COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss. NO. 06990

BEHAVIOR RESEARCH INSTITUTE, INC., et al.

Plaintiffs-Appellees

and

JANINE CASORIA, et al.

Student Intervenors-Appellants

v.

PHILIP CAMPBELL, in his capacity as Commissioner of the DEPARTMENT OF MENTAL RETARDATION,

Defendant

ON DIRECT APPELLATE REVIEW FROM AN ORDER OF THE BRISTOL COUNTY PROBATE/SUPERIOR COURT

BRIEF OF THE INDIVIDUAL STUDENTS, INTERVENORS - APPELLANTS

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STATEMENT OF THE ISSUES

1. Should the individual students of the Behavior Research Institute (BRI) whose lives, health, and welfare are directly affected by the pending litigation between BRI and the Department of Mental Retardation (DMR) be permitted to intervene as of right or permissively, under Mass. R. Civ. P. 24(a) or (b)?

2. Does the class of parents *and* students certified by the trial court and represented by the same attorney who represents the corporate intervenor, the BRI Parents and Friends Association, Inc., adequately represent the individual students of BRI under Rule 24(a) of the Mass. R. Civ. P.?

3. Are individual members of a class, certified under Rule 23 of the Mass. R. Civ. P., precluded from intervening in an action to protect interests that have not been adequately represented by the class and the class attorney?

STATEMENT OF THE CASE

After a protracted licensing dispute between the Massachusetts Office for Children (OFC) and the Behavior Research Institute (BRI), a Settlement Agreement was signed by the parties on December 12, 1986 and approved by the probate court on January 7, 1987. App. 51-70. As a result of three new and critical events -- (1) a decision by the Department of Mental Retardation (DMR) in February 1994 threatening to decertify BRI[1]; (2) a series of contempt motions filed by BRI against DMR under the Settlement Agreement in late 1993 and 1994; and (3) actions by the probate court in late 1993 allowing certain lawyers for the

[1] Certification is the process used by the Department to review and approve the use of behavior modification procedures by programs which serve persons with mental disabilities.

students to withdraw from the case and appointing others in their stead -- the individual students moved to intervene in the equity action on March 30, 1994.[2] See Complaint in Intervention, App. 86-136; Motion to Intervene, App. 79-85. DMR supported the motion. BRI opposed the students' request to intervene, as did attorneys C. Michelle Dorsey and Paul Cataldo, purporting to act on behalf of a class of students,[3] App. 143-49, and Eugene Curry, who represented the BRI Parents and Friends Association Inc., an intervenor organization in the case. App. 150-59.

On April 5, 1995, the probate court finally held a hearing on the students' motion to intervene. It issued a memorandum opinion and order denying the motion on May 18, 1995.[4] App. 241-44. At the same time, the court scheduled a trial on BRI's contempt motions to begin June 26, 1995. On May 24, 1995, the students filed their notice of appeal. App. 245. On May 31, 1995, the students sought a stay of the trial from a single justice of

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[2] The motion was accompanied by a request by each attorney who had been appointed to represent individual students in pending substituted judgment treatment petitions that they be appointed as the next friend of each of the students who they represent. App. 130-42. That request was appropriate because of the attorneys' extensive familiarity with the needs, interests, and preferences of the individual students. It was necessary because, under numerous decisions of the Supreme Judicial Court, the students' plenary guardians who supported the use of painful aversives and who had requested authority to consent to the administration of extraordinary treatment were not in a position to independently determine the views and preferences of their wards in a related injunctive proceeding concerning the appropriateness of and necessity for that same extraordinary treatment.

[3] As it turned out, Mr. Cataldo and Ms. Dorsey did not represent a class of students because there was no certified class of students. See pp. 26-28, *infra.*

[4] Although the trial court did not discuss most of the factors under either Rule 24(a) or (b), it apparently acted under both of these sections in denying the motion. App. 242-43. It is at least clear that the individual students filed their intervention motion under both sections and set forth sufficient facts and claims to justify both intervention as of right as well as permissive intervention. App. 79-84.

the Appeals Court under Mass. R. App. P. 6(a) and appealed the denial of their request for permissive intervention pursuant to G.L. C. 231, §118, para. 1. The single justice denied both the petition and the request for a stay on June 5, 1995. See A.C. 95-J-415, App. 249. A further request for a stay of the trial from a single justice of the Supreme Judicial Court was denied on June 21, 1995. See SJ-95-0293, App. 250.

The individual students then appealed the trial court's judgment to the full Appeals Court. The clerk of the trial court, apparently acting on instructions from the judge, refused to assemble the record. App. 252. Another interlocutory appeal to a single justice of the Appeals Court pursuant to G.L. c. 231, §118, para. 1 was necessary to compel the clerk to assemble the record. See Order, No. 95-J-564, July 25, 1995, App. 254. A request for Direct Appellate Review was allowed by this Court on September 6, 1995.

STATEMENT OF THE FACTS

Rather than considering the factors relevant to intervention under either Mass. R. Civ. P. 24(a) or (b), the trial court's memorandum opinion and order denying the individual students' motion to intervene instead concluded that since the students already were members of a plaintiff class comprised of all students and parents, they should not be permitted to intervene. App. 244. That conclusion was based upon certain questionable assumptions concerning the right of the individual students to participate as parties in a matter which directly affects their rights and interests.

On April 29, 1986, shortly after the filing of the first amended complaint in this case, the lower court appointed Marc Perlin and Max Volterra to represent the "potential class" of *all students* at BRI in an action filed by BRI against the then Director of the Office for

Children.[5] App. 71. On June 4, 1986, without an opportunity for hearing and without making any findings, as required by Mass. R. Civ. P. 23, the probate court "preliminarily" certified a different class -- one comprised of both students *and* parents -- solely for purposes of preliminary injunctive relief. App. 41-44. Two parents were appointed as class representatives for this purpose. This actual class supplanted the earlier "potential class." App. 41. It was represented by attorney Robert A. Sherman, and included both parents of residents as well as the *then* residents of BRI.[6] App. 44. Attorneys Perlin and Volterra continued to be involved in their capacity as guardianship counsel for their individual clients. The court explicitly deferred final action on class certification, and particularly on the definition of any class, until trial of the case in chief. App. 41.

The case was never tried. Instead, the defendant and plaintiffs settled the case. On December 12, 1986, BRI and the attorney for the preliminarily certified class jointly moved for class certification with the assent of defendants. App. 47. They filed no supporting memorandum, but on that same day, without providing notice to putative classmembers, without affording either parents or students an opportunity to object,[7] and, in fact, without

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[5] Messrs. Perlin and Volterra previously had been appointed as counsel for five individual students in related guardianship proceedings, which were initiated by BRI allegedly on the students' behalf. Thus, from the inception of this litigation, the probate court has always recognized the appropriateness of the guardianship counsel assisting the students in this action.

[6] Only a small portion of the current residents of BRI attended the school in 1986, when the preliminary injunction was entered. All of those who did not were never part of any "potential class' that might have existed, never received any notice of their class membership or appointed "class counsel," and never were made aware of any class certification decision.

[7] Prior to the filing of this motion, one parent, one guardian, and two students had voiced their objection to being included in any class and had separately moved to intervene because they strongly opposed the positions of the "class representative" and class counsel. See Motion of Bruce Deniz and Robert Collins to Intervene, November 26, 1986, App. 13. This clear division

conducting any evidentiary hearing at all, the court certified a class of "all students at Behavior Research Institute, Inc., their parents, and, where so appointed, their guardians as of September 26, 1985."[8] App. 49-50. The 1987 Settlement Agreement was signed by representatives of BRI, OFC,[9] a class of students *and* parents, and the two attorneys appointed in the substituted judgment proceedings, as counsel for some BRI students. App. 64. From the entry of the Settlement Agreement until September 1993, there was relatively little activity in this case.

In 1991, Mr. Sherman left private practice and joined the Office of the Attorney General.[10] No substitute counsel was ever appointed for the class of parents and students. Rather, the parents' distinct interests have been represented by their own attorney, Eugene Curry, who filed pleadings in response to the students' intervention motion on behalf of the BRI Parents and Friends Association, Inc., an organizational intervenor in this case for at least the past several years. App. 150.

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between putative classmembers should have led the probate court to at least afford them an opportunity for a hearing and, in any event, disclosed serious questions about the adequacy of representation of the named plaintiffs.

[8] Several weeks later, Robert Sherman signed the Settlement Agreement as counsel for "the Class of All Students at BRI, Their Parents, and Guardians." Leo Soucy and Peter Biscardi, both parents, signed as class representatives. App. 64. Marc Perlin and Max Volterra also signed this Settlement Agreement as "counsel for BRI clients." *Id.* They did not, and could not, sign as counsel for any class comprised only of students, since BRI residents were subsumed in the class which Mr. Sherman represented.

[9] The Department of Mental Retardation was subsequently substituted for the Office as the defendant, because it assumed the responsibility for licensing, regulating, and monitoring BRI.

[10] In 1994, Robert Sherman left the Attorney General's Office and joined Eckert Seamans Cherin & Mellot, the firm of Roderick MacLeish, who has represented the plaintiff BRI since the inception of this litigation. Mr. Sherman then filed his appearance for BRI in this action.

After receiving notice of BRI's motion for contempt and the resumption of significant activity in the case, attorneys Perlin and Volterra moved to withdraw from the case. In granting their motions, the probate court appointed two new attorneys, C. Michele Dorsey and Paul Cataldo, to represent what the court mistakenly referred to as "the class of students." App. 74. However, no such class exists, nor could it, because a differently defined class already had been certified.

On September 2, 1993, BRI filed a motion to further amend its complaint, a request for preliminary relief, and a motion for contempt against DMR, alleging interference in the operation of its program as a result of administrative monitoring and licensing activities initiated by the state agency.[11] App. 19. On February 9, 1994, DMR issued a conditional certification decision, granting BRI final approval to use behavioral aversive techniques if it met certain requirements within ninety days.[12] App. 118-36. BRI never appealed the certification decision. Instead, it simply informed DMR that it had no intention of complying with the agency's order, claiming it was no bound by from state regulation and certification as a result of the Settlement Agreement. After extensive discussions between BRI and DMR to clarify these conditions, DMR issued a final, unconditional certification decision on January 26, 1995, which granted BRI a two year certification, but limited the range of permissible aversives and imposed certain reporting and access requirements. App. 160-70.

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[11] Several amendments to the contempt motion have been subsequently filed, the most recent in March 1995. See App. 32.

[12] DMR's decision identified twelve major deficiencies in BRI's program. It conditioned permanent certification of BRI upon compliance with specific remedial actions which DMR required in each deficiency area.

Again, BRI never appealed the agency's decision but instead insisted that the Department's regulatory decision was illegal and of no effect. App. 171-72. It also sought to enjoin DMR's decision and pressed for a prompt trial on its contempt motions. App. 25.

In its May 18, 1995 order denying the students' motion to intervene, the probate court surprisingly concluded that the class comprised of students and parents is represented by Mr. Curry, even though all pleadings in this matter which have been filed by him are on behalf of an intervenor corporation, the BRI Parents and Friends Association, Inc.,[13] and even though in November 1993 that same court had supposedly appointed Ms. Dorsey and Mr. Cataldo to represent a "class of students."[14] App. 74.

The trial court's order recognized separate representation for the students "to be important in protecting the Students from potential conflict with the interests of the Parents and Guardians." May 18, 1995 Order, App. 243. Although no subclass had ever been

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[13] BRI explicitly conceded at oral argument on the intervention motion that Mr. Curry represented the Parents Association as a party in this case. It asserted: "The parents have a parents group. They've hired an attorney. That's certainly within their right. I think it is appropriate." Transcript of April 4, 1995 hearing at 52, App. 226. Mr. Curry concurred with this role:

> I happen to represent three-quarters of the parents.... [M]y clients, who have retained me to participate in this proceeding, have a common interest in making sure that the option of treatment at the Judge Rotenberg Center remains available.

Id. at 55. For the lower court to conclude, despite the absence of evidence and in face of the explicit statements of counsel for the BRI Parents and Friends Association, Inc. as well as by counsel for BRI that Mr. Curry actually represents the class of students and parents was clearly erroneous.

[14] These attorneys also labored under the mistaken impression that they represented a class of students, although one never existed, since they filed their pleadings in response to the students' intervention motion on behalf of such a class. App. 143.

certified or student class representatives identified separate from the parent class representatives, the lower court's order concluded that Attorneys Dorsey and Cataldo are "Counsel to Student members of the Class. *Id.* This decision is clearly inconsistent with the evidence, the history of this litigation, the rights of the students, and the requirements of Rule 23. Moreover, the probate court's order never considered the right of individuals to intervene in a proceeding, even if they are unnamed members of a class, in order to assert and protect their own interests.

The trial on BRI's contempt motion commenced on June 26, 1995 and concluded almost a month later. The motion to intervene and subsequent appeal are not moot even though the contempt trial has been completed, since the individual students' interest in participating in the ongoing equity case continues. That case, which has been active for the past decade and is likely to remain so for some time in the future, continues to directly determine the scope of the monitoring and regulatory protection the students will receive from the duly-authorized licensing agency, the Department of Mental Retardation. While the intervention motion was prompted in part by circumstances related to the Department's 1994 certification decision and BRI's contempt motion, it was by no means limited to those matters, as more fully described in the students' motion. App. 81-83. In addition, the students continue to have an interest in the basic issues litigated in the contempt proceeding, either on appeal or in any future hearing before the trial court. In fact Justice Abrams noted, in denying the students' motion to stay the contempt trial, that a prompt appeal to a full panel of the Appeals Court was appropriate. App. 250.

SUMMARY OF THE ARGUMENT

The individual students' motion to intervene satisfies the standards for both intervention as of right and permissive intervention. Their motion was timely since it was filed within sixty days of the time when DMR took the decisive action to decertify BRI that threatened the students' interests in continued treatment, education, and related services. (pp. 10-14). The students' have an indisputable interest in this matter, which will be directly affected by the resolution of BRI' contempt motion, as well as by other proceedings and decisions in this case. Such resolution will impede, if not foreclose, the intervenors' ability to protect those interests or assert them, especially in related forums such as substituted judgment proceedings involving the same questionable practices and aversive interventions. (pp. 15-18). These interests are not adequately represented by any party, and particularly not by the attorney who represents both a corporate intervenor, the BRI Parents and Friends Association, Inc., as well as the combined class of parents, guardians, and students. (pp. 18-26). Nor are the students adequately represented by two attorneys who were mistakenly appointed by the lower court to represent an uncertified and non-existent class or subclass comprised solely of students. (pp. 26-33).

The individual students clearly meet the more lenient standards for permissive intervention, since their application was timely, it involves common questions of law and fact, and intervention would not delay or prejudice the adjudication of the parties' claims. (pp. 34-38).

The lower court erroneously assumed that absent classmembers were automatically precluded from intervening in this proceeding. In fact, intervention is the preferred method

for addressing substantial and unreconcilable conflicts between the vast majority of classmembers and the named class representatives, who speak only through their parents, who identically mirror the views of their parents, who share few if any critical characteristics with other classmembers, and who have never asserted an independent position from BRI. (pp. 39-40).

Finally, just as guardians do not have the authority to consent to extraordinary treatment such as painful aversives on behalf of their wards, so too they cannot be the proper representatives of their wards in an injunctive proceeding which is focused exclusively on the appropriateness of such extraordinary interventions on persons with severe disabilities. Therefore, the individual students need next friends to assist them to participate in that proceeding. The most appropriate next friends for these individual students are the guardianship counsel who are the most familiar with their needs, interests, preferences, and rights at BRI. (pp. 39-45).

ARGUMENT

I. THE STUDENTS ARE ENTITLED TO INTERVENE AS OF RIGHT UNDER MASS. R. CIV. P. 24(a).

Together with their motion to intervene, the individual students filed a Complaint in Intervention, detailing their claims against the Department of Mental Retardation. App. 86, 109-11. Their accompanying memorandum of law described in detail the reasons why their motion met the four standards for intervention as of right under Mass. R. Civ. P. 24(a).[15]

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[15] Rule 24(a)(2) states that:

> Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject

The probate court's opinion and order failed to analyze or even discuss any of these factors. App. 242-43. Its denial of the motion wholly ignored the criteria for intervention. *Id.* A careful analysis of the motion to intervene pursuant to the relevant criteria of Rules 24(a) leads to the conclusion that the individual students clearly satisfied the standards for intervention as of right. At the very least, the individual students are entitled to a fair consideration of their motion as required by the rules and implementing decisions. See *Mayflower Development Corp. v. Town of Dennis*, 11 Mass App. Ct. 630, 631, 418 N.E.2d 349, 351 (1981).

While Massachusetts appears to have adopted an "abuse of discretion" standard of review for trial court decisions on motions to intervene as of right, it is clear that this review is both searching, *Cosby v. Dept. of Social Services*, 32 Mass. App. 392 (1992), and more stringent than the standard used to review denials of permissive intervention. *International Paper Company v. Town of Jay*, 887 F.2d 338 (1st Cir. 1989).[16] The court in *Jay* underscored its willingness to reverse denials of motions to intervene as of right, stating:

> We will, therefore, reverse a district court's denial of intervention if the court fails to apply the general standard provided by the text of Rule 24(a)(2), of if the court reaches a decision that so fails to comport with that standard as to

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> of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[16] Because there are few state court decisions on this rule and because the language of the parallel federal rule (Fed. R. Civ. Pro. 24) is substantially the same as the Massachusetts rule, state courts generally follow federal decisions construing the requirements for intervention. *Attorney General v. Brockton Agricultural Society*, 390 Mass. 431, 434 n.3, 456 N.E.2d 1130, 1133 n. 3 (1983), citing *Rollins Environmental Services, Inc. v. Superior Court*, 368 Mass. 174, 179-80, 330 N.E.2d 814, 818 (1975).

indicate an abuse of discretion.

Jay at 344. In this case, the court both failed to undertake a proper analysis under Rule 24, and committed error when it found that individual students were adequately represented. A fair consideration of the relevant factors demonstrates that the individual students have clearly met the standards for Rule 24(a) intervention.

A. The Application Was Timely.

There can be little argument that the request was timely. Many, if not most, of the students who presently attend BRI were not students at the time the Settlement Agreement was approved by the Court on January 7, 1987. Therefore, many of the current students did not have an opportunity to intervene earlier, at the most significant phase of the litigation. Until September of 1993, there had been little controversy under the Settlement Agreement. The critical event triggering the students' request to intervene was DMR's February 9, 1994 certification decision.[17] App. 118. Only after this decision letter was issued was it manifestly clear that this dispute could have severe ramifications for the students, including decertification of BRI by early August of 1994 if certain conditions were not met or immunity by BRI from DMR regulations. It was only recently that the individual students were no longer able to participate, at least informally, in this proceeding through their guardianship counsel, as had been the practice for the past seven years prior to the

[17] The agency's action came after an extensive review into the aversive, restraint, treatment, investigation, reporting, and research practices at BRI. This review had prompted BRI to file its first contempt motion in September 1993, which asserted that the Settlement Agreement authorized BRI to operate free of certain DMR regulations and authorized the court monitor, rather than DMR, to be the ultimate arbiter of the agency's rules, policies, and licensing requirements.

withdrawal of attorneys Perlin and Volterra.[18] *Id.* The Appeals Court has stated that "if the underlying action takes an unexpected turn, we perceive no reason why the third party cannot intervene to protect its position." *McDonnell v. Quirk*, 22 Mass. App. Ct. 126, 133, 491 N.E.2d 646, 651 (1986).[19]

Because the students had no reason to suspect that matters would accelerate to this level, their motion to intervene is timely in light of this unexpected turn of events.[20] See *Fiandaca v. Cunningham* , 827 F.2d 825, 834 (1st Cir. 1987)(motion to intervene found timely given class' initial disinterest in litigation, sequence in which events unfolded, and gradually growing awareness that its interests may be implicated in the outcome of the case). Compare *Peabody Federation of Teachers, Local 1289, AFT, AFL-CIO v. School Committee of Peabody*, 28 Mass. App. Ct. 410, 413-14; 551 N.E.2d 1207, 1210 (1991)(intervention not timely where there was no surprising turn of events, and teacher knew her recovery was in doubt long before filing motion to intervene). See *In re Acushnet River & New Bedford*

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[18] It is significant that it was only after new guardianship counsel were appointed for many students in November and December 1993 that these issues were identified as directly affecting the students' rights and interests, rather than solely the interests of BRI.

[19] It is not uncommon, under appropriate circumstances, for intervention to be allowed after judgment, during the implementation and remedial phase of an injunctive case. See *Halderman v. Pennhurst*, 612 F.2d 131, 134 (3rd Cir. *en banc* 1979) (approving participation by intervenor parent group in the relief phase of five year old injunctive case, even if superfluous at the liability stage).

[20] This is not a case where intervenors could reasonably have been expected to know about their interests in the suit due to extensive media coverage. See *Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir. 1980)(sophisticated unions should notice news stories about cases affecting their interests); *Garrity v. Gallen*, 697 F.2d 452, 456 (1st Cir. 1983)(school districts should have known of their interest in case due to extensive media coverage and legislative and court actions). Here, intervenors are people with severe mental disabilities who have limited access to and understanding of media coverage of this action.

Harbor Proceedings re Alleged PCB Pollution, 712 F.Supp. 1019, 1023 (D.Mass. 1989)("the sudden revelation of a divergence of interests between the sovereigns and the intervenor constitutes an unusual circumstance militating for intervention").

The intervention by the students in 1994 or early 1995 would not have resulted in any prejudice to any party or delay in the proceedings. The intervention motion was filed more than a year before the trial on the contempt motion was even scheduled. In addition, in the pleadings and at the hearing on the intervention motion, the students agreed to waive any discovery and not to seek any delay in the proceedings.[21] Furthermore, the trial court has consistently acknowledged that the students have a crucial role in this litigation. App. 74, 243. Their involvement as a party, with intervenor status and guardianship counsel as next friends, would not require a substantial realignment of this long-standing litigation nor the introduction into this case of an entirely new and adversarial interest.

The students at BRI have fundamental rights and interests at stake in this case. In light of the importance of addressing these interests, as well as the unique circumstances surrounding the students' desire to intervene at this point in the litigation, their application satisfies the standards for timeliness.[22]

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[21] At this stage of the case, there clearly is no prejudice since the contempt trial is over and there are no other pending proceedings, other than a number of appeals.

[22] In determining prejudice to an applicant should intervention be denied, one significant factor is the applicant's probability of success on the merits. *Garrity*, 697 F.2d at 457; *Culbreath*, 630 F.2d at 23. To the extent that this is a consideration here, the students enjoy a substantial probability of success on the merits, given the many allegations of rights violations by BRI and other enforcement failures by DMR.

B. Intervenors Have An Interest in this Action Which May Be Impaired by The Outcome of the Case.

In order to intervene, the moving party must demonstrate that it has a significantly protected interest. *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992), citing *Donaldson v. U.S.*, 400 U.S. 517, 531 (1971). All parties to the litigation between BRI and DMR, as well as the probate court, has always acknowledged that the residents are entitled to representation in this case because of their critical interest in its outcome. App. 42. All parties agree that the class of residents of BRI[23] "continues to have the most vital interest in the process and outcome of any litigation that occurs in the above cited matter [the case at issue here]..." App. 74. Neither the trial court judge nor any party has ever disputed this in ten years of litigation. Indeed, intervenors have perhaps the greatest interest of any party, since the issues in this case directly affect their very lives and health.

The individual students have rights and interests which in some respects parallel and in others diverge from those of existing parties. Unless they participate individually in this action, their individual rights to (1) safety, (2) freedom from harm, (3) freedom from unnecessary restraint,[24] (4) freedom from cruel and unusual punishment, (5) adequate treatment in the least restrictive setting, (6) safe and effective behavior interventions, (7)

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[23] Although there was and continues to be confusion about the nature, representation and composition of the class, there has never been any disagreement among any of the parties or the court below about the vital interest of the residents of BRI in this litigation.

[24] See *Youngberg v. Romeo*, 457 U.S. 307 (1982)(establishing right to safety, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably might be required by these interests for individual involuntarily committed to a state institution for the mentally retarded).

appropriate services pursuant to DMR regulations,[25] (8) appropriate education, (9) procedures and guarantees under the Settlement Agreement,[26] and (10) adequate monitoring of services will not be fully represented or protected by any other party or representative presently participating in this litigation.[27] All of these rights are potentially threatened by BRI's failure to comply with applicable regulations and by DMR's threatened decertification of BRI. Moreover, the individual students will have no ability to contest or appeal those decisions and orders in this case which affect their individual rights.

C. *Disposition of This Action Would, As a Practical Matter, Impede Intervenors' Ability to Protect Their Interests.*

All parties in this litigation, as well as the lower court, have consistently acknowledged that the outcome of the litigation -- as well as of the discrete contempt motion recently tried before the court below -- will crucially affect the intervenors' interests, since the process by which their living conditions and treatment are monitored, and their lives and health are protected, are clearly of greater significance to the students than to any party in this case. The trial court specifically stated that any court decision in the equity case has and

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[25] See 104 C.M.R. 20.04 ("[mental retardation] programs are to be designed to provide meaningful habilitation ... through services which ensure (1) Human dignity; (2) Humane and adequate care and treatment; (3) Self-determination and freedom of choice to the person's fullest capability; (4) The opportunity to live and receive services in the least restrictive and most normal setting possible; ...").

[26] See Settlement Agreement, §A(3), App. 52 ("For all clients, BRI shall propose those treatments which are the least intrusive, least restrictive modalities appropriate to each client's needs").

[27] This assertion has become prophetic. At the contempt trial, the appointed lawyers for "the student class" presented no evidence whatsoever. The lawyer who jointly represents the BRI Parents and Friends Association, Inc. and the combined class of parents and students presented only the views, interests, and testimony of the parents.

will continue to have profound implications for the interests of the students, including their interest in appropriate and effective treatment, their interest in the least restrictive form of care, their interest in the program or location in which they receive that treatment, and their interest in the fair and effective implementation of the Settlement Agreement. App. 74.

Unless they are allowed to intervene and participate as formal parties in this action, the individual students will have no standing to appeal an adverse disposition of the pending contempt action, any other enforcement decision under the Settlement Agreement, or any other order entered in this litigation. It is significant that the students alone do not now have official party standing. Because the students have never been formally and permanently afforded party status either individually or as a separate group from their parents in this case, they do not have standing to challenge decisions which threaten only their interests or rights. The fact that two guardianship lawyers for the individual students signed the Settlement Agreement does not change this fact, since "an interested party who had taken part in the (compromise and settlement) proceedings and had the right to intervene, but had not formally done so, was not capable of appealing. [A]s such, a party was not properly on the record as an intervenor, and not being a party to the record has no standing to appeal." *In re Central Ice Cream Co.*, 62 F.R.D. 357, 360 (N.D.Ill. 1986)(quoting *In re South State Street Bldg. Corp.*, 140 F.2d 363, 367 (7th Cir. 1943), quoted in *In re Thompson*, 965 F.2d 1136, 1142 (1st Cir. 1992).

Nor are the other alternatives to intervention practical or efficient here, particularly in light of the length of this litigation and the existence of the Settlement Agreement. Initiating separate legal proceedings would be made far more difficult by the resolution of virtually

identical issues here. It would certainly be uneconomical to both the trial court and the indigent students. *Mayflower Development Corp.*, 11 Mass. App. Ct. at 635, 418 N.E. 2d at 354 (intervenors' interest in prompt resolution). The disposition of legal issues in this case and under the Settlement Agreement will directly impact the lives and welfare of the individual students. Such disposition, and particularly a final judgment in this action, is certainly likely to impede, both legally and practically, the students from asserting their similar claims elsewhere.[28]

D. The Intervenors' Interests Are Not Adequately Protected by the Existing Parties.

The only real intervention factor at issue under Rule 24(a) is whether the individual students' interests were adequately represented by either class counsel or appointed counsel.[29] While there is a requirement of inadequate representation by existing parties, the intervenor need only show that representation *may be* inadequate, not that it is inadequate. *Conservation Law Foundation*, 966 F.2d at 44, citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). Students can make this showing as to all parties who are or have been involved in this case.

No precise dividing line is indicated in the rule or related cases for determining when

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[28] What type of aversives BRI is permitted to use on the students and whether DMR is authorized to certify, regulate, and monitor BRI's program is at the very core of the pending dispute raised in the contempt motion. How these questions are resolved not only directly impacts each of the individual students, but it also will determine the scope and content of the separate substituted judgment proceedings. The history of this case has amply demonstrated that once these systemic regulatory issues are resolved in the equity case, they bind the individual students and cannot be relitigated in each separate guardianship proceeding.

[29] No claim has ever been advanced by any party throughout this litigation that the students' rights are protected by either the real plaintiff in interest, BRI, or by the defendant DMR.

the intervenors' interests are adequately protected by the parties. But the usual test requires a comparison of the interests "from the perspective of the result sought by [the] proposed intervenor vis-a-vis the result sought by the existing party." *United States v. International Business Mach. Corp.*, 62 F.R.D. 530, 536-37 (S.D.N.Y. 1974), quoted in *Mayflower Development Corp.*, 11 Mass. App. Ct. at 637, 418 N.E. 2d at 354. Here, the result sought by the individual students is distinctly separate and different from that espoused by any of the existing parties or attorneys. Where the "interest is similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene...." *Mayflower Development Corp.*, 418 N.E.2d at 354, quoting 7A Wright & Miller, Federal Practice and Procedure §1909, at 524 (1972).

On first examination, there appears to be a surfeit of agencies and individuals charged in some way with representation of the students' interests. Paradoxically, this has led to confusion and inadequate representation, which continues to this day. A careful review of the interests and past actions of the existing parties is useful in determining whether they have and can adequately represent the interests of the individual students.

1. **BRI**

BRI is primarily concerned in this litigation with maintaining its license to operate and retaining the flexibility to employ a wide range of behavioral interventions with minimal interference from regulatory authorities. This may be in conflict with the students' interest in the least restrictive form of treatment and in adequate monitoring of BRI's compliance with DMR regulations. There has been considerable evidence amassed since the filing of the

motion to intervene concerning: (1) the use of aversive conditioning devices without obtaining the necessary federal approval and in violation of DMR regulations on treatment, research, and human rights; (2) possible violations of state laws on restraint; (3) the confirmed abuse of two students; (4) the weaknesses of BRI's education program for certain students; and (5) inadequate monitoring and treatment of medical and psychiatric conditions of several of its students. App. 111-12. This information makes it unreasonable to conclude that BRI can adequately represent all of the students' interests.

2. DMR

DMR is sued in its capacity as the statutory licensing agency and regulator for all programs which serve persons with mental retardation. DMR has special procedures for certifying programs to use Level III behavior interventions, which are the most intrusive form of aversive treatment. As such, DMR has interests which are distinct from those of the students. The lower court has recognized these differences from the outset of this litigation, first by appointing two attorneys (Perlin and Volterra) to represent a potential class of students and then by certifying a different class of parents and students.

DMR is motivated primarily by its obligation to ensure full compliance with its regulations. While the students should be expected to benefit from BRI's compliance with the law, they have additional, and perhaps primary, interests in appropriate treatment, less restrictive interventions, and continuity of care. Although some of these interests may be related to those of DMR, there are clearly distinctions and points of divergence between the rights and interests of a regulatory agency and those of its clients. For example, DMR has now terminated BRI's certification to use Level III aversives. This decertification could

operate to the detriment of some of the students and to the benefit of others, underscoring the need for individual student intervention and the inadequacy of the current class, which assumes that all students and parents have a single point of view.

Violations of some of the Department's requirements do not necessarily affect the students at all and certainly not directly; rather they represent a failure by BRI to satisfy a particular administrative interest of the reviewing agency. Yet the decertification may cause a major disruption in the continuity of the students' care and could result in an inappropriate placement or an inadequate educational program. Where there are substantial differences in the remedy sought, courts have found that there was inadequate representation by existing parties that justified intervention. *Acushnet*, 712 F.Supp. at 1024, n. 7 (substantial differences in measure of damages sought would impact on the quality of harbor cleanup, thus rendering representation inadequate for the purposes of Rule 24(b) and under the heightened showing required for Rule 24(a) in *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982)). See also *Massachusetts Federation of Teachers AFT, AFL-CIO v. School Committee of Chelsea*, 409 Mass. 203, 207, 564 N.E.2d 1027 , 1030 (1991)(adequate representation when parents agreed with the school board both as to the goal and the means for educational reform). Here, on the contrary, the possible remedies and methods of achieving the primary goal of a quality residential and educational program appropriate to the needs of each student, as well as the secondary goal of ensuring compliance with DMR regulations and other laws, differ significantly between the students and DMR.

Although "where one party is charged by law with representing its own interests and those interests are the same as or similar to potential intervenor's, adequate representation is

presumed," *Mass. Federation of Teachers*, 409 Mass. at 207-8, that rule has no applicability to this situation. First, DMR is not charged with the responsibility for representing the interests of *all* Massachusetts citizens with mental retardation or even all of the students at BRI. Rather, it is required to take cognizance of and provide services only to certain *priority* clients, consistent with professional standards and within available resources. Moreover, DMR has no obligation to protect the rights or safeguard the interests of non-Massachusetts citizens.[30] Similarly, it has no responsibility for persons with conditions other than mental retardation, as is the case with many BRI students.[31] Finally, DMR cannot consider each individual student in their actions. As an agency charged with the duty to protect the public and, in general, Massachusetts citizens with retardation, it cannot primarily focus on the needs of certain individual students at BRI, cannot fairly weigh their needs and interests against those of the larger population, and certainly cannot excuse compliance with its rules or standards, even if to do so might directly benefit a particular student.[32]

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[30] Approximately two thirds of BRI's total student population are from other states.

[31] At least one-quarter of BRI's population has not been determined to have mental retardation.

[32] Thus, this is not a case where the government's sole reason for initiating legal action is to vindicate the rights of the general public or of all individuals within its jurisdiction. See, e.g., *E.E.O.C. v. United Airlines*, 515 F.2d 946 (7th. Cir. 1975) (determination that interests of movants who sought to intervene in action by government charging employer with discrimination in violation of Equal Employment Opportunity Act were adequately represented was not an abuse of discretion). Nor is it like those cases where a government agency, acting in the public interest, was found to adequately represent the interests of the intervenors who sought to represent the public interest as well. See, e.g., *James City, VA. v. U.S. Environmental Protection Agency*, 131 F.R.D. 472 (E.D.Va. 1990)(EPA adequately represented interests of environmental groups in case trying to override veto of a permit to build a creek reservoir).

Most importantly, the individual students are not seeking to intervene on the side of DMR, nor to assert interests which are in any way identical or even similar to those of the state agency. This lower court has already held, at least implicitly, that the presumption of adequate representation by a government agency is not appropriate in this case. App. 69. In fact, for the reasons discussed above, the trial court determined that the interests of DMR are actually adverse to those of the students. App. 5 (Preliminary Injunction Order). Similarly, it effectively concluded that DMR cannot be said to adequately represent the interests of the students.[33]

3. The Class of Parents and Students

Although the students are part of a unified class comprised of all students and parents, their rights and interests hardly can be properly represented by class counsel, Eugene Curry, since by his own admission he instead represents a corporate intervenor, the BRI Parents and Friends Association, Inc. in this case. App. 150. Nevertheless, the lower court concluded that "The Students are adequately represented by the Parents or Guardians as Next Friend." *Id.* This conclusion was plainly error.

The trial court's acknowledgement of the distinct interests of parents and their children is well established in the law. Courts have traditionally recognized that the interests of parents or guardians are at least potentially adverse to those of their family members or wards with disabilities. See *Parham v. J.L.*, 442 U.S. 584, 606-07 (1979)(parents should

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[33] See also, *Conservation Law Foundation*, 966 F.2d at 44-5, citing *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 912 (D.C.Cir. 1977)(fishing industries have more narrowly focused interests than governmental agency's interest in implementing the law such that there was an adversity of interest resulting in inadequate representation).

not have absolute discretion to voluntarily admit child to mental health facility; review by independent professional is constitutionally necessary); *Horacek v. Exon*, 357 F.Supp. 71 (D.Neb. 1973)(acknowledging that parents of children residing in a state home for people with mental retardation may not represent the best interests of the children, and appointing a guardian ad litem to point out potential conflicts to court). "The general rule is that a guardian may not waive the rights of an infant or an incompetent." *Childress v Madison County*, 777 S.W.2d. 1, 6 (Tenn. Ct. App., 1989) (citing 39 Am. Jur. 2d *Guardian & Ward* § 102 (1968); 42 Am. Jur. 2d *Infants* § 152 (1969). See *People First of Tennessee v. Arlington Developmental Center*, No. 92-2213-M1/V (Sept. 27, 1995)(deciding that guardians do not have the authority to determine the legal position of a resident with respect to future institutionalization or discharge).

This Court has been especially reluctant to allow parents or guardians to make unreviewable treatment decisions for their children or wards, particularly where the intervention is considered to be highly intrusive or the outcome drastic. Thus, in *Doe v. Doe*, 377 Mass. 272, 280-81, 385 N.E.2d 995, 1000-1001 (1979), the Court held that a guardian could not decide to admit his ward to a public mental institution unless he obtained a judicial determination that the ward satisfied the statutory standards for civil commitment. And a guardian cannot consent to treatment with certain intrusive procedures, including the administration of anti-psychotic medications, without first obtaining court permission pursuant to a substituted judgment determination. *Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983). By requiring these safeguards for persons with disabilities, Massachusetts has essentially transferred decisionmaking

authority with respect to certain intrusive activities and treatments from parents and guardians to the courts. As such, these cases represent an implicit determination that parents and guardians cannot adequately represent the interests of their wards in these situations. Moreover, as a practical matter, the parents have, from the outset of this litigation, defined their interests not as shared with the students and not even as independent, but rather as coterminous with those of BRI.

The class of parents and students is, in effect, a duplicate of the intervenor parent association. The BRI Parents and Friends Association pays and directs class counsel, as he himself has acknowledged. App. 229. The Parents' Association does not represent all guardians at BRI, nor all relatives or even all parents.[34] No students are consulted in any way concerning the actions and decisions of the class counsel.[35]

At the April 5, 1995 hearing on the individual students' motion to intervene, the court mistakenly believed that the certified class consisted solely of residents, that it had been represented by guardianship counsel Volterra and Perlin until their withdrawal in November 1993, and that it was thereafter represented by Paul Cataldo and C. Michelle Dorsey. In fact, however, the certified class of parents *and* students had effectively been without counsel since the departure of Robert Sherman several years ago.

On May 18, 1995, the lower court attempted to correct the lack of class counsel by

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[34] Not all guardians of BRI residents are parents or relatives; in some cases the state agency operates as guardian. Not all parents are members of the BRI Parents' Association or support its positions. App. 229.

[35] The process by which students would be consulted by class counsel is inextricably intertwined with the need for the appointment of next friends, *see* pp. 39-45, *infra*.

appointing Eugene Curry, counsel for the BRI Parents and Friends Association, as class counsel for a class of parents and residents. The interests of individual students cannot be adequately represented by the Parents' Association. All parents and guardians must sign a contract with BRI when their ward is placed there agreeing to cooperate with BRI in seeking approval of BRI's treatment regimen. The Parents' Association has been unconditionally and without exception supportive of BRI throughout this litigation. Moreover, there is an obvious conflict for one attorney to represent not only the competing interests of various classmembers and their respective separate groupings (parents v. residents), but also the competing interests of all classmembers and an intervenor corporation, the BRI Parents and Friends Association, Inc.[36]

4. **C. Michelle Dorsey and Paul Cataldo**

Despite the unavoidable reality that, as members of the plaintiff class of all students and parents, the students' rights and interests must be represented by class counsel (Mr. Curry), the probate court went on to conclude that separate counsel (C. Michelle Dorsey and Paul Cataldo) actually represent the *students'* interests. App. 243. Until the students filed their motion to intervene, and throughout these proceedings, Ms. Dorsey and Mr. Cataldo consistently claimed to represent a class of students, although no such class was ever

[36] The trial court recognized that the class, as currently constituted and represented, could not adequately address the rights of the residents. Therefore, in its same May 18, 1995 order, without notice, explanation, or a recertification decision, it implicitly appointed Paul Cataldo and C. Michelle Dorsey to an unspecified role involving separate representation of an undefined "subclass" of residents. App. 243. This too was plainly error.

certified.[37] App. 143. In its November 8, 1993 order, the lower court appointed Ms. Dorsey and Mr. Cataldo to represent "the class of students."[38] App. 74. The probate court and some of the parties were apparently content with this erroneous construction until the question of the students' formal role was raised by their intervention motion. Even when the motion was argued, Mr. Curry claimed to represent a corporation, the BRI Parents and Friends Association Inc., not any class of students and parents. App. 151. Until May 18, 1995, the probate court clearly concurred in this alignment. But in the absence of subclasses, properly created under Mass. R. Civ. P. 23(e) and clearly defined after notice to all existing classmembers, this contorted reconstruction of the students' role and their counsel is neither permissible nor adequate.

In this case, the certification requirements of commonality, typicality, and adequacy of representation could not be satisfied by the probate court's implicit and explicit conclusions in its May 18, 1995 Order concerning an undefined "subclass" of students. App. 244.

(a) Commonality

The mere fact that the students reside at the same institution does not ensure that the commonality requirement is met. "Commonality requires more than sharing a common

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[37] In fact, they still do. On October 2, 1995, Mr. Curry, apparently acting on behalf of a class of students, parents, and guardians, filed in this Court the class' assent to BRI's motion for a stay of all pending appeals. App. 256. On the same day, Ms. Dorsey and Mr. Cataldo filed the same assent on behalf of "the class of students." App. 255. Thus, the lower court intervention decision has perpetuated, if not aggravated, the confusion and procedural irregularities with respect to the representation of the students in this case.

[38] These attorneys do not represent a certified class or subclass of students, since no such class or subclass has ever been certified and no class representatives ever identified.

circumstance". *Baldridge by Stockley v. Clinton*, 139 F.R.D. 119, 127 (E.D. Ark. 1991). Classmembers must "share a common deprivation," *Id.*, which parents and residents clearly do not. In fact, it is even questionable whether the residents themselves have enough in common to share any singular deprivation. Because the motion for class certification simply recited in a conclusory manner that "there are questions of law and fact which are common to all class members," without further elaboration, and because the court order echoed this conclusion, it is impossible to know what those common questions might have been, and whether they were outweighed by the numerous distinctions and conflicts between classmembers.

At least five significant distinctions are relevant to the students' legal rights and to the positions that individual students might want to take in this action. First, most "students" are adults and do not have statutory rights under the Individuals with Disabilities in Education Act (IDEA).[39] See 20 U.S.C. §1400 *et seq.* However, they have constitutional and common law rights not possessed by minor students or at least not applied in the same manner.[40] Second, some students are Massachusetts residents, with rights under state law,

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[39] Approximately twenty-five percent of the residents of BRI are under the age of eighteen. They have a right to a free and appropriate education in the least restrictive setting under IDEA. These students have compelling claims to an individualized education program which must be funded by the local education agency where the student or his/her parents reside. In one of the leading cases involving institutionalized persons in the First Circuit, children with special education rights were treated as a subclass and distinguished from institutionalized adults because of their special legal right to education. *Garrity v. Sununu*, 752 F.2d 727, 737 (1st Cir. 1984).

[40] For residents who are minors, presumptions of competence and the application of any rights they may have with regard to treatment refusal are different from adults at BRI. The legal force of their parents' conclusions as to their treatment is given special consideration not applicable to adult residents of the school. Significantly, over three-quarters of the residents at

while others have separate claims that arise from their state of citizenship.[41]

Third, some students have court-approved treatment plans which do not permit such aversives. Many others have plans which permit these procedures. Those residents who receive Level III aversives have a particular interest in the outcome of this litigation that other residents do not share, since BRI's ability to employ Level III aversives and DMR's decisions to limit certain practices at BRI are at the very core of this case and the pending contempt motion.

Fourth, there is also a crucial difference between residents with regard to their preferences concerning aversive procedures. Some students may prefer to continue receiving these procedures, believing that they are benefiting from them, while others may wish to be removed from aversives and not inflicted with painful punishment. Courts have traditionally certified subclasses when the interests of one group of classmembers collide with another. *Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992)(in challenging prison regulation segregating inmates who tested HIV-positive, court divided class of prisoners into those who tested HIV-positive and those who did not); *Clarkson v. Coughlin*, 145 F.R.D. 339 (S.D.N.Y. 1993)(in a class action involving hearing-impaired prisoners, the court certified two subclasses according to gender because male hearing impaired prisoners had access to programs denied to female hearing impaired prisoners).

BRI are adults, with distinct legal rights under federal and state statutes and constitutions. Residents who are not eligible for special education benefits may have no, or at least a much narrower, entitlement to any form of services, treatment, or educational programs.

[41] For example, some states which send individuals to BRI have banned the aversives used at BRI. A student might have a claim that a public agency should not pay for procedures in another jurisdiction which would be outlawed in his own state.

Finally, some residents are wards of their natural parents, while others are wards of the state or of a corporate guardian. The Supreme Court has noted that for children who are state wards:

> Obviously their situation differs from those members of the class who have natural parents...It is possible that the procedures required in reviewing a ward's need for continuing care should be different from those used to review a child with natural parents...The absence of an adult who cares deeply for a child ... may have some effect on how long a child will remain in the hospital.

Parham v. J.R., 442 U.S. 584, 617, 619 (1979). Complicating the matter further, some state wards are from other jurisdictions, making the likelihood that their guardians are closely monitoring their treatment needs even less likely. Thus, there appears to be significant doubt as to the commonality of the situation of all of the residents.

(b) Typicality

The claims and theory of the class representative(s) must be typical of and not conflicting with the claims of the class, and must not operate to disadvantage some members of the putative class. *Spence v. Reeder*, 382 Mass. 398, 409, 416 N.E.2d 914 (Mass. 1981); *Smith v. Babcock*, 19 F.3d 257, 265, n. 13 (6th Cir. 1994). Just as there are numerous conflicts between the students which preclude even a unified subclass of all students, the student representatives, Brendon Soucy and P. J. Biscardi, are not typical of their fellow students. These named plaintiffs are: (1) Massachusetts residents, whose rights and entitlements are governed primarily by Massachusetts law, whereas two-thirds of the students of BRI are from other states and have separate state law claims which may be greater or lesser than the Massachusetts residents; (2) over twenty-one, while one-quarter of their colleagues are under this critical age; (3) under the guardianship of their parents, which

is not true in the case of a significant number of other residents; (4) both receiving Level III aversives; and (5) ardent supporters of aversive therapy whose parents have repeatedly spoken out publicly against any form of restriction or regulation of these interventions. The residents of BRI, on the other hand, include a diverse and potentially conflicting range of ages, conditions, needs, and even legal rights. These variations and conflicts at least require subclassing of various student groupings, so that each set of interests can be adequately represented. *Spence*, 382 Mass. at 409.

(c) Adequacy of representation

Both the First Circuit and the leading treatises have given special emphasis to the importance of the requirement of adequacy of representation. See *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)("adequate representation is particularly important"); *Key v. Gillette Company*, 782 F.2d 5, 7 (1st Cir. 1986)("one of the most important of these requirements is that the representative party fairly and adequately represent the interests of the class); Newberg and Cote, 1 H. NEWBERG ON CLASS ACTIONS ¶3.21 at 3-125 (3rd Ed. 1992)("Adequate representation is especially important"). The importance of this requirement is due to the fact that "the due process rights of absentee class members may be implicated if they are bound by a final judgment in a suit where they were inadequately represented by the named plaintiff." *Key*, 782 F.2d at 7. A non-typical class representative is not an adequate representative. *Scott v. University of Delaware*, 601 F.2d 76 (3rd Cir. 1979); *Hartman v. Duffy*, 158 F.R.D. 525 (D.D.C. 1994).

Mr. Cataldo and Ms. Dorsey were never appointed to represent a subclass of residents, since no such class or subclass exists. They are not constrained by the usual rules

which apply to class counsel and are not accountable to specific clients or class representatives. Since they do not even know most (or any) of the individual students, have never represented them, and have no formal relationship with many of them, as do all of the guardianship counsel and proposed next friends, it is difficult to understand how these attorneys reach whatever positions they assert[42] or can be said to "represent the students."[43] If a classmember's interests are not fully and adequately represented, then that classmember is not bound by any court order or fairly subjected to its terms. *Id.*

5. **Guardian Ad Litem**

Ms. Bettina Briggs has been appointed a guardian ad litem for all the students collectively. However, she is an officer of the court, reporting to the judge, and as such, could not properly represent the individual students' interests and desires for purposes of determining what position to take on a particular issue in this case or whether the students should appeal an adverse decision. Indeed, what might be an adverse decision for some residents might be a positive decision for others. In addition, as guardian ad litem for a

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[42] Some of the students' guardians are state agencies which Mr. Cataldo and Ms. Dorsey have never contacted. Others are relatives who never visit their wards and with whom Mr. Cataldo and Ms. Dorsey have not communicated. As a practical matter, this leaves the more active, involved parents to provide guidance as to what all residents would want to Mr. Cataldo and Ms. Dorsey. These more active parents belong to the BRI Parents and Friends Association. Their point of view is thus triply represented: by the Association as an intervenor organization, by the class counsel (Mr. Curry) whom they employ and pay, and, by default, by Michelle Dorsey and Paul Cataldo "on behalf" of the residents.

[43] These counsel have never represented the individual students and are not familiar with their unique needs and the differences among them. Because of these students' disabilities, becoming familiar with them requires much more time and effort than would representation of a non-disabled client. Since their appointment, counsel have not spent any considerable time with any of their "clients" nor have they challenged any of the allegedly illegal activities of BRI.

collective of students, Ms. Briggs' role in this litigation overlaps and potentially conflicts with the responsibilities of Mr. Cataldo and Ms. Dorsey, but leaves unrepresented the particularly personal needs and claims of the individual students.

It was just because of the obvious confusion with respect to who represented the students' interests that the individual students sought to intervene.[44] The students should be permitted to intervene because their rights and interests are not adequately represented by class counsel who is dedicated exclusively to assisting a corporate intervenor or by separate lawyers who act on behalf of an uncertified, undefined, and inherently unworkable subclass. The students, just like the parents, should be able to participate in this case as intervenors, even if they also are absent members of a class.[45] The lower court's failure to analyze the factors relevant to intervention as of right and its conclusion that intervention was not needed because the individual students' interests are represented by the named classmembers was clearly error and should be reversed.

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[44] The inherent difficulty in his case with parents being the primary decisionmakers with respect to the individual students' interests strongly suggests the need for next friends for each of them.

[45] Even if counsel were capable of representing the interests of each individual student or all of the students collectively, the protective action of a court does not customarily extinguish an individual's freedom to secure counsel. Students, acting either independently or through their next friends, should have the option of securing counsel of their choosing. See *Attorney General v. Brockton Agricultural Society*, 390 Mass. 431, 436, 456 N.E.2d 1130, 1134 (1983) (shareholders have constitutional right to participate in pending action through counsel of their own choosing).

II. THE INDIVIDUAL STUDENTS MEET THE STANDARDS FOR PERMISSIVE INTERVENTION.

In addition to being entitled to intervene as of right, the student intervenors qualify for permissive intervention.[46] The students' application is timely, it raises common questions of law or fact, and it will not unduly prejudice or delay the adjudication of the parties' claims. See *Corcoran v. Wigglesworth*, 388 Mass. 1002, 448 N.E.2d 1128 (1983).[47] The lower court abused its discretion in failing to even address the requirements of Rule 24(b)(2) or to make any determination whatsoever with respect to the students' request for permissive intervention.

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[46] Mass. R. Civ. P. Rule 24(b)(2) provides:

> Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[47] The Mass. R. Civ. Pro. 24(b)(2) explicitly omits any requirement that the applicant demonstrate the inadequacy of representation by any of the existing parties. However, in construing the federal rule, some courts nevertheless consider this to be a factor in determining whether to allow permissive intervention. See, e.g., *In re Thompson*, 965 F.2d at 1137. This requirement is seen as being more lenient for permissive intervention than for intervention of right. *Acushnet*, 712 F.Supp. at 1024. And some cases do not seem to consider adequacy of representation for permissive intervention. See *Resolution Trust Corp. v. City of Boston*, 150 F.R.D. 449 (D.Mass. 1993)(finding adequacy of representation defeats intervention of right, but stating that permissive intervention remained within the discretion of the court which had denied the motion).

At least one court, in construing Mass. R. Civ. P. 24(b), has found that a judge "could consider that the [applicant's] interest was already adequately represented in the action" among other factors. *Attorney General v. Brockton*, 390 Mass. at 435, 456 N.E.2d at 1134. To the extent that inadequacy of representation is deemed relevant, the discussion in section I(D) demonstrates that students satisfy this requirement, especially under the lower standard for permissive intervention.

A. The Application is Timely.

The same factors are analyzed when considering timeliness under Rule 24(b) as under Rule 24(a)(2). *Corcoran*, 389 Mass. at 1003, 448 N.E.2d at 1129 (permissive); *Teachers Local 1289*, 28 Mass. App. Ct. at 413, 551 N.E.2d at 1209 (as of right). Therefore, the analysis and conclusion that the motion is timely for intervention as of right[48] also controls the analysis under permissive intervention. In view of all of the factors set forth *supra*, the importance of the students' participation as separate parties in this case, and the significance of their rights at issue, the motion was timely for the purposes of permissive intervention.

B. The Application Contains Common Questions of Law or Fact.

The standard for establishing a common question of law or fact is quite lenient. A proposed intervenor need not have a strong nexus of common fact or law to satisfy the requirement under Rule 24(b)(2). *Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159 (6th Cir. 1987). A single common question of law or fact will suffice, despite factual differences between parties. *McNeill v. New York City Housing Authority*, 719 F.Supp. 233 (S.D.N.Y. 1989), citing 7A C. Wright and A. Miller, Federal Practice and Procedure, §1924 at 473. The individual students easily satisfy this standard.

The questions of law which have been presented and will continue to arise in this case necessarily include legal issues which are common, if not identical, to those that the students raise in their Complaint in Intervention. See App. 112-14. Questions of the students' rights to safety, to freedom from harm, to freedom from unnecessary restraint, to freedom from cruel and unusual punishment, to adequate treatment in the least restrictive setting, to

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[48] See section I(A), *supra*.

appropriate education, and to compliance with DMR regulations and federal law are all at issue in the instant case. Most importantly, the rights and obligations set forth in the Settlement Agreement will be the fundamental legal determinant of both the contempt motion and other enforcement activities in this case. The question of whether DMR, as the licensing and regulating authority for programs serving persons with mental retardation in Massachusetts, has the right and responsibility to monitor BRI's compliance with state regulations despite any informal monitoring provided by Dr. Daignault is central to the present contempt action as well as to virtually all other proceedings in this case. This question is of utmost concern to the students, as its outcome will implicate their interest in adequate monitoring of programs and the treatment they receive.

In addition, the question of whether the DMR has failed to enforce its regulations forbidding the use of mechanical restraints without first obtaining a substituted judgment treatment plan directly concerns the students. Their rights to freedom from unnecessary restraint, to appropriate behavior treatment, and to adequate treatment in the least restrictive setting are directly implicated by this question.

In assessing common questions of law and fact, courts look to see whether intervenors present any arguments that reshape the issues in the case or contribute to its just resolution. *Resolution Trust Corp.*, 150 F.R.D. at 455. Courts have permitted intervention in cases in which the intervenors' "legal arguments will undoubtedly round out the considerations before [the] Court." *Acushnet*, 712 F.Supp. at 1024 (allowing intervention for limited purposes).

Permitting intervention by the students would assist in determining whether BRI has consistently acted within the requirements set forth in the Settlement Agreement, particularly

with respect to whether the treatment given was the least restrictive treatment possible in each individual case.[49] These facts are substantial and not likely to be raised by any other party. The presentation of this information by the individual students is essential, as it is closely related to the common nucleus of facts at issue in this case. Moreover, to date it has not been presented by anyone.

The rights of the students are central to the arguments of both DMR and BRI, as both entities exist to serve the students. Their disagreement stems from different interpretations of how best to achieve this goal. Intervention by the students can only benefit both parties, as the trial court will be provided with a more complete *and individualized description* of the needs and desires of the students and will therefore be able to make a more informed decision.

C. *Intervention Will Not Prejudice or Delay the Adjudication of the Parties' Claims.*

In deciding whether to allow permissive intervention, courts place emphasis on any prejudice or undue delay that would result from intervention. Courts often combine the discussion of whether the delay engendered by intervention at this stage of litigation will prejudice existing parties with its consideration of undue delay as an element of the timeliness question. See *Acushnet*, 712 F.Supp. at 1025.

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[49] See *McNeill*, 719 F.Supp. at 250, stating "it may even be the case that efficiency is promoted by intervention, as the proposed plaintiffs' claims may elucidate the peculiar difficulties allegedly visited on tenants by NYCHA policies". Contrast *Attorney General v. Brockton Agricultural Society*, 390 Mass. at 436, 456 N.E.2d at 1134, denying permissive intervention where "the underlying issue is one of law that appears to turn on facts that are largely documentary. In such a case, differences in the manner of representation seem less likely to influence the outcome than where there are factual disputes "

For the reasons set forth above,[50] and particularly since the contempt trial has proceeded, allowing the students to intervene will not delay any pending matter in this case. This Court found no prejudice to the defendant state agency even when intervention was sought after a trial was concluded. *Sargeant v. Commissioner of Public Welfare*, 383 Mass. 808, 423 N.E.2d. 755 (1981).

A successful motion to intervene will not open the door for other parties to intervene, thereby adding unnecessarily to the length and complexity of the trial. Because there are a limited number of students at BRI, and there are no outside parties who could legitimately claim an interest in the action, this would be the only group of people who would qualify for permissive intervention. This case can thus be distinguished from those in which courts deny intervention because "[t]o allow [applicant] to intervene would open the floodgates to innumerable others with the potential for drowning the whole project in a sea of litigation." *U.S. v. Metropolitan Dist. Comm'n*, 147 F.R.D. 1, 6 (D. Mass. 1993) (case involving Boston Harbor cleanup, an enormous project which would impact hundreds of groups).

The probate court never even considered the students' request for permissive intervention. Its failure to do so, and its implicit denial of their motion to intervene under Mass. R. Civ. P. 24(b), was an abuse of discretion warranting reversal.

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[50] See Part I(A), *supra*.

III. ABSENT CLASSMEMBERS ARE NOT AUTOMATICALLY PRECLUDED FROM INTERVENING IN A PENDING PROCEEDING.

It is clear that "one who is already a classmember [can] intervene in a lawsuit" if the classmember believes his or her interests are being inadequately represented. *Shults v. Champion International Corp*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb et al v. Q.T. Wiles, et al.*, 11 F.3d 1004, 1008 (10th Cir. 1993); *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1405 (9th Cir. 1989); *McNeil v. Guthrie*, 945 F.2d 1163, 1167-68 (10th Cir. 1991); 7B Wright, Miller and Kane, Federal Practice and Procedure ¶1799 (2d Ed. 1986). In fact, intervention is the preferred remedy for a classmember aggrieved by inadequate representation; the only other remedy is to bring an independent action, which is more expensive and inconvenient, and less efficient. See *McNeil*, 945 F.2d at 1167-68. In addition, intervention may be the only procedural device by which a classmember can protect his or her right to appeal a decision or settlement that he or she regards as adverse. See cases collected in *Shults*, 35 F.3d 1056 (6th Cir. 1994).

The requirement of inadequate representation for the purpose of intervention by a classmember is clearly lower than the requirement of adequate representation that must be met before a class is certified. *Id.* As the First Circuit pointed out:

> It is worth noting that 'the adequacy of existing representation is sometimes regarded as only a minimal barrier to intervention,' *Moosehead San. Dist. v. S.G. Phillips Co.*, 610 F.2d 49, 54 (1st Cir. 1979), and that 'if the applicant shows that the representation may be inadequate ... then the court is precluded from finding that the interest is adequately represented. *Flynn v. Hubbard*, 782 F.2d 1084, 1090 (1st Cir. 1986)(Coffin, J., concurring)(further citations omitted). Moreover, the burden of persuasion that representation is adequate appears to rest on the party opposing intervention (citations omitted).

Caterino v. J. Leo Barry, 922 F.2d 37, 42 (1st Cir. 1990). Where, as here, there is

substantial confusion about the identity, role, and loyalty of class counsel, and where the named student representatives are the incompetent wards of the leaders of the intervenor corporation, the BRI Parents and Friends Association, Inc., there is ample reason to conclude that the individual students should be permitted to intervene to protect their separate and distinct interests, even though they may be absent members of a class, just as the parents have been able to participate separately through their own association. The failure of the probate court to analyze or even consider this critical issue of conflict *within* the student and parent class requires reversal of its denial of intervention. Similarly, the lower court's assumption that since the students were members of a class of parents and students, there is no need to consider the individual students' request for intervention is plainly erroneous and should be reversed.

IV. THE INDIVIDUAL STUDENTS NEED APPOINTMENT OF NEXT FRIENDS TO BE PROPERLY REPRESENTED IN THIS ACTION.

The issue of appointment of next friends is inextricably intertwined with the issue of adequacy of representation. All of the students at BRI have significant disabilities and many suffer from severe mental impairments. They are vulnerable to abuse and neglect and need assistance in protecting their legal rights. All of the students have been deemed incapable of consenting to treatment and in need of a legal guardian. Because of the limited authority of the guardians with respect to aversive treatment under Massachusetts law and the potential conflict between guardians and their wards, the existence of the guardians does not obviate the need for the appointment of next friends for the individual students or the importance of their separate participation in the equity proceeding. In fact, given the critical importance of the issues raised in this case for each of the students, it is essential that every student have an

independent next friend who is extensively familiar with the individual needs and preferences of each student, who is free of all conflicts, and who is capable of asserting the individual rights of the student in this proceeding.

Rule 17(b) of the Mass. R. Civ. P. governs the appointment of a next friend or guardian ad litem for an infant or incompetent person.[51] A next friend is authorized to sue as the person's representative. The rule abolished the traditional distinction between the functions of guardian ad litem and next friend and sets forth the guidelines governing the appointment of a legal representative. The provisions of the rule flow from the general duty of the court to protect the interests of infants and incompetents in cases before the court. Thus, a court typically appoints a next friend to assert the rights of those persons who cannot do so themselves. In the context of this case, the relevant question is who is the most appropriate person to protect the individual student's interests, particularly with respect to the issues raised in the pending equity action and resolved, at least in substantial part, by the Settlement Agreement.

The decision as to whether or not to appoint a next friend or guardian ad litem rests

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[51] The rule provides that:

> Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

The Massachusetts Rules of Civil Procedure mirror their federal counterparts in several significant respects and have customarily been interpreted with reference to federal rules decisions. See Fed. R. Civ. P. 17(c).

within the sound discretion of the court and will not be disturbed unless there has been an abuse of its authority. *Gardner v. Parson*, 874 F.2d 131 (3d Cir. 1989); *N.O. v. Callahan*, 110 F.R.D. 637 (D.Mass. 1986); *Developmental Disabilities Advocacy Center Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982). See also *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 804 (9th Cir. 1986). But this discretion is not boundless and must be exercised with careful attention to the role of and potential conflict with the existing guardian, particularly where state law imposes limitations on the authority or responsibility of a guardian. *Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) (district court erroneously denied mother's petition for appointment as next friend in action against mental hospital because the court failed to consider whether the incompetent son's interests were adequately protected by his existing guardian).

Under Rule 17(b), a court generally is cautious about appointing a next friend or guardian ad litem in an action where the infant or incompetent person is already represented by someone who is considered appropriate. See *N.O. v. Callahan*, 110 F.R.D. 637 (court refused to appoint next friend for one of named plaintiffs in class action by inpatients at state mental facility because patient already had duly appointed guardian and guardian had the authority to act in the litigation). However, because the protection of infants and incompetents is the goal of Rule 17(b), the trial judge has a duty to consider whether the incompetent person will be adequately represented without appointment of a next friend. Federal and state courts have repeatedly affirmed their power to determine that the general interests of the child or incompetent would best be represented not by a general representative, such as a parent or guardian, but by a guardian ad litem or next friend.

These courts have consistently recognized their power to appoint a next friend when it appears that: (1) the infant or incompetent person's general representative has interests which may conflict with those of the person he or she is supposed to represent, or (2) the representative is unable, unwilling, or refuses to act on behalf of the infant or incompetent.

Cases provide numerous examples where the existing representative, while generally adequate, has a conflict of interest with the infant or incompetent that necessitates the appointment of a guardian ad litem. Courts are concerned with conflicting financial interests. See *Hoffert v. General Motors Corporation*, 656 F.2d 161, reh'g. denied, 660 F.2d 497 (5th Cir. 1981)(question of how to apportion tort suit's settlement proceeds between father and son created a potential conflict of interest, which merited the appointment of a guardian ad litem). However, courts have also found conflicting interests in other instances. See *M.S. v. Wemers*, 557 F.2d 170 (8th Cir. 1977) (conflict exists where suit itself seeks to advance interests of child over those of parent);[52] 6 C. Wright & A. Miller, §1570. The facts and decision in *Horacek v. Exon*, 357 F.Supp. 71, 74 (D.Neb. 1973) are particularly instructive here. In that case, a group of mentally retarded residents represented by their parents, brought an action against a state institution. The court identified a conflict of interest between the parents and children and appointed a guardian ad litem. "While the parents in all good conscience may desire one remedy, or a specific type or style of

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[52] In *Wemers*, an infant brought suit challenging the state's parental notification laws concerning contraceptives. The court noted, "When there is a potential conflict between a perceived parental responsibility and an obligation to assist the court in achieving a just and speedy determination of the action, the parents have no right to act as guardians ad litem." 557 F.2d. at 175. Because the action focused on the issue of parental notification, the Eighth Circuit reasoned that parents would be hard-pressed to serve as impartial representatives willing to vigorously pursue their child's interests in this claim.

treatment for their children, it would not necessarily be in the best interests of the children." 357 F.Supp. at 74.

There is a particularly compelling reason to appoint a legal representative when vindication of fundamental rights or participation in a legal proceeding would otherwise be impossible. Access to the courts by aggrieved persons should not be unduly limited, particularly as in this case, where an incompetent person raises allegations of violations of her rights attributable to his custodians. *Adelman*, 747 F.2d at 986; *Seide v. Prevost*, 536 F.Supp. 1121, 1132 (S.D.N.Y. 1982); *Child v. Beame*, 412 F.Supp. 593, 599 (S.D.N.Y. 1976).

A recent federal court decision in a similar case involving the authority of guardians to determine the rights and legal positions of their wards, particularly with respect to classmembership, is instructive. The court's analysis is relevant here:

> Indeed, legal authority supports the proposition that minors and other persons under a legal disability retain the rights of other citizens and that parents and guardians lack the power to waive the fundamental rights of their children and wards. Thus, a minor or ward has standing to sue to enjoin violations of his or her constitutional rights despite the parent's or guardian's consent to the practices or conditions being challenged. See *Milonas v. Williams*, 691 F.2d 931, 943 (10th Cir. 1982), *cert. denied*, 460 U.S. 967 (1988) (the commitment of mentally retarded adults upon application by a parent or guardian is to be considered involuntary); *Thomas S. by Brooks v. Morrow*, 601 F.Supp. 1055 (W.D.N.C. 1984), *aff'd*, 781 F.2d 367 (4th Cir. 1986), *cert. denied sub. nom. Kirk v. Thomas S. by Brooks*, 476 U.S. 1124 (1986) (young man with retardation whose court-appointed guardian had consented to his admission to a state institution had standing to sue the Secretary of the North Carolina Department of Human Resources and his guardian for violating his right to minimally adequate habilitation and unnecessarily restraining his liberty).
>
> As for the Arlington residents whose guardians have the authority "to protect their well-being and legal interest," even if this clause is interpreted to authorize the guardian to bring civil litigation on behalf of the ward, such authority cannot be exclusive. *Bonnie S. v. Altman*, Civ. No. 87-3709, slip.

> op. at 5 (D.N.J. April 19, 1988) (quoting S. BRAKEL, ET AL., THE MENTALLY DISABLED AND THE LAW 437 (3d ed. 1985) ("[m]odern authorities generally regard the requirement that a guardian sue or be sued for the incompetent person as a protection of the interests of the incompetent person rather than as a limitation on his or her capacity to institute suite" (emphasis added by the court)).

People First of Tennessee, No. 92-2213-M1/V, 1995 WL* (Sept. 27, 1995).

In the instant case, the individual students are already "represented" by their parents or guardians. However, the Court has previously determined that these students are not *adequately* represented, at least for the purposes of the equity action, since it has appointed separate counsel to represent the students' interests in this proceeding, albeit without either certifying a class under Rule 23 or indicating that it was in any way acting under Rule 17. In so doing, it has implicitly acknowledged at least the potential for a conflict between the parents and the students. Therefore, it should not rely on the existence of these guardians to exclusively protect the students' interests, particularly where the guardians lack the authority under Massachusetts law to make the very decisions (consent to aversive treatment) which are at stake in this litigation. Rather, the lower court should have exercised its authority to appoint next friends for each student with respect to the equity proceeding. See *Adelman*, 747 F.2d 986; *Chrissy F. v. Missouri Dept. of Welfare*, 883 F.2d 25 (8th. Cir. 1989); *In the Matter of Chicago Rock Island & Pacific R.R. Co.*, 788 F.2d 1280, 1282 (7th Cir. 1986) ("If there were some reason to think that [the plaintiff's] mother would not represent his interests adequately, the district court would, we may assume, be required (and certainly would be empowered) to appoint a guardian ad litem to represent him."); C. Wright & A. Miller, §1570. Its failure to do so, in circumstances where the existing guardians are specifically precluded by state law from making decisions concerning aversive treatment, was an abuse of

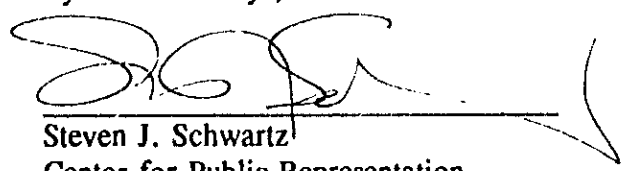
discretion.

CONCLUSION

For the above reasons, this Court should reverse the lower court's denial of the individual students' motion to intervene and for the appointment of their guardianship counsel as their next friend. The individual students should be allowed to participate in the retrial, if any, of BRI's contempt motion. In any event, the individual students should be afforded intervenor status in all subsequent proceedings in this case, including remedial activities pursuant to any decision on the contempt motion.

THE INDIVIDUAL STUDENTS,
THROUGH GUARDIANSHIP COUNSEL AND
NEXT FRIENDS

By their attorneys,



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