC residents, or “eviscerate[d]” the “individualized oversight” that transpires at ISP team meetings. Add. 60. Particularly after the Commonwealth addressed concerns in the wake of the closure announcement by signing a

comprehensive stipulation protecting the integrity of the ISP development process, which was approved and entered as an order by the District Court, the burden fell on the appellees or the court to justify reopening this long-closed case. Given the absence of record evidence that DMR did not honor its obligations under the stipulation and Decree, the court's decision fails the key jurisdictional test.

Independent of the protections offered by the stipulation and Decree, FDC residents enjoy adequate protections under state law from precipitous or ill-advised transfers. As discussed more fully in the Commonwealth's principal brief, the state transfer statute gives all individuals DMR serves the rights of participatory input, appeal, and a decision in the best interest of the affected client. M.G.L. c. 123B, § 3.¹² *See* Com.Br. 51-52. If DMR fails to comply with the terms of this statute or its implementing regulations, 115 C.M.R. § 6.63, aggrieved individuals have recourse in the Commonwealth's tribunals (not federal court). *See* Decree, Add. 11, ¶ 7(b) ("Nothing in this Order shall make state law (including but not limited to the ISP regulations) enforceable in federal court"). By attempting to

¹² Under this state law, before DMR implements any transfer, it must provide the individual or guardian with 45-days' prior notice and an opportunity to visit the new setting. M.G.L. c. 123B, § 3, ¶ 2. It also must explain how the transfer "will result in improved services and quality of life" for the affected resident. *Id.* Individuals or guardians can object to and appeal the transfer plan, or may seek relief directly from the state's independent Division of Administrative Law Appeals. *Id.* No change may be implemented pending resolution of the appeal. *Id.* Finally, the proposed move must be in the "best interest" of the individual. *Id.* at ¶ 3.

fashion a remedy for conduct (*e.g.*, failure to honor the right of participatory input into transfer decisions) that, if proven, would constitute a violation of state law, the August Order runs afoul of the Eleventh Amendment. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (“it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law”).

The August Order is also legally infirm because it implicitly assumes that FDC residents have a federally-protected right to remain in the facility of their choosing. *See* Add. 56 (requiring DMR to list the FDC “among the [available] options” in every communication concerning residential placement choices). As discussed above, there is no such federally-protected right and, indeed, the law is clearly to the contrary. In sum, federal law places no obligation on DMR to cater to the “wishes” or “preferences” of FDC guardians. *But see* August Memorandum, Add. 61; August Order, Add. 56.

B. The August Order Is Adverse to the Public Interest and the Interests of Fernald Residents in the Way It Contravenes Both Positive Law and the Law of the Case.

The Fernald appellees claim that because the August Order does not prohibit outright the closure of the FDC, or mandate that the facility remain open indefinitely, it does not contravene existing law or supersede the Decree. *Fer.Br.* 18, 48-49. However, the mandate inherent in the August Order that all remaining

Fernald residents be offered the option of staying at the FDC is a non-individualized command at odds with the Decree, as well as state and federal law, and is not based on any professional clinical judgment. The Decree, state ISP regulations, and federal law all require DMR to pursue the least restrictive placements feasible for *Ricci* class members. Add. 7 n.2; *see* Com.Br. 49-50 & nn. 58, 60. Listing the FDC for Fernald guardians when a less restrictive, and immediately available, setting might be the most appropriate placement for a current FDC resident could, in an individual case, undermine the intent, if not the letter, of both state and federal law. The District Court's order could also undermine the ability of DMR's experts in the treatment of developmental disabilities to communicate an honest judgment regarding placement to Fernald guardians. *See* Add. 60-61.

The Fernald guardians themselves have illustrated how the August Order is interfering with DMR's ability to communicate its clinically-based, professional placement recommendations in a straightforward fashion. More than 150 Fernald guardians, who represent the majority of remaining residents, signed and filed in the District Court form letters "exercising [their] option[,] as provided by the order of . . . August 14, 2007, to rank Fernald Developmental Center as [their] first *and only* preference for the residential placement of [their] ward[s]." Docket nos. 260-

262 (emphasis supplied).¹³ Each of these letters states: “Neither my ward nor I wish to receive any further communication from the Commonwealth of Massachusetts Department of Mental Retardation regarding further residential placement.” *Id.* Given this, further voluntary transfers from Fernald will not occur because guardians will continue to insist that the Order effectively retains the FDC as a placement option and that there is therefore no reason to consider alternative placements.

Throughout the many court proceedings that preceded the August Order, the District Court consistently insisted upon a strict segregation of the ISP and transfer processes at the FDC. *See* JA4:1177 (transcript of the court’s statement on June 15, 2005: “If the ISP isn’t done, no talk about transfers. I have made that very, very clear. And that is the way I want it done.”) Indeed, the court repeatedly ordered DMR not to engage in placement discussions with a guardian until his or her ward’s current-year ISP had been set “in cement.” *See* JA4:1172 (“The ISP has to be in cement and then you can [issue] invitations to consider a transfer”); JA3:892 (no placement discussion “until the ISP for an individual is concluded for that year”); JA4:1173 (“I have said it many times: Until the ISP is in cement,

¹³ Pursuant to a stipulation entered into by the principal parties in this appeal, the state appellants have reproduced in the addendum to this brief a letter that is representative of the 156 essentially identical form letters filed by the Fernald guardians in the District Court.

[DMR is not to take] any official movement toward trying to [interest] someone . . . in a transfer.”); *see also* JA4:1091; JA4:995 (converting the stipulation at JA4:923-925 -- eliminate all placement discussions from the ISP process -- into a court order).¹⁴ But guardians are part of the ISP team, and a guardian who opposes closure of the FDC may be able to preclude any discussion of transfer by refusing to approve a final ISP. Thus, by prohibiting DMR from announcing a closure of the FDC, as both the August Order and prior court directives effectively have done,¹⁵ the District Court has removed any incentive for guardians to discuss with DMR the best placement for their wards.

Making an ICF/MR closure decision conditional upon completion of new ISPs reflecting new placements – which cannot occur in concert with guardians until a closure announcement is made and guardians engage in the transfer planning process – creates a classic Catch-22 situation for the Commonwealth.

¹⁴ Contrary to these prior directives, however, the court’s August memorandum faults DMR for not discussing with Fernald guardians *during* ISP meetings plans for phasing out the FDC and potential transfers. Add. 60-62. In the August memorandum, the court wrote that its Order was intended to “ensur[e] that the DMR *use* the ISP process” to “assess” whether a proposed new placement is opposed by the guardian. Add. 62 n.16 (emphasis added). The Fernald appellees now also argue for detailed discussions of alternative placements within the ISP process, Fer.Br. 39, a position directly contrary to the stipulation they entered into with DMR in 2004. *See* JA4:923-925.

¹⁵ In March 2007, the District Court ordered DMR to cease disseminating a letter stating that the FDC was going to close. JA6:1767-1768.

While DMR has always sought to minimize the number of involuntary transfers out of Fernald by engaging guardians in the placement planning process, the August Order may have the perverse effect of thwarting the guardians' best chance to have significant input into the placement process by signaling to the guardians that they can insist that their wards remain at the FDC (and refuse to discuss other possibilities) when, at some point, that will no longer be the case. The inevitable losers, of course, will be the residents themselves if either a setting less restrictive than the FDC would have been in their best interests or they are transferred involuntarily without family input and cooperation that could have eased the transition.

Moreover, because the August Order prohibits DMR from declaring in placement discussions that the FDC is closing, DMR cannot easily satisfy the usual predicate under the federal law and state transfer regulations for effectuating an involuntary transfer. Federal regulations require that if a client is to be either transferred or discharged from an ICF/MR, the facility must "[h]ave documentation in the client's record that the client was transferred or discharged for good cause." 42 C.F.R. § 483.440(b)(4)(i). The announced closing of the FDC, which the August Order and previous oral orders of the court implicitly prohibit, would be the "good cause" necessary to meet this standard. Both state and federal regulations typically permit discharge and transfer without residents' consent when

the facility ceases to operate or under circumstances such as contract or lease termination or conditions that make continued residence infeasible. *See* 115 C.M.R. §§ 6.25(2)(e), 6.63(1) (b), and 6.63(5) (state ISP modification and transfer regulations); 42 C.F.R. § 483.12(a)(2)(vi) (federal regulations governing private Medicaid-funded facilities).

At a minimum, the August Order has constrained the Commonwealth considerably. It is likely that DMR's forced listing of the FDC as an option for Fernald residents in all placement discussions will be used against DMR in FDC guardians' (state forum) appeals from transfer decisions. *See* M.G.L. c. 123B, § 3. Time-consuming litigation over transfer decisions for the remaining FDC residents, which ordinarily would have been short-circuited by a definitive closure announcement, now appears unavoidable. Moreover, even if the August Order does not directly curtail DMR's ability to transfer residents and close the FDC, the Order has no support in the language of the Decree¹⁶ and thus cannot stand. In sum, it is both the real-world, negative effects of the Order, as well as the court's

¹⁶ In fact, the August Order contravenes the Decree's provision reserving facility planning decisions to DMR exclusively. *See* Add. 10 (Decree, ¶ 5) (“[N]othing in this Order is intended to detract from or limit the discretion of the [Commonwealth] in developing and improving programs, managing and determining the personnel and budget of the [DMR,] implementing innovative services, . . . or allocating its resources to ensure equitable treatment of its citizens”).

violation of the principle that federal judges should not exceed the bounds of their jurisdiction, that the Commonwealth finds objectionable.

C. The Appellees Understate the Effects of the August Order.

If the District Court had “simply ordered that the process for making such [placement] decisions comply with the terms of the 1993 consent decree,” and nothing more, as the Fernald appellees claim, Fer.Br. 17, DMR would be telling Fernald guardians today that the FDC is no longer an option for their wards. Clearly, however, the August Order precludes – and was intended to preclude – such a course of action.

The August Order is not “extremely limited,” as the appellees claim (Fer.Br. 43, Wr.Br. 1).¹⁷ Rather, the Order is intrusive in that it, *inter alia*, compels speech by DMR that runs directly contrary to Commonwealth policy, as expressed in acts of the Massachusetts Legislature. *See* Com.Br. 47-48; *see also* Com.Br. 45-54. Except to order state officials to comply with federal law, a federal judge cannot compel a state entity to speak through its employees contrary to the state’s own

¹⁷ The Fernald guardians characterize the Order as requiring only that “Fernald be part of the ISP discussion,” Fer.Br. 48, although they have stated that Fernald should be the only placement option for their wards – or, that there be no talk of placement elsewhere at all. *See* 156 guardian letters filed as docket nos. 260-262. If “[t]he intent, and only real effect, of the [August] Order is to promote a full discussion,” as Wrentham claims (Wr.Br. 13), then the Order plainly has failed. *See id.*

well-considered policy beliefs. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (except in matters governed by the federal Constitution or by acts of Congress, federal court supervision over the legislative action of a State “is in no case permissible”). *Cf. New York v. United States*, 505 U.S. 144, 178-79 (1992) (a federal command to a State to set policy pursuant to federal direction violates the Constitution). The Fernald appellees’ statement (Fer.Br. 47) that “Judge Tauro did not interfere in any manner with the Commonwealth’s . . . decision as to whether to close Fernald” is simply untrue.

The appellees contend that, because many remaining FDC residents suffer from profound mental retardation and have lived at Fernald for decades, the FDC must remain the presumptive placement for all of them. *See* Fer.Br. 48. The Fernald appellees acknowledge (Fer.Br. 31) that the District Court shared the Monitor’s sentiment “that Fernald should remain open during the lifetimes of the Ricci class members.” *See also* JA7:1752-1755 and Com.Br. 46 n.55. The district court thus imposed its personal policy preferences on the Commonwealth when it issued a mandatory injunction, even if the court did not directly command that the FDC be kept open.¹⁸ Even initiating alternative placement discussions with

¹⁸ To be clear, the state appellants have never “characterize[d]” the August Order “as a mandatory injunction prohibiting the closure of Fernald,” Fer.Br. 46, or as “giv[ing] families absolute veto power over any proposed transfer,” Fer.Br. 31, as the Fernald appellees claim. While the August Order did not explicitly foreclose
(footnote continued . . .)

guardians under the presumption that the FDC is the default placement – particularly where the August Order expressly requires the FDC to be offered in every placement discussion initiated by DMR – materially undermines the Commonwealth’s ability to implement its Fernald closure policy decision. To the extent the August Order gives this presumption the force of law (and given the precedent being set here), the District Court has interfered dramatically with DMR’s ability to manage its own system, and without any legal basis to do so.¹⁹

VI. THE APPELLEES’ OTHER ARGUMENTS ARE MERITLESS.

The appellees raise a number of other claims that also lack merit. First, the appellees’ “transfer trauma” argument is not only, as the Fernald appellees concede, a “red herring” (Fer.Br. 43), it also lacks any evidentiary support. More specifically, the District Court’s conclusion that for some FDC residents a residential transfer “could have devastating effects,” Add. 60, is unsupported by any record evidence. Nor do the Fernald appellees point to any evidence to bolster

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the possibility of a future closure of FDC, nonetheless it was an unnecessary and unlawful mandatory injunction for the reasons argued above. Regardless of the level of intrusion the Order represents, if neither the Decree nor federal law supports its issuance, the District Court’s consequent lack of jurisdiction over the Commonwealth requires vacating the Order.

¹⁹ Quite simply, no authority supports the District Court’s “declar[ation] that starting an ISP discussion with the assumption that Fernald is not an available [placement] for its residents is not acceptable.” Add. 62.

the court's speculation. *See* F.Br. 39-43 (citing only articles discussing nursing home patients or outdated articles examining the experiences of developmentally disabled individuals in other systems that did not adhere to the transfer placement protocols followed by DMR).²⁰ The only expert testimony and studies in the record conclude that the "best practices" transfer protocol that DMR employs poses no grounds for concern.²¹ *See* JA7:1842-1851; JA8:2136-2138; docket no. 196-2.²²

²⁰ The Fernald appellees' attempt to supplement the record with materials that were never proffered to, nor considered by, the District Court, *see* Fer.Br. 40 n.5, must be rebuffed. Federal Rule of Appellate Procedure 10 (a), defining the record on appeal, does not permit a party to add new material to the appellate record to support the district court's decision. *Ball v. Rodgers*, 492 F.3d 1094, 1118 (9th Cir. 2007); *Lowry v. Barnhart*, 329 F.3d. 1019, 1024-25 (9th Cir. 2003). The Fernald appellees' discussion of "transfer trauma" (Fer.Br. 40-42, including footnote 5) should also be disregarded because DMR never had the opportunity to challenge it under Fed. R. Evid. Rule 702 on *Daubert* grounds. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-593 (1993).

²¹ The un rebutted expert evidence before the District Court explained that transfer-induced disruptions can readily be mitigated with careful planning and attention. *See* Affidavit of Tamar Heller, Ph.D., at JA8:2126-27. Additionally, the only expert evidence before the court regarding facility closures and the potential for transfer trauma among persons with mental retardation (given that appellees submitted no evidence on point) -- including that proffered by a second nationally-recognized expert, Robert M. Gettings -- pointed toward more positive outcomes for individuals who moved out of facilities than for those who stayed. JA7:1842-43; docket no. 196-2. *See also* NASDDDS amicus brief at 21-27.

²² The Fernald appellees' suggestion (Fer.Br. 42) that any FDC resident will be transferred 100-200 miles farther away from an elderly parent, against the resident's guardian's wishes, is incorrect. In addition to the FDC, DMR maintains five other ICF/MRs regionally located throughout the state and hundreds of other

(footnote continued . . .)

The appellees' argument based on *Olmstead v. L.C., ex rel. Zimring*, 527 U.S. 581 (1999), is also unavailing. The state appellants have never argued that the *Olmstead* decision *requires* transfers to the community, as the Wrentham appellees contend. Wr. Br. 48.²³ Rather, the issue is whether DMR can simultaneously support expensive ICF/MR care for a rapidly dwindling number of residents at six large ICFs while building up its community capacity to serve a burgeoning group (of nearly 10,000 citizens) that prefers a community-based (less restrictive and more integrated) service modality.

Contrary to the Wrentham appellees' claim, there is no causal connection between any transfer from the FDC and the death of any former FDC resident. Following state mortality investigations, which raised no concerns, and with the assistance of three independent medical experts, the Monitor carefully examined the circumstances surrounding those deaths and did not conclude that any causal

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facilities (both state-operated homes and residences housing DMR clients under contract) in all parts of the Commonwealth. JA7:1971-1973.

²³ While the *Olmstead* decision leaves states some flexibility to design their developmental disabilities services system, it does require that states move with reasonable speed to ensure that individuals with disabilities have a meaningful option of receiving services in community-based settings. 527 U.S. at 606. Accordingly, states must make funding decisions that will permit the creation of adequate capacity to meet this demand. In light of the other appellants' comprehensive treatment of the appellees' *Olmstead*-based arguments, *see* the Arc's reply brief at 25-35, the state appellants will not address further the import of the *Olmstead* decision.

link existed. *See* Add. 49 n.2. Although the mortality rate among individuals in DMR's care is higher than in the general population, it is greatly influenced by factors such as advanced age and the presence of serious medical conditions. The District Court properly did not address this issue, given the lack of evidence in the record of the average mortality rate of persons within this cohort, or of the underlying medical conditions of the deceased individuals, and the lack of any further basis for drawing conclusions.

Another meritless contention put forth by the Wrentham appellees is based upon a flawed analysis of the supposed differential rates of abuse and neglect in community versus ICF/MR settings. *See* JA8:2286-2303 (addressing in detail the Wrentham appellees' misreading of government statistics). The District Court did not accept Wrentham's analysis, however, finding insufficient evidence of any systemic problem. Add. 65. Moreover, the court has repeatedly rejected bids by the appellees to enlarge the scope of the Monitor's mandate to include investigating the system for protecting DMR's community-based clients. *Id.*; JA6:1769-1771. Wrentham's faulty analysis does not bolster the August Order in any event, because over two-thirds of the transfers from the FDC have been to other ICF/MRs and not to community residences. Add. 27.²⁴

²⁴ Finally, although not a proper subject for federal court examination, were the policy considerations that motivated the FDC closure announcement open to
(footnote continued . . .)

VII. THE APPELLEES FAIL TO ADDRESS THE COMMONWEALTH'S CENTRAL ARGUMENTS.

In its opening brief, the Commonwealth argued that the District Court's entry of a mandatory injunction, when neither the Decree nor federal law had been violated, contravened fundamental federalism principles. *See* Com.Br. at 40-45. Neither set of appellees addresses this argument at all. Rather, they assert that the District Court possessed ancillary jurisdiction to breathe new life into its prior judgment -- notwithstanding the lack of evidence that the state appellants violated the Decree's terms. Fer.Br. 21-22; Wr.Br. 27. In general, federal courts may possess wide latitude in giving effect to their prior orders, but the situation changes when the defendant is a sovereign state. In that circumstance, and particularly where, as here, the prior order is a consent decree entered into many years ago by government officials no longer in office, it is essential that the district court enter detailed findings of fact that demonstrate solid legal footing for the remedial orders it enters. *Evans v. City of Chicago*, 10 F.3d 474, 477-480, 482 (7th Cir. 1993); *Heath v. DeCourcy*, 992 F.2d 630, 634 (6th Cir. 1993). Here, however, the District Court failed to specify the scope and bounds of its own authority and make

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review, the Wrentham Association's bid to erase cost factors from the picture (Wr.Br. 8) would be inappropriate. The Decree does not preclude DMR from taking into consideration the inordinate cost of running a particular facility. In fact, the contrary is true. Add. 10 (¶ 5).

findings showing that the Commonwealth defendants had transgressed either federal law or its own prior judgment. Instead, without factual support, the District Court veered off into substantive policy – an area in which the court generally has no jurisdiction or authority to enter orders. *See, e.g., Rosen v. Goetz*, 410 F.3d 919, 922-923 (6th Cir. 2005). Both in entering the August Order and in issuing some of the directives that preceded the August Order – such as effectively ordering DMR to retract its written statement that the FDC would be closing and barring DMR from hosting informational events to inform FDC guardians of alternative placement options²⁵ – the District Court exceeded its authority. Indeed, neither set of appellees actively contests that the real controversy here is a public policy dispute – whether the FDC should remain open – a matter beyond the jurisdiction of the federal courts.

CONCLUSION

For the foregoing reasons, and those stated in the Commonwealth appellants’ principal brief, this Court should vacate the District Court’s order of August 14, 2007, declare that it was improper for the lower court to have reopened this case under existing circumstances, and hold that the District Court lacks authority to issue further orders in this case in the absence of any proven violation of the Constitution or the 1993 consent decree.

²⁵ *See* JA4:1171-1173; JA6:1768.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,018 words of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman style.

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CERTIFICATE OF SERVICE

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