
COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

BRISTOL, SS.

No. SJC-06956

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

v.

DIRECTOR, OFFICE FOR CHILDREN,
Defendant,

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

ON DIRECT APPELLATE REVIEW FROM
A PRELIMINARY INJUNCTION
OF THE BRISTOL SUPERIOR/PROBATE COURT

REVISED REPLY BRIEF
COMMISSIONER OF MENTAL RETARDATION

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This is the reply brief of the Commissioner of the Department of Mental Retardation ("Commissioner") in his appeal from the trial court's preliminary injunction.

ARGUMENT

THIS COURT SHOULD NOT RECONSIDER AND REVERSE ITS DENIAL OF BRI'S MOTION TO DISMISS THE COMMISSIONER'S APPEAL FROM THE PRELIMINARY INJUNCTION.

By order dated March 8, 1996, the Full Court (1) denied BRI's motion to dismiss, on mootness grounds, the Commissioner's appeal from the trial court's preliminary injunction in the contempt proceedings in this case and (2) directed the parties to brief the issues in that appeal along with the other pending appeals in this case. BRI Supp. App. 151.¹ Despite this order, in its subsequently filed brief, BRI² failed to brief the merits of the issues raised in the Commissioner's appeal from the preliminary injunction³ and, instead, persisted in rearguing its already denied motion to dismiss this appeal. BRI Br. at 7-8.

Should the Court decide to revisit the issue of whether to dismiss the Commissioner's appeal from the preliminary injunction as moot, the Court should reaffirm its prior decision not to dismiss this appeal and should proceed to decide this appeal on the merits. Although final judgment has entered in the contempt proceedings, the underlying equity case and the individual guardianship cases involving the students at BRI are still very

¹The following abbreviations are used herein to refer to the parties' briefs and appendices: "DMR PI Br." (Commissioner's opening brief in SJC-06956), "BRI Br." (BRI's brief in SJC-06956), "App." (appendix in SJC-07101), "PI App." (appendix in SJC-06956), "BRI Supp. App." (BRI's supplemental appendix), "DMR Supp. App." (Commissioner's supplemental appendix in SJC-07045).

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

³Having failed to brief the merits of this appeal, BRI has waived its right to oral argument on the issues raised in the Commissioner's brief. Mass. R. App. P. 19(c).

much alive. In its judgment and order in the contempt proceedings, in addition to the contempt sanctions, the court expressly retained jurisdiction over the underlying equity case, App.1351; ordered DMR to comply with the terms of the 10-year-old Settlement Agreement, App. 1340; indicated that orders were “being entered [that day] in the Guardianship proceedings appointing the Honorable George N. Assack (Ret.) as Master to hear Treatment Plan Reviews,” App. 1342 n.1; and ordered DMR's attorneys, under threat of sanctions, not to “seek to accomplish through the Individual Guardianship proceedings what they are enjoined from doing herein.” App. 1342.

Although the contempt judgment and order further provided that “[t]he Court’s preliminary injunction . . . is hereby vacated and superseded by this Final Judgment of Contempt,” App. 1342, it is unclear what effect, if any, that provision has on BRI’s current right to use Level III aversives in general and the specialized food program in particular. Since the preliminary injunction principally enjoined the Commissioner from enforcing his decision of March 23, 1995, decertifying BRI to use any Level III aversives (with the proviso that, during the term of the preliminary injunction, BRI comply with the conditions contained in the Commissioner’s certification letter of January 20, 1995), PI App. at 505, vacation of the preliminary injunction technically means that the Commissioner is no longer enjoined from decertifying BRI. However, since the same order also transferred all of the Commissioner’s regulatory authority over BRI to a court-appointed receiver, App. 1342, the Commissioner himself remains powerless to decertify BRI as long as the receivership orders remain in effect.

Nowhere in its contempt judgment and order does the trial court either vacate the Commissioner's decision of January 20, 1995, which required BRI to stop using the specialized food program, or directly require or prohibit BRI from using that program. Therefore, the propriety of such

orders either by the Commissioner or by the trial court, the central issue in the preliminary injunction appeal, *see* DMR PI Br. at 1-2, 30-42, is not directly presented by the Commissioner's appeal from the contempt judgment.

When the Receiver subsequently exercised his authority, under the contempt judgment and order, to review and affirm, modify, or rescind all of the Commissioner's previous certification decisions, App. 1343, he renewed BRI's certification to use Level III aversives through December 31, 1996. BRI Supp. App. 78. However, he expressly excluded from this certification authorization to utilize the specialized food program and three other procedures, on the ground that, in his view, the Appeals Court Single Justice's orders prohibiting BRI from using these procedures are still in effect. BRI Supp. App. at 78, 81.

Absent a decision by this Court on the Commissioner's appeal from the preliminary injunction, the issues raised by that appeal—involving the respective authority of DMR and that of the Probate or Superior Court over the treatment of students at BRI and, in particular, whether BRI may continue to use the specialized food program—will continue to be actively disputed by the parties in the underlying equity case as well as in the individual guardianship cases. These novel and important issues, while directly related to those that are raised in the Commissioner's appeal from the contempt judgment, are legally and factually distinct and therefore will not be resolved by this Court in the Commissioner's pending appeal from the contempt judgment.

Moreover, even if the Commissioner's appeal from the trial court's preliminary injunction is deemed by this Court to be moot, the appeal should nevertheless be decided by this Court in order to provide needed guidance to the parties and to the trial court—in a discrete, concrete factual context that is not as squarely presented by the Commissioner's appeal from the more

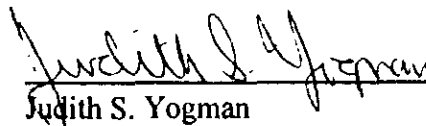
broadly sweeping contempt orders—on these issues of public importance.⁴ *Cf. Guardianship of Weedon*, 409 Mass. 196, 197 (1991) (deciding moot question because “there is a significant public interest in clarifying the requirements for review of substituted judgment treatment plans issued by the Probate Court”); *Sciaba Constr. Corp. v. Boston*, 35 Mass. App. Ct. 181, 185 (1993) (deciding moot appeal from denial of preliminary injunction because “issue is one of public importance and is likely to arise again in similar factual circumstances . . . and a decision will probably prevent further litigation between the parties); *Metros v. Secretary*, 396 Mass. 156, 159 (1985) (deciding moot appeal “because of the public interest involved and the uncertainty and confusion that exist”).

CONCLUSION

For all of the reasons discussed above and in the Commissioner’s opening brief, the Court should retain jurisdiction of the Commissioner’s appeal from the preliminary injunction and reverse the preliminary injunction issued by the trial court.

Respectfully submitted,

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⁴As acknowledged by BRI in concurring in the Commissioner’s application for direct appellate review in SJC-07045, all of these interrelated appeals raise novel and complex issues of public importance. DMR Supp. App. 69, 93.