UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| ROBERT SIMPSON RICCI, *et al.* | Civil Action Nos. 72-0469-T (Belchertown) |
| Plaintiffs, | 74-2768-T (Fernald) |
| | 75-3910-T (Monson) |
| ROBERT L. OKIN, *et al.* | 75-5023-T (Wrentham) |
| Defendants. | 75-5210-T (Dever) |

**PLAINTIFFS' OPPOSITION TO THE ARC OF GREATER BOSTON'S MOTION TO STRIKE JANUARY 28, 2010 LETTER SUBMITTED BY DIANE WALSH McDONALD**

## I. INTRODUCTION

It is not a party to this litigation and never has moved to intervene, but nevertheless the ARC of Greater Boston ("GBARC") has once again filed a motion with this Court. This time, GBARC requests that the Court strike a letter from Diane Walsh McDonald (the "McDonald Letter") that was properly placed on the Courts' docket and shared with the parties and counsel to this case.

For almost 40 years, this Court has overseen the matters of great public concern at issue in this case, which resulted in agreed-upon, permanent obligations being placed on the Commonwealth. This Court has the ongoing authority to ensure that those obligations are faithfully observed, and the McDonald Letter relates directly to those obligations. In view of the strong public policy and democratic principle that court dockets should remain open and public, there is no legitimate reason for the McDonald letter – or any other document – to be removed from the Court's docket, and certainly not for the only reason advanced here: that GBARC does not like the content.

The Court should deny GBARC's Motion for at least three reasons. First, this Court has the continuing jurisdiction and authority to enforce the Disengagement Order, which necessarily

encompasses the ability to review documents and information that may have bearing on whether the Commonwealth has complied with that Order. Second, the letter that GBARC seeks to strike was a communication with the Court that was properly shared with the parties to the litigation through the normal procedure for doing so, the CM/ECF system. Third, there is no legitimate reason for effectively closing part of a judicial proceeding from the public with respect to the McDonald Letter, or any other documents filed in this Court. The McDonald Letter refers to and is based on sworn testimony from a previous public hearing held on February 26, 2008, the transcript of which is properly available to the public. There is no reason to strike a portion of the record, when the same information has been available to the public for more than two years.

## II. ARGUMENT

Over the past 40 years, thousands of documents that concern the rights of the class members have been filed with this Court. Even after the entry of the 1993 Disengagement Order, hundreds of documents have been filed with the Court concerning the manner in which the 1993 Disengagement Order has been implemented and the rights of the protected class members respected (or not). Indeed, although it is not even a party to this case, GBARC has itself filed papers with this Court. See Docket Nos. 249, 253.

While the case may not be on the active docket, the matter is not dead. The December 9, 2008 mandate from the First Circuit explicitly states that "[t]he 1993 Disengagement Order remains in full force and effect." Docket No. 272. The Disengagement Order expressly provides that this Court has ongoing jurisdiction to enforce and remedy systemic violations of the Order. Disengagement Order ¶ 7; Baella-Silva v. Hulsey, 454 F.3d 5, 10 (1st Cir. 2006) (ancillary jurisdiction clearly exists "where the district court has ensured its continuing jurisdiction" to enforce an agreement by "'including a provision explicitly retaining [enforcement]

jurisdiction.'") (citations omitted). Contrary to the contention of GBARC that nothing should be presented to the Court in this case:

> The entry of a consent decree does not "kill" a case or terminate a district court's jurisdiction. Rather, when, as now, an injunction entered pursuant to a consent decree has ongoing effects, the issuing court retains authority to enforce it. See, e.g., System Fed'n No. 91, Etc. v. Wright, 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961) (explaining that structural injunctions "often require[ ] continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained th[e] equitable relief"). By the same token, a court retains authority to modify or interpret such decrees in light of changed circumstances.

Pearson, 990 F.2d at 657.

This Court, moreover, has the inherent power to oversee and enforce its own orders. In re: Pearson, 990 F.2d 653, 657 (1st Cir. 1993) ("when, as now, an injunction entered pursuant to a consent decree has ongoing effects, the issuing court retains authority to enforce it"). Where such orders are directed at implementing institutional reform, such as this case, circumstances demand that "judicially-imposed remedies [remain] open to adaptation . . . [and] improvement when a better understanding of the problem emerges." New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 969 (2d Cir. 1983); see also Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) (adopting flexible standard of review of orders modifying consent decrees in institutional reform cases).

To be able to exercise its authority to enforce and/or modify the Disengagement Order, the Court also requires the ability to receive documents, review allegations, and make any necessary determinations. Pearson, 990 F.2d at 658 (no error for District Court to act on its own initiative to appoint a master to review and determine whether modification of a consent decree may be necessary). The Court may do so even *sua sponte*.

> [N]otwithstanding the parties' silence or inertia, the district court is not doomed to some Sisyphean fate, bound forever to enforce and interpret a

> preexisting decree without occasionally pausing to question whether changing circumstances have rendered the decree unnecessary, outmoded, or even harmful to the public interest.

Id. This case may not be on the Court's active docket, but that does not mean that the Court does not have the discretion to receive correspondence and filings that involve the rights of the parties.[1]

Importantly, it was the Court that filed the McDonald Letter, which was sent *ex parte*. It is well-understood that the Court should share with the parties any *ex parte* communication that it might receive. The Court's filing of the McDonald Letter appropriately served to notify the parties of the substance of an *ex parte* communication with the Court. As GBARC is certainly aware, the standard way of notifying the parties of activity in a case or communications with the Court is through the Court's CM/ECF System. That is precisely what the Court did in this situation, and nothing can be said to be wrong with using the ordinary method of communication.

Even though GBARC has previously filed its own papers in this case, it asks that the McDonald Letter be stricken simply because GBARC does not like the content. GBARC's objection to the content of the document, even if it may be "prejudicial," is no basis for striking it from the public docket. This matter is one of significant public importance—as demonstrated by the large attendance at hearings and the not infrequent coverage in the media—and should not be closed off to the public, in whole or in part. As Judge Selya so aptly pointed out, in institutional

[1] GBARC claims that the Court "arguably" should not make any findings or issue any reports with respect to the transfer of A.T., which was the subject of the February 26, 2008 hearing, because of the ordered "dismissal with prejudice of 'all claims' that gave rise to the Department's appeal." Motion at 4. As this Court is certainly aware, the transfer of A.T. and the February 26, 2008 hearing took place while the appeal was pending. In fact, the Commonwealth moved to stay the proceedings because of the pending appeal. Docket No. 245. Therefore, the matters raised at the hearing could not have given rise to the appeal and consequently, were not included in the order to dismiss.

reform cases, “a court's decrees implicate the citizenry's interests as well as those of the parties and bear directly on the salubrious operation of public institutions.” Pearson, 990 F.2d at 658.

When such matters of public importance are presented to the Court, they should remain open and available to the public. Under the common law, there is a long-standing presumption of public access to judicial records. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). This presumption of access “helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies.” Gitto v. Worcester Telegram & Gazette Corp., 422 F.3d 1, 6 (1st Cir. 2005), quoting, In re Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir.1994). As such, the presumption that court files should remain open and available to the public is a strong one; “only the most compelling reasons can justify non-disclosure of judicial records.” FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987). The presumption is even stronger in cases in which the government is a party. Id. GBARC cannot satisfy the heavy burden of demonstrating a compelling need to remove a portion of this proceeding from the public’s view.

This case has always involved issues related to the protection of some of the Commonwealth’s most vulnerable citizens, and has always involved the nature and actions of the government of the Commonwealth. Both issues are of great public concern. Because GBARC is a government-funded service provider for the mentally retarded, the issues raised in the McDonald Letter and in the sworn-testimony on which the Letter is based, are directly related to both of those public concerns. Members of the community have a vested interest in protecting the rights of the mentally retarded and understanding the operation of its government and government-funded contractors, whether the information that is in the Court’s files is flattering or not. A matter of great importance, as here, should remain open to the public.

GBARC's inability to establish any substantial reason, let alone the "compelling reason" required by law, to strike the McDonald Letter is highlighted by the fact that the concerns raised by GBARC will not be alleviated by striking the letter. Any "prejudicial" statements contained in the McDonald Letter were voiced in open court in sworn testimony at the February 26, 2008 hearing held by this Court. That public hearing was heavily attended and the transcript is readily (and properly) available to the public. Indeed, GBARC's current Motion even repeats the allegations contained in the McDonald Letter. GBARC has made no suggestion that the two-year old proceedings should now be sealed or that its own Motion should be stricken from the docket, nor can it make such claims legitimately. Therefore, there is no reason to strike the McDonald Letter because the relief that GBARC seeks will not even relieve the prejudice that it would supposedly suffer.

## III. CONCLUSION

For the foregoing reasons, the Wrentham Association for the Retarded, Inc., respectfully requests that this Court deny GBARC's Motion to Strike, and maintain the public's right to access the records of this Court.

Respectfully submitted,

WRENTHAM ASSOCIATION FOR THE RETARDED, INC.

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Dated: March 4, 2010

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically and served by mail on any counsel of record unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties below by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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Electronic Notice will also be sent to the following non-party:

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Dated: March 4, 2010

/s/ Daniel J. Brown
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