COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

BRISTOL, SS. NO. 07101

BEHAVIOR RESEARCH INSTITUTE, INC., ET AL.,
Plaintiffs, Appellees,

v.

DIRECTOR, OFFICE FOR CHILDREN,
Defendant,

COMMISSIONER OF MENTAL RETARDATION,
Defendant in Contempt Proceeding, Appellant.

ON DIRECT APPELLATE REVIEW FROM
A FINAL JUDGMENT OF THE
BRISTOL SUPERIOR/PROBATE COURT

BRIEF FOR APPELLANT COMMISSIONER OF MENTAL RETARDATION

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STATEMENT OF ISSUES

1. Whether the trial court erred as a matter of law in concluding that the Commissioner of the Department of Mental Retardation ("DMR"), in exercising his statutory and regulatory authority over the Behavior Research Institute ("BRI"),[1] clearly and directly violated unequivocal provisions of a Settlement Agreement entered as a court order in this case in 1987.

2. Whether all of the trial court's factual findings—including findings of bad faith, perjury, and attorney misconduct—which are adopted almost verbatim from BRI's proposed findings and are entirely unsupported by the evidence, are clearly erroneous.

3. Whether the trial court abused its discretion and intruded impermissibly on the prerogatives of the executive and legislative branches in appointing a receiver to assume all of DMR's regulatory authority over BRI as well as other powers and immunities that exceed those of DMR and of the court itself.

4. Whether the trial court abused its discretion and erred as a matter of law in awarding over $1 million in attorneys' fees, without giving the Commissioner an opportunity to review and respond to the fee applicants' contemporaneous time records, and without making specific and detailed findings as to the reasonableness of the time spent or the expenses incurred by the 25 attorneys and paralegals for whose services fees were awarded.

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[1] In the fall of 1994, the plaintiff, formerly known as Behavior Research Institute ("BRI") changed its name to the Judge Rotenberg Educational Center ("JRC"). However, to avoid confusion, it is referred to throughout as "BRI."

STATEMENT OF THE CASE

This is an appeal from a judgment of the trial court holding the Commissioner of Mental Retardation in contempt of a 10-year-old Settlement Agreement, entered as an order of the trial court, which was intended to resolve then-pending litigation between BRI and the Office for Children ("OFC"). The contempt litigation itself is the culmination of a two-year controversy as to whether DMR should continue to certify BRI to utilize certain highly intrusive behavior modification procedures and, if so, under what conditions. To put the issues presented by this appeal in context, it is necessary to describe the ten-year history of the relationship between DMR and BRI, both in court and out, in some detail.

Prior Proceedings

1. The Underlying Case

This case originally arose from a licensing dispute between the Office for Children ("OFC") and its licensee, BRI, a private provider of services to autistic and mentally retarded young people and adults. In September 1985, OFC issued an order to show cause why BRI's license should not be suspended or revoked for failure to comply with OFC regulations. App. 60. At the same time, OFC issued an Emergency Order to Correct Deficiencies, which required BRI to cease using certain behavior modification procedures (i.e., vapor sprays, pinches, slaps, spanks, muscle squeezes, and the "contingent food program") and to cease intake of new students. Appendix ("App.") 61.[2]

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[2]A three-volume Appendix of pertinent parts of the trial court record is filed herewith, pursuant to Mass. R. App. P. 18. Also filed herewith, in separately bound volumes, are:

(1) All trial exhibits ("Ex."). The exhibits are indexed and numbered as follows: Uncontested Exhibits (U-1—U-235) (three volumes), Plaintiffs' Exhibits (BRI-236—BRI-326, Parent-1, and GAL-1) (three volumes), and

(continued...)

On February 28, 1986, BRI and two parents of BRI students, who sought to represent a class of all students at BRI and their parents and guardians, filed a complaint in the Bristol Probate and Family Court[3] seeking to enjoin OFC from enforcing its emergency order and from revoking BRI's license without court approval. App. 52. On June 4, 1986, the trial court issued a preliminary injunction, maintaining the status quo pending a trial on the merits. App. 5, 115. A Single Justice of the Appeals Court denied OFC's petition for interlocutory relief from that order.[4] App. 109.

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[2](...continued)

Defendant's Exhibits (DMR-1—DMR-80) (two volumes).

(2) The entire trial transcript ("Tr.") (15 volumes).

(3) An Addendum to Argument III of this brief. That Addendum is organized into 21 sections, corresponding to the 21 subsections of Argument III.B of this brief. Each section of the Addendum contains, side-by-side, the relevant trial court findings and the corresponding proposed findings of BRI, followed by copies of the pertinent transcript pages and exhibits. All documents reproduced in this Addendum are also contained in the Appendix, Exhibits, or Transcript volumes listed above.

[3]After OFC contested the Probate Court's jurisdiction, the then-presiding judge (Rotenberg, J.) obtained an order specially assigning him to sit as a Superior Court judge in this case. App. 5. After Judge Rotenberg's death in 1993, another Probate Court judge (LaStaiti, J.) assumed responsibility for the case and was also specially assigned as a Superior Court judge for that purpose. App. 19.

[4]No appellate court ever examined the record underlying the preliminary injunction or ruled on the merits of the trial court's findings of bad faith on the part of OFC. *Cf.* App. 109 (Single Justice who denied interlocutory relief from preliminary injunction was unable to read extensive trial court record before doing so). Although OFC had filed a notice of appeal of the preliminary injunction to a full panel of the Appeals Court, that appeal was voluntarily dismissed once the Settlement Agreement was entered into. App. 5.

2. The Settlement Agreement[5]

On December 12, 1986, after a lengthy period of negotiations, a Settlement Agreement was entered into by BRI, OFC, the Director of OFC, and counsel for a "Class of All Students at BRI, Their Parents and Guardians," App. 133, which class was certified as such that same day.[6] App. 118. The Settlement Agreement was approved by the court and entered as a court order on January 7, 1987. Ex. U-4.

As stated in the Preamble to the Settlement Agreement, its purpose was to "end the litigation" that was then pending between OFC, BRI, and the parents. App. 120-21. By its terms, the Settlement Agreement was to terminate automatically after one year, unless the court ordered otherwise, "for good cause shown related to the terms or substance of th[e] agreement." App. 132-33. In the meantime, i.e., "on or before July 1, 1987," the Settlement Agreement provided that "the licensing responsibility for B.R.I. shall be transferred from O.F.C. to D.M.H. [the Department of Mental

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[5]For the Court's convenience, a copy of the Settlement Agreement is included in the attached Addendum to this brief. It also appears in the Appendix at 120-33 and as Ex. U-2.

[6]Attorney Robert Sherman (who is presently one of BRI's counsel) signed the Settlement Agreement on behalf of the "Class of All Students at BRI, Their Parents and Guardians." App. 133. The Agreement was also signed by Marc Perlin and Max Volterra as "Counsel for B.R.I. clients." App. 133.

Mr. Perlin and Mr. Volterra had been appointed by the court to represent individual students in their individual guardianship cases and were also appointed, in the present case, App. 3, to represent the "potential class of students," App. 208, which was never actually certified. On November 8, 1993, the court allowed the motions of Mr. Perlin and Mr. Volterra to withdraw and appointed attorneys Paul Cataldo and Michele Dorsey "as successor counsel to the [never certified] class of students" in the present case. App. 22, 211. (By that time, first Kenneth Kurnos and then Eugene Curry had succeeded Mr. Sherman as counsel for the certified "class of all students, their parents and guardians." App. 12, 1148, 1176.)

Other attorneys were appointed, through the Committee for Public Counsel Services, to represent each of the individual students in the individual guardianship cases. These attorneys' subsequent motion, on behalf of their individual clients, to intervene in the present case, App. 27, was denied by the trial court. App. 38. Their appeal from the denial of that motion is presently before this Court as SJC-06990.

Health]." App. 127. During the pendency of the Agreement, the court retained jurisdiction over the case, but the rights of the parties were expressly "limited to enforcement of the terms of this agreement." App. 132.

The Settlement Agreement imposed many obligations on BRI.[7] In return, OFC agreed to restore BRI's licenses, to permit intake of new clients, to give BRI equal consideration with other private providers in referring new clients for placement at public expense, and to pay $580,605.25 in attorneys' fees. App. 120-33.

Specifically, under Part A of the Agreement, BRI is obligated to formulate a treatment plan for each client and, where the treatment plan calls for aversive procedures, to obtain the authorization of the Probate Court, "utilizing the 'substituted judgment' criteria," prior to implementing the treatment plan. App. 122, 123. The only obligation imposed on any state agency by Part A is the requirement that the Department of Mental Health ("DMH") provide clinicans to evaluate BRI's proposed treatment plans and provide their recommendations to the court.[8] App. 125. BRI is required to cooperate fully with these clinicians. *Id.*

Part B of the Agreement, as its title indicates, provides for "Monitoring of Substituted Judgment Treatment Plans and B.R.I.'s Treatment Program." App. 125. Paragraph 2 of Part B provides for the appointment of Dr. John Daignault, a psychologist, as "a general monitor" of BRI's treatment and educational program. App. 126. In this role, Dr. Daignault is "responsible for overseeing B.R.I.'s compliance with all applicable state regulations,

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[7]Although, in entering into the Settlement Agreement, BRI did not concede the truth of the findings made by OFC in its licensing orders, App. 121, the obligations assumed by BRI under the Agreement are in the same areas in which OFC found BRI to be deficient, i.e., lack of staff training and excessive use of physical aversives and mechanical restraint. Verified Complaint, App. 52, Exhibits D, E.

[8]In a later order, dated December 29, 1988, the court clarified that, although these clinicians were to be provided by DMH, they were not intended to report to or speak for DMH (or its successor, DMR): "The Court reiterates that the D.M.R. experts are not partisan witnesses, that their evaluations are for the Court." Ex. U-13.; *see also* Ex. BRI - 317.

except to the extent that those regulations involve treatment procedures authorized by the Court in accordance with Paragraph A."[9] *Id.* As part of his role under Part B, ¶ 2, the general monitor is required to make reports to the court and "arbitrate" disputes between the parties. *Id.* The term of Dr. Daignault's initial appointment was six months, *id.*, by which time it was anticipated that DMH would assume the function of monitoring BRI's compliance with its regulations. App. 127.[10]

Part C of the Agreement provides that the licenses for BRI's residential facilities, which had been suspended by OFC, be restored and "not be revoked without the approval of the Court or until such time as D.M.H. licenses B.R.I." App. 127. It further provides that intake of new clients, which had been closed by OFC, be reopened and "not be impermissibly obstructed during the pendency of this agreement." *Id.*

Part D of the Agreement imposes the following additional requirements on BRI: to retain at least one additional doctoral level psychologist to assist in designing, implementing, and modifying treatment plans; to provide staff training and supervision by doctoral level psychologists; to comply with Department of Education standards regarding certification of staff; to assign clients to staff, classrooms, and residences so as to assure consistency and continuity of care; to employ specified treatment approaches as a means of minimizing the use of restrictive procedures; to comply with DMH regulations concerning restraint and human rights committees; to continue its use of a developmental disabilities review committee; and to follow all applicable regulations concerning periodic review of individualized educational and service plans. App. 127-29.

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[9]As to the scope of this exception to the general monitor's authority, *see* Arguments I.A. and I.C, *infra*.

[10]This understanding of the temporary nature of the monitor's role was shared by Dr. Israel (BRI's Executive Director) and by Dr. Daignault himself. *See* Ex. DMR-26 at 2; DMR-27 at 163, 182-83.

Part F[11] of the Agreement requires DMH, OFC, and all state placement and funding agencies to "give B.R.I. equal consideration with all other private providers for new clients referred for private placement by state agencies."[12] Finally, Part L of the Agreement provides that "each party shall discharge its obligations under the terms of this agreement, in good faith." App. 133.

By order dated June 22, 1987, the court extended the Settlement Agreement for six months, App. 135, as contemplated by Part K of the Agreement. App. 132. At the second six-month review, on January 7, 1988, the court extended the Agreement for another six months, based solely on the fact that BRI had not yet been licensed by DMH. App. 136.

Effective July 1, 1987, the responsibility for licensing BRI was transferred, by statute, from DMH to DMR. St. 1986, c. 599. Based on that fact and on the fact that DMR was then in the process of considering BRI's pending application for licensure, DMR ("as successor to . . . DMH") moved to amend the Settlement Agreement, on October 24, 1988, to substitute the words "Department of Mental Retardation" for the words "Department of Mental Health," wherever the latter words appear in the Settlement Agreement,[13] and to modify the requirement concerning the provision of clinicians to make it less burdensome to DMR. Ex. U-10. By order dated December 29, 1988, the trial court treated DMR's motion to amend as a

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[11]Part E and other parts of the Agreement not described here have no bearing on the issues presented by this appeal.

[12]Although BRI relied on Part F in a previous contempt complaint against DMR and the Director of OFC, App. 138, *see* subsection 3, *infra*, BRI did not claim any violation of this provision in the contempt complaint that gave rise to the present appeal. App. 344, 1212.

[13]The Settlement Agreement referred to only three obligations of DMH (which was not a party to the Agreement, App. 133): (1) to provide clinicians to assist the Probate Court in reviewing treatment plans in the individual guardianship cases, App. 125; (2) to enter into an interagency agreement transferring licensing responsibility over BRI from OFC to DMH, App. 127; and (3) to give BRI equal consideration for referrals of new clients. App. 130. The second obligation was discharged by DMH on March 19, 1987, prior to the creation of DMR. Ex. U-5, U-6.

motion to intervene in the underlying case, allowed the motion, and "welcome[d] DMR as a party under the Settlement Agreement."[14] Ex. U-13. Although DMH was not a party and DMR had never sought to become "a party" to the case or to the Settlement Agreement, DMR did not appeal from the court's interlocutory "allowance" of its motion to amend.[15]

BRI was ultimately licensed by DMR effective March 1, 1990. In light of this, DMR's General Counsel asked Dr. Daignault's advice "as to how we should proceed at this point, as it seems appropriate under the terms of the settlement agreement that it now be terminated." Ex. U-29. However, to date, no party has formally moved for termination of the Agreement.

3. Prior Contempt Complaints and Other Litigation

No sooner was DMR made a party to the Settlement Agreement, than it was named as a defendant in several successive actions brought by BRI.[16] On February 27, 1989, BRI sought a "preliminary injunction" from the trial court

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[14]As will be seen below, the incongruency between what DMR sought and what the court allowed is a source of continuing confusion and disagreement as to the scope of DMR's responsibilities under the Settlement Agreement.

[15]In his answer and motion to dismiss the contempt complaint that gave rise to the present appeal, the Commissioner asserted, as one of 12 affirmative defenses, that he "is not a proper party to this case." App. 361, 486. However, that defense was not pressed in the trial court, App. 374-75 (memorandum in support of motion to dismiss assumes DMR is a party but reserves the right to raise issue at later time), and is not raised as an issue in the present appeal. *See* Argument III.B.1, *infra*.

[16]In none of these cases did BRI seek arbitration of the disputed issues by the court monitor under the Settlement Agreement prior to filing its complaints in court. This pattern of conduct by BRI militates against the broad interpretation of the arbitration clause advanced by BRI in the current litigation, requiring arbitration of all disputes between BRI and DMR on any subject. *See* Argument I.C, *infra*.

BRI's successive actions in 1989 and 1990, alleging bad faith by the previous Commissioner of DMR and by other state agencies, also seriously undermine one of the central themes of BRI's most recent contempt complaint and the trial court's findings thereon—that the regulatory actions taken by DMR over the past two years were motivated by Commissioner Campbell's personal bias against BRI.

in this case (and in the guardianship case of David McKnight, a BRI student) requiring DMR to pay BRI for the continued care of Mr. McKnight, App. 15, who had been placed at BRI by another state that was no longer willing to fund the placement. In granting the requested relief, the court (Rotenberg, J.) relied, in part, on a finding that DMR's failure to fund this student's placement at BRI constituted a violation of the good faith provision of the Settlement Agreement in this case. DMR appealed from that order, and this Court vacated it. *In the Matter of McKnight*, 406 Mass. 787, 791 (1990) (finding "nothing in th[e] settlement agreement that justified entry of the preliminary injunction").[17]

A few months later, on July 7, 1989, while the *McKnight* appeal was pending, BRI filed a contempt complaint against DMR and the Director of OFC, alleging that they had violated Parts F(2) and L of the Settlement Agreement by failing to give BRI equal consideration with other providers for referrals of new clients. App. 138-46. After 15 months of discovery, App. 16-19, BRI did nothing further to prosecute that complaint.

In 1990, BRI and the parents of two BRI students sued DMR, three other state agencies, and the Commonwealth in Bristol Probate and Family Court[18] seeking an order requiring that BRI be reimbursed at the FY 1991 per-student rate of $153,351, despite legislation freezing rates for private special education schools at the lower FY 1990 rate. BRI claimed, *inter alia*, that, by refusing to reimburse the school at the higher rate, DMR and the other state agencies were reneging on a settlement of an administrative appeal. The Probate Court (Rotenberg, J.) reported the case, and this Court ruled that BRI

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[17]Once again, because this Court vacated the order on other grounds, no appellate court addressed the merits of the trial court's findings of bad faith.

[18]The defendants contested the Probate Court's jurisdiction over this rate-setting case; but, after the Probate Court reported the case to the Appeals Court, this Court granted direct appellate review and resolved the merits of the case in defendants' favor without addressing the jurisdictional issue. *BRI, Inc. v. Secretary of Administration*, 411 Mass. 73 (1991).

had no constitutional, statutory, or contractual right to be paid at the higher rate. *BRI, Inc. v. Secretary of Administration*, 411 Mass. 73 (1991).[19]

On September 3, 1993, BRI filed another contempt complaint, alleging various violations of the Settlement Agreement relating to DMR's processing of BRI's then-pending application for renewal of its certification to utilize aversive behavior modification procedures. App. 19. Among the contentions in that complaint were allegations that DMR had violated Part B of the Settlement Agreement by failing to submit various matters to Dr. Daignault, the court monitor, for arbitration. Shortly thereafter, BRI noticed a series of depositions, as did DMR.[20] App. 20. On October 26, 1993, BRI moved to amend its contempt complaint, App. 21; and, on November 1, 1993, the court allowed that motion and issued a contempt summons. App. 22.

4. Mediation, 1993-94

In the meantime, in August 1993, the attorneys who were then representing DMR in this case learned from BRI's attorneys that Dr. Daignault, the court monitor, who had been functioning as a mediator in this case, was working with BRI's law firm as a consultant in other, nonspecified, cases. Ex. U-85, U-86. Shortly thereafter, DMR's attorneys discovered, more specifically, that Dr. Daignault had prepared affidavits that were filed by BRI's law firm on behalf of the firm's other clients in another case against DMR. Ex. DMR-41. Because this information raised questions as to the court monitor's neutrality, DMR sought further information from Dr. Daignault as to his financial relationships with BRI's attorneys and their other

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[19]During this same time period, BRI also litigated, as a defendant, its right to restrain and treat a student against his will. Because the student was found competent and his guardianship was therefore discharged, this Court dismissed the student's appeal in that case as moot, without addressing the merits. *In the Matter of Sturtz*, 410 Mass. 58 (1991).

[20]Among the nine depositions noticed by DMR at that time was that of Dr. Daignault, Ex. U-111, who took that deposition notice as "an attempt to impugn [him]." Tr. II:172. *See* Argument III.B.5, *infra*.

clients, first by letter dated August 24, 1993, Ex. U-86, and then by motion. App. 185, 195, 197. Dr. Daignault did not provide the requested information, and the court did not act on DMR's motion to require disclosure.[21]

On September 24, 1993, Dr. Daignault filed a report to the court stating that his efforts to mediate a dispute between BRI and DMR had been unsuccessful. Ex. BRI-250. His report contained no decision or recommendation on the matter then in controversy,[22] i.e., DMR's communications with out-of-state agencies funding students at BRI.

Shortly thereafter, on October 22, 1993, "[i]n order to remove this distraction [i.e., DMR's questions as to his impartiality] from the real issues of dispute or concern," Dr. Daignault moved that the responsibility "to conduct mediation/arbitration under the Settlement Agreement," App. 183, 184, be assigned to someone else. The court allowed that motion on November 1, 1993, App. 194,[23] and, by orders dated November 19 and December 6, 1993, appointed Judge George Hurd, Jr. (ret.) as "mediator under the settlement agreement," in place of Dr. Daignault, and directed the parties to submit outstanding issues to him, App. 213, 214, which they did. App. 26-27, 229-53.

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[21]By letter dated November 17, 1993, DMR requested a hearing on this motion, but the hearing was continued indefinitely until such time as Dr. Daignault's previously filed request for court-appointed counsel was resolved. Ex. DMR-42. The court eventually granted Dr. Daignault's request for court-appointed counsel on April 13, 1994, but still did not rule on DMR's motion for disclosure, which was renewed by DMR on February 21, 1995, App. 272, App. 269, in response to Dr. Daignault's motion to confirm his responsibilities under the Settlement Agreement. When DMR later noticed Dr. Daignault's deposition in connection with the present contempt proceedings, his court-appointed counsel sought and obtained a protective order, barring questions on the subject of his financial relationships with BRI's attorneys and their other clients. App. 36. In effect, this protective order constituted a denial, without a hearing, of DMR's long-pending motion for disclosure.

[22]*Cf.* Settlement Agreement, Part B, ¶ 2. App. 126 (requiring that matters be submitted to the court "in the event that any party disagrees with any *decision or recommendation* of Dr. Daignault," emphasis added).

[23]Dr. Daignault retained the other responsibilities of "general monitor" under Part B of the Settlement Agreement, as the court later confirmed. App. 194.

By motion dated February 22, 1994, DMR sought a temporary protective order staying discovery on BRI's amended contempt complaint, pending consideration by Judge Hurd of the issues presented to him by the parties. App. 218. That motion was denied, and discovery and mediation occurred concurrently through April of 1994. App. 24-26.

5. Second and Third Amended Contempt Complaints

On April 25, 1994, BRI moved for leave to file a second amended contempt complaint and sought a trial date on that complaint. App. 26. DMR opposed BRI's motion for an immediate trial on the grounds, *inter alia*, that it would serve the interests of judicial economy to narrow the issues by further discovery and by potentially dispositive motions, rather than have a lengthy trial on the broad range of legal and factual issues raised by BRI's wide-ranging, 41-page proposed complaint. App. 254-60. Neither the motion to amend nor the motion for a trial date was acted upon by the court.

The litigation was relatively quiet until March 24, 1995, when BRI filed a motion for leave to file a third amended contempt complaint and sought a preliminary injunction enjoining the Commissioner of DMR from revoking BRI's certification to use aversive behavior modification procedures.[24] App. 32. The proposed third amended complaint alleged, in essence, that the Commissioner's decertification decision and the two-year process leading up to that decision violated various provisions of the Settlement Agreement. App. 284-355.

6. The Preliminary Injunction

That same day, the court allowed BRI's motion to amend the complaint and issued a preliminary injunction enjoining the Commissioner from:

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[24]As discussed more fully in the Statement of Facts, section A.6, *infra*, the Commissioner had issued a decision the preceding day, March 23, 1995, revoking BRI's certification, effective July 1, 1995, based on BRI's outright refusal to comply with the conditions contained in his previous certification decision of January 20, 1995. Ex. U-179.

> enforcing decertification of Behavior Research Institute, Inc. (sometimes called the Judge Rotenberg Educational Center, Inc.) as set forth in a letter dated March 23, 1995 provided:
>
> a. that during the terms of this order or any extensions thereof, the BRI, alias, shall comply with the conditions contained in the Commissioner's letter dated January 20, 1995 granting conditionl certification to said BRI, alias; and
>
> b. that any changes in treatment plans to be made shall be subject to the approval of the Court in a substituted judgment proceeding after due notice and an opportunity to be heard.

App. 283.

Shortly after the issuance of the preliminary injunction, it appeared, from correspondence between the parties and comments made by the court at a subsequent hearing, that the Commissioner's interpretation of the injunction might differ from that of BRI and, perhaps, that of the court itself.[25] Therefore, the Commissioner attempted to obtain clarification of the injunction by filing a motion to clarify it. App. 356-57. However, by letter dated April 18, 1995, the Clerk returned that motion and supporting memorandum to the Commissioner's counsel "in accordance with Judge LaStaiti's request." App. 406. The court allowed DMR's subsequent motion to require the clerk to docket its motion for clarification, App. 400, 409, but never acted on the motion for clarification itself.[26] In the absence of the

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[25]The precise issue in dispute was whether the preliminary injunction required BRI to comply with all of the conditions in the Commissioner's January 20th letter, including particularly the requirement that BRI cease using the "specialized food program," a food deprivation program under which a student may receive as little as 20 percent of his daily caloric requirement, depending on his behavior during the day. Ex. U-166 at 12.

[26]Clarification of the preliminary injunction was subsequently provided by a Single Justice of the Appeals Court, who modified the preliminary injunction, pending appeal, in the manner requested by the Commissioner in his petition for relief under G.L. c. 231, § 118, ¶ 1. BRI's appeal from the Single Justice's order modifying the preliminary injunction is presently pending before this Court as SJC-07045.

requested clarification from the trial court, DMR appealed from the preliminary injunction, pursuant to G.L. c. 231, § 118, ¶ 2. App. 36. That appeal is presently pending before this Court as SJC-06956.

7. Pre-trial Proceedings

On April 20, 1995, the Commissioner moved to dismiss the third amended contempt complaint on the ground (among many others) that the facts alleged in BRI's 72-page complaint, even if entirely true, failed to state a claim for contempt of the Settlement Agreement. App. 359. Rather than rule on this potentially dispositive motion as proposed by DMR's counsel, App. 277, the court scheduled a trial on the contempt complaint, preceded by a brief period of discovery. The court ultimately denied the motion to dismiss immediately prior to the commencement of the trial on June 26, 1995, on the grounds that "to insure judicial economy, a full evidentiary hearing must be held on this Complaint for Contempt." App. 544.

In a pre-trial order, dated April 25, 1995, the court directed the parties to pre-mark and bind a compilation of all "uncontested" exhibits. By including exhibits in the uncontested binder, the parties waived all evidentiary objections except relevance. App. 415. Pursuant to this order, the parties ultimately stipulated to 235 uncontested exhibits, U-1— U-235, which were submitted to the court by BRI at the commencement of the trial on June 26, 1995. Tr. I:93.

In an order issued after the pre-trial conference, the court announced that the trial would begin on June 26, 1995, and estimated that it would last approximately five weeks. App. 506. The court further directed the parties to file complete witness lists by June 12 and advised them that any witnesses not listed would not be permitted to testify.[27] *Id.* BRI listed 45 potential witnesses, App. 533-35; and DMR listed 128, App. 445-47, many of whom were also included on BRI's list.

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[27]That order was later enforced against the Commissioner, Tr. XI:240-43, but not against BRI. Tr. VII:152-53.

On June 5, 1995, the Commissioner filed an answer and counterclaim to the third amended contempt complaint. App. 458-504. BRI failed to respond to the counterclaim until June 30, 1995, the fifth day of trial, App. 42, 547-62, after the Commissioner had moved, unsuccessfully, for default judgment on his counterclaim. App. 41.

8. The Contempt Trial

The trial commenced on June 26 and concluded on July 14, 1995, thirteen trial days later. Tr. I-XIII. During the trial BRI called seven witnesses, the parents called four witnesses, and the Commissioner called six witnesses. *Id.* In addition to the 235 uncontested exhibits, BRI introduced 90 exhibits, the parents and the Guardian ad Litem each introduced 1 exhibit, and DMR introduced 80 exhibits.

Prior to opening statements, counsel for the Commissioner objected to the participation of counsel for the class of students, parents, and guardians and counsel for the student members of the class on the grounds that their clients were not parties to the contempt proceedings.[28] Tr. I:81-82. Without expressly ruling on their party/non-party status, the court permitted them to participate as parties in the trial.[29] Tr. I:84. The court also permitted Bettina

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[28]The contempt complaint was brought only by BRI, App. 284 ("NOW COMES the Plaintiff, The Judge Rotenberg Educational Center, Inc. . . . and hereby files its . . . Complaint for Contempt"); was signed only by BRI's counsel, App. 354; and was verified only by Dr. Israel. App. 355.

[29]Counsel for the class of students, parents, and guardians called four witnesses, Tr. IX:60-115, X:4-15, all of whom were also on BRI's and DMR's witness lists. Counsel for the student members of the class did not call any witnesses but examined several witnesses called by the other parties and occasionally raised evidentiary objections to questions asked and documents offered by the Commissioner. For their relatively minimal participation in this case, the court awarded these attorneys over $200,000 in attorneys' fees. App. 1321. *See* Argument IV.B.3.a, *infra*.

Briggs, another non-party,[30] to examine a witness, Tr. VIII:195-96; introduce an exhibit, Tr. XIII:129; and argue as to the admissibility of evidence, Tr. II:138; and further permitted the court monitor, Dr. Daignault, to testify as a witness over the Commissioner's objections.[31] Tr. II:19, 23; App. 545.

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[30]On April 29, 1986, prior to the entry of the Settlement Agreement, the court appointed Ms. Briggs as "Guardian ad Litem to serve as an independent investigator for the Court." App. 3. Although the Settlement Agreement is silent as to any continuing role for a guardian ad litem in this case, Ms. Briggs signed the motion for a preliminary injunction and filed an appellee's brief in the *McKnight* case, 406 Mass. at 788, and (along with Dr. Daignault, the court monitor) has submitted reports to the court from time to time. App. 32, 39.

One such report was admitted into evidence in the contempt trial, over the Commissioner's objections. Tr. II:98, 104-06. The requests of the Commissioner's counsel to obtain a copy of this report, both before and after its admission into evidence, Tr. II:98, 106, were initially denied by the court because "there's only so much that the Court can do in the midst of this trial." Tr. II:106. After the lunch break, the Commissioner's counsel renewed her request for a copy of the report, and the court again denied this request:

> MS. YOGMAN: Your Honor, with respect to the joint report [of] the Court Monitor and the Guardian Ad Litem that's been introduced into evidence, may we have a copy at this point?
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> THE COURT: It is my practice to deny copies of GAL and Monitor reports and I will do so in this case. Thank you.
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> MS. YOGMAN: It's in evidence? I can't have a copy of it?
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> THE COURT: That's correct. You may not, nor may any other party to this proceeding.

Tr. II:128. For this reason, no copy of that report is contained in the record appendix.

[31]The grounds for the Commissioner's objections were (1) that, as a mediator or arbitrator, Dr. Daignault was disqualified from testifying as a witness, and (2) that his testimony as to the content of mediation discussions would have a chilling effect on the parties' willingness to be candid and to compromise in future mediations in this case. App. 545.

Briggs, another non-party,[30] to examine a witness, Tr. VIII:195-96; introduce an exhibit, Tr. XIII:129; and argue as to the admissibility of evidence, Tr. II:138; and further permitted the court monitor, Dr. Daignault, to testify as a witness over the Commissioner's objections.[31] Tr. II:19, 23; App. 545.

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9. Contempt Findings and Conclusions

At the close of trial, the court directed all parties to file proposed findings and conclusions by July 24, 1995,[32] Tr. XIII:133, which they did. App. 634-1130. On October 6, 1995, the court issued its Findings and Conclusions, App. 1207-1321, which were taken, almost verbatim, from BRI's proposed findings and conclusions. *See* Argument III, *infra*, and Addendum to Argument III, a separately bound volume filed herewith.

The court made 304[33] findings of fact.[34] App. 1207-93. On the basis of those findings, the court concluded that the Commissioner "is in contempt having clearly and undoubtedly disobeyed the Order of this Court."[35] App. 1302. The court's findings and conclusions did not specify what conduct of the Commissioner violated what provision(s) of the Settlement Agreement or other order(s) of the court. At the same time, the court issued an order "denying" the Commissioner's counterclaim. App. 1322.

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[32]This directive was followed by a telephone call from the Assistant Register requesting that the proposed findings and conclusions be submitted both in hard copy and on computer disk.

[33]The court's last two findings are both numbered "303."

[34]In addition to its contempt findings, the court also made 25 "Corollary Findings" of "Improper Conduct by DMR and Its Attorneys," App. 1287, which the court referred to the Board of Bar Overseers. App. 1293. The Board of Bar Overseers has deferred its consideration of this matter pending this appeal. As discussed in Arguments I and III, *infra*, virtually all of those findings are both immaterial and clearly erroneous.

[35]Later, in its order denying the Commissioner's motion for a stay pending appeal (in which the Commissioner had pointed out this lack of specificity), the court belatedly made some links between its findings and conclusions, by adopting, almost verbatim, large portions of BRI's memorandum in opposition to the stay. App. 1432, 1377.

10. Receivership and Injunctive Relief

As a remedy for this contempt, the court appointed a receiver[36] to "exercise all powers presently held by DMR as well as any additional powers as may be necessary and appropriate. DMR's powers, as they relate to [BRI], its students and families, shall be totally superseded by the Receiver." App. 1342. Among the powers expressly granted to the receiver are the following:

- to "control all the funds and revenues of DMR as they relate to JRC," App. 1342;
- to "review . . . all adverse regulatory decisions and actions taken by DMR against [BRI] and affirm, modify or rescind those regulatory decisions and actions as required," App. 1343;
- to "conduct a *de novo* review of any outstanding regulatory decisions including the Defendant's decisions regarding [BRI]'s Level III certification . . . and make a decision on [BRI]'s application," App. 1344;
- to "develop and improve DMR's management systems, personnel standards, [and] employee relations," App. 1344;
- to "direct, control, manage, administer and operate the property, funds and staff of DMR," App. 1345;
- to "apply for and accept funds on behalf of DMR from any public or private entity or person for any lawful purposes," App. 1345;
- to "contract on behalf of DMR with any public or private entity or person for any lawful purpose," App. 1345;
- to "approve and execute all contracts that DMR enters into," App. 1345;

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[36]The Court appointed Judge James Nixon (Ret.) as the receiver. App. 49. The Court also appointed Judge George N Assack (Ret.) as a special master. App. 1342. The five court-appointed quasi-judicial officers in this case—Dr. Daignault, the court monitor; Bettina Briggs, the guardian ad litem; Judge Hurd, the court mediator; Judge Nixon, the receiver; and Judge Assack, the master—are all permitted to have ex parte communication with the parties and with the court. App. 1350. This quasi-judicial superstructure contributes to the unorthodox nature of the proceedings in this case.

- to "disaffirm, reject or discontinue at any time any executory or partially-executed contract . . . entered into before the date of this Order, including but not limited to employment, consultant, personal or professional services and material contracts," App. 1346;
- to "direct, supervise and oversee all employees of DMR, including without limitation, the Commissioner, Assistant Commissioner, the legal department, the investigations unit, area directors and service coordinators," App. 1346;
- to "create, abolish, and transfer positions, establish the duties of such positions, establish lines of authority and reporting, and otherwise reorganize the structure and responsibilities of DMR staff," App. 1346;
- to "hire, promote, transfer, discipline, suspend or discharge all employees of DMR, and establish systems to evaluate periodically the performance of each employee and to establish and enforce standards of employee productivity," App. 1346;
- to "file and prosecute suits or commence other legal actions in the name and on behalf of DMR," App. 1346;
- to "defend, compromise and settle any legal action or administrative proceeding to which DMR is a party," App. 1346; and
- to disaffirm, reject, discontinue, amend, revise, or rescind any internal rule, regulation, policy, custom or practice of DMR," App. 1347.

The trial court's order further requires DMR to compensate not only the receiver, at an hourly rate of $150, but also any lawyers, accountants, or other professional consultants that the receiver finds necessary for the performance of his duties. App. 1343, 1347-48. Furthermore, the court's order immunizes the receiver in his capacity as receiver from any suit, legal action, or administrative proceeding in any court or forum arising from any action taken by him in the performance of the above duties, unless the trial court expressly consents to such suits. App. 1347, 1349. Under no circumstances can the receiver be held personally liable for any action taken in the performance of his duties. App. 1350. In addition to these receivership orders, the court also enjoined the Commissioner, "his agents, attorneys, employees, and anyone

acting in concert with them," App. 1341; from "tak[ing] any action to obstruct, frustrate or interfere with the Receiver in the performance of his duties," App. 1348; from "taking any retaliatory action against the Plaintiffs, their counsel, the Court Monitor or the *Guardian ad litem*"; and from "seek[ing] to accomplish through the Individual Guardianship proceedings what they are enjoined from doing herein." App. 1341-42.

11. Attorneys' Fees

At the close of trial, the court directed all counsel to submit "affidavit[s] of counsel fees and costs incurred in connection with the trial," Tr. XIII:43, which they did. App. 563-627, 1131-1200. When BRI's counsel submitted his affidavit, the Commissioner objected on the ground that the affidavit did not contain any contemporaneous time records. Tr. XIII:46. BRI's counsel thereupon submitted a memorandum, arguing that their time records are protected by attorney-client privilege. Tr. XIII:46-47. The court declined to rule on the Commissioner's objection at that time. *Id.*

In the Commissioner's proposed findings and conclusions, he reiterated his objection to BRI's fee affidavit.[37] App. 700, 737. Thereafter, the court issued an order instructing the parties "to submit and file *in camera* their respective existing unredacted legal bills that underly [sic] their Affidavits heretofore submitted on this issue." App. 1201. In that order, the court stated "that such in camera review is necessary and appropriate in order to inspect and consider the confidential billing information under the circumstances of this litigation where attorney-client privilege applies." *Id.* In his response to that order, the Commissioner objected to the court's *in camera* consideration of opposing counsel's billing records without service

[37]The affidavits of Kenneth Kumos and Eugene Curry (counsel for the class of students, parents, and guardians) and Michele Dorsey (counsel for the student members of the class) share the same infirmity. App. 1148, 1173, 1176.

on the Commissioner, the party who would be charged with paying any fees awarded on the basis of those records.[38]

On the basis of counsel's fee affidavits and the court's *in camera* inspection of the underlying billing records, the court awarded a total of $1,098,087.50 in attorneys' fees and expenses to the 25 attorneys and paralegals who worked on this case on behalf of BRI, the parents, and the students. App. 1286. This total amount was based on the full amount of time purportedly spent and the amount of expenses purportedly incurred by counsel for the various parties, as stated in their respective affidavits. App. 1321. Apart from the conclusory statements that the amount awarded was "fair," App. 1314, "necessary and reasonable," App. 1286, and a list of the factors considered by the court in reaching this conclusion, App. 1314-15, the court made no findings as to the reasonableness of the time spent by particular attorneys on particular tasks or as to the reasonable necessity of the $71,017.34 in expenses incurred.

12. Motions for Stay Pending Appeal

The Commissioner filed a notice of appeal from the contempt judgment,[39] App. 1353, and unsuccessfully sought a stay pending appeal of the court's injunctive and receivership orders[40] from the trial court, App. 1355, 1430; a Single Justice of the Appeals Court, App. 1357, 1454; a Single Justice of the

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[38]Because the Commissioner's response to the court's order calling for *in camera* inspection of billing records was impounded by the court, along with the billing records themselves, App. 1206, no copies of these documents are included in the appendix. The Commissioner's subsequent motion to terminate or modify the court's *sua sponte* impoundment order was denied.

[39]After the appeal was docketed in the Appeals Court, this Court granted the Commissioner's application for direct appellate review.

[40]As recognized by the trial court, the court's award of attorneys' fees is automatically stayed pending appeal pursuant to Mass. R. Civ. P. 62(a). App. 1432-33.

Supreme Judicial Court, App. 1456, 1465; and, finally, from this Court.[41] App. 1469, 1471. Therefore, pending this appeal, the Commissioner's powers to regulate BRI remain entirely supplanted by those of the Receiver.

Statement of Facts

For at least the last ten years, BRI has aggressively challenged various aspects of state regulation of its program, as described in the Prior Proceedings, *supra*. In the contempt complaint that gave rise to the present appeal, BRI focuses on the period from 1991 to the present and claims that DMR's regulation of BRI in three areas–certification to use aversive procedures, licensing of its group homes, and setting of its tuition rates–violated various provisions of the ten-year-old Settlement Agreement in this case. Throughout this five-year period, despite almost constant controversy between the parties, DMR has continued to certify, license, and fund BRI. Accordingly, BRI's contempt claims are addressed primarily to the regulatory process, rather than to the substance of DMR's regulatory actions.

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[41] In its order denying the Commissioner's motion for a stay pending appeal and dismissing his appeal from the Single Justice's denial of such relief under G.L. c. 211, § 3, this Court permitted the Commissioner to renew his request for a stay in the present brief, which he does in Argument IV.A.4, *infra*.

A. Certification Process

The facts underlying the present appeal primarily concern the process that resulted in the renewal of BRI's certification to utilize Level III aversive behavior modification treatments,[42] subject to certain specified conditions, and the subsequent revocation of that certification because of BRI's refusal to comply with those conditions. That process is governed by DMR's behavior modification regulations. 104 C.M.R. § 20.15.[43]

1. Initial Recommendations of Field Review Team

BRI submitted its application to renew its certification on July 31, 1991. Ex. BRI-236. George Casey, a DMR attorney, and Dr. Kevin Reilly, a DMR psychologist, were assigned to review the application and make a recommendation to the Commissioner. Ex. U-34. Accordingly, Attorney Casey and Dr. Reilly visited BRI in November 1991, Ex. BRI-36, where they interviewed staff, reviewed records, and toured the day program. They did not observe any aversive treatments, medical care, or staff training; nor did

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[42]Under DMR's behavior modification regulations, "Level III Interventions" are defined as follows:

1. Any intervention which involves the contingent application of physical contact aversive stimuli such as spanking, slapping or hitting.
2. Time out wherein an individual is placed in a room alone for a period of time exceeding 15 minutes.
3. Any Intervention not listed in 104 CMR 20.00 as a Level I or level II Intervention which is highly intrusive and/or highly restrictive of freedom of movement.
4. Any Intervention which alone, in combination with other Interventions, or as a result of multiple applications of the same Intervention poses a significant risk of physical or psychological harm to the individual.

104 C.M.R. § 20.15(3)(d).

[43]Effective December 1, 1995, these regulations were re-promulgated and recodified as 115 C.M.R.§ 5.14. To avoid confusion, this brief will cite only to 104 C.M.R. §20.15, the codification that was cited below. Copies of these regulations are contained in the attached Addendum to this brief.

they tour the group home component of BRI's program. Tr. I:104-07, 147-48, 182-83, 186; Ex. U-37. Based on their review of BRI's application and on their visit to BRI, Attorney Casey and Dr. Reilly recommended that BRI be re-certified with five conditions, all relating to the composition and operation of BRI's Human Rights Committee. Ex. U-37. By letter dated June 10, 1992, Amanda Chalmers, the Commissioner's designee, notified BRI that, prior to being re-certified, BRI would have to remedy the human rights deficiencies identified by Attorney Casey and Dr. Reilly. Ex. U-43.

Shortly thereafter, first by telephone and then by two follow-up letters, DMR informed BRI that it lacked sufficient information about the specialized food program and the "GED" program to act on BRI's renewal application at that time.[44] Ex. U-46, U-51; *see also* Ex. U-53 (explaining in more detail why DMR was seeking additional information on those two programs). DMR therefore requested additional information from BRI and indicated that it would add a nutritionist, a cardiologist, and an internist to the team reviewing BRI's application, who would make another visit to BRI to review these two programs. Ex. U-46. In mid-September 1992, BRI provided some general information in response to DMR's earlier requests. Ex. U-53. Because that information was insufficiently specific, DMR requested more detailed information by letter dated November 3, 1992, followed by a reminder dated December 21, 1992. Ex. U-57. BRI eventually responded to these requests on January 6, 1993, by providing additional information about the specialized food program. U-64. However, BRI declined to provide detailed information about the GED device, unless DMR first entered into a confidentiality agreement with respect to that information. Ex. U-66.

At about this same time, DMR became aware, through papers filed by BRI in the individual guardianship cases (in which DMR was not actively participating at the time) that BRI continued to experience some difficulties

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[44]As explained earlier, the specialized food program is a food deprivation program under which a student may receive as little as 20 percent of his daily caloric requirement, depending on his behavior during the day. Ex. U-166 at 12. The GED (graduated electronic decelerator) is a device used to administer electric shocks to BRI clients as a means of eliminating targeted behaviors. Ex. U-37 at 3.

with "misfirings" of the GED.[45] Ex. U-58; Tr. I:188-90. (The problems with misfirings were twofold. Sometimes the GED did not emit a shock when activitated, and sometimes it shocked a student without being activated.) Tr. I:188; Ex. U-74. Also during the same time period, the Commissioner received several letters from members of DMR's Human Rights Advisory Committee expressing their concerns about the specialized food program. Ex. U-42, U-59, U-60, U-62.

After DMR signed the confidentiality agreement requested by BRI and various scheduling problems were worked out, the review team re-visited BRI on May 5, 1993. Ex. U-66, U-68; Tr. I:185-86. During that visit, the team again spoke to various BRI staff members and reviewed additional documents but did not observe the use of any aversive procedures, including the GED or the specialized food program. Tr. I:186-87. After this visit, in the course of writing its report, the review team requested further information from BRI concerning the specialized food program and the GED, Ex. U-70, U-74, which BRI then provided. Tr. I:124; Ex. BRI-237.

On the basis of the information provided by BRI, the review team submitted a report on July 15, 1993, containing its findings and conclusions with respect to the specialized food program and the GED-4 (a more powerful version of the GED) and again recommending that BRI be re-certified to use Level III aversives, subject to two conditions requiring additional reports on BRI's use of these two procedures. Ex. U-75. Although, on the basis of the information available to them, the review team "could discern no adverse health consequences of the specialized food program," *id.* at 6, it recommended that BRI be required to compile and provide additional data in order to demonstrate the effectiveness of the program and the degree of health risk involved for particular students. *Id.* at 6, 11.

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[45]During his visit to BRI in December 1991, Attorney Casey had been told by BRI staff that previous problems with GED misfirings had been corrected, Tr. I:189; but the papers filed by BRI in the individual guardianship cases demonstrated that the problems were continuing. Ex. U-58.

Similarly, with respect to the GED, while the physicians on the team opined, based on the information provided to them by BRI, that the GED-4 protocol "does not present a danger to the students at BRI" and that "there are no medical contraindications to using this device for behavior modification," the team noted that the problems with misfirings "could affect the clinical effectiveness of the program." *Id.* at 6-7. The team was unable to comment further on the clinical effectiveness of the GED because the psychologist on the team, Dr. Reilly, had resigned from DMR and left the state without seeing the information provided by BRI concerning misfirings. *Id.* at 7 n. 18. Because of the misfirings and because the GED-4 was a new device whose "safety parameters . . . are still not clearly established" and "could present unknown problems," the team recommended that BRI be required to furnish additional information on any changes in the design or use of this device and an analysis of the effectiveness of all GED devices then in use or proposed for future use. *Id.* at 11.

2. The Commissioner's Letter of August 6, 1993

Based on his general counsel's analysis of the review team's report, Tr. V:53, and also on concerns raised both by DMR's Human Rights Advisory Committee, Ex. U-42, U-59, U-60, U-62, and by Dr. Paul Jansen (a psychologist who had evaluated some BRI students in connection with their individual substituted judgment proceedings), Ex. U-81, the Commissioner decided to gather further information prior to taking final action on BRI's application for re-certification, rather than immediately re-certify BRI as recommended by the review team. Tr. V:53. Accordingly, on August 6, 1993, the Commissioner sent a letter to Dr. Israel, BRI's Executive Director, outlining his concerns, requesting further information, and granting BRI interim certification for 25 days, pending receipt of the information requested. Ex. U-82. BRI responded to this letter on August 28, 1993, by criticizing the certification process, contesting the factual statements and legal conclusions set forth in the Commissioner's August 6th letter and in the

letter from Dr. Jansen, and providing information and documents in response to the Commissioner's requests. Ex. DMR-17.

In order to assist him in gathering and assessing the additional information needed to make a final decision on BRI's application for recertification, the Commissioner assembled large and small "BRI working groups," which met on Tuesday mornings in his office. Ex. BRI-257, BRI-258. Although the primary purpose of these groups was to consider BRI's re-certification application, the groups also discussed other BRI-related subjects, including, e.g., rate-setting, public relations, investigations, and legal issues. Tr. V:104-06, as indicated by the workplans (which served as agendas for those meetings) and by the notes of the participants. Ex. U-190—U-225, BRI-293—BRI-305, BRI-320—BRI-322.[46]

3. Interim Certification Letters, 1993

The information provided by BRI in response to the Commissioner's August 6th letter did not entirely alleviate the Commissioner's concerns and raised some additional questions, particularly about BRI's use of mechanical restraints. Ex. DMR-17 at 20-21. Nevertheless, the Commissioner extended BRI's interim certification for an additional 25 days, by letter dated August 31, 1993, with certain conditions, in order to give BRI an opportunity to provide further information. Ex. U-91. In that letter, the Commissioner explained the factual and legal basis for each of the stated conditions. *Id.* at 7-8.

Among those conditions were requirements that BRI notify DMR if it proposed to use other aversive procedures in addition to those currently in use, *id.* at 3, and that BRI comply with DMR's regulations concerning the use of mechanical restraints. *Id.* Another condition required BRI to cooperate with an independent performance and program review of BRI to be arranged by DMR. *Id.* at 7. That review was ultimately performed by the Rivendell Group, which issued a comprehensive report on BRI's program. Ex. DMR-2.

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[46] *See* Argument III.B.13, *infra*.

Condition 10 of the August 31 letter required BRI to inform out-of-state agencies that fund students at BRI of the requirement that those agencies have in place "an emergency plan for each resident to address the funding and logistics of any unexpected medical, personal or programmatic situations which BRI deems are beyond the capacity of BRI to address." Ex. U-91 at 5. As explained in the letter, that condition was intended to address situations, which had occurred in the past, in which BRI determined that it was no longer able to meet the needs of an out-of-state client, and the state that had placed the student at BRI had no contingency plans in place, leaving DMR forced to serve the client in the interim. *Id.* at 8; Tr. V:78-79; Ex. DMR-18. After BRI objected to this condition, the Commissioner agreed to amend it in the manner proposed by BRI. Ex. U-99, U-106. Although BRI feared that this condition would discourage funding agencies from placing students at BRI, when notified of this condition, representatives of agencies funding four BRI clients stated "that their state had emergency services for all of their clients and that an emergency plan should not be an issue." Ex. DMR-34 at 3.

Condition 11 of the same letter required BRI to give DMR and any other funding agency at least 60 days' notice before withdrawing any or all essential services from any client. Ex. U-91 at 5. As explained in the letter, that condition, like Condition 10, was intended to address emergencies created by BRI. *Id.*; Tr. XIII:75. In imposing this requirement, the Commissioner sought to avoid what he had been told had occurred in response to OFC's orders in 1985, i.e., that while OFC had ordered only that certain specified treatments be stopped, BRI had stopped all treatments, thereby creating a crisis. Tr. XIII:65.

In order to enable out-of-state agencies to better understand the status of BRI's application for re-certification, the Commissioner sent them copies of his August 6 and 31 letters, along with a copy of BRI's 52-page response to the August 6 letter. Ex. U-105. In his cover letter, dated September 24, 1993, the Commissioner reassured these agencies that the conditions contained in his letters "are not intended to imply that the Department intends to take any action that would negatively affect the treatment of any

consumer." *Id.* On the preceding day, Dr. Israel, BRI's Executive Director, had also sent letters to these same agencies reassuring them that BRI's "program has never been stronger." Ex. DMR-33. The Commissioner also corresponded and met with the parents of BRI students to keep them informed and allay their anxieties. Ex. U-92, U-109; Tr. V:82-91.

By letters dated September 24, 1993, and December 15, 1993, DMR again extended BRI's interim certification to utilize Level III aversive behavior modification procedures, with substantially the same conditions, while the DMR working groups gathered and evaluated additional information from various sources. Ex. U-106, U-128, U-190—U-225.

4. Certification Letter of February 9, 1994

By letter dated February 9, 1994, the Commissioner continued BRI's certification for another six months and indicated that, if BRI complied with the stated conditions by May 8, 1994, the certification would be effective for two years from that date. Ex. U-139. Among the conditions contained in that letter was a requirement that BRI develop a written treatment plan for each client that fully complies with DMR regulations, since the sample plan previously provided by BRI did not. *Id.* at 3. Two other conditions, to which BRI particularly objected, required independent psychiatric and medical evaluations of BRI's clients, in order to determine if the clients' behavior problems might be due to the existence of unmet medical or psychiatric needs that could be addressed with less restrictive treatments. *Id.* at 8-11. Although, as stated at the close of that letter, BRI had a right to seek administrative and judicial review of the Commissioner's decision, *id.* at 18. BRI did not do so.

As the May 8 deadline for compliance with the conditions for further certification approached, it became apparent that BRI would fail to achieve compliance by that date. However, rather than decertify BRI, DMR instead offered to suspend the May 8 deadline and enter into a period of intensive discussions with BRI in order to attempt to reach agreement as to how and when BRI would comply with each of the conditions for certification. Ex. U-

150. BRI agreed to participate in such discussions, *id.*, which commenced on May 9, 1994, and continued almost daily until the end of June 1994. *Id.*

Through these intensive discussions, BRI and DMR reached agreement as to precisely how and by what dates BRI would comply with each of the conditions contained in the Commissioner's February 9, 1994, letter. Ex. U-150. Accordingly, by letter dated July 5, 1994, the Commissioner further extended BRI's certification to December 31, 1994, and stated that, if BRI in fact implemented its agreements to comply with each of the conditions and with the underlying DMR regulations, a two-year certification to use the aversive procedures would be issued. *Id.*

5. Certification Letter of January 20, 1995

From July 1994 through December 1994, DMR closely monitored BRI's compliance with the requirements of DMR's behavior modification regulations and the conditions contained in the Commissioner's February 9, and July 5, 1994, certification letters. Tr. VI:46-47, Ex. U-166, DMR-23. As part of that monitoring process, five DMR psychologists, Ex. DMR-10—DMR-14, evaluated the implementation of the treatment plans of six individuals, pursuant to the parties' agreement on Condition 1 of the February 9 letter, Ex. U-152, and prepared detailed reports on each student's treatment. Ex. DMR-3—DMR-8. Based on these reports and on other information gathered during the certification process, DMR staff prepared a comprehensive *Report on Compliance by [BRI] with the Requirements of the Behavior Modification Regulations and the Terms of Certification to Use Level III Aversives.* Ex. DMR-23.

Based on all of the above information, the Commissioner determined that BRI had not fully complied with the certification conditions or with the applicable DMR regulations. Nevertheless, by letter dated January 20, 1995, the Commissioner certified BRI to utilize Level III aversives through May 8, 1996, subject to five remaining conditions. Ex. U-166.

Among the conditions imposed by the Commissioner on January 20, 1995, and the one most vigorously opposed by BRI, was the requirement that

BRI cease utilizing certain specified Level III interventions, including the specialized food program. Ex. U-166 at 12. This condition was based on DMR's determination that there is no professional literature to support the use of these procedures as treatment for human beings in general or for the problems exhibited by BRI clients in particular, and that the specialized food program deprives a client of basic sustenance. *Id.*

6. Certification Revocation

As stated at the close of the January 20th letter, BRI had a right to seek administrative and then, if necessary, judicial review of the certification conditions, pursuant to 104 C.M.R. § 20.15 (4)(f)(8); G. L. c. 19B, § 15(d); and G. L. c. 30A, § 13. *Id.* at 13. However, rather than utilize these available remedies, Tr. VIII:105, BRI unilaterally refused to comply with the conditions. Ex. U-168, U-171, U-172. On that basis and on the basis of DMR's own monitoring, which confirmed that BRI was not complying with certain conditions, the Commissioner notified BRI, by letter dated March 23, 1995, that its certification would be revoked effective July 1, 1995. Ex. U-179. Immediately thereafter, again without seeking judicial or administrative review, BRI filed the third amended contempt complaint that gave rise to this appeal. *Id.*

B. Licensing Process

Because BRI's program has a residental component, it is also subject to the DMR regulations governing licensing of group homes.[47] In the fall of 1994, DMR conducted a survey of BRI's group homes to determine whether its licenses to operate those homes should be renewed. Tr. X:33-35. As a result of that survey, called "QUEST" (Quality Enhancement Survey Tool),

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[47]Licensing of group homes is a separate process, governed by different regulations, than certification to use aversive behavior modification procedures. 115 C.M.R. §§ 8.00 *et seq.*

the surveyors concluded that BRI had "not achieved" or had only "partially achieved" many of the licensing criteria, including those relating to the physical safety and human rights of BRI's clients. Ex. U-164. In April 1995, DMR indicated that it would give BRI at least 90 days to rectify the deficiencies identified in that survey. Ex. U-183. As of the time of trial, in early July, 1995 DMR had taken no action to revoke or suspend BRI's group home licenses. Ex. U-188; Tr. X:35. As explained in a letter from DMR's Director of Survey and Certification, if this survey process eventually results in BRI's group home licenses being revoked or suspended, BRI will have an opportunity to appeal any such action pursuant to 115 C.M.R. §§ 8.21(4), 8.33(1)(b), and 8.34, and to seek judicial review of any adverse administrative decision pursuant to G.L. c. 30A, § 14. Ex. U-183.

C. Rate-Setting Process

In recent years, BRI's tuition rates for Massachusetts clients have been set by the Division of Purchased Services ("DPS"), pursuant to that agency's authority to set rates for private schools serving school-aged children with special educational needs. Ex. BRI-292; Tr. V:112, VIII:165-67. Based on a provider's average per-student costs, DPS sets a flat per-student rate (about $161,000 for BRI in 1994-95, Tr. VIII:167), regardless of the level of services provided to each individual client. Ex. BRI-292; Tr. V:112. This is not the method generally used by DMR and other state agencies to establish the amounts paid to providers of services to adult clients.[48] Rather, these amounts are usually set by negotiated contracts specific to each client for whom services are provided. Tr. III:270, V:113-17.

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[48]For this reason, in January 1994, in the context of the rate-setting proceedings on BRI's FY 1995 tuition rate, DMR questioned whether DPS should continue to set BRI's rate, in that BRI was then serving no Massachusetts students under the age of 22. Ex. BRI-262 at 4; Tr. III:266-70.

As of the time of trial, at the turn of the 1995-96 fiscal year, DMR and BRI had not entered into either an agreement to use the DPS rates or any other contractual arrangement for fiscal year 1996.[49] Therefore, it was unclear, at the time of trial, what the legal mechanism for payment to BRI would be for the coming year. Nevertheless, the Commissioner stipulated that DMR intended to pay BRI for any services rendered to DMR clients during fiscal year 1996. Tr. XIII:132.

By letter dated June 30, 1995, the last day of the fiscal year, DMR "prequalified" BRI to enter into a contract with DMR for fiscal year 1996, on the condition that BRI cooperate with DPS's then-pending request for information concerning BRI's legal expenses. Ex. BRI-267. DPS had sought that information in order to determine whether BRI's rate for prior fiscal years should be reduced, retroactively, to account for nonreimbursable expenditures for lobbying and for legal fees incurred in suing the Commonwealth.[50] Ex. BRI-267.[51] As stated in that decision, if, based on the requested information, DPS determined that a downward adjustment of BRI's rates was warranted, BRI would have an opportunity to appeal any such determination. *Id.*

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[49]DMR attempted to initiate contract negotiations in September, October, and December of 1994, but BRI did not come to the negotiating table until mid-June 1995. Tr. XI:264-67; Ex. DMR-60, U-161.

[50]In an audit conducted in 1993, the State Auditor also questioned the reimbursability of BRI's legal expenses but was unable to reach any definitive conclusions on this issue, because BRI refused to provide sufficient documentation of its legal and lobbying expenses to the Auditor. Ex. BRI-267.

[51]Upon receipt of DPS's request for information, BRI subpoenaed Michael Kan, the Assistant Commissioner of DPS, to testify in the contempt trial. Tr. VI:161-68. However, BRI ultimately decided not to call him, because they could produce no evidence linking his request for information to any allegedly contumacious conduct by DMR, Tr. IX:56-57, which the court had required as a precondition for admitting evidence on this subject. Tr. VI:168-69.

SUMMARY OF ARGUMENT

This is a contempt case. Even if the trial court's findings of fact were grounded in the evidence, they would not support a judgment of contempt, because they do not show any "clear and undoubted disobedience of a clear and unequivocal command." The Settlement Agreement does not bar DMR from regulating BRI, or from denying, conditioning, or revoking its certification or licenses. On the contrary, the Settlement Agreement expressly requires *BRI* to comply with all applicable state regulations and authorizes DMH, DMR's predecessor, to revoke BRI's licenses without court approval. Thus, DMR's decisions regarding BRI's certification and licenses cannot be the basis for a judgment of contempt. *A fortiori*, the Commissioner's subjective motivations for making those decisions, which are the principal subject of the trial court's factual findings, cannot constitute contempt. (pp. 37-43)

The requirement in Part A of the Settlement Agreement that BRI obtain authorization for the use of aversive procedures through individual substituted judgment proceedings does not bar DMR from regulating BRI's use of such procedures. That requirement imposes obligations on BRI, not on DMR. Moreover, the authorization provided by substituted judgment does not require BRI to use all procedures authorized but only supplies the substituted consent of the ward to receive them. Thus, regulatory constraints imposed by DMR on BRI's use of such procedures do not conflict with any orders issued by the Probate Court in the individual cases. (pp. 43-46)

Part B, ¶ 2, of the Settlement Agreement, which describes the responsibilities of the court monitor, does not by its terms impose any obligations on DMR, still less any "clear and unequivocal command." If the direction that the court monitor "oversee" BRI's compliance with "all applicable state regulations," except those governing behavior modification procedures, and "arbitrate any disputes between the parties" imposes any obligation at all on DMR, that obligation is too ambiguous to be enforceable by contempt. Moreover, nothing in the Agreement even mentions mediation. Thus, the trial court's findings that DMR refused three requests to mediate

over the ten-year history of the Agreement do not support its contempt judgment (pp. 46-51)

Part C, ¶ 3, of the Settlement Agreement, providing that "intake at B.R.I. for new clients shall be reopened and shall not be impermissibly obstructed," also by its terms imposes no obligation on DMR. The context of the case shows that this provision related specifically to rescission of OFC's 1985 order and OFC's activity pending DMH's assumption of licensing responsibility. Even if this provision has any implication for DMR, it expresses no constraint whatever on action relating to BRI's current students. Even as to new students, it is far from "clear and unequivocal," since it does not indicate what obstruction would be "impermissible." The trial court made no finding that DMR ever closed or obstructed intake. Its findings that DMR's communications with referring agencies in other states adversely affected BRI's reputation are too attentuated to support a judgment of contempt of this provision. (pp.51-53).

The final sentence of the Agreement, providing that "each party shall discharge its obligations under the terms of this agreement, in good faith," does not in and of itself provide the clear and unequivocal command necessary to support a contempt judgment. By its terms, this provision is limited to the performance of obligations stated elsewhere in the agreement; it imposes no general duty of good faith. Moreover, the phrase "good faith" is inherently subjective and ambiguous. The trial court's findings of "bad faith" action by DMR involve conduct entirely independent of any substantive obligations under the Agreement; indeed, these findings for the most part relate not to any actions at all, but to discussions, motivations, plans, and desires. Such findings cannot support a contempt judgment. (pp. 53-61)

Even if findings of the sort entered here could support a contempt judgment, and even if the evidence supported the findings, the trial court record is so replete with evidentiary errors that a new trial would be required. Among the most egregious of those errors is the admission of evidence as to BRI's financial condition, despite BRI's having failed to produce a witness knowledgeable on that subject in response to a Rule 30(b)(6) deposition. A

similarly prejudicial error is the court's refusal to permit DMR's expert to examine the students who, according to witnesses called by the parents, had been harmed by cessation of the specialized food program after the close of discovery. The court's ruling that the evidence to be obtained through such examination would be irrelevant directly contradicts its ruling admitting the parents' evidence on the same point. (pp.62-69)

Even on the record as developed through these unfairly prejudicial evidentiary rulings, the trial court's factual findings are entirely unsupported and clearly erroneous. This Court should scrutinize the findings particularly closely, because they are adopted nearly verbatim from the proposed findings submitted by BRI. Such scrutiny reveals that each and every one of the trial court's findings, and most particularly those involving bad faith, perjury, misrepresentations, and misconduct of various kinds, lacks any support in the record. Where the findings bear any connection to the trial transcript at all, they reflect not actual testimony, but mischaracterizations of testimony contained in questions posed by BRI's counsel. In numerous instances, the only pertinent evidence in the record directly contradicts the court's findings. (pp.70-149)

Even if a judgment of contempt were warranted on the record, the extraordinary relief entered far exceeds the bounds of the trial court's discretion. Rather than exercise the caution required in imposing equitable remedies, particularly against an agency of a co-ordinate branch of state government, the trial court completely deprived DMR of its statutorily granted role. Further, the court conferred on the receiver powers and immunities far beyond any even possessed by DMR. In doing so, the court not only abused its discretion but intruded unconstitutionally into the authority of the legislative and executive branches. The harm resulting from this intrusion affects not only DMR but a host of other state agencies and officials, as well as third parties, including DMR employees, vendors, unions, and clients. Most important, the harm affects BRI students, by depriving them of the protection of effective oversight of the application to them of the most intrusive treatments permitted by law. The high likelihood that this Court will reverse the contempt judgment and vacate the trial court's

injunction and receivership orders, and the substantial harm that would flow from those orders pending decision, warrants immediate entry of a stay. (pp. 149-163)

The trial court erred and abused its discretion in awarding over $1 million in attorneys' fees. The court failed to conduct any examination of the reasonableness of the time spent by the 25 attorneys and paralegals for whom it awarded fees or of the expenses claimed. Perhaps even more egregious, the court denied the Commissioner any opportunity to review and respond to the time records submitted in support of the fee applications. The trial court's receipt of those records *in camera* and its *sua sponte* impoundment of them were erroneous, since no privilege applies to billing records used to support a fee claim. Moreover, even the limited documentation that was provided to the Commissioner shows that the amount awarded included some items that are patently unreasonable, such as time spent on lobbying, preparing public records requests, and responding to abuse investigations. In addition, the nearly $200,000 awarded to attorneys for the parents and students, whose contribution to the proceedings was minimal, was unwarranted. (pp.164-167)

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THE COMMISSIONER IN CONTEMPT OF THE SETTLEMENT AGREEMENT.

In order to hold a party in contempt, the court must find "a clear and undoubted disobedience of a clear and unequivocal command." *E.g.*, *Warren Gardens Housing Co-op. v. Clark*, 420 Mass. 699, 700 (1995). Under that standard, this Court has upheld contempt findings of clear and specific orders, where such orders were undoubtedly violated. *E.g.*, *Commonwealth v. One 1987 Ford Econoline Van*, 413 Mass. 407, 409, 411 (1992) (despite

court order to "return [a] van," was not returned).[52] However, where the order is ambiguous or the disobedience is indirect or doubtful, this Court has not hesitated to reverse contempt findings on appeal. *See, e.g., Warren Gardens, supra* (reversing finding of contempt of an order requiring tenants to "adequately supervise" their children, which the Court characterized as insufficiently "clear," to form the basis for a contempt sanction); *U.S. Time Corp. v. G.E.M. of Boston, Inc.*, 345 Mass. 279, 282-83 (1963) (reversing finding of contempt of an order requiring defendant to refrain from selling watches below list prices at premises under his "control," where such control was proved only indirectly, under a theory of implied agency).[53]

In the present case, nowhere in the court's voluminous findings of fact or conclusions of law is there any finding or conclusion as to what conduct by the Commissioner constituted "clear and undoubted disobedience" of what "clear and unequivocal" provision(s) of the settlement agreement. Rather, the court's entire application of the law of contempt to the facts of this case appears in the following two conclusory sentences:

> The provisions of the court-ordered Settlement Agreement are clear and unequivocal commands which are binding on the defendant.
>
> The defendant is in contempt having clearly and undoubtedly disobeyed the Order of this Court.

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[52]*See also Allen v. School Committee of Boston*, 400 Mass. 193, 194 (1987) (order required school committee to provide "reliable, timely, and substantially uninterrupted transportation," and no transportation was provided to thousands of students for up to 12 days); *Town of Manchester v. DEQE*, 381 Mass. 208, 212 (1980) (order required town to hire an engineer and submit final operating plans for dump by specific dates, and town failed to take these actions until more than a year later); *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 361 Mass. 35, 36 (1972) (order prohibited stores from using the words "Mammoth Mart," and stores used those words in newspaper advertisements).

[53]*See also Hinds v. Hinds*, 4 Mass. App. Ct. 63, 66-67 (1976) (reversing finding of contempt for failure to convey house where order did not specify date for conveyance); *Burke v. Guiney*, 700 F.2d 767, 770 (1st Cir. 1983) (reversing finding of contempt of gag order where statement made to press, "while perhaps implying more," did not "directly" state what the order prohibited).

App. 1302. Rather than identify which of the 304 findings of fact constitute clear and undoubted violations of which purportedly clear and unequivocal commands, the court simply states: "The numerous multiple violations of DMR are set forth in the Findings of Fact and need not be repeated here." *Id.* However, reference to the Findings of Fact is equally unavailing, because those findings contain no indication as to the relevance of any finding to any provision of the Settlement Agreement.[54]

In any event, even if every one of the court's 304 findings were factually correct (which will be strenuously contested, *infra*) the court erred as a matter of law in concluding that these facts constitute a direct violation of any clear and unequivocal provision of the Settlement Agreement. As will be shown in the following subsections, neither the Settlement Agreement as a whole nor any of the four provisions relied upon by BRI in its third amended contempt complaint is sufficiently unambiguous to form the basis for a contempt citation. Nor are the court's findings (even if they were factually correct) sufficient as a matter of law to establish that the Commissioner clearly and directly violated any of the provisions in question.

A. The Settlement Agreement Does Not Prohibit DMR from Regulating BRI.

The Settlement Agreement in this case contains no "unequivocal command" that the Commissioner refrain from regulating BRI in general[55]

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[54]The trial court's belated attempt to bolster its contempt findings and conclusions in its order denying the Commissioner's motion for a stay pending appeal, App. 1432, adds nothing of substance to the court's original contempt findings.

[55]Indeed, it is doubtful that any state agency would have the authority to enter into an agreement abdicating the regulatory duties conferred upon it by the Legislature through the political process. *Boston v. Back Bay Cultural Assoc.*, 418 Mass. 175, 184 (1994) ("officers of governmental agencies have authority to bind their governmental bodies only to the extent conferred by the controlling statute"); *Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993) ("[T]emporary officeholders may not contract away the basic powers of government . . . in the same way natural persons may make enduring promises about their own future

(continued...)

or from conditioning or revoking BRI's certification to utilize Level III aversives or licenses to operate group homes in particular. Nor does the Agreement require DMR to certify or license BRI by any particular dates or for any particular duration. To the contrary, while no mention is made in the Agreement of "certification," the Agreement expressly authorizes DMH (DMR's predecessor agency) to revoke BRI's licenses without court approval, once BRI became licensed by DMH. App. 127.

Far from insulating BRI from state regulation, the Settlement Agreement expressly requires BRI to comply with all applicable state regulations, including those of DMH. App. 126, 128-29. Moreover, the Settlement Agreement expressly excludes from the general monitor's responsibilities the duty to monitor BRI's compliance with regulations governing the use of behavior modification procedures: "Dr. Daignault shall be responsible for overseeing B.R.I.'s compliance with all applicable state regulations, except to the extent that those regulations involve treatment procedures authorized by the Court in accordance with Paragraph A." App. 126.

The "treatment procedures" referred to in this exception to the general monitor's oversight responsibility are the "aversive procedures" defined in Part A of the Agreement to include "all aversive procedures which are presently used or may be proposed for use at B.R.I. with [specified] exception[s]." App. 121. At the time the Settlement Agreement was entered into, "state regulations" "applicable" to these "treatment procedures" had not yet been finalized. Ex. U-9, DMR-27 at 27. Such regulations, 104 C.M.R. § 20.15, were eventually promulgated and are now administered by DMR. Subsection 20.15 (4)(e) of those regulations, requires all providers (including BRI and DMR itself) who propose to use Level III aversives on incompetent individuals to obtain authorization of the Probate Court in substituted judgment proceedings prior to doing so. However, DMR's behavior

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[55](...continued)
behavior."), *cert. denied*, 114 S. Ct. 1831 (1994). Certainly, no such unenforceable requirement should be read into the Agreement. *Berger v. Siegel*, 329 Mass. 74, 77-78 (1952) (avoiding construction rendering contract unenforceable).

modification regulations contain many additional requirements[56]—including the requirements pertaining to certification—that also "involve [Level III aversive] treatment procedures" and are therefore excepted from the general monitor's oversight authority under Part B, ¶ 2. Those regulations are administered exclusively by DMR itself, not by the monitor or by the Probate Court. Indeed, the very fact that the Agreement refers *to "regulations* involving treatment procedures authorized by the *Court"* demonstrates that where such procedures (i.e., Level III aversives) were concerned, the parties did not contemplate exclusive court control. Rather they contemplated a role for the Probate Court (i.e., substituted judgment proceedings), a role for the court monitor (i.e., temporarily monitoring BRI's compliance with regulations, other than behavior modification regulations), *and* a role for DMH/DMR, (i.e., administering its own behavior modification regulations once promulgated).

From the outset, it was understood by all parties to the Settlement Agreement that BRI would be subject to the behavior modification regulations once promulgated, including the certification requirements contained in those regulations, and that those regulations would be administered and enforced by DMH itself, not by the court monitor or the Probate Court. In a letter to the parents of BRI students shortly after entry of the Settlement Agreement, Dr. Israel, BRI's Executive Director, advised the parents that "[a]n independent court monitor will regulate BRI (taking the place of OFC) between now and July 1, 1987, when the Department of Mental Health takes over the licensing of BRI." Ex. DMR-26 at 2. In order to make BRI's "position concerning monitoring quite clear," he stated:

> We recognize the need for programs such as ours to be subject to thorough regulatory scrutiny, and we look foward

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[56]For example, these regulations require providers who use Level III aversives to have human rights committees and peer review committees, 104 C.M.R. § 20.15 (4)(d)(3) and (5); to obtain qualified medical review to determine that the treatment plan is not contraindicated, 104 C.M.R. § 20.15 (4)(d)(4); to submit to a program inspection by DMR representatives and to provide inspection staff with access to the program and its records. 104 C.M.R.§ 20.14 (4)(f)(6).

> [sic] to the new relationship with the Commonwealth that will be created as we come under the licensing authority of the Massachusetts Department of Mental Health. We are heartened that this Department will be the new monitoring agency for BRI.

Id. at 6.

Similarly, six months after entry of the Settlement Agreement, Dr. Israel testified that he had been invited to comment on DMH's then-proposed behavior modification regulations, and that he felt that the current draft was "one that we believe we can live with." DMR-27 at 27. At the same hearing, counsel for DMH similarly testified that these regulations would be applicable to BRI just as to all other providers using behavior modification treatments; that DMH and DMR (not yet a separate entity) would be overseeing compliance with those regulations by all providers, including BRI; and that he thought BRI would "have no trouble whatsoever in meeting its responsibilities under the regulation and under the Settlement Agreement [which he viewed as "consistent" with each other], once that regulation is promulgated." *Id.* at 134-36. Dr. Daignault, the court monitor, consistently described his monitoring role as limited to "overseeing compliance of B.R.I. with State licensing regulations during the transition period from the Office for Children licensure to the Department of Mental Health licensure." *Id.* at 163. In their trial testimony, both Dr. Israel and Dr. Daignault reaffirmed their understanding that BRI is subject to DMR's behavior modification regulations, including particularly the certification requirements. Tr. VIII:9-24, IX:4-9.

Because virtually all of the court's factual findings relate to DMR's certification or licensing processes, App. 1207-93, which are governed by DMR regulations, and not by the Settlement Agreement, all of those findings are immaterial to the only issue properly before the court in this contempt proceeding, i.e., whether the Commissioner directly violated any unequivocal provision of the Settlement Agreement. Moreover, even if the Commissioner's licensing or certification decisions were somehow relevant to some obligation of his under the Settlement Agreement, the trial court,

properly, made no findings and drew no conclusions as to the merits of those decisions.[57] Rather, the court's findings focus not on the merits of the Commissioner's regulatory actions but on the subjective motivations underlying them. As will be discussed in Argument I.E.1, *infra*, if the substance of the Commissioner's certification and licensing decisions cannot form the basis for contempt sanctions, then, *a fortiori*, his subjective motivations for making such decisions certainly cannot be punishable as contempt.

B. The Commissioner's Regulatory Actions Do Not Constitute Contempt of Part A of the Settlement Agreement or of the Probate Court's Rulings in Individual Substituted Judgment Proceedings.

To the extent that the court's contempt judgment is premised on an (unstated) conclusion that the Commissioner's regulatory actions constitute contempt of Part A of the Settlement Agreement or of the Probate Court's orders in substituted judgment proceedings involving individual students at BRI,[58] any such conclusion is incorrect as a matter of law. Part A of the Settlement Agreement imposes no obligations on DMR, except to provide clinicians to assist the court in reviewing treatment plans, App. 125, Ex. U-13; and there are no allegations or findings that DMR failed to comply with that requirement. Nor do the Probate Court's orders in the substituted judgment proceedings, conducted pursuant to Part A, even run against DMR. *See, e.g.*, Ex. BRI-239 at 8-9, BRI-240 at 9.

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[57]The court was precluded from doing so by BRI's failure to seek administrative and, if necessary, judicial review of those decisions in a timely manner. *East Chop Tennis Club, Inc. v. MCAD*, 364 Mass. 444 (1973).

[58]*See* Judgment and Order, ¶¶ 8, 10 (enjoining DMR attorneys from "seek[ing] to accomplish through the Individual Guardianship proceedings what they are enjoined from doing herein" and enjoining the Commissioner from "issuing any orders or directives which interfere with outstanding treatment orders or decisions issued by this Court"). App. 1342.

Rather, under Part A of the Settlement Agreement, *BRI* is required to obtain authorization from the Probate Court in substituted judgment proceedings prior to using aversive behavior modification techniques on any individual student. App. 121-23. Like DMR's own regulations, 104 C.M.R. § 20.15(4)(e)(3), the Settlement Agreement permits BRI to use Level III aversives only when authorized to do so by the Probate Court utilizing substituted judgment criteria. App. 121-23. However, simply because a treatment plan providing for the use of such aversives is approved by the Probate Court for a particular individual, BRI is not thereby insulated from DMR's other regulatory requirements, including the requirement that BRI be certified by DMR to utilize such procedures. 104 C.M.R. § 20.15(4)(f).

As indicated by the term "substituted judgment," those proceedings function only as a substitute for a ward's own informed consent. *Commonwealth v. DelVerde*, 398 Mass. 288, 294-95 (1986); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 752 (1977); *In the Matter of Jane A.*, 36 Mass. App. Ct. 236 (1994) (in substituted judgment proceeding, Probate Court's function is to "determine[] whether [ward], if competent, would choose" the treatment in question). Just as a competent adult's consent would not empower BRI to administer treatments in violation of DMR's other regulatory requirements, a substituted judgment order similarly has no such legal effect. *See Commonwealth v. DelVerde*, 398 Mass. at 294 (recognizing that substituted judgment of incompetent ward has no more legal effect than does competent adult's consent); *cf. Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) ("decision by the patient whether to have a treatment or not is a protected right; but his selection of a particular treatment . . . is within the area of governmental interest in protecting public health"), *cert. denied*, 449 U.S. 937 (1980).[59]

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[59]*Cf. also Custody of a Minor*, 375 Mass. 733, 737 (1978) (parental choice of medical treatment, i.e., to treat child with laetrile, "not absolute, and may be limited where . . . 'it appears that parental decisions will jeopardize the health or safety of [their] child'"); *Custody of a Minor No. 3*, 378 Mass. 732, 744 (1979) ("the law presently appears to impose certain limitations on such rights in competent adults, [i.e.,] to make personal health care

(continued...)

In other words, a determination that a ward, if competent, would consent to aversive treatment is a necessary, but not a sufficient, condition for the utilization of such treatment under state law. DMR's other regulatory requirements must still be met. *See* 104 C.M.R. § 20.15(4)(d) and (e) (listing other required approvals, in addition to a client's consent or substituted judgment). By analogy, the fact that a particular medical procedure was approved by a Probate Court in substituted judgment proceedings would not "legalize" the use of an otherwise illegal procedure or the administration of that procedure by a physician or hospital that did not meet state licensing requirements, as determined by the appropriate state regulatory agency.

Thus, the fact that some of the certification conditions imposed by the Commissioner require BRI to cease utilizing certain aversive treatments to which the Probate Court consented on behalf of incompetent students[60] does not, as a matter of law, constitute contempt of Part A of the Settlement Agreement.[61] Nor do such certification conditions "violate" or even frustrate the Probate Court's orders in those individual cases. While a particular Level III aversive cannot be used *without* Probate Court approval, the converse is not true. The Probate Court's determination that a ward, if competent, would consent to the use of the treatments contained in his treatment plan, does not *require* that BRI utilize every treatment contained in the plan and approved

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[59](...continued)
decisions and to choose or reject medical treatment").

[60]*E.g.*, U-166 at 12 (requiring BRI to cease using the specialized food program and other specified procedures).

[61]When setting the ground rules for relevance at the outset of the trial, the court appeared to recognize that treatment issues were immaterial to the contempt proceedings. Tr. I:6. "You will be held to issues of contempt. Treatment issues are not part of this litigation." The court nevertheless permitted BRI and the parents to introduce evidence on treatment issues (i.e., the effect on BRI students of ceasing the specialized food program), over the objections of the Commissioner's counsel, Tr. VII:64-65, IX:96-97, X:6-7, and then proceeded to base its findings and conclusions, at least in part, on treatment issues. F. 298, App.1284-85. *See* Argument II.B, *infra*.

by the Probate Court,[62] and does not legalize any procedures that violate DMR regulations. The Probate Court's substituted judgment rulings do not purport to, and that court would have no jurisdiction to, either invalidate DMR's behavior modification regulations or overturn DMR's administrative determinations that BRI was not in compliance with those regulations. Simply put, the substituted judgment proceedings do not resolve the entire universe of legal issues related to the use and regulation of aversive procedures.[63]

C. The Commissioner's Actions, As Found by the Court, Do Not Constitute Contempt of the Arbitration Provision of the Settlement Agreement.

Part B, ¶ 2, of the Settlement Agreement, authorizes Dr. Daignault to "undertake *general monitoring* of B.R.I.'s treatment and educational program" (emphasis added). App. 126. As general monitor, Dr. Daignault is "responsible for *overseeing* B.R.I.'s compliance with all *applicable* state regulations" except DMR's behavior modification regulations, as discussed above. (Emphasis added.) *Id.* Under the same paragraph, he is further required to report to the court any health or safety issues he deems necessary and to "arbitrate any disputes between the parties."[64] *Id.* "[I]n the event that

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[62]As Dr. Israel himself acknowledged, BRI need not (and does not) seek Probate Court approval before discontinuing the use of procedures contained in a previously approved treatment plan. Tr. VIII:40.

[63]*Cf. Daley v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 406 Mass. 857, 860 (1990) (fact that court imposed driver's license suspension as sentence does not preclude Registrar from imposing longer suspension, pursuant to independent statutory authority).

[64]By orders dated November 1 and 19, 1993, the responsibility for conducting arbitrations was reassigned to Judge George Hurd (ret.) at Dr. Daignault's request. App. 194, 213.

any party disagrees with any decision or recommendation of Dr. Daignault," Part B, ¶ 2, further provides that "the matter shall be submitted to the Court for resolution."

Rather than impose any clear and unequivocal obligation on anyone, much less the Commissioner in particular, this paragraph is inherently ambiguous in five significant respects. First, it is unclear what are the "applicable state regulations" Dr. Daignault is charged with overseeing. Even Dr. Daignault himself was unable to give a direct answer to this question when asked:

> Q. [W]hat agency regulation[s] do you oversee BRI's compliance [with] other than with the Department of Mental Retardation regulations?
> A. Any that would apply.
> Q. And what are those?
> A. Any that would apply that would be brought to my attention, [in] my capacity of overseeing the compliance with them.

Tr. IX:16.

Second, as to the meaning of "overseeing," Dr. Daignault resorted to "Webster's Dictionary," which, he said, defines this word to mean "supervising or watching out for."[65] Tr. IX:17. Although the title of Part B, App. 125 ("*Monitoring of* Substituted Judgment Treatment Plans and *B.R.I.'s Treatment Program*," emphasis added), and the language of paragraph 2 in particular, App. 126 ("monitoring of B.R.I.'s . . . program"; "overseeing B.R.I.'s compliance"), would seem to require Dr. Daignault to oversee *BRI*, he testified that this provision requires him to "oversee[] the work of what others [without specifying who] are doing to enforce regulations."[66] Tr.

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[65]In fact, *Webster's New World Dictionary* (3rd college ed. 1991) defines "oversee" in a range of more and less intrusive senses, including: "to watch over and manage; supervise; superintend; . . . to survey; watch; [or] to examine; inspect."

[66]After the court reassigned Dr. Daignault's arbitration functions to Judge Hurd, Dr. Daignault sought "confirmation" from the court of his remaining duties as court monitor. App. 269. The court's tautological ruling on this motion provided no further guidance to him or the parties beyond the language of the Agreement itself, since the court simply found

(continued...)

1X:17. If Dr. Daignault's interpretation of his role is correct, it is certainly not "unequivocally" so.

Third, the arbitration provision of Part B, ¶ 2, falls particularly short of imposing any unequivocal obligations on the Commissioner. While Dr. Daignault is required to "arbitrate" disputes and, apparently, to make "arbitration decision[s] or recommendations," App. 126, nothing in the Agreement requires him to undertake the quite different role of "mediating" disputes or requires others to utilize him in the latter role.[67] Thus, although DMR and other parties voluntarily submitted disputes to Dr. Daignault or Judge Hurd for mediation on numerous occasions, *see, e.g.*, Ex. U-98, U-113, U-182, DMR-79, the Settlement Agreement cannot be read as giving clear and unequivocal notice to DMR that failure to seek or agree to mediation would be punishable as contempt. All of the court's findings concerning BRI's requests for mediation and DMR's responses thereto, *e.g.*, App. 1229-31, 1236, 1241, 1270-71, 1275-76, are therefore entirely immaterial.

Fourth, it is also unclear whose disputes this provision requires Dr. Daignault to arbitrate. As discussed above, at the time the Settlement Agreement was entered into, both BRI and Dr. Daignault himself anticipated that Dr. Daignault's role as general monitor would end once DMH took over the regulation of BRI from OFC. Thus, Dr. Daignault's obligation to arbitrate "disputes between the parties" was apparently designed to cover any continuing disputes between BRI and OFC in the interim period, rather than

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[66](...continued)
"that Dr. Daignault's responsibilities are confirmed as set forth in the Settlement Agreement." App. 420.

[67]The words "mediate," "mediator," or "mediation" appear nowhere in the Agreement. As recognized by Dr. Daignault himself, the words "arbitration" and "mediation" have very different meanings. Tr. IX: 20 ("mediation involves the parties arriving at the decisions themselves without being dictated to as is the case in arbitration"). *Compare* Joseph R. Nolan & Jacqueline M. Nolan-Haley, *Black's Law Dictionary* (6th ed. 1990) at 105 (defining "Arbitration" as a "process of dispute resolution in which a neutral third party (arbitrator) renders a decision") *and id.* at 981 (defining "Mediation" as a "[p]rivate, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.").

any subsequent disputes between BRI and its new licensor, DMH. Although several years later, after DMR took over licensing authority from DMH, the court made DMR a "party" to this case, it is far from clear that doing so was intended to expand the substantive scope of this provision, particularly since the court's order making DMR a party was rendered by way of "allowing" DMR's more limited request to substitute itself for DMH, wherever DMH was mentioned in the Agreement. Ex. U-10, U-13. *See* Prior Proceedings, subsection 2, *supra*.

Fifth, since the early days of the Settlement Agreement, it has been particularly unclear what subject matter(s) are arbitrable under this provision. At a hearing six months after entry of the Agreement, counsel for two of the individual wards alerted the court that there might "need to be, in short order, some clarification as to what types of disputes are appropriate for submission to the Monitor and which are not." Ex. DMR-27 at 122. No such clarification was forthcoming, and the scope of the arbitration clause has continued to be unclear. *See, e.g.*, Ex. BRI-246, BRI-276, U-96, U-110, U-90 ("the historical understanding of the Settlement Agreement—including in [the Attorney General's] office—is not what [Attorney MacLeish's] letter sets forth").

This lack of clarity stems, in part, from an internal inconsistency in the provision itself. While the overall scope of the general monitor's authority is defined to exclude oversight of BRI's compliance with behavior modification regulations, the dispute-resolution component of this oversight function is described to cover "any" dispute between the parties. App. 126. While Dr. Daignault focuses on the word "any," as broadly defining the scope of his authority to resolve disputes,[68] Tr. IX:21; and BRI has also

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[68]In practice, Dr. Daignault sometimes took a narrower view of the scope of his dispute-resolution authority. For example, when DMR asked him to approve its use of the Rivendell Team to perform an independent review of BRI's program as part of the certification process, Dr. Daignault declined on the ground that to do so was outside the scope of his authority under Part B, ¶ 2. Ex. U-103, U-104. Dr. Daignault's attempt, on cross-examination, to harmonize this earlier, more limited view of his authority with the broader view he now espouses was, at best, unconvincing. Tr. IX:21-24.

broadly construed that provision, at least in recent years,[69] Ex. BRI-245, Ex. BRI-246; DMR's understanding is that disputes over behavior modification treatments fall within the express exception to Dr. Daignault's general monitoring authority. Ex. U-90, U-182; App. 379-80, 413.

For these reasons, it is far from "unequivocal" that the *arbitration* provision applies to the few specific instances where the court found that DMR refused to *mediate*. F. 116, App. 1237; F. 129, App. 1241; F. 282, App. 245. In each of these instances, the subject that BRI sought to mediate concerned BRI's certification to use aversive behavior modification procedures[70] and therefore, at least arguably, fell within the express exception to the monitor's authority under Part B, ¶ 2.

Moreover, even if the arbitration provision meant what BRI construes it to mean, and were sufficiently unambiguous to support a contempt citation, the court's factual findings are insufficient as a matter of law to establish contempt. The court cited only three instances in the ten-year tenure of the Settlement Agreement in which DMR refused to mediate. F. 116, App. 1237; F. 129, App. 1241; F. 282, App. 245. On many other occasions, while DMR reserved the right to argue that arbitration or mediation was not legally required, it nevertheless agreed to mediate such disputes and frequently engaged in such mediation at BRI's request. *E.g.*, F. 114-15, App. 1236-37; Ex. U-98, U-113, U-114, U-182, DMR-79. Therefore, even if this provision of the Settlement Agreement "clearly and unequivocally" required DMR to arbitrate disputes involving behavior modification procedures, the court's findings indicate that the Commissioner's conduct fell far short of

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[69]As discussed in the Prior Proceedings, *supra*, in 1989 and 1990, BRI filed three complaints against DMR and other state agencies in the Bristol Probate Court without first seeking arbitration with the court monitor.

[70]F. 116, App. 1237 (sending copies of certification letters to out-of-state agencies); F. 129, App. 1241 (requiring BRI to appoint Commissioner's designee to its Human Rights Committee as a condition of interim certification to use Level III aversives); and F. 245, App. 244 (requiring BRI to submit to a review of treatment plan implementation pursuant to a certification condition). In any event, as shown in Argument III.B.8, 10, 17, *infra*, the court's findings that DMR refused to mediate are clearly erroneous.

constituting a "clear and undoubted" disobedience of any such requirement. To the contrary, the court's own findings establish that DMR, at the very least, "substantially complied," with this provision. *Town of Manchester v. DEQE*, 381 Mass. at 214-15 (applying the "substantial compliance" standard for civil contempt). Accordingly, to the extent that the court's contempt finding was premised on a violation of this provision, it was incorrect as a matter of law.

D. The Commissioner's Actions, as Found by the Court, Do Not Constitute Contempt of the Provision of the Settlement Agreement Prohibiting BRI's Intake of New Clients from Being "Impermissibly Obstructed."

Part C, ¶ 3, of the Settlement Agreement provides, in pertinent part, that "intake at B.R.I. for new clients shall be reopened and shall not be impermissibly obstructed during the pendency of this agreement." App. 127. It is not clear on the face of this provision, which is in the passive voice, who had the obligation to open intake of new students and not to "impermissibly" obstruct it during the pendency of the Settlement Agreement, which was anticipated to terminate automatically one year after its execution. App. 132. However, since it was OFC that closed intake in the first place, Tr. VIII:73-74, App. 52, it is reasonable to assume that this provision was intended to impose a requirement on OFC, rather than any other party. In any event, this provision does not clearly and unequivocally impose any such obligation on DMR, or even DMH, DMR's predecessor as licensor of BRI.

Furthermore, on its face, this provision does not unequivocally prohibit all interference with the intake of new clients but rather provides only that such intake shall not be "impermissibly obstructed." Since this provision thus provides no clear and unequivocal notice of what conduct might be deemed to be an "impermissible obstruction" of intake, this provision is not

enforceable by contempt.[71] *Cf. Warren Gardens*, 420 Mass. at 701 (phrase "adequately supervise" not enforceable by contempt for this reason).

Nor does this provision provide clear and unequivocal notice to the Commissioner that his conduct with respect to existing students at BRI could be punishable as contempt of this provision, which expressly relates only to "intake at B.R.I. for *new* clients" (emphasis added). To the extent that the court's contempt finding holds the Commissioner responsible for any indirect effect of his conduct on other funding agencies' decisions not to refer new students to BRI, any such indirect effect would not be punishable as contempt, which requires a *direct* violation of a court order.[72] *Burke v. Guiney*, 700 F.2d at 770.

Nowhere does the court find that the Commissioner ever entered any order closing or in any way limiting or obstructing BRI's right to take in new students. In fact, as admitted by BRI's Executive Director, no one at DMR ever issued such an order. Tr. VIII:74.

Even if this provision could be deemed to provide clear and unequivocal notice to the Commissioner that he could be held in contempt for conduct adversely affecting referrals of new students to BRI by other agencies, the court's findings are insufficient to support a conclusion that the Commissioner directly and undoubtedly violated this provision. The only findings even remotely relating to intake of new students are those describing the Commissioner's communications with state and local agencies in other

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[71]If "impermissible" in this context means in violation of some generally applicable law or regulation, then any such obstructions would be redressable pursuant to the administrative and judicial remedies available for violations of the provision(s) in question, rather than by contempt. Such a construction would be generally consistent with the provision in the same part of the Agreement that, once DMH took over the licensing function, it could revoke BRI's license without prior court approval. App. 127.

[72]Another provision of the Settlement Agreement, Part F, App. 130, relates more directly to referrals by parents and state agencies to BRI. However, this provision was not cited by BRI or by the trial court as a basis for holding the Commissioner in contempt in the present case. *Cf.* Prior Proceedings, subsection 3, *infra*.

states, which, according to the court, adversely affected BRI's reputation.[73] F. 118, App. 1238. Although the court infers a causal connection between this damage to BRI's reputation and its declining enrollment, F. 290, App. 1282, it makes no findings to support an inference that the Commissioner's conduct directly caused other agencies not to refer new students.[74] Thus, to the extent that the court's contempt holding was based on a conclusion that the Commissioner undoubtedly violated an unequivocal provision concerning intake of new students, that holding is incorrect as a matter of law.

E. The Commissioner's Actions, as Found by the Court, Do Not Constitute Contempt of the Good Faith Provision of the Settlement Agreement.

1. The Good Faith Provision Is Too Ambiguous to Form the Basis for Contempt Findings or Sanctions.

The concluding sentence of the Settlement Agreement, Part L, provides that "each party shall discharge its obligations under the terms of this agreement, in good faith." App. 133. By its own terms, this good faith

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[73]As shown in Argument III.B.8.a and 15, *infra*, those findings are also clearly erroneous.

[74]To the contrary, the uncontradicted evidence at trial showed that out-of-state agencies in general and New York State in particular have policies and/or legislation favoring in-state over out-of-state placements, which policies have motivated their efforts to find alternative in-state placements for BRI clients and to place newly eligible clients in state rather than refer them to BRI. Tr. IV:66, VIII:90, 94-95, IX:111-12; Ex. DMR-80. Despite these policies, BRI continues to take in new students, including four between January and June of 1995, two of whom came from New York State. Tr. VIII:85-86. In fact, BRI's student enrollment in the summer of 1994 was at least 57 (the number of students who underwent medical evaluations at that time), Ex. BRI-285, precisely the same number of students enrolled at BRI in July 1991, when BRI first submitted its application for re-certification. Ex. BRI-236 at 1.

provision applies only to the parties' "obligations under the [Settlement A]greement." *Id.* Therefore, to hold the Commissioner in contempt of this provision, the trial court would have to identify an "obligation under the terms of this agreement." that the Commissioner has failed to discharge in good faith. As discussed above, the Agreement imposes no obligation on the Commissioner to refrain from regulating BRI and the Commissioner's conduct did not, as a matter of law, constitute contempt of any of the other provisions cited by BRI as a basis for their contempt complaint. Therefore, any implicit finding of contempt based on a violation of the good faith provision alone should be reversed as a matter of law. *See United States v. Board of Education of Chicago*, 744 F.2d 1300, 1307 (7th Cir. 1984) (where party found not in violation of substantive requirement of consent decree, party could not be found in contempt of requirement to use good faith efforts to comply with that provision), *cert. denied*, 471 U.S. 1116 (1985); *Board of Education of Chicago*, 799 F.2d 281, 292 (7th Cir. 1986) (good faith "not a term that exists in a vacuum"; nature and circumstances of underlying obligation must be considered in determining good faith compliance).[75]

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[75]The other cases cited by BRI in its proposed conclusions of law, App. 1013, and adopted by the court, App. 1304, are not to the contrary. In *Murphy v. Timberlane*, 855 F. Supp. 498 (D.N.H. 1994), the defendant school district was not held in contempt for its "bad faith" standing alone, nor was a bad faith requirement "implied" by the court as the trial court states in its Conclusions of Law. App. 1304. Rather, the defendant school district in that case was sanctioned for its noncompliance with a prior court order, which required the parties to establish a compensatory education plan for the plaintiff in accordance with the procedures set forth in the applicable statute and warned that delays in this process resulting from bad faith would be addressed by the court's exercise of its equitable powers. *Id.* at 501. It was only after finding that the defendant had intentionally delayed the process, in violation of the court's prior order, that the court held the defendant in contempt. *Id.* at 517-18.

In citing the district court's unpublished opinion in *Bates v. Johnson*, App. 1304-05 the trial court neglects to cite the decision on appeal in that case, holding that the district court's oral order was unenforceable and therefore dismissing defendant's appeal from the substance of order. 901 F.2d 1424, 1426 (7th Cir. 1990). On another point, rather than support the trial court's broad interpretation of the Settlement Agreement, the court of appeals decision in that case takes a much more limited view of the effect of consent decrees on the regulatory powers of state officials. *Id.* at 1426 ("A state's right to make fresh choices about domestic policy as political officials may even be an implied term in a consent decree, given

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As recognized by this Court, in the absence of any substantive requirement that public officials act in good faith, the "'acts of administrative officers cannot be attacked in judicial proceedings on the ground that in fact those officers were not governed by the highest standards of impartial and unselfish performance of public duty.'" *Brennan v. The Governor*, 405 Mass. 390, 398 (1989) (affirming grant of summary judgment for defendants despite plaintiffs' desire to conduct discovery on defendants' state of mind in selecting prison site) (quoting *Kelley v. School Committee of Watertown*, 330 Mass. 150, 154 (1953)). "The general rule is that courts do not sit in judgment on the motives of administrative officers, acting in purely administrative matters, and overturn action found to have been taken in 'bad faith.'" *Wilson v. Brookline Housing Authority*, 383 Mass. 878, 879 (1981) (rescript).[76]

Moreover, even if the good faith language in Part L of the Settlement Agreement could be construed as requiring the Commissioner generally to act "in good faith" (apart from any specific obligations under the Settlement Agreement), the inherent subjectivity and ambiguity of that phrase precludes the imposition of contempt sanctions for a violation of this provision. This phrase cannot be characterized as an "unequivocal command" to do or refrain from doing any particular act.[77] *United States v. Board of Education of*

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[75](...continued)
the norm that public officials may not bind their successors.").

[76]*See also Municipal Light Co. of Ashburnham v. Commonwealth*, 34 Mass. App. Ct. 162, 168 (1993) (refusing to address claims that state officials' opposition to nuclear power plant was politically motivated; "it is their actions that matter, not their states of mind"), *review denied*, 415 Mass. 1102, *cert. denied*, 114 S. Ct. 187 (1993); *Barnes v. Secretary of Administration*, 411 Mass. 822, 828 (1992) (refusing to determine Governor's motives for otherwise permissible veto).

[77]Even where the phrase "good faith" is statutorily defined, its meaning remains sufficiently elusive to provoke appellate litigation. *See, e.g., Industrial Nat'l Bank of Rhode Island v. Leo's Used Car Exchange, Inc.*, 362 Mass. 797, 801 (1973) (refusing to read into statutory definition of "good faith" an implied obligation to exercise due care to be in good faith); *New Bedford Institution for Savings v. Gildroy*, 36 Mass. App. Ct. 647, 652,
(continued...)

Chicago, 717 F.2d 378, 382 (7th Cir. 1983) (good faith provision not unambiguous); *Board of Education*, 799 F.2d at 289, 291 (good faith provision "inherently nebulous" and "ambiguous" and therefore not enforceable by contempt sanctions, absent prior judicial clarification and opportunity to comply with provision as judicially clarified); *cf. Warren Gardens*, 420 Mass. at 700 ("adequate supervision" too ambiguous a term to form basis for contempt finding).

The central legal issues underlying the present controversy—involving the respective authority of the Department of Mental Retardation and the Probate Court to regulate BRI's provision of services to its clients—are novel and complex ones that have not yet been fully addressed by an appellate court. In the absence of a clear ruling, even by the trial court,[78] as to the limiting effect, if any, of the Settlement Agreement on the Commissioner's otherwise broad statutory authority to regulate the provision of services to the mentally retarded, G.L. c. 19B, § 1; 104 C.M.R. § 20.15, he should not have

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[77](...continued)
review denied, 418 Mass. 1106 (1994) (citing string of cases construing "good faith" under UCC).

[78]Prior to its final decision in the contempt proceeding, the trial court issued no opinions, either on the allowance of BRI's application for a preliminary injunction or on the denial of DMR's motion to dismiss. When it became apparent that the parties disagreed as to the meaning of the preliminary injunction, DMR filed a motion for clarification, App. 356, which the clerk at first refused to docket (until DMR sought and obtained a court order requiring that the motion be docketed), App. 36, 406, 409, and which the court never ruled upon. App. 36. Ultimately, the preliminary injunction was clarified, in accordance with DMR's interpretation, by a Single Justice of the Appeals Court; and a Single Justice of the Supreme Judicial Court found that clarification to be a supportable exercise of discretion. In light of this procedural history, it is particularly inequitable for the trial court to hold the Commissioner in contempt contemporaneously with the trial court's first explication of the Commissioner's obligations under the Settlement Agreement.

been held in contempt, even if he exercised bad judgment[79] or overstepped the boundaries of his authority, which he did not.[80]

Particularly where, as here, the defendant is a state official, who is attempting to carry out his statutory duties as he understands them, contempt sanctions are not an appropriate means of redressing any violation of his obligation to act in good faith. *United States v. Board of Education*, 717 F.2d at 385. Indeed, imposing such sanctions on the Commissioner for the making of policy decisions in the exercise of his statutory authority raises serious separation of powers problems.[81] *Id.* at 383; 799 F.2d at 289. Accordingly, even if the Commissioner's interpretation of his authority is held to be erroneous, rather than impose contempt sanctions, the court should have assumed that, as a public official, he would henceforth act in accordance with

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[79]Even in the commercial context, where presumptions of good faith and separation of powers concerns are absent, "[w]ant of good faith involves more than bad judgment, negligence or insufficient zeal. It carries an implication of a dishonest purpose, conscious doing of wrong, or breach of duty through motive of self-interest or ill will." *Hartford Accident & Indemnity Co. v. Millis Roofing & Sheet Metal, Inc.*, 11 Mass. App. Ct. 998, 999-1000 (1981) (rescript).

[80]Any such errors in judgment, *ultra vires* actions, or abuses of discretion would be redressable through the ordinary course of administrative and judicial review established by the Legislature, G.L. c. 19B, § 15; c. 30A, §§ 13, 14, which BRI chose not to pursue with respect to the regulatory actions at issue here. By, instead, holding the Commissioner in contempt for what the court found to be improperly motivated regulatory actions, the court sharply diverged from the ordinary relationship between the judicial, the legislative, and executive branches, in which executive decisions are reviewed by the judiciary based solely on legal standards set by the Legislature, not on the subjective motivations of the decisionmaker. *Brennan v. The Governor*, 405 Mass. at 397-98; *Wilson v. Brookline Housing Authority*, 383 Mass. at 879. Such a gross departure from the ordinary separation of powers should be supported by a far clearer statement than an agreement to carry out certain obligations in "good faith."

[81]Indeed, to the extent that the Agreement can be construed to prevent the Commissioner from exercising his statutory authority, it is doubtful that the officials who entered into this Agreement had the authority to bind him to that extent. *See Bates v. Johnson*, 901 F.2d at 1426 (state official cannot, by consent decree, preclude successors from making "fresh" policy choices); *Evans v. City of Chicago*, 10 F.3d at 480 (same). *See also* Argument IV.A, *infra*.

the law as judicially construed. *United States v. Board of Education*, 717 F.2d at 384; *Alves v. Town of Braintree*, 341 Mass. 6, 12 (1960); *cf. Attorney General v. Sheriff of Worcester County*, 382 Mass. 57, 63 (1980) (ordinarily court will not issue injunctive order against public official when declaratory judgment of official's legal duties will be sufficient to accomplish compliance).

2. *The Court Impermissibly Shifted the Burden of Proof onto the Commissioner to Prove His Good Faith.*

In a contempt case, "the burden [is] upon the petitioner to prove [the respondent's clear and undoubted disobedience of an unequivocal court order], not upon the respondent to disprove it." *U.S. Time*, 345 Mass. at 279. Because of the presumption that public officials act in good faith, *LaPointe v. License Board of Worcester*, 389 Mass. 454, 459 (1983). BRI had a particularly heavy burden in proving contempt of the good faith provision of the Settlement Agreement. And that burden could not be met merely by persuading the court to disbelieve the Commissioner and other DMR witnesses, *see Atkinson v. Rosenthal*, 33 Mass. App. Ct. 219, 223-24 (1992) (disbelieving evidence presented by one party does not satisfy the opposing party's burden of establishing the contrary proposition), or to reject their explanations for the challenged conduct, *cf. St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2750-54 (1993) (in employment discrimination case, court's disbelief of employer's asserted reasons for challenged action, not sufficient to satisfy employee's burden of establishing discriminatory motive). Rather, it was incumbent on BRI to prove, by its own affirmative evidence, that the Commissioner acted in bad faith.

Contrary to these well-settled principles, the court's comments during the trial and its findings thereafter demonstrate that it impermissibly imposed the burden on the Commissioner to prove that he acted in good faith. On the very first day of trial, in the midst of the direct testimony of BRI's first witness, the court interrupted BRI's counsel's direct examination to instruct

the Commissioner's counsel that the court expected the Commissioner to explain the good faith basis for the conduct being testified to by BRI's witness. Tr. I:180-81. Similarly, throughout its findings, the court repeatedly draws inferences of bad faith solely from findings that the Commissioner was unable to prove the good faith basis for his facially permissible actions to the court's satisfaction.[82]

While it may be difficult, if not impossible, for a contempt petitioner to satisfy its burden of proving something as subjective as good faith, *see Hartford Accident & Indemnity Co.*, 11 Mass. App. Ct. at 1000 (plaintiff's expressions of belief, not based on personal knowledge, insufficient to show defendant's lack of good faith), that does not justify shifting the burden to the respondent. Rather, this further highlights why a party's lack of "good faith" cannot be the basis for holding him in contempt.

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[82]*See, e.g.*, F. 68, App. 1226 ("Commissioner Campbell was unable to show that" he had asked BRI for certain information); F. 92, App. 1231 ("Commissioner Campbell attempted to justify" the amount of legal resources devoted to certification process); F. 118, App. 1238 ("Commissioner Campbell could not offer an explanation as to why" he kept out-of-state agencies informed of certification process); F. 140, App. 1242-43 ("nor could [the Assistant Commissioner] provide an explanation" for 10-day deadline for bids to perform program review of BRI); F. 184, App. 1253 ("Inability of the Commissioner to offer any justification [for conducting title searches of BRI's properties] demonstrates his bad faith."); F. 230, App. 1268 ("Commissioner Campbell could not identify any credible reason for the imposition of a condition regarding medical evaluations."). Even if the Commissioner had the burden of explaining his otherwise unobjectionable actions, each of the above findings, as to his failure to provide such explanations, is clearly erroneous, as shown in Argument III.B, *infra*.

3. The Court's Findings of Subjective "Bad Faith," Even If True, Are Insufficient, As a Matter of Law, to Constitute a "Direct" and "Undoubted" Violation of the Good Faith Provision of the Settlement Agreement.

Even if the good faith provision could be broadly construed to require the Commissioner to act in good faith in some general sense, to conclude that the Commissioner "directly" and "undoubtedly" violated this provision would require findings that the Commissioner *acted* in bad faith, not simply that his subjective motivations were improper. *See United States v. Board of Education*, 744 F.2d at 1307; 799 F.2d at 292. Here, virtually all of the court's findings of bad faith relate only to the Commissioner's "plans," "desires," and "intentions," rather to any concrete actions on his part.[83]

Most of the actions that are cited as evidence of this improper intent are not, and could not reasonably be, characterized as improper in themselves.[84] And, even as to those actions that are themselves characterized as improper, there are no findings that those actions, in fact, caused the "desired" effects; indeed, the court's findings are either directly to the contrary or noticeably

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[83] *E.g.*, F. 52, App. 1222 ("bad faith *purpose of* . . . *discussions*"); F. 62, App. 1224 ("Campbell's *concern* as to how his agency might be depicted in the upcoming CBS television program"); F. 112, App. 1236 ("*plan* to place JRC in receivership or to close JRC down"); F. 166, App. 1248 ("DMR's *plan* to get a biased review of JRC . . . in time for the December 15 deadline, which is the date DMR *planned* to de-certify JRC"); F. 167, App. 1248 ("*desire* not to certify JRC . . . consistent with DMR's overall *plan* to put JRC out of business"); F. 186, App. 1254 ("*plan* to disrupt financial operations of JRC"); F. 188, App. 1255 (DMR "*targeting* closure BRI" by *discussing* potential receivership action); F. 230, App. 1268 ("condition regarding medical evaluations . . . *designed* to disrupt the operation of JRC"). (Emphases added.) In addition, as shown in Argument III.B, *infra*, each of these findings is clearly erroneous.

[84] *E.g.*, F. 62, 63, 195-96; App. 1251-54, 1259, 1262 (taking various actions in anticipation of a nationwide television documentary concerning DMR and BRI); F. 176-85, 203, 207; App. 1251-54, 1259-62 (discussing matters other than certification at DMR staff meetings concerning BRI); F. 187, 207; App. 1254, 1261-2 (establishing contacts with other states' mental retardation agencies).

silent in that regard.[85] The connections that the court does draw between the Commissioner's conduct and BRI's purportedly adverse circumstances are far too attenuated to be characterized as "direct" for purposes of drawing a legal conclusion of contempt.[86] *U.S. Time Corp.*, 345 Mass. at 282-83; *Burke v. Guiney*, 700 F.2d at 770.

When all was said and done, despite whatever the Commissioner and his staff may have discussed, planned, or desired, they did not close down BRI, put it into receivership, or put it out of business. To the contrary, from August 1993 to July 1994 the Commissioner repeatedly extended BRI's interim certification to use Level III aversives and, on January 20, 1995, ultimately granted final certification effective until May 9, 1996. Ex. U-82, U-91, U-106, U-128, U-139, U-152, U-166. And, despite BRI's fears of impending doom, it not only remains in business but enjoys a surplus of $520,000. F. 302, App. 1285.

In sum, the court erred as a matter of law in concluding that the Commissioner's motivations and actions were direct and undoubted violations of any clear and unequivocal provisions of the Settlement Agreement. Absent these necessary prerequisites for contempt sanctions, the contempt judgment should be reversed, as a matter of law, without reaching any of the other independently sufficient grounds for reversal that are discussed in the remainder of this brief.

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[85] *E.g.*, F. 112, App. 1236 (no finding that DMR took any action to place BRI into receivership); F. 166, App. 1248 (no finding that report prepared by Rivendell was, in fact, biased, or was used to justify any adverse action by DMR); F. 184, App. 1253 (no finding that title search of BRI's properties revealed any related party transactions or was otherwise used against BRI) F. 197-201, App. 1258-59 (DMR's "attempt . . . to interfere" with BRI's tuition rate proved unsuccessful); F. 302, App. 1285 (despite actions "intended" to put BRI out of business, BRI still has a surplus of over $500,000).

[86] *E.g.*, F. 285, 288, 291; App. 1280-82 (DMR's regulatory activity resulted in increased legal costs for BRI, which resulted in layoffs of BRI staff, which resulted in higher student/staff ratios, which resulted in decrease in quantity and quality of services provided to students).

II. THROUGHOUT THE COURSE OF THE TRIAL, THE TRIAL COURT ABUSED ITS DISCRETION IN RULING ON EVIDENTIARY ISSUES, TO THE SUBSTANTIAL PREJUDICE OF THE COMMISSIONER.

The trial record is replete with evidentiary errors, only the most egregious and prejudicial of which are raised here. Taken together they demonstrate a consistent pattern of abuse of discretion, legal error, and lack of even-handedness that so taints the proceedings as to warrant reversal of the court's contempt judgment *in toto* or, at the very least, a new trial.

A. The Trial Court Abused Its Discretion in Allowing BRI to Present Evidence as to BRI's Financial Condition, after BRI Failed to Produce Anyone with Knowledge of This Subject in Response to the Commissioner's Rule 30(b)(6) Deposition Notice.

During the discovery period, DMR notified counsel of record of its intent to take the deposition of BRI, pursuant to Mass. R. Civ. P. 30(b)(6), by the person with the most knowledge of the factual basis of the allegations contained in the third amended contempt complaint. App. 510. In response to this notice, BRI produced Dr. Matthew Israel, its Executive Director, as its sole witness. App. 512, 521-22.

In the course of that deposition, on May 3 and 10, 1995, counsel for the Commissioner questioned Dr. Israel as to the factual basis for various allegations contained in the third amended contempt complaint (which he alone had verified under oath), including allegations concerning BRI's financial condition.[87] In response to questions about BRI's financial status, staffing, and student census, Dr. Israel repeatedly claimed a lack of

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[87] *E.g.*, App. 520 (asking for factual basis of allegation contained in Third Amended Complaint, ¶ 62, that Commissioner's conduct is "threatening [BRI]'s viability as a going concern," App. 311, and receiving the answer, "I'm not sure of the economic status at this moment.").

knowledge. App. 514-30. After exhausting Dr. Israel's knowledge or memory as to the factual basis for the the allegations in the complaint, the Commissioner's counsel stated that, if there were more time, she would seek an order requiring BRI to produce additional witnesses.[88] The deposition was then suspended, but not completed. App. 531-32.

At the pre-trial conference on May 18, 1995, BRI filed a pre-trial memorandum listing three BRI employees as witnesses who are "expected to testify as to the financial impact the actions of DMR have had on [BRI], including as well, intake and consensus [sic] information which show the loss of clientele and referrals which [BRI] has suffered," App. 436, the very areas as to which Dr. Israel claimed lack of knowledge or memory at the Rule 30(b)(6) deposition of BRI. After reading BRI's pre-trial memorandum (which had been served in hand that day), counsel for DMR orally requested that the May 18, 1995, discovery deadline be extended to permit the Department to complete its Rule 30(b)(6) deposition by deposing additional witnesses, including those listed by BRI as potential trial witnesses, with knowledge of these subjects. App. 540. That request was denied by the court from the bench.[89] *Id.*

At trial, when BRI called its accountant, Arthur Mullen, to "testify with respect to [BRI] financial condition and the effect in terms of prior to DMR's actions and the current financial situation," Tr. VIII:159-60, the Commissioner's counsel reiterated her pre-trial objection to his testimony, based on BRI's failure to produce a knowledgeable witness on this subject in response to the Rule 30(b)(6) deposition notice of BRI. Tr. VIII:160-61.

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[88]The discovery deadline was May 18, 1995, App. 417, and other depositions had already been scheduled for all available dates in the interim.

[89]In a telephone conversation following the conference, the Commissioner's counsel was advised by the Assistant Register that counsel's request for additional discovery and the court's denial thereof would not appear on the court's docket unless this request were made by written motion. Tr. VIII:161. Accordingly, a written motion was filed on June 13, 1995, App. 40, 508, but was not acted upon by the court until the first day of trial, on June 26, 1995, at which time it was denied on the ground that the motion was untimely. App. 540.

That objection was overruled, Tr. VII:162; and Mr. Mullen was permitted to testify at length on this subject. Tr. VIII:163-96.

Permitting Mr. Mullen to testify as to BRI's financial status was extremely prejudicial to the Commissioner, since the extraordinary relief ultimately granted by the court was premised almost exclusively on the financial harm to BRI that the court found was caused by DMR's regulatory actions. App. 1283-86, 1312-13. The court's findings of such financial harm were based expressly, App. 1285, and (presumably) solely on Mr. Mullen's testimony, since he was the only witness who testified on this subject. Absent any opportunity to depose BRI on the subjects of Mr. Mullen's testimony, the Commissioner's cross-examination of this witness was necessarily abbreviated and limited to questions concerning the witness's experience and the bases for his direct testimony. Tr. VIII:185-94.

By allowing this testimony over the Commissioner's objections, the court abused its discretion under the applicable rules. Under Mass. R. Civ. P. 30(b)(6), a party may notice the deposition of a corporation and describe "with reasonable particularity" the matter on which examination is requested. In response to such a notice, the corporation is required to "designate one or more . . . persons who consent to testify on its behalf . . . . The persons so designated [are required to] testify as to matters known or reasonably available to the organization." This rule was "designed to . . . avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself." 8A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2103 (1994 ed.); *see also* Notes of Advisory Committee on Rules, 1963 Amendment to Fed. R. Civ. P. 30.

A Rule 30(b)(6) deposition notice satisfies the "reasonable particularity" requirement as long as it is "sufficient to inform [the organization] of the matters which will be inquired into at the deposition so that [the organization] can determine the identity and number of persons whose presence will be necessary to provide an adequate response to any . . . potential questions." *Mitsui & Co. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 66

(D.P.R. 1981). In this case the Department described the subject matter on which testimony was requested as "the factual basis for the allegations contained in the Third Amended Contempt Complaint." App. 510. If this description lacks "particularity," that is the fault of the drafters of the voluminous and wide-ranging complaint,[90] not of the Commissioner, who had to prepare to respond to all of those allegations at trial. *See AMP, Inc. v. Fujitsu Microelectronics, Inc.*, 853 F. Supp. 808, 831 (M.D. Pa. 1994), *app. dismissed*, 47 F.3d 1180 (Fed. Cir. 1995) (where subject of deposition notice included certain contentions contained in the company's counterclaims and answer, "[i]t is not unreasonable to conclude that someone at [the company] believed there were factual bases for such assertions").

An organization receiving such a notice "must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation." *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989). If it becomes apparent, in the course of a depostion, that there are gaps in the witness's knowledge or memory, the organization must immediately substitute other witness(es) who are able to answer fully and completely the questions posed. *Id.*; *Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121, 122-23 (D. Conn. 1974); 8A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2103 (1994 ed.).

In the present case, by producing only Dr. Israel, who repeatedly claimed lack of knowledge or memory of the factual basis for many of the factual allegations contained in the complaint, including particularly the allegations of financial harm, and then by failing to produce any other, more knowledgeable witnesses, BRI failed to comply with its obligations under this rule. Where, as here, a corporation served with a Rule 30(b)(6) deposition notice fails to comply with its obligation to produce witnesses who are able to answer the questions posed fully and completely, this

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[90]As raised in the Commissioner's motion to dismiss, which was denied on the grounds of "judicial economy," App. 541, 544, the contempt complaint should have been summarily dismissed on this ground, i.e., failure to comply with the requirements that a complaint, particularly one for contempt, be short, plain, and concise. Mass. R. Civ. P. 8 and 65.3.

amounts to a failure to attend the deposition, for which sanctions are appropriate under Mass. R. Civ. P. 37(d). *Mitsui*, 93 F.R.D. at 67; *Marker*, 125 F.R.D. at 126.

In the circumstances of the present case, having denied the Commissioner's request for an order requiring BRI to produce additional, knowledgeable witnesses to be deposed prior to trial, *cf. Mitsui, supra*; *Marker, supra*; *AMP*, 853 F. Supp. at 831, the only available remedy remaining was to preclude BRI from introducing any evidence at trial in support of the factual allegations in the complaint as to which Dr. Israel claimed lack of knowledge or memory. *Cf. Worthington Pump Corp. v. Hoffert Marine, Inc.*, 34 Fed. R. Serv.2d 855, 857 (D.N.J. 1982) (latter sanction imposed "in order to insure that these [defendants] cannot attempt in the future to use that which they refuse to disclose now").

Failing to impose this remedy in these circumstances constituted a clear abuse of the court's discretion, which operated to the extreme prejudice of the Commissioner. Since, if Mr. Mullen's testimony is disregarded, there is no basis for the court's findings of financial harm or for the relief that was granted to remedy that harm, this abuse alone warrants vacating the court's remedial orders, including its award of attorneys' fees.

B. The Court Abused Its Discretion in Excluding Evidence that Should Have Been Admitted Under the Curative Admissibility Doctrine.

Under the doctrine of curative admissibility, colloquially known as the "fight fire with fire" doctrine, if one party is permitted to introduce evidence on a particular subject, which is prejudicial to the opposing party, the opposing party should be permitted to rebut that evidence, even if the rebuttal evidence would otherwise be inadmissible. *Commonwealth v. Ruffen*, 399 Mass. 811, 813 (1987) (reversing conviction for failure to admit evidence

under this doctrine).[91] In the present case, the court repeatedly violated this doctrine by permitting BRI to introduce evidence on a particular subject and then excluding rebuttal evidence on the same subject when proffered by the Commissioner.

One particularly prejudicial example of this type of abuse of discretion involved evidence as to the effect on the students at BRI of eliminating the specialized food program (one of the conditions imposed by the Commissioner in his conditional certification letter of January 20, 1995, Ex. U-166 at 12). At the outset of the trial, in setting the grounds for relevance, the court repeatedly cautioned all parties that "[t]reatment issues are not part of this litigation"; that "the overall debate as to the use of aversive therapies is not part of this litigation," Tr. 1:6; and that "the issues before the Court...do not directly affect students." Tr. 1:90. Despite these caveats, the court permitted BRI and the parents to introduce expert and lay testimony, over the Commissioner's objections, as to the purportedly adverse effect on two of the students of ceasing the specialized food program. Tr. VII:64-65, IX:96-97, X:6-7. However, when the Commissioner moved for an order requiring the guardians of those two students to consent to having the students examined by the Commissioner's expert, so that the Commissioner could present rebuttal testimony on this issue, Tr. X:22-25, that motion was denied on the grounds that "[t]his is a treatment decision which belongs in the substituted judgment process; it doesn't belong here."[92] Tr. X:25-26. When the Commissioner's counsel then asked that the evidence previously

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[91]*See also Commonwealth v. Amirault*, 404 Mass. 221, 236 (1989) (applying this doctrine to permit otherwise impermissible comments on defendant's post-arrest silence); *Commonwealth v. Smith*, 342 Mass. 180, 185-86 (1961) (applying this doctrine to permit otherwise impermissible closing argument, "to correct the erroneous impression for which the defendant himself was responsible").

[92]BRI's argument in opposition to the Commissioner's motion, that any such examinations "should have been done during discovery," Tr. X:25, which was not addressed by the court, was entirely unfounded, since BRI did not cease using the specialized food program until ordered to do so by a Single Justice of the Appeals Court in mid-June 1995, a month after the close of discovery. Tr. X:25, App. 417.

presented by the parents on this same issue be stricken on the same ground, that motion was also denied. Tr. X:26.

The court's refusal to permit the Commissioner's expert to examine these two students and to provide expert testimony on this issue was seriously prejudicial, since the court's finding that these two students "are currently suffering a dramatic increase in their health-dangerous behaviors," F. 298, App. 1284-85, is the court's only finding of concrete, physical harm to any students resulting from the Commissioner's conduct. As discussed in Argument IV.A, *infra*, there is no way that the remaining findings of harm—economic harm to BRI and resulting decrease in special rewards and individual attention to students[93]—could justify the drastic injunctive and receivership relief imposed by the court. Accordingly, the court's failure to permit the Commissioner to introduce evidence on this subject warrants vacating this relief.

Another example of the prejudicial exclusion of rebuttal evidence was the court's disparate treatment of evidence concerning DMR's regulation of providers other than BRI. One of the central themes of BRI's case was that BRI was treated differently from other providers, App. 987-90; and BRI was permitted to ask many questions as to DMR's ordinary practices with respect to other providers. *E.g.*, Tr. III:11, 154, 190, 193, 194, 200, 209, 226, 250, 258, 265; IV:35, 46, 84, 211-12; VI:109-10, 171, 192. However, when DMR attempted to introduce evidence as to DMR's usual investigation practices in order to rebut BRI's evidence of disparate treatment, BRI objected on the grounds of relevance. Tr. XIIA:141. Those objections were sustained, and the court repeatedly instructed the Commissioner's counsel to limit her questions solely to DMR's investigations concerning BRI students. Tr. XIIA:141-43, 148, 149.[94] Since the court made many findings that DMR treated BRI differently from other providers, particularly with respect to

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[93]Moreover, as shown in Argument III.B.21, *infra*, all of these findings of harm are clearly erroneous, even on the existing record.

[94]*See also* Tr. X:34-35 (excluding proffer of testimony that the licensing standards applied to BRI were the same standards applied to all other providers).

investigations, *e.g.*, F. 118, App. 1238; F. 132, App. 1241; F. 204, App. 1260; and F. 206, App. 1260-61, and presumably relied on those findings to infer bad faith on the part of the Commissioner, the court's refusal to permit the Commissioner to introduce rebuttal evidence on this subject was seriously prejudicial.

The above two examples are illustrative of the court's pervasive pattern of ruling in favor of BRI and against DMR on the very same evidentiary issues.[95] This pattern casts significant doubt on the court's fairness in exercising its discretion throughout this proceeding.

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[95]*See also* Argument III.B.5 at 92 n. 131, *infra* (BRI allowed to introduce deposition notice of Dr. Daignault; DMR not allowed to introduce other deposition notices to provide context); Argument III.B.12.e at 119 n. 174, *infra* (BRI's counsel allowed to use inaccurate notes of prior testimony to impeach; DMR's counsel not allowed to use actual transcript for same purpose); Argument III.B.14 at 131, *infra* (Commissioner's objections to questions as calling for speculation, overruled; BRI's objections on same ground to questions of same witness on same subject, sustained).

III. THE TRIAL COURT'S FACTUAL FINDINGS—INCLUDING FINDINGS OF BAD FAITH, PERJURY, AND ATTORNEY MISCONDUCT—WHICH ARE ADOPTED ALMOST VERBATIM FROM BRI'S PROPOSED FINDINGS AND ARE ENTIRELY UNSUPPORTED BY THE EVIDENCE, ARE CLEARLY ERRONEOUS.

A. This Court Should Strictly Scrutinize the Trial Court's Factual Findings to Ensure that They Are Supported by the Evidence in the Record.

1. Where, as Here, the Trial Court's Factual Findings Are Taken Almost Verbatim from the Prevailing Party's Proposed Findings, the Appellate Court Must Scrutinize the Entire Record with Particular Care.

Under Mass. R. Civ. P. 52(a), a trial court's findings of fact will not be set aside by an appellate court "unless clearly erroneous." *Cox v. New England Tel. & Tel Co.*, 414 Mass. 374, 384 (1993). However, "there is and should be certain leeway in applying the standard to varying cases," *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962), *cited with approval in Cormier v. Carty*, 381 Mass. 234, 236 n. 4 (1980); *see also Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 417 (1980), in light of the underlying purposes of requiring fact finding by the trial court. Those purposes are to: (1) insure the quality of a judge's decision making process by requiring simultaneous articulation of the judge's underlying reasoning; (2) assure the parties that their claims have been fully and fairly considered; and (3) inform an appellate court of the basis on which a decision has been reached. *Cormier*, 381 Mass. at 236.

As repeatedly recognized by this Court, the practice followed by the trial court in this case, of adopting almost verbatim the proposed findings of the

prevailing party, "defeat[s] each of these three underlying purposes." *Cormier, id.*; *see also Commonwealth v. Hawkesworth*, 405 Mass. 664, 669 (1989); *Lewis v. Emerson*, 391 Mass. 517, 524 (1984); *Anthony's Pier Four, Inc. v. HBC Assoc.*, 411 Mass. 451, 465 (1991). It is particularly problematic for a trial court to adopt verbatim a party's proposed findings on the credibility of witnesses, "in view of both the need for such assessments to be made dispassionately and the difficulty an appellate court necessarily encounters when forced to assess the credibility of witnesses solely on the basis of a 'cold' record." *Cormier*, 381 Mass. at 237 n. 7. Where this disfavored practice is followed, the appellate court is faced with the increased burden of conducting a painstaking review of the entire record of the lower court proceedings, in order to ensure that the trial court's findings are actually supported by the underlying evidence. *First Pa. Mort. Trust v. Dorchester Savings Bank*, 395 Mass. 614, 622 n. 12 (1985); *Anthony's Pier Four*, 411 Mass. at 465; *Edinburg v. Cavers*, 22 Mass. App. Ct. 212, 219 (1991), *review denied*, 398 Mass. 1101 (1986).

Moreover, the maximum doubt as to the independence of the trial court's findings, and hence the most intrusive appellate scrutiny, is warranted where, as here, the adopted findings are numerous,[96] complex,[97] subjective,[98]

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[96]The court makes 86 pages of factual findings, including 304 contempt findings plus 25 "Corollary Findings," virtually all of which are based on BRI's proposed findings. *See* Addendum to Argument III.

[97]The court's findings cover a broad range of subjects covering a ten-year time period. The court's choice of subjects and order of discussion tracks that of BRI's proposed findings.

[98]Even the court's credibility findings are adopted essentially verbatim from BRI's proposed findings. *Compare, e.g.*, F. 152, App. 1245, *and* BRI's Prop. F. 239, App. 703-04 ("Dr. Cerreto's statement . . . is also false"); F. 176, App. 1251, *and* BRI's Prop. F. 262, App. 848 ("This Court concludes that the Commissioner . . . testified falsely under oath . . ."); F. 13 (counterclaims), App. 1325, *and* BRI's Prop. F. 12, App. 1051 ("This Court also discounts the testimony of Dr. Carol Upshur" who "did not testify in a credible fashion before the Court."); F. 53 (counterclaims), App. 1335, *and* BRI's Prop. F. 5, App. 1068 ("First, the Court notes with great skepticism the testimony which was given by Attorney Cohen on July 13th.").

hyperbolic,[99] tendentious,[100] contested,[101] and largely immaterial[102] to the central legal issues.[103] In such cases, much less deference is appropriately accorded to the trial court's findings, including findings of credibility; and the findings must be rejected or disregarded if, as will be shown here, they are not supported by the evidence in the record. *Marr v. Back Bay Architectural Commission*, 23 Mass. App. Ct. 679, 681, *review denied*, 399 Mass. 1105 (1987) (rejecting findings that consisted, for the most part, "of nothing more than a retyping of the proposed findings of fact and conclusions of law which

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[99]The court's hyperbolic adjectives and adverbs are taken verbatim from BRI's proposed findings. *Compare, e.g.*, F. 97, App. 1233, *and* BRI's Prop. F. 140, App. 676 ("blatant[]," "untruthful," "enormous," "unlawful"); F. 120, App. 1239, *and* BRI's Prop. F. 180-81, App. 687 ("unsolicited," "blatant false statements and material omissions," "express purpose of creating the false impression"); F. 79 n. 21, App. 1229, *and* BRI's Prop. F. 125, App. 670-71 ("completely contrary fashion"); F. 208 n. 49, App. 1262 *and* BRI's Prop. F. 314, App. 873 ("hypocritical," "abuse of governmental power in an effort to intimidate court officials and remove individuals from the case that the Department regarded as obstructionist or road blocks . . .").

[100]*Compare, e.g.*, Corollary F. 23, App. 1293, *and* BRI's Prop. F. 418, App. 917 ("The sophistry of the Department's counsel," "This Court is appalled,"); Corollary F. 22, App. 1292, *and* BRI's Prop. F. 417 (The Court "felt the need on numerous occasions, after repeated instances of contradictory sworn testimony, to remind witnesses that they were under oath," or "had to tell the truth.").

[101]Virtually all of BRI's proposed findings, which were adopted by the court, are directly antithetical to DMR's proposed findings on the same subjects. *Compare* App. 742-998, 1207-93, *and* 634-741.

[102]As shown in Argument I, *supra*, virtually all of the court's factual findings are immaterial to the legal issues of whether the Commissioner clearly and directly violated any clear and unequivocal provision of the Settlement Agreement.

[103]*Cf. Hawkesworth*, 405 Mass. at 671 (upholding adopted findings that "carefully avoided hyperbole and tendentiousness"); *Markell*, 9 Mass. App. Ct. at 418 (where decision depends on two or three clearly drawn factual issues, appellate court may assume trial court found facts independently); *Edinburg*, 22 Mass. App. Ct. at 219 (upholding verbatim adoption of "neutral" facts that "simply recount the procedural history of the case [or] present uncontested facts.").

had been submitted by counsel for the plaintiff" and "transparent[ly] refuse[d] to consider any of the contentions of the [defendant]").[104]

As can be seen by comparing BRI's proposed findings with the court's findings,[105] virtually all of the trial court's findings are taken almost verbatim from BRI's proposed findings. Although some subsidiary proposed findings are omitted, some paragraphs are moved around, and some minor changes are made in wording or punctuation, the trial court made virtually no changes of any substance in adopting these findings. The same is true of the trial court's corollary findings and conclusions of law.[106] *Cf. Lewis v. Emerson*, 391 Mass. at 524 ("to be proper a judgment must give evidence of independent judicial consideration of the issues, not merely a slavish reliance on a party's view of the law"). Even typographical errors in dates and quotations in the proposed findings and inapt case citations in the proposed conclusions are adopted verbatim by the court.[107] Thus, the court's findings lack the "evidence of independent judicial consideration of the issues," *Lewis v. Emerson*, 391 Mass. at 524, that is the necessary predicate for the ordinary, more deferential level of appellate review under the clearly erroneous standard.

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[104]Indeed, as indicated in the introduction to the court's findings, the court's findings cite only to the uncontested exhibits and those introduced by BRI, and not to a single one of DMR's 80 exhibits. App. 1208 n. 2.

[105]Cognizant of this Court's warning that an appellate court need not assume that the trial court has adopted a party's proposed findings verbatim where proposed findings are not contained in the record appendix, *Cormier*, 381 Mass. at 236 n. 4, the Commissioner has included all parties' proposed findings in the Appendix, App. 634-1130. In addition, in a separately bound Addendum to Argument III, the Commissioner has reproduced, side-by-side, the proposed findings of BRI and the corresponding findings of the trial court.

[106]*Compare* App. 1287-93 *and* App. 904-17; App. 1294-1320 *and* App. 1020.

[107]*See infra* at 78 n. 113 (misciting cases); 83 n. 118 (misciting cases); 91 n. 129 (inaccurate date); 94 n. 137 (inaccurate date); 96 n. 140 (inaccurate quotation).

2. *Strict Scrutiny of the Trial Court's Factual Findings Is Warranted for Other Reasons as Well.*

Apart from the verbatim adoption problem discussed above, there are several additional circumstances that require this Court to take a particularly hard look at the trial court's factual findings in this case. First, because the evidence in this case was largely documentary—and even the oral testimony consisted largely of descriptions and explanations of documents contained in the record[108]—this Court is free to draw its own conclusions from the evidence. *Markell*, 9 Mass. App. Ct. at 418; *see also Strand v. Herrick & Smith*, 396 Mass. 783, 789 n. 6 (1986) (reserving question whether clearly erroneous standard applies to appellate review of findings based on documentary evidence). Moreover, to the extent that the trial court's "findings of fact" are, instead, unsupported characterizations or inferences, which is largely the case here, they "are entitled to no weight from this court." *Simon v. Weymouth Agricultural & Industrial Society*, 389 Mass. 146, 148 (1983); *see also Heinrich v. Silvernail*, 23 Mass. App. Ct. 218, 229 (1986), *review denied*, 399 Mass. 1101 (1987) (rejecting characterizations and inferences not based on "solid foundation of established facts"). And, of course, this court is not bound by the trial court's conclusions of law, *Simon*, 389 Mass. at 149, 151, even if characterized as findings of "fact" by the judge. *Strand*, 396 Mass. at 783 n. 5 (in determining applicable standard of appellate review, reviewing court may disregard form of trial court's "findings" and "conclusions").

More substantively, a closer than usual look at the trial court's findings is warranted here because of the subject matter of the findings and the severity of the relief predicated upon them. As discussed above, the trial court's legal conclusion of contempt was based largely on findings of bad

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[108]As recognized by the trial court, "This litigation was somewhat unusual due to the fact that the actions of all parties are fully documented in the[] exhibits." App. 1208 n. 2.

faith on the part of the Commissioner and his staff. Because "[t]here is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare," *LaPointe*, 389 Mass. at 459, this Court should carefully scrutinize the evidence underlying the trial court's findings of bad faith to ensure that there was an adequate basis for overcoming this presumption to the contrary. If not, those findings should be overturned. *Cf. Stamper v. Stanwood*, 339 Mass. 549, 553 (1959) (relying, in large part, on presumption that marriage was entered into in good faith, appellate court rejects trial court's factual finding to the contrary as based on "meager" evidence).

Similarly, because of the far-reaching receivership relief imposed by the trial court, it is particularly important for this Court to scrutinize the factual findings on which that relief was predicated, to ensure that such a drastic remedy was, in fact, warranted by the underlying evidence. *See* Arguments III.B.21 and IV.A.1, *infra*. As this Court has repeatedly warned, "[P]articular care must be exercised...in order to ascertain that facts exist which justify...the appointment of a temporary or permanent receiver." *Lopez v. Medford Community Center, Inc.*, 384 Mass. 163, 169 (1981) (quoting *George Altman, Inc. v. Vogue Internationale, Inc.*, 366 Mass. 176, 179 (1974)).

B. Careful Scrutiny of the Record Reveals That All of the Trial Court's Adverse Factual Findings Are Clearly Erroneous.

For the reasons discussed in Argument I, *supra*, virtually all of the court's factual findings are immaterial to the legal issues that were properly before the court in this contempt proceeding—i.e., whether the Commissioner directly and undoubtedly violated any clear and unequivocal provision of the Settlement Agreement. However, because the court's findings of misconduct are so serious on their face and so personally damaging to the Commissioner and other public officials, the Commissioner asks this Court to take the additional step of carefully scrutinizing those findings and comparing them

to the underlying evidence in the record, under the standards articulated above.[109]

Accordingly, this section points out the evidence, if any, that is pertinent to the trial court's findings on various subjects, roughly in the order that those subjects were addressed by the trial court, and shows that there is no evidence whatsoever to support the factual findings made or inferences drawn by the trial court. In many cases, this argument will show that other evidence in the record, which was disregarded by the trial court, unequivocally establishes the opposite of what the court found.[110] In order to assist the Court in undertaking this review, the Commissioner has filed herewith a separately bound Addendum to Argument III. That Addendum is organized into 21 sections, corresponding to the following 21 subsections of Argument III.B. Each section of the Addendum contains, side-by-side, the relevant trial court findings and the corresponsing proposed findings of BRI, from which the

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[109]Even the introductory paragraphs and the Procedural Background section of the court's findings, App. 1207-09, which were also adopted from BRI's proposed findings, App. 748-50, contain factual errors that, while immaterial to this appeal, indicate the pervasive extent of the court's errors. For example: (1) While the court finds that the contempt complaint was "brought by [BRI] and the parents and guardians of students at [BRI]," F. 1, App. 1207, in fact, the contempt complaint was brought only by BRI. App. 1207. (2) While the court finds that "DMR voluntarily entered into the Settlement Agreement," F. 3, App. 1208, in fact, DMR did not seek to become a "party" but moved only to substitute itself for DMH (which was not a party to the Settlement Agreement but nevertheless had certain limited obligations thereunder). App. 1208. (3) While the court found that the preliminary injunction and the supporting findings entered by the court in 1988 were "affirmed in a decision of the Single Justice of the Appeals Court," F. 6 n. 4, App. 1209, in fact, the Single Justice simply denied a request for interlocutory relief from the preliminary injunction pending plenary review by a full panel of the Appeals Court (which never occurred because of the intervening Settlement Agreement). App. 109-17.

[110]Where the trial court has not made findings on factual issues that this Court deems significant, this Court may make additional findings based on its own review of the evidence. *Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157, 161 (1977); *In the Matter of Jane A.*, 36 Mass. App. Ct. 236, 237 (1994).

court's findings were adopted, followed by copies of the pertinent transcript pages and exhibits.[111]

As will be seen in the following subsections, many of the factual errors made by the court fall into the following pattern: First, the court adopts BRI's mischaracterizations of a witness's trial testimony and of that witness's prior testimony (either at a deposition or earlier in the trial), then finds some minor inconsistency between the present and past testimony (as mischaracterized), and then infers from this "inconsistency" that the witness deliberately lied. *See, e.g.*, subsections 4, 7, 12, 13, 14, 15, *infra*. Often the "inconsistencies" identified by the court are not between the witness's own words on different occasions but between the witness's "yes" and "no" answers to different leading questions or between the witness's monosyllabic answers to leading questions and the witness's narrative testimony fully explaining the matter in question. *See, e.g.*, subsections 2, 4, 12, 13, *infra*. And, frequently, the "falsehoods" amount to no more than the contrast between a witness's lack of memory at a deposition and the witness's refreshed memory at trial. *See, e.g.*, subsections 3, 13, *infra*.

1. DMR Did Not Contest Its Status As a Party to This Case.[112]

DMR never argued in the trial court that it was not a party to or was not bound by the Settlement Agreement. Nevertheless, throughout its findings, the court repeatedly finds that DMR took this position and infers from this

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[111]The findings, proposed findings, transcripts, and exhibits are also reproduced in their entirety in the Appendix, Exhibits, or Transcript volumes also filed herewith.

[112]The trial court's findings on this subject, F. 12, 17, 23, 35, 65, 114; App. 1211-14, 1217, 1225, 1236, 1237, are adopted from BRI's proposed findings 22, 28, 34, 51, 54, 96, 169; App. 748, 750, 752, 758, 770, 791.

purportedly "abrupt[] change[]," F. 12, App. 1211, that the Commissioner was acting in bad faith.[113]

In moving to dismiss the contempt complaint, the Commissioner expressly assumed that DMR *is* a party to this case (although he did reserve the right to argue otherwise at some later time).[114] App. 374-75. Similarly, nowhere in the Commissioner's proposed findings and conclusions is there any factual or legal claim that DMR or the Commissioner is not a party to the Settlement Agreement or to this case. App. 634-741.

The only "evidence" in the record on this issue are the Commissioner's answers to questions by BRI's counsel as to his understanding of whether DMR is a party to the Settlement Agreement. His counsel objected to those questions, as irrelevant and as calling for legal conclusions or privileged communications, but those objections were overruled. Tr. III:25; IV:171-72, 174, 175, 176. In response to such questions, the Commissioner demonstrated only his own personal lack of understanding of this essentially legal issue. Tr. III:22-25 (acknowledging inconsistency between his understanding and positions taken on his behalf by his attorneys in

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[113]In its conclusions of law, App. 1294-1300, adopted from BRI's proposed conclusions, App. 1002-09, the court held that the doctrine of equitable estoppel bars DMR from arguing that it is not a party to the Settlement Agreement, citing, *inter alia, McAndrew v. School Committee of Cambridge*, 20 Mass. App. Ct. 356 (1985). However, in *McAndrew*, the Appeals Court specifically noted and reaffirmed the traditional judicial reluctance "to apply principles of estoppel to pubic entities where to do so would negate requirements of law intended to protect the public interest," and found it particularly *inappropriate* to apply this doctrine to estop a government body, in that case the Cambridge School Committee, "where a government official acts, or makes representations, contrary to a statute or regulation designed to prevent favoritism, secure honest bidding, or ensure some other legislative purpose." *Id.* Another case, *Peoples Savings Bank v. Board of Assessors of Chicopee*, 384 Mass. 808, 809 (1981), cited by BRI, App. 1007-09, and the court, App. 1299, on the issue of equitable estoppel, has nothing whatever to do with the application or non-application to the government of that doctrine. Rather, it deals solely with the admissibility of an expert opinion in a taxpayer's appeal to the Appellate Tax Board.

[114]The Commissioner asserted, as one of 12 affirmative defenses in his answer and motion to dismiss the third amended contempt complaint, that he (not DMR) was "not a proper party" to the contempt complaint (not the Settlement Agreement or the underlying case), App. 361, 486, but that defense was not pressed below and is not raised here.

correspondence and briefs); III:48 (acknowledging that he was "not clear" as to whether he was a party to the Settlement Agreement); IV:172 (stating that he is "confused about that question" and that "it's difficult, not being an attorney, to know what each of the documents means relative to the question" of DMR's party status). At the very most, his testimony on this subject establishes that at some point DMR considered taking the position that it was not a party but, apparently, that suggestion was either never communicated to or was rejected by the Attorney General, who has sole authority to represent state officials in litigation and to formulate litigation strategy on their behalf. Tr. IV:173-77 (citing G.L. c. 12, § 3).

Thus, the court's "factual" findings that DMR took the legal position that it was not a party to the Settlement Agreement are clearly erroneous and therefore cannot be the basis for inferring a bad faith motive on the part of the Commissioner or his counsel.[115]

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[115]Even if the Commissioner had changed his position on this issue, it is doubtful that this would constitute contempt, particularly given the legitimate questions raised by the manner in which the court made DMR a "party" to this case and to the Settlement Agreement and the interlocutory nature of the order in question. *See* Prior Proceedings, subsection 2, *supra*. *Cf. Evans v. City of Chicago*, 10 F.3d at 478 (government officials cannot contract away statutory authority of successors, "especially when one of 'the parties' did not consent.")

2. *The Commissioner Had a Good Faith Basis for Rejecting the Recommendations of a Staff Review Team and for Seeking Additional Information Before Acting on BRI's Application for Recertification.*[116]

In August 1993, as described in the Statement of Facts, subsections 1 and 2, the Commissioner rejected the recommendations of a staff review team that BRI be re-certified to use Level III aversives and decided, instead, to seek further information from BRI before taking final action on its re-certification application. Pending receipt and review of that information, the Commissioner granted BRI interim re-certification, Ex. U-82. The court's findings that this decision was made in bad faith, F. 49, 52; App. 1221, 1222, are clearly erroneous.

The trial court found that DMR sent in a second review team unnecessarily and under false pretenses, finding that the first team had reviewed both the GED-4 and the specialized food program, so that no further review was necessary. F. 42, 45, App. 1219, 1220. In fact, however, as George Casey testified, the first team examined only the GED (Graduated Electronic Decelerator, a device used to shock students as a means of eliminating targeted behaviors), not the GED-4 (a new and more powerful version of that device). Tr. I:118. Attorney Casey also testified that he never saw any application of the GED or any other painful aversive, Tr. I:186, and that he knew only that a food program existed but did not go into it in detail. Tr. I:118-19. As to the *specialized* food program, Attorney Casey testified only that he believed he saw treatment plans which included references to "specialized food." *Id.*

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[116]The trial court's findings on this subject, F. 42-55, App. 1219-22, are adopted from BRI's proposed findings 68, 70-73, 75-79, 81-82; App. 771, 772-73, 774-76, 777.

Most of the court's findings on this subject focus on the Commissioner's decision to reject the staff review team's recommendations.[117] The evidence established that the Commissioner had good reasons for seeking more information prior to acting on BRI's application. The trial court ignored this evidence and found the team's reports to be thorough and complete, F. 48, 51; App. 1221, 1222, despite the lack of any expert testimony to that effect.

In particular, the court erred in finding that the review team conducted a "thorough" investigation of the GED and specialized food programs. F. 48, App. 1221. In fact, the review team relied almost exclusively on information and documentation provided to them by BRI staff, rather than on first-hand observations. Attorney Casey testified, without contradiction, that the team did not observe the application of any Level III aversives. Tr. I:143-144, 186. He also testified, again without contradiction, that he never observed the "make-up" meal element of the specialized food program, and that he did not go to any residences or review any videotapes of BRI's residential treatment program. *Id.* at 187, 147-48. The staff reviewers made no first-hand observations of staff training, delivery of medical services, human rights committee meetings, or peer review committee meetings during either of their two visits to BRI. *Id.* 182-83. Given the unique nature of BRI's program, and the highly intrusive procedures involved, the Commissioner had good cause to reject recommendations that were based on little more than a paper review.

The court's findings regarding the "completeness" of the 1993 report are directly contradicted by the report itself and Attorney Casey's testimony. F. 49-51, 54-55; App. 1221-22, 1223. The report itself states that misfirings of the GED, although not dangerous to health, might affect the clinical effectiveness of the BRI program, and that no analysis by the team psychologist was available on this issue, due to his resignation prior to the

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[117]As discussed in Argument I.E, *supra*, in second-guessing the Commissioner's judgment and exploring his underlying motivations, the court exceeded the proper bounds of judicial rev.ew of executive decisionmaking. Moreover, because BRI never availed itself of its statutory right to administrative and judicial review of any of the regulatory actions at issue here, the court erred in undertaking any review of the merits of those decisions.

receipt of the pertinent information. Ex. U-75 at 6-7. While Attorney Casey testified that he considered the 1993 report to be "complete," in the sense that he had completed what he understood his task to be, Tr. I:128-129, he also testified that he was concerned about the impact of misfires on the efficacy of the treatment. *Id.* at 190-91. However, because the team psychologist was unavailable to review the data, Attorney Casey submitted the report without any competent clinical opinion on this issue. *Id.*

In finding that the Commissioner's only justification for considering the 1993 report "incomplete" was the fact that it was not signed by Dr. Reilly, F. 54, App. 1223, the trial court ignored the Commissioner's testimony that he received advice from his general counsel describing the report and its deficiencies. Tr. III:77-79. The Commissioner testified that the lack of Dr. Reilly's signature was "partially" why he considered the report incomplete but was not the only reason. *Id.* at 78-79, 84.

Furthermore, the report itself identifies a serious deficiency, Ex. U-75 at 6-7, that is, the absence of any psychologist's input. Tr. V:49-50. DMR's practice was to seek input from a psychologist in the certification process. Tr. V:23-24. Because a major component of DMR's certification requirements involves the application of technical psychological standards to the applicant's program, 104 C.M.R. § 20.15 (4), requiring psychologist's participation in evaluating the relevant information would appear essential; and there was no evidence indicating that it was unreasonable to do so.

Also, some of the information provided by BRI itself conflicted with the reports' conclusions that BRI was complying with regulations. BRI sent DMR a letter in which BRI admitted that four students had received mechanical restraint prior to any authorization for such restraint by a court in a substituted judgment order. Ex. DMR-17 at 20. In this same letter, BRI acknowledged that it had not been forwarding reports on the use of mechanical restraint to DMR as required by DMR's regulations. *Id.* at 20-21.

The trial court also erred in finding that the 1991 and 1993 certification team reports were never read by any of the key individuals who were making decisions on BRI's certification. F. 52, App. 1222. The Commissioner testified that he ordinarily received certification reports through his general

counsel, whose role it was to check the reports against the regulations and advise him as to whether the regulations were met by the applicant. Tr. V:24. Attorney Casey, an assistant general counsel at DMR, testified that he submitted the BRI report to the general counsel, Tr. I:192; and, consistently, the Commissioner testified that, in the case of BRI, he received an extensive memorandum from his general counsel summarizing the certification team's efforts and attaching the report itself. Tr. V:39, 41. Based largely on his general counsel's advice, the Commissioner rejected the certification teams' recommendation. Tr. V:52.[118]

The Commissioner also received clinical advice from Assistant Commissioner Mary Cerreto regarding the adequacy of the reports. After learning about the certification teams' methods and drawing conclusions based on those discussions, Dr. Cerreto advised the Commissioner that the reports were insufficient to evaluate the BRI program. Tr. X:43-44.[119]

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[118]In its conclusions of law, App. 1301-02, adopted from BRI's proposed conclusions, App. 1001, the court held that advice of counsel is not a defense to an action for contempt. It also concluded that proof of willfulness is not required in a civil contempt proceeding. App. 1301. However, the case which the court cited regarding the advice of counsel defense, *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986), was a *criminal* contempt case in which the Ninth Circuit Court of Appeals held that counsel's advice to disobey a court order is not a defense to criminal contempt, in that it does not negate the existence of *willfulness*, an essential element of the *crime* of contempt. The Court of Appeals held "[a]lthough a defendant's good faith belief that he is complying with the order of the court may prevent a finding of willfulness, good faith reliance on the advice of counsel to disobey a court order will not." The court's reliance on *United States v. Underwood*, 880 F.2d 612 (1st Cir. 1989), was misplaced for precisely the same reason. As held by this Court in *Alves v. Braintree*, 341 Mass. at 12, advice of counsel *is* a defense to civil contempt, particularly where the defendant is a public official who is presumed to act in good faith.

[119]Even disbelief of the just-described evidence of the basis for the Commissioner's decision to reject the team's recommendations could not support the court's contrary finding that the decision was motivated, instead, by bad faith. *Atkinson*, 33 Mass. App. Ct. at 225. Moreover, to the extent that the court undertook to review the legal or clinical merit of the Commissioner's decision, such an undertaking exceeded the much more limited scope of this contempt proceeding.

As the reports' ultimate recommendations were rejected by the Department based on legal and clinical advice, Tr. V:52, X:43-44, the trial court's conclusion, that a failure to include the authors of the report in further discussions demonstrated the Commissioner's bad faith, is clearly erroneous. F. 52, App. 1222. The only certification team member with any qualifications to comment on the efficacy of BRI's treatment, the psychologist Dr. Reilly, was no longer a DMR employee, Tr. I:121, 190-91; and other, higher-ranking DMR psychologists, including Dr. Cerreto, were qualified and more readily available to provide such advice.

3. The Commissioner Had a Good Faith Basis for the Statements Contained in His Letter of August 6, 1993.[120]

On August 6, 1993, Commissioner Campbell issued a letter extending BRI's certification for 25 days. This letter primarily asked BRI to supply DMR with additional information. The Commissioner also identified deficiencies which BRI was to correct immediately. In the same letter, the Commissioner informed BRI that, assuming BRI met these requirements, the Commissioner would extend BRI's certification for another 25 days, to allow DMR to analyze the submitted information and complete the review process. Ex. U-82.

The evidence introduced at trial detailed the Commissioner's good faith basis for the August 6, 1993 letter. However, the trial court ignored this evidence and issued findings based on misstatements of the record, contradicted by the record, and unsupported by the record. These findings

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[120]The trial court's findings on this subject, F. 63-81, App. 1224-29, are adopted from BRI's proposed findings 93-94, 96, 100-03, 105, 108, 113, 115-17, 120-27; App. 782-83, 785-87, 789, 791-92, 795-98.

are unrelated to any obligation of DMR under the Settlement Agreement and immaterial to the contempt action but, in any event, are clearly erroneous.[12]

The Commissioner relied on advice from his staff in issuing the letter, which was primarily a request for further information. Tr. III:113-14, 117; V:53; Ex. U-82. In addition, the Commissioner had also received disturbing communications from the DMR Human Rights Advisory Committee, Ex. U-42, 59, 60, 62, and a copy of a letter from Dr. Paul Jansen (an outside psychologist who had evaluated some BRI students in connection with substituted judgment proceedings in the Probate Court), Ex. U-81, regarding conditions at BRI. Contrary to the trial court's findings, evidence at trial established that the Commissioner's request for information and statement of deficiencies were entirely warranted under the circumstances.

Many of the court's findings concerning the August 6 letter are based on the erroneous premise that any statement in the Commissioner's letter which conflicts with the findings of the 1991 or 1993 certification team reports was not only incorrect but intentionally misleading. F. 64, 66, 71, 72, 73, 74, 76; App. 1224-25, 1227-28. These findings ignore the substantial testimony regarding the deficiencies in the reports, discussed in the preceding subsection, which led the Commissioner to reject the recommendations contained in those reports and to seek further information. As the court never

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[12]One example of an utterly immaterial, yet inflammatory, finding is taken verbatim from BRI's proposed finding 125, App. 797, and identifies a purported inconsistency between the Commissioner's deposition and trial testimony as to whether the Department took any steps to substantiate allegations against BRI contained in a letter attached to the August 6, 1993 letter. F. 79 n 21, App. 1229. The August 6 letter itself asks BRI to respond to the allegations, Ex. U-82; and at trial, the Commisssioner so testified. Tr. III:176. Apparently Commissioner Campbell had forgotten about this aspect of the August 6 letter at the time of his deposition, and testified accordingly at that time. *Id.* at 176-78. There is no logical reason to find that the Commissioner intentionally falsified his deposition or trial testimony on this subject. However, the trial court adopted BRI's characterization of this memory lapse as intentional. F. 79 n. 21, App. 1229. *See Cormier*, 381 Mass. at 237 n. 7 (noting particular importance of trial court's careful consideration in making findings regarding credibility).

found the certification reports to be accurate,[122] no factual basis exists to support findings of bad faith on the part of the Commissioner, simply because his statements conflict with those of the staff reviewers. In the absence of any independent basis for inferring an improper motive, there is nothing inherently improper about the Commissioner rejecting the recommendations of his field staff, based on the advice of his general counsel and assistant commissioner. To the contrary, reliance on such advice demonstrates his good faith. *See Alves*, 341 Mass. at 12.

The court's findings concerning the accuracy of various statements contained in the August 6 letter are also clearly erroneous. For instance, the August 6 letter stated that the certification team "felt unable to reach a conclusion on whether the issue of GED misfires presented a problem for [BRI's] ability to comply with [DMR's behavior modification regulations]." Although the trial court found the statement to be false, F. 70, App. 1226, the statement was supported by both the certification report itself, Ex. U-75 at 6-7, and the testimony of Attorney Casey, the author of the report. The testimony on this issue proceeded as follows:

> Q. So I ask you again: When the Commissioner states that the team failed to reach a conclusion on this issue, would you agree that's not an accurate statement? It's misleading, is it not, Mr. Casey?
>
> A. Well, your question is misleading, too. I was unable to form a conclusion about the GED, and I think I put that in the report. I don't know what else I'm supposed to say. In the sense that I didn't know what effect the misfires had.

Tr. 1:153. The court either ignored Mr. Casey's testimony or discounted it for an unstated reason.[123] In either case there exists a clear conflict between uncontroverted testimony and the court's findings.

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[122]The trial court never found the factual or legal conclusions of either report to be correct. The court only found that the reports were thorough" and "complete." F. 51, 48; App. 1222, 1221.

[123]Attorney Casey was the only DMR employee the court expressly found to be credible. App. 1292 n. 76.

The court criticized the Commissioner for asking BRI to provide a list of aversive procedures currently in use (along with a description of how the techniques were used at BRI) and copies of, or citations to, peer-reviewed professional research specific to each such technique. F. 73, App. 1227. This request was patently reasonable in light of DMR's obligation to judge whether BRI's use of such techniques complied with applicable laws and regulations. The court found the request unnecessary because, according to the court, Attorney Casey testified that this material had been reviewed previously. *Id.* Although Attorney Casey testifed that there were descriptions of aversive procedures in the materials he reviewed, Tr. I:161, the record provides no support for the court's conclusion that what Mr. Casey previously reviewed accurately described the procedures in use at BRI in August 1993. Regarding peer-reviewed research, Attorney Casey testified only that he believed Dr. Reilly read something, but Mr. Casey did not know what Dr. Reilly was given or read. *Id.* at 162-63. BRI introduced no evidence from which the court could conclude that Dr. Reilly had reviewed the material requested in the Commissioner's August 6 letter, and the reports themselves contain no such information.

The court made similarly erroneous findings regarding the Commissioner's statement that DMR had not "been able to conclude that the GED, the specialized food program, or other painful interventions . . . effective . . . or that their use by BRI is consistent with [relevant regulations], or the fundamental principles informing the DMR regulations . . . . Nor [had they] concluded to the contrary." Ex. U-82 at 2. The trial court attacks this statement as inconsistent with earlier Probate Court findings on the effectiveness of such procedures. F. 67 n. 18, 69; App. 1225-25.

The court faults the Commissioner both for contradicting those Probate Court findings and for "deliberate[ly] ignor[ing]" the opinions of psychologists hired by the Department to report to the Probate Court in individual substituted judgment proceedings. *Id.* However, although these private psychologists are provided by DMR, pursuant to Part A of the Settlement Agreement, App. 125, they report to the court, not to DMR, Ex. BRI-13, which was not participating in the Probate Court proceedings at that

time. F. 22, App. 1214. Therefore, there was no reason for the court to infer that DMR had copies of those reports, much less that DMR deliberately ignored them. Even assuming that these reports were provided to DMR, there was no evidence that DMR had "ignored" them, only that the Commissioner himself had not personally read them. Tr. III:38-43. In any event, the Commissioner would not have been bound by those psychologists' opinions as to BRI's compliance with DMR regulations, one of the unresolved issues identified in the August 6th letter. Ex. U-82 at 2.

While the trial court found the Commissioner's statement concerning efficacy to be baseless, F. 69, App. 1226, in fact, his August 6th letter itself detailed the basis for DMR's inability to resolve the issue of efficacy. Ex. U-82.[124] As explained in the letter and as discussed in subsection 2, *supra*, the staff review teams had not reviewed the implementation of Level III procedures first hand and did not reach a conclusion as to whether misfirings presented problems for the efficacy of treatment. Absent evidence to the contrary, there was no basis for the court to find that statement to be "without factual basis," much less "in deliberate ignorance" of other available information. F. 69, App. 1226.

4. DMR Acted Appropriately in Anticipation of, and in Response to, a Nationwide Television Program Concerning BRI and DMR.[125]

The trial court found that the Commissioner's "position[s] concerning both the Settlement Agreement and the [BRI] program" were improperly motivated by his "concern as to how his agency might be depicted" in an upcoming television program ("the Connie Chung Show") on BRI, and that

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[124]No evidence was introduced in the contempt trial to establish the falsity of the reasons stated in the August 6 letter, so the letter itself, an uncontested exhibit admitted for the truth of its contents, is the only evidence on the issue.

[125]The trial court's findings on this subject, F. 58-62, App. 1222-24, are adopted from BRI's proposed findings 88-92, App. 780-82.

the Commissioner testified falsely on this subject. F. 61, 62; App. 1224. These findings are not only without any basis in the evidence but grossly mischaracterize the little evidence presented on this subject.

In response to a series of leading questions posed by BRI's attorney, the Commissioner testified that, in the "course of performing his regulatory duties, [he did not] take into account the effects of the upcoming CBS television program . . . ," that he "was not motivated by [the CBS program]," and that he "never did anything in connection with [the television program],[] concerning BRI, *concerning the regulation of BRI.*" Tr. III:206 (emphasis added).

BRI's counsel began to mischaracterize this testimony immediately. *Id.* at 250-51. The Commissioner resisted this mischaracterization on the witness stand, Tr. IV:47; however, it is this very mischaracterization which was incorporated into both BRI's proposed finding of fact 91, App. 781, and the trial court's finding. F. 61, App. 1224. A full reading of the series of leading questions posed to the Commissioner and his responses makes clear the central point of his testimony on this issue: his regulation of BRI was not motivated by the television program.[126] Tr. III:206.

The court's adverse findings on this subject all rest on the erroneous premise that the Commissioner testified that he "never did anything" in anticipation of the television program. F. 61, App. 1224. Although, as just discussed, he testified that his regulatory actions with respect to BRI were not motivated by the television program, Tr. III:206; he never denied doing "anything" in anticipation of that show. In fact, earlier in the same day, the Commissioner testified, as the court found, F. 60, App. 1224, that he had discussed the upcoming television program with the Under-Secretary of the Executive Office of Health and Human Services. Tr. III:57-59. The Commissioner also readily agreed that DMR planned to draft letters to be sent to parents in anticipation of, and response to, the CBS program and that

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[126]The trial court's disbelief of the Commissioner's testimony on this subject does not provide support for the contrary finding, that his regulation of BRI was, in fact, motivated by this television program. F. 62, App. 1224. *See Levine v. Amber Manuf. Co.*, 6 Mass. App. Ct. 840, 841 (1978).

the DMR press office prepared to respond to media inquiries.[127] Tr. IV:47-51. These activities were neither improper nor inconsistent with the Commissioner's testimony that his regulation of BRI was not motivated by this television show.

5. DMR Had a Good Faith Basis for Seeking Information about the Court Monitor's Financial Relationships with BRI's Attorneys and Their Clients.[128]

The trial court's finding that DMR engaged in an unwarranted "attack" on the court monitor, Dr. Daignault, F. 86, App. 1230, grossly mischaracterizes DMR's good faith attempts to learn the nature and extent of Dr. Daignault's relationships with BRI's attorneys and their clients. In fact, the evidence demonstrated that DMR had good reason for seeking this information--i.e., to determine whether Dr. Daignault, the presumably "independent" court monitor, in fact had financial ties to BRI's lawyers or their other clients that undermined either his impartiality or the appearance thereof. In response to DMR's initial inquiries on this subject, BRI's attorneys acknowledged that they, as well as three or four wards, had hired Dr. Daignault as a forensic evaluator or expert witness in a number of matters. Ex. U-86. In addition, DMR learned that Dr. Daignault had filed affidavits on behalf of clients of BRI's law firm in other cases brought against DMR. Tr. IX:43-45; Ex. DMR-41. Without more information about this potentially conflicted relationship

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[127]No evidence established the content of such drafts or that any letters were actually sent in response to the program. Although DMR's press office prepared for media inquiries by drafting an information sheet, Ex. BRI-263; Tr. IV:47-51, there was no evidence that this information sheet was anything other than an accurate synopsis of DMR's positions regarding both BRI and aversives.

[128]The trial court's findings on this subject, F. 84-86, App. 1230, are adopted from BRI's proposed findings 141-42, 144; App. 803-04.

between the court monitor and counsel for the opposing party, DMR could not determine whether there existed any actual impropriety.

DMR first sought further information on this subject from BRI's attorneys, who directed DMR to seek the information from Dr. Daignault himself. Ex. U-86. DMR then sought this information from Dr. Daignault directly. Tr. IX:40-42; Ex. U-85. In response, Dr. Daignault refused to provide the information and stated that the court had told him he need not do so, absent a court order. Tr. IX:41-42; Ex. DMR-39, 40. At that point, DMR filed a "Motion for Disclosure of Court Monitor's Work for and Compensation by Attorneys for the Plaintiffs." App. 185. DMR requested a hearing on this motion on a previously scheduled court date, but the court continued the hearing indefinitely pending the resolution of Dr. Daignault's request for court-appointed counsel. Ex. DMR-42.

The trial court's inference that DMR's "August 19th" request for this information was "in response" to BRI's first request for mediation with the court monitor is baseless. F. 84, App. 1230. The letter was in fact dated August 24, 1993.[129] From its content, it is clear that this letter was prompted by a letter from BRI's attorney that was received by DMR's attorney that same day, in which BRI's attorney suggested that DMR contact Dr. Daignault to seek the information, stating, "Dr. Daignault's records would be more accurate and complete than my own with respect to the total fees paid to Dr. Daignault." Ex. U-85.

The trial court also erred in finding that, at the time that DMR sought this information from Dr. Daignault, DMR itself had also retained Dr. Daignault for consultation on unrelated matters. F. 85, App. 1230. This finding (taken nearly verbatim from BRI's proposed finding 142, App. 803) is contrary to the testimony of Dr. Daignault himself, who testified that since the inception

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[129]The wrong date, "August 19," appears in both the court's finding, F. 84, App. 1230, and BRI's proposed finding 141, App. 803, demonstrating that the trial court relied on BRI's proposed finding rather than on DMR's letter itself in making this finding.

of DMR, there has been no occasion on which DMR had paid for his services as a consultant. Tr. IX:56.[130]

On September 3 and October 12, 1993, BRI filed contempt complaints, App. 19, 20, alleging, among other things, that DMR had violated Part B of the Settlement Agreement by failing to submit various matters to Dr. Daignault for arbitration. In response, DMR filed an answer, App. 259, and noticed nine depositions, including that of Dr. Daignault. App. 20, Ex. U-111. All of those depositions were cancelled a week later, by agreement of counsel. U-115.

Although Dr. Daignault apparently took DMR's information requests and deposition notice as personal attacks, Tr. II:172, there was no evidence that these facially legitimate actions were intended to "harass" and "intimidate" Dr. Daignault, as the court found.[131] F. 86, 155-57; App. 1230, 1246. Those findings should therefore be rejected as clearly erroneous. *See Hartford Accident & Indemnity Co.*, 11 Mass. App. Ct. at 1000 (one person's expressions of belief without personal knowledge insufficient to show another person's lack of good faith).

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[130]Prior to Dr. Daignault's testimony on this point, the Commissioner mistakenly agreed, in response to leading questions by BRI, that DMR had paid Dr. Daignault as a consultant. Tr. III:158-59. To rely solely on the Commissioner's response to a leading question in the face of Dr. Daignault's own denial of this fact, based on his own personal knowledge, was clearly erroneous.

[131]The Commissioner attempted to introduce all of the other deposition notices served by DMR and by BRI at that same time, Ex. DMR-A, DMR-B, in order to rebut the false impression created by the admission of Dr. Daignault's notice alone and his related direct testimony. However, those notices were excluded as irrelevant. Tr. IX:28-29.

6. *The Commissioner's Account of His 1991 Telephone Conversation with Henry Clark Was Neither "Blatantly False" nor Intentionally Untruthful.*[132]

On cross-examination by his counsel, the Commissioner testified as to a telephone conversation he had had in 1991 with Henry Clark, an attorney who was at that time an associate of Roderick MacLeish, BRI's lead counsel in this case. According to the Commissioner, Mr. Clark called him on the eve of his assuming the position of Commissioner and conveyed a message, purportedly from Mr. MacLeish, "warn[ing him] . . . not to do anything to BRI on Monday when [he] became Commissioner." Tr. VI:8. Mr. Clark's comment was only one anecdote offered by the Commissioner as the basis for his belief that BRI was inclined to be litigious and would therefore be likely to contest any adverse regulatory actions. Tr. VI:7-8. A more significant basis for this belief was the Commissioner's familiarity with the history of the present litigation.[133] *Id.*

As to the truth of the Commissioner's testimony on this subject, Mr. Clark confirmed that he telephoned Mr. Campbell at the time in question on the subject of Mr. Campbell's assuming the position of Commissioner of DMR. Tr. VIII:155-57. Mr. Clark also testified to the Commissioner's agitated response to the conversation. *Id.* The fact that Mr. Clark and Commissioner Campbell testified differently as to the substance and tenor of Mr. Clark's comments does not mean that Commissioner Campbell's testimony was "blatantly false" and intentionally untruthful, as the court found, F. 97, App. 1233 (adopting those words from BRI's proposed finding 140, App. 802). Rather, it is apparent that they each sincerely understood or remembered the

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[132]The trial court's findings on this subject, F. 92-97, App. 1231-33, were adopted from BRI's proposed findings 133-40, App. 800-02.

[133]The Commissioner's belief as to BRI's litigiousness was well-founded. *See* Priot Proceedings, subsection 3.

conversation, which took place four years before, differently. Although the court apparently found Mr. Clark's version of the conversation more credible, its further characterization of the Commissioner's version as blatantly and intentionally false should be rejected by this Court.[134]

7. The Commissioner Had a Good Faith Basis for His Letter of August 31, 1993, Conditionally Certifying BRI to Use Level III Aversives.[135]

a. BRI's Response to August 6th Letter

By letter dated August 31, 1993, the Commissioner extended BRI's interim certification to use Level III aversives, with certain conditions.[136] Ex. U-91. The court's findings on this subject begin with the suggestion that the letter was entirely unnecessary in light of Dr. Israel's letter of August 27, 1993,[137] and accompanying "significant documentation," which the court found "rebutted most of the factual allegations" contained in the

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[134]The words used to characterize the Commissioner's testimony are significant because such findings of "intentionally" false testimony form the basis for the court's legal conclusions that the Commissioner (and Dr. Cerreto) committed perjury, App. 1231-34, which in turn, are relied upon as a basis for the extraordinary relief granted by the court. As a legal matter, even if the Commissioner's testimony on this point were false, the precise content of his telephone conversation with Mr. Clark is far too removed from the legal issues in this case—whether the Commissioner violated an unequivocal provision of the settlement agreement—to be material, an essential element of perjury. G.L. c. 268, § 1 (1994 ed.); *Commonwealth v. Geronomi*, 357 Mass. 61, 63, 64 (1970).

[135]The trial court's findings on this subject, F. 98-112, App. 1233-36, are adopted from BRI's proposed findings 151-65, App. 807-13.

[136]To put this letter in context, see Statement of Facts, subsection A.3.

[137]Dr. Israel's letter is actually dated August 28, 1993. Ex. DMR-17. The court apparently based this finding on BRI's proposed finding 151, App. 807, which contains the same error.

Commissioner's August 6, 1993 letter. F. 98, App. 1233. This finding has no basis whatsoever in the evidence. BRI offered Dr. Israel's letter, Ex. DMR-17, not for the substance or truth of its contents, but only to show that Dr. Israel gave a "full and complete" response to the requests for information contained in the Commissioner's August 6 letter.[138] Tr. VIIA:36. The accompanying documentation was not offered into evidence by any party, and Dr. Israel's testimony concerning it was limited to a description of its size and the amount of work that it took to compile. Tr. VIIA:35-38. There was thus no evidentiary basis for the court to find that the accompanying documentation was "significant" or that it "rebutted most of the [Commissioner's] factual allegations," F. 98, App. 1233, thereby making further inquiries unnecessary.[139] This is a particularly clear example of an instance where "[d]eference to a trial judge's findings reaches its limit," i.e., "when they are without basis in the record." *Atkinson v. Rosenthal*, 33 Mass. App. Ct. at 223-24.

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[138]Dr. Israel's letter of August 28, 1993, was originally introduced by DMR, solely for the purpose of showing that it was enclosed in a later letter sent by the Commissioner to BRI's out-of-state funding agencies. Tr. VI:14-15. On the other hand, the Commissioner's letter of August 31, 1993, like all of his other certification letters, was offered and admitted for the truth of its contents, as an uncontested exhibit. App. 415, 506; Tr. II:134-35, 145.

[139]In fact, rather than "rebut" the concerns expressed in the Commissioner's August 6th letter, Dr. Israel's letter, which admitted restraining students without court authorization and failing to report the use of restraints in accordance with DMR regulations, Ex. DMR-17 at 20-21, raised further concerns that were addressed by the imposition of further conditions. Ex. U-91 at 2.

b. Misfirings of GED

The court next makes the general finding that "[t]he August 31 letter...contained false information concerning [BRI]," F. 99, App. 1233; but the only factual information identified as "false" is the statement that the "field review has learned from a source 'other than JRC'[140] that there were problems with the misfirings of the GED device." F. 101-02, App. 1233-34. The trial testimony and documentary evidence on this point, however, fully support the statement in the Commissioner's letter as to the source of the information on problems with GED misfires.

Attorney Casey testified that he first learned of continued problems[141] with GED misfirings from reading a motion, contained in his file on BRI, which BRI had filed in Probate Court proceedings in November of 1992 in which DMR had not participated.[142] Tr. I:188-90, Ex. U-74. Although Attorney Casey could not recall from whom he had received a copy of the motion (i.e., from BRI or from some other source, Tr. I:190), uncontroverted documentary evidence establishes that he received this motion, not from BRI as part of its application for re-certification, but from DMR's deputy general counsel, who mailed him a copy of the motion on November 16, 1992. Ex. U-58 at 2. Thus, the statement in the letter is true and was amply supported by the evidence at trial. More significant (with respect to the Commissioner's good faith), the evidence shows that the Commissioner

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[140]Although this phrase appears in quotation marks in the court's finding (and in BRI's corresponding proposed finding no. 154, App. 807), it is not an accurate quotation from the Commissioner's letter, which states: "Later, the field reviewers learned (*not from BRI*) that there were problems with misfirings of the GED device . . ." (emphasis added). Ex-U91 at 1. The court's verbatim adoption of BRI's "quotation" demonstrates, once again, that the court relied on BRI's proposed finding, rather than on the letter itself, in making this finding.

[141]In 1991 Attorney Casey had been told by BRI staff that previous problems with GED misfirings had been corrected. Tr. I:189, n. 49 *supra*. *See* Statement of Facts, subsection A.1.

[142]*See* F. 102 n. 25, App. 1234 (finding that DMR did not participate in the Probate Court proceedings in which evidence of misfirings had been presented).

believed this statement to be true when he made it. On direct examination, the Commissioner testified that his general counsel told him that DMR field staff (including Attorney Casey) had first learned from a source other than BRI that the GED device was misfiring. Tr. III:92-93. On cross-examination, the Commissioner further testified that it was his understanding that DMR staff had learned of the misfirings "in reviewing records." Tr. V:76-77.

He specifically explained what he meant when he used the parenthetical "(not from BRI)" in his letter of August 31, 1995: "It was my understanding that the team went out and, in reviewing records, came to this understanding that there had been mis-firings." Tr. V:77. And he also explained why the source of the information was significant to him:

> [T]he department is really in a role of monitoring, and to the greatest degree, providers are required to be forthcoming with various information. It is their requirement to bring that to the attention of the department . . . . The department does not have the ability to go out and review and inspect all activities of all three or four hundred providers across the Commonwealth of Massachusetts.

Tr. V:77-78; *see also* Tr. VI:105-06; F. 101, App. 1233 (finding that the parenthetical, "(not from BRI)," "was intended to imply that [BRI] was being less than forthcoming concerning the issue of misfires of the GED device").

Thus, the trial testimony of Attorney Casey and Commissioner Campbell fully supports the statement that the information concerning misfires was not provided to the staff review team by BRI but, rather, that DMR first learned that there was a continuing problem with GED misfirings by reading a motion filed by BRI in a court proceeding to which DMR was not a party. As stated in the letter itself, it was that outside information that then led DMR to seek further information on this subject directly from BRI. Ex. U-91 at 1. There is therefore no basis in the evidence for the court's finding that the statement contained in the Commissioner's letter of August 31, 1993—that DMR field staff obtained this information from a source other than BRI—is false. At the very least, the evidence demonstrates that the Commissioner had a good faith basis for making this statement. Accordingly, the court's finding that the statement was false should be set

aside as clearly erroneous.

c. Certification Conditions

The court then goes on to discuss five of the eleven conditions contained in the August 31 letter.[143] First, the court finds that "Condition 1 restricted JRC to the use of procedures which were actually in use as of August 27, 1993." F. 104, App. 1234. That finding is contradicted by the letter itself. As indicated in the letter, while the 25-day interim certification granted by that letter applied only to the procedures then currently in use by BRI, the letter did not prohibit BRI from using other techniques. To the contrary, the letter stated: "Should BRI believe that the use of any other technique is required, BRI will provide advance notice to DMR and meet with DMR regarding any such proposal." Ex. U-91 at 3. Given DMR's previously expressed concerns as to the effectiveness and professional acceptability of painful procedures, Ex. U-82 at 5, such as spanks, pinches and slaps, and the fact that BRI confirmed that it was no longer using those procedures anyway, Ex. U-91 at 3 n. 5; Tr. VIII:41, it was not unreasonable for the Commissioner to require advance notice if BRI chose to resume the use of such procedures. In any event, Dr. Israel testified that since August 31, 1993, BRI never proposed resuming the use of any of these procedures, Tr. VIII:41, so any burden imposed by this requirement was purely theoretical.[144]

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[143]To the extent that the court was, in effect, reviewing *de novo* the legal and factual bases for the conditions imposed by the Commissioner, the court exceeded its jurisdiction. BRI waived any right to judicial review of the Commissioner's certification decisions by failing to exhaust its administrative remedies and seek judicial review under G.L. c. 30A, § 14, in a timely manner. Moreover, any such review would have to be the subject of an independent chapter 30A action, with the applicable, limited scope of judicial review, rather than a component of a contempt proceeding in a ten-year-old "settled" case.

[144]The court's statements that this condition violated the Settlement Agreement and the substituted judgment rulings of the Probate Court, F. 104-10, App. 1234-35, are incorrect as a matter of law for the reasons discussed in Argument I.B, *supra*. In addition, as a matter of fact, it was not BRI's practice to seek court approval when discontinuing a procedure

(continued...)

Second, the court mentions (but finds no express fault with) the condition requiring BRI to comply with all DMR regulations regarding the use of mechanical restraint. F. 106, App. 1234. The court's further statement that "[t]here was no evidence adduced in this case that [BRI] had utilized mechanical restraint" in violation of DMR's regulations, F. 107, App. 1235, is false.[145] The August 31, 1993, letter itself, an uncontested exhibit admitted for the truth of its contents, sets forth, in full detail, the factual bases for DMR's conclusion that BRI had consistently and repeatedly violated DMR's mechanical restraint regulations.[146] Ex. 91 at 5-7. In addition, Dr. Israel admitted such violations in his response to the Commissioner's August 6th letter. DMR-17 at 20-21. At the very least, this demonstrates a good faith basis for this requirement, if any justification is needed for a requirement that a licensed provider mechanically restrain its clients only in accordance with the applicable state regulations.[147]

The third condition mentioned by the trial court required BRI to cooperate with an independent performance and program review of BRI to

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[144](...continued)
previously authorized by the Probate Court in substituted judgment proceedings, Tr. VIII:41, thus undermining BRI's argument that Probate Court authorization to use a procedure constitutes an order to continue doing so.

[145]This statement is also another example of the court's requiring the Commissioner to prove the good faith basis for his actions, rather than placing that burden on BRI, the party alleging that his lack of good faith constitutes contempt. *See* Argument I.E.2, *supra*.

[146]For example, the letter states:

> On August 16, 1993, a DMR licensor discovered in a BRI group home the presence of a shower with a leather restraining cuff, and an apparent GED electrode. The licensor was told that, when a BRI client had a behavior problem in the shower, he or she was restrained and electric shock administered. A hose was found attached to one home's shower. Two homes' showers had keyrings attached.

Ex. U-91 at 6.

[147]Compliance with these regulations is also expressly required by the Settlement Agreement, Part D, ¶ 6, App. 128.

be arranged by DMR. F. 108, App. 1235; Ex. U-91 at 7. Although the court found fault with the process by which DMR selected the team to conduct this review, *see* subsection 12, *infra*, the court found no fault with the condition itself. Nor was there any evidentiary basis for doing so, given the Commissioner's legal authority and uncontradicted factual justification for conducting this review, as set forth in the letter itself. Ex. U-91 at 7.

The fourth condition alluded to by the trial court, Condition 10, required BRI to inform out-of-state agencies that fund students at BRI of the requirement that they have in place "an emergency plan for each resident to address the funding and logistics of any unexpected medical, personal or programmatic situations which BRI deems are beyond the capacity of BRI to address. Such plans must provide evidence of the funder's ability to immediately provide all needed services for such clients so as to ensure that the client is not substantially endangered." Ex. U-91 at 5. In that same letter, the Commissioner explained the rationale for this requirement as follows:

> There have been situations in which BRI has expressed concern, as have parents of some BRI residents, that the health and program needs of clients continue to be met under any circumstances. DMR shares this concern. Because many clients are not funded or placed by the Commonwealth of Massachusetts, it is appropriate for the placing agency to address those situations in which BRI determines it is unable to meet a client's needs.[148]

Id. at 8. At trial, the Commissioner elaborated on this rationale, Tr. V:78-79, and also explained why such a requirement had not been imposed on other providers: because BRI has an usually large number of out-of-state clients. Tr. V:79-82.

The last sentence of finding 111, App. 1236—that "[n]o funding agency would ever place a client in a private program for services when that *provider* was being compelled at the same time to develop plans for emergency placements" (emphasis added)—demonstrates that the court (and BRI, who

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[148]One such situation occurred in 1989, when BRI discharged a New Jersey student, and DMR was forced to provide services to the student on an emergency basis because New Jersey had no contingency plan in place. Ex. DMR-18.

proposed this language, F. 164, App. 112) misunderstood the very nature of the condition. As indicated in the language of the condition itself, the condition did not in any way require the provider, BRI, to develop emergency placements for its out-of-state clients; rather, it required BRI simply to notify out-of-state funding agencies of that requirement, as Commissioner Campbell also testified at trial. Tr. V:82.

In any event, there was absolutely no basis for the court's finding that "[n]o funding agency would ever place a client in a private program" that was subject to Condition 10. F.111, App. 1236. Although Dr. Daignault expressed his concern that it would be difficult for agencies to make emergency plans for BRI students, Tr. II:141, Dr. Israel himself could not recall a single instance of an agency removing a client from BRI after receiving notice of this condition, Tr. VIII:100; and he admitted that New York and other states continued to refer new clients after this condition was imposed.[149] Tr. VIII:75-86; *see also* Ex. DMR-49; Tr. XI:109-111 (student from New York admitted in February 1994). In fact, as reported by BRI's counsel, in four meetings where funding agencies were ultimately notified of this requirement, representatives of the agencies stated "that their state had emergency services for all of their clients and that an emergency plan should not be an issue." Ex. DMR-34 at 3, 4.[150]

The Commissioner's testimony on this subject was internally consistent and also consistent with his letter of August 31, 1993. The court's disbelief of the Commissioner's stated purpose for this condition was no basis, in itself, for finding that the Commissioner had different, ulterior motives for imposing this condition, *Atkinson*, 33 Mass. App. Ct. at 223-24—i.e., "to

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[149]This latter testimony was contrary to the contempt complaint, which was verified by Dr. Israel under oath and stated that "referrals from New York ha[d] decreased to zero." App. 311.

[150]Despite their knowledge of the agencies' actual response to this requirement, BRI's counsel proposed the finding, which the court adopted almost verbatim, that "[n]o funding agency would ever place a client in a private program for services when that provider was being compelled to develop plans for emergency placements." BRI Prop. F. 164, App. 812. If any party should be reprimanded for misleading the court, it is not DMR. *Cf.* App. 1290.

alarm funding agencies and obstruct [BRI]'s intake of new clients," F. 111, App. 1236, or "to place [BRI] into receivership or to close [BRI]." F. 112, App. 1236.

There was no evidence in the record that the dire consequences hypothesized by the court were either the intent or the effect of this condition. Rather, in the letter itself, the Commissioner "stress[ed] that these [certification conditions] are not intended to imply any anticipated action by the Department to prevent BRI from meeting the needs of its residents." Ex. U-91 at 8.

Moreover, Condition 10, as set forth in the August 31 letter, was in effect for less than one month. The Commissioner agreed to change that condition on September 23, 1993, in response to a proposal made by BRI, Ex. U-99; and BRI unilaterally ceased complying with it several months later, even in its modified form. Tr. VIII:100; Ex. DMR-34. Thus, the court's inference as to what effect this condition, in the form set forth in the August 31 letter, would have had if it were in fact implemented was entirely speculative and directly contradicted by Dr. Israel's own testimony and his counsel's own statements on this subject, discussed above.[151] Ex. DMR-34 at 3.

Although the court finds a sinister connection between a reference to "receivership" in a DMR workplan, Ex. BRI-293,[152] and the motivations underlying Condition 10, F. 112, App. 1236, the workplan's reference to receivership provides no evidentiary support for the court's findings concerning Condition 10. The workplan item provided, in pertinent part, as follows:

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[151]The stipulated testimony of Richard Wolfe, a New York State official, establishes that New York agencies had other reasons for removing students from BRI and not making new referrals, i.e., New York's policies disfavoring out-of-state placements. Ex. DMR-80.

[152]As discussed in Argument subsection 7.c, *infra*, that portion of Exhibit 293 should have been excluded on the ground of attorney-client privilege.

> -AG should prepare receivership petition in case of emergency.
> -Kim [Murdock, DMR's general counsel] should include in letter to BRI that DMR would need 60 days advance notice before BRI closes.

Ex. BRI-293. Contrary to the court's finding, that workplan item did not even relate to Condition 10, much less demonstrate the falsity of the Commissioner's testimony concerning the purpose of that condition. DMR's need for 60 days' notice prior to BRI's withdrawing any essential services is contained in Condition *11* (*not* Condition 10) of the Commissioner's letter of August 31, 1993, which provided as follows:

> BRI will notify DMR, at least sixty days in advance, prior to BRI withdrawing any essential services, or all services, from any client, and will simultaneously notify any funding agency, so that alternative care can be arranged appropriately and promptly. Ex. U-91 at 5.

As indicated in Condition 11 itself, the emergency that this condition was intended to address was one created by BRI itself, not by DMR. As the Commissioner testified at trial, the same was true of the possibility of seeking a receiver: "[I]t was a contingency plan in response to an action taken by BRI, not something initiated by DMR." Tr. XIII:75. *See also* Ex. BRI-293 at 5 (also using the term "contingency" in this context).

On the last day of trial, when the Commissioner was asked for the very first time about the basis for Condition 11 and the reference to receivership that appeared in Ex. BRI-293, he responded as follows:

> It had come to my attention that in the mid 1980's, in response to a licensing action taken by OFC, that did not require a response by BRI to withdraw people from all treatment,[153]

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[153]The Commissioner's characterization of OFC's order was correct. Verified Complaint, App. 61, Attachment E (ordering BRI to cease using only physical aversives—i.e., automatic vapor spray, rubberbands, spanks, squeezes, and pinches—and the contingent food program); Judge Rotenberg's Findings in Support of Preliminary Injunctive Relief, ¶ 46, App. 96, (characterizing OFC's orders as "attenuat[ing] the modes of treatment available to the students at BRI"). There is no basis in the record for the court's finding to the contrary. F. 190, App. 1255. Again, the court's disbelief of the Commissioner's testimony does not

(continued...)

> that that in fact is what BRI did, created a crisis, and I wanted—so the issue was raised, and I did not want such a crisis to be created for the welfare—the people who were [at] BRI.

Tr. XIII:63; *see also* Tr. XIII:65 (responding consistently to a similar question).

Moreover, there was no evidence that this workplan item was ever, in fact, implemented. In any event, even if DMR requested the Attorney General to prepare a receivership petition to be used in case of an emergency, no such emergency ever materialized and no such petition was ever filed.[154]

Thus, the evidence in the record demonstrates that the Commissioner had a good faith basis for imposing each of the five conditions in his August 31, 1993, letter that are mentioned in the court's findings. The court's findings to the contrary have no basis in the evidence and therefore should be set aside as clearly erroneous.

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[153](...continued)
constitute evidence of the opposite proposition. *Atkinson*, 33 Mass. App. Ct. at 223-24.

[154]While the court analogized the reference to receivership to a "smoking gun," F. 173, App. 1250, in fact, there is no evidence that this "gun" was ever loaded, much less fired.

8. *The Commissioner Acted Responsibly in Keeping Out-of-State Agencies and Parents of BRI Students Apprised of the Certification Process.*[155]

The court also made erroneous findings as to the Commissioner's motivations for sending copies of his August 6 and 31 letters to out-of-state agencies that were funding students at BRI and to the parents of BRI students.

a. Communications with Funding Agencies

As the Commissioner stated in his cover letter to the out-of-state agencies, his purpose in sending them copies of these letters was "[t]o enable [these] agenc[ies] to better understand the current situation." Ex. U-105. To that same end, he also enclosed a copy of Dr. Israel's 52-page response to the Commissioner's August 6 letter and to the letter from Dr. Jansen that was enclosed in the Commissioner's August 6 letter. Ex. U-105, DMR-17. Since these out-of-state agencies, like DMR itself, are also accountable to the parents of the BRI students funded by those agencies,[156] the Commissioner reassured the agencies that the parents had no reason to be alarmed by the certification conditions, "many of which [we]re for the purpose of obtaining more accurate and complete information on BRI's program." Ex. U-105. He "stressed . . . that the requirements [we]re not intended to imply that the

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[155]The trial court's findings on this subject, F. 116-19, App. 1237-38, are adopted from BRI's proposed findings 174, 177-79, App. 817-19.

[156]Out-of-state agencies could not necessarily rely on providers alone to supply the agencies with all necessary information. Ex. U-148.

Department intends to take any action that would negatively affect the treatment of any consumer."[157] Ex. U-105.

The court's finding that DMR "rejected" BRI's request for mediation on this issue, F. 116, App. 1237, mischaracterizes the evidence on this point. Although there was no face-to-face mediation on this subject, Dr. Daignault did attempt to mediate this dispute by telephone and fax on September 23, 1993. Ex. BRI-250. When the Commissioner ultimately decided to send out his September 24, 1993 letter, Ex. U-105, without further mediation, Dr. Daignault nevertheless "thank[ed DMR's counsel] for [her] willingness to speak with [him and the guardian ad litem]." Ex. U-104 at 2. Dr. Daignault then reported to the court that "arbitration among the parties under the Settlement Agreement, Section B-2, has failed." Ex. BRI-250 at 2. Thus, although Dr. Daignault's efforts to resolve this dispute were unsuccessful, it is not accurate to suggest, as does the court's finding, that DMR refused even to discuss the issue.

Moreover, as indicated by the exchange of correspondence between Dr. Daignault and DMR's counsel on this subject, it was not clear that even Dr. Daignault believed that arbitration or mediation of this issue was required under the Settlement Agreement. *See also* Tr. IX:35-37. Although Dr. Daignault urged DMR not to send out the letter, he and the guardian ad litem acknowledged that "the Commissioner certainly ha[d] the prerogative to do so." Ex. U-104. Therefore, even if the court's finding on this subject were accurate, that finding would not support a conclusion that failure to mediate this issue constituted contempt of an unequivocal order. *See* Argument I.C, *supra*.

Ten days later, on October 4, 1993, the Commissioner sent another letter to the out-of-state funding agencies enclosing a copy of his September 24,

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[157]The Commissioner's trial testimony on this subject was consistent with these statements. Tr. III:129-30 (Commissioner did not believe that funding agencies would be alarmed by receiving copies of these letters); Tr. III:152-53 (Commissioner would not be alarmed if he received notice that DMR would have to develop contingency plans for students placed out of state); Tr.VI:13-16 (Commissioner sent funding agencies copies of Dr. Israel's response to August 6 letter).

1993, letter extending BRI's certification to December 15, 1993, and amending Condition 10 in the manner proposed by BRI. Ex. U-107 (enclosing Ex. U-106). In that letter, the Commissioner "reiterate[d] that [DMR] will take no precipitous action that could disrupt the treatment now being provided to the residents of BRI." Ex. U-107.

If any further reassurance to the funding agencies was needed, it was provided by Dr. Israel, in his letters to them of September 23, 1993 (which he sent in anticipation of the Commissioner's letter of September 24, 1993),[158] assuring them that BRI's "program has never been stronger." Ex. DMR-33. Still more reassurance was provided in the Commissioner's subsequent letter, sent at the trial court's direction, in January 1994, specifically advising these agencies that the length of time DMR was taking to consider BRI's certification application "should, in no way, adversely [a]ffect any decisions about placement that you may be making." App. 216.

There was no evidence presented at trial to support the court's inference that sending copies of the certification letters to funding agencies was done "with the intent to interfere with [BRI]'s relationship with its funding agencies." F. 118, App. 1238. Nor, as discussed above, is there any evidence that doing so had this effect.

b. Communications with Parents

By letter dated September 3, 1993, the Commissioner wrote directly to the parents of BRI students to assure them that the Department had not taken any actions that would result in the abrupt cessation of BRI's certification to use Level III aversives and that no such actions were contemplated. Ex. U-92. In that letter, the Commissioner enclosed copies of his August 6 and 31 letters, Ex. U-92, which Dr. Israel apparently had already sent to the parents. Ex. DMR-35. To further address any concerns the parents might have about BRI's certification, the Commissioner met personally with them in Waltham,

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[158]As a courtesy, the Commissioner had notified BRI, in advance, of his intention to apprise the out-of-state agencies of the status of the certification process. Ex. U-102.

Massachusetts, and in New York City on September 29 and October 6, 1993. Ex. U-109.

There is nothing in the Commissioner's letter or in his remarks to the parents from which the court could reasonably infer that these communications were "designed to alarm the parents []and. . . to interfere with [BRI]'s relationship with the families." F. 119, App. 1238-39. To the contrary, as the documents show, and as the Commissioner testified at trial, his intent was both to inform the parents and to allay their anxieties. Tr. V:82-91, VI:21-23. To the extent that the Commissioner was the "bearer of bad tidings" (e.g., as to the large number of abuse complaints that had been filed concerning BRI students),[159] which understandably caused concern on the part of the parents, this was the unavoidable consequence of his efforts to keep them informed, rather than evidence of the Commissioner's bad faith. The court's inference to the contrary, akin to "shooting the messenger," was entirely unfounded.

On the other hand, there is ample evidence in the record, which was disregarded by the trial court, that the parents' anxieties were caused, not by communications from DMR, but by communications from BRI itself. In a series of letters to BRI parents and "friends," Dr. Israel characterized the Commissioner's regulatory actions as "ominous," "bad faith" "attacks" that show that "Commissioner Campbell's intent is to close BRI" and "put BRI out of business." Ex. DMR-35. These letters were obviously intended to alarm the parents in order to rally their support—"to join hands and fight back," as Dr. Israel put it—in "defeating the attempts of DMR to close BRI." Ex. DMR-35. Some parents apparently responded to BRI's battle cries by sending letters to the Commissioner accusing him of harrassing BRI or planning to close BRI down. Ex. U-92, U-109; Tr. V:85-86. Rather than "interfere with [BRI]'s relationship with the families," F. 119, App. 1238, the

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[159]As the Commissioner attempted to show at trial, through the testimony of Richard Cohen, DMR's Director of Investigations, none of those complaints had been filed by DMR employees. However, that testimony was excluded, for no stated or apparent reason. Tr. XIIB:24-25, App. 633.

Commissioner's actions apparently further cemented at least some parents' loyalty to BRI.

9. DMR's Report to the Court on the Status of BRI's Application for Certification Was Neither False nor Misleading.[160]

Among the principal bases of the court's conclusion that the Commissioner acted in bad faith are the findings that his general counsel filed a report to the court in September 1993, App. 147, which did not fully describe, or include as exhibits, internal reports of DMR field staff that had recommended certifying BRI to use Level III aversives with relatively minimal conditions.[161] On this basis, the court found this report to contain "blatant false statements and material omissions." F. 120, App. 1239.

As explained by the Commissioner, in response to questions as to why he did not send copies of his staff's recommendations to the parents of BRI students, it would have been misleading to publicize those internal recommendations after they had been rejected by the Commissioner. Tr. V:87-89. For the very same reasons, those internal recommendations, which had been rejected by the Commissioner in July 1993, were immaterial to the "current status of BRI with regard to compliance with state law and regulations," as of September 1993, which was the stated subject of the report. App. 147. The official position of the Department as to BRI's compliance with state law and regulations was fully set forth in the report and the exhibits thereto. Previously rejected internal recommendations of lower level officials and consultants were not only immaterial but would have been misleading to the court as to BRI's actual prospects for certification. *See* subsection 2, *supra*.

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[160]The trial court's findings on this subject, F. 120-25, App. 1239-40, are adopted from BRI's proposed findings 180-93, App. 819-24.

[161]As to these certification team reports, *see* Statement of Facts, section A.1.

BRI was aware, as early as May 1992, that the staff review team had recommended certification of BRI. Ex. BRI-271, Tr. VIIB:71. If BRI believed that DMR's report to the court did not sufficiently describe or emphasize those recommendations, it could have so advised the court at that time, which it did not.

Moreover, there is no indication in the court's findings or in the underlying record that the court ever relied upon this report, prior to trial, for any purpose. Indeed, as found by the court, it was "unsolicited," F. 120, App. 1239; and, as is apparent from the report itself, App. 147, it was not filed in support of or in opposition to any motion, and it sought no action from the court. Nor was this report relied upon by the Commissioner at trial. Rather, the court took judicial notice of it at BRI's request. Tr. I:177.

The court's finding that the omission of rejected staff recommendations from this report constituted a material omission intended to deceive the court is therefore clearly erroneous. To the extent that these "findings" and accusations are, instead, inferences or legal conclusions, they should be summarily rejected by this Court based on its own review of the underlying evidence. *Simon*, 389 Mass. at 148-51.

10. The Commissioner Had a Good-Faith Basis for Appointing Gunnar Dybwad to BRI's Human Rights Committee and Did Not Refuse to Mediate This Issue.[162]

As explained in the Commissioner's August 6 letter, his decision to appoint two people to BRI's thirteen-member Human Rights Committee,[163] Ex. DMR-47, was based on a review of the minutes of the committee's meetings, which showed "that there is little or no discussion, questioning, or analysis of the treatments proposed for BRI clients, nor is there any discussion of the application of regulatory and other rights protection issues in individual[s'] cases." Ex. U-82. The Commissioner's assessment was corroborated by the testimony of Carol Upshur, one of the Commissioner's appointees to this committee, Tr. XI:96-97, and by the minutes of the meetings she attended. Ex. DMR-47, DMR-50, DMR-52. The Commissioner testified that his reason for appointing Dr. Gunnar Dybwad to BRI's Human Rights Committee, knowing Dr. Dybwad's general opposition to aversive treatments, was "to stimulate discussion, to provide the committee with a range of ideas." Tr. V:72.[164] While the court "recognize[d] the value of members of the Human Rights Committee with differing positions," F. 128, App. 1241, it nevertheless found that the Commissioner's appointment of Dr. Dybwad was "calculated . . . to disrupt the operations of [BRI]." *Id.*

There is no evidence from which the court could infer such a motivation on the part of the Commissioner. Indeed, the only evidence is to the contrary.

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[162]The trial court's findings on this issue, F. 126-29, App. 1240-41, are adopted from BRI's proposed findings 194-97, App. 825-26.

[163]The Commissioner is authorized to make such appointments as a condition for certification to use Level III aversives "in the event that he . . . determines that such appointment or appointments are necessary to ensure performance by [the] committee of their review responsibilities consistent with the requirements established by [DMR's behavior modification] regulations." 104 C.M.R. § 20.15(4)(f)(7)(a).

[164]Dr. Dybwad's name is inaccurately transcribed as "Duarte" at Tr. V: 72-73.

Both the Commissioner and Dr. Upshur, his other appointee, testified that the Commissioner gave his appointees no particular instructions as to their role, other than that it should be the same as the other members of the committee. Tr. VI:9, XI:81. Nor is there any evidence that Dr. Dybwad's presence on the committee, which lasted for only five or six months, during which he attended only one or two meetings, Tr. V:74, Ex. DMR-47, caused any disruption whatsoever to BRI's program. While he and Dr. Upshur apparently voted against the treatment plans proposed by BRI's staff, they were always out-voted by the majority of the committee, Tr. XI:133, as the Commissioner anticipated when he appointed them. Tr. V:73.

The court's further findings, that BRI had proposed mediation on the subject of Dr. Dybwad's appointment and that DMR had refused to mediate this issue, F. 129, App. 1241, are also clearly erroneous. Contrary to these findings, the only evidence on this subject shows that the parties discussed Dr. Dybwad's appointment at a follow-up meeting to a mediation session on September 27, 1993, but that BRI then proceeded to raise this issue in its amended contempt complaint, filed on October 8, 1993, without first seeking mediation or arbitration. Ex. U-110, BRI-309.

11. The Commissioner Had a Good Faith Basis for the Statements Contained in His Certification Letter of September 24, 1993.[165]

By letter dated September 24, 1993, the Commissioner extended BRI's certification until December 15, 1993, again with certain conditions. Ex. U-106. The court takes issue with only two points in that letter. First, the court finds that the Commissioner's reference to the fact that 14 abuse investigations were then pending against BRI, including complaints against Dr. Israel himself, was a departure from DMR's usual practice not to reveal allegations of abuse without first having them substantiated. This finding is

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[165]The trial court's findings on this issue, F. 130-34, App. 1241-42, are adopted from BRI's proposed findings 198-205, App. 826-28.

clearly erroneous. The Commissioner himself testified that it was DMR's practice to release such information in response to a "freedom of information act" request. Tr. III:188. When the Commissioner's counsel attempted to elicit further information from DMR's Director of Investigations about DMR's usual practices with respect to abuse investigations, such testimony was excluded as irrelevant, and the court repeatedly instructed the Commissioner's counsel to limit her questions solely to DMR's investigations concerning BRI students. Tr. XIIA:141-43, 148, 149. *See also* Argument II.B, *supra*.

In any event, even if mentioning these abuse complaints were a departure from DMR's ordinary practice, such a departure would have been warranted in this context, as one area where further investigation was needed before a final decision could be made on BRI's certification. Ex. U-106 at 1. As testified by the Director of Investigations, there were in fact 14 recently filed abuse complaints concerning BRI students pending at that time, which was an unusually large number of complaints against a single provider in such a short time period. Tr. XIIB:23-24.

The only other problem that the court cites with respect to the September 24 letter is the use of the plural word "deaths" in the condition requiring BRI to "provide the Commissioner with all reports, if any, which should have been received pursuant to [DMR regulations] since 1989 . . . . The reports shall be provided by October 22, 1993, *except that any reports of deaths shall be provided by October 5, 1993.*"[166] Ex. U-106 at 4. According to the court, the use of the plural word "deaths" was "misleading and likely to produce the damaging impression that deaths had been occurring at [BRI] and that [BRI] had not been reporting them." F. 134, App. 1242. There is no evidence that anyone was actually misled by the wording of this condition; nor is there any evidence that it was intended to be misleading. To the contrary, both in the condition itself and in the earlier explanation of why this condition was being

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[166]As set forth in the letter, the Commissioner had a reasonable basis for imposing this condition, i.e., BRI's use of an "incident" form that does not contain all of the information required by DMR regulations. Ex. U-106 at 2; *see also* Ex. DMR-17 at 20-21.

imposed, the letter repeatedly uses the words "any" or the phrase "if any" in connection with the reports, injuries, or deaths in question, thereby precluding the inference that a particular number of deaths or injuries had occurred or gone unreported. Tr. U-106 at 2, 4.

12. DMR Conscientiously Exercised Its Authority to Conduct an Independent Review of BRI's Program.[167]

As one of the conditions of BRI's interim certification, the Commissioner required that BRI submit to an independent program review. Ex. U-91 at 4.[168] Over BRI's objections, DMR selected the Rivendell Team to perform this review; and, in the spring of 1994, the Rivendell Team visited BRI, examined records, and prepared a 134-page report on BRI's program. Ex. DMR-2.

a. The Decision to Require an Independent Program Review

In its findings on this subject, the trial court first attacks the decision to conduct an independent review, by discrediting Assistant Commissioner Cerreto's testimony that she had recommended the outside review because the staff certification team's review was inadequate.[169] F. 136-37, App. 1242. Apparently, the court based this finding solely on the fact that Dr. Cerreto had not seen the written reports of the staff review team, F. 137, App. 1242,

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[167]The trial court's findings on this subject, F. 136-52, 158-60, 162-66; App. 1242-45, 1246-48, are adopted from BRI's proposed findings 211, 215, 218-22, 225-27, 229-39, 241, 243-45, 247-51; App. 831, 833-34, 835-39, 840-44.

[168]As set forth in the Commissioner's letter, his authority to require such a review derives from 104 C.M.R. § 20.15(4)(f)(10).

[169]As to the staff certification team's reports and recommendations, *see* Statement of Facts, subsection A.12, and Argument III.B.2, *supra*.

as Dr. Cerreto testified. Tr. X:138-144. However, the trial court ignored the further, uncontroverted testimony of Dr. Cerreto—that she was informed of the teams' methods, and, based on her experience as a clinical psychologist, that she found those methods to be insufficient to review a program such as BRI. Tr. X:43-44. In particular, Dr. Cerreto testified that she was aware that the review teams "had reviewed all 48 paper programs [i.e., behavior modification treatment plans] but had reviewed implementation of only one student['s plan]." In her professional opinion, "it no longer mattered what the [certification team's] report said because the method to collect the data wasn't very good." Tr. X:145. The trial court did not find that Dr. Cerreto's opinion on this issue was mistaken, and BRI presented no evidence of any sort, let alone any competing expert testimony, from which one could conclude that Dr. Cerreto's assessment of the team's methods was unsound. Thus the findings both ignored uncontroverted evidence,[170] and lacked any foundation in the record.

b. Requests for Proposals

The court's findings regarding the process by which DMR solicited proposals are equally erroneous. For example, while it is true that Dr. Cerreto testified that she knew of no other examples of a request for proposals ("RFP") being issued with a ten-day response time, F. 140, App. 1242, Dr. Cerreto's responses to the two previous questions established that she was not aware of any similar RFPs being issued at all. Tr. X:149-50. The trial court also found that the procedure used by DMR was inconsistent with Commonwealth "policy," F. 140, App. 1242, without any evidence of what Commonwealth policy was or how it would apply to the RFP issued by DMR. Tr. X:151.

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[170]The trial court also completely ignored uncontroverted testimony that DMR was motivated, in part, by a concern that BRI would challenge as biased any in-depth review performed by DMR itself. Tr. X:44.

With no support in the record, the court found that the reason why only two proposals were received in response to the RFP was the ten-day turn-around time. F. 142, App. 1243. Absent a factual basis, this finding is clearly erroneous. The court also erred in finding that Dr. Cerreto failed to extend the deadline in response to complaints about insufficient turn-around time. F. 141, App. 1243. There was no testimony indicating that Dr. Cerreto received comments prior to the close of the response time, or even prior to the selection of a consultant. Tr. X:158-59.

c. Rivendell's Proposal

The trial court's findings regarding the Rivendell proposal itself appear to be based solely on mischaracterizations of Dr. Cerreto's testimony drawn from BRI's proposed findings of fact. Dr. Cerreto testified that the initial Rivendell proposal identified the personnel on its team by means of short lists of names from which the team would be drawn. The proposal stated that the final selection of team members would be dependent upon the dates on which the visit was to occur. DMR selected Rivendell based on that initial proposal. Tr. XI:51-52, Ex. BRI-310. In October of 1993, Rivendell submitted a revised version of its proposal, which narrowed the choices of team members down to approximately two per category. This iteration also proposed alternative dates for the site visit. Tr. XI:52-54; Ex. BRI-308. Still another version of the proposal was necessary to finalize the actual team membership. Tr. XI:53.

The trial court's findings regarding the proposal finalization abound with mischaracterizations. First, the court faults Dr. Cerreto for testifying untruthfully about this issue. F. 145 n. 31, 146, App. 1244. In fact, when given the opportunity, Dr. Cerreto explained the process fully. Tr. XI:51-53. During cross-examination of Dr. Cerreto, BRI attempted to suggest that submitting a revised version of the proposal constituted "altering" the proposal in some improper manner. Dr. Cerreto first rejected BRI's attempts to establish the dates of various documents based solely on the dates that the documents appeared to have been faxed. Rather than agree to the dates

suggested by BRI, she consistently maintained that she could not tell if a given exhibit was the *initial* Rivendell response without comparing it to the copy in her office. Tr. X:164-65, 179. She then tried to clarify her testimony on this point, only to be cut off, three times by BRI and once by the court. Tr. X:179-81, 185.

The trial court also unreasonably imputed a bad faith motive for DMR's simply providing BRI with the then-current version of the Rivendell proposal in response to BRI's request for a copy of the RFP and Rivendell's proposal. F. 144-46, App. 1244; Ex. BRI-308. This inference, as well, is clearly erroneous.

d. Selection of Rivendell

The trial court found (using the exact language proposed in BRI's proposed finding 238, App. 839) that the presence of one individual, Dr. Richard Amado, on the six-person team rendered Rivendell "incapable of doing a fair, impartial and unbiased review" of BRI. F. 151, App. 1245. There is no basis in the record for this finding. The only testimony regarding Dr. Amado's ability to conduct an unbiased review came from Dr. Cerreto herself,[171] who testified that, in conducting her analysis, she considered, among other factors, the fact that Dr. Amado had been a consultant for the United States Department of Justice ("DOJ"). As a DOJ consultant herself, Dr. Cerreto knew the rigor and objectivity one has to apply in such a capacity; and DOJ had given Dr. Amado a favorable recommendation. Tr. X:54-55; XI:46. Findings of bias on the part of Dr. Amado lacked any evidentiary support. In selecting Rivendell's proposal, DMR had relied on the fact that Dr. Amado himself, like all members of the Rivendell team, had used both aversive and non-aversive procedures and recognized the need for aversive measures in appropriate situations. Ex. U-147 at 2. The trial court

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[171]The court found Dr. Cerreto's testimony on Dr. Amado's impartiality to be incredible, F. 151-52, App. 1245, adopting the language verbatim from BRI's proposed findings 238-39, App. 839-40; but that credibility finding does not establish the opposite proposition, i.e., that Dr. Amado was biased against BRI.

ignored this evidence along with evidence that, in early 1994, Dr. Amado himself was overseeing the use of electric shock in the control of self-injurious behavior. *Id.* at 5. Surely, Dr. Amado's public opposition to the incompetent and abusive use of aversive treatment, *id.* at 5, and the appearance of his name on a list of "supporters" of an article opposing painful aversives, Ex. U-72, the only evidence of "bias" relied upon by BRI, is not sufficient, in itself, to support the court's characterization of DMR's selection of Rivendell as "an example of bad faith." F. 163, App. 1248.

Nor is there any evidence to support the court's further finding that DMR's selection of Rivendell was motivated, not by the factors testified to by Dr. Cerreto, but, instead, by "DMR's plan to get a biased view of BRI in time for the December 15 deadline, which is the date DMR planned to de-certify BRI."[172] F. 166, App. 1248. The court makes no findings that the report actually produced by Rivendell was, in fact, biased, although that report was in evidence. Ex. DMR-2. Nor is there any evidence that the Commissioner ever relied on the Rivendell report in taking any adverse action against BRI. In fact, rather than de-certify BRI on December 15, 1993, the date cited by the court, the Commissioner's letter of that date extended BRI's certification for an additional 60 days. Ex. U-128.

e. Dr. Cerreto's Role

The court's finding that Dr. Cerreto testified inconsistently as to her role in considering BRI's claims that the Rivendell team was biased, F. 162, App. 1247-48, is a particularly striking example of the pattern discussed at the outset of this argument, i.e., inferring that a witness intentionally lied, F. 168, App. 1249, based solely on purported "inconsistencies" between a witness's testimony and mischaracterizations of that witness's earlier testimony. Despite the court's finding to the contrary, F. 162, App. 1247, Dr. Cerreto

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[172]Again, the court's disbelief of Dr. Cerreto's testimony is not sufficient to prove this other, ulterior motive for the selection of Rivendell. *Atkinson*, 33 Mass. App. Ct. at 224.

never testified that she was "the [only] person from the Department who conducted the review of the Rivendell 'bias' issue."[173]

On direct examination, Dr. Cerreto testified that both she and Jean Tuller, the Commissioner's special assistant, had a role in analyzing BRI's allegations. Tr. X:53, 55. That testimony was consistent with her deposition tesimony, that she "read BRI's responses and responded to Jean [Tuller]," she "commented to Jean." Tr. XI: 19-24.

On cross-examination, BRI's counsel, relying on his personal notes of Dr. Cerreto's direct examination, which mischaracterized Dr. Cerreto's earlier testimony,[174] and on selected excerpts from her deposition,[175] attempted to establish an inconsistency between Dr. Cerreto's direct and deposition testimony. Although Dr. Cerreto successfully resisted BRI's efforts to mischaracterize her previous testimony,[176] the court nevertheless adopted

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[173]Language indicating that Dr. Cerreto was "the person" from DMR to conduct the review appears only in BRI's (objected to) questions, Tr. XI:19-24; BRI's proposed finding 245, App. 841; and the court's finding, F. 162, App. 1247; never in Dr. Cerreto's own words.

[174]When the Commissioner objected to BRI's use of counsel's (inaccurate) notes for this purpose, the court overruled the objection on the ground that "this is cross-examination." Tr. XI:23. However, when the Commissioner attempted to use the trial transcript itself to cross-examine one of BRI's witnesses, BRI objected, and the objection was sustained. Tr. IX:26.

[175]At trial, BRI's counsel attempted to create the false impression that Dr. Cerreto's deposition and trial testimony were inconsistent by reading only carefully selected deposition questions and answers into the trial record. Tr. XI:13-15, 19-20. The Commissioner's counsel corrected the record by insisting that the subsequent questions and answers also be read. Tr. XI:19-22. Although this fuller statement of Dr. Cerreto's deposition testimony made abundantly clear that there was no inconsistency, BRI's counsel proposed that the court find Dr. Cerreto's deposition and trial testimony inconsistent, BRI's Prop. F 245, App. 841; and the court did so. F. 162 n. 33, App. 1247.

[176] MR. SHERMAN: You testified you were the one that was assigned to do the review and make the report to the Commissioner. That was your testimony yesterday, correct, that's what you said?

DR CERRETO: I testified that I did a review.

(continued...)

BRI's proposed finding that her direct examination "was totally contradicted the next day on cross-examination." F. 162, App. 1248; BRI's Prop. F. 245, App. 841-42. Because the court's ultimate finding that "Dr. Cerreto repeatedly and without hesitation lied to this Court," F. 168, App. 1249, was based on nothing more than the above machinations, this finding is also clearly erroneous.[177]

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[176](...continued)

> MR. SHERMAN: No. My question to you, Dr. Cerreto, and let me ask it again. You testified yesterday, your words were you were the one that was assigned to do the review and make the report to the Commissioner? Yes or no, was that your testimony?
>
> MS. WALL: I object.
>
> THE COURT: Overruled, Attorney Wall.
>
> DR. CERRETO: I can't answer that unless I see the testimony from yesterday.
>
> MR. SHERMAN: Okay. Now, Dr. Cerreto --
>
> THE COURT: Dr. Cerreto, please remember that you are under oath.

Tr. XI:23-24.

[177]*Cf.* App. 1308-09. Nor could this finding of untruthfulness, even if it were a correct characterization of the testimony, support a prosecution for perjury, since the subject of the testimony—i.e., Dr. Cerreto's role in reviewing claims that Dr. Amado was biased against BRI—is entirely immaterial to the legal issues in this contempt case—i.e., whether the Commissioner directly violated any unequivocal provision of the Settlement Agreement. G L. c. 268, § 1 (willfulness and materiality are essential elements of the crime of perjury); *Commonwealth v. Geromini*, 357 Mass. 61, 63, 64 (1970).

13. Neither the Commissioner nor His Attorneys Improperly Attempted to Conceal the Subjects Discussed at DMR Staff Meetings on BRI.[178]

As discussed in the Statement of Facts, section A.2, the Commissioner established large and small working groups to assist him in considering BRI's application for re-certification. These groups regularly met on Tuesday mornings.

a. Commissioner's Testimony

Contrary to the court's findings, Commissioner Campbell never testified at his deposition or at trial that "the Tuesday Morning meetings related exclusively to the issue of certification." F. 170, 176; App. 1249, 1251. Since the pertinent portions of the deposition transcript were not offered or admitted into evidence at trial or even read into the record for impeachment purposes, there was no basis whatsoever for the court's findings as to how the Commissioner testified at his deposition.[179] F. 170, 176; App. 1249, 1251. The only possible basis for this finding is BRI's mischaracterization of the Commissioner's deposition testimony, both during the trial, Tr. III:216, and in BRI's proposed finding no. 255. App. 845.

At trial, on direct examination by counsel for BRI, the Commissioner initially responded affirmatively to general, leading questions as to whether the BRI meetings "dealt strictly with the issue of BRI's application for

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[178]The trial court's findings on this subject, F. 169-209, App. 1249-62, are adopted from BRI's proposed findings 253-314, App. 849-75.

[179]For this Court's information, the Commissioner's pertinent deposition testimony was as follows: When he was asked "*why*" (emphasis added) he organized the BRI meetings, he responded, "To gather information about the certification application." When asked, "Did you have any other *reason for forming* the BRI meetings?" (emphasis added), he responded, "No." Depo. Tr. I:67.

certification," Tr. III:72, and "only concerned certification applications." Tr. III:214.[180] However, when his attention was drawn to certain items on the agendas, workplans, or notes of these meetings, he readily agreed that those items did not relate to certification. Tr. III:216, 221, 222, 223, 233, 235, 262; IV:43, 61, 127. On cross-examination by his own counsel, the Commissioner again confirmed that "a number of matters that were on the agendas of the work plans and that were discussed at the meetings had nothing to do with certification" but "that the focus of the discussions at those meetings was primarily on the subject of certification." Tr. V:104-05. As to why items that did not relate to certification were discussed at these meetings, the Commissioner explained as follows:

> If items beyond the focus of certification came up, there was a time that all of the principal people of the department who were involved in one aspect or another of BRI and the department were already called together in one place, so it was efficient to use the time for that . . . .

Tr. V:105-06.

Thus the Commissioner's trial testimony about the subjects actually discussed at these meetings was fully consistent with his deposition testimony about his purpose for organizing these meetings. At trial, he readily qualified his initial response to general leading questions by agreeing that certain particular items brought to his attention by BRI's counsel did not relate strictly to certification. The court's findings that the Commissioner "knowingly and willfully" "testified falsely under oath" on this subject are therefore entirely unfounded.[181]

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[180]The Commissioner's initial agreement with this overgeneralization is not surprising, given the fact that he had spent only a few minutes prior to trial in reviewing some but not all of the many agendas for these meetings. Tr. V:104.

[181]Certainly, the Commissioner's testimony on this subject cannot be characterized as "perjury," *cf.* App. 1308-09 (concluding that the Commissioner's testimony on this subject "would support a prosecution for perjury), since any initial misstatements as to the subjects discussed at these meetings were not "willful," Nolan and Henry, 32 *Mass. Practice* § 611 (no perjury in a witness's making and correcting an innocent mistake); and what items were discussed in DMR staff meetings is entirely immaterial to the legal issue before the court in

(continued...)

b. Assistant Commissioner's Testimony

The court's finding that Dr. Cerreto's deposition testimony "echoed" the Commissioner's testimony that "the purpose of the Tuesday morning meetings was 'strictly to determine . . . whether BRI's use of Level III aversives complied with Departmental regulations,'" F. 170 n. 34, App. 1249, is both identical to BRI's proposed finding 256 n. 21, App. 845, and clearly erroneous. To make this finding, the court adopted BRI's skewed description of Dr. Cerreto's deposition testimony, *id.*, and ignored Dr. Cerreto's trial testimony on this very issue. Tr. X:109-10.

In her deposition, Dr. Cerreto testified that the group's "charge" was to "address the question of whether BRI['s] use of Level III behavioral interventions was in compliance with DMR regulations." Tr. X:113. In order to clarify that philosophical and moral concerns were not part of the group's charge, Dr. Cerreto responded "yes" to the follow-up question, whether "[i]t [i.e., the group's charge] was *strictly* to determine . . . whether BRI's use of Level III interventions complied with the departmental regulations." *Id.* (emphasis added).

At trial, Dr. Cerreto attempted to correct the misinterpretation of her deposition testimony offered by BRI's counsel, *id.*; and she herself offered "at least two" examples of topics discussed at the meetings which did not relate to BRI's certification. Tr. X:109-110.[182] Dr. Cerreto's trial testimony, readily acknowledging the discussion of issues unrelated to BRI's certification was ignored by the court in concluding that she "lied" on this subject.

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[181](...continued)
this case—whether the Commissioner violated any clear and unequivocal provision of the Settlement Agreement.

[182]BRI's attempts to force Dr. Cerreto, later in the trial, to accept an inaccurate restatement of this testimony led the court to call a recess and instruct Dr. Cerreto to confer with counsel about the necessity of telling the truth. Tr. X:123. After the recess, DMR attempted to correct the misimpression created by BRI's questions on this subject, by requesting that the court reporter read the relevant portion of Dr. Cerreto's prior testimony into the record. BRI objected to this request, and it was denied by the court. Tr. X:124.

c. Attorney-Client Privilege

Equally unfounded are the court's findings that the Commissioner "attempt[ed] to conceal [the subjects of these meetings] from the Court." F. 177, App. 1251. Because the court's findings on this subject form the basis for its conclusions of perjury, government malfeasance, and attorney misconduct,[183] App. 1308-10, they require a particularly detailed discussion.

As found by the court, the agendas and minutes of these meetings were produced by DMR in discovery.[184] F. 169, App. 1249. Although, when originally produced, these documents contained redactions, BRI did not move to compel unredacted copies. Rather, counsel for BRI and DMR agreed prior to trial that the redacted documents could be marked as "uncontested" exhibits; and they were offered, as such, by BRI, at the outset of the trial. Tr. 1:93-94; Ex. U-190-216.

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[183]Because, as the court implicitly acknowledged, its "Corollary Findings of Improper Conduct by DMR and Its Attorneys" are immaterial to the contempt judgment, App. 1237, those findings are not discussed in this brief, except, as here, where they overlap with the court's contempt findings. It should be noted, however, that, like the contempt findings, the corollary findings are adopted almost verbatim from BRI's findings on this subject, App. 904-23, and are equally unsupported by the evidence.

To take just one particularly clear example, although BRI proposed and the court found that "DMR listed more than 140 individual witnesses in its pre-trial memorandum," App. 1292, in fact, DMR listed 128 witnesses, many of whom were also included in BRI's list of witnesses. App. 445. The court's further inference, that "listing . . . such a large number of witnesses was a purposeful attempt to cause the plaintiffs to incur unnecessary legal expenses," App. 1292 (adopted from BRI's proposed finding 412, App. 914), is directly contradicted by the fee affidavits of BRI's counsel, which show that they spent no time preparing to examine any witness not ultimately called by the Commissioner or another party, except Kim Murdock, App. 1188, who was also on BRI's list, App. 433, but was not called by BRI either.

[184]Although the court found that the documents were produced "on the eve of trial," there is no support for this finding in the record, other than the unsworn statement of BRI's counsel to that effect at trial. Tr. III:229-30. In fact, although there is nothing in the court record to document this (because responses to document requests are not filed in court), DMR responded to BRI's document requests by making documents, including the agendas and minutes of these meetings, available for BRI to inspect and copy on May 30, 1995, almost a month prior to trial.

During the first week of the trial, BRI's counsel informally asked DMR's counsel to provide unredacted copies of these documents. After reviewing the unredacted documents, DMR's counsel decided to release to BRI some redacted material as to which DMR had originally claimed attorney-client privilege. However, BRI did not offer those additional documents into evidence at that time. Tr. III:230.

In the afternoon of June 28, 1995, BRI's counsel began to question Commissioner Campbell about the meeting agendas. During the course of that examination, BRI's counsel asked the court to order DMR to produce unredacted copies of all of these documents to BRI or for *in camera* review by the court. Tr. III:230. In response to that request, the Commissioner's counsel stated, "[W]e are trying to go through them and see which ones [i.e., which claims of privilege] we would really want to press or not." The court then directed, "Don't redact them. They can be taken up in camera before the judge." Tr. III:231. The Commissioner's counsel agreed to produce them for that purpose the next morning. *Id.*

When court was called into session the next morning, June 29, 1995, BRI's counsel, Mr. Flammia, reported that DMR had produced additional unredacted documents to BRI that morning but that he had not yet had an opportunity to review them. He therefore asked "if [he] could just have some more time this morning to look at these notes and, if we need, to raise that matter with [the court]." Tr. IV:4. The court then asked the Commissioner's counsel whether she "agree[d] as to the material Attorney Flammia wishes to review during the day," Tr. IV:4-5; and counsel responded, "Yes." At the end of the court day on June 29, 1995, BRI's counsel again stated that BRI had received the additional documents but needed more time to review them. Tr. IV:241. After reviewing those documents, BRI's counsel did not seek *in camera* review of the few items that remained redacted.

Two weeks later, on July 11, 1995, in response to the Commissioner's counsel's offer to produce all remaining redacted material for *in camera* inspection by the court, Tr. X:68, BRI's counsel expressly disavowed any interest in seeing any material as to which DMR continued to claim attorney-client privilege: "Your Honor, we don't plan to hold up this trial for anything

that they still maintain is privileged." Tr. X:69-70. However, in response to a request from one of the attorneys for the students, the court did examine the September 7, 1993, workplan and the other redacted documents *in camera*, "disallowed" all of the redactions, and provided copies of the unredacted documents to all counsel.[185] Tr. X:76-78; Ex. BRI-293 - BRI-304.

During the lunch hour on July 11, 1995, BRI's counsel identified a few additional documents of which DMR had not yet produced unredacted copies. DMR agreed to search for them and produce them by 4 p.m. that day, and BRI's counsel stated that that would be "fine." Tr. X:93; Ex. BRI-321. On July 12, 1995, four other unredacted documents were produced, which were substantially identical to the unredacted documents previously produced. Ex. BRI-322. They contained no additional material as to which a privilege had been claimed.

In its post-trial findings and conclusions, the trial court rejected the Commissioner's claim of attorney-client privilege as to the two remaining items on which the privilege was claimed. App. 1250, 1308.[186] That ruling was incorrect as a matter of law.

As recognized by the court, App. 1305, the Commissioner ultimately asserted the attorney-client privilege only with respect to portions of two documents, Ex. BRI-293 and BRI-294, which are workplans dated September

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[185]Despite the court's dissemination of the unredacted documents and its statement that they were admitted into evidence, the court declined the Commissioner's request for a ruling as to whether the redacted items were privileged. Tr. X:76-78.

[186]The trial court's finding on this subject, F. 173, App. 1350, is adopted from BRI's proposed finding 259, App. 847. The court's conclusions on this subject, App.1305-08, are adopted from BRI's proposed conclusions. App. 1036-40.

7 and 13, 1993. The two items for which the privilege was claimed concerned: (1) the applicability of certain conflict of interest provisions to the court monitor, Dr. Daignault,[187] *see* subsection 5, *supra*; and (2) the preparation of a receivership petition for use if an emergency relating to BRI arose.[188] *See* subsection 7, *supra*.

The court stated two rationales for rejecting the Commissioner's claim of privilege with respect to these items. First, the court ruled the privilege inapplicable because the attorneys present at the meetings at which these items were discussed were acting as regulators rather than attorneys. App. 1306-08. This rationale is both factually and legally incorrect. The fact that the purpose of these meetings was to determine whether BRI should continue to be certified to use Level III aversives and, if so, with what conditions—does not mean that legal advice did not play a role in making that policy decision or that other legal issues did not arise in the course of those meetings. To the contrary, since the certification decision turned on compliance with the Department's regulations and other applicable legal requirements, legal advice was an essential component of that determination. The fact that information was provided by non-lawyers, but for the purpose of obtaining legal advice, renders the privilege applicable, not inapplicable. *See Panell v. Rosa*, 228 Mass. 594 (1918); *Foster v. Hall*, 29 Mass. (12 Pick.) 89 (1831). The attorney-client privilege applies in full force where, as here,

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- Prelim. determined "state employee" under c. 258 (Maria M. providing confirming data on billing)
- Daignault response was to direct DMR to file motion with the court
- Psychology Code of Ethics (Mary)
- Works under DMH contract
- APA ethics board

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- Plans developed
- AG should prepare receivership petition in case of emergency.
- Kim should include in letter to BRI that DMR would need 60 days advance notice before BRI closes.

a government agency is acting in the role of client and agency counsel are acting as attorneys, *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977), particularly where the attorney-client communication relates to ongoing or anticipated decisionmaking. *Babets v. Secretary of Human Services*, 403 Mass. 230, 237 n. 8 (1988).

The item concerning conflict of interest clearly indicates that the Commissioner and his non-legal management staff sought legal advice from the agency's general counsel. *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (privilege protects "not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice"). The task was assigned to "Kim [Murdock]," DMR's General Counsel;[189] and the document apparently reports her "prelimin[ary] determin[ation] [that Dr. Daignault is a] 'state employee' under [G.L.] C. 258." *See Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 601 (S.D.N.Y. 1991) (reports of attorney-client communications privileged). Likewise, discussions between agency officials and agency lawyers concerning referral of a potential receivership case to the Attorney General, who serves as DMR's litigation counsel, constitute the seeking of legal advice by a client agency from its attorneys. *Id.* at 601 (entry regarding referral of legal matters to outside counsel privileged).

Alternatively, the court held the privilege to be inapplicable because, in the court's view, the redacted items showed that the testimony of DMR officials concerning the subject matter of the meetings in question was materially and intentionally false. App. 1308-09. This rationale has no basis in law or fact.

As described by the United States Supreme Court, the purpose of the privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United*

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[189]There is no basis for the court's mistaken premise that this task was "assigned to a non-lawyer, Dr. Mary Cerreto." App. 1307. As clearly indicated on the document itself, under the heading "Who Is Responsible," this task was assigned to "Kim." Ex. BRI-293.

States, 449 U.S. at 389. Since the very purpose of the privilege is to permit attorney-client communications to remain confidential, the fact that the privilege, where applicable, shields information from the public, App.1308, cannot, in itself, constitute grounds for holding the privilege inapplicable.

The cases cited by BRI, and adopted by the court, purportedly in support of this rationale, in fact have nothing whatsoever to do with this entire issue. Rather, the cited cases and the quotation therefrom, purportedly supporting the proposition that the *attorney-client* "privilege is routinely denied 'where the documents sought may shed light on alleged government malfeasance,'" actually pertain not to the attorney-client privilege, but to the "deliberative process" or "official information" privilege, *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d, 867, 885 (1st Cir. 1995); *In re Franklin National Bank Securities Lit.*, 478 F. Supp. 577, 577 (E.D.N.Y. 1979), a much more limited privilege that is not even recognized under Massachusetts law, *see Babets*, 403 Mass. at 232-39, and was not claimed here.

Furthermore, the information withheld here—that legal advice was sought or rendered concerning a potential receivership petition and a potential conflict of interest—is hardly the kind of "government malfeasance" that would warrant exempting this material from an otherwise applicable privilege. Therefore, even if there were a recognized exception to the attorney-client privilege in such circumstances, such an exception would not be applicable here.

At the very least, the Commissioner had a good faith basis for asserting the privilege here. The court therefore erred in admitting this material into evidence and, *a fortiori*, in equating this legitimate claim of privilege with a "fraud upon the Court." App. 1308. What should have been, at most, an evidentiary dispute as to whether the two items as to which the Commissioner claimed attorney-client privilege were admissible was blown out of all proportion by BRI in its proposed findings on this subject, which

were adopted almost verbatim by the court. The court's findings that the Commissioner improperly "attempt[ed] to conceal" the subjects of the staff meetings, F. 177, App. 1251, are clearly erroneous, as are the court's corresponding "corollary findings" of attorney misconduct. App. 1287-93.

14. The Commissioner Had a Good Faith Basis for the Statements Contained in His Certification Letter of December 15, 1993.[190]

By letter dated December 15, 1993, the Commissioner again extended BRI's certification to use Level III aversives. Ex. U-128. In this letter, the Commissioner stated that BRI had failed to report a death of a student directly to the Commissioner's office. The letter went on to describe how the report was made by BRI—i.e., by telephone to a field office rather than in writing to the Commissioner's office, as required by DMR regulations. These facts are not disputed by BRI. Ex. U-146. The court's characterization of the December 15 letter as "falsely accus[ing BRI] of not reporting a death," F. 210, App. 1263, is therefore erroneous in two respects: First, the letter did not accuse BRI of failing to report a death; rather, it stated that BRI failed to make the report in writing to the Commissioner's office.[191] Second, the fact that BRI failed to make the report in writing to the Commissioner's office is undisputedly true, not "false."

Two semantic faults the court found with the December 15 letter were the statement that the death in question occurred in "1991," when it actually occurred a few weeks earlier, on December 19, 1990, F. 212, App. 1263, an entirely immaterial and obviously unintentional error, and, again, the use of

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[190]The trial court's findings on this subject, F. 210-18, App. 1263-65, were adopted from BRI's proposed findings 318-34, App. 875-84.

[191]The court's similar characterization of a letter on this subject from DMR's general counsel to BRI's counsel is clearly erroneous for the same reason. F. 218, App. 1265; Ex. U-146.

the plural word "deaths," which the Commissioner explained as a typographical error. Tr. IV:132-35. *See also* subsection 11, *supra*. Apart from the court's stated disbelief of the Commissioner's explanation, which is not itself evidence of some other motive, there was no basis for the court to infer that the use of this word was an intentional misrepresentation. F. 212, App. 1263.

Finally, the court finds fault with the letter's statement that BRI's failure to file a written report with the Commissioner's office "made it impossible for [the Commissioner] to fulfull [his] responsibilities," i.e., to investigate the death. F. 211, App. 1263. Because this death occurred and was reported in 1990, prior to Mr. Campbell's tenure as Commissioner, he has no personal knowledge as to how, when, and where the death was reported or why the Department did not investigate the death upon receiving the oral report, via the field office.[192] Therefore, when the Commissioner was asked questions concerning this statement during direct examination by BRI, his counsel repeatedly objected on the grounds that the Commissioner had no personal knowledge of these events and that, therefore, these questions called for speculation on his part. Tr. IV:95, 98, 100, 101, 102. However, the court required the Commissioner to answer these questions over these repeated objections.

On cross-examination by his own counsel, after the Commissioner had had an opportunity to examine the death report and other relevant documents, he attempted to correct his earlier testimony on this subject. Tr. VI:30-37. However, before this line of questioning was completed, the court sustained BRI's objection that these questions called for speculation, the very same objection that the court overruled when the Commissioner's counsel objected to BRI's questions on this subject. Tr. VI:36-37.

Since the Commissioner had no personal knowledge of why no investigation was done in 1990, he should not have been required to answer

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[192]As testified by the Commissioner, his certification letters were drafted by his general counsel, Kim Murdock, who was working at DMR in 1990, when the death report was made. Tr. IV: 161-62.

questions on this subject in the first place. But having been required to answer such questions on direct examination by BRI, he should have been given a full opportunity to correct his testimony on cross-examination by his own counsel.

In any event, the Commissioner's testimony on this subject is consistent with his general counsel's contemporaneous letter to BRI's counsel, which is in evidence for the truth of its contents. Ex. U-146. And there is no evidence in the record contradicting the Commissioner's truncated explanation of why the death was not immediately investigated by DMR, i.e., that there was an ongoing investigation by the local police, to which DMR ordinarily defers. Tr. VI:36-37. Thus, the court's finding that the Commissioner testified "falsely" on the subject of this death report, F. 216, App. 1265, is clearly erroneous.

15. There Is No Evidence that DMR's Communications with New York State Agencies in February 1994 Caused New York State to Remove Any Clients from BRI.[193]

The court makes a series of findings about a (cancelled) meeting and a telephone conference between DMR officials and their counterparts in New York State, which the court characterizes as "a continuation of the Commissioner's campaign of interfering with [BRI]'s relationship with its funding agencies." F. 221, App. 1266. This characterization and the subsidiary findings underlying it are clearly erroneous.

There is no evidence whatsoever to support the court's finding that the meeting in question was either requested or cancelled by DMR, as found by the court, F. 220, App. 1265, rather than by the New York agency. Nor is

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[193]The trial court's findings on this subject, F. 219-21, App. 1265-66, are adopted from BRI's proposed findings 335-40, App. 884-87. On the general subject of DMR's communication with its counterparts in other states, *see also* subsection 8.a, *supra*.

there any evidence of a causal relationship between Guardian ad Litem Bettina Briggs' request to attend, which DMR did not oppose, F. 219, App. 1265; Ex. U-138, and the cancellation of the meeting. In any event, since the meeting did not even occur, there is no basis for the court's characterizing that "meeting" as "a continuation of the Commissioner's campaign" against BRI.

Nor was there any basis for inferring a causal connection between (1) a telephone conference between DMR and New York State officials and (2) subsequent letters from the New York agency to the parents of BRI students, requesting their assistance in formulating plans to enable their children to return home to New York. Ex. DMR-80. The only evidence of the content of the telephone conference was the stipulated testimony of a New York official, who stated that the conference was requested by his agency (not by DMR), Tr. XIII:125-26, to obtain information on the current status of BRI's certification. Ex. DMR-80. The evidence further indicates that New York's letters to BRI parents were motivated, not by any impetus from DMR, but by New York's own long-standing goal, since prior to 1990, of returning all New York clients to New York, Ex. DMR-80, a policy shared by other states and of which Dr. Israel was well aware. Tr. VIII:94-95.

Nor was there any evidence that any New York students were in fact removed from BRI following that telephone call. To the contrary, the evidence shows that at least one new New York student, Duane B., was admitted to BRI in February 1994.[194] Ex. DMR-49, DMR-50.

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[194]This evidence directly contradicts the allegation in the contempt complaint, which was verified by Dr. Israel under oath, that admissions from New York State had dropped to zero by this time. App. 311.

16. The Commissioner Had a Good Faith Basis for Imposing the Conditions Contained in His Certification Letter of February 9, 1994.[195]

By letter dated February 9, 1994, the Commissioner continued BRI's certification for another six months and indicated that, if BRI complied with the stated conditions by May 8, 1994, the certification would be effective for two years from that date. Ex. U-139. In its findings, the court mentions only three of the thirteen conditions contained in that letter.

The Commissioner's basis for imposing Condition 1, which required BRI to demonstrate that it "has in place a single written Behavior Modification Plan for each client, which plan fully complies with the requirements of [the applicable DMR regulations]," is set forth in the letter itself: i.e., that the sample plan previously provided by BRI failed to comply with DMR's regulations in many important respects. Ex. U-139 at 5. The court's only findings on this condition concern the amount of time that it took BRI's staff to comply with it. F. 225, 228, App. 1267. However, the onerousness of this condition, which merely tracks DMR's independently binding regulations, is a function of how out of compliance BRI's existing plans were, not of the substantive reasonableness of the condition, which was not even questioned by the court.

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[195]The trial court's findings on this subject, F. 222-30, App. 1266-68, are adopted from BRI's proposed findings 341-47, 354, 374; App. 891-95.

The only two conditions that the court found to be unjustified,[196] F. 229-30, App. 1267-68, were the conditions requiring independent psychiatric and medical evaluations of BRI's clients. Ex. U-139 at 8, 11. As to the psychiatric evaluations, the court's finding that "there was no basis for th[is] requirement," F. 229, App. 1267, is clearly erroneous. The rationale for this requirement is set forth in the letter itself—that DMR's review of the psychiatric evaluations provided by BRI's psychiatrist, Ex. DMR-43,[197] demonstrated "a consistent problem," i.e., that BRI "did not give adequate consideration to causes of the individual's behavioral problems which might be treated psychiatrically." Ex. U-139 at 9. As further explained, such consideration is necessary in order to comply with the requirement that a provider demonstrate, prior to using Level III aversives, that other, less intrusive, less restrictive, and less risky procedures have been exhausted. 104 C.M.R. § 20.15(1)(c). Ex. U-139 at 9-10. At the very least, this constitutes a good faith basis for imposing this requirement, regardless of whether the evaluations in fact revealed any unmet psychiatric needs.[198]

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[196]These findings are further examples of the court's impermissibly placing the burden on the Commissioner to demonstrate the good faith basis for his regulatory actions. *E.g.*, F. 230, App. 1268 ("Commissioner Campbell could not identify any credible reason for the imposition of the condition regarding medical evalutaions."). *See* Argument I.E.2, *supra*.

By reviewing the reasonableness of the conditions imposed by the Commissioner, the court also overstepped the bounds of its jurisdiction, since BRI had waived its right to judicial review of the February 9 decision by failing to exhaust its administrative remedies and then to seek such review in a timely manner, pursuant to G.L. c. 30A, §§ 13, 14; c. 19B, § 15(d); and 104 C.M.R. § 20.15(f)(8).

[197]As indicated in that review, every one of BRI's own psychiatric evaluations recommended continuation of aversives, and none recommended any medication or other alternative therapy. Ex. DMR-43.

[198]In fact, contrary to the court's finding, F. 229, App. 1267, many of the psychiatric evaluations ultimately performed under this condition did recommend discontinuing or reducing the use of Level III aversives, Ex. BRI-285 (evals. of William McC., John C., Korren C., David McK., Jacque W., Brendon S., Robert N., Duane B., Gregory M., Rick G., Jose H., Caroline B., Burt S., Janine C., William H.); and many also identified possibly unmet psychiatric or psychopharmacological needs. *Id.* (evals. of Mary Claire J., Edward

(continued...)

The Commissioner's rationale for requiring medical evaluations is also reasonable on its face. As stated in the letter itself, "The Department found that, in a number of cases, BRI has not sufficiently considered possible medical causes for behavior targeted for Level III interventions." Ex. U-139 at 11. And, in fact, the medical evaluations performed pursuant to this condition served their intended purpose of identifying unmet medical needs or recommending further evaluations in many cases,[199] unlike BRI's own annual medical examinations, which were cursory and superficial. Ex. DMR-31.

There is no basis for the court's finding that these evaluations were designed, instead, to "disrupt the operation of [BRI] and cause needless expense." F. 230, App. 1268. The schedule for conducting these evaluations was agreed to in advance by BRI, Ex. U-152, Condition 7; and there was no evidence that the evaluations caused any disruption of BRI's overall operation. Since the evaluations were paid for by DMR, they caused no "needless expense" on the part of BRI.[200] Nor were there any "ethical" problems with conducting these evaluations, F. 224, App. 1267, since they were conducted only with the prior, informed consent of each student's parent or guardian. Ex. U-152, Conditions 6 and 7.

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[198](...continued)
F., Antonio S., Kevin B., Michael T., Gregory M., Michael S., Nicholas S., Lorenzo S., Elly N., John K., Duane B., Heather S., Janine C., William H., Wayne M., Jennifer H., Mark L., Lourdy L., Ernest P., James V., Julia C., Phillip B., Brandon S.).

[199]Ex. BRI-284 (evals. of Paul M., Terry P., Peter B., Janine C., Michael S., Antonio S., Duane B., Phillip B., William H., Burt S., Mark L., Mary Claire J., Heather S., Michael T., Ernest P., Michelle G., Caroline B., Brian S., Brandon S., Jennifer H., Julia C., James V.).

[200]BRI's protests concerning the "prohibitive" costs of these evaluations, F. 224, App. 1267, were disingenuous. While BRI refused to pay for these evaluations, it arranged and paid for its own additional medical evaluations during the same time period. Ex. DMR-29, 30, 31.

17. The Department Committed Extensive Resources to Assisting BRI to Comply with DMR Regulations Rather than Simply Decertifying BRI for Failure to Comply with the February 9th Certification Conditions.[201]

As described in the Statement of Facts, subsection A.4, although BRI had not complied with the February 9 certification conditions by the deadline of May 8, 1994. rather than decertify BRI, DMR entered intensive negotiations with BRI, aimed at ensuring that BRI would ultimately comply with DMR regulations and thereby maintain certification. Those negotiations resulted in written agreements as to what BRI would do to comply with each of the conditions. *See* Statement of Facts, subsection A.4, *supra.*

All of the trial court's factual findings on the subject of these agreements share the same erroneous premise: that the agreements reached between BRI and DMR as to how *BRI* would comply with each of the certification conditions instead imposed some obligations on DMR. In fact, the quid pro quo for BRI's agreeing to comply with the conditions in the manner set forth in these agreements was that the Commissioner would not revoke BRI's certification for failure to comply with those conditions by May 8, 1994, as the Commissioner's February 9th letter had warned. Ex. U-150, U-152. In fact, based on these agreements, the Commissioner extended BRI's certification to December 31, 1994. Ex. U-152.

Nor did the Commissioner's letter of July 5, 1994, unconditionally promise that BRI would be finally re-certified six months later. Rather, the Commissioner stated that "[a] two year certification will be issued to BRI *if* the Department determines that BRI has achieved compliance with the certification conditions *and* regulations, *and* assuming no other changes in material facts" (emphasis added). U-152 at 2. In the same letter, the Commissioner reiterated that "[t]his certification decision is made without

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[201]The trial court's findings on this subject, F. 231-45, App. 1268-70, are adopted from BRI's proposed findings 358-63, 370-71, 373-75, 377-79; App. 896-97, 899-901.

prejudice to the continuing authority of the Department to regulate BRI and to suspend, revoke, limit, or otherwise act upon BRI's certification or licensure based upon any non-compliance with the attached agreements or conditions, *or* other violation of the law *or* regulations, *or* any changes in material facts occurring during this certification period" (emphasis added). *Id.*

Because, the court's premise—that DMR had the obligations under these agreements or under the Commissioner's conditional certification letter of July 5, 1994—is incorrect, it is unnecessary to address in detail the court's subsidiary findings as to how the Commissioner "violated" those agreements, although those findings, as well, are factually unsupported by the evidence.

First, the court finds that the Commissioner's determination (in his January 20, 1995 letter), that BRI's treatment plans did not fully comply with DMR regulations, U-166 at 6, is somehow inconsistent[202] with the parties' prior agreement requiring BRI to submit a sample treatment plan for DMR's approval and then to revise all of its other treatment plans using the approved sample as a model. Ex. U-152. The court does not find that BRI's revised plans, in fact, conformed to the sample plan, nor could the court make such a finding, since the revised plans were not in evidence. In fact, the only evidence as to the adequacy of the revised plans fully supports the Commissioner's determination that the plans were deficient in the manner described in his January 20, 1995 letter. Ex. U-166 at 2-7, DMR-4-9, DMR-23, DMR-67, DMR-69.

The only other "violation" found by the court concerns DMR's attempt, in December 1994, to have two outside experts review the implementation of two students' treatment plans. F. 243-45, App. 1269-70. However, after BRI objected and Judge Hurd, the court-appointed mediator, attempted

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[202]The court does not explain how the Commissioner's January 20th finding conflicts with BRI's prior agreement to revise its treatment plans in accordance with the approved sample, other than to find that BRI's psychologist, who had drafted the sample plan that was approved by Dr. Cerreto, was "shocked" by the Commissioner's finding. F. 241, App. 1269.

unsuccessfully to resolve the dispute,[203] that review was cancelled. Tr. VIII: 68-69, Ex. DMR-79. Therefore, the court's finding that this "review . . . was in violation of the July 5 agreement" is clearly erroneous.

18. The Commissioner Had a Good Faith Basis for Imposing the Conditions Contained in His Certification Letter of January 20, 1995, and for Decertifying BRI for Refusing to Comply with Those Conditions.[204]

Over the next six months, from July through December 1994, DMR closely monitored BRI's compliance with the certification conditions and with the underlying regulations. Tr. V:159-67. As a result of that intensive monitoring, DMR determined, and informed BRI by letter dated January 20, 1995, that BRI had not fully complied with the certification conditions or with the applicable DMR regulations. Ex. U-166; Tr. VI:45-46. Nevertheless, rather than decertify BRI on that basis, the Commissioner continued BRI's certification for another 16 months, to May 8, 1996, again with certain conditions. Ex. U-166, Tr. VI:46-68.

The court finds fault with only two of the six conditions contained in the January 20, 1995, letter. First, the court mischaracterizes Condition 1, by stating that it "required that [BRI] discontinue Level III interventions for six individuals." F. 249, App. 1270. In fact, this condition gave BRI a choice. It could revise the treatment plans for those six individuals *either* to conform to DMR's regulations on Level III aversives (in which case BRI could continue to use such aversives, subject to the remaining conditions) *or* to

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[203]The court's finding that DMR refused to mediate this dispute is also clearly erroneous. Although DMR's counsel initially believed that the dispute could be resolved without mediation, Ex. U-160, when informal efforts proved unsuccessful, the parties did mediate this issue with Judge Hurd in December 1994. Ex. DMR-79.

[204]The trial court's findings on this subject, F. 247-51, App. 1270-71, are adopted from BRI's proposed findings 419-29, App. 917-22.

exclude Level III aversives from these individuals' plans. In either case, the existing treatment plans would remain in effect until the revised plans were approved by DMR, BRI's Peer Review and Human Rights Committees, and the individual's parent or guardian or (for Level III interventions) the Probate Court. Ex. U-166 at 9, 10, 13.

As indicated in the letter itself, this condition was based on reports prepared by doctoral level psychologists who had closely monitored the implementation of these individuals' treatment plans, as agreed to by the parties in June 1994. Ex. U-166 at 2; U-152, Condition 1; DMR-4-9. Those reports indicated that BRI had failed to implement the treatment plans of these six individuals in accordance with DMR's behavior modification regulations, in the following significant respects: (1) BRI used Level III interventions to address minor behaviors, such as slouching, silly laughing, and tearing paper; (2) BRI did not use the least restrictive and most appropriate interventions available; and (3) BRI's data collection procedures did not provide for monitoring, evaluating, and documenting the use and effectiveness of particular interventions for treating particular behaviors. Ex. U-166 at 2-6, DMR-4-9, DMR-23.

The court's "findings" with respect to Condition 1 are actually legal conclusions, which should therefore be reviewed by this Court *de novo*. Implicit in the court's findings concerning the application of this condition to Brandon S., F. 249, App. 1270, are (1) the premise that this Condition "conflicts" with the Probate Court's prior approval of Brandon's individual treatment plan in individual substituted judgment proceedings, and (2) the legal conclusion that such a conflict renders this condition invalid as a matter of law. Both the premise and the conclusion are incorrect. As discussed in Argument I.B, *supra*, the function of the Probate Court in substituted judgment proceedings is solely to decide whether the individual, if competent, would consent to the proposed treatments. Although the criteria considered by the Probate Court in making that decision overlap to some extent with the requirements contained in DMR's behavior modification regulations, DMR's regulations are far broader. For example, while the Probate Court considers solely the written treatment plan, DMR's regulations

also govern the manner in which the court-approved plan is actually implemented on a day-to-day basis. Therefore, DMR's determination that a student's written treatment plan is not being implemented in accordance with its regulations in no way conflicts with the Probate Court's determination that the student would consent to the treatments set forth in the written plan.

The court's second "finding," that DMR's regulations do not authorize the Commissioner to grant or deny certification to use Level III aversives on an individual basis,[205] F. 250, App. 1271, is also incorrect as a matter of law.[206] The Department's behavior modification regulations expressly provide that "[t]he use of [Level III] procedures *for a particular individual* will be allowed *for a particular client* only after a rigorous review and approval by clinicians, human rights committees, and the Department. . . . It is further the policy of the Department that *the application of a procedure for clients* even after it has been approved must be strictly monitored by the program as well as by the Department itself" (emphasis added). 104 C.M.R. § 20.15(1)(c).

The only other condition in the Commissioner's January 20th letter mentioned by the court is the condition requiring BRI to stop using the "specialized food program," a food deprivation program in which, depending on an individual's behavior on a given day, he or she may receive as little as 20 percent of his or her daily caloric requirement. Ex. U-166 at 12. Although the court does not expressly find that this condition was unreasonable or imposed in bad faith, its findings suggest that there was no

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[205]The court's factual finding that the January 20, 1995, letter "first introduced the concept of regulatory approval of treatment plans on a 'case-by-case' basis," F. 250, App. 1271, is clearly erroneous. As the Commissioner testified, DMR has approved or disapproved the use of Level III aversives on a case-by-case basis for individuals at the state schools for the mentally retarded and has also authorized another private provider to seek certification on a case-by-case basis. Tr. V:26-27. There was no evidence to the contrary.

[206]This is another issue that could have and should have been raised, if at all, in an administrative appeal by BRI from this decision. Having forgone this available administrative remedy, BRI was not entitled to judicial review of this decision, particularly in the context of a contempt proceeding.

clinical justification for imposing this condition.[207] Any such finding is clearly erroneous.

As indicated in the January 20 letter itself and in the report that the Commissioner issued in support of that letter, there was ample justification for imposing this condition. This condition was based on DMR's determination that there is no professional literature to support the use of this procedure as treatment for human beings in general or for the problems exhibited by BRI clients in particular. Ex. U-166 at 12. In addition, DMR found that this program "denies the client basic sustenance," thereby violating the regulatory requirement that "[n]o Behavior Modification plan may provide for a program of treatment which denies the individual . . . a nutritionally sound diet." 104 C.M.R. § 20.15(4)(b)(1). Ex. U-166 at 12. In further support of this condition, DMR's accompanying report outlined and documented specific nutritional and sanitation problems with the specialized food program as well as evidence that this intervention is not only ineffective in controlling the targeted problem behaviors but may actually cause or increase other problem behaviors that are then treated with other Level III interventions. Ex. DMR-23 at 47-53. In addition, several of the psychiatric and medical evaluations of individual students raised concerns about adverse effects of this program on the students being evaluated. Ex. DMR-284 (eval. of Jennifer H.), DMR-285 (evals. of Elly N., Jeanine C., William H., and Jennifer H.). At the very least, the Commissioner had a good faith basis for imposing this condition.

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[207]The framing of the court's finding on this subject is another example of its improperly placing the burden on the Commissioner to explain the good faith basis for his regulatory actions, i.e., "he failed to identify any medical evidence to support this decision." F. 251, App. 1271.

19. DMR Dealt Fairly with BRI on Contract Issues.[208]

As discussed in the Statement of Facts, section C, in recent years, BRI's tuition rates for Massachusetts clients have been set by the Division of Purchased Services ("DPS"). Ex. BRI-292; Tr. V:112, VIII:165-67. DPS sets a flat per-student rate (about $161,000 for BRI in 1994-95, Tr. VIII:167), regardless of the level of services provided to each individual client. Ex. BRI-292; Tr. V:112. This is not the method generally used by DMR and other state agencies to establish the amounts paid to providers of services to adult clients. Rather, these amounts are usually set by negotiated contracts specific to each client for whom services are provided. Tr. III:270, V:113-17. It was for this reason (and not for the ulterior motives found by the court, F. 200, App. 1258) that DMR questioned, in December 1993, whether DPS should continue to set BRI's rate, in that BRI was then serving no Massachusetts students under the age of 22. Ex. BRI-262 at 4; Tr. III:266-70.

DMR's more recent attempts to negotiate a contract with BRI were similarly well-intentioned. Despite DMR's repeated efforts to initiate contract negotiations, beginning in the fall of 1994,[209] as of the end of the 1995 fiscal year DMR and BRI still had not entered into either an agreement to abide by the DPS rates or any other contractual arrangement for fiscal year 1996.

Nevertheless, in order to continue contract negotiations into the new fiscal year, on June 30, 1995, the last day of the 1995 fiscal year (and, coincidentally, the fifth day of the contempt trial), DMR "prequalified" BRI

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[208]The trial court's findings on this subject, F. 197-202, 256-61; App. 1258-59, 1272-74, are adopted from BRI's proposed findings 298-304, 434-38; App. 865-67, 923-25.

[209]DMR attempted to initiate contract negotiations in September and October of 1994 and, in December of 1994, restated its willingness to meet with BRI on this issue, but BRI did not come to the negotiating table until mid-June 1995. Tr. XI:264-67; Ex. DMR-60, U-161.

to enter into a contract with DMR for fiscal year 1996, on the condition that BRI cooperate with DPS's then-pending request for information concerning BRI's legal expenses.[210] Ex. BRI-267. DPS had sought that information in order to determine whether BRI's rate for prior fiscal years should be reduced, retroactively, to account for nonreimbursable expenditures for lobbying and for legal fees incurred in suing the Commonwealth. *Id.*

Over the Commissioner's objections, the trial court admitted DMR's prequalification letter and DPS's request for information *de bene*, subject to BRI's ability to offer testimony linking DMR to DPS's request for information on BRI's legal expenses. Tr. VI:168-69. Although BRI later conceded that it was unable to prove such a connection and therefore did not introduce further evidence on this issue, Tr. IX:56-57, the court nevertheless relied on the conditionally admitted evidence to infer that "the letter"[211] constituted a purposeful attempt by DMR to interfere with on-going court proceedings." F. 259, App. 1273.

Apart from the inadmissibility of the only evidence on this issue, even that evidence does not support the court's inference that requiring BRI's cooperation with DPS's request for information was an attempt by DMR to interfere with the on-going contempt trial. DPS's letter clearly indicates that its request for information was just the first step in a long administrative process, including the availability of appeals, before any action would be taken affecting BRI's funding. Ex. BRI-267. Moreover, since the Commonwealth funds only a small percentage of BRI's students, even if DPS eventually took steps to recoup overpayments for Massachusetts students,

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[210]The court mischaracterizes DPS's letter, as "[finding] [BRI]'s legal fees to be non-reimbursable," and "subject to recoupment." F. 258, App. 1273. In fact, DPS only requested information from BRI for purposes of determining the reimbursability of its legal fees and stated that, depending on what the requested information shows, "the funds *may* be subject to recoupment" (emphasis added). The mischaracterizations are taken verbatim from BRI's proposed finding 436, App. 924.

[211]It is unclear whether the letter referred to here is DMR's prequalification letter or DPS's request for information.

this would not have the drastic effects, hypothesized by the court, of "disrupting [BRI]'s ability to continue to retain its counsel."

20. The Commissioner Acted Reasonably in Giving BRI Additional Time to Correct Deficiencies Identified by a Licensing Survey.[212]

In 1994, DMR conducted surveys of licensed residential programs, using newly revised licensing standards, referred to as "QUEST," (Quality Enhancement Survey Tool). Tr. X:33-35. Although BRI was rated "partially achieved" or "not achieved" in all categories of this survey, Ex. U-164 at 1, its group home licenses were not revoked, Ex. U-183, and remained in effect at the time of trial. Tr. X:35. As explained in a letter from DMR's Director of Survey and Certification, if this survey process eventually results in BRI's group home licenses being revoked or suspended, BRI will have an opportunity to appeal any such action pursuant to 115 C.M.R., §§ 8.21(4), 8.33(1)(b), and 8.34, and to seek judicial review of any adverse administrative decision pursuant to G.L. c. 30A, § 14.

Despite the "unripe" procedural posture of BRI's license renewals, the court made adverse findings as to the procedure and substance of the licensing survey. Those findings were clearly erroneous. First of all, the court mischaracterizes, by quoting out of context, the actual findings of the surveyors.[213] The court's selective list of infractions also creates the false

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[212]The trial court's findings on this subject, F. 261-66, App. 1274-75, are adopted from BRI's proposed findings 439-46, App. 926-31.

[213]For example, while the court states that "DMR *faulted* [BRI] staff for the affectionate and caring interaction with the students because 'they were not reflective of positive adult roles,'" F. 263 n.5, App. 1275, the survey actually stated, "*Although* interactions were affectionate and caring, they were not reflective of positive adult roles" (emphasis added). Ex. U-164 at 1. The survey further elaborates on this point by stating that, although most BRI clients are over 21 years old, they are "consistently referred to as 'kids'"; are told they

(continued...)

impression that all of the deficiencies related to client dignity. F. 263 n. 65, App. 1275. In fact, the survey also found deficiencies in all other areas, including client safety, Ex. U-164 at 36-39, human rights, and personal well-being. *Id.* at 48-51. Since the only evidence on the QUEST survey were the survey findings themselves, there was no basis for the court to conclude that the survey findings were "arbitrary and capricious."[214] F. 263, App. 1275.

21. The Court's Findings Grossly Overstate the Evidence of Harm to BRI and Its Students.[215]

The court's findings that the Commissioner's actions "financially devastated" BRI, F. 269, App. 1277, and caused it "to suffer a loss of revenues of such magnitude that its financial viability is in peril," F. 270, App. 1277, are clearly erroneous.[216] First of all, according to the court, the direct cause of BRI's decrease in revenues is its declining enrollment. *Id.* However, as discussed in subsection 8.a, *supra*, the court's inference that BRI's declining enrollment was caused by the Commissioner's conduct—i.e.,

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[213](...continued)
are "good boys and girls"; and are given children's toys as rewards. Ex. U-164 at 1. Since these comments pertained to the standard for rights and dignity of clients, measured by the respect paid to them by staff, the comments are directly relevant and at least facially support the rating given.

[214]Furthermore, while such a finding would be grounds for setting aside an administrative decision under G.L. c. 30A, § 14, it falls far short of supporting a contempt judgment.

[215]The trial court's findings on this subject, F. 268-303, App. 1276-86, are adopted from BRI's proposed findings 447-504, App. 932-62.

[216]For the reasons discussed in Argument II.A, *supra*, BRI should not have been permitted to introduce any evidence as to its financial condition.

in communicating with out-of-state funding agencies—is clearly erroneous.[217] Absent a causal connection between the Commissioner's conduct and declining enrollment, there is no basis for inferring a causal connection between the Commissioner's conduct and BRI's decreased revenues.

Second, the court's findings as to BRI's "perilous" financial situation are also unsupported by the evidence. Although declining enrollment necessarily resulted in a loss in revenues, it also presumably resulted in decreased costs, since BRI's tuition rate is set on the basis of its average costs per student. Tr. V:112. In any event, as BRI's accountant testified, and as the court found, BRI continues to enjoy a $520,000 surplus, Tr. VIII:171; F. 302, App. 1285, only $65,000 less than in 1993. F. 300, App. 1285.[218] Although the court found that this surplus would be eliminated, and BRI's credit line thereby jeopardized, if BRI were to use the surplus to pay its attorneys' fees, F. 303, App. 1286, there is no evidence that BRI has actually paid or ever intends to pay the more than $800,000 of fees assertedly billed by its counsel.[219] Moreover, as discussed in subsection 19, *supra*, unless DPS takes some action to recoup the funds that BRI expended on this litigation, BRI will continue to be reimbursed for its legal fees through its tuition.

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[217]BRI's accountant admitted that nothing in his analysis of BRI's finances provides any information as to the cause for BRI's declining enrollment. Tr. VIII:193-94. Moreover, he testified that enrollment had not declined severely as of June of 1994, Tr. VIII:193, which precludes the inference, made by the court, that the decline in enrollment was the direct result of letters sent by the Commissioner in August and December of 1993. F. 290 n. 73, App. 1282. In fact, in the summer of 1994, BRI had at least as many students (57), Ex. BRI-284, as it had in 1991, when it first applied for re-certification. Ex. BRI-236.

[218]This is consistent with Dr. Israel's statement, in March of 1995, that BRI is "alive, well and prospering." Ex. DMR-35.

[219]As discussed in Argument IV.B, *infra*, the court's finding that this amount of fees was "necessary and reasonable" is also clearly erroneous and unsupported by the requisite subsidiary findings.

The court's findings of harm to the students are also clearly erroneous.[220] The findings that declining enrollment caused loss of revenues, which caused layoffs, which caused less individual attention to the remaining students, F. 293, 294, 295, App. 1283-84, are fallacious on their face; if staff are laid off in proportion to the drop in enrollment, then the staff-to-student ratio should remain approximately the same.

The only findings of concrete, physical harm to individual students concern the effects on two students of the cessation of the specialized food program in June 1995.[221] The evidence on this subject falls far short of supporting the court's finding that the cessation of this program "critically impacted" two students "who are currently suffering a dramatic increase in their health-dangerous behaviors." F. 298, App. 1284.

As to one of the students, Wayne M., Dr. Von Heyn, a BRI psychologist, testified that, after BRI stopped using the specialized food program, Wayne had to be restrained on one occasion. Tr. IX:96. Although he testified that the use of such restraints on this student "used to be infrequent," that testimony is directly contradicted by a progress report for the month of January 1995 (when the specialized food program was still in use), which indicates that Wayne was placed in leg restraints for 634 minutes, waist restraints for 675 minutes, wrist straps for 15,298 minutes, and a helmet for 230 minutes in that one month alone. Ex. DMR-21.

As to the other student, Janine C., both Dr. Von Heyn and the student's father testified that, after cessation of the specialized food program, she pulled her hair and picked her finger. Tr. IX:97-98; X:6. However, on cross-examination, they both admitted that she had engaged in these same behaviors when she was on the specialized food program. Tr. IX:99; X:14. In her psychiatric evaluation, the evaluator states that "according to multiple

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[220]To the extent that the findings of harm to students are based on the evidence of financial harm to BRI, those findings should be set aside for the same reasons just discussed.

[221] For the reasons discussed in Argument II.B, *supra*, the evidence presented by the parents on this subject should have been excluded or stricken.

staff reports, these episodes [of self-mutilation and hair pulling] did not appear to have any external precipitant. They appear to have occurred in 1990, 1992 and then most recently in November and December of 1993." Ex. BRI-285.[222] Furthermore, given the evaluator's recommendation that Janine's daily caloric intake be increased in order to avoid exacerbating her hypoglycemia,[223] any harm she suffered by the cessation of the specialized food program was most likely outweighed by this benefit. *Id.*

Thus, the court's subsidiary findings of harm to BRI and its students are clearly erroneous and its charcterizations of that harm as "devastating" and "perilous" are grossly exaggerated. The court's errors in assessing the nature and degree of harm are particularly prejudicial, since the harm found forms the basis for the drastic relief imposed by the court. Conversely, since the court's findings on this issue are clearly erroneous, the relief granted to remedy that harm is unwarranted.

IV. THE EXTRAORDINARY RELIEF GRANTED BY THE TRIAL COURT IS UNJUST AS A MATTER OF EQUITY AND IMPROPER AS A MATTER OF LAW.

To remedy the harm discussed above, the court appointed a receiver to assume all of DMR's regulatory authority over BRI, "as well as any additional powers as may be necessary and appropriate." App. 1342. The court also enjoined the Commissioner, "his agents, attorneys, employees, and anyone acting in concert with them," from "tak[ing]any action to obstruct, frustrate or interfere with the Receiver in the performance of his duties," App. 1348, and from "seek[ing] to accomplish through Individual Guardianship proceedings what they are enjoined from doing herein." App. 1341-42. In

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[222]*See also* Ex. DMR-47 at 5 (BRI Human Rights Committee minutes, 10/25/93, referring to "Janine's recent episodes of health dangerous behaviors").

[223]Similar recommendations were made with respect to other students who were on the specialized food program at the time of their evaluations. Ex. DMR-284 (Jennifer H.), DMR-285 (Elly N., William H., Jennifer H.).

addition to this sweeping equitable relief, the court awarded over $1 million in attorneys' fees. App. 1341. As will be shown in this final section of this brief, even if the court's contempt findings were legally and factually sound, this extraordinary relief is unwarranted and should therefore be vacated by this Court.

A. In Issuing the Receivership Orders and Other Broad-Ranging Injunctive Relief, the Trial Court Abused Its Discretion, Exceeded Its Authority, and Impermissibly Intruded on the Powers of the Legislative and Executive Branches.

1. The Trial Court Abused Its Discretion in Imposing the Drastic Remedy of Receivership on the Facts of This Case.

Even if the trial court's contempt judgment were factually or legally sound, it would not justify the extraordinary relief granted by the trial court. As this Court counseled in denying a petition for mandamus relief against a state official, "The severity of remedial devices which may be considered [to enforce judgments against the Commonwealth] demands caution . . . not a resort to extraordinary judicial intervention." *Bromfield v. Treasurer & Receiver General*, 390 Mass. 665, 670 (1983); *see also Massachusetts Coalition for the Homeless v. Secretary of Human Services*, 400 Mass. 806, 823-24 (1987). Even in the face of systemic violations of constitutional rights, the equitable powers of courts to award relief against state and local officials is not unlimited. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990).

As to the extraordinary remedy of receivership, this Court has held that, even in the private business context, the power to appoint a receiver should be exercised "with circumspection. It should not be exercised except in cases where otherwise there would be wasting and loss of property . . . which cannot be conserved in any other way." *New England Theatres, Inc. v. Olympia Theatres, Inc.*, 287 Mass. 485, 492 (1934), *cert. denied*, 294 U.S.

713 (1935); *see also George Altman, Inc. v. Vogue, Int., Inc*, 366 Mass.176, 180 (1974) (same). Where the deficiencies found by the trial court do not "necessitate th[is] drastic remedy," this Court has held that "the trial judge's appointment of a receiver clearly exceeded the bounds of his authority," *Lopez v. Medford Community Center, Inc.*, 384 Mass. 163, 169 (1981), and directed that "[a] more limited remedy . . . be fashioned" to address the particular deficiencies identified by the trial court. *Id.* at 170.

Additional problems arise where, as here, receivership is sought as a remedy against government agencies, in which case "a receivership must be thoroughly justified on the facts, is always to be considered a remedy of 'last resort,' and therefore is not often applied in practice." *Perez v. Boston Housing Authority*, 379 Mass. 703, 733 (1980). Accordingly, in affirming the appointment of a receiver under the extraordinary circumstances of the *Perez* case, this Court was careful to note that, because of the quasi-private character of the BHA, "that remedy appears much less drastic" than it would where it "invade[s] any 'line' department or unit of city or State."[224] *Id.* at 738.

In this respect, the remedy of receivership—which entirely supplants the Commissioner's discretion as to how to carry out his statutory duties—is even more drastic than other forms of equitable relief which specify how an administrative agency must perform its discretionary functions. The separation of powers problems inherent in such injunctive orders therefore apply to an even greater degree to the relief granted here. As this Court has repeatedly recognized in overturning injunctions against state agencies, even where judicial remedies are warranted, the relief must be fashioned so as to preserve the agencies' discretion to determine how to perform their statutory and regulatory duties. *Care and Protection of Jeremy*, 419 Mass. 616, 622-23 (1995); *Care and Protection of Isaac*, 419 Mass. 602, 606-07 (1995);

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[224]Although various state officials were originally named as defendants in the *Perez* case, they were dismissed on the ground that the statute under which plaintiffs sought relief was not applicable to them. *Perez v. BHA*, 368 Mass. 333, *appeal dismissed*, 423 U.S. 1009 (1975). The Commissioner is aware of no reported cases in which a state agency has been placed in receivership.

Guardianship of Anthony, 402 Mass. 723, 727 (1988); *Bradley v. Commissioner of Mental Health*, 386 Mass. 363, 365 (1982). Indeed, in a previous appeal in this very case, this Court vacated, on these grounds, an injunction issued by the Bristol Probate Court requiring DMR to pay BRI for its care of a particular student. *In the Matter of McKnight*, 406 Mass. 787, 801-02 (1990) (vacating injunction on the grounds that "[t]he determination of where and how the department will carry out its statutory, regulatory, and any constitutional obligations, is . . . for it to decide"); *see also Charrier v. Charrier*, 416 Mass. 105, 110 (1993) ("judge does not have authority to order [state agency] to do anything that [agency] is not required to do as a matter of law"; to do so "would violate the principle of separation of powers . . . by usurping an executive function").

The facts of this case, as found by the trial court, fall far short of the circumstances that were held to warrant the appointment of a temporary receiver for the Boston Housing Authority in the *Perez* case. In that case, this "exceptional" remedy was reluctantly imposed as an "ultimate recourse," where "[t]he unabated mis- and nonfeasance of the Board" resulted in "the unprecedented deterioration of the BHA's developments and . . . widespread violations of the Sanitary Code," *id.* at 705, 724-26, which directly jeopardized the health and safety of thousands of tenants. In particular, the BHA failed to fill top management positions, *id.* at 717-19; failed to engage in financial planning, *id.* at 718-19; failed to deliver maintenance supplies to tenants, *id.* at 719-20; failed to supervise or prioritize maintenance work, *id.* at 719-20; and failed to protect the safety of tenants from physical and psychological invasion. *Id.* at 721-22. Due to the Board's "incompetence," "indifference," and "gross mismanagement," the physical condition of public housing was found to be "appalling," and violations of the sanitary code, "rampant." *Id.* at 725.

By contrast, in the present case, far from neglecting their statutory and regulatory responsibility to ensure the health, safety, and dignity of BRI's clients, the Commissioner and his staff were found to have aggressively monitored and regulated BRI's compliance with state regulations. F. 268-85, App.1276-81. Although the court found the degree of regulatory activity to

be excessive, unnecessary, and ill-motivated,[225] F. 230, 268-85; App. 1268, 1276-81, there are no findings that this regulatory activity directly resulted in any serious or pervasive harm to the health or safety of BRI's clients. Rather, as discussed in Argument III.B.21, *supra*, the harm found by the court was primarily to BRI's financial well-being, which was found to result in a reduction in staffing and, in turn, in a general reduction in the quantity and quality of services provided. F. 268-85, App.1276-81. Moreover, there is no finding that even this financial harm ever reached crisis proportions in any way comparable to *Perez*. Nor, unlike in the *Perez* case, is there any finding that the quality of services currently provided by BRI has declined to a level that necessitates the drastic remedy of receivership in order to protect the health and safety of its student body as a whole.[226] To the contrary, the court lauded the quality of services provided by BRI's staff, F. 264, App. 1275, and, in denying the Department's counterclaims, rejected each and every one of the Department's contentions that BRI had failed to provide the level of service required by DMR regulations. App. 1322-39.

Nor was this relief the only means of addressing any regulatory wrongdoing by the Commissioner. If BRI was aggrieved by the Commissioner's certification, investigatory, or licensing decisions, on substantive or procedural grounds, it had the right to seek administrative and, if necessary, judicial review, which it failed to do. If warranted, the reviewing Superior Court could "set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed." G.L. c. 30A,

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[225]As shown in Argument III.B, *supra*, these findings are clearly erroneous.

[226]The one finding of harm to an individual student, J.C., who was found to require increased use of other aversives after being removed from the specialized food program, F. 298, App.1284, could have been remedied, if necessary, by a narrowly focused injunction, requiring DMR to permit BRI to utilize the specialized food program on this individual student at least temporarily. *Cf. McKnight*, 406 Mass. at 801 (indicating that a temporary injunction requiring DMR to continue the availability of aversive procedures might be warranted if the requisite showing of immediate and irreparable harm were made, but holding that "[n]o permanent injunction should be entered to that effect . . . unless [the individual] proves that the department, acting on the judgment of qualified professionals, could not reasonably deny the continued availability and use of aversives").

§14(7). BRI's failure to exhaust these available legal remedies barred the granting of any equitable relief, particularly the most extreme remedy of receivership. *George Altman*, 366 Mass. at 180 ("in order to justify the appointment of [a receiver], it should at least appear . . . that [the applicant] has exhausted his legal remedies").

Alternatively, in lieu of the sweeping relief granted here, the trial court could have issued discrete injunctive orders tailored to address any particular instances of ongoing and harmful wrongdoing. *See, e.g., Halderman v. Pennhurst State School & Hospital*, 154 F.R.D. 594, 610 (E.D. Pa. 1994) (finding state officials in contempt of settlement agreement and issuing injunctive orders requiring them to take particular actions, e.g., to provide community living arrangements to all Philadelphia class members within 12 months, with coercive fines if defendants fail to comply with those orders); *Coyne Industrial Laundry of Schenectady, Inc. v. Gould*, 359 Mass. 269 (1971) (finding defendant in contempt of consent decree prohibiting it from soliciting dust control business and issuing an order requiring it to cease and desist from doing so); *Manchester v. DEQE*, 381 Mass. at 209 (finding town in contempt of court order setting deadlines for town to take various actions to bring dump into compliance with state law and issuing an order requiring town to act according to new compliance schedule).

By, instead, imposing the extraordinary remedy of receivership, the trial court failed to heed this Court's admonitions that this extreme sanction should be imposed only where it is fully justified by the facts and only as a last resort where other, less drastic remedies have failed to preserve the assets of the entity placed in receivership (not those of the entity *seeking* receivership)[227] or to protect the health and safety of those served by public institutions. The receivership orders should therefore be vacated *in toto* even if the contempt judgment is otherwise upheld.

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[227]If the assets of BRI are truly at risk, and its students' health and safety are thereby jeopardized, as was the case with respect to the assets and tenants of the BHA in *Perez*, this might justify placing *BRI* in receivership, but not DMR.

2. *The Plenary Powers Granted to the Receiver in this Case Are Overly Broad, Unconstitutional, and in Conflict with Various Statutory Provisions.*

Even if some form of receivership were warranted by the circumstances of this case, the extremely broad powers granted here should be vacated on equitable, statutory, and constitutional grounds. Injunctive relief, even where otherwise warranted, must be narrowly tailored to redress the particular legal wrong found by the court. Here, the legal wrong found by the court is of relatively limited scope, affecting a single provider and relating primarily to its certification to use certain particularly intrusive behavior modification procedures. Yet, the receiver is authorized not simply to right these "wrongs" but to "exercise all powers presently held by DMR as well as any additional powers as may be necessary and appropriate," including, for example, the power to reorganize the structure of the entire Department; to supervise, hire, and fire all DMR employees, including the Commissioner himself; and "to develop and to improve DMR's management systems, personnel standards, employee relations so that anti-BRI bias is eliminated." App. 1342-47. Taken together, these provisions empower the receiver to conduct a purge of DMR employees solely on ideological grounds.

A further infirmity with many of the enumerated powers of the receiver is that they exceed the powers of either DMR or the court itself under the state and federal constitutions. Under Amendment Article 63 of the Massachusetts Constitution, and G.L. c. 29, § 2, no state agency has the power to receive or spend money without an appropriation, even pursuant to a court order. *Manchester v. DEQE*, 381 Mass. at 218-19; *Bromfield*, 390 Mass. at 671; *cf. Evans v. City of Chicago*, 10 F.3d at 480 ("judges should not take control of the budgetary process even with the consent of the parties"). Yet, the receiver is empowered to "apply for and accept funds on behalf of DMR from any public or private entity or person," App. 1345; and to "contract for such legal, accounting, professional or consultant services furnished directly to the Receiver as he finds necessary for the performance

of his duties . . . and direct DMR to pay the costs therefor." App. 1347. DMR is also required to pay the receiver himself at an hourly rate of $150. App. 1343.[228]

Several of the receiver's powers also run afoul of Article 30 of the Declaration of Rights, which requires a strict separation of powers between the executive, legislative, and judicial branches of government. *New Bedford Standard-Times Publishing Co. v. Clerk of the Third District Court of Bristol*, 377 Mass. 404, 410 (1979) ("Article 30 . . . is more explicit than the Federal Constitution in calling for the separation of powers of the three branches of government, and we have insisted on scrupulous observance of its limitations."). While the judicial appointment of a receiver, per se, may not be an impermissible intrusion on executive powers (at least where the agency placed in receivership is a quasi-private entity rather than an executive department of state government and has failed to carry out its statutory duties), *Perez*, 379 Mass. at 739 and n. 36, a court-appointed receiver may not exercise powers that conflict with state statutes.[229] *Spence v. Reeder*, 382 Mass. 398, 418 (1981) (court could not empower BHA receiver to evict tenants in a manner inconsistent with tenants' rights under existing statutes). As stated by this Court, with respect to the BHA

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[228]While, in some extraordinary circumstances (unlike those presented here), the courts have inherent authority to require expenditures without appropriation, *O'Coins, Inc. v. Treasurer of Worcester County*, 362 Mass. 507, 509 (1972) (county could be ordered to purchase tape recorder and tapes necessary for operation of criminal courts), that power may be exercised only where such expenditures are essential to the fulfillment of the court's constitutional obligations, *County of Barnstable v. Commonwealth*, 410 Mass. 326, 333 (1991), and, even then, only with the prior written approval of the Chief Justice of the court in question and notice to the Chief Justice of this Court. *O'Coins*, 362 Mass. at 516; SJC Rule 1:05.

[229]To the extent that the receiver's powers enable him to exercise executive functions (such as hiring and firing of personnel, entering and terminating contracts, and spending funds appropriated by the Legislature) without the statutory constraints that otherwise apply to the exercise of these functions by state officials, those powers also run afoul of Article XX of the Declaration of Rights, which vests the "power of suspending the laws, or the execution of the laws" exclusively in the Legislature. *MBTA Advisory Board v. MBTA*, 382 Mass. 569, 578 (1981).

receivership, "The principle of separation of powers requires that the court not intrude into an area that is fundamentally legislative." *Id.* at 418. Nor may a receiver, a judicial officer, perform functions that have been statutorily delegated to the executive branch, *Brach v. Chief Justice of the District Court Department*, 386 Mass. 528, 538 (1982), particularly where the executive powers in question have been assigned to executives outside of the department whose operation the receiver is appointed to oversee. *Cf. Perez*, 379 Mass. at 739-40 (receivership does not derogate from separation of powers where municpal agency's powers are taken over by receiver as remedy for that agency's violation of law).

In this case, many of the receiver's enumerated powers intrude impermissibly on the powers of the legislative and executive branches. For example:

(1) The receiver's power to create positions, App. 1346, is a legislative prerogative. *Commissioner of Administration v. Kelley*, 350 Mass. 501, 505 (1966).

(2) The receiver's power to prosecute, defend, and settle lawsuits on behalf of DMR, App.1346, directly conflicts with G.L. c. 12, § 3, by which the Legislature delegated this authority exclusively to the Attorney General. *Feeney v. Commonwealth*, 373 Mass. 359, 366 (1977); *cf. Commonwealth v. Gordon*, 410 Mass. 498, 500 (1991) (judge cannot exercise prosecutor's discretion not to prosecute an indictment).

(3) The receiver's power to "contract on behalf of DMR with any private entity or person for any lawful purpose to perform any function currently or previously performed by DMR," App. 1345, conflicts with the Pacheco Law, G.L. c. 7, §§ 52-55, which strictly curtails the power of state agencies to contract with private entities to provide services previously provided by the state agencies well as other public bidding and contracting statutes, G.L. c. 29 §§ 29A-29B, imposing various procedural and substantive requirements for the letting of state contracts.

(4) The receiver's power to retroactively review DMR's previous regulatory decisions, which BRI failed to appeal in a timely manner, and to modify or rescind those decisions "as is required," App. 1343-44, directly

conflicts with the time limits and deferential standards for judicial review of such decisions under G.L. c. 30A, § 14, which would otherwise apply.

(5) The receiver's power to remove the Commissioner, App. 1346, is a power that has been statutorily assigned to the Secretary of Health and Human Services. G.L. c. 19B, § 2; *cf. McGonigle v. The Governor*, 418 Mass. 147, 150-51 (1994) (Governor had no power to remove county sheriff, where statute conferred that power on Supreme Judicial Court).

(6) The receiver's power to unilateraliy "disaffirm, reject or discontinue at any time any . . . personal or professional services and material contracts," App. 1346, not only conflicts with the statutes governing collective bargaining and procurement of services by the state but also raises serious problems under the takings clause of the Fifth Amendment to the United States Constitution, insofar as the receiver's termination or breach of existing contracts leaves the vendors without either a contractual remedy or "just compensation" for their goods or services.

All of these constitutional problems with the receiver's powers are exacerbated by the court's grant to the receiver of immunity from suit in any forum arising from the exercise of these powers, App. 1349-50, immunity which exceeds even that of the court itself. *Pulliam v. Allen*, 466 U.S. 522, 528-44 (1984) (state court judges not immune from prospective injunctive relief or attorney's fees for civil rights violations). Apart from the court's doubtful authority to grant such immunity, this grant of immunity deprives third parties, including DMR employees, unions, vendors, and clients, of any recourse for violation of their constitutional, statutory, collective bargaining, contractual, or common law rights by the receiver. This wholesale abrogation of the rights of third parties is perhaps the most egregious aspect of the court's receivership orders. *Cf. Spence*, 382 Mass. at 418 (rights of third parties "should not be swept away simply because the [party placed in receivership] has mismanaged its affairs").

3. The Trial Court's Overly Broad Injunctive Orders Fail to Conform to the Requirements of Mass. R. Civ. P. 65(d).

Rule 65(d) of the Massachusetts Rules of Civil Procedure requires that "an injunction or restraining order . . . be specific in terms . . . [and] describe in reasonable detail . . . the act or acts sought to be restrained." The trial court's injunctive orders fall far short of meeting these requirements.

Particularly problematic in this regard are the orders that enjoin DMR's attorneys from "seek[ing] to accomplish through the Individual Guardianship proceedings what they are enjoined from doing herein" and from filing "groundless and multiple pleadings" in those proceedings. App. 1342. These orders fail to specify what particular actions DMR's attorneys are enjoined from taking. This lack of specificity, combined with the court's threat of sanctions, App. 1342, and its referral of its findings to the Board of Bar Overseers, App. 1293, can serve only to chill *any* actions by DMR's attorneys, or by the court-appointed lawyers for the individual students, to vigorously represent the interests of their clients in those proceedings. *See Commonwealth v. Segal*, 401 Mass. 95, 98 (1987) ("[c]ontempt or the threat of contempt should not be used to chill an attorney's vigorous but respectful advocacy").

In addition, given the broad-ranging duties delegated to the receiver by the court's receivership orders (which are themselves highly problematic, as shown above), the orders enjoining DMR employees or agents and anyone acting in concert with them from "tak[ing] any action to obstruct, frustrate, or interfere with the Receiver in the performance of his duties" and from "aid[ing], counseling or soliciting any other person to take any such action," App. 1348, similarly fail to specify or describe in reasonable detail what particular actions are prohibited. Virtually any action or advice pertaining to BRI could well be deemed to fall within this prohibition.

4. Because It Is Likely that the Trial Court's Receivership and Injunctive Orders Will Be Vacated by this Court, and Because of the Serious Risk of Irreparable Harm to the Commonwealth and the Public in the Interim, These Orders Should Be Stayed Pending This Court's Decision on the Merits of This Appeal.

For the reasons just discussed, in addition to the arguments on the merits of the trial court's contempt judgment made in the earlier sections of this brief, the extraordinary injunctive and receivership relief granted by the trial court should ultimately be vacated by this Court. However, as this Court has repeatedly recognized, "[A receivership] decree can often have irreversible and far-reaching consequences" that cannot be remedied even by an appellate court's eventual ruling in defendant's favor. *Lopez*, 384 Mass. at 169; *George Altman, Inc.*, 366 Mass. at 179. It is therefore appropriate, in the interests of justice, that these orders be stayed pending this Court's decision on the merits of this appeal.[230]

a. Absent a stay of the extraordinary relief granted by the trial court, DMR and the public will be irreparably harmed.

The extraordinary relief granted by the trial court, if not stayed pending resolution of this appeal, will have the increasingly irreparable effect of depriving DMR—the state agency charged with protecting the health, safety, and dignity of the Commonwealth's mentally retarded citizens—of any

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[230]In its order denying the Commissioner's previous motion for a stay pending appeal, this Court expressly permitted the Commissioner to renew his request in the present brief. App. 1471-72.

regulatory authority over BRI, a provider of the most highly intrusive forms of behavior modification treatment permitted by state law.

Under the trial court's orders, "DMR's powers, as they relate to BRI, its students and families, [are] totally superseded by the Receiver." App. 1342. Thus, absent a stay, DMR will be powerless to ensure that aversive procedures are used only "as a last resort" and "only to address extraordinarily difficult or dangerous behavioral problems . . . that have seriously harmed or are likely to seriously harm the individual or others,"[231] as required by DMR regulations. 104 C.M.R. §§ 20.15(1)(c) and 20.15(4)(b). Nor will DMR be able to investigate allegations of abuse or neglect of BRI students, as required by G.L. c. 19C and 104 C.M.R. §§ 24.01 *et seq.* Given the court's findings of over-regulation and over-investigation by DMR, F. 271-85, App. 1277-80, it is obviously the court's intention that the receiver carry out these crucial responsibilities in a less vigilant manner. Any harm suffered by BRI's clients in the absence of strict oversight and thorough investigation may well be tragically irreparable. App. 1428-29.

Furthermore, despite the language limiting the receiver's powers to DMR's relations with BRI, App. 1342, the potential effect of the court's orders on DMR's operations is far more sweeping. The receiver is directed to ensure that "anti-[BRI] bias is eliminated," App. 1344, and, to that end, is empowered to reorganize the entire structure of DMR and to discipline or fire all employees. App. 1346. The receiver is also empowered to "disaffirm" any contracts previously entered into by DMR. App. 1346. Thus, these orders affect not only the individual who has been found to be in contempt

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[231]No such protection is or could be provided by the Probate Court, which approves individual treatment plans periodically but has no day-to-day oversight as to how those plans are actually implemented by BRI. Moreover, the Probate Court's "approval" is limited to a determination of whether the ward, if competent, would consent to the treatments contained in his or her treatment plan. This procedure provides no oversight whatsoever of the overall operations of the facility. Nor can the court monitor perform this function, since, as discussed above, his powers under the Settlement Agreement expressly exclude the power to oversee BRI's compliance with behavior modification regulations. *See* Arguments I.A-I.C, *supra*.

but also a broad range of innocent third parties, including all DMR employees, unions, and vendors and the public they serve.

Nor is the effect of the court's orders limited to DMR and its employees and vendors. Rather, insofar as the receiver will oversee all abuse investigations concerning BRI's students, he will also supplant the authority of the Disabled Persons Protection Commission, a state agency that shares this responsibility with DMR under G.L. c. 19C. The operations of other state agencies—including the Executive Office of Health and Human Services, the Department of Education, the Civil Service Commission, the Division of Purchased Services, the Attorney General's Office, and the Department of Personnel Administration—who each act "jointly or in concert with" DMR for various purposes, are also constrained by these orders. App. 1348.

The potential interference with the statutory missions of these various state agencies and officials and, more important, the harm that may be suffered by the particularly vulnerable individuals served by BRI, is exacerbated by the fact that the order further deprives those who may be harmed by the receiver's action (or inaction) of any legal recourse. App. 1349-50. Thus, in the absence of a stay, any third parties adversely affected by the receiver's actions will have no remedy, at least until the court's orders are vacated, which may be too late to adequately prevent or repair the injuries they have suffered in the interim.

b. Neither BRI nor its students would be immediately or irreparably harmed if the relief granted by the trial court is stayed.

As discussed in Arguments III.B.21 and IV.A.1, *supra*, the trial court's findings and the underlying evidence fail to establish the requisite risk to the public health or safety or to the financial stability of BRI that would warrant the drastic remedy of placing DMR in receivership. *A fortiori*, no emergency

warrants the continuing imposition of this remedy pending resolution of this appeal.

Nothing in the court's findings or in the underlying evidence indicates that this drastic relief is necessary in order to protect BRI or its clients from any present risk of concrete, immediate, and irreparable harm. Rather, the harm to BRI found by the court is primarily economic, F. 286-90, 299-303; App. 1281-82, 1285-86, and will be amply remedied if the court's generous attorney's fee award, App. 1341, is upheld on appeal. *But see* Argument IV.B, *infra*. There is no indication that any indirect effect of this financial harm on BRI's students is serious enough to warrant the continuation of this receivership pending resolution of this appeal. Rather, even the court's own findings (which, as shown in Argument III.B.21, *supra*, are clearly erroneous in any event), indicate that the adverse effect of DMR's regulatory activity on students is primarily limited to a decrease in the amount of time that staff can devote to individual students and a reduction in the availability of special rewards, such as field trips. F. 291-95, App. 1283-84. Other than a finding that one individual received more treatments with other aversives after being taken off of the specialized food program, F. 298, App. 1284-85, which is contradicted by that student's own court-appointed attorney, App. 1363, and BRI's own reports of that student's progress, App. 1363, there is no finding that any student has suffered, or is likely to suffer, any serious or irreparable harm absent the continuing imposition of the drastic relief ordered by the trial court. Moreover, any harm that may be suffered by BRI pending a decision by this Court is far outweighed by the continuing risk of more serious harm to DMR and the public in the absence of a stay.

B. The Trial Court Abused Its Discretion and Erred as a Matter of Law in Awarding over $1 Million in Attorneys' Fees.[232]

1. The Trial Court Abused Its Discretion by Failing to Scrutinize the Reasonableness of the Hours Expended or the Expenses Incurred and by Failing to Explain the Amount of Its Award so as to Permit Meaningful Appellate Review.

In awarding a total of $1,098,087.50 in attorneys' fees and expenses, the trial court compensated a total of 25 attorneys and paralegals for every minute of time[233] and every penny of expenses actually spent, without any determination as to the reasonableness of the amount of time spent by particular attorneys on particular tasks or of the $71,017.34 of expenses they incurred, and without permitting DMR to review the underlying billing records so as to contest these issues. This gross abuse of the court's discretion warrants vacating this award in its entirety, even if the underlying contempt judgment is upheld.

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[232]It is doubtful whether any award of attorney's fees against a state official in his official capacity as a sanction for civil contempt is permissible without an express statutory waiver of sovereign immunity. *M.C. v. Commissioner of Correction*, 399 Mass. 909, 913 (1987); *Broadhurst v. Director, Division of Employment Security*, 373 Mass. 720, (1977). *Cf. Commonwealth v. One 1987 Ford Econoline Van*, 413 Mass. 407, 414 (1992) (upholding award of fees against the "Commonwealth," viz., the District Attorney, as a contempt sanction, without any discussion of sovereign immunity, which was waived by the Commonwealth in bringing that affirmative case); *see In re Grand Jury Subpoena*, 411 Mass. 489, 502 n. 14 (1992).

[233]While the fees awarded to 23 of the attorneys and paralegals were based on the time spent multiplied by various hourly rates, Kenneth Kurnos and Charles Krattenmaker were awarded a flat fee of $5,000, the precise amount that they charged their clients for their services. App. 1321.

Although trial courts have broad discretion in determining the amount of court-awarded attorney's fees, that discretion is not unlimited. As aptly stated by one appellate court, "The court's role as the guarantor of fairness obligates it not to accept uncritically what lawyers self-servingly suggest is reasonable compensation for their services." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). Rather, "the judge must *exercise* the discretion granted" (emphasis added), to ensure that the amount awarded is in fact "reasonable." *Stratos v. Department of Public Welfare*, 387 Mass. 312, 324 (1982);[234] *see also Coyne Industrial Laundry of Schenectady, Inc. v. Gould*, 359 Mass. 269, 277-78 (1971) (applying "strictly conservative principles" to reduce the amount of fees awarded by the trial court as a contempt sanction).

"The [trial] court should not only exercise its discretion but do so demonstrably," *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931, 964 (1st Cir. 1995), by "provid[ing] a concise but clear explanation of the reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *accord Rapp v. Barry*, 398 Mass. 1004, 1005 (1986); *Strand v. Herrick & Smith*, 396 Mass. 783, 789 (1986); *Torres v. Attorney General*, 391 Mass. 1, 16 (1984). In particular, the trial court must make specific findings as to the reasonableness of the time spent by particular attorneys on particular tasks, *Stewart v. Gates*, 987 F.2d 1450, 1452 (9th Cir. 1993); *Kennedy*, 400 Mass. at 275; and the reasonableness of the particular expenses incurred. *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983). In addition, where fees are awarded as a sanction for contempt, the court must make specific findings identifying "those . . . efforts that were useful and necessary to ensure compliance with the court's orders and those that were not,"

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[234]Although many of the attorney's fees cases cited herein were decided under the federal Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, the same standards and methodology are applied by both federal and state courts in awarding fees as a sanction for civil contempt. *See, e.g., Halderman v. Pennhurst State School & Hospital*, 49 F.3d 939, 941 (3rd Cir. 1995); *Ranco Industrial Products Corp. v. Dunlap*, 776 F.2d 1135, 1140 (3rd Cir. 1985); *Burke v. Guiney*, 700 F.2d 767, 770 (1st Cir. 1983); *Kennedy v. Kennedy*, 400 Mass. 272, 274-75 (1987); *Arch Medical Associates, Inc. v. Bartlett Health Enterprises*, 32 Mass. App. Ct. 404, 409 (1992); *Olmstead v. Murphy*, 21 Mass. App. Ct. 664, 666 (1986).

Stewart, 987 F.2d at 1452; *Halderman v. Pennhurst State School and Hospital*, 533 F. Supp. 649, 654 (E.D. Pa. 1982), *aff'd in part, remanded in part*, 49 F.3d 939 (3rd Cir. 1995); *Arch Medical Associates*, 32 Mass. App. Ct. at 409. In the absence of such findings, there can be no meaningful appellate review of the trial court's award. *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713, 723 (3rd Cir. 1989); *Ranco Industrial Products Corp. v. Dunlap*, 776 F.2d 1135, 1140 (3rd Cir. 1985); *Donnell v. United States*, 682 F.2d 240, 250 (D.C. Cir. 1982), *cert. denied*, 459 U.S.1204 (1983).

In this case, the trial court's sole finding of fact relating to attorney's fees is the following conclusory statement: "Total legal fees incurred by BRI, the parents and the class of students as a result of this litigation, which were necessary and reasonable in response to the wrongful conduct of DMR, are $1,098,087.50."[235] In its Conclusions of Law, the court further states as follows:

> The amount sought by the Parties as reimbursement for the attorneys' fees they have been forced to expend as a result of the defendant's conduct over the last two years is fair and reasonable. The Court makes this finding, incorporating the Affidavits of the above mentioned parties based on the attorneys' years at the bar, standing in the legal community, the caliber of their work in this case, the difficulty of the matter, and the fact that there was minimal duplication of effort.

With respect to the last factor, the court further "notes that it was reasonable at trial for three attorneys from [BRI] to be involved. DMR was represented at trial by three attorneys." More generally, the court further "finds that the enormous expenditure of legal resources by DMR in its contemptuous attack on [BRI] more than justifies the legal commitment [BRI] was obliged to make to repel those efforts."

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[235]As indicated in the Appendix to the trial court's conclusions of law, the total amount of the fee award is simply the sum total of the hours claimed by each of the applicants (multiplied by various hourly rates) plus the amount of expenses actually incurred, according to their affidavits.

These conclusory statements, which are based almost verbatim on BRI's proposed conclusions of law,[236] App. 1028-29, fall far short of providing the kind of reasoned analysis that is necessary to permit meaningful appellate review. "Conclusory statements concerning reasonableness are insufficient to withstand appellate review." *Grendel's Den v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984) (citing *Hensley*, 461 U.S. at 439 n. 15). As this Court recognized in one of its leading cases on the calculation of attorney's fees, simply listing the relevant factors does not "lead with any certainty to a number of dollars." *Stratos*, 387 Mass. at 322. In particular, while the amount of time actually spent is an appropriate starting point for the court's calculation of a reasonable fee, the court must go on to make findings as to the reasonableness of spending particular amounts of time on particular tasks. *Society of Jesus of New England v. Boston Landmarks Comm.*, 411 Mass. 754, 760 (1992); *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977) ("'an attorney's record of time is not a talisman'; the [trial] court should scrutinize it with care"), *cert. denied*, 438 U.S. 916 (1978). Nor is the finding that DMR expended substantial legal resources in regulating BRI sufficient, in itself, to justify the reasonableness of every minute spent by each of the 25 attorneys and paralegals who worked on this case on behalf of BRI, the parents, and the students. *Cf. Olmstead v. Murphy*, 21 Mass. App. Ct. at 668 (concluding that "more effort was expended . . . than the difficulty of the case warranted, notwithstanding the particular obstacles erected by the defendants").

Remarkably absent from the court's findings and conclusions are any findings whatsoever on the following essential points:

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[236]As discussed in section III.A, *supra*, this, in itself, casts substantial doubt on whether the trial court exercised its independent judgment in calculating and explaining its fee award. *Lewis v. Emerson*, 391 Mass. at 524, 526. Although the court requested and obtained the attorneys' billing records prior to making these findings, App. 1201, the court's findings and conclusions contain no information that is not contained in the applicants' affidavits and in BRI's proposed findings and conclusions, which were submitted prior to the underlying billing records.

(1) why it was reasonable for BRI to staff this case with 18 lawyers and paralegals during the two-year period covered by its fee request, App. 621-22, *see Hensley*, 461 U.S. at 434;

(2) why it was reasonable to compensate attorneys, including several first-year associates, at rates ranging from $125 to $175 per hour, App. 1321, for every hour of time spent, including time spent on routine tasks (such as drafting correspondence and deposition notices, drafting public records requests, preparing fee affidavits, and preparing exhibit binders) and nonlegal tasks (such as rewriting treatment plans; providing factual information to DMR, attending Human Rights Committee meetings, and preparing for psychiatric evaluations), App. 572-87, 1188-90. *See Hensley*, 461 U.S. at 434; *Stratos*, 387 Mass. at 323; *Pennhurst*, 49 F.3d at 942;

(3) why it was reasonably necessary for BRI's lawyers to aggressively oppose virtually every regulatory action taken by DMR over the last two years, rather than simply comply with such actions or pursue less expensive remedies, including administrative appeals, which BRI neglected to do; and

(4) why it was reasonably necessary for counsel to incur expenses totaling $71,017.34, including $13,057.09 for outside photocopying alone. App. 1194-95. *See Grendel's Den*, 749 F.2d at 957; *Loper v. NYC Police Dep't*, 853 F. Supp. 716, 723-24 (S.D.N.Y. 1994).

The trial court's failure to make findings on these issues may be due, in large part, to the applicants' failure to satisfy their burden of demonstrating the reasonableness of the amounts sought. *See Hensley*, 461 U.S. at 433; *Society of Jesus*, 411 Mass. at 759. In particular, the burden is on the fee applicants "to produce satisfactory evidence—in addition to the attorney[s'] own affidavits"—of the reasonableness of the amounts sought, *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984); *Society of Jesus*, 411 Mass. at 759 n. 11; to demonstrate that they exercised "billing judgment" "in excluding from a fee request hours that are excessive, redundant, or otherwise unnecessary," *Hensley*, 461 U.S. at 434; and to justify their expenses. *Grendel's Den*, 749 F.2d at 957. In a contempt case, the fee applicants have the additional burden of establishing a causal connection between the amount of their fee requests and the defendant's disobedience of a court order. *Arch*

Medical Associates, 32 Mass. App. Ct. at 409. Because the applicants produced no evidence on these points, as to which they had the burden of proof, the trial court abused its discretion in failing to deny, or at least substantially reduce, their fee award on this basis.

2. *The Trial Court Erred in Awarding Fees Without Giving the Commissioner an Opportunity to Review and Respond to the Fee Applicants' Contemporaneous Time Records, Which Were Submitted In Camera and Impounded by the Court.*

In support of their respective applications for attorney's fees, counsel submitted affidavits describing their background, experience, and billing rates and generally describing the various kinds of work performed in this case. App. 563-627, 1176-1200. The affidavits did not specify which attorney(s) performed particular tasks, the dates on which particular tasks were performed, or the amount of time spent on particular tasks; nor did the affiants provide any contemporaneous time records containing such information.[237] The expenses claimed were similarly un-itemized, except in general categories, and unsupported by any invoices or receipts.

Because these affidavits were patently insufficient to support an application for court-awarded attorney's fees, *e.g.*, *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 32 F.3d 632, 634 (1st Cir. 1994); *Stewart*, 987 F.2d at 1453; *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); *National Assoc. of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982); *Arch Medical Associates*, 32 Mass. App. Ct. at 409, the Commissioner argued that the fee applications should be denied for failure

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[237]Paul Cataldo, one of the two attorneys for "the student members of the class," did attach his billing records to the affidavit that he filed with the court and served on other parties including the Commissioner. App. 1131-34. While Mr. Cataldo's co-counsel, Michele Dorsey, states in her affidavit that her billing records are attached, App. 1174, no copies of the attachments were, in fact, served on the Commissioner.

to provide such supporting documentation. App. 737-38. DMR's Proposed C. 49. Perhaps in response to the Commissioner's proposal, the court subsequently issued an order requiring counsel "to submit and file *in camera* their respective existing unredacted legal bills that underly [sic] their Affidavits heretofore submitted on this issue." App. 1201. As grounds for this order, the court stated, "This Court finds that such in camera review is necessary and appropriate in order to inspect and consider the confidential billing information under the circumstances of this litigation where attorney-client privilege applies." *Id.*

The Commissioner objected to such *in camera* review on the grounds that such information is not privileged and that, without access to this information, he was severely prejudiced in his ability to contest the reasonableness of the amount of fees sought.[238] After issuing a judgment and order awarding counsel fees for every hour of time spent on this case, the court ordered, *sua sponte*, that the supporting documentation be impounded, so that, to date, the Commissioner still has had no opportunity to review counsel's time records and to object, on that basis, to the reasonableness of the time spent.[239]

Where a party seeks to have its fees paid by an opposing party, courts uniformly require the fee applicant to provide the underlying contemporaneous billing records or other suitable documentation—specifying precisely how much time was spent by particular attorneys, on particular tasks, on particular dates—not only to the court but also to the opposing party. *E.g.*, *Hensley*, 461 U.S. at 433; *In re Kunstler*, 914 F.2d 505, 524 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991); *Concerned Veterans*, 675 F.2d at 1327; *cf. Handy v. Penal Institutions Commissioner of Boston*, 412 Mass. 759, 767-68 (1992) (not an abuse of

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[238]Because the Commissioner's response was subsequently impounded by the court, App. 1206, no copy of that response is included in the Appendix.

[239]The Commissioner subsequently moved to terminate or modify the court's impoundment order so that he would be better able to contest the reasonableness of the fee award in the present appeal, but the court denied that motion.

discretion to reduce fee award by one-fourth rather than deny it entirely for failure to produce contemporaneous time records, where defendants did not seek the records and applicant provided other evidence of time spent by particular lawyers on particular tasks). As stated by former Chief Justice Burger,

> When a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of the time and services for which fees are sought. It would be inconceivable that the prevailing party should not be required to establish at least as much to support a claim [for fees to be paid by the opposing party] as a lawyer would be required to show if his own client challenged the fees.

Hensley, 461 U.S. at 440 (Burger, C.J., concurring). Without access to such information, the party opposing a fee application is unable to meet his burden of identifying, with specificity, what particular aspects of the claim are unreasonable. *Stewart v. Gates*, 987 F.2d at 1452; *Bell*, 884 F.2d at 720; *Donnell v. United States*, 682 F.2d at 247. And, as several courts have recognized, the opposing party's active and informed participation in the process of determining a reasonable fee is necessary to ensure that the fee awarded is not arbitrary or based solely on the self-serving affidavits of the fee applicant but, rather, is the result of a fair adversary process. *Scarfo*, 54 F.3d at 965 ; *Grendel's Den*, 749 F.2d at 950; *Stewart*, 987 F.2d at 1452; *Bell*, 884 F.2d at 719; *Concerned Veterans*, 675 F.2d at 1327.

In the few cases where attorney-client privilege has been raised as a bar to providing billing records for purposes of determining the reasonableness of an attorney's fees, such claims have been rejected, either on the basis that information contained in such records is not a communication subject to the privilege, *Stastny v. Southern Bell Tel. & Tel. Co.*, 77 F.R.D. 662, 663 (W.D.N.C. 1978); *Blowers v. Lawyers Co-op Publishing Co.*, 526 F. Supp. 1324 (W.D.N.Y. 1981), or because any claim of privilege is "undoubtedly" waived by the filing of a fee application. Mary Frances Derfner & Arthur D. Wolfe, *Court Awarded Attorney's Fees* I 18.06[2][d] (1995 ed.). These holdings are in accordance with the general rule that attorneys' billing records and hourly statements are not privileged. *FSLIC v. Ferm*, 909 F.2d 372, 373 (9th Cir. 1990); *Tornay v. United States*, 840 F.2d 1424, 1426, 1428 (9th Cir.

1988); *FTC v. Cambridge Exchange, Ltd.*, 845 F. Supp. 872, 874 (S.D. Fla. 1993); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 517 (M.D.N.C. 1986); E. Richard Larson, *Federal Court Awards of Attorney's Fees*, 274 n. 19 (1981).

In directing the applicants to provide the documentation for their fee claims only to the court and then impounding that information, *sua sponte*, the trial court provided no explanation as to why all of the information contained in the applicants' billing records is privileged, contrary to the general rule discussed above.[240] Nor did the court follow the procedures mandated by the Uniform Rules on Impoundment Procedure, Trial Court Rule VIII—including notice, hearing, and written findings—prior to impounding these documents. Moreover, even if there is some information contained in the billing records of counsel for BRI or for the parents that is privileged and is not essential to a determination of their claims for fees, that information alone should have been redacted and the remaining records should have been disclosed to the Commissioner, either by the fee applicants themselves or by the court after its *in camera* review. To award every penny of the more than $1 million claimed by these attorneys without permitting the state agency that is charged with paying this extraordinary sum, any access to the underlying basis for these claims, in itself warrants vacation of the fee award to these applicants in its entirety.

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[240]This extraordinarily broad and unexplained application of the attorney-client privilege to all of BRI's billing records over the course of the last two years stands in stark contrast to the court's ruling that the privilege does *not* apply to the only two items, comprising less than one page of a single document, as to which DMR claimed the attorney-client privilege. App. 1305-08; *see* Argument III.B.13.c, *supra*.

3. *The Trial Court Abused Its Discretion in Failing to Reduce Its Award to Account for Certain Patently Unreasonable Expenditures of Time and Money.*

Even based on the limited information available to the Commissioner and to this Court, certain amounts claimed by the applicants and awarded by the trial court should be vacated as abuses of the trial court's discretion to award a "reasonable" fee.

a. The Trial Court Abused Its Discretion in Awarding More Than $200,000 to the Parents and the Students, Given Their Attorneys' Limited Contribution to the Contempt Proceedings.

In addition to awarding $896,795.61 to BRI's 18 attorneys and paralegals, App. 661-62, the court also awarded $201,291.98 to 7 attorneys for the parents,[241] App. 1148-52, 1176-85, and the students.[242] App. 1131-47, 1173-

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[241]It is not clear from the record precisely whom Eugene Curry, Allen Larson, Christopher Fiset, Kenneth Kumos, and Charles Krattenmaker represent in this case. In their respective fee affidavits, Mr. Curry identifies himself, Mr. Larson, Mr. Fiset, and Mr. Kumos as "counsel to the plaintiff class of students at the Judge Rotenberg Educational Center, their parents and guardians," App. 623; while Mr. Kumos identifies himself and Mr. Krattenmaker as "counsel to the parents and guardians of the plaintiff class of students." App. 1148-49. Earlier court filings were signed by Mr. Curry as attorney for "The BRI Parents and Friends Association, Inc.," an organization comprising some but not all of the parents of BRI students. However, since May 18, 1995, when the trial court stated (in its memorandum and order denying the individual students' motion to intervene) that "the entire Class [consisting of all Students at BRI, their Parents and Guardians] is . . . represented by Mr. Curry," he has been signing court papers as attorney for that entire class. *E.g.*, App. 1130.

[242]There is also some confusion as to whom Paul Cataldo and Michele Dorsey represent.

(continued...)

75. This amount is clearly excessive, given the limited role played by these attorneys in the contempt proceedings.

Because neither the parents nor the students were parties to the contempt proceedings,[243] the trial court would have been justified in declining to award any fees to their attorneys on that ground. *See Morales v. Turman*, 820 F.2d 728, 731-32 (5th Cir. 1987) (denying fees to counsel for non-party even though they were appointed by the court and rendered services beneficial to plaintiff class). A more moderate approach, often taken with respect to intervenors, is to base a determination of fee eligibility on the role their counsel played in the litigation. *E.g., Grove v. Mead School District No. 354*, 753 F.2d 1528, 1535 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985) ("Awards to intervenors should not be granted unless the intervenor plays a significant role in the litigation."); *Donnell v. United States*, 682 F.2d at 247-48 (same). "Even if the [trial] court finds that intervenors' participation in the case was important and substantial, there yet remains the question whether this participation needed to be so extensive given the central role played by [other attorneys with similar interests]." *Id.* at 250. Where fees are awarded to several attorneys whose clients have similar interests, the amount awarded should be reduced to account for any unnecessary duplication of effort. *Pennhurst*, 49 F.3d at 943; *cf. Society of Jesus*, 411 Mass. at 759-61 (reducing amount of fees where several attorneys for same party requested

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[242](...continued)
The trial court appointed them to succeed attorneys Marc Perlin and Max Volterra, who had signed the Settlement Agreement on behalf of "BRI clients," App. 133, not on behalf of the "Class of All Students at BRI, Their Parents and Guardians," which was represented at that time by Robert Sherman, App. 133, now one of BRI's counsel. App. 563. In appointing Mr. Cataldo and Ms. Dorsey, the court indicated that they were being appointed as "counsel to the class of students," App. 132, although no such subclass has ever been certified by the court. *See* Prior Proceedings, subsection 2, *supra*. In a subsequent order, denying the individual students' motion to intervene, the trial court indicated that Mr. Cataldo and Ms. Dorsey represent "the student members of the Class." Mr. Cataldo and Ms. Dorsey themselves apparently share in this confusion, since, in their fee affidavits, Mr. Cataldo identifies himself as counsel for the "class of students," App. 1132, while Ms. Dorsey identifies herself as counsel for the "student members of the Class." App. 1173.

[243]*See* Prior Proceedings, subsection 8, *supra*.

fees for preparing and appearing at oral argument but only one attorney argued).

Under these standards, the fees awarded to counsel for the parents and students should be substantially reduced if not entirely disallowed.[244] Ms. Dorsey and Mr. Cataldo called no witnesses and introduced no exhibits at trial. Mr. Curry introduced one exhibit and called four witnesses, all of whom were also on BRI's and/or DMR's lists of potential witnesses; the combined testimony of those four witnesses consumed less than a half-day of the 13-day trial. Mr. Fiset was silent throughout the trial. Counsel for the parents and for the students each submitted proposed findings of fact and conclusions of law, App.1086-1130, neither of which added anything substantial to the voluminous proposed findings and conclusions submitted by BRI. It does not appear that the trial court adopted any of the parents' or students' proposed findings as written.

Given the very limited role played by these attorneys, the court abused its discretion in requiring the defendant to compensate them at the rate of $125 or $150 for more than 1,000 hours, largely spent sitting silently at counsel table or at depositions or drafting documents that added little or nothing of substance to those submitted by BRI. Like other fee applicants who were denied fees in similar circumstances, these attorneys "'merely caught hold of a train on its way out of the station and are seeking to ride it to substantial award of attorney's fees. [They] played no part in firing the boiler, getting up a head of steam, or opening the throttle. [They] just went along for the ride.'" *Donnell*, 682 F.2d at 247 (quoting *Bush v. Bays*, 463 F. Supp. 59, 66 (E.D. Va. 1978)); *see also Pennhurst*, 49 F.3d at 943-44 (reducing by 50% fees awarded for time spent by additional attorney with similar interest attending depositions and drafting proposed findings).

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[244]The fees awarded to Ms. Dorsey and Mr. Cataldo should be disallowed for another reason as well. As court-appointed counsel, App. 211, 1132, 1173, these attorneys are paid by the state rather than by their clients. Therefore, no award of fees is necessary to compensate their clients for the cost of vindicating their rights under the Settlement Agreement, the only legitimate reason for awarding attorneys' fees in a contempt action. *Arch Medical Assoc.*, 32 Mass App. Ct. at 409; *Burke v. Guiney*, 700 F.2d at 770.

At most, these attorneys should be compensated only for the time they spent actually preparing and examining their own witnesses or attending their own clients' depositions. In no event should the opposing party be required to pay for the time of more than one of these attorneys for simply sitting in on the trial or at depositions, in addition to one or more attorneys for BRI.[245] *Cf. Major v. Treen*, 700 F. Supp. 1422, 1433 (E.D. La. 1988) (where several attorneys billed for time at trial, court allowed fees only for those who took a leading role on that day).

b. The Trial Court Abused Its Discretion in Compensating Counsel for Certain Noncompensable Activities.

Even based on the limited information contained in the applicants' fee affidavits, certain activities for which they sought and received compensation stand out as clearly noncompensable. Many of the activities listed in BRI's fee affidavits—such as responding to DMR's requests for information, complying with certification conditions, responding to abuse investigations, drafting letters to BRI's out-of-state funding agencies, making public records requests (and related expenses), and attending to BRI's fiscal matters, App. 574-87—were not undertaken in the contempt litigation itself and therefore should not have been included in BRI's application, much less in the court's award. As is clear from BRI's own fee affidavits, BRI's counsel kept separate records for time spent on "litigation" and time spent on other nonlitigation activities including "certification."[246] App. 1194-95. Only time related to the contempt litigation itself is properly chargeable to the opposing party in that

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[245]Although the court found it was reasonable for BRI to be represented at trial by three attorneys, App. 1315, it made no attempt to explain why it was reasonable to have four additional attorneys present to represent the parents and children.

[246]Although, as discussed above, those records were not made available to the Commissioner.

litigation.[247] *Pennhurst*, 855 F. Supp. 733, 739 (E.D. Pa. 1994), *aff'd in part, remanded in part*, 49 F.3d 939 (3rd Cir. 1995); *Kennedy v. Kennedy*, 23 Mass. App. Ct. 176, 180 (1986), *aff'd*, 400 Mass. 272 (1987). Time spent responding to media inquiries is also noncompensable, *Pennhurst*, 49 F.3d at 942; *In re Kunstler*, 914 F.2d at 523; *Auburn Police Union v. Tierney*, 762 F. Supp. 3, 4-5 (D. Me. 1991), as is time spent on appellate litigation, absent express authorization by the appellate court. *Mellor v. Berman*, 390 Mass. 275, 284 (1983).

If this case is remanded to the trial court for further proceedings on attorneys' fees or for any other purpose, the Court should direct that it be assigned to a Superior Court judge in accord with the ordinary assignment process in the Superior Court.

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[247]Time spent by BRI's attorneys on regulatory matters, not related to litigation against the Commonwealth, is already paid for by Massachusetts and other states as a component of BRI's state-approved tuition rate. Ex. BRI-267. Requiring the Commonwealth to pay twice for such services would be particularly unreasonable. Moreover, although DPS has taken the position that time spent suing the Commonwealth is not reimbursable, *id.*, BRI's present rate apparently does not reflect this exclusion. *Id.* Therefore, any fees awarded to BRI in this case will be in addition to the amounts included in BRI's tuition rate for the same purpose.

CONCLUSION

For all of the above reasons, this Court should reverse the contempt judgment and vacate the relief granted by the trial court. Pending this Court's decision in this appeal, the Court should stay the trial court's receivership and injunctive orders.

Respectfully submitted,

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ADDENDUM

19B:1. Department of mental retardation; creation; powers of department and commissioner.

Section 1. There shall be a department of mental retardation, in this chapter called the department, and a commissioner of mental retardation who shall have and shall exercise exclusive supervision and control of the department. All action of said department shall be taken by the commissioner, or under the direction of said commissioner, by such agents or subordinate officers as he shall determine.

The department shall take cognizance of all matters affecting the welfare of the mentally retarded citizens of the commonwealth. The department shall have supervision and control of all public facilities for mentally retarded persons and of all persons received into any of said facilities, and shall have general supervision of all private facilities for such persons; provided, however, that this sentence shall not be deemed to interfere with or supersede any other provision of general or special law which grants or confers supervision and control of certain public facilities for mentally retarded persons and persons admitted to such facilities or which grants or confers supervision over certain private facilities for such persons, to any other department of the commonwealth or to any political subdivision. The department shall have supervision and control of all mental retardation facilities established within the department and, subject to appropriation, may further develop additional mental retardation facilities under commonwealth operation or, subject to appropriation, may contract with any private agency furnishing complementary or community mental retardation services to pay it the ordinary and reasonable compensation for such services actually rendered or furnished to persons in need thereof. The department may, subject to appropriation, enter into agreements with nonprofit charitable corporations, partnerships or collaboratives for the providing of mental retardation services. Such agreements may provide for the retention of all revenues resulting from all billings and third party reimbursements by such organizations, provided, that the expenditure of such funds is made in conformance with applicable state and federal law and subject to the approval of the commissioner.

The department shall be a corporation for the purpose of taking, holding and administering in trust for the commonwealth any grant, devise, gift or bequest made to the commonwealth, to it, or to any state school or other mental retardation facility of the department for the use of persons under its control in any such facility or for the use of such school or facility, or, if the acceptance of such trust is approved by the governor, for expenditure upon any work which the department is authorized to undertake.

The department shall select the site of any new state mental retardation facility and any land to be taken or purchased by the commonwealth for the purposes of any new or existing state mental retardation facility.

The department of highways shall construct and maintain roads on the grounds of property of a state mental retardation facility; and expenses so incurred shall be paid from appropriations for the maintenance of such facility.

20.15: Behavior Modification

(1) Authority, Applicability and Policy.

(a) Authority. 104 CMR 20.15 is promulgated under authority of M.G.L. c. 9, M.G.L. c. 123 and St. of 1986 c. 599, §§ 54 through 62..

(b) Application. 104 CMR 20.15 applies to all mental retardation programs which are operated, funded or licensed by the Department of Mental Health (hereinafter 'the Department") or by the Department of Mental Retardation.

In accordance with the requirements of St. 1986, c. 599, § 60, 104 CMR 20.15 shall remain in force and effect until superseded, revised, rescinded, or cancelled in accordance with law, by the Department of Mental Retardation.

(c) Policy. It is the purpose of the Department, reflected in 104 CMR 20.15, to assure the dignity, health and safety of its clients. Behavior modification is a widely accepted and utilized treatment which in many cases has enabled clients to grow and reach their maximum potential. Behavior modification emphasizes the use of positive approaches but in some cases involves the use of negative procedures. It is the Department's expectation that, in the vast majority of cases, particular procedures used to modify the behavior of clients will not pose a significant risk of harm to clients and will not be unduly restrictive or intrusive. Indeed, the Department believes that it is both sound law and policy that in individual cases the only procedures which may be used are those which have been determined to be the least restrictive or least intrusive alternatives.

As a general matter, it is the Department's strong policy that behavior modification procedures which pose a significant risk of physical or psychological harm to the clients or which are highly intrusive or restrictive should be used only as a last resort, subject to the most extensive safeguards and monitoring. Such interventions, under normal circumstances, would be considered to be corporal punishment and ordinarily would not be permitted in facilities operated, licensed or funded by the State. However, the Department recognizes that there are extraordinary cases in which there is a need to treat the most difficult or dangerous behavioral problems (which often involve serious self-mutilation or other self-destructive acts). In such cases it may be necessary to use extraordinary behavior modification procedures which would otherwise involve too much risk or potential harm to the dignity, health or safety of the client to be permitted.

It is the Department's policy that the use of such procedures in such exceptional circumstances must meet the heaviest burden of review among all treatments. The use of such procedures for a particular individual will be allowed for a particular client only after a rigorous review and approval by clinicians, human rights committees, and the Department. This process will insure, before the client can be subjected to this type of extraordinary procedure, that clinicians have exhausted other less intrusive, restrictive or risky procedures and further, that the likely benefit of the procedure to the individual out-weighs its apparent risk, intrusiveness, or restrictiveness.

In addition, it is the Department's policy that such procedures are only to be used in programs which are specially qualified and certified to use such procedures with appropriate care. It is further the policy of the Department that the application of a procedure for clients even after it has been approved must be strictly monitored by the program as well as by the Department itself. In summary, it is the purpose of 104 CMR 20.00 to insure that behavior modification procedures are used to enhance the dignity, health, and safety of clients and that extraordinary procedures which pose a risk to such health, safety and, dignity may only be used as a last resort, by certified programs, subject to the strictest safeguards and monitoring.

(2) Definitions.

Behavior Modification means treatment using Interventions designed to increase the frequency of certain behaviors and to decrease the frequency of or eliminate other behaviors which behaviors have, as a result of a behavior analysis by persons experienced in such analysis, been identified as needing to be changed in order to enable the individual to attain the most self-fulfilling, age appropriate and independent style of living possible for the individual.

20.15: continued

Intervention or Interventions means one or more of the following Behavior Modification procedures:

Aversive Stimuli means procedures involving things or events that, when presented contingent upon some specified target behavior(s), have a decelerating effect upon that behavior.

Deprivation Procedures means procedures which withdraw or delay in delivery goods or services or known reinforcers to which the individual normally has access or which the individual owns or has already earned by performing or not performing specified behavior.

Positive Reinforcement Programs means procedures in which a positive reinforcer (i.e., any consequent action which increases the likelihood of the immediately precedent behavior) is contingent on a specified behavior.

Time Out means socially isolating an individual by removing the individual to a room or an area physically separate from, or by limiting the individual's participation in, ongoing activities and potential sources of reinforcement, as a suppressive consequence of an inappropriate behavior.

(3) Classification of Interventions. Interventions used for Behavior Modification purposes shall be classified by Level pursuant to the provisions of 104 CMR 20.15(3).

(a) Advisory Panel for Classification of Behavior Modification Interventions. The Commissioner of Mental Retardation acting jointly with the Commissioner of Mental Health shall establish a joint Advisory Panel for the Classification of Behavior Modification Interventions for the purpose of ensuring that all Behavior Modification Interventions are properly classified by level.

1. The Advisory panel shall be composed of no fewer than five individuals, a majority of whom shall possess doctoral level degrees in psychology, with significant training and experience in applied behavior analysis and behavioral treatment. Such individuals shall be appointed for such terms as the Commissioners shall jointly designate.

2. The Advisory Panel shall meet as often as may be necessary to ensure the proper classification of Interventions.

3. The Advisory Panel shall assist the Commissioner or designee in responding to requests for advisory opinions pursuant to 104 CMR 20.15(3)(e) and in ensuring that the provisions of 104 CMR 20.15 are met.

(b) Level I Interventions. The following shall be deemed Level 1 Interventions for purposes of these regulations, 104 CMR 20.15, provided that use of such Level I procedures shall conform to the applicable standards specified in 104 CMR 20.15(4)(b):

1. Positive Reinforcement Programs utilizing procedures which have no discernible aversive properties, pose minimal risk of physical or psychological harm, and that do not involve significant physical exercise or physical enforcement to overcome the individual's active resistance, including but not limited to the following:

a. Positive reinforcement: procedures wherein a positive reinforcer is provided following a particular behavior.

b. Differential reinforcement of other behavior: procedures wherein a positive reinforcer is given after a specific behavior has not occurred for a certain period of time.

c. Differential reinforcement of incompatible behavior: procedures wherein a positive reinforcer is provided following a given behavior which is physically incompatible with the occurrence of one or more inappropriate behaviors.

d. Differential reinforcement of alternative behavior: procedures wherein a positive reinforcer is provided after a given behavior which is designed to replace one or more inappropriate behaviors.

e. Satiation: continued or repeated presentation of a positive reinforcer that poses no risk to health and is made available until it no longer is effective as a positive reinforcer.

20.15: continued

f. Token/point gain: procedures wherein a symbol or physical object or other tokens or points are provided after a given behavior and a given number of these tokens or points can be exchanged for a positive reinforcer.

2. Aversive Stimuli or Deprivation Procedures that involve no more than a minimal degree of risk, intrusion, restriction on movement, or possibility of physical or psychological harm, and that do not involve significant physical exercise or physical enforcement to overcome the individual's active resistance, including but not limited to the following:

a. Corrective feedback and social disapproval: the use of disapproving facial expressions and verbal statements such as "no", "wrong" or "stop that" following the occurrence of an unacceptable behavior.

b. Relaxation: procedures wherein, following the occurrence of unacceptable behavior with and agitated component, the individual is requested to assume and maintain a relaxed posture in a quiet location, with staff present.

c. Restitution: procedures wherein, following the occurrence of unacceptable behavior that disturbs the environment, the individual is requested to restore the environment to its original condition (or to a cleaner and/or more orderly state) by, for example, picking-up fallen objects, cleaning, apologizing, or otherwise providing restitution.

d. Ignoring: physical and social inattention during the occurrence of an unacceptable behavior.

e. Extinction: failing to supply (or otherwise arranging the absence of) the accustomed consequence(s) after a given inappropriate behavior occurs.

f. Token fines: procedures wherein points or tokens (which were previously earned or otherwise supplied) are removed or lost, contingent upon the occurrence of an inappropriate behavior.

g. Reinforcement Restriction: the withholding or decrease in the availability of positive reinforcements such as tea, coffee, desserts or edible treats that a dietician would find to be nonessential to a nutritious diet or specified leisure activities that are not part of the facility's or program's daily living routine.

h. Positive Practice: procedures wherein an individual is required to undertake repeated performances of an appropriate behavior.

i. Negative Practice: procedures wherein an individual is required to undertake repeated performances of an inappropriate behavior for a given time or repetitions following the occurrence of the inappropriate behavior.

j. Contingent exercise: procedures wherein a designated exercise or physical activity is performed for a given period of time or number of repetitions following the occurrence of an inappropriate behavior.

3. Time Out wherein:

a. the individual is moved away from the location where positive reinforcement is available, but remains in the same area and in view; or

b. the material, activity or event providing positive reinforcement is removed for a given period; or

c. the individual is placed in a room alone for brief periods of time, in no case more than 15 minutes, provided that the door of the room is open and that staff are present at or near the door of the room to monitor the individual's behavior while in the room; or

d. the individual is placed in a room with the door closed, with staff present in the room, for brief periods of time, in no case more than 15 minutes.

(c) Level II Interventions. The following shall be deemed Level II Interventions for purposes of these regulations, 104 CMR 20.15, provided that no such Level II Interventions may be used except in accordance with the applicable standards and procedures set forth in 104 CMR 20.15(4):

1. All Positive Reinforcement Programs, Aversive Stimuli and Deprivation Procedures, with the exception of those classified as Level I or Level III, including but not limited to the following:

20.15: continued

a. Any Intervention otherwise classified as level I where the procedure must be physically enforced to overcome the individual's active resistance.

b. Any Intervention otherwise classified as Level I where the procedure involves significant physical exercise.

c. Contingent application of unpleasant sensory stimuli such as loud noises, bad tastes, bad odors, or other stimuli which elicit a startle response.

d. Short delay of meal for a period not exceeding 30 minutes, as a result of inappropriate meal related behavior, designed specifically to teach appropriate meal related behavior.

2. Time Out wherein an individual is placed in a room alone with the door closed (but not locked) for brief periods of time, in no case more than 15 minutes; provided that staff are present at or near the door of the room to monitor the individual's behavior in the room.

(d) Level III Interventions. The following shall be deemed Level III Interventions for purposes of 104 CMR 20.15, provided that no such Level III Intervention may be used except in accordance with the standards and procedures set forth in 104 CMR 20.15(4), including without limitation the special certification requirement of 104 CMR 20.15(4)(f) and the general requirement of 104 CMR 20.15(4)(b) that a determination be made that the predictable risks, as weighed against the benefits of the procedure, would not pose an unreasonable degree of intrusion, restriction of movement, physical harm or psychological harm:

1. Any Intervention which involves the contingent application of physical contact aversive stimuli such as spanking, slapping or hitting.

2. Time Out wherein an individual is placed in a room alone for a period of time exceeding 15 minutes.

3. Any Intervention not listed in 104 CMR 20.00 as a Level I or level II Intervention which is highly intrusive and/or highly restrictive of freedom of movement.

4. Any Intervention which alone, in combination with other Interventions, or as a result of multiple applications of the same Intervention poses a significant risk of physical or psychological harm to the individual.

(e) Advisory Opinions. Any person may request the Commissioner or designee to provide an advisory opinion regarding the proper classification of particular Interventions by Level for Interventions not set forth in 104 CMR 20.15, or for clarification of proper classification by Level in a particular instance involving a specific individual.

1. Upon receipt of any such request, the Commissioner or designee shall refer the request to the Advisory Panel.

2. The Commissioner or designee shall facilitate the Advisory Panel's review of the request and shall seek to obtain such additional information regarding the request as the Advisory Panel shall deem necessary.

3. Upon completing its review of the request, the Advisory Panel shall advise the Commissioner or designee regarding the matter and the Commissioner or designee shall thereupon issue an advisory opinion responding to the request and classifying the Intervention as appropriate.

4. The Commissioner or designee, and the Advisory panel, shall respond to each request as expeditiously as possible, and shall prioritize those requests that allege either that inappropriate treatment is resulting from an improper classification or that there is an urgent need for treatment that may be jeopardized if a prompt response is not received.

(4) Requirements for Behavior Modification.

(a) Scope. 104 CMR 20.15(4), establishes requirements for Interventions that are used, or that are proposed for use, for Behavior Modification purposes.

1. Interventions that limit an individual's freedom of movement and that are consented to, approved, and implemented for treatment purposes as part of a Behavior Modification plan for an individual in accordance with the requirements of 104 CMR 20.15(4), constitute reasonable limitations on freedom of movement. Such Interventions are not subject 104 CMR 20.02(54) and 104 CMR 20.08.

20.15: continued

2. Procedures that are used, or that are proposed for use, for the purpose of protecting an individual or others from harm and not for Behavior Modification purposes may be used subject to 104 CMR 20.02(54) and 104 CMR 20.08, and are not subject to the provisions of 104 CMR 20.15.

3. The prescription and administration of psychotropic medication are not subject to 104 CMR 20.15.

(b) General Requirements.

1. No Behavior Modification plan may provide for a program of treatment which denies the individual adequate sleep, a nutritionally sound diet, adequate bedding, adequate access to bathroom facilities, and adequate clothing.

2. No Interventions shall be approved in the absence of a determination, arrived at in accordance with all applicable requirements of 104 CMR 20.00, that the behaviors sought to be addressed may not be effectively treated by any less intrusive, less restrictive Intervention and that the predictable risks, as weighed against the benefits of the procedure, would not pose an unreasonable degree of intrusion, restriction of movement, physical harm or psychological harm.

In the case of Level II and Level III Interventions, such determination shall be made and the Interventions shall be approved and consented to in accordance with the special requirements of 104 CMR 20.15(4)(d) and (e).

3. Only those Interventions which are, of all available Interventions, least restrictive of the individual's freedom of movement and most appropriate given the individual's needs, or least intrusive and most appropriate, may be employed.

4. Any procedure designed to decrease inappropriate behaviors such as Aversive Stimuli, Deprivation Procedures and Time Out may be used only in conjunction with Positive Reinforcement Programs.

5. Level III Interventions may be used only to address extraordinarily difficult or dangerous behavioral problems that significantly interfere with appropriate behavior and or the learning of appropriate and useful skills and that have seriously harmed or are likely to seriously harm the individual or others.

6. No Intervention may be administered to any client in the absence of a written Behavior Modification plan.

In the case of Level II and Level III Interventions, the plan shall conform to the special requirements of 104 CMR 20.15(4)(c) and shall be subject to the special consent requirements of 104 CMR 20.15(4)(e).

7. Programs using Time Out shall conform such use to the following standards and restrictions:

a. The head of the facility or program or his/her designee shall approve the room or area as safe and fit for the purposes of Time Out.

b. Behavior Modification plans employing forms of Time Out that involve placing an individual alone in a room with an open or closed door shall comply with all safety, checking, and monitoring requirements set forth at 104 CMR 3.12(6) and 3.12(9).

c. An individual may not be maintained in Time Out alone in a room the door of which is closed and locked (*i.e.*, secured by a key, bolt or door stop).

8. All Behavior Modification plans shall be developed in accordance with 104 CMR 20.15 and in accordance with the policies of the facility or program within which the plan is to be implemented, insofar as those policies do not conflict with 104 CMR 20.15.

9. In the event of a serious physical injury to or death of a person who is the subject of a Level II or Level III Intervention, whether or not such injury or death occurs during the implementation of the Behavior Modification program, the injury or death shall be reported immediately to the Commissioner or designee who may thereupon initiate an investigation pursuant to 104 CMR 24.00.

(c) Written Plan. All proposed uses of Level II and Level III Interventions for treatment purposes shall be set forth in a written plan which shall contain at least the following:

20.15: continued

1. A clear specification of the behaviors which the treatment program seeks to decelerate or decrease, a specification of the methods by which the behaviors are to be measured (using measures such as frequency, severity, duration, etc.) and the available data concerning the current state of the behaviors with respect to these methods of measurement.

2. A clear specification of the behaviors which the treatment program seeks to have replace the behaviors targeted for deceleration, the methods by which these behaviors are to be measured, and available data concerning the current state of the behaviors with respect to these methods of measurement.

3. A description and classification by Level of each of the Interventionn to be used; a rationale, based on a comprehensive functional analysis of the antecedents and consequences of the targeted behavior, for why each Intervention has been selected; the conditions under which each Intervention will be employed; the duration of each Intervention, per application; the conditions or criteria under which an application of each Intervention will be terminated; in measurable terms, the behavioral outcome expected from the use of each proposed Intervention; the criteria for measuring success of each Intervention and the Behavior Modification plan as a whole and for revising and terminating the plan; the risks of harm to the individual with each Intervention and the plan as a whole; the individual's prognosis if the treatment is not provided; feasible treatment alternatives; and, a statement indicating the nature of the less restrictive or less intrusive Interventions which have been employed and the clinical results thereof, or those which have been considered and the reasons they have not been tried.

4. The name of the treating clinician or clinicians who will oversee implementation of the plan.

5. A procedure for monitoring, evaluating and documenting the use of each Intervention, including a provision that the treating clinician(s) who will oversee implementation of the plan shall review a daily record of the frequency of target behaviors, frequency of Interventions, safety checks, reinforcement data, and other such documentation as is required under the plan. Such treating clinician(s) shall review the plan for effectiveness at least weekly and shall record his/her assessment of the plan's effectiveness in achieving the stated goals.

(d) Review and Approval. In addition to consent requirements stated in 104 CMR 20.15(4)(e) the following reviews and approvals are required prior to the implementation of any Behavior Modification plan involving the use of level II or Level III Interventions:

1. All such plans shall be developed by those clinicians who provide services to the individual, and such other clinicians as they may designate (the treating clinician(s)).

2. All such plans shall be classified, reviewed and approved prior to implementation by a clinician designated by the head of the program. Such clinician shall have a demonstrated history of experience and training in applied behavior analysis and behavioral treatment. Such clinician may be the same clinician as the clinician who develops the plan pursuant to 104 CMR 20.15(4)(d)1.

3. Each such plan shall be reviewed by the program's human rights committee (*i.e.*, a committee established in accordance with the provisions for human rights committees set forth at 104 CMR 20.14). The committee's review shall occur no later than the next meeting following the meeting at which the plan is first presented to the committee, provided that the committee shall further expedite such review on request of the program head or designee for cases where the program head or designee determines that there is an urgent need for treatment that may be jeopardized if prompt attention is not given to the proposed plan. Except in an emergency (*i.e.*, in circumstances where the treating clinician, subject to the approval of the program head, determines that the immediate application of the Interventions provided for by the proposed plan is necessary to prevent serious harm to the individual or to others), such review shall occur and the comments (if any) of the human rights committee shall be addressed by the treating clinician(s) prior to implementation of the plan.

20.15 : continued

a. The committee shall review a plan to determine if it conforms to the requirements for protection of human rights established by 104 CMR 20.15.

b. The committee's review of a plan may be based on such record reviews, interviews, inspections, and other activity as the Committee may in its discretion deem necessary and may include requests that the plan be resubmitted for such periodic review as the Committee may deem appropriate.

c. In the event that the human rights committee concludes that the plan or a part of the plan violates the requirements of 104 CMR 20.15 the plan or part thereof shall not be implemented unless:

i. the problem is resolved informally with the treating clinician(s), or

ii. the client or his or her representative or guardian or the treating clinician(s) initiate(s) an appeal under 104 CMR 21.40 through 21.90, and the plan or part thereof is determined pursuant to such appeal to conform to 104 CMR 20.15.

4. Each such plan shall be reviewed by a physician or by a qualified health care professional working under a physician's supervision who shall determine whether, given the individual's medical characteristics, the Intervention is medically contraindicated. No Intervention that is medically contraindicated shall be implemented.

5. Each such plan shall, in addition to other requirements set forth in 104 CMR 20.00, be reviewed by a Peer Review Committee appointed by the program head or designee. The Peer Review Committee shall conduct such review in a timely manner consistent with the individual's needs for treatment as represented by such plan, and shall further expedite its review on request of the program head or designee in cases where the program head or designee determines that there is an urgent need for treatment that may be jeopardized if prompt attention is not given to the proposed plan. Except in an emergency (*i.e.*, in circumstances where the treating clinician, subject to the approval of the program head, determines that the immediate application of the Interventions provided for by the plan is necessary to prevent serious harm to the individual or to others), such review shall occur and the comments (if any) of the peer Review Committee shall be addressed by the treating clinician(s) prior to implementation of the plan.

a. For each such review, the Peer Review Committee shall be composed of three or more clinicians with combined expertise in the care and treatment of individuals with needs similar to those served by the facility or program and in behavior analysis and behavioral treatment, at least one of whom shall be a licensed psychologist.

b. For reviews of Level III Interventions, the Committee shall be specially constituted so as to exclude any clinician serving as a treating clinician within the program proposing to use the Intervention.

c. The Committee shall review a plan to determine if it conforms to the requirements for appropriate treatment established by 104 CMR 20.15.

d. The Committee's review of a plan may include such record reviews, interviews, inspections, and other activity as the Committee may in its discretion deem necessary and may include requests that the plan be resubmitted for such periodic review as the Committee may deem appropriate.

e. In the event that the Peer Review Committee concludes that the plan or a part of the plan violates the requirements for appropriate treatment established by 104 CMR 20.15, the plan or part thereof shall not be implemented unless:

i. the problem is resolved informally with the treating clinician(s), or

ii. the client or his or her representative or guardian or the treating clinician(s) initiate(s) an appeal under 104 CMR 21.40 through 21.90, and the plan or part thereof is determined pursuant to such appeal to conform to 104 CMR 20.15.

6. The head of any program using or proposing to use a Level III Intervention shall notify the Commissioner of Mental Retardation or designee upon the filing of any guardianship petition, temporary or permanent, seeking authorization by substituted

20.15: continued

judgment for such Intervention. The Commissioner may upon receipt of such notice, provide for an independent clinical review by one or more clinicians designated by the Commissioner or designee of the proposed treatment and may advise the court having jurisdiction of the matter of said clinician's treatment recommendations. Said program shall cooperate fully with said clinicians and shall afford full access to each individual, his/her record and the staff working with the individual.

7. In lieu of having the human rights and/or peer review functions specified above performed by committees appointed by the same program that is proposing to use Level II or level III Interventions, the director of such a program may request the Commissioner or designee to provide for the performance of such reviews by human rights committees and/or peer review committees established by the Commissioner or designee. The Commissioner or designee may provide for such reviews in response to such a request in the event that he or she determines that the program is unable to provide itself for such reviews or that the purposes of 104 CMR 20.00 will be served by the provision of such reviews by committees established by the Commissioner or designee.

(e) Consent. In addition to consent requirements generally applicable to individual service plans, a Behavior Modification plan employing Level II or Level III Interventions may not be implemented unless it has been consented to in accordance with the following requirements:

1. Where the individual is 18 years of age or older, or is deemed a mature minor under the applicable law, and is able to provide informed consent to a plan of treatment, the plan may be implemented upon his/her acceptance of its provisions.

a. Before a plan involving the use of Level III procedures is implemented pursuant to such consent, the head of the program shall notify the Commissioner of Mental Retardation or his/her designee who shall be afforded an opportunity to evaluate the individual. In the event that the Commissioner or designee doubts the individual's ability to provide informed consent, a petition for the appointment of a temporary or permanent guardian shall be filed by the Commissioner or designee or by some other suitable person.

2. Where the individual is a minor and is not deemed a mature minor capable of giving informed consent:

a. that portion of the plan which does not involve the use of Level III Procedures may be implemented upon a parent's or legal guardian's informed consent to its provisions.

b. in the event that no parent or legal guardian exists or is available, then that portion of the plan which does not involve the use of Level III Procedures may be implemented upon its approval by the head of the program, provided that actions to initiate proceedings for the appointment of some suitable person as guardian or, where applicable, actions to provide for the availability of a temporarily unavailable parent or legal guardian are commenced by the head of the program concurrently with such approval.

c. that portion of the plan which involves the use of Level III Interventions may be implemented only upon authorization of a court of competent jurisdiction utilizing the substituted judgement criteria.

3. Where the client is an adult but is unable to provide informed consent to the implementation of the plan,

a. that portion of the plan which does not involve the use of Level III Interventions may be implemented when informed consent is provided by the individual's temporary or permanent guardian.

b. is the event that no permanent or temporary guardian has been appointed or is available, then that portion of the plan which does not involve the use of Level III Interventions may be implemented upon its approval by the head of the program, provided that actions to initiate proceedings for the appointment of some suitable person as guardian or, where applicable, actions to provide for the availability of a temporarily unavailable parent or legal guardian are commenced by the head of the program concurrently with such approval.

c. that portion of the plan which involves the use of Level III Interventions may be implemented only upon authorization of a court of competent jurisdiction utilizing the substituted judgement criteria.

20.15: continued

(f) Special Certification Requirement for programs Utilizing Level III Interventions. No Behavior Modification plans employing Level III Interventions may be implemented except in a program or a distinct part of a program that meets the standards established by 104 CMR 20.15(4) and that is therefore specially certified by the Department as having authority to administer such treatment. The following standards and procedures shall govern all such certifications:

1. Only those programs or facilities which meet the following standard shall be certified under 104 CMR 20.15(4): the program or facility must demonstrate that it has the capacity to safely implement such Behavior Modification plan in accordance with all applicable requirements of 104 CMR 20.15.
2. Any program seeking such certification shall submit a written application to the Commissioner or designee.
3. Such application shall include a comprehensive statement of the program's policies and procedures for the development and implementation of plans employing Level III Interventions, including a description of the program's actual use, or proposed use, of such procedures, and of the program's policies and practices regarding the training and supervision of all staff involved in the use of such procedures, and further including current resumes of all members of the Peer Review Committee required by 104 CMR 20.15(4)(d)5. and a description of the review procedures followed by such Committee.
4. Such application shall further include a certification by the program of its ability to comply with the department's Behavior Modification regulations.
5. The Commissioner or designee shall review such application upon its receipt and, after a determination that the written application is complete and satisfies all applicable requirements, shall provide for an inspection of the program by authorized Department representatives.
6. In the course of any inspection pursuant to 104 CMR 20.15(4)(f)5 or 104 CMR 20.15(4)(f)10., inspection staff shall have access to the records of the program's clients (including any written plans required by 104 CMR 20.15(4)(c) and data and information developed pursuant to such plan), the physical plant of the facility, the employees of the program, the professional credentials of such employees, and shall have the opportunity to observe fully the treatment employed by the program and to review with the program's staff the procedures for which certification was granted or is sought and the manner in which such procedures have been or are to be implemented.
7. After such review and inspection, the Commissioner or designee shall approve, approve with conditions, or disapprove the program's application and, if approved, shall certify the program subject to any applicable conditions based upon his or her determination of the program's compliance with all applicable requirements.

The Commissioner or designee may, as a condition of approval, require appointment of one or more persons approved by the Commissioner or designee to the program's peer review committee or human rights committee in the event that he or she determines that such appointment or appointments are necessary to ensure performance by such committees of their review responsibilities consistent with the requirements established by 104 CMR 20.15.

8. If disapproved, or if certification is revoked in accordance with 104 CMR 20.15(4)(f)10., programs not operated by the Department shall have the right of appeal established by the applicable provisions of M.G.L. c. 19 and M.G.L. c. 30A.
9. Any such certification of a program shall be effective for a maximum of two years and may be renewed thereafter upon the Commissioner or designee's approval of a renewal application pursuant to the standards and procedures set forth in 104 CMR 20.15(4)(f).

20.15: continued

10. The performance of a program pursuant to any such certification shall be reviewed as part of the periodic inspections of licensed facilities required by 104 CMR 23.25, and shall further be subject to such additional inspections as the Commissioner may in his or her discretion deem appropriate. Such certification may be revoked, and the Department may revoke, suspend, limit, refuse to issue or refuse to renew a program's license pursuant to 104 CMR 23.25, upon a finding that the conditions for certification are no longer met.

11. A program shall be eligible for consideration for certification for use of Level III Interventions only if, prior to the effective date of 104 CMR 20.15, the program had been using one or more level III Interventions pursuant to a Behavior Modification plan for one or more clients of the program. This restriction on eligibility shall continue in effect indefinitely and shall be modified only by amendment of this regulation, 104 CMR 20.15. Such amendment shall only be proposed or adopted by the Commissioner in the event that he or she finds that there exists a compelling need for treatment with such Interventions that cannot be met within existing programs or through alternative programs.

12. When necessary to prevent discontinuity in existing programming or to provide for an emergency, the Commissioner may in his or her discretion provide for the interim certification of a program, provided that the application and review process required for certification by 104 CMR 20.15 shall be initiated and completed as soon as possible thereafter.

(5) Relationship to ISP Process. Behavior Modification treatment plans are subject to the ISP planning requirements of 104 CMR 21.00 to the following extent only:

(a) Behavior Modification treatment plans employing Level II and III Interventions are subject to the procedural requirements concerning the development and implementation of individual service plans as set forth in 104 CMR 21.40 through 21.49, the modification of such plans as set forth in 104 CMR 21.60 through 21.62 and the requirements concerning periodic review as set forth at 104 CMR 21.70 through 21.74. Furthermore, such plans are subject to ISP appeal as provided for in 104 CMR 21.85 through 21.90.

(b) Behavior Modification treatment plans employing Level I Interventions are subject to the requirements concerning periodic review as set forth at 104 CMR 21.70 through 21.74 and are subject to ISP appeal as provided for in 104 CMR 21.85 through 21.90.

20.20: Scope and Purpose

(1) Scope. 104 CMR 20.20 through 20.24 applies to:

(a) Persons within the Commonwealth who are mentally retarded and who the Department has determined to be in need of specialized care, treatment, training, or supervision;

(b) The Department of Mental Health with respect to its obligations to provide, purchase, arrange, monitor, and coordinate services for mentally retarded persons; and

(c) Providers of mental retardation services, including the Department of Mental Health and private agencies that are under contract with, and subject to licensure and Regulation by the Department to provide specialized care, treatment, training, or supervision to mentally retarded persons.

(2) Purpose. The purpose of 104 CMR 20.20 through 20.24 is to describe the relationships among mentally retarded persons in need of services, the Department of Mental Health as the lead agency for providing, purchasing, arranging, monitoring, and coordinating such services, and public and private agencies which provide mental retardation services on a day-to-day basis.

20.21: Rights and Responsibilities of Clients

In addition to other rights and responsibilities set forth elsewhere in 104 CMR 20.00 through 23.00 or under other applicable State or Federal laws or judicial decrees, clients shall have the following rights and be subject to the following responsibilities:

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT, AND THE
PROBATE AND FAMILY COURT
DEPARTMENT OF THE
TRIAL COURT
DOCKET NO. 86E-0018-GI

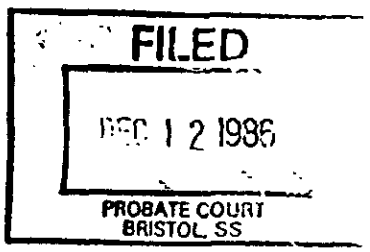
BEHAVIOR RESEARCH INSTITUTE; DR. MATTHEW L. ISRAEL: LEO SOUCY, Individually and as Parent and Next Friend of BRENDON SOUCY; PETER BISCARDI, Individually and as Parent and Next Friend of P.J. BISCARDI; and ALL PARENTS AND GUARDIANS OF STUDENTS AT THE BEHAVIOR INSTITUTE, on behalf of themselves, their children and wards,

Plaintiffs

V.

MARY KAY LEONARD, individually and in her capacity as the Director of the Massachusetts Office for Children,

Defendant



SETTLEMENT AGREEMENT

Preamble

On September 26, 1985, the Massachusetts Office for Children ("O.F.C.") issued an order to show cause why the license of the Behavior Research Institute ("B.R.I.") should not be suspended, revoked or otherwise sanctioned for various violations of O.F.C.'s regulations. Since that time, the parties, O.F.C., B.R.I. and parents of the clients attending B.R.I., have been engaged in a multitude of lawsuits and administrative proceedings. The parties, for the benefit of the clients attending B.R.I., now intend to resolve their differences and end the litigation;

administrative and judicial, between them. For that reason, the parties enter into the following agreement, which is made for this case only. By entering into this agreement, none of the parties admit liability or concede the truth of the allegations made by the other party. The sole intent of each party is simply to resolve this case and the other administrative and judicial cases which are now pending between O.F.C., B.R.I. and the parents.

A. Substituted Judgment for Aversive Procedures

1. Aversive procedures are permitted for use at B.R.I. only when authorized as part of a court-ordered "substituted judgment" treatment plan for an individual client, when such client is either a minor or is not able to provide informed consent thereto. As used herein, the term "aversive procedures" shall include all aversive procedures which are presently used or which may be proposed for use at B.R.I. with the exception of the following:

a) "no";

b) ignore;

c) token fines; and

d) any other procedure found by the court after hearing not to require substituted judgment.

2. Nothing in this agreement shall preclude B.R.I. from developing new reward and aversive procedures.

3. For all clients, B.R.I. shall propose those treatments which are the least intrusive, least restrictive modalities appropriate to each client's needs. For purposes of this section, physical aversive procedures, such as spanks, pinches and muscle

squeezes, and the restrained time-out shall be considered the most intrusive, most restrictive forms of treatment.

4. Prior to intake, B.R.I. shall formulate an interim treatment plan based upon clinical information received from the referring agency. The following procedure shall be followed upon the client's arrival at B.R.I.:

a) Where the client is an adult and able to provide informed consent to such interim treatment plan, the plan may be implemented upon his/her acceptance of its provisions; provided, however, that before said plan is implemented D.M.H. shall be notified and shall be afforded the opportunity to evaluate the student. In the event that the student's ability to provide such informed consent is doubted, a petition for the appointment of a temporary guardian shall be filed;

b) Where the client is a minor,

(i) that portion of the interim treatment plan which does not involve the use of aversive procedures or extraordinary procedures determined to require substituted judgment by the Court may be implemented upon the parents' acceptance of its provisions.

(ii) that portion of the interim treatment plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization of the court in a temporary guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

c) Where the client is an adult but is unable to provide informed consent to the implementation of the interim treatment plan,

(i) that portion of the plan which does not involve the use of aversive or extraordinary procedures may be implemented upon its acceptance by a temporary guardian appointed by the court;

(ii) that portion of the plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization of the court in a temporary guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

5. B.R.I. shall formulate a treatment plan within 45 days of a client's arrival at B.R.I. Upon formulation of such a plan for a new client and regarding the treatment plan of a client presently at B.R.I., the following procedure shall be followed:

a) Where the client is an adult and is capable of providing informed consent thereto, the treatment plan may be implemented upon his/her acceptance of its provisions; provided, however, that before said plan is implemented D.M.H. shall be notified and shall be afforded the opportunity to evaluate the student. In the event that the student's ability to provide such informed consent is doubted, a petition for the appointment of a permanent guardian shall be filed;

b) Where the client is a minor,

(i) that portion of the treatment plan which does not involve the use of aversive or extraordinary procedures may be implemented upon the parents' acceptance of its provisions;

(ii) that portion of the treatment plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization by the court in a permanent guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

c) Where the client is an adult but is incapable of providing informed consent to implementation of the treatment plan,

(i) that portion of the plan which does not involve the use of aversive or extraordinary procedures may be implemented upon its acceptance by a guardian;

(ii) that portion of the plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization of the court in a permanent guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

6. In any "substituted judgment" proceeding in which authorization to implement aversive or extraordinary procedures is

sought, the petitioner shall present, in addition to evidence concerning the client's inability to provide informed consent to such procedures and the client's present and past psychological and medical circumstances, evidence of the following:

a) the "target behaviors" to be treated by means of such aversive or extraordinary procedures and the clinical reasons why nonaversive or less intrusive aversive procedures are inappropriate;

b) a full description of the procedures to be followed in treating such target behaviors at the B.R.I. School facility, at the child's residence, in transit and on field trips, the process and period of time by which the implementation of such procedures is to be monitored, and the method by which the effectiveness of such procedures is to be determined;

c) the reasonably foreseeable adverse side-effects, if any, associated with the use of such aversive or extraordinary procedures, the likelihood that such side-effects will occur and the likely severity of such side-effects were they to occur;

d) the professional disciplines of the staff members who will implement such aversive or extraordinary procedures, as well as the supervision and training such staff members have had and will receive;

e) the client's prognosis should such aversive or extraordinary procedures be implemented;

f) the client's prognosis should such procedures not be implemented;

g) the opinions and concerns of the client's family and the impact upon the family were the aversive or extraordinary procedures not to be implemented;

h) the treatment previously provided the client at B.R.I. and elsewhere and a clinical assessment of its results;

i) a description of the client's appropriate behaviors, if any, and the procedures to be implemented to reinforce them, which description shall include appropriate functional communication behaviors and behaviors incompatible with the targeted inappropriate behaviors;

j) the client's current I.E.P. or I.S.P.;

k) any other information requested by the court.

7. The Department of Mental Health ("D.M.H.") shall be notified of the referral to and acceptance by B.R.I. of any client as soon as is practicable. Where appropriate, clinicians of D.M.H. shall review the information received from the referring agency and may advise the court of their treatment recommendations in the temporary guardianship proceedings called for in section 4, above. Prior to the hearing on a treatment plan for a new or current student called for in section 5, above, D.M.H. clinicians shall evaluate the client's clinical circumstances and shall provide the court with their recommendations on the issues noted in section 6, above, as well as their assessment as to the client's ability to provide informed consent to treatment. D.M.H. clinicians shall submit their report to the Court within 10 days, if practicable, but in no event more than 20 days following receipt of B.R.I.'s treatment plan. Such clinicians shall also be available for consultation with the guardian ad litem, court-appointed monitor and court-appointed counsel. B.R.I. shall cooperate fully with the D.M.H. clinicians and shall afford them full access to each client, his/her record and the B.R.I. staff working with the client.

B. Monitoring of Substituted Judgment Treatment Plans and B.R.I.'s Treatment Program

1. On each occasion when the Court issues a substituted judgment treatment plan, the Court shall also appoint a monitor

who will report to the Court as to the effectiveness of the treatment plan, adherence to orders by B.R.I., and any proposed modifications to the treatment plan.

2. The Court shall also appoint Dr. John Daignault (or some other suitable person) who shall undertake general monitoring of B.R.I.'s treatment and educational program. Dr. Daignault shall be responsible for overseeing B.R.I.'s compliance with all applicable state regulations, except to the extent that those regulations involve treatment procedures authorized by the Court in accordance with Paragraph A. The relevant state agencies shall, if appropriate, afford Dr. Daignault, at his request, technical assistance necessary to perform his duties. Dr. Daignault shall report to the Court concerning any issues he deems necessary relating to the health, safety or well-being of any B.R.I. client. Dr. Daignault shall arbitrate any disputes between the parties, and in the event that any party disagrees with any decision or recommendation of Dr. Daignault, the matter shall be submitted to the Court for resolution.

3. The fees and expenses of Dr. Daignault shall be assumed by the Trial Court of the Commonwealth.

4. The term of Dr. Daignault shall be for a period of six months unless extended by the Court in accordance with the provisions of Paragraph K.

C. Licensing of B.R.I. and Reopening of Intake

1. Upon the execution of this agreement, the outstanding O.F.C. licenses for the operation of the B.R.I.'s residential

facilities shall be restored. These licenses shall not be revoked without the approval of the Court or until such time as D.M.H. licenses B.R.I.

2. On or before July 1, 1987, the licensing responsibility for B.R.I. shall be transferred from O.F.C. to D.M.H in accordance with an interagency agreement as authorized by G.L. c. 28A §3 and c. 19 §1. The terms of the interagency agreement shall be enforceable by any party to this litigation.

3. Upon the execution of this agreement, intake at B.R.I. for new clients shall be reopened and shall not be impermissibly obstructed during the pendency of this agreement. The Court may limit intake for good cause shown.

D. Programmatic Standards for B.R.I.

In delineating the following programmatic standards, the parties neither allege nor concede that such standards have been deficient in the B.R.I. program.

1. B.R.I. will retain at least one additional doctoral level psychologist (preferably an individual with behavior modification experience), and it shall continue to make a good faith effort to that end. That individual will assist Dr. Israel, and the duties shall include the design, implementation and modification of treatment plans for individual students, upon demonstration to Dr. Israel of sufficient competence and experience.

2. Ongoing training and supervision of staff will be supervised by a doctoral level psychologist. Training will be conducted by staff who have actual experience in behavior modification techniques. The qualifications and training of staff

having principal treatment responsibilities for each client requiring substituted judgment shall be submitted to the Court as part of the treatment plan described in Paragraph A.

3. B.R.I. will continue to comply with all applicable Department of Education standards regarding certification of staff.

4. B.R.I. will assign clients to staff, classrooms and residences subject to availability, in a good faith effort to assure consistency and continuity of care to clients.

5. B.R.I. will continue to employ the following treatment approaches as a method of minimizing the use of restrictive procedures:

1) passive behavior management;

2) functional communication;

3) analysis of stimulus control;

4) analysis of consequence control.

6. B.R.I. will comply with all D.M.H. regulations concerning restraint (104 C.M.R. §20.08).

7. B.R.I. will comply with D.M.H. regulations concerning human rights committees (104 C.M.R. §20.14 and §24.11) and will contact parents of present and former clients to ascertain their willingness to serve on the human rights committee.

8. B.R.I. agrees to continue its use of a developmental disabilities review committee whose members shall include recognized experts in the field of autism and retardation.

9. B.R.I. will continue to follow all applicable regulations concerning periodic review of individualized educational plans and individual service plans.

E. Notification by O.F.C. to School Districts, Approval Agencies, Placement Agencies and Licensing Authorities

1. Upon execution of this agreement, O.F.C. shall send a letter (in a form approved by the parties) concerning the resolution of this controversy to the following:

a) The special education directors of all Massachusetts public schools districts;

b) All committees on the handicapped in the state of New York;

c) The Massachusetts Department of Education;

d) The Rhode Island Department of Mental Health and Mental Retardation;

e) The Rhode Island Department of Education;

f) The Rhode Island Department of Children and Families;

g) Any out-of-state agency which approves the placement of any client at B.R.I.;

h) Any public school district or placement agency which funds any part of the tuition of any B.R.I. client;

i) The Massachusetts Department of Mental Health;

j) A reasonable number of additional individuals or entities whose name and address is provided to O.F.C by B.R.I. within 10 days of the date of execution of this agreement.

2. The Defendant shall send a letter to all B.R.I. parents in the form attached hereto.

F. Notification to Massachusetts Parents and Placement Agencies

1. O.F.C. will undertake appropriate action to make the parents of severely handicapped clients, as well as the Department of Public Health, Department of Social Services, Department of Mental Health, Department of Youth Services, Department of Education, Department of Public Welfare, Massachusetts Rehabilitation Commission, Massachusetts Commission for the Blind, and the Massachusetts Commission for the Deaf and Hard of Hearing, aware of the B.R.I. program and the population of severely handicapped clients which B.R.I. serves.

2. The Department of Mental Health, the Office for Children and all state placement and funding agencies shall give B.R.I. equal consideration with all other private providers for new clients referred for private placement by state agencies.

G. New B.R.I. Program

Nothing in this agreement shall prevent B.R.I. from developing a new, separate program, licensed according to applicable law, for clients who are not as severely behaviorally handicapped as clients in the existing population. This new program will serve a client population, whose needs are not so severe that the use of restrictive procedures is clinically indicated. The relevant state agencies will agree to provide B.R.I. with the level of technical assistance accorded providers in general in the establishment of this new program.

H. Agreement Concerning Attorneys' Fees

Upon execution of this agreement, the parties shall enter into an agreed judgment for attorneys' fees in the amount of, five hundred eighty thousand six hundred and five dollars and twenty-five cents ($580,605.25) payment of which shall be full satisfaction of all monetary claims in this action. The Defendant agrees that, through statutory procedures, she will request the Legislature to appropriate the funds to satisfy the judgment through an FY 1987 Supplemental Budget. The Defendant shall use her best efforts to secure the appropriation. In the event that the Legislature declines to appropriate the funds, nothing in this agreement shall prevent the Plaintiffs from using whatever legal remedies are available to enforce the judgment and, if necessary, to modify its terms to include the personal liability of the Defendant. By entering into this agreement, B.R.I. does not make any acknowledgment as to the adequacy of attorneys' fees for rate setting purposes.

I. Withdrawal of All Litigation and Execution of Releases

Upon execution of this agreement, all pending administrative and judicial actions (with the exception this action and the pending guardianship actions) shall be dismissed with prejudice. Upon payment to the Plaintiffs of the attorneys' fees referenced in Paragraph H, the parties shall exchange mutual releases, in a form to be negotiated by counsel, and all monetary obligations of the Defendant to the Plaintiffs shall be discharged. The parents and guardians agree to hold the Defendant harmless from any causes of

action (including, without limitation, any action under G.L. c. 258) which arise from this agreement, (excepting the breach of this agreement), and hereby release and forever discharge subject to the provisions of paragraph H, O.F.C. and the Defendant in her official and individual capacity from any and all claims which arise from the actions of September 26, 1985.

J. Form of the Agreement

This agreement shall constitute an Order of the Bristol County Probate and Family Court in the case of Behavior Research Institute, Inc., et al. v. Mary Kay Leonard, Civil Action No. 86E-0018-GI. The rights of all parties shall be limited to enforcement of the terms of this agreement. The Court will retain continuing jurisdiction over this action until such jurisdiction is terminated in accordance with the provisions of Paragraph K, at which time an order of dismissal of this action shall enter. During the pendency of this agreement, any dispute between the parties that cannot be resolved by the general monitor shall be submitted to the Court for resolution.

K. Periodic Review

The Probate Court shall conduct a hearing at six-month intervals in order to review the parties' adherence to the provisions of this agreement. This agreement shall be automatically extended at the first six month review unless the Court, upon motion by any party, orders otherwise. This agreement shall automatically terminate at the second review unless the Court, for

good cause shown related to the terms or substance of this agreement, orders otherwise. Upon termination of this agreement, BRI shall continue to employ substituted judgment procedures as ordered by the court.

L. Good Faith

The resolution of this matter depends upon the good faith of all parties and each party shall discharge its obligations under the terms of this agreement, in good faith.

Counsel for the Class of All Students at BRI, Their Parents and Guardians
Robert A. Sherman

Counsel for B.R.I.
Roderick MacLeish, Jr.

Leo Soucy
Class Representative

Dr. Matthew L. Israel

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Marc A. Perlin
Max Volterra

Counsel for the Office for Children,
E. Michael Sloman, A.A.G.

Peter Biscardi
Class Representative

Mary Kay Leonard, individually and as Director of the Massachusetts Office for Children