PARALEGAL EDITOR

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

BRISTOL, SS. NO. SJC-07101

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

v.

DIRECTOR, OFFICE FOR CHILDREN,
Defendant,

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

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

REVISED REPLY BRIEF
COMMISSIONER OF MENTAL RETARDATION

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REVISED REPLY BRIEF
COMMISSIONER OF MENTAL RETARDATION

INTRODUCTION

This is the reply brief of the Commissioner of the Department of Mental Retardation ("Commissioner") in his appeal from the trial court's contempt judgment. Rather than repeat the arguments contained in the Commissioner's opening brief, which are, instead, liberally cross-referenced herein,[1] this reply brief focuses on pointing out the many misstatements of

[1]The following abbreviations are used herein to refer to the parties' briefs and supplemental appendices: "DMR Br." (Commissioner's opening brief in SJC-
(continued...)

law and fact contained in BRI's brief[2] that were not anticipated in the Commissioner's opening brief.

ARGUMENT

I. BRI MISSTATES THE LEGAL STANDARDS GOVERNING THE CONSTRUCTION AND ENFORCEMENT OF CONSENT DECREES AGAINST STATE OFFICIALS.

A. BRI Misstates the Scope of Appellate Review of the Trial Court's Contempt Findings.

BRI appears to assume that the scope of appellate review of the trial court's contempt findings is the relatively deferential abuse of discretion standard.[3] That assumption is incorrect. This Court reviews contempt

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[1](...continued)
07101, his appeal from the contempt judgment), "DMR PI Br." (Commissioner's opening brief in SJC-06956, his appeal from the preliminary injunction), " PI App." (appendix in SJC-06956), "BRI Br." (BRI's brief), "Parents' Br." (brief of the class of BRI students and parents), "Students' Br." (brief of the student members of the class), "BRI Supp. App." (BRI's supplemental appendix), "Parents' Supp. App." (supplemental appendix of the class of BRI students and parents), "DMR Supp. App." (Commissioner's supplemental appendix in SJC-07045).

[2]Because, in most instances, the arguments made by the class of students and parents and the student members of the class are essentially the same as those made by BRI, this brief uses "BRI" to refer generally to all appellees, unless otherwise specified.

[3]At some points in its brief, BRI appears to premise its contempt arguments on the deferential abuse of discretion standard, *e.g.*, BRI Br. at 62 ("There was no abuse of discretion by the Trial Court . . . ."), 66 ("This Court Should Afford Great Deference to the Trial Court's Construction And Enforcement of the Settlement Agreement."). At other points, however, BRI appears to acknowledge that the plenary error of law standard of appellate review applies. *E.g.*, BRI Br. at 58 ("The Trial Court's construction of the Settlement Agreement and enforcement through the contempt sanction against the Commissioner of Mental Retardation were correct (continued...)

judgments under the plenary error-of-law standard, *see, e.g., Warren Gardens Housing Coop. v. Clark*, 420 Mass. 699, 701 (1995) (reversing contempt judgment where, "*[a]s a matter of law*, clear and undoubted disobedience of a clear and unequivocal order has not been established"; emphasis added); and the federal cases cited by BRI on this point also counsel in favor of plenary review by this Court of the trial court's contempt findings. In *AMF, Inc. v. Jewett*, 711 F.2d 1096 (1st Cir. 1983), the court held that, regardless of how the standard of appellate review is characterized, "the lower court's construction of the meaning of language in a consent decree is subject to closer scrutiny than is likely appropriate as to ordinary factual questions." *Id.* at 1100-01.

Particularly where the case involves "the interpretation of defendant's activities in light of the meaning and purpose of the decree," as this one does, "courts of appeal have considerable freedom to review the [trial] court's determination of such matters." *Id.*; *see also United States v. Bd. of Educ.*, 717 F.2d 378, 382 (7th Cir. 1983) ("*Bd. of Educ. I*") ("interpretation of consent decree provisions . . . is a matter of law and subject to plenary review on appeal"). In a more recent case, also cited by BRI, *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325 (1st Cir. 1991), the Court of Appeals for the First Circuit distinguished several earlier cases relied upon by BRI—*United States v. Massachusetts*, 890 F.2d 507 (1st Cir. 1989); *Mass. Ass'n of Older Ams. v. Comm'r of Pub. Welfare*, 803 F.2d 35 (1st Cir. 1986); *Langton v. Johnston*, 928 F.2d 1206 (1st Cir. 1991)—and held that plenary appellate review, with no deference to the trial court's judgment, is appropriate where the issue "involves determining the scope of the parties' original bargain." *Navarro-Ayala* at 1339-40. As explained by the Court of

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[3](...continued)
as a matter of law."), 62 (Heading IA, to the same effect).

Appeals in that case, "If this were not so, the making of a consent decree would, from the government's point of view, be a game of Russian roulette, since there could be no predicting the circumstances which might lead the judge, a decade or so later, to enlarge the areas of his own control." *Id.* at 1339.

Even less deference is due to the trial court's contempt rulings, where, as in this case, the trial court judge whose rulings are being reviewed was not involved in the parties' negotiations that resulted in the consent decree that is now being interpreted and enforced. *Id.* at 1339 n.17; *cf. United States v. Bd. of Educ.*, 717 F.2d at 382 (deference due to trial judge who approved the decree). Furthermore, as recognized by the First Circuit in reversing contempt rulings made by the trial court in another public law case, appellate review of a finding of contempt is appropriately even more searching than review of a finding of no contempt, because "[t]he contempt power is . . . one of the most potent weapons in the judicial armamentarium." *Project BASIC v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991).

B. BRI's Argument that Public Officials Are Required, Under Penalties of Contempt, to Comply Not Only with the Literal Language of a Consent Decree, but with Its "Spirit," Stands the Doctrine of Substantial Compliance on Its Head.

BRI's remarkable contention that a public official may be subjected to contempt sanctions if his conduct, although not clearly in violation of the literal terms of a consent decree, fails to comply with its "spirit," BRI Brief at 58, 63-64,[4] turns the doctrine of substantial compliance on its head. That

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[4]BRI summarizes its position on this issue as follows: "[T]he standard for finding contempt of the Settlement Agreement as a public law consent decree is more flexible, and enforcement through contempt is proper since the Commissioner violated the *objectives* of the Settlement Agreement" (emphasis added). BRI Br. at 58. Similarly, in the body of its argument BRI contends, "[T]he touchstone of contempt of a public law consent decree is a violation of the *intent, spirit and objectives* of the decree, not a violation of the strict terms of the order" (emphasis (continued...)

doctrine, as articulated and applied in the cases cited by BRI, calls for a more flexible, i.e., more lenient, standard in enforcing consent decrees against public officials. Rather than require strict compliance by public officials, both federal and state courts refrain from holding public officials in contempt, even where they clearly fail to comply with the literal terms of a decree, as long as they "substantially comply,"—a lower, not a higher, standard. *E.g.*, *Langton*, 928 F.2d at 1222 (upholding finding of no contempt, although "quite plain . . . that there was n[ot] letter-perfect compliance with . . . the demands of the consent decrees");[5] *United States v. Massachusetts*, 890 F.2d at 510 (upholding finding of no contempt, despite Commonwealth's noncompliance with staffing ratios required by consent decree); *Palmigiano v. DiPrete*, 700 F. Supp. 1180, 1191-92 (D.R.I. 1988) (stating that court would not entertain contempt petition where prison population exceeded decreed cap by only several persons for short time, but upholding finding of contempt where defendants had far exceeded cap for several years); *Town of Manchester v. DEQE*, 381 Mass. 208, 209 n.2, 212-13 (1980) (upholding finding of contempt where town had not substantially complied with requirements of consent decree).

As recognized in the cases cited by BRI, the "safe harbor" from contempt sanctions afforded to public officials by the substantial compliance doctrine, *Palmigiano*, 700 F. Supp. at 1191, is warranted in order to avoid the "societal disruptions" that might otherwise result from strict enforcement of such decrees against public officials, *AMF*, 711 F.2d at 1101, and to

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[4](...continued)
added). *Id.* at 63-64.

[5]BRI's paraphrase of this holding—"contempt upheld despite record indicating not 'letter-perfect compliance' with consent decree," BRI Br. at 64—directly misstates the holding and typifies BRI's perversion of the doctrine of substantial compliance.

accommodate "the differing competencies of different branches of government."[6] *Mass. Assoc. of Retarded Citizens, Inc. v. King*, 668 F.2d 602, 607-08 (1st Cir. 1981). Thus, BRI's contention that the trial court appropriately imposed contempt sanctions against the Commissioner for violating the "spirit" if not the letter of the Settlement Agreement is directly at odds with the substantial compliance doctrine, which comes into play only where a public official clearly has failed to comply with the literal terms of a decree and, even then, serves as a defense to, not a justification for, the imposition of contempt sanctions on a public official.

C. BRI's Arguments Erroneously Assume that Contempt Sanctions May Be Imposed on a Public Official for Violation of an Ambiguous Consent Decree.

Because this is a contempt case—in which it is axiomatic that a party cannot be sanctioned for violating an ambiguous order, *see* DMR Br. at 37-38; *see also Bird v. Capital Site Management Co.*,423 Mass. 172, 178 (1996), quoting *Peggy Lawton Kitchens, Inc. v. Hogan*, 403 Mass. 732, 734 (1989) (upholding contempt "because there was 'a clear and undoubted disobedience of a clear and unequivocal command'")—this Court should not even reach the merits of BRI's arguments as to how the ambiguous provisions of the Settlement Agreement should be construed. Whatever tenets and extrinsic aids may be applicable in construing a consent decree in other contexts, e.g., in acting on a motion for clarification or modification or declaring the parties' rights and responsibilities under the decree, *see, e.g.,United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975), where, as here, a consent

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[6]Even in enforcing private, commercial consent decrees, where such prudential considerations are absent, courts will not "reach beyond the strict terms of the decree to find [a defendant] in violation." *AMF*, 711 F.2d at 1107 ("Just as we do not think a court can ignore obvious violations, it need not reach out for an expansive interpretation.").

decree is ambiguous on its face, a party cannot properly be held in contempt for violating its provisions.[7]

As held by the United States Supreme Court, in reversing the affirmance of a contempt finding on the ground that the underlying decree was "too vague to be understood," "[t]he most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). Similarly, in vacating contempt sanctions imposed on a federal agency, the Court of Appeals for the First Circuit held:

> For a party to be held in contempt, it must have violated a clear and unambiguous order that left no reasonable doubt as to what behavior was expected and who was expected to behave in the indicated fashion. "In determining specificity, the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden."

Project BASIC, 947 F.2d at 17 (citations omitted).

Another example of a contempt finding being reversed because of the lack of clarity of the underlying order is the *AMF* case, relied upon by BRI for another point. In that case, the court refused "to reach beyond the strict terms of a decree" to hold a party responsible for its failure to prevent others within its control from doing what the decree prohibited, on the grounds that the decree imposed no such monitoring obligation directly on the party in

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[7]For this reason, many of the authorities relied upon by BRI—which deal with the construction of consent decrees but not with the imposition of contempt sanctions, *e.g.*, *ITT Continental Baking Co.*, *supra*; *Juan F. v. Weicker*, 37 F.3d 874 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 2579 (1995); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976)—have no bearing on this point.

question. *AMF*, 711 F.2d at 1107; *see also MARC*, 668 F.2d at 608 (where "decree's language does not *expressly* forbid [particular conduct] . . . [s]till less does it expressly forbid the round-about type of [conduct]" at issue there). In the present case, however, the trial court engaged in just such impermissible "reaching," by finding the Commissioner in contempt for his communications—communications not expressly mentioned in, much less prohibited by, the Settlement Agreement—to other states' officials, A. 1237-38, who, in turn, purportedly decided not to place new students or maintain existing students at BRI.[8]

Because a party may not be held in contempt of an ambiguous decree, the parties' intentions in entering into an ambiguous consent decree and the court's intentions in approving the decree are irrelevant in a contempt proceeding[9] and "cannot suffice either to clarify what is at best an ambiguous decree or to patch the hole in the lower court's contempt analysis." *Project BASIC*, 947 F.2d at 18. "[L]itigants' and jurists' objectives, no matter how laudable, can be achieved only through and in conformity with established standards: . . . no one may be punished under our system of justice, for failing to conform his conduct to rules that he could not ascertain." *Id.* at 21.[10] As held by the Court of Appeals for the Seventh Circuit, in a case heavily relied

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[8]The court's findings to this effect were, in any event, clearly erroneous. *See* DMR Br. at 101-02, 105-07, 132-33.

[9]The Commissioner objected on this ground to the admission of evidence of such intentions, but that objection was overruled. Tr. II:133-34.

[10]Even outside the contempt context, "it is inappropriate to search for the 'purpose' of a consent decree and construe it on that basis. '[T]he *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve . . . . [T]he instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *ITT*, 420 U.S. at 235-36, quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

upon by BRI and by the trial court, "[A] consent decree . . . cannot be interpreted by taking a hindsight view of conduct that is facially in compliance but produces an unsatisfying result and deciding therefore that the agreement must mean something more." *United States v. Bd. of Educ.*, 799 F.2d 281, 291 (7th Cir. 1986) ("*Bd. of Educ. III*"); *cf. ITT*, 420 U.S. at 236 n.9 (even where "the interpretation offered by [a party] might better effectuate the purposes of the acts assertedly violated, this 'does not warrant our substantially *changing* the terms of a decree'"; citation omitted).

Rather, where, as here, the decree contains such inherently ambiguous terms as "good faith," "the court and the parties must accept the inherent uncertainty with respect to the specifics of performance, or void the agreement on the grounds of vagueness." *Bd. of Educ. III*, 799 F.2d at 291. For these reasons, none of appellees' arguments as to the parties' and the court's original understanding of the purpose and meaning of the decree (which are factually incorrect in any event, *see* DMR Br. at 41-43) should be considered by this Court in this contempt case.

Nor should the Court countenance, as an aid to construing these facially vague provisions, BRI's argument that DMR purportedly shared BRI's interpretation of these provisions prior to 1993. BRI Br. at 68-74. First of all, in arguing to this Court that "[t]he Commissioner and DMR [f]ollowed the Settlement Agreement [u]ntil August of 1993," BRI Br. at 68, BRI conspicuously ignores and directly contradicts its own repeated charges in 1989 and 1990—including two separate lawsuits and a prior contempt complaint in the present case—that DMR had violated the Settlement Agreement and otherwise acted in bad faith with respect to BRI. *See* DMR Br. at 8-10.[11]

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[11]These facts are conspicuously absent from BRI's statement of the case. BRI Br. at 11.

Second, and more important, even if DMR had previously agreed with or acquiesced in BRI's overly broad interpretation of the Settlement Agreement, this prior conduct should not be relied upon as a means of importing meaning into the facially vague provisions of the Settlement Agreement, since to do so "would be to punish [DMR] for [its] cooperation." *Navarro-Ayala*, 951 F.2d at 1346. As recognized by the First Circuit Court of Appeals,

> In institutional litigation, assertions by the court and its agents, as well as the parties, must often be understood as part of an extended negotiating process: statements are not always made for the literal truth but to encourage or cajole. By the same token, silence in the face of what may appear to be overclaiming by the court may seem to be prudent policy where matters generally are proceeding satisfactorily. Defendants should not have to fear that their willingness to cooperate to a degree greater than required by a consent decree will later be taken as proof that they agreed to do more.

Id. at 1346 n.24.

BRI's attempt to attach some significance to the fact that DMR is a party to the Settlement Agreement (a fact that DMR did not contest below, *see* DMR Br. at 77-79)[12] is particularly unavailing as a means of clarifying

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[12]For this reason, the doctrine of judicial estoppel, invoked by the trial court, App. 1295-1300, and echoed by the student members of the class, Students' Br. at 58-59, has no bearing here. *See Navarro-Ayala*, 951 F.2d at 1343-44 (rejecting judicial/equitable estoppel claim where positions taken were not inconsistent); *see also E. Cambridge Sav. Bank v. Wheeler*, 422 Mass. 621, 621-23 (1996) (describing concept of judicial estoppel as precluding party from asserting position in one proceeding that is contrary to position that party previously asserted successfully in another proceeding but "declining to identify a settlement as representing success for th[is] purpose[ ]"). Moreover, there is no evidence that any court or party relied to its detriment on DMR's prior acknowledgment of its party status. *See Navarro-Ayala*, 951 F.2d at 1346 n.25 (rejecting equitable estoppel (continued...)

DMR's obligations thereunder. "[P]arty status, without more, cannot subject [a party] to the constraints of an injunctive decree" that does not clearly prohibit him from engaging in the conduct in question. *Project BASIC*, 947 F.2d at 19. Because none of the provisions at issue here expressly requires or prohibits DMR to take any particular actions, *see* DMR Br. at 39-58, the fact that DMR is a party to the agreement as a whole falls far short of leaving "no reasonable doubt as to what behavior was expected and who was expected to behave in the indicated fashion." *Project BASIC*, 947 F.2d at 17 (reversing contempt judgment against HUD, a party to the decree and the underlying case, on this ground); *see also Spallone v. United States*, 493 U.S. 265, 276 (1990) (reversing contempt finding against city council members for violating order directed only to city); *United States v. Richlyn Labs.*, 817 F. Supp. 26, 27-28 (E.D. Pa. 1993) (finding no contempt where decree was directed primarily to party seeking contempt rather than to alleged contemnor).

Because the "unflagging need for clarity," *Project BASIC*, 947 F.2d at 16, is based on the due process principle that a party must be notified, *prior* to being held in contempt, precisely what conduct is required or prohibited, the lack of specificity in the Settlement Agreement cannot be cured by the contempt findings themselves or, *a fortiori*, by post-judgment findings on a motion to stay the contempt order pending appeal, as BRI appears to contend. BRI Br. at 62-63. As the Seventh Circuit forcefully held, where a party's conduct has been found to be in violation of an ambiguous order, contempt sanctions may not be imposed contemporaneously with the finding that the decree has been violated. *Bd. of Educ. III*, 799 F.2d at 289. "Rather, the

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[12](...continued)
argument on that additional ground).

government [must] be given a sufficient chance to bring itself into compliance" with the decree as construed. *Id.*

As recognized by the Seventh Circuit, imposing contempt sanctions based on the violation of a vague decree is not only unfair to the putative contemnor but also raises separation of powers concerns where the respondent is an executive branch official. *Id.; see also* DMR Br. at 57. These same concerns were expressed by the First Circuit in another case relied upon by BRI, in which the court rejected an interpretation of a consent decree that "would result in placing the . . . court in essentially standardless control" of a public institution. *Navarro-Ayala*, 951 F.2d at 1341. In reaching this conclusion, the court emphasized the danger of broadly construing consent decrees against state officials:

> State officials entering into a consent decree are entitled to rely on courts to apply the decree only to its agreed objects. Consent decrees are not like the camel's proverbial nose in the tent which, once inserted, gives the animal free rein to come and go at will. The improvement of [public institutions] will not be advanced by giving state officials reason to avoid entering into such arrangements in the future for fear they will be expanded beyond their language.

Id. at 1343. To avoid the problems inherent in enforcing ambiguous decrees against state officials, courts must construe any ambiguities in favor of the alleged contemnor, not against him, *Project Basic*, 947 F.2d at 16; *see also AMF*, 711 F.2d at 1101, particularly where the case involves the exercise of professional judgment by agency officials. *United States v. Massachusetts*, 890 F.2d at 510; *cf. In re McKnight*, 406 Mass. 787, 801 (1990) ("If accepted professional practice would tolerate the unavailability or the nonuse of aversives [for a BRI student] . . . and the Department elects to follow that professional practice, the courts must respect that judgment.").

Also, any construction of an ambiguous decree that would bring the provisions of a decree into conflict with a pertinent state statute, as interpreted by the agency charged with administering it (i.e., in this case, G.L. c. 19B, as interpreted by DMR in its behavior modification regulations) should be rejected to avoid unnecessary conflict between the judicial and the legislative and executive branches. *MARC*, 668 F.2d at 609; *Gray v. Comm'r of Revenue*, 422 Mass. 666, 674-75 (1996); *see also Alliance, AFSCME/SEIU v. Sec'y of Admin.*, 413 Mass. 377, 383 (1992) (declining to adopt "strained and constitutionally questionable interpretation" of agreement with Commonwealth). By construing ambiguous provisions of the Settlement Agreement against the Commissioner and in a manner that brings the Agreement into conflict with his statutory and regulatory authority, and then by imposing contempt sanctions against him for violating the Agreement as so construed, the trial court violated the most fundamental principles both of contempt law and of separation of powers: that a party can be held in contempt only for violating a clear and unequivocal court order, and that judicial enforcement of consent decrees against public officials must be conducted in a manner that safeguards the autonomy of governmental entities to the "maximum extent possible." *Langton*, 928 F.2d at 1221.

D. BRI Erroneously Minimizes Its Burden of Demonstrating that the Commissioner Directly and Undoubtedly Violated a Clear and Unequivocal Provision of the Settlement Agreement.

It should be undisputed, given the well-settled state of the law, that a party seeking contempt has the burden of proving both that the order in question was clear and unequivocal and that the alleged contemnor directly and undoubtedly violated the order. *See* DMR Br. at 37-38, 58-59. Yet BRI appears to dispute both the locus and the substance of this burden.

As to the locus of the burden, BRI contends that, by introducing "sufficient evidence" of bad faith, it shifted the burden to the Commissioner

to prove that he had not violated the good faith provision of the Settlement Agreement. BRI Br. at 59, 85. In support of that proposition, BRI cites two cases and an evidence treatise. The first case, *Rockdale Management Co. v. Shawmut Bank*, 418 Mass. 596 (1994), is both legally and factually dissimilar to the present case. It is a fraud case rather than a contempt case; the remedy sought was merely dismissal of the action in which the fraud occurred; and the wrongdoing in question (forging a letter and then testifying that it was genuine) bears no resemblance even to the court's most critical findings concerning the Commissioner's conduct. In any event, in that case, the Court held that the party seeking the sanction bore the burden of proving, through clear and convincing evidence, that the fraudulent conduct was part of a scheme to defraud. *Id.* at 598, 600. Thus, to the extent this case is at all relevant, it supports placing the burden of proof on BRI, not on the Commissioner.

The second case cited by BRI on this point was brought under the "lemon law," which contains a statutory burden-shifting presumption, under which an arbitrator's finding that a car is defective shifts the burden to the dealer to prove the contrary. *Ford Motor Co. v. Barrett*, 403 Mass. 240, 242-43 (1988). That case clearly has no bearing on the burden of proof in a common law contempt case.

The treatise section cited by BRI deals with the allocation of the burden of production, not the burden of proof, and states that the burden of production shifts only "when the evidence becomes such that the jury could reasonably find only for the other party." Hon. Paul J. Liacos, *Handbook of Massachusetts Evidence*, § 5.6.2 at 225 (6th rev. ed. 1994). The piece of evidence that BRI relies upon, a report that DMR filed with the court in September 1993, App. 147, of which the court took judicial notice during BRI's direct examination of its first witness on the first day of the three-week contempt trial, falls far short of constituting such weighty evidence of

contempt that, having received it, the court "could reasonably find only for the other party." *Mass. Evidence* at 225. Indeed, as demonstrated in the Commissioner's opening brief, the court's findings concerning this report are clearly erroneous. *See* DMR Brief at 109-10. However, even if they were true—i.e., even if the report were misleading in not fully describing, or not including as exhibits, favorable internal recommendations of DMR field staff on BRI's application for certification, A. 1239-40—it cannot be said that the court had no choice but to find the Commissioner in contempt of the Settlement Agreement, based on that evidence alone.

BRI also erroneously minimizes both of the essential elements of its burden of proof—to show that the defendant (1) directly and undoubtedly violated (2) a clear and unequivocal court order. In their briefs to this Court, none of the appellees makes a serious effort to argue that the terms of the Settlement Agreement at issue here are clear and unequivocal. Rather, after making some conclusory statements as to the clarity of those provisions, BRI Br. at 58, 63;[13] Parents' Br. at 10; Students' Br. at 51, BRI and the other appellees quickly move on to argue that the trial court correctly construed the

[13]The only two cases cited by BRI in support of its conclusory statement that "[t]he terms of the Settlement Agreement impose clear and unequivocal legal obligations on DMR and the Commissioner," BRI Br. at 63, provide no support for that proposition. In *Commonwealth v. One Ford Econoline Van*, 413 Mass. 411 (1992), the court order in question—requiring the Commonwealth to return a van within 10 days—was undeniably clear; and the Commonwealth did not dispute the clarity of the order, only the possibility of complying with it. *Id.* at 411-12. In *McKnight*, 406 Mass. at 791, this Court did not opine on the clarity of the Settlement Agreement at all, but only made the axiomatic pronouncement that *if* the Department violated paragraph F of the Settlement Agreement (a provision that was not invoked in the present case), "it *might* be liable for breach of the agreement and *perhaps* for contempt of court" (emphasis added).

agreement to prohibit the conduct the Commissioner was found to have engaged in.[14]

Similarly, rather than attempt to shoulder its equally heavy burden of demonstrating that the Commissioner directly and undoubtedly violated the Settlement Agreement, BRI takes on the less weighty, but legally insufficient, task of demonstrating that the Commissioner's conduct was designed to accomplish, "indirectly," what he could not achieve under the express terms of the Settlement Agreement. BRI Br. at 84. BRI's repeated use of the word "latent," BRI Br. at 59, 85—i.e., "inactive," *Webster's New World Dictionary* at 762 (3rd college ed. 1991)—to describe the Commissioner's purportedly contumacious conduct is particularly telling in this regard.

In accordance with the lower standard that BRI sets for itself, the conduct it relies upon as constituting violations of the Settlement Agreement is almost exclusively indirect. For example, while Part A of the Settlement Agreement does not prohibit or require any actions by the Commissioner, BRI contends that the Commissioner's certification decisions, "[i]n effect," BRI Br. at 76, violated that provision, because they purportedly conflict with the Probate Court's rulings in individual substituted judgment proceedings, which are required by Part A.[15] BRI Br. at 74-77. Similarly, BRI contends that the Commissioner violated Part C, which requires that "intake at B.R.I. for new clients . . . shall not be impermissibly obstructed," by taking various "indirect action[s]," BRI Br. at 80, that purportedly had the effect of reducing BRI's enrollment.[16] BRI Br. at 79-80.

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[14]Appellees' lengthy arguments as to the proper construction of the Settlement Agreement further demonstrate that the agreement on its face is not sufficiently clear to support the contempt judgment.

[15]As a matter of law, no such conflict exists. *See* DMR Br. at 39-46.

[16]The trial court's findings to that effect are, in any event, clearly erroneous. (continued...)

E. BRI Failed to Meet Its Burden of Demonstrating that the Commissioner Directly and Undoubtedly Violated Any Clear and Unequivocal Court Order.

In its brief, BRI attempts to delineate, as the trial court failed to do, *see* DMR Br. at 38-39, what conduct by the Commissioner violated what provisions of the Settlement Agreement. BRI Br. at 74-85. This effort fails in many important legal and factual respects, which will be highlighted here without reiterating the arguments made in the Commissioner's opening brief at 37-61.

1. BRI's Position on the Central Legal Issue in this Case—i.e., Whether the Settlement Agreement Prohibits the Commissioner from Regulating BRI's Use of Aversive Procedures—Is Unclear and Unsupported as a Matter of Fact or Law.

At various points in its brief, BRI takes a range of contradictory positions as to whether and, if so, to what extent, the Settlement Agreement prohibits the Commissioner from regulating BRI's use of aversive procedures. At some points, BRI appears to contend that, by entering into the Settlement Agreement, the Commonwealth waived all regulatory authority over BRI.[17] At other points, BRI seems to acknowledge that the

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[16](...continued)
See DMR Br. at 105-07, 146-47.

[17]*See* BRI Br. at 9 ("Court Monitor would oversee [BRI]'s compliance with all applicable state regulations, except to the extent those regulations involved treatment decisions, which were reserved for the Trial Court"; "[a]ll regulatory disputes or concerns between the parties were required to be submitted to [the Court Monitor] for resolution"); 51 ("Settlement Agreement . . . vested treatment authority in the Court"); 59 ("Commissioner engaged in contempt . . . [by]enforcing his regulatory authority over [BRI] . . . and in refusing to arbitrate regulatory disputes"); 67 ("Commonwealth agreed to relinquish its regulatory authority over [BRI]"; "[a]ll regulation of aversive therapies was expressly reserved for the Trial Court"); 70 ("Settlement Agreement granted to the Trial Court exclusive power to determine treatment for the [BRI] students"); 74-75 ("Commonwealth . . . waived its right to unlaterally determine which treatments could be used at [BRI] when it (continued...)

Commissioner retains authority to regulate BRI.[18] At still other points, BRI appears to take an intermediate stance on this issue, under which the precise extent of the Commissioner's authority remains unclear.[19] If even BRI itself cannot articulate a clear and consistent position as to whether or to what extent the Settlement Agreement prohibits the Commissioner from regulating BRI's use of aversive procedures, then certainly the Commissioner cannot properly be held in contempt on the ground that his regulatory actions violated the "clear and unequivocal" terms of that agreement.

To the extent that BRI contends that the Settlement Agreement does prohibit the Commissioner from regulating BRI in general or conditioning or revoking its certification to use Level III aversives in particular, that

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[17](...continued)
signed the Settlement Agreement"; "it is the Trial Court, not the Commissioner, which is in the position of authorizing particular treatments for particular clients"); 76 ("Settlement Agreement was intended to provide the Trial Court with exclusive authority to determine the propriety of aversive treatments"); 77 ("Commissioner's unilateral termination of treatments by withholding certification is . . . a direct violation" of the Settlement Agreement).

[18]*See* BRI Br. at 10 ("As a result of the Settlement Agreement, regulatory authority over [BRI] was transferred from OFC to DMR . . . ."); 58 ("behavior modification regulations . . . vested [Commissioner] with authority to certify Level III aversive treatments"); 68 ("[BRI] has never asserted . . . that the Settlement Agreement mandates that the Commissioner should have refrained from regulating [BRI]'s treatment program"; "Settlement Agreement did not strip the Commonwealth from regulating [BRI]"); 74 ("substituted judgment determination does not, *ipso facto*, authorize the use of procedures which are deemed to be violative of state law").

[19]*See* BRI Br. at 58-59 ("exclusive role of the state administrative agencies in regulating [BRI]was changed substantively in all respects" under Settlement Agreement; Commissioner's "regulatory power" to order termination of aversive treatments was "modified with the signing of the Settlement Agreement"); 70 ("Settlement Agreement placed conditions on [Commissioner's] regulatory authority over [BRI]"); 72-73 ("signatories to the Settlement Agreement did not intend to reserve to the Commonwealth the same . . . regulatory power over treatment decisions" that existed prior to 1985); 74 (Commonwealth "waiv[ed. . .] certain regulatory powers under the Settlement Agreement"; "Settlement Agreement resulted in DMR having limited authority in treatment decisions").

contention is incorrect as a matter of law and fact. BRI offers little, by way of legal analysis, in response to the authorities cited and legal arguments made by the Commissioner, demonstrating the lack of any conflict between the Settlement Agreement or the substituted judgment rulings of the Probate Court, on the one hand, and the Commissioner's exercise of his regulatory authority to condition or revoke the use of Level III aversives, on the other. *See* DMR Br. at 39-46; *McKnight*, 406 Mass. at 789, 800-01 (despite fact that probate court, exercising substituted judgment, had previously approved use of Level III aversives on BRI student, permanent injunction requiring DMR to make such treatment available might be improper; rejecting arguments that student has "right to elect (pursuant to substituted judgment principles) among . . . treatment procedures that are acceptable to qualified professionals").

In response to the Commissioner's argument that the Probate Court's approval of a treatment in substituted judgment proceedings cannot operate to legalize a form of treatment prohibited by state law, DMR Br. at 44-46, BRI first makes the conclusory statement that, by entering into the Settlement Agreement, the Commonwealth waived its authority to enforce state law against BRI. BRI Br. at 74-75. BRI offers no legal support for this contention, which begs the central question in this case. To the extent that this contention is based on the factual premise that the parties or the trial court intended the Settlement Agreement to effect such a waiver, that premise is directly contradicted by the factual record. *See* DMR Br. at 41-42. Moreover, even if the agreement could be read to effect such a waiver, it would be void and unenforceable as against public policy. *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 322-23 (1996).

If it is unclear whether, or to what extent, the Settlement Agreement abrogates or waives the Commissioner's regulatory authority over BRI, the agreement should be construed to incorporate state regulations of aversive

procedures "as much as if th[ose] provisions . . . had been written into the [Agreement]." *Gray*, 422 Mass. at 675 (citiations omitted; discussing Dep't of Revenue's authority under agreement and regulations). Once DMR's behavior modification regulations are read into the Settlement Agreement, "[i]t follows that the [Commissioner's enforcement of those regulations] was not in conflict with the [agreement] but entirely consistent with it."[20] *Id.*

BRI's alternative argument, that the aversive procedures in question here are not prohibited by state law, BRI Br. at 75 n.17, is equally unavailing. Although it is true that aversive procedures are not absolutely prohibited by state law, their use is strictly limited by DMR's behavior modification regulations, 104 C.M.R. § 20.15, the validity of which is not questioned by BRI.[21] These regulations specifically authorize the Commissioner to enforce these stringent requirements by conditioning or revoking the certification of

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[20]This does not mean, of course, that the Commissioner's regulatory actions are insulated from judicial review. To the contrary, if the Commissioner's decisions to condition or revoke BRI's certification were arbitrary and capricious, not based on proper procedure, not supported by substantial evidence, or otherwise incorrect as a matter of law, BRI had a right, which it failed to exercise, to petition for judicial review on those grounds pursuant to G.L. c. 30A, § 14. (Contrary to BRI's contention, BRI Br. at 68 n.11, this exhaustion/primary jurisdiction argument is not relegated to a single footnote, but rather is reiterated throughout the Commissioner's opening brief. *See* DMR Br. at 43 n.57, 98 n.43, 135 n.196, 141 n.206, 153-54.) *Cf. Gray*, 422 Mass. at 674, 675 & n.12 (relying, in part, on availability of judicial review to harmonize judicial, legislative, and executive powers to enforce child support obligations).

[21]In fact, BRI's Executive Director assisted the Department of Mental Health in developing these regulations, with the express understanding that BRI would be subject to state regulation in its use of aversive procedures. *See* DMR Br. at 41-42.

providers who do not comply with the standards set forth in the regulations.[22] 104 C.M.R. § 20.15(4); *see* DMR Br. at 39-46, 139-42.

Even if the Settlement Agreement could be read to prohibit the Commissioner from imposing certification conditions that require BRI to cease using aversive procedures that have been authorized by the Probate Court in substituted judgment proceedings—which it cannot, *see* DMR Br. at 43-46—BRI grossly overstates the conditions actually imposed by the Commissioner, so as to create "conflict" where none in fact exists. While BRI characterizes various certification conditions as absolutely prohibiting BRI from using particular procedures, BRI Br. at 76, in fact the conditions did not do so.

In his letter of August 31, 1993, the Commissioner did *not* prohibit BRI from using aversive procedures that were not then in use at BRI, as BRI falsely states.[23] BRI Br. at 26. Rather, as stated in that letter itself, if BRI proposed to use other aversive procedures in addition to those currently in use, BRI was required only to notify and meet with DMR regarding any such proposal. Ex. U-91 at 3. Similarly, in his letter of January 20, 1995, the Commissioner did *not* prohibit BRI from using Level III aversive procedures on six students, as BRI suggests.[24] BRI Br. at 52, 76. Rather, as stated in the letter itself, the condition gave BRI a choice. It could either revise the

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[22]As discussed in DMR's Brief at 141, the Commissioner's regulatory authority extends not only to "programs" as a whole, as BRI contends, BRI Br. at 75 n.17, 76 n.19, but to the use of particular procedures for particular clients. 104 C.M.R. § 20.15(1)(c). The trial court's legal conclusions to the contrary are incorrect. *See* DMR Br. at 141 & n.205.

[23]The trial court's finding to that effect is clearly erroneous. *See* DMR Br. at 98.

[24]The trial court's finding that this letter "required that [BRI] discontinue Level III interventions for six individuals," A. 1270, is clearly erroneous. *See* DMR Br. at 139-40.

treatment plans for these individuals to conform to DMR's regulations, or it could exclude Level III aversives from these students' plans and utilize Level I or II aversives instead. In either case, BRI was authorized to continue using Level III aversives on these students until revised plans were submitted and approved by the Probate Court. Ex. U-166; DMR Br. at 139-40.

While the Commissioner's January 20, 1995, letter did prohibit BRI from using four particular treatments, BRI was not then using any of those treatments except for the specialized food program. PI App. at 135-36. Moreover, that same prohibition was also contained in subsequent orders of a Single Justice of the Appeals Court, BRI Supp. App. 133, 134, the merits of which are not challenged by BRI or any other party before this Court.[25] *See* the Commissioner's appellee's brief in SJC-07045.

In characterizing the revocation of its certification as a "unilateral" action by the Commissioner, BRI Br. at 77, BRI neglects to mention that the sole ground for this revocation was *BRI's* unilateral refusal to comply with the certification conditions over a two-month period, without seeking more time or judicial or administrative review. *See* DMR Br. at 31. That fact is also noticeably missing from BRI's Statement of the Facts, BRI Br. at 54, as is the fact that the court's preliminary injunction required BRI to comply with the certification conditions pending a decision on the merits. PI App. at 504. BRI did not appeal from that preliminary injunction, but, instead, touted it as a victory. Ex. DMR-35 at 12.

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[25]In denying BRI's request for relief from those orders, a Single Justice of this Court (Abrams, J.) concluded that "there was no abuse of discretion and there was a supportable basis for the single justice's Orders." BRI Supp. App. 136.

2. BRI Misstates the Facts Concerning DMR's Willingness to Participate in Mediation.

Even if the meaning and scope of the arbitration provision of the Settlement Agreement were sufficiently clear and unequivocal as to permit contempt sanctions to be imposed for its violation, *but see* DMR Br. at 46-50, BRI fell far short of meeting its burden of proving that the Commissioner failed to substantially comply with this provision. Contrary to BRI's contentions, BRI Br. at 27, 35, 36, and the trial court's findings on this point, DMR repeatedly *agreed* to participate in mediation sessions with Dr. Daignault and then with his successor Judge Hurd, while, at the same time, reserving its right to argue that mediation of certain disputes was not required by the Settlement Agreement.[26] *See* DMR Br. at 50; *see also, e.g.*, Ex. U-96, U-98, U-114, U-124, U-182, DMR-79; Tr. VIIA:55.

In particular, with respect to the independent program evaluation by the Rivendell team, it was DMR who requested mediation, Ex. U-110, which was refused by the court monitor, Dr. Daignault, as beyond his jurisdiction, Ex. BRI-251; while BRI brought its concerns about Rivendell directly to the court without first bringing them to the court monitor's attention. Ex. BRI-251, U-110. When the court subsequently referred that issue and others to the court "mediator," Judge Hurd, App. 214, the mediator permitted the evaluation to go forward, and BRI did not appeal that decision to the court for resolution under Part B(2) of the Agreement.

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[26]Given the long history of contentious litigation between the parties both before and after the execution of the Settlement Agreement, such reservation of rights was understandable and prudent. Indeed, in agreeing to meet with DMR *without* the court monitor present, BRI conversely reserved its rights to argue that the court monitor's presence was required by the Settlement Agreement. Ex. BRI-245 at 2.

3. BRI Failed to Demonstrate that the Commissioner "Impermissibly Obstructed" BRI's Intake of New Clients.

BRI's argument, BRI Br. at 79-80, as to the Commissioner's contempt of Part C of the Settlement Agreement, which provides (in the passive voice) that BRI's intake of new clients "shall not be impermissibly obstructed," rests exclusively on the factual premise that DMR's communications with other states' agencies resulted in those agencies not referring new students to BRI, purportedly in violation of DMR's obligations under Part C. Even if the Commissioner could be held in contempt for conduct that is not expressly prohibited by the Settlement Agreement, *but see* Arguments IC and ID, *supra;* DMR Br. at 51-53, the factual premise for this argument is mistaken. *See* DMR Br. at 52-53, 101, 105-07, 132-33, 146-47.

With respect to New York State in particular, as discussed in the Commissioner's opening brief, DMR Br. at 133, that state's actions to remove students from BRI were motivated, not by any impetus from DMR, but by New York legislation, enacted in 1994, which required state mental health and mental retardation agencies to transfer their adult clients from out-of-state to in-state placements, and New York City's decision to cease funding out-of-state placements altogether. *See generally Brooks v. Giuliani*, 84 F.3d 1454, 1456-58 (2d Cir. 1996) (describing legislation, related funding dispute between New York State and New York City, and resulting transfers of adult clients from out-of-state to in-state facilities); *New York Council for Exceptional People v. Pataki*, 632 N.Y.S.2d 531 (App. Div. 1995) (related state court litigation).

4. BRI Failed to Demonstrate that the Commissioner Violated Any Clear and Unequivocal Obligation Under the Good Faith Provision of the Settlement Agreement.

BRI's argument as to contempt of Part L of the Settlement Agreement—which requires that "each party . . . discharge its obligations under the terms of this agreement, in good faith"—begins with a quotation of the trial court's mischaracterization of the Commissioner's position on this issue. BRI Br. at 80. Contrary to that characterization, the Commissioner did *not* contend below that he has no legal obligation to act in good faith; to the contrary, in her opening statement his counsel expressly acknowledged such an obligation. Tr. I:55, 64-66. What the Commissioner does contend, as correctly paraphrased by the trial court in an earlier finding, A. 1212-13, is that the *Settlement Agreement* requires only that he act in good faith "in discharging his obligations under this agreement." Accordingly, if he fails to act in good faith in other respects, his decisions may be challenged, under G.L. c. 30A, as arbitrary and capricious; the agency may be sued for breach of contract, etc.; but the Commissioner may not be held in contempt of the Settlement Agreement on that basis alone. DMR Br. at 53-58.

BRI's protestations notwithstanding, the Seventh Circuit's decisions in the *Board of Education* case strongly support the Commissioner's contention that the "good faith" provision of the Settlement Agreement is too ambiguous to form the basis for contempt sanctions. DMR Br. at 53-58. The provision at issue in the *Board of Education* case ("¶ 15.I") required the parties "to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan." *Bd. of Educ. I*, 717 F.2d at 380. In the first of three appeals from district court orders enforcing that provision against the United States, the court of appeals found the "district court incorrect in its ruling that

¶ 15.1 is unambiguous."[27] *Id.* at 382. In reaching that conclusion, the court defined "ambiguous" as "reasonably susceptible to more than one meaning" and found the "broad language that permeates all of ¶ 15.1" and the word "available," in particular, to fall within that definition. As evidence of the ambiguity of that term, the court cited the differing arguments put forth by the various parties as to its meaning. *Id.* Under this standard, the good faith provision in the Settlement Agreement, which is even less specific as to what is required than is ¶ 15.1, is hopelessly "ambiguous," as evidenced by the volume of ink that has been spilled by the trial court and the various parties in putting forth their diverse contentions as to the multifarious meanings of which that term is "reasonably susceptible."

In its second opinion, the court of appeals held that the district court erred in construing the good faith provision in ¶ 15.1 to require the government to request legislative appropriations to fund the desegregation plan. *United States v. Bd. of Educ.*, 744 F.2d 1300, 1306-07 (7th Cir. 1984) ("*Bd. of Educ. II*"). Contrary to BRI's characterization, the court did *not* hold that "legislative lobbying activities by the executive branch intending to decrease funding available to desegration programs . . . would be a violation of the express good-faith provision subject to contempt sanctions." BRI Br. at 82. Rather, while the court stated that such lobbying "could be interpreted to contravene the *spirit* of the Decree"[28] (emphasis added), the court expressly declined to decide whether such activities constituted violations of

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[27]In his brief, the Commissioner accurately paraphrased that holding as follows: "(good faith provision not unambiguous)." DMR Br. at 56. BRI's claim that the Commissioner "miscite[d]" this holding, BRI Br. at 81, is clearly unfounded.

[28]BRI misleadingly omits the qualifying phrase "could be interpreted" from its quotation of this language. BRI Br. at 82.

the good faith provision.[29] *Bd. of Educ. II*, 744 F.2d at 1307-08; *see also Bd. of Educ. I*, 717 F.2d at 382.

In its third opinion, the court of appeals again vacated the district court's remedial orders, "in part because of the lack of any direction as to the meaning of [¶15.1] and in part because of the inherent problems with ordering relief against the government." *Bd. of Educ. III*, 799 F.2d at 289. In addition to stating that "what constituted good faith was not readily apparent" from the language of the decree, *id.*, the court repeatedly described the good faith provision as "ambiguous," "inherently nebulous" and "uncertain."[30] *Id.* at 289, 291, 292. On that ground, the court held that the district court erred in imposing remedial orders based on a violation of that provision. *Id.* at 291.

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[29]In declining to reach this question, the court noted, but prudently avoided, the "significant constitutional issue . . . as to whether a finding of lack of good faith properly can be based upon . . . a series of sweeping Executive policy decisions and recommendations," including requesting Congress to reduce or rescind appropriations and supporting other legislation. *Bd. of Educ. II*, 744 F.2d at 382. To the extent that the trial court's contempt findings in this case were based on the Commissioner's subjective "wish[] to testify on a bill before the legislature which would 'prohibit aversive treatment,'" A. 1218 (a desire that was never consummated, due to BRI's objections, A. 1218), and on other "policy decisions and recommendations" made by him in his official capacity (e.g., questioning the tuition rate set for BRI by another state agency, A. 1258-59), those findings raise the same serious constitutional issues. Indeed, at an earlier stage of this litigation, BRI's counsel acknowledged that a former Secretary of Human Services "unquestionably" had a first amendment right to testify against anti-aversive litigation, even if such testimony might "undermine" the Settlement Agreement. Ex. DMR-27 at 11.

[30]While BRI accuses the Commissioner of misciting this case, it is BRI that is guilty of doing so in its statement that "the court held that the good faith provision requiring the parties to use their best efforts to effectuate desegregation of the Chicago public schools was not in the least ambiguous or 'nebulous,'" BRI Br. at 81-82, which is belied by the above direct quotations from the court's opinion.

To the extent that some unequivocal meaning can be attributed to the term "good faith," lack of good faith must be narrowly construed, particularly in the contempt context, so as not to "place an impossible burden on a defendant . . . to be absolutely right, and not merely reasonable." *Parker v. D'Avolio*, 40 Mass. App. Ct. 394, 402 (1996). As repeatedly held by this Court and the Appeals Court, "[B]ad faith is 'not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will.'" *Id.* at 402-03 (quoting from *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398, 416 (1937)). Particularly "in a complex factual and legal entanglement such as this, it would be grossly unfair to bring down the potent weaponry" of contempt "upon one who may guess wrongly about what a court will ultimately do with the problem." *Parker*, 40 Mass. App. Ct. at 403 (reversing award of damages and attorney's fees in Chapter 93A case). Thus, even if the Commissioner's decisions to impose various conditions on BRI's certification to use Level III aversives are deemed to be legally or factually incorrect, such errors could not form the basis for imposing contempt sanctions against him for violation of the good faith provision of the Settlement Agreement.

As a factual basis for its argument that the Commissioner violated the good faith provision, BRI lists six actions purportedly taken by the Commissioner, with no citations either to the trial court's findings or to the underlying evidence.[31] BRI Br. at 81. In each case, BRI's descriptions of the

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[31] *Cf.* Mass. R. App. P. 16(e) ("No statement of a fact of the case shall be made in any part of the brief without an appropriate and accurate record reference."); *Service Publications, Inc. v. Goverman*, 396 Mass. 567, 580 (1986) (brief not complying with this rule may be struck in its entirety, or unsubstantiated arguments may be disregarded).

Commissioner's conduct are either entirely false or grossly distorted.

(1) Although the Commissioner did not adopt the recommendations of the 1991 and 1993 certification teams, *see* DMR Br. at 25-26, 80-84, he did not "ignore" or "secrete" their recommendations, as BRI contends. BRI Br. at 19-20, 81, 101. In fact, BRI knew about the 1991 team's favorable recommendations at least since January 1992, when the team leader so informed BRI, Ex. BRI-247 at 3, BRI-271, Dr. Israel's trial testimony to the contrary notwithstanding. Tr. VIIA:18-19. The teams' findings and recommendations were also expressly alluded to in the Commissioner's letter of August 6, 1993, Ex. U-82, and in DMR's September 1993 report to the trial court. App. 147.

(2) The Commissioner's certification letters "and other statements" were not "rife with false and defamatory statements," as BRI contends. BRI Br. at 81. Rather, the Commissioner had a good faith basis for all of the factual statements, legal conclusions, and conditions imposed in those letters. *See* DMR Br. at 26-31, 84-88, 94-110, 112-14, 130-36, 139-42. Accordingly, as discussed above, even if some statements contained in those letters had been inaccurate as a matter of fact or law (which is not the case), such errors cannot form the basis for the extraordinary contempt sanctions imposed here. *Parker*, 40 Mass. App. Ct. at 402-03.

(3) As discussed and documented in DMR's opening brief, DMR's September 1993 report to the court was neither false nor misleading. Rather, it accurately described the then-current status of BRI's compliance with state law and regulations, as construed by DMR. DMR Br. at 109-10. Indeed, the only "misrepresentations" identified by BRI are that this report did not fully describe or attach as exhibits the rejected internal recommendations of lower

level DMR officials that BRI be certified with relatively minor conditions.[32] BRI Br. at 31-32, 115-16. Even if the trial court had jurisdiction to review the merits of the Commissioner's certification decisions, *but see* DMR Br. at 43 n.57, 57 n.80, 81 n.117, 141 n.206, the rejected internal recommendations of lower level officials would be immaterial to such review. *Towns of Norfolk & Walpole v. United States Army Corps of Engineers*, 137 F.R.D. 183, 186-87, 188 (D. Mass. 1991) ("fact that there was divided opinion within an executive agency does not automatically imply bad faith"; internal recommendations properly excluded from administrative record), *aff'd*, 968 F.2d 1438 (1st Cir. 1992).

(4) Contrary to BRI's next allegation, BRI Br. at 81, the conditions imposed on BRI's use of Level III aversives on six individual students were neither unprecedented nor unauthorized. *See* DMR Br. at 141 & n.205.

(5) While weekly staff meetings about an individual provider may have been unusual, Tr. III:200, the frequency of such meetings falls far short of evidencing a "plot . . . to bring about JRC's downfall" as BRI contends. BRI Br. at 81. Similarly, although the Commissioner readily agreed that some of the matters discussed at those meetings did not relate to BRI's certification application per se, the fact that other BRI-related issues were sometimes discussed at those meetings does not in any way contradict the Commissioner's testimony that his sole *purpose* for scheduling weekly meetings was to gather information concerning the certification application,

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[32]In particular, BRI alleges that the report falsely stated that DMR staff had recommended "further review." BRI Br. at 31. However, the factual record, including those portions cited by BRI in support of that proposition, demonstrates that further review *was*, in fact, recommended. Ex. U-75 at 6, 11 (recommending further review of data on GED misfirings and on the specialized food program), Tr. V:45-50,VI:103 (Commissioner so testified).

as he and the Assistant Commissioner consistently maintained. *See* DMR Br. at 121-23.

(6) The sixth and final factual basis identified by BRI as grounds for finding the Commissioner in contempt of the good faith provision of the Settlement Agreement—the Commissioner's purported "harass[ment]" of the Court Monitor and guardian ad litem, BRI Br. at 81—is also legally and factually unfounded. Nowhere in its brief does BRI identify what, if any, actions the Commissioner purportedly took to "harass" the guardian ad litem,[33] nor was there any evidence on that subject at trial.[34]

As to the Court Monitor, the evidence demonstrates only that DMR raised legitimate concerns as to a possible conflict of interest (or appearance of such) on his part, after it came to DMR's attention that the Court Monitor had been retained by BRI's attorneys or their other clients to provide expert

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[33]Under a heading to that effect, BRI Br. at 108, there is no mention whatsoever of the guardian ad litem, only of the Court Monitor.

[34]There was evidence at trial that a question was raised at a DMR staff meeting as to whether the guardian ad litem was related in some way to the medical examiner who conducted an autopsy of a BRI student. Tr. IV:73-77. However, there was no evidence that anyone from DMR ever conducted an investigation of this matter or even questioned (much less "harassed") the guardian ad litem on this subject. To the contrary, DMR's Director of Investigations had no recollection of even being asked to investigate that question. Tr. XIIB:9, 36. And, based on the guardian ad litem's spontaneous offer, during the trial, to submit an affidavit on this issue, Tr. IV:78-79, it appears that she was not even aware of any such concerns on DMR's part prior to trial. Thus, the court's findings that DMR's "efforts to investigate the GAL" constituted an "effort to intimidate" her, App. 1262 n.49, were clearly erroneous.

In the court's post-trial findings, which accompanied the contempt judgment, the court belatedly took judicial notice of motions filed by DMR in individual guardianship cases to remove the guardian ad litem for failing to do her job. A. 1262 n.49. DMR was given no opportunity to be heard as to "the propriety of taking judicial notice and the tenor of the matter noticed." *Cf.* Proposed Mass. R. Evid. 201(e); Fed. R. Evid. 201(e) (requiring such opportunity to be heard). In any event, filing such motions, per se, can hardly be characterized as "harassment," much less a violation of a Settlement Agreement in another case.

affidavits in another case against DMR.[35] *See* DMR Br. at 90-92. Such questions, which remain unanswered to this day, due to the trial court's failure to require the Court Monitor to disclose the information requested by DMR,[36] *see* DMR Br. at 10-11 & n.21, can hardly be characterized as "harassment."

II. BRI'S COUNTER-ARGUMENTS ON THE EVIDENTIARY ISSUES RAISED BY THE COMMISSIONER ARE ENTIRELY WITHOUT MERIT.

A. BRI's Attempts to Defend the Trial Court's Rulings Concerning the Rule 30(b)(6) Deposition of BRI Are Unavailing.

BRI's attempts to defend—(1) its failure to produce knowledgeable witness(es) in response to the Commissioner's Rule 30(b)(6) deposition notice, (2) the trial court's denial of the Commissioner's motion to extend the discovery period for this purpose, and (3) the trial court's rulings allowing BRI to present evidence at trial on the very subjects as to which BRI's sole Rule 30(b)(6) designee claimed a lack of knowledge—are totally unavailing as a matter of fact and law.

The cases cited by BRI on this issue are either entirely inapt or support the Commissioner's position. Two of these cases—*United States v. Gahagan Dredging Corp.*, 24 F.R.D. 328, 329 (S.D.N.Y. 1958), and *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169, 171 (S.D.N.Y. 1956)—predate Rule 30(b)(6) and hold deposition notices defective, *not* because they insufficiently described "the subject matter of the deposition,"

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[35]BRI's allegation that *DMR* retained the Court Monitor for some purpose was denied by the Court Monitor himself. Tr. IX:56; *see also* DMR Br. at 91-92 & n.130.

[36]DMR did not bring this matter to the court's attention until the Court Monitor declined to provide this information unless ordered to do so by the court. *See* DMR Br. at 90-91.

as BRI inaccurately states, BRI Br. at 88, but because they insufficiently identified the *deponent* (as was required under the pre-1970 version of Rule 30).[37] In the only case cited by BRI in which a deposition notice was held to provide insufficient notice of the subject matter of the deposition, the notice provided no description whatsoever of the subject matter. *Operative Plasterers' & Cement Masons' Int'l Ass'n v. Benjamin*, 144 F.R.D. 87, 89 (N.D. Ind. 1992). On the other hand, the deposition notice at issue in a case cited by BRI as an example of sufficient notice, *Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 282 (D. Neb. 1989) (describing notice as seeking testimony with regard to "the factual basis for the contentions contained in the counterclaim and answer and the factual basis for the damages claimed" by defendant) is strikingly similar to the one here, which sought testimony "with regard to the factual basis for the allegations contained in the Third Amended Contempt Complaint." A. 510; *see also* DMR Br. at 64-65.

BRI's attempts to defend the trial court's refusal to remedy BRI's failure to provide deponent(s) with knowledge of its financial condition, either by requiring BRI to provide additional deponents or by excluding testimony on this subject at trial, are equally unavailing. BRI's suggestion that DMR should have begun its discovery earlier is disingenuous, since DMR noticed its depositions on April 11, 1995, A. 510, within a week of the court's oral order on April 5, 1995, permitting discovery on BRI's Third

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[37]In fact, the *Gahagan* case was cited in the notes of the Advisory Committee on Rules as an example of why Rule 30(b)(6) was needed, i.e., because "[s]ome courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it." Fed. R. Civ. P. 30 advisory committee's note. Rule 30(b)(6), which expressly places that burden on corporations, was added because, as noted by the Advisory Committee, "[t]his burden is . . . lighter than that of an examining party ignorant of who in the corporation has knowledge." *Id.*

Amended Contempt Complaint, which is not automatically allowed in contempt cases. Mass. R. Civ. P. 65.3(g).

BRI further claims that the Commissioner was not prejudiced by the court's permitting BRI's accountant to testify at trial as to BRI's financial condition—the very subject on which its sole designated deponent claimed a lack of knowledge—because BRI's offer of proof as to the substance of its accountant's testimony, which was not filed until the first day of trial, gave DMR sufficient "opportunity to counter" his testimony. BRI Br. at 89. However, the factual circumstances in the cases cited by BRI in support of that contention are very different from those presented here. In *Eagan v. Marr Scaffolding Co.*, 14 Mass. App. Ct. 1036 (1982), *review denied*, 388 Mass. 1102 (1983), the court found no prejudice in permitting a party to substitute one expert witness for another, where, unlike here, the opposing party "long had notice of the substance of the testimony expected . . . [and] had an opportunity to—and did—depose each witness before testimony was presented." *Id.* Similarly, in *Wilson v. Honeywell, Inc.*, 28 Mass. App. Ct. 298, 304 & n. 5 (1990), *aff'd*, 409 Mass. 803, 809-10 (1991), the court found no abuse of discretion in permitting a previously unidentified expert to testify as to lost wages, where the plaintiff had provided wage information at his deposition and in his answers to interrogatories. By contrast, in the present case, the Commissioner was severely prejudiced by the trial court's erroneous and inequitable rulings on this issue. *See* DMR Br. at 66.

B. BRI's Arguments on Attorney/Client Privilege Have No Factual or Legal Basis.

At trial, the Commissioner claimed attorney/client privilege with respect to two items on the agenda of staff meetings on BRI. *See* DMR Br. at 124-30. In its brief, BRI parrots the trial court's factual findings concerning the Commissioner's claim of attorney/client privilege. BRI Br. at 124-25. However, as discussed in the Commissioner's opening brief, the

court's findings as to how and when the attorney/client privilege was raised by the Commissioner, challenged by BRI, and rejected by the court are clearly erroneous. DMR Br. at 124-26.

In its legal argument on attorney/client privilege, BRI characterizes this matter as a discovery dispute. BRI Br. at 128. However, when the privilege was claimed in discovery, BRI did not move to compel production of the redacted material but rather offered the redacted documents at trial as "uncontested exhibits."[38] DMR Br. at 124. There was therefore no occasion for the court to rule on the Commissioner's claim of privilege in the discovery context. Nor did BRI seek or the trial court impose any sanctions on the Commissioner for any discovery "abuse."[39] Although in its post-trial findings the court gratuitously opines that the Commissioner's original claim of privilege, which was broader than what was ultimately pressed at trial,

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[38]Even as late as the last week of trial, BRI's counsel disclaimed any interest in "anything that [DMR] still maintain[s] is privileged." Tr. X:69-70.

[39]Nor would any such sanctions be warranted. A claim of attorney/client privilege (which was ultimately abandoned), even if deemed to be unfounded, is in no way comparable to the fraudulent activities that were held sufficient cause for sanctions in the cases cited by BRI. *Cf. Rockdale*, 418 Mass. at 599 (upholding dismissal of complaint where plaintiff forged a letter and then swore that it was genuine in his answers to interrogatories); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1122 (1st Cir. 1989) (upholding dismissal of complaint where plaintiff fabricated the agreement that was the basis for the complaint).

Moreover, even much more serious discovery abuse does not warrant sanctions where the "error d[oes] not injuriously affect [the opposing party's] substantial rights." *Symmons v. O'Keeffe*, 419 Mass. 288, 303 n.13 (1995). BRI does not allege that DMR's claim of privilege substantially interfered with its full and fair preparation or presentation of its case. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924-25 (1st Cir. 1988) (burden on party seeking sanctions to demonstrate such prejudice). Nor could any claim of prejudice succeed, since BRI was permitted to recall and cross-examine the Commissioner concerning the previously redacted material that the court admitted into evidence during the trial. Tr. X:94, XIII:51-123.

"had no basis in fact or in law," App. 1250, that issue was not before the trial court and is not raised as an issue in this appeal.

The narrower issue before the trial court,[40] and now before this Court, was whether portions of two documents, as to which the Commissioner continued to press his privilege claim at trial, were admissible in evidence. On that issue, BRI makes four arguments, none of which is meritorious.

First, BRI argues that these items, which were entries on the agenda of DMR staff meetings attended by both lawyers and high-ranking members of DMR's non-legal staff, were not privileged because they were discussed by non-lawyers as well as lawyers. BRI Br. at 127. The only case cited by BRI in support of this argument is plainly inapt; in that case, the communication in question was solely between two non-lawyers and was held non-privileged on that ground. *Barnes v. Harris*, 61 Mass. (7 Cush.) 576, 577-78 (1852). Nor does the fact that other DMR employees, in addition to the Commissioner, participated in the discussion of these items serve to render the discussions non-privileged. Rather, as recognized by the United States Supreme Court, legal advice is often sought and obtained not only by the highest ranking members of an organization but by middle and lower level employees as well; and such communications are equally in need of privileged treatment. *Upjohn Co. v. United States,* 449 U.S. 383, 391 (1981). *See also* DMR Br. at 127-28.

Second, BRI argues that the items in question—which concerned the possible applicability of certain conflict of interest provisions to the court monitor and a potential request that the Attorney General prepare a receivership petition for use in case of an emergency, Ex. BRI-293, BRI-294—are not privileged because they "regard[ ] future fraudulent or unlawful

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[40]At trial, the court admitted these items into evidence without expressly ruling on the Commissioner's privilege claim. Tr. X:76-78; *see also* DMR Br. at 126 & n.185.

conduct." BRI Br. at 127. Assuming that such a sweeping exception to the attorney/client privilege exists,[41] considering the applicability of conflict of interest provisions and the possibiltiy of requesting the Attorney General to prepare a receivership petition can hardly be considered "fraudulent," "illegal," or "corrupt" activities, as BRI contends. BRI Br. at 127. To the extent that this argument turns on what BRI views as the "damaging" nature of these documents,[42] BRI Br. at 126, it certainly cannot be the case that the privilege protects only innocuous communications that would be of no use to opposing parties in litigation or, conversely, does not protect harmful information. *Cf. Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 306 (S.D.N.Y. 1991) (attorney/client privilege "cannot be overcome simply by a showing of need").

Third, BRI claims that the fact that these documents were labeled "Policy Development" (as well as "Privileged") somehow indicates that they did not contain any privileged attorney/client communications. BRI Br. at 127. In fact, the significance of the label "Policy Development" derives from the Public Records Act, G.L. c. 66 (1994 ed.), which exempts from

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[41]The only case cited by BRI on this point concerns an entirely different exception to the privilege. *Panell v. Rosa*, 228 Mass. 594 (1918) (holding privilege inapplicable to communications between deceased testator and her attorney, where will is subsequently challenged on grounds of testator's unsoundness of mind).

[42]As discussed in DMR's opening brief, the inferences of sinister intent drawn by the trial court from the reference to "receivership" were clearly erroneous. *See* DMR Br. at 102-04. In any event, contrary to BRI's unsupported assertion, BRI Br. at 40, there is no evidence that DMR ever requested the Attorney General to prepare a receivership petition, or that any such petition was ever drafted, much less filed.

With respect to the item concerning Dr. Daignault's potential conflict of interest, there is no evidence that, after raising this issue at a staff meeting and obtaining some reference materials from American Psycholgy Association ("APA"), Dr. Cerreto took any action to file a complaint against Dr. Daignault with the APA. *Cf.* BRI Br. at 39. To the contrary, Dr. Cerreto testified that she did *not* pursue this issue. Tr. X:127-28.

mandatory public disclosure "intra-agency memoranda . . . relating to policy positions being developed by the agency." G.L. c. 4, § 7, cl. 26(d) (1994 ed.); *see Babets v. Sec'y of Executive Office of Human Services*, 403 Mass. 230, 237 n.8 (1988). At the time these documents were generated, in September 1993, DMR was still in the process of making the policy decision of whether, and on what conditions, to renew BRI's certification to use Level III aversives. Until that decision was made, these documents could have been withheld in response to a public records request, as the label "Policy Development" indicates. By the time the documents were released in discovery, the certification decision had already been made, so no attempt was made to withhold the documents on this ground. Rather, DMR released the documents as a whole but redacted only those portions for which attorney/client privilege was claimed.[43]

Because the Commissioner had a valid basis for claiming the attorney/client privilege with respect to these two items, the trial court erred in admitting them into evidence over his objections and then compounded that error by equating this legitimate claim of privilege with a "fraud on the court." App. 1308. Because this "fraud" was a principal basis for holding the Commissioner in contempt and placing the Deparment in receivership, App.1308, 1310, this compound error is exceedingly prejudicial.

III. BRI MISSTATES AND MISAPPLIES THE STANDARD OF APPELLATE REVIEW OF THE TRIAL COURT'S FACTUAL FINDINGS.

In response to the Commissioner's plea that this Court scrutinize the record with particular care due, in part, to the great extent to which the trial court adopted its findings virtually verbatim from the proposed findings of BRI, DMR Br. at 70-73, BRI makes the conclusory statements that the trial court "significantly reworked the proposed findings of [BRI]," "rewrote

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[43]The full names of BRI students were also redacted in order to protect the students' privacy.

[BRI's proposed] findings in drafting her own findings," "painstakingly drafted her own findings regarding the core issues of the case," and "drafted her own distinctive findings." BRI Br. at 93, 95. Not only are BRI's bald assertions as to the trial court's independent authorship of its own findings unsupported by any citations to any particular findings, they are flatly belied by the separately bound Addendum to Argument III of DMR's brief, which reproduces, side-by-side, the trial court's findings and BRI's proposed findings on the same subjects, thereby graphically demonstrating that virtually all of the trial court's findings are adopted almost verbatim from BRI's proposed findings.[44] As demonstrated therein, the extent of the verbatim adoption in this case far exceeds that which occurred in any of the cases cited by either DMR or BRI on this point.[45]

In its argument concerning the scope of appellate review of factual findings in general, BRI mischaracterizes the Comissioner's arguments on this point. The Commissioner does *not* argue that the trial court simply chose incorrectly between "conflicting facts which are equally supported in the record."[46] BRI Br. at 97-98. Rather, the Commissioner argues, and then

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[44]*See also* DMR Br. at 77 n.112, 80 n.116, 84 n.120, 88 n.125, 90 n.128, 93 n.132, 94 n.135, 105 n.155, 109 n.160, 111 n.162, 112 n.165, 114 n.167, 121 n.178, 130 n.190, 132 n.193, 134 n.195, 137 n.201, 139 n.204, 143 n.208, 145 n.212, 146 n.215 (citing, for each subject on which findings were made, the trial court's findings and the corresponding proposed findings of BRI).

[45]The United States Court of Appeals for the First Circuit has admonished trial judges in that circuit to avoid the practice of adopting proposed findings verbatim, except in extraordinary cases, unlike this one, where the subject matter is highly technical and requires expertise that the trial judge does not possess. *See In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970).

[46]If all the trial court did were to choose between conflicting facts that are equally supported in the record, the Commissioner agrees that it would not be appropriate for this Court to second-guess the trial's court's choices. However, even in those few instances where there were two supported versions of the facts—for example, the precise content and tenor of a 1991 telephone conversation—the court did not simply choose to reject the Commissioner's version (continued...)

painstakingly demonstrates, finding by finding, that there is no evidence whatsoever to support most of the factual findings made or inferences drawn by the trial court, and that, in many instances, other evidence in the record, which was disregarded by the trial court, unequivocally establishes the opposite of what the court found. *See* DMR Br. at 76-149.

Nor does the Commissioner argue that "the entire contents of the certification letters must be deemed as true by the factfinder by virtue of the letters being offered into evidence," as BRI contends. BRI Br. at 98 n.25. Rather, because these letters were offered as "uncontested exhibits," i.e., exhibits as to which no objections, except as to relevance, were raised by either party, A. 415, the Commissioner simply pointed out that the letters constituted evidence as to the truth of their contents, which should have been so considered by the trial court, particularly where there was no evidence the contrary. DMR Br. at 88 n.124, 99.

As discussed in DMR's opening brief, most of the facts found by the trial court are entirely immaterial to the legal issue in this contempt case, i.e., whether the Commissioner violated any clear and unequivocal court order. DMR Br. at 39, 42-43, 45-46, 50, 52-53, 60-61. The immateriality of most of the court's findings is graphically confirmed by BRI's brief, in which most of the facts set forth in the statement of the case are not even mentioned in BRI's legal arguments, except in its arguments as to the accuracy of the factual findings themselves.[47] Accordingly, the Commissioner cannot and

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[46](...continued)
of the disputed facts but went on to make the entirely baseless finding that the Commissioner's version was "blantantly false" and intentionally untruthful. App. 1233; *see* DMR Br. at 93-94.

[47]Among the patently immaterial facts that BRI discusses at length are those concerning DMR's selection of the Rivendell Group to conduct an independent review of BRI's program, BRI Br. at 33-37, 118-22; the selection of Dr. Gunner Dybwad to serve on BRI's Human Rights Committee, BRI Br. at 115; (continued...)

will not attempt, in this necessarily limited reply brief, to point out each of the many inaccurate and unsupported factual statements contained in BRI's brief.[48] Rather, the factual statements pertinent to BRI's legal arguments are

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[47](...continued)
and the Commissioner's actions in anticipation of "the Connie Chung show," a television documentary on BRI. BRI Br. at 20-21, 107-08. BRI does not even attempt to argue that the Settlement Agreement clearly and unequivocally prohibited the Commissioner from taking these actions. Nor was there any evidence or any findings that these actions adversely affected BRI in any way. *See* DMR Br. at 88-90, 111-12, 114-20.

[48]A few representative misstatements can quickly be corrected, simply by referring to the pages of the record cited by BRI:

(1) While BRI states in its brief that the "Commissioner admitted that he was aware on December 15, 1993, that DMR had sufficient information to conduct an investigation [of a student's death] in 1991," BRI Br. at 129-30, the transcript pages cited by BRI in support of that statement, Tr. VI:115, 118-19, 122, reveal that the Commissioner's answer of "yes," to one of a long series of confusing questions as to the dates in question, Tr. VI:119, cannot fairly be characterized as an "admission" of anything.

(2) While BRI states the "[t]he Commissioner admitted at trial that he was aware on August 6, 1993 that the DMR clinicians had written favorable reports from 1987 through 1993 on [BRI]'s treatment programs and procedures," BRI Br. at 24, the transcript pages cited by BRI contain repeated *denials* by the Commissioner of such awareness on his part. Tr. III:37-43, 110-11.

(3) While BRI states that one of the "Commissioner's conditions . . . required . . . funding and placement agencies to establish . . . an alternative available placement for every client placed at [BRI]" and to "maintain and fund two placements simultaneously for [each] student," BRI Br. at 27, the certification letter cited by BRI reveals that the condition in question actually required such agencies only to develop a "plan for each resident to address the funding and logistics" of providing services in the event of unexpected emergencies. Ex. U-91 at 5.

(4) While BRI states that "[t]he Commissioner testified . . . that [a] pre-meeting with DPS [the Division of Purchased Services] was not permitted by the applicable regulations," BRI Br. at 140, in fact, the Commissioner answered "no" to a question as to whether he was "aware of any authorization in DPS's regulations," Tr. III:267, but further stated, "I don't think it's disallowed by the regulations either," *id.*, which is an accurate characterization of the regulations themselves. Ex. BRI-292. Moreover, there was no evidence or finding that any
(continued...)

addressed in the context of responding to those arguments. As to the many, many other, immaterial misstatements of fact, the Commissioner will rely on his own fully documented statement of the case, DMR Br. at 2-33, and arguments as to the erroneousness of the court's findings, DMR Br. at 75-149, which anticipate and correct most, if not all, of the factual mistatements contained in BRI's brief.

IV. BRI MISSTATES AND MISAPPLIES THE LAW RELATING TO EQUITABLE RELIEF AND RECEIVERSHIPS AGAINST STATE OFFICIALS.

The authorities cited by BRI, purportedly supporting the sweeping injunctive and receivership orders imposed by the trial court, BRI Br. at 147-56, actually bolster the arguments made in the Commissioner's opening brief on this issue. DMR Br. at 149-63.

A. BRI Minimizes the Serious Separation of Powers Problems Presented by the Court's Remedial Orders.

With respect to the propriety of granting equitable relief against state officials in general, this Court has repeatedly cautioned, in the very cases cited by BRI, that the trial court's ordinarily broad discretion to fashion equitable remedies is more limited, due to separation of powers concerns, where the orders "involve[ ] a State agency and the expenditure of public funds." *McKnight*, 406 Mass. at 791;[49] *see also* DMR Br. at 150-59; DMR

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[48](...continued)
such "pre-meeting" ever took place.

(5) While BRI states that the president of the Rivendell Group "described Dr. Israel's views on aversives as 'out of balance,'" BRI Br. at 36, the document cited as making that statement, Ex. BRI-311, actually refers to "Opra[h]'s show" as being in need of "balance."

[49]In its arguments on the propriety of the remedies imposed by the trial court, BRI repeatedly cites and quotes at length from the *dissenting* opinion in the *McKnight* case, BRI Br. at 150, 153, which, by definition, is directly contrary to the Court's holdings in that case.

Pl Br. at 49-53. In order to minimize any intrusion on executive branch prerogatives, equitable relief against state agencies must be narrowly tailored to address the particular violations of law found and "must allow the agency to exercise its discretion within the legal requirements" identified by the court. *Correia v. Dep't of Pub. Welfare*, 414 Mass. 157, 168, 170 (1993). These well-settled principles of judicial restraint were recently reaffirmed by the United States Supreme Court, which admonished, in vacating an overly broad injunction against a state agency, that "[i]t is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws." *Lewis v. Casey*, 64 U.S.L.W. 4565, 4588 (U.S. June 24, 1996).

BRI seeks to overcome the pervasive separation of powers problems inherent in the trial court's orders, BRI Br. at 151-52, by relying on an exception to the general rule of judicial restraint that exists where the relief imposed by the court is necessary to bring a state agency into compliance with its constitutional or statutory obligations.[50] *Attorney General v. Sheriff*, 394 Mass. at 631; *Bradley v. Comm'r of Mental Health*, 386 Mass. 363, 365 (1982) (distinguishing *Perez v. BHA*, 379 Mass. 703 (1980), and *Blaney v. Comm'r of Correction*, 374 Mass. 337 (1978), on this ground).[51] As

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[50]Even in those circumstances, "courts normally will not direct how the public official should exercise that statutory duty," *Attorney General v. Sheriff*, 394 Mass. 624, 630 (1985); nor may they abrogate or usurp the statutory rights or powers of third parties. *Spence v. Reeder*, 382 Mass. 398, 418 (1981).

[51]In quoting from the *Bradley* case, in support of its argument that the trial court's orders do not offend separation of powers principles, BRI significantly omits (without ellipses) the word "statutory" from the following quotation: "Nor is there any demonstrated basis for concluding that the DMH has broadly abrogated its *statutory* duties in the face of a judicial direction to fulfil them, thus justifying the issuance of an order concerning the carrying out of an executive function" (emphasis added). *Compare Bradley*, 386 Mass. at 365, *and* BRI Br. at 152.

explained by this Court in *Spence*, 382 Mass. at 414-15, 417, where a receivership is imposed in order to remedy a statutory violation, its intrusion on legislative powers is justified "by the achievement of the greater statutory goal" and, for that reason, does not run afoul of Article 30. For example, the receivership imposed by the court in the *Perez* case "was not a usurpation of legislative prerogative. It was an attempt to implement the legislative mandate that public housing meet certain minimum standards." *Spence*, 382 at 418. Moreover, where such relief is based on the court's interpretation of a legislative enactment, there is a built-in safeguard if the judiciary intrudes unduly on legislative powers: "If . . . the court has misassessed the legislative purpose, the Legislature can change the governing legislation." *Id.* This exception and its underlying rationale have no bearing where, as here, the relief in question is imposed, not to remedy a statutory violation, but, instead, to further "some judicially devised objective," *id.* at 415, such as compliance with the court's interpretation of the Settlement Agreement in this case. Accordingly, Article 30's limitations on judicial power apply in full force here.

In accordance with basic separation of powers principles, this Court has repeatedly held it inappropriate for a trial court to supplant an agency's discretion as to how to perform its executive functions (including, particularly, the executive function of coordinating the provision of state-funded services) in compliance with the applicable law. *Care and Protection of Jeremy,* 419 Mass. 616, 622-23 (1995); *Care and Protection of Isaac*, 419 Mass. 602, 606-07 (1995); *Correia*, 414 Mass. at 157; *McKnight*, 406 Mass.

at 792, 798; *Bradley*, 386 Mass. at 365 (1982).[52] Therefore, assuming, *arguendo*, that some remedy was warranted here, rather than totally supplant the Commissioner's authority to regulate BRI, the court should have followed the more prudent route mapped out by this and other courts—that is, first clearly define the Commissioner's legal obligations (which, as discussed above, neither the Settlement Agreement nor the court's contempt findings do) and then leave it up to the Commissioner, not to a court-appointed receiver, to develop and implement a plan for compliance. *McKnight*, 406 Mass. at 801; *Blaney*, 374 Mass. at 342-43; *Lewis*, 64 U.S.L.W. at 4592; *Bd. of Educ. I*, 717 F.2d at 384; *Bd. of Educ. III*, 799 F.2d at 289; *Palmigiano*, 700 F. Supp. at 1199.

Judicial restraint in fashioning relief is particularly important in the contempt context. Because of "the contempt power's virility and damage potential, . . . in levying contempt sanctions, the court must exercise the least possible power suitable to achieve the end imposed." *Project BASIC*, 947 F.2d at 16; *see also Spallone v. United States*, 493 U.S. 265, 276 (1990). This is particularly true where, as here, the provisions of the court order in question are far from unambiguous. *Bd. of Ed. III*, 799 F.2d at 292 n.8 ("more restrained role for the [trial] court . . . necessitated by the broad language of [the decree]").

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[52]This Court vacated the order at issue in the *Bradley* case not "only" because there was no showing that the defendant agency had abrogated its duties in violation of a court order, as BRI states, BRI Br. at 152, but also, and primarily, because the order exceeded the inherent authority of the courts and impermissibly intruded on that of the executive branch. *Bradley*, 386 Mass. at 365. Like the order at issue in the *Bradley* case, the trial court's orders here were not necessary to avoid interference with an essential judicial function, such as committing persons to jail. *Cf. Attorney General v. Sheriff*, 394 Mass. at 631 (upholding court order to construct jail, partially on that ground). BRI mistakenly relies on the *Bradley* case, which *vacates* a relatively narrow court order on separation of powers grounds, as standing for the opposite proposition—"that a trial court has the power to supplement any and all executive functions where . . . the record indicates the need for such sweeping relief." BRI Br. at 152.

B. BRI Exaggerates the Harm on Which the Trial Court Predicated Its Sweeping Remedial Orders.

A further deficiency with the court's orders here is also highlighted by the cases relied upon by BRI. Despite BRI's and the trial court's rhetoric to the contrary, the harm to BRI found here is insufficiently serious and systemic to warrant the drastic and far-reaching relief imposed. *Bradley*, 386 Mass. at 365 (order vacated based, in part, on lack of widespread violations); *Correia*, 414 Mass. at 158 (preliminary injunction vacated because not narrowly tailored to address violations that plaintiff was likely to succeed in establishing).

First of all, BRI's brief at 54-57, 144-47, 155—like the trial court's findings, *see* DMR Br. at 146-49, 152-53—grossly exaggerates the damage purportedly caused by the Commissioner's regulatory actions. In particular, BRI repeatedly asserts that its enrollment dropped from 66 students in 1993 to 44 students "at the time of trial." BRI Br. at 55, 145, 155. These numbers, even if accurate, fail to demonstrate any chronological, much less causal, connection between the Commissioner's communications with out-of-state agencies—which occurred primarily from the late summer of 1993 to the early spring of 1994, BRI Br. at 79-80—and the decline in enrollment—which did not occur to any significant degree until the end of 1994,[53] and did not fall below 50 students until June of 1995, the month of the trial. Tr. VIII:170. Much more telling in this respect is the undisputed fact that BRI had at least as many students (57) in the summer of 1994 as it had in 1991 when it first applied for recertification. *See* DMR Br. at 53 n.74, 147 n.217. Moreover, as discussed above, New York students were removed

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[53]Tr. VIIB:52 (BRI lost only 4 students from August 1993 to the end of 1994), Ex. BRI-262 (census was 64 as of January 1994; rate request for FY1995 based on enrollment of 65), VIIA:96 (census was 60 as of February 1994), Ex. DMR-2 at 16 (census was 64 as of April 1994).

from BRI in late 1994 and early 1995 due to New York State legislation and New York City policy decisions rather than to any communications from DMR. *See Brooks*, 84 F.3d at 1456-58.

BRI's allegations of financial harm, and resulting layoffs, BRI Br. at 56, 145, 155, are also overstated. The layoffs that occurred in fiscal year 1994, when most of the regulatory activity occurred, did not involve direct care staff, Tr. VIIB:54, and were due not to lost revenues, since enrollment did not drop sharply during that period. Instead, these layoffs were due to BRI's extraordinarily high expenditures on attorney's fees, Tr. VIIB:51-52, which, in turn, were due, in large part, to BRI's own decisions to utilize its lawyers for nonlegal tasks, to file and aggressively litigate various motions and complaints, and to conduct heavy affirmative discovery during that period. *See* DMR Br. at 168. Moreover, because BRI was being reimbursed, through its tuition rate, for its attorneys' fees during this period, Ex. BRI-262, it is unclear why its fee expenditures necessitated any layoffs at all. While BRI claims that its surplus has been "negatively impacted," BRI Br. at 56, that projection was based on the worst-case scenario of BRI's enrollment remaining at 43. Tr. III:171. Moreover, even under that scenario, the amount of its projected surplus for 1995 was only slightly less than in 1993. *See* DMR Br. at 147.

Even if the harm purportedly suffered by two BRI students, as a result of the termination of the specialized food program in mid-June 1995, is taken to be true, *but see* DMR Br. at 148-49, 162-63, that harm would fall far short of justifying the sweeping relief imposed by the trial court. *Cf. McKnight*, 406 Mass. at 794, 801 (permanent injunction would not be warranted to prevent harm that one student would suffer if aversives were discontinued). As recently recognized by the United States Supreme Court, only two instances of actual injury to class members are "a patently inadequate basis for . . . imposition of systemwide relief." *Lewis*, 64

U.S.L.W. at 4591. As explained by the Supreme Court in that case, the requirement of demonstrating systemic injury as a predicate for systemic relief is necessary to preserve the appropriate separation of powers between the judicial and political (i.e., executive and legislative) branches of government:

> [T]he distinction between the two roles would be obliterated if, to invoke the intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. . . . The actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.

Id. at 4588, 4590. *See also Madera v. Sec'y of Executive Office of Communities & Dev.*, 418 Mass. 452, 464 (1994) ("[e]rrors in the agency's handling of a single applicant's case do not warrant [injunctive] relief").

V. THIS COURT SHOULD STAY THE TRIAL COURT'S ORDERS PENDING DECISION OF THESE APPEALS.

A. BRI Misstates the Standard of Review Applicable to the Commissioner's Renewed Request for a Stay Pending Appeal.

In its decision of January 12, 1996, this Court dismissed, on BRI's motion, the Commissioner's appeal from the Single Justice's order denying relief under G.L. c. 211, § 3; and denied the Commissioner's motion, to the full Court, for a stay pending appeal; but invited the Commissioner to "renew his request for a stay of the [trial court's] injunctive and receivership orders

in his brief on the merits of th[is] appeal," *Comm'r of Mental Retardation v. Judge Rotenberg Educ.Center, Inc.*, 421 Mass. 1010 (1996), which he did. DMR Br. at 160-63. Despite that procedural history, BRI now contends that the Commissioner's renewed request to the full Court for a stay pending appeal should be treated as if it were, instead, an appeal from the denial of relief by a Single Justice. BRI Br. at 157. That contention is obviously incorrect; rather than apply the deferential abuse of discretion standard that would be applicable to this Court's review of an order of a Single Justice, this Court should apply, *de novo*, the standards applicable to a stay pending appeal.

B. A Stay Is Necessary to Prevent Serious, Ongoing, and Irreparable Harm to DMR and the Public.

In opposition to the Commissioner's renewed request for a stay pending appeal, BRI attempts to minimize the scope and impact of the relief granted by the trial court. BRI Br. at 159-60. However, the actions already taken by the Receiver, pursuant to the trial court's orders, graphically demonstrate that, at least in the Receiver's view, his powers are not as narrowly circumscribed as BRI claims. To the contrary, as anticipated in the Commissioner's opening brief at 161-62, the Receiver's powers, as actually exercised, extend to all aspects of the Department's operations, not just to its interactions with BRI, and affect third parties as well, including other vendors, the parents and guardians of all consumers presently or potentially served by DMR, and all DMR employees.

As documented in the exhibits to the Affidavit of Deputy Commissioner Gerald J. Morrissey, Jr. ("Morrissey Aff.," filed herewith), among the intrusive actions taken by the Receiver to date are the following:

(1) Rather than delegate his regulatory authority to DMR employees, as authorized by the trial court, App. 1347, and as urged by DMR, Morrissey Aff., Ex. D, the Receiver appointed his own staff. *Id.*, Ex. C, T, U. Some

of the Receiver's appointees were appointed over DMR's objections, based on the appointees' financial relationships with either BRI or the court monitor, Dr. Daignault. *Id.*, Ex. D, E. On February 6, 1996, the court approved the Receiver's budget of almost $300,000 for the last six months of fiscal year 1996, *id.*, Ex. A, B; and, as of June 18, 1996, DMR had been ordered to pay a total of $68,367.72 to the Receiver and his staff. *Id.*, Ex. T, U.

(2) The Receiver has directed that no contract be awarded to any vendor without his prior review and approval. *Id.*, Ex. F, G, I. In the meantime, while the Receiver and his staff review all pending contract awards, consumers must wait for critically needed services, including emergency services for families in crisis. *Id.*, Ex. J, K.

(3) The Receiver is also reviewing contracts previously awarded by DMR, *id.*, Ex. F, presumably to determine whether those contracts should be rescinded and awarded to BRI instead, as the trial court authorized him to do. App. 1346.

(4) The Receiver has contacted the parents and guardians of students previously discharged from BRI to determine whether the students were removed from BRI as a result of "improper or undue influence" by DMR. *See, e.g.*, Morrissey Aff., Ex. H.

(5) Rather than merely ensure that DMR considers BRI equally with other providers for new placements, as the Settlement Agreement requires, App. 130, the Receiver is taking "affirmative steps" to promote BRI over other providers. Morrissey Aff., Ex. G, I. Specifically, the first Receiver, Judge Nixon,[54] directed DMR to "reconstitute" BRI's student population by placing 25 additional state-funded students at BRI, *id.*, Ex. G, I, L, and

[54]The first Receiver, retired Judge James J. Nixon, resigned effective April 30, 1996, and was replaced by retired Judge Lawrence T. Perera. Morrissey Aff., Ex. M.

threatened to seek contempt sanctions against individual DMR employees if this quota was not satisfied promptly. *Id.*, Ex. I. Despite DMR's counsel's explanation as to why it is not legally or practically feasible for DMR to comply with this directive, Morrissey Aff., Ex. J., it has not been rescinded by the present Receiver, Judge Perera.

(6) When an investigator from the Office of Civil Rights of the United States Department of Health and Human Services contacted DMR concerning a civil rights complaint that was apparently triggered by the Receiver's reconstitution orders, the Receiver directed DMR not to provide the information requested by the federal investigator without the Receiver's express written authorization. *Id.*, Ex. N.

(7) Most recently, the Receiver asked DMR to mail BRI promotional materials to the guardians and parents of all consumers whose contracts for mental retardation services will be coming up for award in the coming months, under a cover letter drafted by the Receiver and signed by DMR's general counsel. *Id.*, Ex. V.

(8) The Receiver has also intruded on the Attorney General's exclusive authority to represent state agencies in litigation, *see* DMR Br. at 157, by directing DMR's counsel, who was acting as a special assistant attorney general, to withdraw objections to a stipulation entered into by the other parties to a substituted judgment proceeding involving a BRI student, Morrissey Aff., Ex. P, Q, and ordering DMR not to file objections in future Probate Court proceedings without prior notice to the Receiver. *Id.*, Ex. R.

(9) The Receiver is also apparently preparing to exercise his broad personnel authority, since he has requested the names and home and business addresses of all DMR employees (not only those with some BRI-related responsibilities) as well as all DMR organizational charts and policies and procedures relating to employee discipline. *Id.*, Ex. O, S.

Because, for the reasons discussed in this brief and in the Commissioner's opening brief, it is likely that this Court ultimately will vacate the trial court's overly intrusive and unconstitutional remedial orders, the Court should immediately stay those orders to prevent any further impermissible intrusion on the powers of the executive and legislative branches and, more important, to obviate the very concrete risk of immediate and irreparable harm to other vendors, DMR employees, and the consumers served by DMR.

VI. BRI Misstates and Missapplies the Legal Standards Applicable to Its Application for Attorneys' Fees.

BRI's argument in support of the trial court's award of attorneys' fees starts with the mistaken premise that the amount of fees awarded by a trial court is "presumed to be correct." BRI Br. at 161. In fact, no such presumption exists, and the scope of appellate review of fee awards is far more searching than BRI suggests. Indeed, as recognized by the Appeals Court in the principal case relied upon by BRI on this point, although "[s]etting the amount of a reasonable attorney's fee lies largely in the discretion of the trial judge . . . , [t]he exercise of discretion . . . is not beyond appellate review." *Olmstead v. Murphy*, 21 Mass. App. Ct. 664, 665 (1986) (citing *Robbins v. Robbins*, 19 Mass. App. Ct. 538 (1985), *review denied*, 397 Mass. 1102 (1986)). Accordingly, appellate courts do not hesitate to overturn fee awards where, as here, the trial court has not "dwelt on the relevant considerations"; has not "stayed within permissible evidentiary bounds," *Robbins*, 19 Mass. App. Ct. at 543; or has not made sufficient findings to support its conclusions. *Kennedy v. Kennedy*, 23 Mass. App. Ct. 176, 180 (1986), *aff'd*, 400 Mass. 272, 274 (1987) ("agree[ing] with the result and reasoning of the Appeals Court"). *See also* DMR Br. at 164-69.

In particular, fee awards are properly reversed where, as here, the trial court "count[ed] as reasonable all the hours claimed by counsel" without

making its own "independent 'objective' valuation of the services they rendered in fact." *Robbins*, 19 Mass. App. Ct. at 542-43; *see also* DMR Br. at 167. As further recognized in another case cited by BRI, the trial court's findings are deficient where, as here, they do not demonstrate that the court (1) carefully scrutinized whether all of the tasks for which fees are sought are truly legal, as opposed to secretarial, paralegal, or investigatory, in nature; (2) considered potential duplication of effort by attorneys meeting with each other, their clients, opposing counsel, or the court;[55] and (3) "eliminate[d] all time spent on press-related matters." *New Mexico Citizens for Clean Air & Water v. Espanola Mercantile Co.*, 72 F.3d 830, 835 (10th Cir. 1996); *see also* DMR Br. at 168, 173-77.[56]

BRI's argument that the Commissioner is somehow estopped from objecting to the trial court's impoundment of the time records underlying the

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[55]Contrary to BRI's contention, BRI Br. at 165, DMR accurately stated the number of attorneys and paralegals (twenty-five) who worked on this case on behalf of BRI (eighteen, App. 621-22), the parents (five, App. 623-27, 1148-52), and the students (two, App. 1131, 1173). The fact that DMR supported the individual students' motion to intervene in this case is in no way inconsistent with its objections to the trial court's award of fees to counsel for the class of students and parents or to the student members of the class, as BRI claims. BRI Br. at 165. The standards for intervention are entirely different from the standards for determining whether a party or a successful intervenor may recover attorneys' fees from an opposing party. Indeed, many of the cases cited by the Commissioner in opposition to the fee awards to the students and parents' counsel were cases in which fees were denied to intervenors. *See* DMR Br. at 174-76.

[56]Contrary to BRI's contention, BRI Br. at 170 n.65, the Commissioner *did* raise his objections to the reasonableness of BRI's fee application in the trial court, to the extent possible without access to the underlying time records. App. 700-01, 737. BRI's further contention that the Commissioner was not prejudiced in his ability to effectively oppose BRI's fee application by the lack of access to BRI's time records, BRI Br. at 170, is also incorrect. As recognized in the very case cited by BRI on this point, a party opposing fees "cannot merely allege in general terms that the time spent was excessive." *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713, 720 (3d Cir. 1989). Rather, a fee opponent must "identify with precision" those tasks on which excessive time was spent, *id.* at 721, which is, of course, impossible without knowing how much time was spent on particular tasks.

fee awards because the Commissioner's counsel did not keep or submit contemporaneous time records, BRI Br. at 167, 170, rests on the false premise that the Commissioner filed a fee application in this case. While a prayer for fees was included in the Commissioner's counterclaim, App. 504, the Commissioner did not ultimately apply for fees, nor would he be entitled to any, given the court's total rejection of his counterclaim. App. 1322. Indeed, when the court directed the Commissioner's counsel to file affidavits as to the amount of time spent on this case, counsel questioned the relevance of such affidavits, given the lack of any fee application by the Commissioner. Tr. XIII:45-50. *See also Real v. Continental Group, Inc.*, 116 F.R.D. 211, 213 (N.D.Cal. 1986) (time spent by opposing counsel of only minimal relevance in assessing reasonableness of time spent by fee applicant).

BRI's attempt to overcome the Commissioner's procedural objections to the trial court's impoundment of counsel's billing records, by arguing that the court possessed "inherent power" to impound the records without complying with the Uniform Rules of Impoundment Procedure, BRI Br. at 169, should be summarily rejected by this Court. All but one of the cases cited by BRI on this point predate the Uniform Rules; and the only other case, *Newspapers of New England v. Clerk Magistrate*, 403 Mass. 628, 632 (1988), *cert. denied*, 490 U.S. 1066 (1989), upholds the court's impoundment order as *consistent* with the Uniform Rules, not "despite" those rules, as BRI states. Moreover, even prior to the Uniform Rules, "documents [could] only be impounded on a showing of overriding necessity, . . . based on specific findings." *George W. Prescott Publishing Co. v. Register of Probate*, 395 Mass. 274, 279 (1985).

Also, even if the court's impoundment order were procedurally correct, impoundment is not the appropriate means of protecting documents from release to the opposing party in a case. Rather, as provided in the Uniform Rules, "impoundment" is a means of making court records

"unavailable for *public* inspection" (emphasis added), Rule 1; and even impounded records are ordinarily available to the "attorneys of record [and] the parties to the case." Rule 9.

BRI's half-hearted attempt to argue that the court's impoundment of all of counsel's billing records was "narrowly tailored" to protect the privileged material contained therein, BRI Br. at 169, should also be rejected. Even the cases that BRI cites as to the privileged nature of attorneys' billing records recognize that not *all* of the information contained in such records is privileged. *E.g., Gonzales Crespo v. Wella Corp.*, 774 F. Supp. 688, 690 & n.6 (D.P.R. 1991) (amount and date of fees paid and number of hours billed, not privileged). Moreover, in none of the cases cited by BRI was a fee applicant's billing records held to be protected by attorney/client privilege from release to a fee opponent. In fact, in holding billing records privileged in a fraud case, the court expressly distinguished that situation from cases involving an application for attorneys' fees, where the court acknowledged that billing records are *not* privileged. *FTC v. Cambridge Exch., Ltd.*, 845 F. Supp. 872, 874 (S.D. Fla. 1993).

VII. APPELLEES' REQUESTS FOR APPELLATE COSTS AND FEES ARE BARRED BY SOVEREIGN IMMUNITY AND ARE OTHERWISE UNWARRANTED.

Appellees' requests for appellate costs and attorneys' fees, pursuant to Mass. R. App. P. 25, and G.L. c. 211, § 10, can be quickly disposed of on jurisdictional grounds. Even if this appeal were "frivolous"[57] (which it most

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[57]To the extent that BRI's requests for costs are premised on its unsubstantiated and unfounded allegations that the Commissioner's appellate arguments "take[ ] evidence out of context," "misrepresent [ ] many of the facts . . . without proper substantiation in the record," and "missappl[y] legal principles," BRI Br. at 172, BRI is poorly situated to make such claims, given its own pervasive misstatements of law and fact pointed out throughout the foregoing brief. *Cf. DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989) (upholding imposition of Rule 11 sanctions for "maintaining a legal stance untenable with our (continued...)

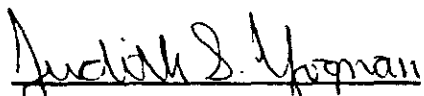
certainly is not, as the foregoing arguments amply demonstrate), the Court's "power to assess double costs, penalty interest, and counsel fees does not extend to appeals brought by the Commonwealth" or its officials. *Spartichino v. Comm'r of Metro. Dist. Comm'n*, 24 Mass. App. Ct. 965, 966 (1987) (rescript); *see also Griefen v. Treasurer & Receiver-General*, 390 Mass. 674, 676 (1983); *Broadhurst v. Director of Div. of Employment Sec.*, 373 Mass. 720, 721-23 (1977). Appellees' claim for such sanctions must therefore be summarily denied.

CONCLUSION

For all of the reasons discussed above and in the Commissioner's opening brief, the Court should (1) stay the trial court's injunctive and receivership orders pending a decision by this Court and (2) reverse the contempt judgment of the trial court or, in the alternative, remand this case for a new trial.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL



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[57](...continued)
law, [which] demonstrates either an ignorance of our law and thus inadequate research; or some intent to mislead the trial court as to the present state of this Circuit's precedent, and thus bad faith").