

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 AN AUGUST 14, 2007 ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF PLAINTIFF-APPELLANT
MASSACHUSETTS ASSOCIATION FOR RETARDED CITIZENS, INC.
AND
INTERVENOR-APPELLANT DISABILITY LAW CENTER, INC.

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, plaintiff-appellant, **Massachusetts Association for Retarded Citizens, Inc.** states that its name has changed to Arc Massachusetts, Inc. and that it is a non-profit corporation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, intervenor-appellant, **Disability Law Center, Inc.**, states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument should be heard in these appeals. The underlying cases were filed beginning in 1973. The injunction appealed from modifies a Disengagement Order entered in May 1993. The record appendix is nearly 2400 pages. In light of the complexity of the record and the age of the case, the Court will benefit from oral argument.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the original actions raised federal constitutional and statutory claims against state officials acting under color of state law.

This appeal arises from the August 14, 2007 Order of the District Court finding that the defendants' plan to close the Fernald State School constitutes a systemic violation of the Disengagement Order entered in 1993, and effectively ordering the defendants to keep Fernald open as long as any current resident wants to continue residing there. Plaintiff-appellant, Massachusetts Association of Retarded Citizens, Inc., and intervenor, Disability Law Center, timely filed a joint notice of appeal on September 12, 2007. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 because the appeal is from a separate and final order of the district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in finding that defendants' plan to close the Fernald State School constituted a "systemic violation" of the Department of Mental Retardation's Individual Service Planning (ISP) process, in the absence of any evidence that defendants had in the past or would in the future fail to comply with ISP requirements with respect to transferred Fernald residents as required by the 1993 Disengagement Order?

2. Did the district court err in finding that defendants' plan to close the Fernald State School constituted a "systemic violation" of the 1993 Disengagement Order's requirement to provide services to class members, in the absence of any evidence that DMR had in the past or would in the future fail to provide transferred Fernald residents with "equal or better services" at their new homes?

3. Did the district court err in modifying the Disengagement Order to effectively bar the defendants from closing Fernald in the absence of an unanticipated change in facts or a change in law that necessitated such a modification?

4. Does the August 14 order contravene public policy and the defendants' legal obligation that services be provided in the most integrated setting appropriate to the needs of the individual, and undercut basic principles of federalism which counsel against undue interference by a federal court with state discretion to fund programs and equitably allocate resources?

STATEMENT OF THE CASE

These appeals are from an order reopening five consolidated cases, filed over three decades ago, seeking to improve conditions at Belchertown, Fernald, Dever, Monson and Wrentham State Schools and seeking community-based services for individuals with mental retardation. Consent decrees resolving the issues raised in these actions were entered in 1977 and 1978.

Ricci v. Okin, 537 F.Supp. 817, 819 n.1 (D. Mass. 1982) (recounting the history of the litigation). In 1993, the district court, at the request of the parties, entered a consent order that "supplants and replaces each of the consent decrees and all orders of the court in these matters." *Ricci v. Okin*, 823 F.Supp. 984, 986 (D.Mass. 1993) (Order at Introduction and ¶ 1), Addendum (Add.) 9.¹ This Disengagement Order (hereafter DO) provided that the five consolidated cases are "closed and removed from the court's active docket [and] [a]ny action to enforce the rights of the plaintiff classes may be brought before the court only pursuant to the terms of paragraph 7...." DO at ¶ 1, Add. 9.

Paragraphs 2, 4, 5, and 7 of the DO are relevant to this appeal. Paragraph 2 requires the defendant Department of Mental Retardation (DMR) to provide appropriate services to the class members and to maintain individual service planning (ISP) regulations that are substantially equivalent to those in effect at the time of the DO, at least with respect to certain specific provisions. Paragraph 4 specifies that DMR shall not approve a transfer of any class member from a state school to the community unless it certifies that the individual will receive "equal or better" services at the new location. Paragraph 5 provides that

¹ The Addendum is paginated in the lower right hand corner of the page.

nothing in the order is intended to limit DMR's discretion to manage its budget and allocate its resources to ensure equitable treatment of all individuals with mental retardation. Paragraph 7 is "the exclusive means of enforcing" the DO and provides that if the defendants "substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order." DO at ¶¶ 2, 4, 5, 7, Add. 9-15.

For eleven years following entry of the DO, there were no pleadings filed and no action taken by the district court in these closed cases. During that time, DMR closed the Dever State School without incident. Riley Aff. of May 30, 2007 at ¶ 1, Joint Appendix VII (JA VII) 1937.² In the year prior to entry of the DO, DMR closed the Belchertown State School, with the support of the plaintiffs. O'Hare Aff. of May 31, 2007 at ¶¶ 15, 29, JA VII 1928, 1932.

On July 6, 2004, the plaintiffs in the Fernald case filed a Motion to Reopen pursuant to ¶ 7 of the DO. JA I 50. That motion was denied without prejudice on January 20, 2005 after the defendants, at the court's urging, entered into a Stipulation agreeing to provide residents of Fernald with a bifurcated ISP

² Citations to the Joint Appendix will be abbreviated JA, followed by the volume of the appendix and then the appendix page number(s) (e.g. JA VII 1937).

process. Transcript (Tr.) 11/10/04 hrg., JA III 870-75; Tr. 11/15/04 hrg., JA III 899-901; Tr. 1/20/05 hrg., JA IV 990-91, 993-94. Pursuant to the Stipulation, the initial ISP meeting is limited to determining the appropriate services and supports for the resident without regard to location. This decision is followed by a second meeting to consider alternative placement options. Stipulation, JA IV 923-25.

Although the Fernald plaintiffs did not file any further motion seeking relief from the district court, on February 2, 2006, they filed a "status report" raising numerous concerns about both the transfer of class members from Fernald and DMR's proposed closure of the facility. JA V 1209. On February 8, 2006, the district court appointed Michael J. Sullivan, the United States Attorney for Massachusetts, as Court Monitor

to advise the court as to whether the past and prospective transfer processes employed by the Department of Mental Retardation comply with federal law, state regulation, as well as the order of this court.... Pending the completion of Mr. Sullivan's inquiry, and his report to the court, all transfers from Fernald to other ICF/MRs³ and community residences shall be discontinued.

³ ICF/MR is the abbreviation for Intermediate Care Facility for the Mentally Retarded.

JA VI 1619-20.

Over one year later, on March 6, 2007, the Monitor submitted his report (hereafter, Report or Monitor's Rpt.) which found that DMR had complied with all relevant provisions of federal and state law, as well as all orders of the court. JA VI 1691, 1703-13. After permitting the parties to file written responses to the Report, the district court, on August 14, 2007, reopened the case based upon its conclusion that the defendants' plan to close Fernald "amounts to a 'systemic failure' to provide a compliant ISP process." *Ricci v. Okin*, 499 F.Supp.2d 89, 91 (D. Mass. 2007), Add. 2, 6.⁴ It then entered an injunctive order requiring that "[a]ny further communication from [DMR] to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences." Order, Add. 1.

The net effect of the district court's new injunction and modification of its prior DO is that DMR must keep Fernald open as long as at least one resident wishes to remain there. It would be disingenuous for DMR to specifically list Fernald as an available option, only to later advise the individual and/or guardian that Fernald is not actually available because it is

⁴ Hereafter referred to as Memorandum Decision and cited only to the Addendum.

closing. Not only would it engender a counterproductive sense of mistrust between the resident and DMR, but it would likely be viewed by the Fernald plaintiffs and the district court as a violation of the spirit, if not the letter, of the order. The only realistic interpretation of the injunction is that DMR must keep Fernald open until the last resident voluntarily relocates or dies. It is from this order that the plaintiff, Massachusetts Association of Retarded Citizens (MARC), and the intervenor, Disability Law Center (DLC), appeal.

STATEMENT OF FACTS

The only information before the district court at the time it entered its August 14, 2007 order was the Report and the parties' written submissions in response to it. No evidentiary hearing was held regarding whether the defendants had engaged in a "systemic violation" of the DO.

The Monitor concluded and the district court found that the defendants had fully complied with state and federal law and the DO with respect to the operation of facilities, the community service system, and the provision of "equal or better" services to transferred class members, including the 49 residents of Fernald who had recently transferred to other residential settings. Monitor's Rpt. at 13-23, JA VI 1703-13; Memorandum Decision, Add. 4. There was no finding that the ISP process was violated. Indeed, the overwhelming majority of class members and

their guardians reported "extremely positive attitudes regarding the moves." Monitor's Rpt. at 22, JA VI 1712. Despite finding DMR in total compliance with federal and state law and with the DO, the Monitor speculated that future transfers from Fernald "could have devastating effects that unravel years of positive, non-abusive behavior" and concluded that some of the Fernald residents "could suffer an adverse impact, either emotionally and/or physically, if they were forced to transfer from Fernald...." Monitor's Rpt. at 24, 27, JA VI 1714, 1717. The district court adopted this speculative assumption and then found that, were defendants to close Fernald, they would commit a systemic violation of the ISP process. Memorandum Decision, Add. 4, 6. Relying upon pure conjecture regarding future events, and contrary to its own finding that defendants were in full compliance with the DO, the district court reopened the case and entered the August 14 order. Memorandum Decision, Add. 6.

SUMMARY OF ARGUMENT

The district court's finding that there was a "systemic violation" of the DO is based exclusively on its conclusion that the ISP process somehow is tainted by the defendants' decision to close Fernald. Memorandum Decision, Add. 5-6. As a result, it ordered the defendants to inform all Fernald guardians that Fernald remains a viable residential option and thus, must be kept open. Order, Add. 1.

The district court's conclusion rests on the untenable assumption that a "systemic violation" of a court order can be proven by a purely speculative concern about the future operation of a treatment planning process that has been found to operate consistent with federal law, state regulations, and federal court orders.

The district court's finding is also contrary to all, indeed the sole, evidence, which is that the ISP process has operated fairly and effectively. Monitor's Rpt. at 13-16, 22-23, JA VI 1703-06, 1712-13. The court's conclusion is also unsupported by any evidence that the ISP process will not continue to operate consistent with its governing regulations. Moreover, since the ISP process incorporates considerable procedural due process protections, it has ample safeguards to ensure its integrity and to correct any deficiencies that might be identified. See, Mass. Gen. Laws c. 123A § 3 (establishing administrative and court review process) and 115 Code of Mass. Regs. §§ 6.30-6.34, 6.63. In fact, the DO specifically establishes this elaborate appeal process as the exclusive method to challenge alleged individual violations of the ISP process. DO at ¶ 7.a, Add. 14.

As a result, the district court acted improperly in relying upon a prediction of the *prospective* operation of the ISP process to support its holding that the DO *had* been violated, warranting a reopening of the case and a substantial expansion of its

fifteen year old DO.

While the August 14 order is based solely upon the ISP prong of the "systemic violation" section of the DO, it would be equally untenable if it was predicated on the "failure to provide services" prong of ¶ 7 of the DO. In light of the Monitor's finding, adopted by the court, that the defendants have provided all transferred residents with "equal or better services" at their new homes, Memorandum Decision, Add. 4, there is no basis to conclude that defendants will not continue to do so in the future, even if Fernald is closed. Any such finding would be pure conjecture, and injunctive orders against state officials must be based upon much more than speculative concerns about future events.

The August 14 order also cannot be upheld as a permissible modification of the DO. The only bases for modification are a significant and unanticipated change in facts or a change in law that renders the prospective operation of the decree unworkable. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384-85 (1992). The factual change upon which the August 14 order is based is the closure of Fernald. However, the closure of state schools was clearly anticipated both by the parties and the court at the time the DO was entered. The DO itself at ¶ 5 reserved to DMR discretion over the allocation of its resources. Add. 13. Belchertown had closed the year prior to entry of the DO and

Dever closed subsequent to its entry. O'Hare Aff. at ¶ 29, JA VII 1932; Riley Aff. at ¶ 1, JA VII 1937. Because such closures were clearly anticipated, indeed they were the natural consequence of the relief sought by plaintiffs, they do not justify modifying the DO.

There also has been no change in law that would justify the August 14 order. The salient legal changes since the DO, the decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999) and state legislation directing that Fernald be closed, both support the closure of Fernald. Certainly, there has been no change in the law that would warrant mandating the continued operation of that antiquated and underutilized facility.

The August 14 order also contravenes the public policy that favors community integration over segregation of individuals with disabilities. It also unduly interferes with the defendants' ability to manage the limited resources available to meet the needs of all individuals with mental retardation in the most efficient, effective, and equitable fashion. Basic notions of federalism counsel against such undue interference with executive decisions of state government as to which of its public facilities should be modified, phased down, or closed.

ARGUMENT

Standard of Review

The 1993 DO was entered with the consent of the parties and

consolidated the consent decrees entered in the five separate actions into one final consent order. DO at ¶ 1, Add. 9. Because the DO is a consent decree, its interpretation “presents a question of law subject to plenary review.” *Consumer Advisory Bd. v. Glover*, 989 F.2d 65, 68 (1st Cir. 1993); *see also*, *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337-38 (1st Cir. 1991) (no deference due district court interpretation of “the parties’ original bargain” in order to avoid subjecting government to “a game of Russian roulette”); *Braxton v. U.S.*, 500 U.S. 344, 350 (1991).

Findings of fact by the district court are subject to review under the “clearly erroneous” standard of Fed. R. Civ. Pro. 52(a). *AccuSoft Corp. v. Palo*, 237 F.3d 31, 39-40 (1st Cir. 2001).

I. The District Court Erroneously Concluded That There Was a “Systemic Violation” of the ISP Provisions of Its 1993 Disengagement Order.

A. *The District Court Ignored the Standards for Reopening the Case Set Forth in Its Disengagement Order.*

The DO provides only two bases for reopening the case: (1) “If the defendants substantially fail to provide a state ISP process in compliance with this Order;” or (2) “if there is a systemic failure to provide the services to class members as described in this Order.” DO at ¶ 7(a), Add. 14. The district

court relied upon the first of these two standards in holding that DMR's "administration of the ISP amounts to a systemic failure to provide a compliant ISP process, within the meaning of the Final Order." See, Memorandum Decision, Add. 6. However, the conclusion is devoid of any evidentiary basis, and appears to deem irrelevant, the magnitude or impact of this highly speculative concern.⁵

The district court's finding depends on the assumption, unsupported by logic or evidence, that DMR's decision to close one of its many institutional facilities, while maintaining the other certified facilities and allowing all Fernald residents to move to any of these facilities, somehow constitutes a "system-wide" violation of the ISP process. However, the DO only

⁵ The court disregarded the legal meaning of "systemic violation" as having a broad and significant impact, see, *Hadix v. Johnson*, 173 F.3d 958, 962 (6th Cir. 1999) (systemic violation must result in "widespread actual injury"); demonstrating a pattern or practice, see, *Jensen v. Frank*, 912 F.2d 517, 522 (1st Cir. 1990) (systemic violation involves policy or practice); creating a serious problem that impacts many individuals, see, *Kane v. Winn*, 319 F.Supp.2d 162, 185 (D.Mass. 2004); or, rendering exhaustion of administrative remedies futile, see, *J.S. v. Attica Schools*, 386 F.3d 107, 113-114 (2d Cir. 2004). Instead, relying on a portion of the dictionary meaning, it determined that any problem of any magnitude with any form of "system" justifies reopening the fifteen year old DO. The court's interpretation of the DO is entitled to little, if any, deference. Because the DO memorializes a settlement agreement of the parties, the intent of the parties controls. *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337-39 (1st Cir. 1991). Certainly deference is not due to a blanket misinterpretation of the well-established meaning of "systemic violation" when it is at odds with the context and plain meaning of the consent order.

requires that the defendants *have* an ISP process which complies with a few general provisions, DO at ¶ 2, Add. 9-11, and there is no question that there is such a process and that it does.

The DO's requirements concerning the ISP process are straightforward. First, there must be a set of ISP regulations that "guarantee that each class member be provided with the least restrictive, most normal, appropriate residential environment, together with the most appropriate treatment, training, and support services suited to that person's individual needs." DO at ¶ 2, n.2, Add. 10. There clearly is, and the district court did not find otherwise. See, 115 Code Mass. Regs. § 6.20(3).

Second, the DO prohibits the defendants from amending or revising the ISP regulations without notice to plaintiffs' counsel and the opportunity for comment. DO at ¶ 2.b, Add. 11. Although the original ISP regulations, then found at 104 Code Mass. Regs. § 20.00 *et seq.*, were recodified and modified with extensive input from the plaintiffs and others in 1997, no one has ever suggested that this provision has been violated, and the district court did not rely on this provision as the basis for its August 14 order.

Third, although amendments to the regulations properly may alter many provisions, requirements, and procedures, the DO requires that DMR "leave in place a process that is at least the substantial equivalent of the regulations currently set forth in

104 CMR 20.00 *et seq.*, with regard to the definition of the ISP, the individualized nature of the ISP, the existence of an appeal process, and the principles contained in footnotes 2 and 3 herein.”⁶ DO at ¶ 2.b, Add. 11. There has never been a question that the modified ISP regulations conform to these four conditions, and the court did not find otherwise.

Significantly, those are the only requirements in the DO concerning the ISP process. Since the district court did not identify a violation of any of those requirements, it had no authority to reopen the case and modify and expand the agreed upon provisions of the DO. *Clark v. Coye*, 60 F.3d 600, 604-05 (9th Cir. 1995).

Furthermore, to the extent that there was any concern about the impact on the ISP process of the State’s decision to close Fernald, those concerns were addressed and resolved in a Stipulation between DMR and the Fernald plaintiffs, signed and filed on December 29, 2004. JA IV 923. In the Stipulation, the parties agreed to bifurcate the ISP process solely for residents of Fernald facing transfer due to the facility’s closure by separating the treatment planning process from the placement process. Specifically, the Stipulation provides that DMR “shall not discuss alternative placement, nor develop a ‘Vision

⁶ Footnote 3 of the DO contains six basic principles that must be maintained in the ISP regulations. They are, virtually verbatim, set forth in 115 Code Mass. Regs. § 6.20(3).

Statement' or an 'Objective' related to alternative placement, for individuals at Fernald during the team meeting convened to develop the individual's annual ISP." Stipulation at ¶ 2, JA IV 923. DMR "will only discuss alternative placement and present specific placement recommendations ... at a separate ISP modification meeting held in compliance with the Department's existing ISP regulations. The ISP modification meeting will be held only after a specific placement site is identified." Stipulation at ¶ 4, JA IV 924.

This Stipulation reflected an adjustment to the ISP process solely for Fernald residents in order to address the parents' concerns about the facility's closure raised in their Motion to Reopen. See, Motion to Reopen, JA I 50. It was negotiated at the urging and direction of the district court at status conferences held on November 10 and 15, 2004. Tr. 11/10/04 hrg., JA III 870-75; Tr. 11/15/04 hrg., JA III 899-901. Based upon this Stipulation, which resolved whatever concerns there may have been about the ISP process, the district court denied the Motion to Reopen on January 20, 2005. Tr. 1/20/05 hrg., JA IV 990-91, 993-94.

In light of this Stipulation and the absence of any finding that DMR was not complying with it and the other requirements of the ISP process, there was no basis for the district court to conclude that DMR's administration of the ISP process denies

“residents and guardians a voice in important decisions” or “disenfranchises the participants in the ISP process.” Memorandum Decision, Add. 5-6. Yet, this finding, and only this finding, formed the basis for the district court’s conclusion that DMR was systemically violating the DO. Since no evidence indicated that the ISP process had been or was currently being operated in a manner that contravened the provisions of the DO, and because the defendants had already agreed to provide Fernald residents with additional ISP protections to resolve the Fernald parents’ Motion to Reopen, the district court’s August 14 injunction is plainly in error.⁷

B. There Was No Evidence of a Violation of the Department’s Individual Service Planning Process.

Not only was there no evidence or finding of any violation of the ISP requirements of the DO, but there was uncontested evidence, accepted by the district court, that the defendants had faithfully complied with the ISP requirements of the DO. Monitor’s Rpt. at 16, 22-23, JA VI 1706, 1712-13; Memorandum

⁷ The ISP process, even without the additional provisions set forth in the Stipulation, is a paradigm of consumer participation and due process protection. The ISP regulations require that all relevant professionals, providers, the individual, and the guardian, if any, participate on a service team to develop a service plan so that each of the individual’s needs is addressed with specific services, 115 Code Mass. Regs. §§ 6.21-6.23, that there be annual reviews of the plan, goals, and outcomes, and that the plan be modified when the individual’s needs change or services are no longer relevant or available. *Id.* at §§ 6.30-6.34, 6.63.

Decision, Add. 4. At the time the district court entered the August 14 order, there was no motion or request for relief pending before the court regarding inadequacies in the ISP process or other aspects of the DO.⁸

Indeed, the district court based its order upon speculation that the ISP process might be compromised by the closing of Fernald and that the state defendants might not continue to implement the ISP process with the same integrity that they have shown over the past fifteen years, all without valid probative support. To unilaterally revise the provisions of a consent decree in such a fashion without evidence of a current violation constitutes an abuse of discretion. *U.S. v. Michigan*, 940 F.2d 143, 163 n.12 (6th Cir. 1991) (abuse of discretion to revise obligations of a consent decree based upon speculation about future conduct); *see also, McConnell v. Federal Election Comm'n*, 540 U.S. 593, 200-02 (2003) (speculation about possible future harm cannot justify injunctive relief); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-06 (1983) (holding that injunctive relief cannot be predicated upon hypothetical or conjectural speculation about future harm); *Palmer v. City of Chicago*, 755 F.2d 560, 571-

⁸ The Fernald parents' "Status Report," dated February 2, 2006, JA V 1209-29, set forth their views of the transfer process from Fernald, and some details concerning many of the recent transfers of class members. The Monitor investigated and rejected every single allegation of non-compliance asserted in the Status Report. Monitor's Rpt. at 13-23, JA VI 1703-13.

72 (7th Cir. 1985).

Not only is the August 14 order based upon pure conjecture, but it is predicated on the assumption that state governmental defendants *will* violate their obligations under state and federal law and the court's fifteen year old DO. That unsupported assumption runs directly counter to the well-recognized presumption that governmental officials will carry out their obligations in good faith. *Costa v. I.N.S.*, 233 F.3d 31, 37 (1st Cir. 2000); *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Even greater restraint is required where a federal court acts "to interfere by means of injunctive relief with state's executive functions, a sphere in which states typically are afforded latitude." *Reynolds v. Giuliani*, 506 F.3d 183, 198 (2d Cir. 2007). See also, *Rizzo v. Goode*, 423 U.S. 362, 377-78 (1976) ("courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'") (quoting *Stefanelli v. Minard*, 432 U.S. 117, 120 (1951)); *O'Shea v. Littleton*, 414 U.S. 488, 500-01 (1974).⁹ Because the August 14 order is based upon speculation about future events

⁹ Also influencing the *Littleton* Court's decision that injunctive relief was inappropriate was "the conjectural nature of the threatened injury" and the existence of "available state... procedures which could provide relief from the wrongful conduct alleged." *Littleton*, 414 U.S. at 502. All of those factors are also present here.

that is directly contrary to all available evidence about present compliance and interferes with fundamental executive functions of the state, it must be reversed.

II. The District Court's August 14 Order Was Improperly Premised on an Unarticulated Finding That the Closure of Fernald Constitutes a Systemic Violation of the DO's Requirement to Provide Services to Class Members.

The Monitor opines, without any clinical or other professional support, and relying primarily on unfounded fears and sympathy, "that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they were forced to transfer from Fernald to another ICF/MR or to a community residence." Monitor's Rpt. at 27, JA VI 1717. The Monitor then recommends "the implementation of a development plan that would enable Fernald to remain open...." *Id.*, JA VI 1717. The district court adopted these speculative concerns. Specifically, the court surmised 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." Memorandum Decision, Add. 5.

To the extent that the district court's order might be interpreted as predicated on a speculative conclusion that placements from Fernald would result in Fernald residents being denied "equal or better services" at their new location, such a contention is belied by the record. As the district court found,

"[a]fter a year of exhaustive and meticulous study, the Court Monitor concluded that the DMR had complied with the Final Order's requirement that transferred residents obtain 'equal or better services'". Memorandum Decision, Add. 4.

Nevertheless, the district court assumes that, in the future, the state officials will not continue to place and provide services for Fernald residents in good faith, but rather will deny them the "equal or better" services to which they are entitled at any new location to which they may be transferred.¹⁰ Memorandum Decision, Add. 4-6. However, all evidence indicates that defendants have faithfully complied with the requirement to provide "equal or better services" to residents who have been transferred. For example, Belchertown closed just before the DO was entered and Dever has closed since. All of the residents of those facilities have been transferred successfully and appropriately to other residential locations. Jones Aff. at ¶¶ 11-22, JA VI 1831-34; Riley Aff. at ¶¶ 5-23, JA VII 1939-1949. The district court's guess about what may happen in the future, particularly where it is contrary to all evidence about what has happened thus far, is clearly not an adequate foundation upon which to enter an order modifying a mutually agreed-upon consent

¹⁰ The ISP process does not guarantee an individual the placement of his or her choice or the right to remain in a particular facility or program. Rather, the appeal sections, 115 Code Mass. Regs §§ 6.30-6.34, 6.63, are available if the individual disagrees with a proposed modification or transfer.

order over the objection of both the state defendants and other plaintiffs. See, *U.S. v. Michigan*, 940 F.2d at 163 n.12 (court cannot modify decree based upon conjecture); *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 200-01 (2003); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-106 (1983). As this Court explained in *Quinn v. City of Boston*, 325 F.3d 18, 30 (1st Cir. 2003), “[p]arties to a consent decree are entitled to know that ... it will not be treated as a mere entering wedge which ... gives a district court untrammelled discretion to increase the depth and breadth of judicial supervision.” That is precisely what has occurred here. Therefore, the district court’s August 14 Order must be vacated.

III. The District Court’s August 14 Injunction Is an Impermissible Modification of Its Disengagement Order.

The August 14 Order, which was entered by the district court on its own motion without a request for relief filed by any party, requires DMR to include continued placement at Fernald as an option in any communication with current residents or their guardians concerning a residential transfer. However, neither the DO nor DMR’s ISP regulations require any such option, and the Order effectively eliminates the ability of the Commonwealth to close Fernald over the objection of any current resident or his or her guardian. The Order therefore constitutes a substantial and onerous modification of the parties’ settlement agreement

that is memorialized in the Disengagement Order.¹¹

While the district court states that its Order "does not mean that the Commonwealth may never close Fernald," Memorandum Decision, Add. 6-7, it effectively does just that by barring defendants from closing Fernald over the objection of any single current resident. Because some of the current residents are under forty years old, Monitor's Rpt. at 6, JA VI 1696, it could be decades before this obsolete institution can be closed if the district court's order remains in place.

In *Rufo*, the Supreme Court set forth the basic standards that govern the modification of consent decrees in institutional reform litigation:

A party seeking modification of a consent decree may meet its initial burden by showing either [sic] a significant change either in factual conditions or in law.

502 U.S. at 384. With respect to factual changes, the Court held:

Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous... Modification is

¹¹ That the DO is a consent decree is evident both from its text and the context in which it was entered. As the introductory sentence of the DO states: "After notice and hearing, and *with the consent of the parties*, it is hereby ordered..." Add. 9 (emphasis added). The DO specifically notes that it is supplanting the then current consent decrees. Add. 9. Because the DO was "an agreement that the parties desire and expect will be reflected in, and enforceable as, a judicial decree," it is a consent decree. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. at 367, 378.

also appropriate when a decree proves to be unworkable because of unforeseen obstacles, or when enforcement of the decree without modification would be detrimental to the public interest...

Ordinarily, ... modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree...

Id. at 384-85. With respect to changes in the law:

A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.

Id. at 388. When changed circumstances warrant a modification, that modification must be "tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Id.* at 391. When the *Rufo* principles are applied to the August 14, 2007 Order, it is apparent that the court overstepped its bounds.

It is abundantly clear that the only factual change upon which the August 14 Order is based is the proposed closure of Fernald. Memorandum Decision, Add. 5-7. However, the proposed closure of Fernald is not an unanticipated change in circumstances. The Belchertown State School, the object of the first of the five consolidated cases, was closed in 1992, the year before the DO was entered. O'Hare Aff. at ¶ 29, JA VII 1932. In a decision issued that same year, the district court made

clear that state school closures were anticipated when it specifically noted that “[t]he Consent Decrees do not prohibit the possible closing of any facility. Indeed, if residents are properly placed into alternative settings, and a facility is no longer needed, this court will not interfere with its closure.” *Ricci v. Okin*, 781 F.Supp. 826, 830 (D. Mass. 1992) (emphasis added).

In the DO itself, the court specifically noted that:

Except as set forth in other paragraphs of this Order, nothing in this Order is intended to detract from or limit the discretion of the defendants in developing and improving programs, managing and determining the personnel and budget of the Department of Mental Retardation and other state agencies, implementing innovative services, improving quality enhancement and dispute-resolution mechanisms, or *allocating its resources to ensure equitable treatment of its citizens.*

DO at ¶ 5, Add. 13 (emphasis added). Furthermore, the following paragraph of the DO obligates the defendants to seek to improve the progress achieved by implementing certain “basic principles” that include providing class members with “the opportunity to live and receive services in the least restrictive and most normal setting possible” and “the opportunity to engage in activities and styles of living which encourage and maintain the integration of the client in the community...” DO at ¶ 6.a & n.3, Add. 13.

The Fernald parents were well aware of the likelihood of facility closures at the time the DO was entered. Indeed, the

provisions in the initial consent decrees and the DO requiring the development of community-based placements presaged the movement of residents out of the old institutions into more integrated settings. It was obvious that, as the census at these large, obsolete institutions declined, there would be efforts at consolidation and closure. Not surprisingly, shortly after the DO was entered, the defendants began a process that spanned a decade leading to the closure of the Dever State School in 2002. Riley Aff. at ¶¶ 1, 5-23 JA VII 1937, 1939-49.

Those plaintiffs opposing the closure of Fernald are now objecting to the predictable results of the relief they sought and obtained. That Fernald, which is the oldest publicly funded facility in the Western Hemisphere serving individuals with developmental disabilities, Monitor's Rpt. at 6, JA VI 1696, would eventually be closed is hardly a significant change in facts and certainly not an unanticipated one. Therefore, under *Rufo*, neither the Fernald plaintiffs nor the court can rely on that fact to justify an order which imposes additional obligations on the defendants beyond those agreed upon in the original consent decrees and the DO, and which directly interferes with defendants' right to "allocat[e] its resources to ensure equitable treatment of its citizens." DO at ¶ 5, Add. 13. See, *Firefighters Local Union v. Stotts*, 467 U.S. 561, 566-67 (1984) (finding no unanticipated change in facts when city used

collective bargaining agreement seniority provisions to implement layoffs resulting from budget crisis).

With no unanticipated change in facts, the only other basis for modification would be a change in either state or federal law that significantly affects the continued operation or legal validity of the consent decree. *Rufo*, 502 U.S. at 384-85. The district court did not rely upon any such change in law and for good reason. There has been no change in law that makes closure of Fernald illegal or otherwise justifies the August 14 Order. Indeed, as is detailed below in Section IV, *infra* at 29-30 & n.12, all changes in law support closure, further rendering entry of the August 14 Order invalid.

IV. The District Court's Order Contravenes, Rather Than Furthers, the Public Interest and the State's Legal Obligation that Services Be Provided in the Most Integrated Setting Appropriate to the Needs of the Individual, and Undermines Basic Principles of Federalism That Counsel Against Unreasonably Restricting State Discretion to Fund Programs and Equitably Allocate Resources.

A. *Community Integration of Individuals With Disabilities Furthers the Public Interest.*

Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12134(b), requires public entities to prevent the segregation of people with disabilities by providing services to qualified individuals in the most integrated setting appropriate to each person's needs. The Supreme Court interpreted and applied this duty in the landmark case of *Olmstead v. L.C.*, 527

U.S. 581, 601 (1999). More recently, the court in *Arc of Washington State Inc. v. Braddock*, 427 F.3d 617, 618 (9th Cir. 2005) explained that States must now

provide care in integrated environments for as many disabled persons as is reasonably feasible, so long as such an environment is appropriate to their mental-health needs.... This requirement serves as one of the principal purposes of Title II of the ADA; ending the isolation and segregation of disabled persons... (citations omitted).

The DO appropriately reflects this same preference for community integration and the provision of services in less restrictive settings. DO at ¶¶ 2(a) n.2, 6(a) n.3, Add. 10, 13. Similarly, DMR's ISP regulations are replete with requirements to provide services in the community whenever possible. See, 115 Code Mass. Reg. §§ 6.20(3)(a)(4) & (6), 6.23(2)(c), 6.24(4), 6.25(1).

There are fewer than 1,000 class members in state-operated institutions and only 186 residents at Fernald. *Tummino Aff.* at ¶¶ 4,16, JA VIII 2109-10, 2114. At the same time, there are almost 10,000 persons receiving services from DMR in the community and thousands more awaiting such services. *Tummino Aff.* at ¶ 4, JA VIII 2109-10. If Massachusetts is prohibited from exercising its discretion to close antiquated institutions like Fernald, its efforts to promote integration will be seriously stymied. It will be forced to devote disproportionately large levels of resources to a minuscule portion of the people it is required to serve, leaving the rest with no assurance at all that

their needs will be met. Tummino Aff. at ¶¶ 15-22, JA VIII 2114-17. This inequitable distribution of resources is inconsistent with the holding of *Olmstead*, principles of federalism, sound public policy, and basic common sense.

B. *The State Has Broad Discretion to Determine Which Programs It Should Fund to Prevent Segregation and Promote Integration.*

The Legislature has entrusted DMR with "supervision and control of all public facilities for mentally retarded persons," Mass. Gen. Laws c. 19B, § 1, and with responsibility for the development and maintenance, "subject to appropriation," of a "comprehensive program of community mental retardation services which shall include state schools and other facilities of the department." Mass. Gen. Laws c. 19B, §§ 12 & 13. These provisions confer on DMR broad discretion to allocate the scarce resources entrusted to it in the manner it determines best meets the needs of citizens with mental retardation. Unless the Legislature has "imposed specific restrictions on the reasonable methods by which an agency may carry out its mandate," DMR is free to exercise its discretion. *Williams v. Secretary of Executive Office of Human Services*, 414 Mass. 551, 609 N.E.2d 447, 459 (1993); accord, *Haverty v. Commissioner of Corrections*, 440 Mass. 1, 792 N.E.2d 989, 993 (2003).

Not only has the General Court imposed no restrictions on DMR's allocation of its resources, it has affirmatively

instructed DMR to close Fernald. As early as 2003, the Legislature directed DMR "to comply with the provisions of the *Olmstead* decision and to enhance care within available resources by taking steps to consolidate or close facilities and to report to the Legislature on a preliminary plan to close Fernald." 2003 Mass. Acts, ch. 26, § 2, line item 5930-1000.¹² Because the DO at ¶ 5 specifically preserves DMR's discretion over the allocation of its resources,¹³ the defendants must be permitted to implement state law directing it to close Fernald.

As the Supreme Judicial Court explained in *Matter of McKnight*, 406 Mass. 787, 798, 550 N.E.2d 856, 863 (1990):

The placement of individuals and the coordination of the provision of services financed by [DMR] are executive functions. Individually focused judicial mandates impinging on those functions are not generally warranted and would be disruptive of attempts to carry out broad departmental policies.

In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court,

¹² Similar language, including specific reference to the closure of Fernald, was contained in the 2004, 2005 and 2006 appropriations bills. 2004 Mass. Acts, ch. 149, § 2, line item 5930-1000; 2005 Mass. Acts, ch. 45, § 2, line item 5930-1000; 2006 Mass. Acts, ch. 139, § 2, line item 5930-1000. Although the current appropriations bill does not specifically reference Fernald, it again calls for the consolidation or closure of facilities to comply with *Olmstead*. 2007 Mass. Acts, ch. 61, § 2, line item 5930-1000.

¹³ Because of the fundamental importance to the Commonwealth of control over its resources to meet the varying needs of its citizens, including the needs of its citizens with mental retardation, it is inconceivable that DMR could or would have consented to the DO absent such a reservation.

in a closely analogous case, considered a challenge to a decision by the Bureau of Indian Affairs to close a particular mental health program and reallocate those funds to a nationwide mental health initiative. Finding no basis for judicial review, the Court explained:

[A]n agency's allocation of funds ... requires "a complicated balancing of a number of factors which are peculiarly within its expertise": whether its "resources are best spent" on one program or another; whether it "is likely to succeed" in fulfilling its statutory mandate; whether a particular program "best fits the agency's overall policies"; and "indeed, whether the agency has enough resources" to fund a program "at all." *Heckler [v. Chaney]*, 470 U.S. [821], at 831, 105 S.Ct. [1649], at 1655 [1985]. As in *Heckler*, so here, the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.*, at 831-832, 1055 S.Ct. at 1656.

508 U.S. at 193.

The Commonwealth informed the district court that in order to comply with the integration mandate of the ADA and state law it has designed its service delivery system to ensure an equitable and rational allocation of its limited resources, while encouraging placement of its clients in the least restrictive setting possible. See, DMR's Response to: (1) The Report of United States Attorney Michael J. Sullivan; and (2) The Court's Order [to] Show Cause Why An Injunction Should Not Enter, at 27-30, JA VII 1889-92. That policy is entirely consistent with the Supreme Court's admonition that States have an "obligation to administer services [to persons with mental disabilities] with an

even hand," *Olmstead*, 527 U.S. at 597, and with the right of state agencies to determine whether individuals are appropriate for community placement. *Id.* at 602 ("[T]he State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program.") The policy is also in accord with the voluminous professional literature that clearly demonstrates that people with mental retardation, regardless of the severity of the disability or length of their institutionalization, have a higher quality of life when they move to the community.¹⁴ Neither the lower court nor the Monitor considered the many variables, responsibilities, and constraints that were necessarily evaluated by the defendants in making the decision to close Fernald. Nor did the district court consider any of the factors required by the ADA and state law in determining that Fernald must remain open and remain a real placement option for the 186 current residents of the facility. As a result, the lower court, operating on pure conjecture, usurped and impeded DMR's

¹⁴ Copies and summaries of the relevant literature were submitted by the MARC and DLC to the Monitor. The studies were also made available to the district court as attachments to the Declaration of Gillian Rattray in Support of *Amici* brief of the Association of Developmental Disability Providers et al. in the District Court. (Docs. 199 to 199-22 of the trial court record). The *amici* intend to seek leave to file a similar brief in this Court.

statutorily conferred discretion to allocate its resources to meet the needs of all persons entrusted to its care.

C. There Is No Obligation for the State to Continue to Operate a Specific Institution.

Numerous other courts have concluded that States have broad discretion to close public facilities, that residents have no right to remain in a particular facility, and that federal courts have no role in requiring States to maintain specific facilities. The Fifth Circuit Court of Appeals has recognized that "the state reserves the right to unilaterally close a state school [for people with mental retardation] for administrative or financial reasons, even if it means that certain residents will have to relocate as a result." *Baccus v. Parrish*, 45 F.3d 958, 961 (5th Cir. 1995). See also, *Alexander v. Rendell*, no. 3:05-cv-00419-KRG (W.D. Penn. 2006) (Add. 47, 56) ("The Court concludes that the Defendants' closing of the Altoona Center and its plan for transfer of its residents serves both the public policy of the ADA, Rehabilitation Act and the applicable Medicaid statutes and proper judicial deference to the discretion of the state in determining the manner in which it allocates its resources."). In *Lelsz v. Kavanagh*, the court addressed a challenge to the closure of a state school and explained:

It is certainly true that closing a school may cause some residents deemed inappropriate for community placement to be relocated to one of the remaining

eleven state schools. The Court recognizes that in some cases hardship will result. The reality is, however, that *the State has always possessed the power-and frequently exercises the power-to relocate its residents for its own administrative needs. If it is so desired, the State could unilaterally close any of the State schools, for economic reasons or otherwise.* The ability of individual residents and parents to fight closure of their own school would likely be limited to political means.

Lelsz v. Kavanaugh, 783 F.Supp. 296, 298 (N.D. Tex. 1991), *aff'd*, 983 F.2d 1061 (5th Cir.), *cert. denied*, 510 U.S. 906 (1993) (emphasis added).¹⁵ The Seventh Circuit reached a similar conclusion in a case where plaintiffs claimed a right to have institutional services provided a short distance from their homes. *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 910-11 (7th Cir. 2003). The United States Supreme Court also rejected nursing home residents' claim of a right to challenge their transfer to another nursing facility, noting that the Medicaid Act "does not confer a right to continued residence in the home of one's choice." *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980). As these cases demonstrate, the district court Order requiring that Fernald be kept open must

¹⁵ *Lelsz* was similar to instant cases, involving all of the state-operated ICF/MR facilities in Texas. The district court approved several settlements, required several remedial plans, and entered several enforcement orders to vindicate the residents' constitutional right to habilitation and community services. One of those plans, opposed by parents and parent groups from several institutions, involved the State's decision to close several of its ICF/MRs and to transfer residents to other similar facilities or community programs.

be vacated.

D. Residents of Fernald Do Not Have a Federally Secured Right to Be Provided Habilitation in a Specific Facility.

The Supreme Court in *Olmstead* noted that States must be accorded leeway to operate a range of facilities and programs. 527 U.S. at 605. The exact blend of institutions and community settings is properly left to the State, provided that some range exists and provided further, and most importantly, that persons with disabilities are not forced to endure unnecessary segregation or isolation as a result of a State's decision to maintain its institutions.¹⁶ *Id.* at 601-602, 605.

The Court also afforded States broad flexibility to manage and distribute those resources to achieve the goal of non-discrimination. *Id.* at 605.

Finally, the Court noted that States must consider the needs of all of their citizens with disabilities, and allocate resources equitably. *Id.* at 604. For DMR, which provides

¹⁶ There is no suggestion that Massachusetts will eliminate all of its ICF/MR facilities. To the contrary, DMR has offered Fernald residents, just as it did Belchertown and Dever residents, a choice of moving to another state-operated ICF/MR. Enoch's Aff. of 5/31/07 at ¶ 65, JA VII 1971. The Court Monitor found that all current ICF/MRs comply with all requirements of federal law and provide "outstanding medical and social care." Report at 2-7, 26, JA VI 1692-97, 1716. Nevertheless, the district court entered the August 14 order requiring the defendants to offer a specific institution--Fernald--as a permanent placement option to all current Fernald residents. Order, Add. 1.

residential services to almost 10,000 non-class members and has a waiting list for thousands more, phasing down some of its extraordinarily expensive facilities that serve only a few hundred persons is a necessary and appropriate action to comply with the ADA. *Tummino Aff.* at ¶¶ 4, 15-22, JA VIII 2109-10, 2114-17.

Moreover, the right to object to a community placement under *Olmstead* is not the same as an affirmative right to remain in the institution of one's choice in the face of a State's reasonable decision to phase-down one of its institutions in order to comply with the integration mandate of the ADA. Nor does the ISP process guarantee an individual the placement of their choice or the right to remain in a particular facility or program. Rather, the process is founded upon the agency's authority to determine which facilities, programs, and services it will operate or fund. It retains the discretion to modify this determination at any time, subject to the due process rights of its clients. *See*, 115 Code Mass. Regs. § 6.25. To translate the ISP process into a veto process over state service and funding decisions, as the district court's order attempts to do, drastically undermines DMR's ability to accomplish its mission and the Commonwealth's duty to efficiently allocate its resources as specifically authorized by ¶ 5 of the DO itself. Basic principles of federalism dictate that such an intrusive order be vacated.

Stanley v. Darlington County School District, 84 F.3d 707, 716 (4th Cir. 1996) (“[i]t would be an unfathomable intrusion into a state’s affairs and a violation of the most basic notions of federalism for a federal court to determine the allocation of a state’s financial resources. The legislative debate over such allocation is uniquely an exercise of state sovereignty.”)

CONCLUSION

For the foregoing reasons, plaintiff-appellants, Massachusetts Association of Retarded Citizens and Disability Law Center, respectfully request that this Court vacate the district court Order of August 14, 2007.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, J. Paterson Rae, certify that:

1. This brief contains 8931 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
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 monospaced typeface using WordPerfect 10 in a 12 point Courier New font which provides 10 characters per inch.

February 13, 2008

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CERTIFICATE OF SERVICE

I, J. Paterson Rae, certify that on February 13, 2008 I have caused two copies of this brief to be served upon all counsel of record for the parties by first class mail, postage prepaid, addressed to:

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