

No. 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 AN AUGUST 14, 2007 ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

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This reply is submitted in response to the briefs of the appellees Fernald (Fernald), Wrentham (Wrentham) and the *amici* Coalition of Families and Advocates for the Retarded/Voice of the Retarded (COFAR).

I. The District Court’s Order Affords Current Residents a Right to Remain at Fernald Indefinitely and a Veto Over Any Transfer from Fernald, Even to Another State Operated ICF/MR Facility.

A. *The District Court Rested Its Decision Entirely Upon Its Erroneous Conclusion that a Decision to Close Fernald Fundamentally Impaired the ISP Process, Even Though Neither the Disengagement Order’s Requirements Concerning ISPs Nor the ISP Regulations Themselves Require that Residents of a Specific Facility Must Be Able to Chose to Remain in that Facility.*

The Fernald and Wrentham appellees attempt to characterize the district court’s August 14, 2007 Order (“Order”) as a “narrow” mandate that simply allows Fernald residents to rank Fernald as their ongoing placement preference.¹ Fernald Brief at 33; Wrentham Brief at 1. This mischaracterization is belied by the terms of the Order, the district court’s own explanation of its Order, and the recent actions of Fernald residents in asserting their rights under the Order.

The Order explicitly requires that Fernald be included as an available placement option for all current residents of the institution. The literal terms

¹ The appellees claim that “[t]he intent, and only real effect, of the Order is to promote a full discussion and consideration of guardians’ wishes in identifying where DMR will provide the services that are set forth in the Class Members’ ISPs.” Wrentham Brief at 13.

of the Order mandate that DMR’s communications with Fernald residents and guardians “include Fernald among the options which residents and guardians may rank when expressing their preferences.” Order at ¶ 2, Mass. Assoc. of Retarded Citizens/Disability Law Center Brief Add. (Arc Add.) at 1. Thus, the Commonwealth must inform all residents that Fernald can be requested by a resident *or* guardian during the ISP process. It would be disingenuous at the very least, and deceptive at worst, for the Commonwealth to provide the mandated communication and make the mandated offer if it did not intend to keep Fernald open. Conversely, any plan to close the facility would contravene the Order by misleading or even lying to class members whom DMR knew would insist on remaining in the institution. While the appellees argue that the Order simply promotes communication and an exploration of preferred placement options, they would hardly sit idly by if the Commonwealth allowed residents to rank Fernald as a preference and then blatantly disregarded that preference because it had determined that Fernald needed to be closed.²

² The Memorandum Decision (Memorandum) accompanying the Order specifically invites the plaintiffs to “bring the matter to the attention of DMR, and eventually, before this court,” if there is any suggestion that Fernald does not remain as a residential option for residents to elect. Mem. at 7, Arc Add. at 8.

The practical result of the lower court's Order is that, despite its disclaimers, it precludes the closure of Fernald unless all current residents elect to leave. As the district court explained:

[The order] simply declares that starting an ISP discussion with the assumption that Fernald is not an available alternative for its residents is not acceptable.

Mem. at 6, Arc Add. at 7 . The plain meaning of the court's justification of its Order, and the meaning promptly adopted and implemented by the vast majority of Fernald guardians, is that (1) ISP meetings must begin with the assumption that Fernald *is* an available residential alternative; (2) guardians' preference for their wards to remain at Fernald and to decline to consider other alternatives are controlling in the ISP process; and (3) therefore, Fernald cannot be closed unless no resident or guardian elects this alternative. No other plausible reading of the Order that is meaningful and honest to Fernald residents has been suggested by the appellees.

The district court's Order erroneously assumes that pursuant to a compliant ISP process, DMR must guarantee that it will continue to operate facilities like Fernald for as long as current residents elect to remain in this institution. Since the court's injunction finds that an ISP process which begins with the premise that a specific facility is not available is *per se* noncompliant, it is only logical that the court is requiring DMR to maintain

Fernald as an available alternative to current residents. The court justifies its far reaching injunction by claiming that the integrity, individuality, and “efficacy” of the ISP process is undermined if DMR exercises its undeniable discretion to determine what programs it should operate.

Tellingly, neither the district court nor the Fernald appellees point to any ISP provision or requirement in the Disengagement Order (hereafter “DO”) that supports its interpretation of a compliant ISP process. That is because there is no obligation to fund or maintain specific facilities. Rather, class members, like all DMR clients, are provided an individualized assessment and service planning process that allows them to select facilities and services from a menu of options, which, of necessity, is not limitless. Nor is the menu designed entirely by the district court or guardians. Because the district court’s Order erroneously assumes that a compliant ISP Process requires DMR to continue to offer Fernald as a residential placement for current residents, it must be reversed.³

³ The Fernald appellees also concede that the Order mandates that DMR cannot exercise its lawful discretion to close one of its facilities, nor implement a policy decision that Fernald should be closed. Fernald Brief at 30. Although the Fernald appellees argue that this mandate does not necessarily mean that DMR is forever precluded from closing this facility, they assert that this can only happen if the Fernald director certifies that another facility can provide “equal or better services.” *Id.* at 31. However, the appellees also argue, relying on professional articles most of which are over thirty years old, that the transfer of any current resident to another

B. By Explicitly Requiring That Fernald Be Included as a Placement Option for Current Residents, the Order Effectively Creates a Right to Remain at Fernald.

In its Memorandum, the district court explains that DMR must provide an ISP process which allows residents *or* guardians to select Fernald as their residential placement, and to oppose any transfer to another setting. Mem. at 4, Arc Add. at 5. If the ISP limits available placement options, it is *per se* deficient because it “damage[s] the Commonwealth’s ability to adequately assess the needs of Fernald residents as an individual [sic], as opposed to a wholesale basis.” *Id.*

The district court defines an adequate and compliant ISP process as one that not only plans services that meet the individual’s needs, but also one that provides a placement that the individual does not oppose. As the court stated:

... this court is simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate and whether it “is not opposed by the affected individual.”

Mem. at n. 16, Arc Add. at 6-7 (emphasis in original). Thus, the Court has made clear that the Commonwealth must not only allow guardians to rank Fernald as a preference, but also must not transfer the resident over the

facility could *never* provide “equal or better services” because of the negative effects of any transfer. In effect, they confirm the interpretation of the Order discussed herein: DMR is precluded from closing Fernald as long as any resident elects to remain.

opposition of the guardian.⁴ This is hardly a narrow order that merely allows guardians to include a particular facility on a list of possible options.

Significantly, the Fernald guardians themselves do not agree with the appellees' characterization of the Order. Almost immediately after the Order was entered, Fernald family members began to refuse to consider any placement option other than Fernald and undertook a coordinated campaign to avoid even a discussion of alternative placement in ISP meetings. Within six months, over a hundred and fifty guardians⁵ had written identical letters to DMR stating that they permanently were exercising their preference to keep their wards at Fernald and that they would never be interested in even discussing any other placement alternative. *See* Sample Letter appended

⁴ As explained in detail in our principal brief, DMR has an elaborate administrative process, followed by judicial review, through which a DMR client or family member can challenge any ISP decision. Arc Brief at 21, n.10. But this administrative process does not guarantee that the individual's preferences will prevail, only that it will be fairly considered. This administrative process was referred to in the DO and made the *sole* method of contesting individual service and placement decisions. DO at ¶ 7.a, Arc Add. at 14. Deeming these protections inadequate, the Order seeks to arm guardians with a veto over transfer from Fernald, regardless of the reasonableness of the transfer decision.

⁵ Because more than one letter was written for some residents, the number of class members impacted by this unconditional opposition to any place other than Fernald is approximately 125.

hereto.⁶ Addendum at 1. In effect, the guardians had adopted a “global policy” that their wards had a right to remain in this institution, and they would refuse to discuss transfer from Fernald, even to another institutional facility. To formalize their global position even further, the guardians filed their letters with the court, making their position on the scope of the Order part of the record in this case. To the extent that the goal of the Order was to promote communication, it has been a dismal failure.

The court’s Memorandum and the guardians’ actions leave no doubt that the Order permits current residents to select Fernald as their ongoing residential placement. It finds that for a treatment planning process to be compliant, it must not only accurately assess the individual’s needs and appropriately determine services designed to meet those needs, but it also must reflect the guardians’ preference for continued placement at Fernald. There was no evidence that the first of these two conditions were not met in the current ISP process. In fact, there was undisputed evidence from the Monitor’s review that the ISP process at Fernald met all federal and state requirements, including those in the DO. Monitor’s Rpt. at 13-16, JA VI: 1703-1706. Thus, the district court’s finding that the ISP process was not

⁶ The parties have filed a Stipulation with this Court pursuant to Fed. R. App. Pro. 10(e)(2)(A) providing that the 156 letters be included in the Record on Appeal and, in lieu of a Supplemental Appendix, that a copy of one representative letter could be included as an addendum.

“compliant” could only have been based on its factual determination and legal conclusion that the ISP process must, but did not, allow guardians to select Fernald as their preferred residential placement. Mem. at 4-5; Arc Add. at 5-6. Pursuant to the district court’s interpretation of a compliant ISP process, guardians who have included Fernald as the only residential alternative on their “list” cannot be required to select other placement possibilities. In other words, the court transformed the concept of a preference into a veto.⁷ In so doing, the court effectively created a right to remain at Fernald, since any other reading would render the Order meaningless or misleading.⁸

C. *The ISP Process That Is Required by the Disengagement Order and by DMR Regulations Does Not Constrain the Department’s*

⁷ The district court achieves this transformation obliquely but unmistakably. First, it notes that: “An essential function of the ISP process is to give residents and guardians a voice in important decisions.” Mem. at 4, Arc. Add. at 5. Then it finds that: “Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight.” From this premise -- that a policy decision to close a facility, contrary to the preferences of its residents, contravenes the “essential function of the ISP process” -- it then concludes that “such administration of the ISP process amounts to a “systemic failure” to provide a compliant ISP process, within the meaning of the Final Order.” Mem. at 5, Arc Add. at 6.

⁸ Appellees’ suggestion that the Order does no more than allow Fernald residents and guardians to place the facility on a “list” is belied by the guardians’ own actions that informed DMR and the court that Fernald was, and would forever be the only option they would consider. *See* Guardian letter, Arc Reply Add. at 1.

Authority to Determine Which Facilities It Will Operate or Fund.

The Disengagement Order's requirements for a "compliant" ISP process are general, leaving substantial discretion to DMR. *See* DO at ¶¶ 2(a), (b), Arc Add. at 10-11; *see also* Arc Brief at 13-14. The Monitor found no violation of these requirements. Monitor's Rpt. at 13-23, JA IV: 1703-13. Similarly, he found no violation of any state statutory or regulatory requirements that apply to the ISP or transfer process from Fernald. *Id.* Nevertheless, the district court determined that the ISP process at Fernald was not compliant with its DO, allegedly because the Commonwealth's policy determination to close the facility "disenfranchises the participants in this ISP process ... thereby undermining the efficacy of the ISP process." Mem. at 5, Arc. Add. at 6. The sole predicate for this conclusion is the Commonwealth's decision not to continue to operate Fernald, and not to continue to offer Fernald as a residential option. Thus, the district court interpreted the ISP compliance requirements of its DO as *precluding* a decision by the Commonwealth to close Fernald, despite the fact that the DO, by its very terms, allows DMR to close any of its ICF/MR facilities, including Fernald. DO at ¶ 5; Arc. Add. at 13; *see* Mem. at 6 n. 17, Arc Add. at 7 (acknowledging that no previous court order "prohibit[s] the possible closing of a facility").

The Wrentham appellees quote extensively from DMR’s current ISP regulations, suggesting that each provision is enforceable by the lower court in this case.⁹ Wrentham Brief at 8-9. But they ignore the plain words of the DO, which explicitly disavows any intention to make state law, including the ISP regulations, enforceable in federal court. DO ¶ 7(b), Arc Add. at 14. Rather, the proper measure of a compliant ISP process is one that meets, on paper and in practice, the ISP provisions required by the DO. *Id.* at ¶ 7(a). The current ISP process at Fernald clearly does. *See* Arc Brief at 13-16. There is nothing in these requirements that precludes DMR from determining that one of its facilities should be closed. To the contrary, these disengagement obligations explicitly include the discretion to “allocate resources to ensure equitable treatment of its citizens.” DO ¶ 5, Arc Add. at 13.

As more fully explained in Arc's opening brief, DMR has the authority and responsibility to determine which facilities and services it will operate or fund, provided that it offers professionally appropriate care to class members. Arc Brief at 29-33. This discretion is both endorsed by the

⁹ Significantly, the Fernald appellees, like the district court, do not even discuss the specific requirements of the ISP process that DMR allegedly violated, nor cite to even one ISP regulation or ISP provision of the DO that could conceivably justify the Order. This glaring omission speaks volumes about the legal justification for the Order.

DO, and not constrained by its ISP requirements. Moreover, even if state law provisions were relevant to this case, which they are not, they support the discretion of DMR to determine how to allocate its resources, whether to contract with specific providers and programs, and whether to operate specific institutional facilities. *See* G.L. c. 19B, §§ 12-13; *see also* Arc Brief at 29.

Even the ISP regulations themselves, on which the Wrentham appellees rely so heavily, explicitly recognize that DMR may close certain programs or not continue to provide existing services in the same manner or location. 115 Code Mass. Regs. § 6.63(1). To read these regulations as creating a prohibition on the defunding of an existing program or the closing of a facility converts an individualized planning process into an entitlement to veto state agency funding decisions.

D. DMR Did Not Constrain the Ability of Fernald Residents and Guardians To Express Their Preferences Regarding Placement.

The district court and the appellees attempt to justify the Order on the basis that DMR deprived Fernald residents and guardians from being able to express, and DMR from being able to “hear[] the voices and wishes of those most directly impacted.” Order at 5, Arc Add. at 6; *see also*, Fernald Brief at 30, 32-33, 44; Wrentham Brief at 13, 29, 35-36. However, it is abundantly clear that DMR provided ample opportunity for residents and

guardians to express their views regarding placement and all other issues related to the development of their ISP. Certainly after the Stipulation which bifurcated the discussion of services from placement, *see*, JA IV: 923-24, there can be no doubt that residents and guardians were provided with notice and the opportunity to share their preferences and concerns about both services and residential placement. This Stipulation, which was requested by the Fernald plaintiffs and urged and adopted by the district court, ensured that guardians could freely discuss needed services in the ISP process without regard to location and then voice their views on placement.

Under the guise of promoting communication, the Order, by not permitting DMR to approach the ISP process with the assumption that Fernald is closing, effectively dictates that no residents can be transferred against their will.¹⁰

¹⁰ The Fernald plaintiffs' suggestion that the ISP process somehow violated procedural due process is entirely untenable. Fernald Brief at 24-25. Not only is there no evidence or indication that any residents have been or would be constrained in any way regarding what they could present, assert or argue during the ISP meetings, but, should they disagree with any aspect of the ISP, they are provided a full panoply of due process protections, including the right to an informal dispute resolution process, the right to an adjudicatory hearing, and the right to judicial review of the administrative decision. 115 Code Mass. Regs. §§ 6.23(5), 6.30-6.34, 6.63(3) & (4), Arc Add. at 32-35, 39-46. A more comprehensive set of procedural due process protections would be difficult to devise. Not surprisingly the district court did not predicate its decision on such an untenable proposition.

II. There Were No Facts that Justified a Reopening of the Case and a Modification of the 1993 Disengagement Order.

A. There Was No Systemic Violation of the Disengagement Order.

In light of the findings by the Monitor that DMR had not violated any federal or state law or any provision of the DO with respect to the transfer of Fernald residents, it stretches credulity to assert that the Order could be predicated upon a systemic violation of the DO.¹¹ Not only is there absolutely nothing in the DO that prohibits the defendants from closing any facility which they determine is no longer needed, but the DO specifically reserves to DMR the right, in its discretion, to “allocate[e] its resources to ensure equitable treatment of its citizens.” DO at ¶ 5, Arc Add. at 13.

Furthermore, in 1992, just before the DO was entered and just after the successful closing of the Belchertown State School, the district court acknowledged that “the parties ... disagreed over ‘whether DMH can transfer residents to other state mental retardation institutions where that facility offers equivalent services and an equivalent environment...’” *Ricci*,

¹¹ If the decision to close Fernald is a *per se* violation of the DO, the earlier decisions to close the Belchertown and Dever ICF/MR facilities would have been also. That there was no such finding with respect to either closing strongly indicates that facility closure decisions were never envisioned by either the parties or the district court as violations of the DO. This is particularly telling because the Dever closing was very much on the mind of the Court at the very moment the DO was entered. *See, Ricci v. Okin*, 781 F. Supp. 826, 827-28 (D. Mass. 1992).

781 F.Supp. at 829 n. 7. This contemporaneous explication of the parties' positions demonstrates that the consent agreement which was incorporated into the DO has limited applicability to inter-institutional transfers.¹² Since DMH never agreed to be constrained with respect to "inter-institutional" transfers, other than to provide affected residents with an opportunity to obtain an administrative hearing to contest the decision, the DO cannot be properly read to prohibit a policy decision to close a facility when DMR is prepared to provide inter-institutional transfers to any residents who desire to remain in an ICF/MR. Here, DMR has offered to place all Fernald residents who wish to remain in an institutional setting at another ICF/MR facility, JA VI: 1567-69, 1713. The Monitor has found that the other ICF/MR facilities are all able to provide Fernald residents with "equal or better services." JA VI: 1704, 1713. Therefore, the Commonwealth's decision to close Fernald can not be considered a systemic violation of the DO.

¹² The Fernald appellees concede that the DO is a "consent decree," Fernald Brief at 16-17, which has significant implications for any modification of that decree. Courts are not free to modify the parties' agreement, when to do so is inconsistent with its terms or not necessary to achieve its purposes. *Brewster v. Dukakis*, 687 F.2d 495, 497-501 (1st Cir. 1982). Here, where the DO and the parties' longstanding practices endorsed facility closures without court interference and without any claim that it undermined the ISP process, the district court's modification is particularly untenable. *See* Section II(C), *infra*.

B. In Several Prior Facility Closures Involving Class Members, the Court Did Not Require that Residents Be Allowed to Choose That Facility as Their Continued Residential Placement.

The Belchertown State School was closed in 1992 and the Dever State School closed in 2002. In neither case did the district court mandate that current residents be permitted to remain at the facility or dictate that their guardians be allowed to choose that facility as a placement option.

In 1992, shortly after Governor Weld announced that Dever would be closed, the district court received a report of the federal Health Care Finance Administration documenting deficiencies at Dever that needed to be corrected in order for Dever to retain its Medicaid certification and federal funding. While the district court reminded the defendants that they were obligated to properly maintain the facility during the closure process, the court 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. at 830. The district court did not consider “the Commonwealth’s stated policy judgment that [Dever] should be closed” to have “damaged the Commonwealth’s ability to adequately assess the needs of the [Dever] residents on an individual, as opposed to a wholesale basis.” *Cf.*, Mem. at 4, Arc Add. at 5. Rather the

court specifically noted that “[t]he Decrees permit significant changes in the life circumstances of class members, including the anticipated movement of a majority of class members from institutional environments to community homes.” *Ricci*, 781 F. Supp. at 828. All of the Dever residents were successfully transferred to alternative residential placements without any court interference in the ISP process.¹³

Based upon its prior experiences with the closure of Belchertown and Dever, DMR developed a planning process and transition tools to ensure that all Fernald residents would receive all needed services and supports during and after their relocation to new residential settings. JA VII: 1952-53, 1962-64. DMR also entered into a stipulation with the Fernald plaintiffs that bifurcated the ISP process, in order to avoid any possibility that determinations of the needed services and supports might be adversely impacted or constrained by the available placement choices. JA IV: 923-24. DMR has also agreed, regardless of whether the ISP process indicates that a community placement is appropriate, to permit any Fernald resident to transfer to another ICF/MR. *See* Meacham Letter of 6/28/04, JA VI: 1567-69; Monitor’s Rpt. at 23, JA VI: 1713.

¹³ The experience at Belchertown was equally positive and proceeded without interference by the district court.

The defendants have undertaken considerable voluntary actions and made substantial accommodations to ensure the Fernald residents, their guardians and the court that all residents will have their identified needs met during their transition from Fernald to other residential placements. Despite these efforts and DMR's demonstrated ability to manage such facility closures, the district court has interceded in the ISP process at Fernald in a manner destined to confuse, complicate and likely thwart the defendants' efforts to allocate their scarce resources efficiently and effectively for Fernald residents, as well as thousands of other developmentally disabled individuals in the Commonwealth.¹⁴ This effort to micro-manage DMR's

¹⁴ The Fernald plaintiffs, echoing the speculative conclusions of the Monitor, offer as justification for the Order the possible harm that residents might experience if transferred. Fernald Brief at 39-42 & n. 5. Not only do the experiences with the closures of Dever and Belchertown belie those concerns, but studies of the impact of facility closures on developmentally disabled individuals also confirm that "transfer trauma is neither an absolute nor an unavoidable outcome of deinstitutionalization." Assoc. of Developmental Disabilities Providers Amicus Brief at 21, 22-27 (discussing numerous studies showing that residents' overall quality of life improved after transfer). Certainly, without the benefit of expert testimony, neither the Monitor nor the Court was in any position, either as a matter of judicial notice or otherwise, to make any findings on the possible impact of future transfers. As Justice Blackmun explained in his concurrence in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 804 (1980):

The fact of the matter, however, is that the patients cannot establish that transfer trauma is so substantial a danger as to justify the conclusion that transfers deprive them of life or liberty. Substantial evidence suggests that "transfer trauma" does not exist, and many

operation of its facilities and the ISP process is contrary to the district court's approach to prior facility closures, is belied by the experience of those successful closures, and certainly does not constitute a systemic violation of the ISP process today any more than it did previously.

C. By Requiring That Fernald Be Included as a Placement Option for Current Residents, the Order Modifies the Disengagement Order.

It is well established that “a party seeking modification of a consent decree bears the burden of establishing that a *significant* change in circumstances warrants revision....” *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992)(emphasis added). Furthermore, “[o]rdinarily..., modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree.” *Id.* at 385. Where a litigant is seeking, through modification, to impose additional obligations on a governmental defendant, serious federalism concerns are raised, making the movant's already “heavy burden” even more difficult. As *Rufo* makes clear, courts considering modification requests should, “based on the allocation of powers within our federal system,” appropriately “defer to local government administrators who have

informed researchers have concluded at least that this danger is unproved. [footnote omitted]. Recognition of a constitutional right plainly cannot rest on such an inconclusive body of research and opinion.

‘the primary responsibility for elucidating, assessing, and solving’ the problems of institutional reform.” *Id.* at 392 (quoting *Brown v. Board of Ed.*, 349 U.S. 294, 299 (1955)); *see also King v. Greenblatt*, 52 F.3d 1, 4 (1st Cir. 1995); *Mackin v. City of Boston*, 969 F.2d 1273, 1276 (1st Cir. 1992)(“An intrusion by a federal court into the affairs of local government should be kept to a bare minimum....”).

The appellees suggest that the Order is merely an interpretation of “the mandates already set forth in the Disengagement Order and is therefore squarely within its ‘four corners.’” Wrentham Brief at 29; Fernald Brief at 33. Interestingly, they do not cite to any specific provision of the DO that the Order purportedly “interprets.” That is because there is none. While both the appellees and the district court place considerable focus on the ISP process, all that the DO requires is that DMR not amend the ISP regulations without first consulting with the plaintiffs and that any such amendments must leave in place a process that is at least equivalent in various specified respects to the regulations in place at the time the DO was entered. DO at ¶¶ 2.b, Arc Add. at 11. No one has even suggested that DMR has amended the ISP regulations in violation of ¶¶ 2.b. Any suggestion that the Order requiring DMR to list Fernald as a placement option in its communications

with Fernald residents and their guardians is an interpretation of ¶2.b or any other section of the DO is entirely untenable.

Rather, the Order is a freestanding additional injunctive order imposed upon the defendants against their will. As such, it is certainly not an interpretation of the intent of the parties, including the Arc, when they consented to the DO, but rather a fundamental modification of the DO. *See, Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574-75 (1984) (reversing modification based on generalized purposes of the decree, rather than the specific provisions agreed to by the parties). Just as the *Stotts* Court could not discern any indication within the four corners of the decree that the City had agreed to depart from its seniority system in the event of layoffs, so too there is no indication that the defendants here ever agreed to explicitly offer residents of an institution they had decided to close the option of selecting that very institution as their new residential placement. Yet that is what the district court's Order requires the State to do. Despite the disclaimers, this Order is clearly designed to limit the defendants' ability to close Fernald over the objection of any current resident and to constrain DMR's discretion to allocate its scarce resources equitably to meet the needs of all whom it is charged to serve. The Order is a massive and unwarranted

modification of the consent agreement upon which these consolidated cases were settled and cannot be allowed to stand.

D. The District Court's Decision Was Based Solely on the Commonwealth's Decision to Close Fernald.

Wrentham attempts to identify several alleged factual changes that justify the Order modifying the DO, including a purported state policy to close all ICF/MRs. Wrentham Brief at 32. But the one and only fact upon which the district court based its Order was the planned closure of Fernald, a fact that was clearly anticipated at the time the DO was entered.¹⁵

The Order is predicated entirely on the “Commonwealth’s stated global policy judgment that Fernald should be closed....” Mem. at 4, Arc Add. at 5. Although there are repeated references to the closure of Fernald and its impact on current residents, there is absolutely no mention of any state policy to close other facilities. *Id.* at 1-7, Arc Add. at 2-8. Further confirmation that the only basis for the Order was the closure of Fernald is found in the text of the Order itself, which is entirely focused on the transfer of Fernald residents. Order, Arc Add. at 1. Because the only factor identified by the district court in its decision was the closure of Fernald, the

¹⁵ Wrentham appears to grudgingly concede that the closure of Fernald was foreseeable at the time the DO entered. Wrentham Brief at 32 n. 10.

other alleged facts which Wrentham asserts as possible justifications for the Order are irrelevant.

1. The District Court Did Not Mention, Let Alone Rely Upon, the Policy Decision of a Prior Administration to Close All ICF/MR Facilities As Grounds for the Modification of its Disengagement Order.

Wrentham's assertion that the announcement in February 2003 by then Governor Romney that he would like to close all ICF/MR facilities provides a basis for upholding the Order fails even the most cursory scrutiny. Wrentham Brief at 32. First, at the time that the district court entered its Order, Governor Romney was no longer in office, having been replaced by a Democratic administration. There is absolutely no evidence in the record indicating that Governor Romney's desire to close all ICF/MR facilities was then, or is now, shared by Governor Patrick and his Administration.¹⁶ Absent such evidence, it would have been inappropriate to predicate an order modifying an institutional reform decree on a stale pronouncement by a prior administration. Not surprisingly, the district court did not do so. Just as the district court wisely ignored this irrelevant and factually questionable predicate for modification, so too should this Court.

¹⁶ See, Walker, *A Closer Look at Fernald*, Boston Globe, July 27, 2007 (http://www.boston.com/news/local/massachusetts/articles/2007/07/27/a_closer_look_at_fernald/) (indicating that Governor Patrick is undertaking his own assessment of the issue).

2. The District Court Made No Findings of Fact, or Otherwise Relied Upon Any Evidence of DMR's Intimidation of Families.

Wrentham also claims that DMR intimidated Fernald residents into accepting alternative placements. Wrentham Brief at 32. Not only did the district court not base its Order on such bald assertions of misconduct by DMR, but the Monitor investigated these allegations and found them to be baseless. Specifically, the Monitor “verified that DMR received the consent of all of the guardians for the transfer of all 49 individuals from Fernald.” Monitor’s Rpt. at 19, JA VI: 1709. The Monitor also reported, in response to allegations by the appellees that DMR did not obtain informed consent prior to the transfers, that “[o]ur office did not find that DMR initiated any transfers without the full knowledge and consent of guardians. There were no allegations from any of the guardians, or from our medical doctors, that there were any unmet active treatment needs for the individuals transferred.” *Id.* at 22, JA VI: 1712. The Monitor also reported that “[a]ll of the individuals that responded to the Post Placement Satisfaction Surveys affirmatively stated that they participated in planning for their ward’s placement.... The written commentary reflected extremely positive attitudes regarding the moves.” *Id.*

What Wrentham considers intimidation were simply the reasonable efforts of DMR to engage the guardians and their wards in a discussion of all aspects of the ISP process, which, as specified in 115 Code Mass. Regs. 6.23(4)(e)(1)-(3), Arc Add. at 43-44, includes not only the individual's goals, needs, and supports, but also the setting in which those supports and services will be provided. *See* Wrentham Brief at 13-21. Indeed, Wrentham's entire discussion about intimidation is predicated on their position that DMR does not have the right to close Fernald, for, if DMR does have that right, then notifying guardians and wards of its intentions could not conceivably be considered intimidation. To fail to apprise them of such a critical piece of information would impair their ability to make informed decisions during the ISP process.

Although allegations of intimidation prompted the district court to order the Monitor to investigate this issue, he found the allegations to be wholly without merit. Monitor's Report at 13-23, JA IV: 1703-13. Not surprisingly, the district court made no mention of intimidation in either its Memorandum or the Order. These baseless allegations do not provide any permissible justification for modifying the DO.¹⁷

¹⁷ The other purported factual changes that Wrentham lists are the deaths of some transferred Fernald residents, allegations of increased abuse in community settings, and the Monitor's speculative and conclusory

III. The District Court's Order Is Neither Compelled By Nor Consistent With the Americans with Disabilities Act.

A. *The Supreme Court's Decision in Olmstead v. L.C. Determined Only That Unnecessary Institutionalization Constitutes a Form of Segregation and Discrimination that Violates the ADA.*

The critical significance of *Olmstead* to this case is found in the Supreme Court's holding: "Unjustified isolation, we hold, is properly regarded as discrimination based on disability." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999). The Court, after noting that "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'form of discrimination,'" explained the reason why such segregation is discriminatory:

assumption that a move to a different residential setting might negatively impact some Fernald residents. Even Wrentham acknowledges that "the deaths may have occurred regardless of where the individual resided..." Wrentham Brief at 43. Without any evidence tying these unfortunate deaths to the transfers, this fact is probative of nothing, and the district court recognized as much by not relying upon it. Even Wrentham appears to recognize that "allegations" of abuse are not evidence upon which an injunctive order can be based, for it makes no argument whatsoever related to this issue. With respect to the Monitor's speculative concern that some residents might suffer an adverse impact if they have to transfer from Fernald, this is not even a fact, much less a factual change. Therefore, it is not a basis for modifying the DO. Furthermore, as discussed in Arc's principal brief at 20-22, speculation and conjecture about what may happen in the future is not an appropriate basis upon which to enter an injunctive order, especially one that intrudes upon the autonomy of state government. *See, O'Shea v. Littleton*, 414 U.S. 488, 500-01, 502 (1974); *Miller v. Silberman*, 951 F.Supp. 485, 491-92 (S.D.N.Y. 1997).

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Id. at 600-01(citations omitted). Ultimately, the Court held that “States are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” *Id.* at 607.

The plaintiffs in *Olmstead* were seeking transfer from a segregated institutional placement to an integrated community setting. The Court’s holding, understandably and appropriately, addressed only whether unnecessary institutionalization constituted discrimination and concluded that it did. The suggestion by the Fernald plaintiffs and COFAR *amici* that

Olmstead somehow mandates that the Commonwealth keep Fernald open as long as any current resident wishes to stay there is illogical at best.¹⁸

1. *Olmstead's* Dicta Concerning a State's Discretion to Maintain a Range of Facilities Does Not Mandate That States Maintain Institutions, and Certainly Not a Particular Institution.

The COFAR *amici* and Wrentham appellees predicate their defense of the Order in significant part on Justice Kennedy's concerns that the *Olmstead* decision not lead to inappropriate community placement without needed services and supports. *Olmstead*, 527 U.S. at 610. However, the DO, the ISP regulations and the transfer protocol developed by the defendants ensure that no current Fernald resident in need of institutional care will be transferred to a community setting. Indeed, under the transfer protocol, any Fernald residents, whether or not their ISP evaluation indicates

¹⁸ That this is the position of the COFAR *amici* and, indeed, the ineluctable result of the Order, is made clear at p. 25 of their brief where they assert that "the Supreme Court's language in *Olmstead* concerning the factors that must be considered prior to a transfer – including, *most fundamentally, the views of the affected individual* – dictates that those factors must also be considered in *Ricci*." (emphasis added). The Fernald plaintiffs echo this refrain at pp. 35-36 of their brief. Because DMR has promised to provide an institutional placement to any Fernald resident who prefers such a setting, the reliance by Fernald and COFAR on *Omega Healthcare Investors v. Res-Care, Inc.*, 475 F.3d 853 (7th Cir. 2007) is misplaced. Indeed, appellees repeatedly attempt to transform statements regarding the choice between institutional and community-based care into assertions of a right to choose the specific institution at which their care will be provided. However there is simply no authority for such a proposition and they have provided none.

that they are appropriate for community-based care, can choose among a wide array of placement options, including continuing to receive services in another DMR-operated ICF/MR facility. JA VI: 1567-69. DMR has approached the closure of Fernald with great sensitivity to both the needs and desires of the current residents and the concerns expressed by Justice Kennedy.

The *Olmstead* Court recognized that “[t]o maintain a range of facilities and administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense [of the ADA] to allow.” *Olmstead* at 605. Justice Kennedy similarly cautioned that “[i]t is of central importance, then, that courts apply today’s decision with great deference to the medical decisions of the responsible treating physicians and, as the Court makes clear, *with appropriate deference to the program funding decisions of state policymakers.*” *Olmstead*, 527 U.S. at 610 (Kennedy, J. concurring) (emphasis added). Justice Kennedy’s concern that States might misinterpret *Olmstead* to *require* the closure of *needed* institutions did not signal any legal impediment arising from the ADA or any other source to a State closing some or all of its institutions. As Justice Kennedy explained, “[n]o State has unlimited resources, and each must make hard decisions on how

much to allocate to treatment of diseases and disabilities. If, for example, funds for the care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment, however, is a political one and not within the reach of the statute.” *Id.* at 612. As Justice Kennedy went on to note, grave constitutional concerns are raised when a federal court steps in and interferes with such fundamental policy decisions of the State. *Id.*

The decision to close Fernald was precisely the type of “program-funding decision” regarding the appropriate “range of facilities” to meet the needs of all citizens with mental retardation “with an even hand” that both the *Olmstead* plurality and Justice Kennedy identified as a core State function. The district court’s decision to interfere with that decision contravenes well-recognized federalism principles and most certainly is not supported by either *Olmstead* or the ADA, both of which are concerned with the “unjustified institutional isolation of persons with disabilities.” *Id.* at 600. Especially here, where the State defendants have agreed to continue to

provide all Fernald residents with the option of transferring to another ICF/MR, the district court's Order is particularly unwarranted.¹⁹

B. Olmstead's Emphasis on Individualized Assessments Is Amply Met Through the ISP Process.

A major focus of the COFAR amicus brief is the proposition that *Olmstead* mandates that any state-initiated transfer from a segregated institution to an integrated community setting be based upon an individualized assessment of the resident's needs. Whether or not *Olmstead* actually mandates such a process in the context of an institution closure is of no consequence in the context of this case because the DO and DMR's own

¹⁹ The decision to close Fernald is clearly a matter of state law and policy. The Supreme Court made clear in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980), that the right to care or treatment at government expense "do[es] not confer a right to continued residence in the home of one's choice." As a result, the *O'Bannon* Court held that nursing home residents did not have the right to an administrative hearing to contest the State's decision to decertify the nursing home and terminate Medicaid payments. See also *Rosen v Goetz*, 410 F.3d 919, 926 (6th Cir. 2005) ("'matters of law and policy,' as opposed to matters of fact or the application of law, 'are not subject to any hearing requirements....'") *aff'd* *Rosen v. Goetz*, 129 Fed.Appx. 167, 171-72, 2005 WL 843883 at *4 (6th Cir. 2005).

Yet the Order invites a series of administrative hearings and possible state court appeals by residents challenging the policy decision to close Fernald. As such, it not only seeks to restrict the State's discretion in funding disability services, contrary to the admonition of the *Olmstead* court, but it subjects the State's policy decision to hundreds of separate administrative hearings.

ISP regulations require it.²⁰ In addition to the ISP regulations which mandate a comprehensive client-centered, individualized assessment of the resident's needs, *see*, 115 Code Mass. Regs. §§ 6.20 – 6.25, Arc. Add. At 26-39, the defendants have also agreed, in order to alleviate concerns expressed by the Fernald plaintiffs, to bifurcate the ISP process, addressing support and service needs first, and placement options later. JA IV: 923-24.

There was no credible evidence that DMR was failing, or would in the future fail, to engage in an individualized assessment of Fernald residents' needs in making transfer and placement decisions. To the contrary, all the evidence points in the other direction. The Monitor's Report documents that all recent transfers from Fernald have complied with the individualized support planning requirements of the DO and DMR regulations. Monitor's Rpt. at 13 – 16, JA VI: 1703 – 1706. There was considerable evidence that DMR will continue to provide a robust individualized needs assessment for

²⁰ *Capitol People First v. Dep't of Developmental Services*, 155 Cal. App. 4th 676, 66 Cal. Rptr. 3d 300 (Cal. App. 1st Dist. 2007) and *Ligas ex rel. Foster v. Maram*, 478 F.3d 771 (7th Cir. 2007), relied upon by the COFAR amici, are irrelevant to an analysis of the requirements of the ADA. Both cases concerned intervention motions denied because, as here, all parties agreed that the plaintiff class should be accorded an individualized assessment of need prior to transfer. Moreover, at least Justice Kennedy did not feel that the ADA provisions at issue in *Olmstead* required individualized assessments. *Id.* at 614 (“Nor do [the ADA integration mandate provisions] necessitate a regime in which individual treatment plans are required....”).

all current residents prior to any transfer. Under such circumstances, it was entirely inappropriate for the district court, based upon unfounded speculation about what might happen in the future, to interfere with the ISP process by issuing its Order.

C. *Olmstead Does Not Mandate that the Individual's Preferences Must Be Implemented In All Cases, and Certainly Not When that Preference Is for a Segregated Institution.*

The Fernald plaintiffs, Wrentham, and the COFAR *amici* place heavy emphasis on that part of the *Olmstead* holding that qualifies the State's obligation under the ADA to transfer an individual to a less restrictive setting on the affected individual's willingness to accept the transfer. Fernald Brief at 34-35; Wrentham Brief at 48, 50; COFAR Brief at 14-15, 22-23. This is hardly a remarkable qualification in the context of that case. Indeed, if the *Olmstead* plaintiffs did not want to obtain treatment in the community, there would have been no case.

The fact that an individual cannot complain about discriminatory treatment if the State accedes to his wishes to remain in a segregated institution does not mean that a State's refusal to accommodate his preference for institutional care is itself discriminatory.²¹ Otherwise,

²¹ The decision in *Alexander v. Rendell*, Civ. No. 05-419J (W.D. Pa. 3/9/2006) (Wrentham Brief Add. at 11-18) is not to the contrary. The Court's determination that the guardians would have the final say regarding

individuals could require the State to continue providing expensive institutional care that is no longer needed, simply by refusing to move. Clearly, nothing in the ADA or any other law obligates the State to expend its scarce resources on expensive institutional care, especially if not needed, simply because the individual prefers such care.

Here, the State defendants have agreed to provide all Fernald residents with continued institutional care at one of its five other ICF/MR facilities. Thus, even if some Fernald residents are determined as a result of the ISP process to no longer need institutional care, they will not be forced to relocate into the community. Indeed, any Fernald residents who do transfer into the community and then decide that they would prefer to return to an institution will be allowed to transfer back to an ICF/MR. JA IV: 1566, 1568.

The defendants have developed a plan that ensures appropriate care for all Fernald residents and maximum individual choice. They have gone

whether their ward would be transferred to a community placement or another institutional setting was based on an interpretation of the terms of the settlement agreement, informed by certain promises and representations made by the state during the litigation. *Id.* at 3-4. Significantly, it did not alter the Court's earlier ruling that the closing of the Western Center ICF/MR "serves both the public policy of the ADA, Rehabilitation Act ... and proper judicial deference to the discretion of the state in determining the manner in which it allocates its resources." *Alexander v. Rendell*, Civ. No. 05-00419, slip op. at 10 (W.D. Pa. 1/30/06), Arc Add. at 56, ¶16.

well beyond any obligations of the DO, the ISP regulations, or the ADA to ensure that the needs and preferences of the Fernald residents are addressed to the maximum amount possible. The Order cannot possibly be sustained by any valid interpretation of *Olmstead* or the ADA. Rather, it directly conflicts with *Olmstead's* repeated cautions that federal courts should not interfere with State discretion regarding the allocation of its scarce resources.

D. The Supreme Court's Decision in Olmstead Did Not Involve Persons Who Sought to Remain In Institutions and Creates No Rights or Procedures Applicable to Those Seeking Continued Institutionalization.

There is nothing in *Olmstead* that suggests that a State has to provide institutionalized care at the facility of the resident's choosing. As the district court recently explained in *Rolland v. Patrick*, Civ. No. 98-30208-KPN, slip op. at 17-18 (D.Mass. 6/16/08) (emphasis in original)(Addendum at 2, 18-19), "neither federal nor state law gives class members the right to reside in a particular facility. [citations omitted]. If anything, federal law *requires* Defendants to consider community placement...."²²

Olmstead involved claims under the ADA by two individuals seeking a transfer from an institution to the community. Their discrimination claims were based upon both the Congressional findings that unnecessary

²² See also, Arc Brief at 33-34.

institutionalization is a form of discrimination and the specific regulatory requirement that services be provided in the most integrated setting appropriate to the needs of the individual. 42 U.S.C. §§ 12101(a)(2), (3), (5), 28 CFR § 35.130(d). Based upon our society's long and unfortunate history of unnecessarily segregating and excluding individuals with mental disabilities from society, Congress was well within its authority under § 5 of the Fourteenth Amendment in prohibiting unnecessary institutionalization in the provision of public services in Title II of the ADA. *See, Tennessee v. Lane*, 541 U.S. 509, 521-22 (2004). However, the converse -- inappropriate integration of individuals with mental disabilities into society -- has not been commonplace and certainly was not addressed as a form of discrimination when Congress enacted the ADA. Indeed, had Congress attempted to make state-initiated transfers from more to less integrated settings illegal, the prohibition would likely have exceeded its authority. *See, Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-71 (2001). Since transfer from a segregated institution to an integrated community setting cannot be a form of discrimination, the ADA cannot be invoked to prevent the closure of a state facility.

CONCLUSION

For the foregoing reasons and those set forth in Arc's Main Brief, the Massachusetts Association of Retarded Citizens and the Disability Law Center respectfully request that the Order be vacated.

June 20, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, J. Paterson Rae, certify that:

1. This brief contains 6567 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 proportionally spaced typeface using Microsoft Office Word 2003 in a 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I, J. Paterson Rae, certify that on June 20, 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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