COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR-_____
Appeals Court No. 2021-P-0730

THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC., et al.,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE DEPARTMENT OF DEVELOPMENTAL SERVICES, et al.,

Defendant-Appellant.

On Appeal from an Order of the Bristol County Probate and Family Court, Docket No. 86E-0018-GI

JOINT APPLICATION FOR DIRECT APPELLATE REVIEW

Timothy J. Casey (BBO No. 650913)
Elizabeth Kaplan (BBO No. 568911)
Timothy D. Hartnett (BBO No. 679654)
Christine Fimognari (BBO No. 703410)
Assistant Attorneys General
Government Bureau
One Ashburton Place
Boston, MA 02108
timothy.casey@state.ma.us
(617) 727-2200

Attorneys for Defendant-Appellant Commissioner of the Department of Developmental Services

Michael P. Flammia (BBO No. 552104)
Christian B.W. Stephens (BBO No. 666097)
Matthew D. Rodgers (BBO No. 681761)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
mflammia@eckertseamans.com
(617) 342-6800

Attorneys for Plaintiff-Appellee
The Judge Rotenberg Educational Center, Inc.

Max D. Stern (BBO No. 479560)
Joseph M. Cacace (BBO No. 672298)
TODD & WELD LLP
One Federal Street
Boston, MA 02110
mdstern@toddweld.com
(617) 720-2626

Alexandra H. Deal (BBO No. 660645)
PAIK, BREWINGTON & DEAL, LLP
6 Beacon Street, Suite 305
Boston, MA 02108
adeal@pbdlaw.com
(617) 439-0150

Attorneys for Plaintiffs-Appellees
Leo Soucy, Individually and as Parent and Next Friend of B.S.,
Peter Biscardi, Individually and as Parent and Next Friend of P.J.B.,
Both as Representatives of the Class of All Patients at
The Judge Rotenberg Educational Center, Inc.,
Their Parents, and Their Guardians

C. Michele Dorsey (BBO No. 542155)
P.O. Box 1137
North Eastham, MA 02651
attorneydorsey@comcast.net
(781) 771-3935

Attorney for Plaintiffs-Appellees
The Patient Members of the Class

JOINT INTRODUCTION

All parties (collectively, the "Parties") hereby jointly apply, pursuant to Mass. R. App. P. 11 and G.L. c. 211A, § 10(A), for direct appellate review of this appeal by the Supreme Judicial Court ("SJC").

This appeal concerns a June 20, 2018 Order by the Bristol County Probate and Family Court denying a motion under Mass. R. Civ. P. 60(b)(5) to vacate a 1987 consent decree ("Consent Decree") which has governed the Parties' relationship for over three decades. A copy of the lower court docket is appended hereto at Appendix ("A.") 1-80. A copy of the lower court rulings under review—specifically, (1) the June 20, 2018 Order and (2) the Court's stated rationale and findings of fact supporting its ruling, also issued on June 20, 2018 ("Decision")—are also appended hereto. *See* A81 (Order); A82-131 (Decision).

The appellant is the Commissioner of the Department of Developmental Services ("DDS"). The appellees are The Judge Rotenberg Educational Center, Inc. ("JRC") and a class of all JRC patients, their parents, and their guardians[1] (collectively, "Appellees").

This appeal was docketed in the Appeals Court on August 12, 2021. DDS filed its principal brief on February 18, 2022, and the Appeals Court accepted

[1] The patient members of the class are represented by separate counsel to ensure their interests are adequately represented within the class. *See JRC v. Comm'r of the Dep't of Mental Retardation (No. 4)*, 424 Mass. 476, 480 (1997).

DDS's brief for filing on March 3, 2022. Appellees' responsive brief(s) are presently due on July 5, 2022. Oral argument has not yet been scheduled.

The Parties generally dispute the merits of this contested appeal. Nonetheless, the Parties agree that this appeal should be heard and decided, in the first instance, by the SJC, for the reasons they respectively state below. The Parties submit the following respective position statements for the sole purpose of seeking direct appellate review. The statements below have not been jointly prepared and are not intended to address any statements or assertions made by an opposing party in this joint application. Therefore, the failure by any party to respond to a statement advanced by an opposing party in support of this joint application is not intended to be, nor should be, construed as either waiver or agreement with the opposing party's statement.

APPELLANT'S POSITION

Since 1987, a Consent Decree has governed DDS's and its predecessors' regulation of JRC, a private residential service-provider for persons with developmental disability and other mental-health conditions. As described in DDS's opening brief,[2] the Decree, intended to last approximately one year until JRC regained its license, has allowed JRC to develop and use a highly

[2] On file with the Appeals Court. *See* No. 2021-P-0730, Paper #14

controversial form of treatment—electric skin shock—on developmentally disabled persons. Br.13-15, 67-69, 82-84.

No other provider in the world, and none treating the many patients across this country exhibiting extremely challenging behaviors, employs skin shock. A majority of states have banned it, including Massachusetts: a 2011 DDS regulation prospectively banned skin shock and other "Level III aversive" treatments for new patients. Indeed, since 1987, a near-universal professional consensus has developed that skin shock is inconsistent with the standard of care: its efficacy is highly questionable, and other less restrictive, highly effective forms of treatment have emerged. In 2012, the federal Centers for Medicare & Medicaid Services ("CMS") ended federal funding to DDS for JRC residents because of JRC's use of shock. And in 2016, the FDA issued a proposed rule—finalized in 2020, before being challenged by JRC—banning JRC's Graduated Electronic Decelerator ("GED") skin-shock devices, finding their risks and harms outweighed their questionable therapeutic benefit. But JRC, employing the Decree as a shield, has continued to use GED with new patients and resisted DDS's efforts to ensure JRC uses skin shock only when it is the least restrictive effective treatment, as DDS's regulations require; rather, JRC often uses skin shock for minor behaviors, like getting out of chairs, spilling drinks, or inappropriate urination or defecation. Br.13-15.

The Probate Court grievously erred in denying DDS's motion to vacate the Decree under Rule 60(b)(5). A lower court abuses its discretion "when it refuses to modify an injunction or consent decree" after being presented with significant changed circumstances. *Horne v. Flores*, 557 U.S. 433, 447 (2009). Relief is appropriate when—as here—(1) "enforcement of the decree without modification would be detrimental to the public interest," *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); (2) intervening "significant change[s]" in law or fact make continued enforcement inequitable, *Atlanticare Med. Ctr. v. Division of Med. Assistance*, 485 Mass. 233, 247 (2020); or (3) "the decree has served its purpose, and there is no longer any need for the injunction," *Mitchell v. Mitchell*, 62 Mass. App. Ct. 769, 779 (2005). For "institutional reform litigation" like this, where injunctions "often remain in force for many years" and "commonly involve[] areas of core state responsibility," consent decrees risk "improperly depriv[ing] future officials of their designated legislative and executive powers." *Horne*, 557 U.S. at 447-49. Courts must thus "ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant." *Id.* at 450.

Continued enforcement of the Decree violates the separation of powers and the public interest. It is an affront to our constitutional system to continue to shield from regulatory oversight a provider that administers a form of treatment allowed

nowhere else in the nation. The Legislature has given DDS broad power over "all matters affecting the welfare of" developmentally disabled persons, including supervising "all private facilities for such persons," and the responsibility to promulgate regulations establishing "the highest practicable professional standards" for their treatment, "adaptable to changing conditions and to advances in methods of care and treatment." G.L. c.19B, §1; G.L. c.123B, §§1-2. Exercising this responsibility, DDS prospectively banned Level III aversives, but JRC, relying upon the Decree, continues to obtain Probate Court approval to use GED on new patients, and to resist DDS's regulatory oversight of its program. The Probate Court has effectively ratified JRC's use of the Decree, violating this Court's admonition that "[i]f accepted professional practices would tolerate the unavailability or the nonuse of aversives…and [DDS] elects to follow that professional practice, the courts must respect that judgment." *Matter of McKnight*, 406 Mass. 787, 801 (1990). Br.64-66.

Significant changes in fact and law also warrant vacating the Decree, including the 2011 DDS regulation prospectively banning Level III aversives; the professional consensus that skin shock is no longer consistent with the standard of care; CMS's barring federal financial reimbursement for JRC's care; FDA's efforts to ban the GED; and significant developments in non-aversive treatment for people with developmental disabilities. The Probate Court disregarded the weight of the

entire evidence, and instead focused on isolated evidence showing that some clinicians supported some aversives in some circumstances. In doing so, the court conflated limited evidence supporting some aversives with the almost non-existent support for skin shock outside JRC. And the court held DDS to an impossible standard not required by Rule 60(b)(5), finding DDS had not established a standard-of-care change for lack of a showing all JRC residents could be treated more effectively without GED. Br.67-81.

Finally, the Decree should be vacated because its limited purpose has been fulfilled. The Decree was meant to remedy 1980s-era actions by DDS's predecessors by restoring JRC's license, allowing it to resume intake of patients, and requiring state agencies to give "equal consideration" to JRC in referring new patients, with JRC required to get substituted-judgment court approval before using Level III interventions. The Decree was not intended to grant JRC a "permanent guarantee" to use Level III aversives, as JRC has claimed, nor exempt it from standard regulatory oversight. And DDS has fulfilled the Decree's purpose in good faith: continuously licensing JRC and renewing its Level III certification, increasing patient referrals, and doubling funding to JRC over time, despite losing CMS reimbursement. Contrary to the Probate Court's conclusion that DDS has continued to regulate JRC in bad faith since the 1980s and 1990s, DDS's recent regulatory actions were completely consistent with its regulatory authority and

responsibility to supervise JRC's Level III program, and thus fully entitled to the usual strong presumption that government officials act in good faith. Br.81-95.

APPELLEES' POSITION

This appeal involves the Consent Decree, first entered in 1987, which concerns the treatment of a small group of patients who suffer from profoundly disabling disorders which cause them to inflict devastating and potentially lethal injuries upon themselves and others. The Consent Decree guarantees the right of these patients, who are otherwise wholly resistant to treatment, to benefit from certain life-saving "aversive" therapies—most importantly, the administration of a harmless two-second skin shock from a Graduated Electronic Decelerator ("GED") device as part of a Probate Court-approved and Probate Court-monitored individualized behavioral treatment plan for each impacted patient. This treatment has allowed them to live safe and fulfilling lives.

However, the treatment has always been controversial on philosophical or moral grounds, and this difference of opinion has resulted in repeated attempts by various administrations of DDS and its predecessors,[3] through deceptive and other bad faith conduct, to eliminate the therapy and to evade the requirements of the Consent Decree. These actions have brought the parties to this Court on numerous

[3] DDS was formerly known as the Department of Mental Retardation ("DMR"). *See* St. 2008, c. 182, § 113.

prior occasions. *See JRC v. DMR*, 424 Mass. 430, 432 (1997) (No. 1) (direct appellate review); 424 Mass. 471, 472 (1997) (No. 2) (same); 424 Mass. 473, 475 (1997) (No. 3) (same); 424 Mass. 476, 477 (1997) (No. 4) (same); *Guardianship of Brandon*, 424 Mass. 482, 485 (1997) (transferred to the SJC on its own motion); *Matter of McKnight*, 406 Mass. 787, 789 (1990) (direct appellate review).

In this latest chapter, DDS has sought to vacate the Consent Decree pursuant to Rule 60(b)(5). It asserts that the Court's Order violates the principle of separation of powers. It also claims that vacating the Consent Decree is warranted by significant changes in law and fact, as discussed in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992). As for the law, DDS argues that its promulgation of a new administrative regulation contradicting the Consent Decree and banning the treatment constitutes just such a change. DDS also asserts that certain supposed advances in medical care—an alleged change in the standard of care brought about by the advent of the philosophy of "PBS" (Positive Behavioral Supports) and the development of certain new drugs—make the treatment, and therefore the Consent Decree, unnecessary. Moreover, DDS contends that because it is no longer engaged in the type of "bad faith regulation" that the courts, including the SJC, had previously found it committed, it should now be free to regulate JRC without the protections of the Consent Decree.

Appellees will argue that none of the criteria for dissolving a consent decree are satisfied here. The SJC has previously rejected similar separation of powers challenges. *See JRC (No. 1)*, 424 Mass. at 443-66 (rejecting three separation of powers arguments by DMR). Nor can DDS unilaterally withdraw from the Consent Decree, which has been relied upon by patients for years, simply by issuing a new regulation and characterizing it as a change in law—when it is, in fact, no more than an *ipse dixit*. As for the facts: after 44 days of trial, 27 witnesses, and 788 exhibits, and a detailed and careful set of findings, the Court below decisively rejected DDS's factual allegations: it found no evidence of any serious side effects experienced by those receiving GED treatment, Decision at 35, A116; no "credible evidence…that PBS can effectively treat some or all of JRC's clients", *id.* at 41, A122; "no evidence" that, for those patients currently receiving GED treatment, "either a particular psychotropic drug or psychotropic drugs generally, would be more effective than their current treatment", *id.* at 49, A130; and a lack of persuasive evidence as to any professional consensus that GED treatment does not conform to the accepted standard of care for treating individuals like the patients at JRC, *id.* at 48-50, A129-131. It found that DDS had actually continued to act in bad faith. *Id.* at 45-48, A126-129. Its findings are firmly grounded in the evidence and are in no way clearly erroneous, and DDS has not made a clear showing that the Court below abused its discretion in denying the Order.

Nonetheless, despite Appellees' disagreement with DDS's arguments, we agree that this matter should be determined in the first instance by the SJC. Given the SJC's experience and familiarity with, and its knowledge and understanding of, the Parties, the Consent Decree, and the history of this and related litigation, we think it clear that the SJC is the most appropriate body to resolve the present dispute. Direct appellate review also will promote the most efficient resolution of the appeal. This is especially important to the patients at JRC who depend for their well-being and even survival on the GED treatment. Before coming to JRC these patients had been treated at some of the finest institutions in the country, receiving the full range of other available therapies, but all without success. The availability of the GED has dramatically changed their lives for the better. But when DDS filed its motion nine years ago, it put in question whether that treatment, as well as the resulting health and welfare of these patients, would continue. That has been a steady source of enormous anxiety for the patients and their families ever since. They seek direct appellate review to obtain a definitive ruling from this Court which, they hope, will finally clear the cloud that DDS has hung over their futures.

JOINT CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court grant their joint application for direct appellate review.

Respectfully submitted,

COMMISSIONER of the DEPARTMENT
OF DEVELOPMENTAL SERVICES,

By her attorneys,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Timothy Casey
Timothy J. Casey (BBO No. 650913)
Timothy D. Hartnett (BBO No. 679654)
Elizabeth Kaplan (BBO No. 568911)
Christine Fimognari (BBO No. 703410)
Assistant Attorneys General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 727-2200
timothy.casey@state.ma.us
timothy.hartnett@state.ma.us
elizabeth.kaplan@state.ma.us
christine.fimognari@state.ma.us

THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC.,

By its attorneys,

/s/ Michael P. Flammia
Michael P. Flammia (BBO No. 552104)
Christian B.W. Stephens (BBO No. 666097)
Matthew D. Rodgers (BBO No. 681761)
ECKERT, SEAMANS, CHERIN, & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
mflammia@eckertseamans.com
cstephens@eckertseamans.com
mrodgers@eckertseamans.com
(617) 342-6800

LEO SOUCY, Individually and as Parent and Next Friend of B.S., PETER BISCARDI, Individually and as Parent and Next Friend of P.J.B., Both as Representatives of the CLASS of ALL PATIENTS at THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC., THEIR PARENTS, and THEIR GUARDIANS,

By their attorneys,

/s/ Max D. Stern
Max D. Stern (BBO No. 479560)
Joseph M. Cacace (BBO No. 672298)
TODD & WELD LLP
One Federal Street
Boston, MA 02110
mdstern@toddweld.com
jcacace@toddweld.com
(617) 720-2626

Alexandra H. Deal (BBO No. 660645)
PAIK, BREWINGTON & DEAL, LLP
6 Beacon Street, Suite 305
Boston, MA 02108
adeal@pbdlaw.com
(617) 439-0150

THE PATIENT MEMBERS of the CLASS,

By their attorney,

/s/ C. Michele Dorsey
C. Michele Dorsey (BBO No. 542155)
P.O. Box 1137
North Eastham, MA 02651
attorneydorsey@comcast.net
(781) 771-3935

Dated: May 19, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R.A.P. 11(b) and 16(k), I hereby certify that this joint application complies with the requirements of Mass. R.A.P. 20(a) (form and length of briefs, appendices, and other documents). I further certify that this joint application complies with the applicable length limit of Mass. R.A.P. 11(b) because it uses Times New Roman font (a proportionally spaced font) of 14-point size, and it consists of 1,918 non-excluded words (the total number of words in the Appellant's Position and Appellees' Position sections), as determined by Microsoft Word 2016.

/s/ Timothy Casey
Timothy Casey

Dated: May 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on May 19, 2022, I caused a copy of the foregoing to be served through the Court's e-filing system, and via e-mail, on the following counsel of record:

Michael P. Flammia, Esq.
Christian B.W. Stephens, Esq.
Matthew D. Rodgers, Esq.
ECKERT, SEAMANS, CHERIN, & MELLOTT, LLC
Two International Place, 16th Floor
Boston, MA 02110
mflammia@eckertseamans.com
cstephens@eckertseamans.com
mrodgers@eckertseamans.com

C. Michele Dorsey, Esq.
P.O. Box 1137
North Eastham, MA 02651
attorneydorsey@comcast.net

Max D. Stern, Esq.
Joseph M. Cacace, Esq.
TODD & WELD LLP
One Federal Street
Boston, MA 02110
mdstern@toddweld.com
jcacace@toddweld.com

Alexandra H. Deal, Esq.
PAIK, BREWINGTON & DEAL, LLP
6 Beacon Street, Suite 305
Boston, MA 02108
adeal@pbdlaw.com

/s/ Timothy Casey
Timothy Casey

Dated: May 19, 2022

APPENDIX

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