

424 Mass. 473
Supreme Judicial Court of Massachusetts,
Bristol.
The JUDGE ROTENBERG EDUCATIONAL
CENTER, INC.¹
v.
COMMISSIONER OF THE DEPARTMENT OF
MENTAL RETARDATION (No. 3).

Argued Nov. 5, 1996. | Decided March 13, 1997.

Mental health facility and class of all patients, their parents, and guardians, brought contempt action against commissioner of Department of Mental Retardation in the Bristol County Probate and Family Court, alleging that department had repeatedly violated settlement agreement. While the action was pending, the Probate Court, Elizabeth O'Neill LaStaiti, J., issued preliminary injunction enjoining department from decertifying the mental health facility. Department petitioned for interlocutory relief. A single justice of the Appeals Court modified the preliminary injunction by ordering the facility to stop using certain aversive treatments. Facility appealed. The Supreme Judicial Court, Lynch, J., held that preliminary injunction was vacated when judge entered final decree in related case, and thus, appeal was moot.

So ordered.

Attorneys and Law Firms

****155 *473** Judith S. Yogman, Assistant Attorney General (Lucy A. Wall, Assistant Attorney General, with her), for the Commissioner of the Department of Mental Retardation.

Roderick MacLeish, Jr. (Peter F. Carr, II, with him), Boston, for the Judge Rotenberg Educational Center, Inc.

***474** Cathy E. Costanzo, Northampton (Richard Ames, with her), for P. Bennett & others.

Before ABRAMS, LYNCH, GREANEY, FRIED and MARSHALL, JJ.

Opinion

Footnotes

¹ Matthew L. Israel, executive director of The Judge Rotenberg Educational Center, Inc. (JRC); Leo Soucy, individually, and as parent and next friend of Brendon Soucy; and Peter Biscardi, individually, and as parent and next friend of P.J. Biscardi, both as

LYNCH, Justice.

This is an appeal from an interlocutory order modifying the preliminary injunction entered in *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1)*, 424 Mass. 430, 677 N.E.2d 127 (1997).

The Judge Rotenberg Educational Center, Inc. (JRC), and the class of all patients, their parents, and guardians, brought a contempt action in the Bristol County Probate and Family Court against the commissioner of the Department of Mental Retardation (department). While the action was pending a Probate Court judge issued a preliminary injunction enjoining the department from decertifying JRC. The department petitioned a single justice of the Appeals Court, pursuant to G.L. c. 231, § 118, first par.,² for interlocutory relief.³ On May 11, 1995, the single ****156** justice modified the preliminary injunction by ordering JRC to stop using certain aversive treatments.⁴ JRC appealed from the single justice's order to a full panel of the Appeals Court.

In related cases "guardianship counsel" filed a motion on behalf of the patients, seeking to enjoin JRC from using certain aversive treatments.⁵ On April 14, 1995, the Probate Court judge entered an order on the motion and guardianship counsel petitioned for interlocutory relief in the Appeals ***475** Court. On June 7, 1995, a single justice vacated the April 14, 1995, decision and entered an order consistent with the May 11, 1995, interlocutory order. JRC again sought review from a full panel of the Appeals Court.

The single justice consolidated the appeals and we granted the department's application for direct appellate review.⁶

For the reasons stated in *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 2)*, 424 Mass. 471, 677 N.E.2d 153 (1997), this appeal is dismissed as moot and we need not consider whether the modification of the preliminary injunction was proper.⁷

So ordered.

representatives of the class of all patients at the Behavior Research Institute, Inc., their parents, and guardians.

2 General Laws c. 231, § 118, first par., provides, in pertinent part, as follows: “A party aggrieved by an interlocutory order of a trial court justice ... may file, within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen.”

3 The commissioner also appealed from the preliminary injunction to a full panel of the Appeals Court pursuant to G.L. c. 231, § 118, second par. See *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep’t of Mental Retardation (No. 2)*, 424 Mass. 471, 677 N.E.2d 153 (1997).

4 On June 12, 1995, the single justice entered an order to clarify the May 11, 1995, order, which provided as follows: “It is ordered that the Judge Rotenberg Educational Center is enjoined from using the following Level III aversives, pending a further order of this Court or a Single Justice thereof: automatic negative reinforcement with electric shock, programmed multiple application of electric shock, the specialized food program, and behavior rehearsal lessons using Level III interventions.”

5 Guardianship counsel consist of nine attorneys who represent individual patients in substituted judgment and guardianship cases.

6 Contrary to guardianship counsel’s argument, we do not consider this appeal frivolous and thus decline to award attorney’s fees. See *Commonwealth v. One 1987 Ford Econoline Van*, 413 Mass. 407, 415 n. 10, 597 N.E.2d 430 (1992).

7 Pursuant to G.L. c. 231, § 118, first par., the single justice modified the preliminary injunction. The preliminary injunction, however, was vacated when the judge entered the final decree. See *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of Dep’t of Mental Retardation (No. 2)*, *supra* at 472, 677 N.E.2d 153. Therefore, we need take no action on the single justice’s order because the preliminary injunction did not survive the entry of the final decree. *Mahony v. Board of Assessors of Watertown*, 362 Mass. 210, 216 n. 3, 285 N.E.2d 403 (1972); *Lowell Bar Ass’n v. Loeb*, 315 Mass. 176, 190-191, 52 N.E.2d 27 (1943).