

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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JEANETTE ALLEYNE, individually and as next friend and guardian of T.J., ALLEN DATOUSH and KIM DATOUSH, individually and as next friends and guardians of T.D., LINDA DOHERTY, individually and as next friend and guardian of M.D., SUSAN HANDON, individually and as next friend and guardian of C.C., LESLIE JOYNER and LASHARON JOYNER, individually and as next friends and guardians of C.J., MITCHELL SHEAR and MARCIA SHEAR, individually and as next friends and guardians of S.S., and THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC.,

**PLAINTIFFS'**  
**MEMORANDUM OF LAW**

Civil Action No.

Plaintiffs,

-against-

NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, in his capacity as Commissioner of Education of the New York State Education Department, and THE NEW YORK STATE BOARD OF REGENTS,

Defendants.

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Plaintiffs JEANNETTE ALLEYNE, ALLEN and KIM DATOUSH, LINDA DOHERTY, SUSAN HANDON, LESLIE and LaSHARON JOYNER, and MITCHELL and MARCIA SHEAR,

Plaintiff JUDGE ROTENBERG EDUCATIONAL CENTER, INC.,

By its attorneys,

By their attorneys,

Steven R. Kramer (Bar Roll No. 505074)  
ECKERT SEAMANS CHERIN & MELLOTT, LLC  
81 Main Street, Suite 307  
White Plains, New York 10601  
914.949.2909

Jeffrey J. Sherrin (Bar Roll No. 102601)  
Peter Danzinger (Bar Roll No. 101453)  
Yvonne E. Marciano (Bar Roll No. 510021)  
O'CONNELL AND ARONOWITZ, P.C.  
54 State Street  
Albany, New York 12207-2501  
518.462.5601

Of Counsel:

Michael P. Flammia (to be admitted *Pro Hac Vice*)  
ECKERT SEAMANS CHERIN & MELLOTT, LLC  
1 International Place, 18<sup>th</sup> Floor  
Boston, MA 02110  
617.342.6800

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Dated: August 10, 2006

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## I. INTRODUCTION

The Plaintiffs submit this memorandum of law in support of a temporary restraining order and preliminary injunction to prevent the New York State Education Department ("NYSED"), its Commissioner, Richard P. Mills (the "Commissioner"), and the New York State Board of Regents (the "Board") (collectively, the "Defendants") from implementing and enforcing their emergency regulations adopted on June 20, 2006 and effective June 23, 2006 (hereinafter the "Emergency Regulations"). The Emergency Regulations ban the use of aversive treatment in all but two circumstances, regardless of the fact that the student plaintiffs' (the "Students") individualized educational programs ("IEP") provide for aversives to address their problematic behaviors that interfere with learning and education.

Injunctive relief is the only means to preserve the *status quo* pending final resolution of the lawfulness of the Emergency Regulations. No emergency has arisen that justifies the Emergency Regulations or their far-reaching ramifications. To the contrary, the Defendants have long been aware of aversives and, until recently, approved their use as part of the Students' education and treatment. The Defendants' recent unilateral decision to suddenly reverse course and now ban this same treatment poses irreparable and immediate harm to the Students, many of whom have relied upon and benefited from aversives for years. In addition, since the Emergency Regulations became effective, many of the Students' severe problematic behaviors have recurred while their development has decelerated.

The Court should not allow further endangerment of the Students' education and treatment. Instead, it should maintain the *status quo* (and the Students' longstanding treatment

and care that has been consented to by parents and approved by a court) pending resolution of this matter.

## II. STATEMENT OF FACTS<sup>1</sup>

### A. **Background of the JRC and its Treatment Program.**

The Judge Rotenberg Education Center, Inc. ("JRC") is a non-profit residential facility in Canton, Massachusetts that provides extremely successful special education and behavioral treatment services to children and adults with severe behavior disorders who engage in self-abusive, aggressive, and other severe problematic behaviors that threaten their life and limb and substantially interfere with their education and social development. *See* Israel Aff., ¶ 4; Rivera Aff., ¶ 3. JRC often acts as a placement of last resort for children and adults resistant to all other forms of psychological and psychiatric treatment, including dangerous psychotropic medications that have potentially permanent side effects, and for students who have no other placement that can educate them and keep them safe. *See* Israel Aff., ¶ 4.

JRC is referred students with the toughest cases of behavior disorders and who could not be successfully educated and treated in their home school districts. *See id.*, ¶ 9. The typical JRC student engages in self-mutilation, aggressive behaviors, and extremely destructive and disruptive behaviors such as eye gouging, head hitting, smearing feces, throwing furniture, and indiscriminate screaming and yelling. *See id.*, ¶ 6. These behaviors have caused life-threatening injuries including blindness and brain injury, and render the students unable to receive a free appropriate public education ("FAPE"). *See id.* JRC's extremely effective behavior treatment suppresses these behaviors to zero or near zero levels, removes the sedating drugs, and gives the

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<sup>1</sup> The Plaintiffs rely upon the facts set forth in their supporting affidavits, including the Affidavits of Erin Holland ("Holland Aff."), Matthew L. Israel, Ph.D ("Israel Aff."), Patricia M. Rivera, Ph.D. ("Rivera Aff."), and Edward A. Sassaman, M.D. ("Sassaman Aff."). For efficiency, they incorporate these materials by reference and only summarize the relevant facts herein.

student the opportunity to be educated and learn positive skills to replace the dangerous and maladaptive behaviors. *See id.*

**B. JRC's Use of Aversive Treatment, including the GED and GED-4, to Foster Students' Education and Development.**

JRC uses intensive behavioral treatment, based on peer-reviewed and accepted methods of behavioral psychology, to effectively save the lives of students who would otherwise deteriorate when treated with psychotropic medication or psychotherapy. *See id.*, ¶ 7. JRC first tries positive reinforcement (rewards) and non-intrusive educational and behavioral procedures to determine if they effectively treat a student's severe behavior disorders so that he will not be a danger to himself and others and will progress academically. *See id.*, ¶¶ 7, 9. If these procedures are not effective, JRC may supplement a student's treatment with "aversive" behavior modification techniques, which must first be consented to by the student's parent(s), cleared for use by JRC's consulting physicians, and finally approved on an individual basis, after a hearing, by a Massachusetts Probate Court under "substituted judgment" criteria designed to protect the interests of people not able to make informed decisions on their own behalf. *See id.*, ¶ 9. JRC is licensed by the Massachusetts Department of Mental Retardation ("MA DMR") and Massachusetts Department of Early Education and Care ("MA EEC"). *See id.*, ¶ 19. The MA DMR regulates the use of aversive behavior modification techniques. *See id.*, ¶¶ 10, 19.

JRC uses "aversives" to treat all of a student's severe and persistent problematic behaviors including aggressive, self-injurious, destructive, disruptive, and non-compliant behaviors. *See id.*, ¶ 15. This protects the student's safety and allows safe access to a classroom and peers so that the student can learn how to function and thrive in an educational environment. *See id.* Aversives include a program whereby students' behaviors are rewarded with "mini-meals," the use of a specially-designed helmet, and movement restraints. *See id.*, ¶¶ 11-14. JRC

also uses skin shock aversives that have no permanent adverse side effects and have proven to effectively and rapidly decelerate severe problematic behaviors.<sup>2</sup> *See id.*, ¶ 12. The Massachusetts Supreme Judicial Court has affirmed the Massachusetts Probate Court's authority to approve the skin shock aversives, including both the Graduated Electronic Decelerator ("GED") and the GED-4 devices. *See Guardianship of Brandon*, 677 N.E.2d 114 (Mass. 1997); *Judge Rotenberg Educational Center, Inc. v. Commissioner of the Department of Mental Retardation*, 677 N.E.2d 127 (Mass. 1997), true and accurate copies of which are attached to the Exhibits Binder as Exhibits 3 and 4 respectively. Both the GED and GED-4 are types of equipment that must be considered in the IEP process. *See* 20 U.S.C. §§ 1401(1), 1414(d)(3)(B)(V).

**C. Defendants Abruptly Sought to Ban the Use of Aversives.**

Since the 1970s, NYSED has approved JRC as an out-of-state placement and JRC has successfully treated New York students with the use of aversives for 30 years.<sup>3</sup> *See Israel Aff.*, ¶ 27. NYSED has always closely monitored JRC's behavioral treatment program with no difficulty and conducts regularly scheduled quality assurance reviews. *See id.*

In September of 2005, NYSED's Office of Vocational and Educational Services for Individuals with Disabilities ("VESID") thoroughly evaluated JRC's treatment program, including the "health and safety" and special education of the New York students. *Id.*, ¶ 28.

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<sup>2</sup> A Board-certified physician, who has served as an Expert Reviewer for the New York State Department of Health, has examined JRC students for years, including students treated with the GED and GED-4. *See Sassaman Aff.*, ¶¶ 1-3, 5-8. Based upon these examinations, Dr. Sassaman believes that JRC's treatment is safe, effective, and has not injured any student. *See id.*, ¶ 9.

<sup>3</sup> New York courts have consistently recognized JRC as an appropriate out-of-state residential facility for students with severe behavior disorders and, on a number of occasions, even enjoined NYSED's attempts to change their placements. *See Joseph P., et al. v. Ambach, et al.*, 1986-87 EHLR Dec. 558:473; *Behavior Research Institute, et al. v. Ambach*, (Albany County Sup. Ct. Oct. 30, 1986); *Stanger, et al. v. Ambach et al.*, 501 F. Supp. 1237 (S.D.N.Y. 1980), true and accurate copies of which are attached to the Exhibits Binder as Exhibit 7, 8, and 9 respectively.

VESID's final report, dated November 17, 2005 (the "Final Report"), concluded that JRC was doing an excellent job treating and educating New York students and meeting all of NYSED's educational requirements. *See id.*

On March 20, 2006—apparently in response to negative media attention about one frivolous claim by a parent of a former JRC student from New York and without investigating the complaint or consulting JRC—Dr. Rebecca Cort, Deputy Commissioner of VESID, issued a report (the "March 20, 2006 Report") to the Board recommending a ban on aversives and the removal of any school using aversives from NYSED's approved school list. *See id.*, ¶ 29.

Because the March 20, 2006 Report was inconsistent with the Final Report, NYSED hastily assembled a new team (the "Review Team") to "review" JRC. *See id.*, ¶ 31. This Review Team was biased, unqualified, and created to make negative findings to support banning the behavioral treatment at JRC. *See id.* It visited JRC for parts of only five days. *See id.*, ¶ 34. Two psychologist members of the team visited JRC for less than a day and a half. *See id.* The third visited for three days. *See id.* At least two of the three support an anti-aversive philosophy and at least two have no experience with aversives. *See id.*, ¶ 32. Despite their lack of knowledge and perfunctory visit, the Review Team claimed to be informed and qualified to make conclusions about the quality and efficacy of JRC's treatment and the IEPs of over 140 New York students suffering from the severest forms of behavior disorders. *See id.*, ¶ 34. The Review Team, however, failed to consider various information, did not speak to any of the New York parents, and refused JRC's offers to conduct tours of its facilities and make staff available for questions. *See id.*, ¶ 35. Its report, dated June 9, 2006, was rife with false statements about JRC and was released to the media by NYSED without giving JRC or the parents of JRC students from New York any opportunity to respond. *See id.*, ¶¶ 38-39. Tellingly, nothing in the

June 9, 2006 Report concluded that JRC's treatment or its use of aversives failed to effectively treat students' dangerous and otherwise maladaptive behavior. *Id.*, ¶ 38. It also did not dispute the substantial educational and developmental progress that students have made since coming to JRC. *Id.* JRC has since responded to the June 9 report in detail. *See id.*, ¶ 53.

On June 6, 2006, Dr. Cort issued a revised report to the Board, requesting the adoption of the proposed regulations on an emergency basis (the "Emergency Regulations") because they were "necessary for the preservation of public health and safety in order to minimize the risk of physical injury and/or emotional harm to students who are subject to aversive behavioral interventions that inflict pain or discomfort." *Id.*, ¶ 49.

**D. Defendants Adopted the Emergency Regulations, Effective Immediately.**

With no opportunity for public comment, the Board approved the Emergency Regulations on June 20, 2006 with an effective date of June 23, 2006. *See id.*, ¶ 53. The Emergency Regulations ban the use of aversive treatment with a provision for child-specific exceptions. *See id.*, ¶ 52. Under these exceptions, aversive treatment is limited to "those self-injurious or aggressive behaviors identified for such interventions on the student's IEP." *Id.* The Defendants, however, cited no authority supporting this unilateral restriction. *See id.*, ¶ 56. Nonetheless, failure to comply may result in a school's removal from the "approved list." *See id.*, ¶ 52.

The Emergency Regulations are overbroad by indiscriminately eliminating critical treatment for destructive, disruptive, non-compliant, and other problematic behaviors identified in a student's IEP and by banning specific aversive treatment without considering the needs of the individual student. *See id.*, ¶ 58. They are also poorly drafted, making their implementation impossible. For example, they limit treatment with aversive behavioral interventions to "self-injurious" or "aggressive" behaviors yet never define these categories. *See id.*, ¶ 59;

8 N.Y.C.R.R. § 200.22(f)(4)(vi). Additionally, to obtain a child-specific exception, a New York

school district must submit an application to an independent panel of experts (the "Panel") created by the Commissioner by October 1, 2006 or at their next scheduled IEP review, whichever occurs first. *See* Israel Aff., ¶ 73; 8 N.Y.C.R.R. § 200.22(e)(2). NYSED, however, has refused to make the applications available to the school districts and the Panel will not even be created until October 2006. *See* Israel Aff., ¶ 73; Holland Aff., ¶¶ 11-12.

Similarly, the Emergency Regulations require that "[t]he magnitude, frequency and duration of any administration of aversive stimulus from ... [any aversive conditioning] device must have been shown to be safe and effective in clinical peer-reviewed studies." 8 N.Y.C.R.R. § 200.22(f)(viii). This conflicts with federal law that only refers to peer-reviewed research "to the extent practicable [.]" 20 U.S.C. § 1414(d)(1)(A)(IV). Due to the ambiguity of the phrase "clinical peer-reviewed studies" and uncertainty over whether NYSED would interpret JRC's program to be in compliance with such requirement, JRC requested further clarification from NYSED for the GED and GED-4 which have been used at JRC since 1992 and found to be safe and effective in hundreds of court cases. *See* Israel Aff., ¶¶ 67, 69; *Guardianship of Brandon*, 677 N.E.2d 114 (Mass. 1997) (confirming approval of GED-4). Rather than responding with a definitive answer, NYSED notified JRC that it must provide NYSED with its policies and procedures by August 15, 2006. *See* Israel Aff., ¶ 69. At that time, "NYSED will determine if JRC's use of aversive conditioning devices meet the standard established in regulations and determine the extent of any necessary corrective actions and corresponding timelines." *Id.* Essentially, NYSED would not review whether it deems the GED or GED-4 to be safe and effective until months after the Emergency Regulations are in effect. *See id.*

**E. After Other Treatment Failed, the Students Have Relied Upon and Benefited from Aversives to Address their Serious Behavior.**

The plaintiffs C.C., T.D., M.D., T.J., C.J. and S.S. (the "Students") all attend JRC and suffer severe behavior disorders that have caused them—prior to their treatment at JRC—to inflict severe physical harm to themselves and others, and were so destructive and disruptive that they could not be educated. *See Rivera Aff.*, ¶¶ 6, 9. The Students have long histories of aggressive and self-injurious behaviors such as biting, hitting and otherwise attacking others, biting and hitting themselves, and banging and punching their heads. *See id.*, ¶¶ 11, 22, 33, 45, 56, 67. They also engage in destructive, disruptive, and non-compliant behaviors such as banging, throwing, and breaking objects, yelling and screaming, and temper tantrums. *See id.* Before attending JRC, two Students banged their heads with such force and frequency that one has moderate to severe hearing loss in both ears and the other detached both her retinas. *See id.*, ¶¶ 11, 67.

Prior to their admission to JRC, the Students underwent exhaustive treatments including day and residential programming, psychiatric hospitalization, the constant use of restraint, and the prescription of heavy dosages of dangerous anti-psychotic medications, which caused some of the Students to suffer serious side effects. *See id.*, ¶¶ 12, 23, 34, 46, 57, 68. These treatments were unsuccessful in treating the Students' serious problematic behaviors causing injuries to themselves and others and requiring them to spend significant time in restraints and under the debilitating effects of anti-psychotic medications. *See id.*, ¶¶ 13, 24, 35, 47, 58, 69. Furthermore, the sedative effects of the drugs as well as their persistent destructive, disruptive, and non-compliant behaviors—many of which were antecedents to their aggressive and self-injurious behaviors—prevented their academic or social progress. *See id.*

**F. The Emergency Regulations Threaten the Students' Education and Development.**

Since the prior placements and treatment were completely ineffective in keeping the Students safe and allowing them to progress academically or socially, their local school districts in New York referred them to JRC for special education and behavior modification treatment, including treatment with the GED device and other supplemental aversive interventions. *See id.*, ¶¶ 14, 25, 36, 48, 59, 70. The Students' IEPs specify JRC as their recommended placement and provide for aversive treatment, including the GED, to treat all of their serious problematic behaviors. *See id.*, ¶¶ 15, 26, 37, 49, 60, 71.

After admission to JRC, the Students were tried on a positive-only behavior modification treatment plan, but it proved ineffective to stop their severe problematic behaviors and permit them to make academic and social progress. *See id.*, ¶¶ 16, 27, 38, 50, 61, 72. JRC then sought and received permission from the Students' parents (the "Parents") and the Massachusetts Probate Court as well as medical clearance to add aversives, including the GED and/or GED-4 devices, to the Students' behavior modification treatment plans. *See id.* The aversives had an immediate and dramatic positive effect on their aggressive, self-injurious, destructive, disruptive, and non-compliant behaviors and their education. *See id.* All of the Students' severe problematic behaviors dramatically decreased, preventing them from doing further and permanent damage to themselves or others, and allowing them to progress in their academic skills as well as socially through field trips and visits with their families. *See id.*, ¶¶ 16, 18, 27, 29, 38, 41, 50, 52, 61, 63, 72, 74. The Students were successfully tapered off all anti-psychotic medications and no longer required the constant use of restraint. *See id.*, ¶¶ 17, 28, 40, 51, 62, 73.

Under the Emergency Regulations, JRC can now only treat the Students' aggressive and self-injurious behaviors with aversives. *See* 8 N.Y.C.R.R. § 200.22(f)(4)(vi). In accordance with the Emergency Regulations, JRC is no longer treating the Students' destructive, disruptive, and noncompliant behaviors that have already returned to unacceptably high frequencies. *See* Rivera Aff., ¶¶ 20, 43, 54, 65, 76. These behaviors have led to a decrease in the Students' performance in the classroom, which will directly lead to little or no academic or social progress or access to the community or their family. *See id.* Also, many of the Students' destructive, disruptive, and non-compliant behaviors are antecedents to aggressive or self-injurious behaviors. *See id.* By not treating these antecedents, the Students have already engaged in more aggressive and self-injurious behaviors, placing the Students and those around them in danger of severe injury. *See id.* For example, one Student recently refused to follow JRC staff directions in the bathroom, a non-compliant behavior that could previously be treated with the GED-4. *See id.*, ¶ 43. This resulted in the student assaulting staff, climbing over the bathroom stall, and destroying a toilet fixture. *See id.*

### **III. ARGUMENT**

Injunctive relief preserves the *status quo* pending the Court's final resolution of a dispute. *See, e.g., Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966); *Chapman v. South Buffalo Railway Co.*, 43 F. Supp. 2d 312, 317 (W.D.N.Y. 1999). Such relief is warranted when there is the threat of irreparable harm and either: (a) the movant has a likelihood of success on the merits of their claim; or (b) the balance of equities favors the movant. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996); *Bray v. City of New York*, 346 F. Supp. 2d 480, 486 (S.D.N.Y. 2004). These elements are all present here and demonstrate the immediate need for injunctive relief.

**A. PLAINTIFFS FACE IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF.**

It is beyond dispute that the Students suffer from severe, long-term disabilities that profoundly challenge themselves and their families. The Students previously had few, if any, opportunities for an education or meaningful existence as other facilities or methods failed to address their maladaptive behavior. The bleak prospects of the Students and their Parents, however, have since changed. At JRC, the Students have achieved remarkable progress in the nature and quality of their lives. Aversive treatment has been an integral part of this success. As but one example, before coming to JRC, a Student repeatedly hit herself with sufficient force to detach her retinas. JRC's use of aversive treatment eliminated this behavior—enabling both retinas to be re-attached—and facilitated her education and development of necessary skills.

The Defendants jeopardize this progress and threaten the Students' reversion to their maladaptive behavior. The Emergency Regulations unilaterally declare that aversive treatment can no longer be used for all of the Students' behavior, even though it was previously sanctioned by the Defendants, the Parents, Massachusetts Probate Court judges, and school officials, among others. In other words, the Defendants are denying the Students safe and effective treatment for their disabilities. This disrupts long-standing education, treatment, and care that some Students have relied upon (and benefited from) for years, all without granting any recourse to the Students or their Parents. The Defendants' demand for abrupt and complete cessation of such treatment has already resulted in tangible harm. For example, several Students have lashed out and destroyed various property, including a toilet fixture. Under the Emergency Regulations, such behavior must now go untreated, causing the Students' entire development—including their education—to suffer. More dire situations are inevitable, especially because the Students' behaviors that are now unable to be effectively treated are often direct antecedents to self-

injurious or aggressive actions. In short, the Defendants have thrust the Students into the path of immediate and irreparable harm.

**B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS.**

**1. Defendants Violated Plaintiffs' Rights under the IDEA.**

As passed by Congress, the Individuals with Disabilities Education Act ("IDEA") has a single purpose—to ensure that all disabled children receive "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living" and to ensure that "the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §§ 1400(d)(1)(A), (B); *see Frank G. v. Board of Education of Hyde Park*, No. 04-4981, 2006 U.S. App. LEXIS 19029, at \*12-13 (2d Cir. July 27, 2006) (a true and accurate copy of which is attached to the Exhibits Binder at Exhibit 53). Similarly, New York law and regulations govern the provision of special education services. *See* N.Y. EDUC. LAW § 4401, *et seq.*; 8 N.Y.C.R.R. § 200, *et seq.* The Emergency Regulations violate these principles by denying: (1) the Parents an opportunity to be heard with respect to their children's receipt of special education services; and (2) the Students the specific special education services set forth in their IEPs, ultimately frustrating their right to a FAPE. *See Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982) (state or district policy can violate the IDEA either by failing to comply with its procedural requirements or by failing to comply with its substantive requirements).

**a. The Emergency Regulations Deny Plaintiffs' Procedural Due Process Rights under the IDEA.**

The IDEA and New York law require that each child with a disability have an IEP—the "key element of the IDEA"—that specifies the special education services and supplementary aides and services to be provided to the child so that he or she may advance towards his or her

educational goals. *Frank G.*, at \*13; *see* 20 U.S.C. § 1414(d); 8 N.Y.C.R.R. § 200.4. The ability of parents to participate in this process is an essential federal and state right. The IDEA expressly requires "[a]n opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent evaluation of the child." 20 U.S.C. § 1415(b)(1); *see* 8 N.Y.C.R.R. §§ 200.3(a)(1), 200.4(g), 200.5(c)(1). A parent's right to participate meaningfully in the IEP process is just as important as a disabled child's substantive right to free appropriate public education. *See Rowley*, 458 U.S. at 205-06. Therefore, procedural violations that frustrate or interfere with parental participation are not merely technical deviations but "undermine the very essence of the IDEA." *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9th Cir. 2001). Indeed, procedural deficiencies that result in the loss of educational opportunity, or that seriously infringe on a parent's participation in the creation or formulation of the IEP, constitute a denial of FAPE. *See Gagliardo v. Arlington Cent. School Dist.*, 418 F. Supp. 2d 559, 563 (S.D.N.Y. 2006) (*citing Knable v. Bexley City School District*, 238 F.3d 755, 766 (6th Cir. 2001), *cert. denied*, 533 U.S. 950 (2001)).

Both the IDEA and New York law contain specific procedures regarding the creation of and any changes to a student's IEP and the student's placement. *See* 20 U.S.C. §§ 1414(e), 1415; 8 N.Y.C.R.R. § 200, *et seq.* Parents must be present at all IEP meetings (or meetings of the Committee on Special Education ("CSE")), as the IEP team is referred to under New York Law) and be provided notification of changes to their child's IEP to ensure that they are afforded an opportunity to participate. *See, e.g.*, 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.345(a); 8 N.Y.C.R.R. § 200.3(a)(1) (parents of a student must be present at CSE meeting); § 200.4(g)

(notice of CSE meeting and changes to IEP must be given to parents); § 200.5(c)(1) (notice requirement to parents of CSE meeting).

Here, the Students' IEPs all provide for aversives to treat their self-injurious, aggressive, destructive, disruptive and non-compliant behaviors. Nevertheless, the Defendants—through their Emergency Regulations—have arbitrarily and radically changed the special education services available to the Students, all without considering their individual needs. Under the IDEA, courts have stricken other such policies that categorically prohibit specific treatments or therapies for disabled children. *See Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 859 (6th Cir. 2004) (policy barring consideration of Applied Behavioral Analysis treatment for autistic children); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 176-77 (3d Cir. 1988) (policy refusing to provide direct physical therapy programs to disabled children); *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1575-76 (11th Cir. 1983), *vacated in part on other grounds*, 468 U.S. 1213 (1983), *reinstated in relevant part*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228 (1985) (policy applying across-the-board findings to all profoundly retarded children in lieu of individual consideration of their unique needs); *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir. 1980) (policy limiting the duration of special education to 180 days per year).

The Defendants have completely ignored the procedural due process guarantees required by the IDEA and New York law by denying the Parents any opportunity to discuss possible changes to the Students' IEPs or to consider the potential adverse consequences that the Emergency Regulations and their denial of aversives might have upon their children. No CSE meeting was ever convened and none of the Students' teachers or treating clinicians were ever

consulted regarding the change in special education services. It is apparent that the Defendants' acted with deliberate indifference to the rights and needs of the Students and their Parents.

Additionally, the IDEA and the New York law require that students remain in their current placement—unless the parents and the CSE otherwise agree—during the pendency of any proceedings relating to the identification, evaluation, or placement of the student. *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.514; N.Y. EDUC. Law § 4404(4). According to the U.S. Department of Education, a child's then current educational placement means the current special education and related services provided under the child's most current IEP. *See Susquenita School District v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996). These pendency provisions address the need for stability and consistency in a disabled student's education. *See Honig v. Doe*, 484 U.S. 305, 324 (1988) (discussing "stay-put" provisions). Thus, throughout the whole legal proceedings challenging the Emergency Regulations, the Students are entitled to their "stay-put" rights to remain at JRC and to continue being treated with the aversives for all their behavior categories, as provided for in their IEPs.

**b. The Emergency Regulations Deny Plaintiffs' Substantive Due Process Rights under the IDEA.**

The Emergency Regulations also violate the substantive due process rights under the IDEA and New York Law, which both require that students receive the services specifically described in their IEP. *See, e.g.*, 8 N.Y.C.R.R. § 200.4(e)(7) ("The school district must provide special education and related services to a student with a disability in accordance with the student's IEP and must make a good faith effort to assist the student to achieve the annual goals") (emphasis added).

The IEPs of the Students specifically describe the special education services they are to be provided and include aversive interventions to help them reach their educational goals by

treating all of their severe problematic behaviors. The Defendants have chosen to ignore the plain language of the IEPs and the clear mandate of the IDEA and New York law. Instead, they have summarily prohibited everyone from receiving treatment for all of their severe problematic behaviors with aversives.

Further, the Defendants deprive the Students of a "free appropriate public education" by refusing to provide the necessary funding to JRC for the provision of special education services needed by the Students, and mandated under the IDEA. *See McGaw v. Huntington Hosp.*, 89 A.D.2d 38, 44, 454 N.Y.S.2d 539, 543 (2d Dept 1982) ("It is well established that the burden of providing such educational services falls not upon the parents or other persons liable for the handicapped child's support, but upon the government, such charge being in the first instance upon the county."); *Andree v. County of Nassau*, 311 F. Supp. 2d 325, 333 (E.D.N.Y. 2004) (holding that DSS' placement of a lien on settlement or personal injury awards received by a disabled student to pay for services that are mandated to be provided free of charge to such students is a violation of IDEA).

In order to receive federal funding under the IDEA, a state must provide to all children with disabilities a FAPE in the least restrictive environment possible. The term "free appropriate public education" means "special education and related services that have been provided at public expense, under public supervision and direction, and without charge" and as set forth in a student's IEP. 20 U.S.C. § 1401(8)(A), (D) (emphasis added). As the IDEA states, once an IEP is in place, there can be no change in placement without providing a student and his/her parents the full panoply of due process rights. *See id.*, § 1415.

The Defendants will effectively change the placement of the Students if they follow through on their threat to take JRC off the approved list of schools. Each of the respective

school districts has already determined that the Students should receive their free education at JRC. The Defendants, however, are now threatening to withdraw funding of the Students' education based on the mere fact that the Students are receiving special education services mandated in their IEPs. The failure to fund Students' education merely because their recommended school placement implements the services provided in their IEPs violates the IDEA. The right to receive FAPE cannot be constricted by monetary limitations and the failure to pay for special education programs amounts to a unilateral change in a student's placement, which the IDEA prohibits. *See Petties v. District of Columbia*, 881 F. Supp. 63, 66 (D.D.C. 1995) (*citing Zvi D. By Shirley D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982)). Therefore, the Defendants' threat to cut off funding of JRC completely undermines the individualized educational decision inherent in the IEP and violates the IDEA.

## **2. The Emergency Regulations Violated Plaintiffs' Constitutional Rights to Substantive Due Process.**

Governmental actions that are arbitrary, conscience shocking, or oppressive in a constitutional sense violate substantive due process. *See, e.g., Catanzaro v. Weiden*, 188 F.3d 56, 64 (2d Cir. 1999); *T.S. Haulers, Inc. v. Town of Riverhead*, 190 F. Supp. 2d 455, 460 (E.D.N.Y. 2002); *Friedlander v. Roberts*, 51 F. Supp. 2d 385, 387 (S.D.N.Y. 1999). Such descriptions apply here where the Defendants and the Emergency Regulations violate the Students' rights—under the United States and New York Constitutions, as well as New York law—regarding their education and habilitation for a functioning existence. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 324, 327-29 (1982); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1243, 1250 (2d Cir. 1984); *In re S*, 78 Misc. 2d 351, 355, 356 N.Y.S.2d 768, 772 (N.Y. Fam. Ct. 1974) (mentally-challenged children have a "fundamental right ... to

receive the necessary education and treatment required for their respective problems"); *see also* N.Y. EDUC. LAW §§ 4001-06, 4401-10; N.Y. MENTAL HYG. LAW § 13.01.

After a rigorous process that requires oversight and approval from parents or guardians, educators, medical and mental health professionals, and courts of law, the Students receive and rely upon aversive treatment as part of their comprehensive education and care, as set forth in their IEPs. The Emergency Regulations undermine these substantive rights by driving a wedge between the Students and their education and longstanding treatment. Specifically, the Emergency Regulations mandate that aversive treatment cannot address behavior that is not "self-injurious" or "aggressive." This makes it impossible for the Students to get the full education and care set forth on their IEPs—long acknowledged as the "central mechanism" that provides disabled students with their right to a free and appropriate public education—that expressly provide for such aversive treatment. *Polera v. Bd. of Educ., Newburgh City Sch. Dist.*, 288 F.3d 478, 482 (2nd Cir. 2002); *see* 8 N.Y.C.R.R. § 200.4(e)(7) ("The school district must provide special education and related services to a student with a disability in accordance with the student's IEP") (emphasis added).

Worse still, the Emergency Regulations are effective immediately, without exception or consideration of the Students' individual circumstances. This ignores the harsh consequences facing these severely challenged Students. The Students' inability to receive aversive treatment for their destructive or disruptive conduct threatens to undermine their education and habilitation progress, and forces them to revert to their maladaptive behavior. Moreover, New York regulations state that when changes to an IEP are proposed, a student's IEP-provided care and treatment shall continue in the interim. *See* 8 N.Y.C.R.R. § 200.4(e)(4) ("If the student's parent, teacher or an administrator of the school or agency believes that the program or placement

recommended in the IEP is no longer appropriate, such party may refer the student to the committee on special education for review, provided that the student shall remain in the current placement pending a new recommendation of the committee on special education, unless the board and parent otherwise agree."'). Therefore, injunctive relief is necessary to alleviate such stark realities and the deprivation of the Students' substantive rights.

### **3. Defendants Violated the Rehabilitation Act.**

All New York students—including disabled children—are entitled to a FAPE. *See* N.Y. Const. art. XI, § 1; *see, e.g., In re Wagner*, 86 Misc. 2d 1025, 1026, 383 N.Y.S.2d 849, 850 (N.Y. Fam. Ct. 1976). The State must not only "assure that the educational program provided each child is appropriate to his needs," but:

With respect to handicapped children, section 4402 of the Education Law imposes a duty on the State Department of Education to use all means and measures necessary to adequately meet the physical and educational needs of handicapped children.

*In re Downey*, 72 Misc. 2d 772, 773, 340 N.Y.S.2d 687, 689 (N.Y. Fam. Ct. 1973). Thus, all students have a right to free public education appropriate to their needs.

The Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, gives teeth to these rights by protecting disabled individuals from discrimination in public services. *See Weixel v. Bd. of Educ. of the City of New York*, 287 F.3d 138, 146 (2d Cir. 2002). Specifically, it provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance [.]" 29 U.S.C. § 794(a).

Here, the Students require aversives to control their particular behaviors and enable their individual education. The Emergency Regulations not only prohibit the treatment of those disabilities, but the Defendants' actions are the product of bad faith and gross misjudgment. The

Defendants were clearly aware of the treatment needs of the Students, since their IEPs specifying such treatment were approved by their school districts. Nevertheless, the Defendants sacrificed (or completely ignored) these individual needs to pursue an agenda against JRC through a baseless "emergency" ban.

Due to the Defendants' abrupt prohibition of aversives except under limited circumstances, the Students are being denied the sound basic education guaranteed to them by the New York Constitution. The total elimination of the use of aversives for their disruptive, destructive and non-compliant behaviors will almost certainly result in their increased recurrence posing a danger to themselves and others. This cripples the Students' educational and social progress, and may further undermine their progress made to date. Successful education allows the Students the opportunity to learn replacement skills such as reading, writing, and class participation and to access the community and their family. These new learned skills can permanently "replace" the aggressive and health dangerous behaviors thereby eliminating the need for any further treatment. This is especially troubling since aversives are used after no other treatment has effectively enabled these students to be productive and educated. Therefore, injunctive relief is necessary to protect the Students' rights to a FAPE.

**4. Defendants Violated Plaintiffs' Other Constitutional Rights.**

**a. The Emergency Regulations Deny Plaintiffs' Right to Equal Protection.**

Both the Fourteenth Amendment to the U.S. Constitution and the New York Constitution (N.Y. Const. art. I, § 11) guarantee equal protection under the law. The Emergency Regulations violate the Students' rights by impermissibly treating them differently than those similarly situated. Therefore, the Emergency Regulations must be declared invalid.

The Emergency Regulations violate equal protection in two ways. First, the Emergency Regulations treat the Students differently than other New York children by prohibiting treatment vital for their education, thereby denying them the FAPE afforded to all students. *See Matter of Downey*, 72 Misc. 2d at 773. The Students are at JRC because no other school could keep them safe and educate them. Without treating all of their severe problematic behaviors, the Students will revert to conduct that is destructive, seriously disruptive and non-compliant, all of which prevent them from making academic or social progress. Indeed, the Students have already resumed their maladaptive behavior.

Second, the Emergency Regulations treat the Students differently from other disabled students with IEPs. The IDEA ensures that all children with disabilities receive "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). The Emergency Regulations now unilaterally re-write the IEPs of certain individuals, including the Students, by prohibiting certain forms of aversive treatment, regardless of their individual needs or circumstances. As a result, the Emergency Regulations arbitrarily negate certain IEP provisions while leaving others intact.

Furthermore, the circumstances indicate that the Defendants acted with malicious intent and in bad faith. JRC has been using aversives as a supplement, when required, to its positive programming, and as part of its educational and behavioral efforts since the 1970s. Around that time, NYSED first approved JRC as an out-of-state placement. The Defendants and JRC have worked together for decades to educate and treat students with behavioral disorders. The Defendants' recent push to ban aversives on an "emergency" basis was precipitated by recent negative media from a frivolous claim by the parent of a former JRC student. There has been no showing, however, that aversive treatment actually harmed any of the Students, or that the

implementation of aversive treatment at JRC has changed in any way. Thus, no emergency exists that justifies the implementation of regulations on an "emergency" basis. As a result, the Defendants' actions are harming the Students and a temporary restraining order and preliminary injunction are necessary to prevent further harm and maintain the *status quo*.

**b. The Emergency Regulations Deny Plaintiffs' Rights to Procedural Due Process.**

The Constitutions of the United States and New York State provide the Students with procedural due process rights. At a minimum, these rights require notice and the opportunity to be heard before the deprivation of their life, liberty, or property interests. *See, e.g., Schroeder v. New York*, 371 U.S. 208, 211-12 (1962). Here, however, the Defendants have provided no such process to the Plaintiffs. Instead, the Defendants unilaterally restricted aversives—including treatment specified in the Students' IEPs—without giving the Students or the Parents any prior notice or opportunity to be heard. In short, the Defendants have disregarded all procedural protections afforded by federal and state law and arbitrarily dictated changes in the Students' rights to treatment, habilitation and a free appropriate public education. As a result, the Plaintiffs have no avenue to assert or protect their rights. Thus, a temporary restraining order is necessary to protect the Students from the immediate harm they face as a result of the Defendants' actions.

**5. Defendants Violated the State Administrative Procedure Act.**

The Defendants have failed to meet the carefully-prescribed conditions that permit the adoption of the Emergency Regulations. *See* N.Y. A.P.A. LAW, § 202(6); *Law Enforcement Officers Union, Dist. Council 82 by Engelhardt v. State*, 168 Misc. 2d 781, 784, 643 N.Y.S.2d 301, 303 (N.Y. Sup. Ct. Kings Co. 1995) (discussing the legislative history behind § 202(6)); *see also Home Care Ass'n v. Dowling*, 218 A.D.2d 126, 129, 638 N.Y.S.2d 193, 195 (3d Dep't 1996) (§ 202(6) should be construed narrowly). First, they have not established any real

"emergency"—the fundamental rationale for any "emergency" rule or regulation—that justifies its end-run around the legislative process. This omission is not surprising since no emergency exists. Only a fraction of New York citizens receive aversive treatment for their mental health problems. For years, Defendants have been aware of and approved JRC's educational and treatment methods, and various New York schools and school districts have long sent students to JRC. NYSED sent a team to JRC in September, 2005, prior to the intense media attention, and this team found that JRC met all of NYSED's health, safety, and special education requirements. Until now, no New York statute, agency, regulation, or court has ever banned aversive treatment. As a result, the Students have long received and benefited from aversives as an integral part of their education and habilitation. More importantly, their behavior and educational progress has significantly improved with aversive treatment and numerous parents and guardians oppose the Emergency Regulations.

As shown above, the Emergency Regulations do not rectify an "emergency," they create one. They unilaterally invite chaos and confusion into the longstanding system that carefully controls, monitors, and approves the Students' receipt of aversive treatment. The decision to use aversive treatment is set forth in each Student's IEP and is the product of a deliberative, well-documented, and individualized process that involves parents or guardians, educators, the Massachusetts Probate courts and medical and mental health professionals collaborating to protect the health and safety of the Students. The Students received individually-tailored treatment for their life-threatening behavior, such as self-injurious or aggressive actions, and conduct that interferes with their educational and habilitative progress, such as destructive, disruptive and non-compliant actions. The Students' interests are already adequately protected by the comprehensive procedures in place, including the parental consent requirements and the

legal protections afforded by the applicable Massachusetts regulations and the substituted judgment proceedings in Massachusetts Probate Court. Although this system has been in place for years without change, the Defendants have not established that existing procedures and safeguards are insufficient or expose the Students to actual, immediate, or irreparable harm. Finally, statutory law and common sense require that every "emergency" rule be substantiated with fact, not mere speculation or surmise. *See* N.Y. A.P.A. LAW, § 202(6)(d)(iv). Here, the Defendants proffer little, if anything, besides their own terse conclusion that their action somehow "is necessary for the preservation of the public health and safety in order to minimize the risk of physical injury and/or emotional harm to students who are subject to aversive behavioral interventions [.]" Statement of Facts and Circumstances Which Necessitate Emergency Action ("NYSED Statement"), p. 2. Empty proclamations ring hollow, especially when they shatter the status quo and jeopardize longstanding education and treatment. *See Law Enforcement Officers Union*, 168 Misc. 2d at 784-86. As the New York Supreme Court recognized:

The mere parroting of the phrase "the public health, safety, or general welfare" with no specific facts demonstrates to this court the total absence of justification for this action. Without detailing the necessity of the adoption of a rule on an emergency basis danger of abuse is obvious.

*Brodsky v. Zagata*, 165 Misc. 2d 510, 515, 629 N.Y.S.2d 373, 377 (N.Y. Sup. Ct. Albany Co. 1995) (ultimately rejecting the adoption of "emergency" rules). The absence of any genuine emergency is evidenced by the fact that the Defendants will not even establish the independent panel of experts to review the child-specific exception until October. Given that the Emergency Regulations teeter upon a flawed premise and an absence of sufficient justification, a temporary restraining order and further injunctive relief are necessary to halt them from taking effect.

**C. A BALANCE OF THE EQUITIES FAVORS INJUNCTIVE RELIEF.**

The Plaintiffs seek to preserve the *status quo*—the purpose behind preliminary injunctive relief—and maintain treatment that: (1) the Defendants have sanctioned for years; (2) the Parents have consented to in advance; (3) is set forth expressly in the Students' IEPs; (4) is regulated and monitored by agencies like the MA DMR and MA EEC; and (5) is approved in advance by a peer review committee, a human rights committee, a medical doctor, and the Massachusetts Probate Court. *See, e.g., Unicon Management*, 366 F.2d at 204. The deprivation of this treatment will wreak havoc since it is an integral part of the Students' educational and treatment plans.

In stark contrast, injunctive relief will not negatively affect the Defendants who can have no defensible interest in refusing to provide services required by federal and state law and that the Defendants themselves have repeatedly authorized. Moreover, the Defendants have never articulated any compelling reason why the Emergency Regulations must take effect now, at the expense of the Students. Of course, any attempt at such justification would pale next to the Students' well-being and the thought, effort, and care invested in developing the Students' treatment and educational programs. In short, the balance of equities favors the Plaintiffs and injunctive relief.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant a temporary restraining order and preliminary injunction against the Defendants.

DATED: Albany, New York  
August 10, 2006

O'CONNELL AND ARONOWITZ, P.C.

By: : /s Jeffrey J. Sherrin  
Jeffrey J. Sherrin (Bar Roll No. 102601)  
Peter Danzinger (Bar Roll No. 101453)  
Yvonne E. Marciano (Bar Roll No. 510021)  
Attorneys for Plaintiffs,  
54 State Street  
Albany, New York 12207-2501  
518-462-5601

and

ECKERT SEAMANS CHERIN & MELLOTT, LLC

By: /s Steven R. Kramer  
Steven R. Kramer (Bar Roll No. 505074)  
Attorneys for Plaintiff,  
81 Main Street, Suite 307  
White Plains, New York 10601  
914-949-2909

Of Counsel:

Michael P. Flammia (to be admitted *Pro Hac Vice*)  
ECKERT SEAMANS CHERIN & MELLOTT, LLC  
1 International Place, 18<sup>th</sup> Floor  
Boston, MA 02110  
617-342-6800