COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

BRISTOL, SS. NO. 07101

THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC.,
f/k/a BEHAVIOR RESEARCH INSTITUTE, INC., ET AL.,
Plaintiffs, Appellees,

v.

DIRECTOR, OFFICE FOR CHILDREN,
Defendant,

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

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

BRIEF FOR APPELLEE
CLASS OF ALL STUDENTS
AT THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC.,
THEIR PARENTS AND GUARDIANS

Eugene R. Curry, Esq.
BBO #549239
Christopher S. Fiset, Esq.
BBO #567066
EUGENE R. CURRY & ASSOCIATES
3010 Main Street
Barnstable, Massachusetts 02630
(508) 375-0070
ATTORNEYS FOR APPELLEE

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STATEMENT OF ISSUES

1. Whether a Settlement Agreement, which resolved litigation between the Judge Rotenberg Educational Center, Inc. [1] and the predecessor in interest to the Department of Mental Retardation (hereinafter "DMR"), and which provided an effective framework for relations between the JRC and the agencies of the Commonwealth which regulated the JRC from 1987 to 1993, included no provision that was "sufficiently unambiguous to form a basis for a contempt citation"? [2]

2. Whether, as a matter of law, the Trial Court abused its discretion in denying the motion of the Commissioner of the Department of Mental Retardation (hereinafter the "Commissioner") to compel the psychiatric examination of a JRC Student over the objections of that Student's parent?

3. Whether the finding of the Trial Court that the Commissioner's communications with the parents of Students at the JRC were designed to alarm the parents and interfere with the JRC's relations with the families of the Students was clearly erroneous?

4. Whether the findings of the Trial Court that the Commissioner had inflicted harm on the Students of the JRC are clearly erroneous?

5. Whether, even if the Trial Court's contempt findings were legally and factually sound, the Trial Court abused its discretion in appointing a receiver?

6. Whether the Commissioner has overcome the heavy burden that he must meet in order to demonstrate that he is entitled to a stay of the Trial Court's order pending appeal?

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[1] The Judge Rotenberg Educational Center, Inc. was previously known as the Behavior Research Institute and will be hereinafter referred to as the "JRC" or "BRI".

[2] Brief Of The Appellant Commissioner Of Mental Retardation (hereinafter referred to as "Commissioner's Brief") at 1.

7. Whether the Trial Court erred in ordering the Commissioner to compensate the Class Of All Students At The JRC, Their Parents and Guardians for attorneys fees and expenses incurred in responding to the Commissioner's bad faith attempts to terminate the JRC program?

8. Whether an order of a Single Justice of the Appeals Court that implements an unjustified decision by the Commissioner to terminate treatment options at the JRC should be vacated?

9. Whether this Court should award attorneys fees to the Class Of All Students at the JRC, Their Parents and Guardians for defending this frivolous appeal?

STATEMENT OF THE CASE

STATEMENT OF FACTS

The Class Of All Students At The Judge Rotenberg Educational Center, Inc., Their Parents And Guardians (hereinafter referred to as "the JRC Families")[3] have a vital interest in the preservation of the treatment option offered by the JRC. The Students at the JRC constitute "an extremely vulnerable population" who are "the largest collection of most difficult to treat clients in one program in the nation". F. 267, App. 1276. They exhibit self-injurious and aggressive behaviors that in some cases are life threatening.[4] The average Student at the JRC has "been rejected by five placements and expelled by nine others prior to coming to the JRC". F. 267, App. 1276. Prior to placement at JRC, many students were subjected to the gross misuse of anti-psychotic medications in misguided attempts to treat their behavioral disorders.[5] In some cases, the resulting injuries were life-threatening.[6] In contrast, even though the aversive elements of the JRC program may be unacceptable to the Commissioner,[7] the record in this proceeding more than demonstrates that the JRC program has been successful where every other program

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[3] An order certifying the class, which was never appealed, was entered on December 12, 1986. App. 118-119. All references to the record herein are referenced as follows: references to the Appendix cited as "App. _____;" references to the Trial Transcript according to volume and consecutive numbered pages therein cited as "Tr. __: __;" references to Uncontested Trial Exhibits and pages therein cited as "U-__, __;" references to Trial Exhibits admitted by JRC and pages therein cited as "JRC-__, ___;" references to Trial Exhibits admitted by DMR and pages therein cited as DMR-__, __;" and references to the Supplemental Appendix cited as "S.App. __."

[4] The JRC students' self-injurious and aggressive behaviors include banging their heads to the point of causing brain injury, pulling hair out to the point of baldness, rubbing skin to the point of bone infection, breaking their own bones, rubbing off the side of their nose, biting off other people's noses, and eye poking to the point of threatening dislodging of the retina and threatening blindness." F. 267, n. 67, App. 1276.

[5] See e.g., JRC 19 at 6 [Findings of Probate Court based upon testimony of Dr. Israel and Dr. Jansen, that "anti-psychotic drugs have been grossly misused in attempts to treat the severe behavioral disorders" that afflict several BRI Students].

[6] App. 81.

has not.[8] Thus, as the Trial Court observed, if the JRC program was terminated, the "parents and families would be faced with a concern for the students very survival". App. 1437.

The JRC Families have been active participants in the extended controversy, of which this appeal is but a part. In fact, this litigation had its genesis in an action brought by the parents of J. C., a student at BRI, and by BRI seeking an order "returning Janine C. to the treatment program which had been abruptly terminated by order to the Office For Children (OFC) of September 26, 1985". F. 1, App. 82. In order to avoid unnecessary duplication, the JRC Families adopt the Statement of Facts and Statement of the Case submitted by the JRC.

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[7] As both Judge Rotenberg and Judge LaStaiti recognized, while the aversive elements of the JRC program may attract the most attention, the JRC program is principally a reward-based treatment program. F. 37-38, App. 93-94; F. 292, App. 1283.

[8] The average student at JRC "has been rejected by five placements and expelled by nine prior to coming to the JRC". F.267.App.1276. See also Washington, Tr.IX: 101-103; Peterson, Tr. IX: 61-65.

SUMMARY OF THE ARGUMENT

In order to prevent a repeat of the injury inflicted upon the JRC and the JRC Families by the Office For Children, the Settlement Agreement imposed obligations upon the agencies of the Commonwealth that regulate the JRC. These obligations are clearly stated and were repeatedly violated by the Commissioner. (pp. 7-10). Even if there were some legitimacy to the Commissioner's argument that he does not understand the meaning of the term "good faith", the meaning of that term is informed by the actions undertaken by the Office For Children that formed the basis for the litigation that led to the Settlement Agreement. The fact that the actions undertaken by the Commissioner to attack the JRC in significant respects duplicated the conduct undertaken by the Office For Children demonstrates that the Commissioner not only was aware that his conduct violated the Settlement Agreement, but also demonstrates that the violation was intentional. (pp. 10-11).

The Trial Court properly denied the Commissioner's motions to seek additional discovery and to strike certain testimony offered by the JRC Families. The Students at the JRC had been previously subjected to unnecessary and intrusive medical and psychiatric evaluations provided ample basis for the Trial Court's denial of the Commissioner's motion. (pp. 10-12). Moreover, the Commissioner misstates the relief that he sought at trial and, with respect to both motions, now claims to be prejudiced by the denial of motions that he did not, in fact, make. (pp.13-14).

The bankruptcy of the Commissioner's attempt to literally relitigate each and every finding of fact found by the Trial Court is demonstrated by his failure to satisfy the burden that he must meet to challenge the Trial Court's findings that the Commissioner's communications with the JRC Families were calculated to alarm the Families and that the JRC Families were injured as a result of the

Commissioner's conduct. The Commissioner's argument misstates the standard of review to deny the great deference to which the findings of the Trial Court are entitled. (pp.15-30). The inflammatory nature of the false and unsubstantiated statements contained in the Commissioner's communications with the JRC Families compels the conclusion that they were intended to alarm the JRC families. (pp. 18-23). Similarly, the record amply supports the Trial Courts findings of injury to the JRC Families. (pp.23-30).

The Commissioner's blatant disregard for the injury he has inflicted on the JRC Families demonstrates that he will not be constrained from continuing his regulatory assault on the JRC by any concern for the welfare of the Students. This threat of imminent harm not only justifies the appointment of a receiver (pp.31-33), but also justifies denial of the Commissioner's request for a stay pending appeal. (pp.33-34).

The Commissioner fails to demonstrate that the Trial Court abused its discretion in awarding attorneys fees. The record demonstrates that the Trial Court exercised billing judgment in assessing the fees awarded and found the contributions of counsel to the JRC Families throughout the certification process to be valuable. (pp.35-42).

This Court should vacate the order of the Single Justice which implements the Commissioner's bad faith decision to terminate treatment options at the JRC as it improperly was granted and continues to harm the Students at the JRC. (pp. 42-44).

Because the Commissioner's appeal is frivolous, this Court should award the JRC Families double attorneys fees and expenses for responding to the Commissioner's appeal. (pp.44).

ARGUMENT

I. THE TRIAL COURT'S CONCLUSION THAT THE COMMISSIONER'S CONDUCT CONSTITUTED CONTEMPT IS SUPPORTED BY THE LAW AND BY THE EVIDENCE.

The Commissioner's challenge to the Trial Court's judgment that his conduct was "in contempt of this Court's the Settlement Agreement dated December 12, 1986"[9] is predicated upon a fundamentally flawed analysis of the law and a calculated misstatement of the record of this proceeding. The gravamen of the Commissioner's argument is that, notwithstanding the fact that from 1987 to 1993 the Settlement Agreement provided an effective framework to govern relations among the parties, as a matter of law, neither the Settlement Agreement as a whole nor any of the cited provisions are "sufficiently unambiguous to form the basis for a contempt citation".[10] Under Massachusetts law, there is contempt when there is a "clear and undoubted disobedience of a clear and unequivocal command". Warren Gardens Housing Cooperative v. Clark, 420 Mass. 699, 700 (1995) (citations omitted). Contrary to the Commissioner's argument, the findings of the Trial Court demonstrate a manifest defiance of clear commands of the Trial Court as well as conscious efforts, including the knowing use of perjured testimony (F.11-12, App.1284-1290), to subvert the decree. Accordingly, the Trial Court's finding that Commissioner Campbell's conduct is contemptuous is well supported by the record and the Commissioner's contention should be rejected by this Court.

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[9] Judgment And Order ¶1, App. 1340.

[10] Commissioner's Brief at 37-60.

In order to prevent a repeat of the injury inflicted upon BRI and the JRC Families,[11] the Settlement Agreement provides, in relevant part, that:

> ¶A of the Settlement Agreement provides that "that portion of the [treatment] plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization of the Court in a temporary guardianship proceeding . . . utilizing the substituted judgment criteria". App. 121;
>
> ¶B-2 of the Settlement Agreement provides that "Dr. John Daignault shall be responsible for overseeing BRI's compliance with all applicable state regulations, except to the extent that those regulations involve treatment procedures authorized by the Court in accordance with Paragraph A.". App. 126.;
>
> ¶B-2 of the Settlement Agreement further provides that "Dr. Daignault shall arbitrate any disputes between the parties, and in the event that any party disagrees with any decision or recommendation of Dr. Daignault, the matter shall be submitted to the Court for resolution." Id.;
>
> ¶C-3 of the Settlement Agreement provides that "Upon the execution of this agreement, intake at BRI for new clients shall be reopened and shall not be impermissibly obstructed during the pendency of this agreement." App. 126.-127; and
>
> ¶L of the Settlement Agreement provides that "Each party shall discharge its obligations in good faith. App. 133."

The Settlement Agreement also provided for payment of the Plaintiffs' attorneys fees in the amount of $580,605.25. App. 131.

Notwithstanding the straightforward nature of the provisions of the Settlement Agreement, the Commissioner repeatedly engaged in direct violations of the Trial

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[11] The purpose of the Settlement Agreement was "to protect the JRC, the Students and Families from future bad faith conduct by state officials while safeguarding the state's interest in the welfare of children". F. 13, App. 1211. According to the Commissioner, "[t]he Settlement Agreement imposed many obligations on BRI. In return, OFC agreed to restore BRI's licenses, to permit intake of new clients, to give BRI equal consideration with other providers in referring new clients for placement at public expense, and to pay $580,605.25 in attorneys' fees". Commissioner's Brief at 5. Except for the reference to attorneys' fees, to read the Commissioner's description, one might think that it was JRC and the JRC Families that had been found to have been acting in bad faith rather than the OFC.

Court's order.[12] The record at trial documents an extensive campaign of false and defamatory letters intended to interfere with the relationship of the JRC with the out-of-state funding agencies that refer students to the JRC. F. 77, App. 1228. This campaign was successful in reducing the enrollment at the JRC (F. 290, App. 1282) in violation of the "unequivocal command" of the Settlement Agreement that the Commissioner not impermissibly interfere with intake at the JRC. As a result of the consequential reduction in referrals and loss of revenue, the quality of the JRC program has suffered "all to the great harm and detriment of JRC and the students". Id.

The Commissioner engaged in further violations of unequivocal commands of the Trial Court by refusing to acknowledge the authority of Dr. Daignault to serve as monitor and by refusing to meet with Dr. Daignault to mediate issues as requested by the JRC. F. 80-89, App. 1229-1231. After the Trial Court ordered that the Honorable George N. Hurd be appointed as mediator, an agreement among the parties was reached as a result of the efforts of Judge Hurd, "DMR then promptly proceeded to violate material provisions of this agreement". F. 231-233, App. 1268. These refusals of the Commissioner to negotiate is not only an express violation of the terms of an "unequivocal command", but also manifest evidence of bad faith. See U.S. v. Board of Education of the City of Chicago, 799 F.2d 281, 290 (1986) (holding that "In deciding whether bad faith exists, one crucial factor would be the willingness of a party to enter into discussions designed to resolve the dispute; another would be the conduct of the parties. A party's refusal to bargain in good faith can serve as a basis for a court imposed resolution of the case.").

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[12]The Commissioner also contends that "the settlement agreement does not prohibit DMR from regulating BRI". Commissioner's Brief at 39. While there may be no "unequivocal command" that the Commissioner refrain from regulating the JRC, the Settlement Agreement clearly specifies the manner in which the Commissioner shall undertake that regulation.

The Commissioner's contention that the requirement that he act in good faith is too subjective and ambiguous to constitute an unequivocal command is equally without merit. It is well settled in Massachusetts that Courts have the jurisdiction to interpret and enforce a good faith requirement in a settlement agreement. See Warner Insurance Co. v. Commissioner of Insurance, 406 Mass. 354, 362 n.9 (1990). Moreover, even assuming arguendo that there was some deficiency in the Commissioner's understanding of the term "good faith", the facts and circumstances of the instant case provide more than sufficient guidance as to the nature of his obligation. See United States v. Board of Education Of Chicago, supra, at 292 (stating that "good faith" is "not a term that exists in a vacuum, the nature and circumstances of the underlying obligation help to determine what constitutes good faith.").

The interpretation of the requirements imposed by the Settlement Agreement is informed by the circumstances surrounding its creation, the previous litigation brought by the plaintiffs in this proceeding against Mary K. Leonard, Director of the Office For Children (hereinafter OFC) (DMR's predecessor in interest). Thus, Judge Rotenberg's Findings In Support Of Preliminary Injunctive Relief in the previous litigation involving the Office For Children are instructive as to what conduct might constitute bad faith.

In his Findings, Judge Rotenberg determined that Mary K. Leonard had acted in bad faith by employing tactics nearly identical to those employed by Commissioner Campbell against the JRC. Judge Rotenberg found that Mary K. Leonard was acting in bad faith when she recruited a biased panel to evaluate the JRC program. F. 79-80, App. 106. The Commissioner paid homage to this tactic by recruiting a team in which the co-leader signed a document equating the use of aversive techniques with political torture and which the Trial Court determined to be "incapable of doing a fair, impartial and unbiased review of a program which uses

those very techniques". F. 151, App. 1245; F. 163, App. 1248. Judge Rotenberg also found that the Office For Children acted in bad faith when it presented an altered document in response to a discovery request from plaintiffs counsel (F. 69, App. 103-104), an action that is echoed in DMR's providing plaintiff's counsel with an altered version of the Rivendell RFP. F. 145-147, App. 1244-1245.

Perhaps the most disturbing parallel can be found in Judge Rotenberg's conclusion that Mary K. Leonard acted in bad faith when, just as the Commissioner did in the instant case, she issued treatment orders that were "unsubstantiated" and "based upon no medical foundation and without regard to the consequences of those Orders" thereby playing "Russian Roulette with the lives and safety of the students at BRI". F. 82, App. 107. Similarly, Commissioner Campbell terminated the Specialized Food Program and failed to identify any medical evidence supporting his decision which resulted in a "dramatic increase" in the health threatening behaviors of two students. F. 251, App. 1271; F. 298, App. 1284-1285.

The JRC Families find it incomprehensible that the Commissioner, who is charged with regulating the care provided to highly vulnerable individuals, in essence holds himself to a lower standard of knowledge of the law than is presumed of parties to a routine commercial contract, where there is an implied covenant of good faith. See Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 453, 473 (1991) (citations omitted). The fact that the Commissioner employed tactics in his regulatory assault against the JRC that were virtually identical to those employed by Mary Kay Leonard demonstrates that not only was the Commissioner aware that his conduct violated the Settlement Agreement but also that the violation was intentional.

II. THE TRIAL COURT PROPERLY DENIED THE MOTION OF THE COMMISSIONER TO COMPEL THE EXAMINATION OF A STUDENT AT THE JRC BY AN EXPERT OF THE COMMISSIONER'S CHOOSING.

After the JRC Families presented evidence that the Commissioner's termination of the specialized food program had caused serious injury to two JRC Students, the Commissioner requested that the father of J. C., one of the injured students, consent to having J.C. examined by an expert chosen by the Commissioner. Tr. X:22. When J.C.'s father refused to consent to the examination, the Commissioner moved to have the Trial Court compel consent to the examination. Id. The Trial Court denied the Commissioner's motion. Id. at 25-26. In his appeal, the Commissioner contends that the Trial Court's denial of his motion was "seriously prejudicial" and warrants vacating the relief ordered by the Trial Court.[13] The Commissioner further contends that he was seriously prejudiced by the denial of his motion to strike evidence offered by the JRC Families.[14] Because the Commissioner was neither entitled to examine J. C., nor seriously prejudiced by the denial of his motions, his argument should be rejected by this Court.

Under the circumstances of this case, the Trial Court acted well within its discretion in refusing to compel the examination of J. C. What the Commissioner sought through his motion was not the introduction of rebuttal evidence, but the opportunity to develop rebuttal evidence by examining J. C. The decision whether to permit a psychiatric examination "is addressed to the court's sound discretion and depends upon a showing of good cause". R.R.K v S.P.G., 400 Mass. 12, 19 (1987) (citing Mass.R.Civ.P. 35(a)). As this Court has observed, "more than any

[13] Commissioner's Brief at 68.

other mode of discovery, an examination [under Mass.R.Civ.P. 35] impinges upon the privacy and personality of the party being examined". Id. (citations omitted). The Commissioner's demand that J.C. be examined over the objections of her father not only rides roughshod over her privacy rights, but also directly contradicts the Commissioner's position with respect to psychiatric evaluations. In response to objections raised by certain parents to the psychiatric evaluations required by the Commissioner in his February 9, 1994 letter, the Commissioner, through counsel, represented to the court-appointed mediator that "the Department does not intend to do any psychiatric evaluations without the consent of the parents". S. App. 5, lines 6-11. The Trial Court's conclusion that the Commissioner had already subjected the JRC Students to medical and psychiatric examinations that were "unnecessary" and "intrusive" provides an ample basis for denying the Commissioner the opportunity to perpetrate further injury on J. C. F. 281, App. 1279.

Even if, assuming arguendo, that the Commissioner's motion had been meritorious, the Commissioner's appeal fails to demonstrate that the denial of his motion constituted prejudicial error. See Adoption of Paula, 420 Mass. 716, 734 (1995) (stating that "[t]he burden is on the appellant to demonstrate an abuse of 'a prejudicial error resulting from an abuse of discretion'")(citations omitted).[15] The evidence presented at trial showed that two Students, J. C. and W. M., had suffered injury as the result of the termination of the specialized food program. However, contrary to the Commissioner's representation to this Court, he did not seek to compel examinations of both J. C. and W. M., he only sought to compel

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[14] Id. at 67-68.

[15] The doctrine of curative admissibility upon which the Commissioner relies "allows a party harmed by incompetent evidence to rebut that evidence only if the original evidence created *significant prejudice*". Commonwealth v. Ruffin. 399 Mass. 811, 814 (1987) (emphasis supplied).

the examination of J. C.[16] The Commissioner can hardly be prejudiced by the denial of a motion that he did not make.

Similarly, although the Commissioner claims to have been seriously prejudiced by the Trial Court's refusal to strike the evidence concerning the injuries suffered by W. M. and J. C., the Commissioner did not request that all of that evidence be stricken from the record. The evidence presented on this issue by the JRC Families took the form of testimony from Dr. Von Heyn and J.C.'s father. Tr. IX: 96-97, and X:6-7. In addition, Dr. Israel testified that termination of the specialized food program had injured W. M. and J. C. Tr.VIIB, 63-65. However, the Commissioner moved only to strike the testimony of Dr. Von Heyn.[17] Thus, even if the Court had struck Dr. Von Heyn's testimony in response to the Commissioner's motion, the record would still support the conclusion that J. C. and W.M. had been injured by the termination of the specialized food program. Accordingly, even if the Trial Court erred in denying the Commissioner's motion to strike the testimony of Dr. Von Heyn, the denial constituted harmless error "which does not affect the substantial rights of the parties". Mass.R.Civ.Pro. 61.

[16] The Commissioner misstates the record when he claims that he "moved for an order requiring the guardians of both students to consent to having the students examined by the Commissioner's expert". Commissioner's Brief at 67. In fact, the Commissioner sought an order "compelling J.C. to consent to an evaluation by a psychiatrist". Tr.X: 22, lines 18-22.

[17] The Commissioner also misstates the record when he claims that he moved to have "the evidence previously presented by the parents on this issue [the specialized food program] be stricken ...". Commissioner's Brief at 67-68. In fact, the Commissioner only requested that "the testimony of Dr. Von Heyn as to the effect of stopping the specialized food program be stricken". Tr.X:26, lines 4-7.

III. THE TRIAL COURT DID NOT ERR IN ITS ASSESSMENT OF THE IMPACT OF THE COMMISSIONER'S CONDUCT ON THE JRC FAMILIES

The bankruptcy of the Commissioner's attempt to literally relitigate every single finding of fact entered by the Trial Court[18] is demonstrated by his challenge to the Trial Court's conclusions: (1) that the Commissioner's communications with the JRC Families were calculated to alarm the Families; and (2) that the JRC Families were injured as a result of the Commissioner's bad faith conduct. Even if the findings of the Trial Court were not entitled to great deference, the record of this proceeding manifestly demonstrates that the Commissioner has failed to demonstrate that the Trial Court's findings were clearly erroneous.

A. *Under Rule 52(a) Of The Massachusetts Rules of Civil Procedure, The Trial Court's Factual Findings Are Entitled To Great Deference.*

The findings of the Trial Court "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses". Mass.R.Civ.Pro. 52(a), Cox v. New England Tel. & Tel. Co., 414 Mass. 374, 384 (1993). A finding is "'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).[19] As a result, the Trial Court's findings come "well-armed with the buckler and shield" of Rule 52(a). First Pennsylvania Mortgage Trust v. Dorchester

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[18] The Commissioner contends that "*each and every one of the Trial Court's findings* . . . lacks any support in the record. Commissioner's Brief at 36. (emphasis supplied) According to the Commissioner, "there is no evidence whatsoever to support the factual findings made or inferences drawn by the Trial Court". Id. at 76.

[19] Because the Massachusetts Rules of Civil Procedure, including Rule 52(a) are patterned after the Federal Rules of Civil Procedure, cases interpreting the Federal Rules are "helpful, if not binding.

Savings Bank, 395 Mass. 614, 621 (1985), citing Horton v. U.S. Steel Corp., 286 F.2d 710, 713 (5th Cir. 1961). Accordingly, "[t]he burden is squarely on the appellant to show an appellate court that a finding is clearly erroneous". Id. at 621-622.

While paying lip service to Rule 52(a), the Commissioner urges this Court to disregard the deferential standard mandated by Rule 52(a) and conduct what amounts to a de novo review of the evidence adduced at trial. The Commissioner maintains that this Court must undertake a "painstaking review of the entire record of the lower court proceeding".[20] The Commissioner disregards the admonition that "[i]n applying the clearly erroneous standard, to the findings of a [judge] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo". First Pennsylvania Mortgage, 395 Mass. at 620 (citations omitted). This doctrine is based upon the sound recognition that the trial judge is "in a superior position to appraise and weigh the evidence". Building Inspector Of Lancaster v. Sanderson, 371 Mass. 157, 161 (1977).

The Commissioner's argument rests upon the contention that the Trial Court adopted almost verbatim the findings of BRI and, relying principally upon Cormier v. Carty,[21] that verbatim findings are to be subjected to "the most intrusive appellate scrutiny".[22] The Commissioner's argument ignores the fact that "numerous cases have approved the practice of adoption by the trial judge of findings submitted by counsel for the prevailing party and have held that such findings are entitled to the same weight as they would receive if drafted by the judge himself." Louis Dreyfus & Cie v. Panama Canal Co., 298 F.2d 733, 737-738 (5th Cir. 1962). More importantly, argument advanced by the Commissioner has been expressly rejected

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precedent". Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass.App.Ct. 412, 415 (1980) (citations omitted).

[20] Commissioner's Brief at 71.

[21] 381 Mass. 234 (1980).

by this Court. In Anthony's Pier Four, Inc. v. HBC Associates,[23] the appellant contended, as does the Commissioner, that Cormier stands for the proposition that the verbatim adoption of findings proposed by the prevailing party mandates abandonment of the customary deference accorded the findings of the Trial Court. Anthony's Pier Four, 411 Mass. at 464-465. The Court repudiated this interpretation of Cormier, stating that:

> In Cormier, this court held that we would apply "stricter scrutiny" to findings of a judge "which fail to evidence 'a badge of personal analysis'". At the same time, however, we noted that "the 'clearly erroneous' standard is not displaced. Thus, even in the event of verbatim adoption of a submission of counsel, an appellate court "carefully scrutinizes the record, but does not change the standard of review".

Id. at 465 (citations omitted). Thus, even if the Trial Court had adopted the findings of BRI verbatim,[24] the clearly erroneous standard of review would still apply.

Similarly, the Commissioner's suggestion that "because the evidence in this case is largely documentary . . . this Court is free to draw its own conclusions from the evidence"[25] completely ignores the thirteen days of vigorously contested testimony in this case. The circumstances that place an appellate court in as good a position as the Court to decide on factual issues are not present in the instant case. Courts have limited "the more intrusive review" urged by the Commissioner to

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[22] Commissioner's Brief at 70-71.

[23] 411 Mass. 451 (1991).

[24] Contrary to the Commissioner's contention, the Trial Court neither adopted the proposed findings of BRI verbatim nor failed to demonstrate a lack of independent judgment that warrants a careful scrutiny of the record. Thus, the Commissioner's reliance upon Marr v. Back Bay Architectural Commission, a case in which the trial judge plainly failed to exercise independent judgment in adopting verbatim findings proposed by prevailing parties is unwarranted. 23 Mass.App.Ct. 679, 680-681 (1987). Instead, the record demonstrates that the findings are the product of the Court's "independent judgment" and that the alleged deficiencies "do not result from judicial error but, rather are the product of [the Commissioner's] . . . disagreement with the judge's findings of fact, and [her] resulting interpretation of the agreements". See Anthony's Pier Four, supra at 465.

[25] Commissioner's Brief at 74.

cases "where the facts are not in dispute, and the relevant question involves the application of law to undisputed facts" or where the case involves "inferences or conclusions from undisputed primary or subsidiary facts". Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass.App.Ct. 412, 429 (1980); see also Stamper v. Stanwood, 339 Mass. 549, 551 (1959) (deciding factual issues unaffected by findings below where "all the evidence of substantial importance is documentary and what little oral testimony there is consists almost entirely of explanations and descriptions of the documentary evidence"). The record below, and indeed the Commissioner's brief, demonstrate that the interpretation of the volumious documentary evidence was hotly disputed at trial. Moreover, notwithstanding the Commissioner's characterization of the proceedings below as documentary in nature, the Commissioner makes numerous requests that this Court reject findings made by the Trial Court based upon oral testimony.[26] The fact that the Commission challenges findings made by the Trial Court based upon oral testimony constitutes a "compelling reason" to apply the "clearly erroneous" standard. Markell, supra at 430.

B. *The Evidence Supports The Trial Court's Conclusion That The Commissioner's Communications With The JRC Families Were Calculated To Alarm The Parents And Interfere With JRC's Relationship With The Families.*

The history of communications with the JRC Families is replete with allegations made by the Commissioner and DMR staff which were false or made in reckless disregard for the truth.[27] Moreover, these allegations included statements

[26] For example, the Commissioner contends that the Trial Court erred in finding that the dramatic difference in a descriptions of a telephone conversation between the Commissioner and Attorney Henry Clark was nothing more than a difference in memory rather than false testimony. Commissioner's Brief at 93-94. The Trial Court's findings in this instance were based entirely on oral testimony. F. 92-97, App. 1231-1233.

[27] See, e.g., F. 63-80, App. 1224-1225 (concerning the August 6,1993 letter to Dr. Israel); F.99-116, App. 1233-1237 (concerning the August 31, 1993 letter to Dr. Israel); F. 130-135

that even the Commissioner had to concede would be alarming to a parent, such as an allegation that JRC had failed to report the death of a student.[28] The inflammatory nature of these false and defamatory statements compels the conclusion that these allegations were intended to alarm the JRC Families and drive a wedge between JRC and the JRC Families.

Notwithstanding the extensive record documenting the Trial Court's conclusions, the Commissioner contends that there was nothing in his communications with the families of JRC Students "from which the court could reasonably infer that these communications were 'designed to alarm the parents []and ...to interfere with [BRI]'s relationship with the families".[29] However, the communications chosen by the Commissioner to illustrate his purported concern for full and fair disclosure contain statements that are not only false, but also statements that the Commissioner conceded were alarming, were unsubstantiated, and were never corrected. Thus, the Commissioner's argument, contradicted as it is by his own words, should be rejected by this Court.

There is no small irony in the Commissioner's choice of his September 3, 1993 letter as an illustration of his concern for keeping the JRC Families fully informed.[30] The very premise of the letter is corrupted with duplicity. In that letter, the Commissioner responds to correspondence received from JRC Families "expressing a concern that the Department has taken actions which will result in the abrupt cessation of BRI's authority to use level III interventions" by denying that any such action had been taken or was even "***contemplated***". Ex. U-92 at 1

(concerning the September 23, 1993 letter to Dr. Israel); F.190, fn.42, App.1255 (concerning the Commissioner's September 1993 letter to the JRC Families); F.225-230 (concerning the February 9, 1994 letter to Dr. Israel); F.247-252, App. 1270-1272 (concerning the Commissioner's letter of January 20, 1995 to Dr. Israel).

[28] At trial, Commissioner Campbell conceded that the allegation that the JRC had failed to report the death of a student would cause anxiety and concern among family members of JRC students, that the allegation was not accurate, and that he never corrected his inaccurate statement. Tr. IV: at 198-199.

[29] Commissioner's Brief at 108.

(emphasis supplied), See also Tr. IV: 183-184. However, in direct contradiction to the Commissioner's denial of even contemplating the abrupt cessation of JRC's authority, the closure of JRC was not only contemplated, it was an agenda item for the September 7, 1993, meeting of the so-called "Tuesday Morning Group". The September 7, 1993 Agenda, which includes plans to have the Attorney General's office prepare a receivership petition in case of emergency and a requirement of 60 days advance notice before JRC closes, makes it clear "that the Tuesday Morning Group was targeting closure of JRC as early as September 7, 1993". F.188, App. 1254-1255.

The Commissioner included as enclosures to his September 3, 1993 letter copies of his letters of August 6, and August 31, 1993 letters to Dr. Israel, which the Trial Court found to be replete with false statements concerning the compliance of the JRC with behavior modification regulations, the status of JRC's application to use Level III interventions, and the safety and efficacy of the treatments provided by the JRC. F. 63-67, 70-73, 99-101, 105-110; App. 1224, 1226-1228, 1233-1235. Contrary to his stated intention of keeping the parents of the JRC students fully informed concerning the certification process, Commissioner Campbell failed to disclose in his September 3, 1993 letter the existence of the 1991 and 1993 Certification Reports prepared by DMR staff that effectively refuted the contention that the JRC was not in compliance with DMR regulations and that serious concerns existed regarding the professional acceptability of the interventions in use at the JRC. Campbell, Tr. III: 187-188. The only reference to the work of the certification team contained in the August 31, 1993, letter inaccurately characterizes the July, 1993 Report, to suggest problems within the GED-4 when, in fact, the Report states that "the team is of the consensus that the present use of the GED-4 and the specialized food program are being carried out within the mandate of the

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[8] Commissioner's Brief at 107.

regulations of the Department of Mental Retardation, and there is no reason to change the previous recommendation that BRI retain its certification to employ Level III interventions in its behavior modification programs". U-75 at 11.

The Commissioner's failure to provide the families of the JRC students with accurate information concerning the 1991 and 1993 Certification Reports stands in sharp contrast with his willingness to include as an enclosure to his letter a copy of a letter from Dr. Paul Jansen. At trial, the Commissioner testified that he did not provide the 1993 Certification Report because "there was a process for certification and that was a document that was part of that process and the process had not been concluded". Campbell, Tr. IV: 188. However, the Commissioner acknowledged that, even though he was concerned about the impact that the serious allegations of abuse contained in the Jansen letter might have on the families of the JRC students (Campbell, Tr. IV: 192), he circulated the letter to the families before the Department had completed its review of the JRC response to Dr. Jansen's letter and did not provide the families with any of the materials provided by JRC in response to Dr. Jansen's allegations. Id. at 192-193. Moreover, despite the fact that the Commissioner testified at trial that it is not his usual practice to discuss allegations of abuse with third parties because they are no more than allegations (Id. at 188), the Commissioner circulated the Jansen letter without any explanation that the allegations had not been substantiated. Campbell, Tr. IV: 192-193.

The Commissioner's August 31 Certification letter further belied his assurances that no abrupt cessation of the JRC's certification was even contemplated by including as a condition to the purported grant of interim certification, a requirement that "BRI will notify all funding sources that there must be in place within sixty days an emergency plan for each resident to address the funding and logistics of any unexpected medical, personal or programmatic situations which BRI deems are beyond the capacity of BRI to address". U-91 at

5. This condition, which on its face appears calculated to alarm the families of the students at the JRC as well as agencies that place students at the JRC, was not a legitimate exercise of regulatory power as the Commissioner claimed at trial, but rather was related to the Commissioner's plan to place the JRC in receivership. F.111-112, App. 1236.

The circulation of his September 3, 1993 letter and enclosures did, in fact, alarm the JRC Families. Dr. Paul Peterson, parent of a student at JRC, testified that he became very upset after receipt of the Commissioner's September 3, 1993 letter. Peterson, Tr. Vol. IX: 66. Because the allegations contained in the letter were so inconsistent with the experience that his family had encountered at the JRC, Dr. Peterson concluded that the Department was going to attempt to decertify the JRC. Id. at 67-68. Dr. Peterson also found the conditions being imposed upon the JRC, which he thought were contrary to the Settlement Agreement, to be upsetting. Id. Dr. Peterson's experience is consistent with that of Marie Washington, another parent, who testified that she felt panicked upon receipt of the Commissioner's initial group of certification letters because it was so important for her son to remain in the program. Washington, Tr. IX: 106.

The Commissioner's meetings with the JRC Families in Waltham, Massachusetts and New York, New York, which he cites as an illustration of his good faith efforts to keep the JRC Families informed and to allay their anxieties, continue the pattern of inflammatory falsehoods and half-truths. At each meeting, the Commissioner repeated the unquestionably alarming, ultimately unsubstantiated, and never corrected allegation that Dr. Israel was personally involved in allegations of abuse. Tr. IV: 196, U-109 at 3.[31] Moreover,

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[31] At trial, the Commissioner acknowledged that an allegation of abuse involving Dr. Israel personally might cause anxiety among family members of JRC students. Tr. IV: 197. However, notwithstanding the Commissioner's stated desire to avoid unnecessary concern or anxiety, it never

notwithstanding the fact that BRI Working Group meetings had discussed plans for filing receivership for BRI (F.188, App. 1254-1255), Commissioner Campbell's prepared remarks denied the existence of a plan to close BRI. U-109 at 4.

The Commissioner's meetings with the parents did not reassure the families of the JRC students concerning the Department's intentions. Dr. Peterson, who attended the meeting at Brandeis University, found the Commissioner's allegations that JRC staff members, including Dr. Israel, had abused students at the JRC to be upsetting. Peterson, Tr. IX: 69. Dr. Peterson testified that he did not believe the allegations and was concerned about the impact such false allegations could have on the reputation and integrity of the school. Id. Marie Washington, who attended the New York meeting, testified that the families' members who attended the meeting felt threatened by Commissioner Campbell. Washington Tr. Vol. IX: 107-108.

The record below demonstrates that, contrary to his stated intention of keeping the JRC Families fully informed, the Commissioner took advantage of every opportunity to circulate inflammatory charges concerning the JRC and Dr. Israel while withholding information that tended to support the JRC's position. The Commissioner's claim that alarm that was felt by the JRC Families was caused by JRC[32] rather than by the Commissioner's inflammatory and inaccurate statements is entirely without record support. The record unequivocally demonstrates that the JRC Families were alarmed by the Commissioner's callous disregard for the truth and his blatant hostility to the JRC.

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occurred to him to inform the families that the allegations against Dr. Israel were found to be unsubstantiated. Id.

[32] Commissioner's Brief at 108.

C. *The Trial Court's Conclusion That The JRC Families Have Suffered Injury As A Result Of The Commissioner's Contemptuous Conduct Is Amply Supported By The Record.*

Although the Commissioner has aggressively portrayed himself as a protector of the Student members of the Class, he is apparently indifferent to the injury his conduct has caused to the Students and their Families. The Commissioner challenges[33] the Trial Court's conclusion that "JRC, the students, parents and families of the students have suffered egregious and irreparable harm as a result of Commissioner Campbell's actions of contempt".[34] The Commissioner's argument posits an artificially limited definition of injury to the JRC Students when he contends that "the only findings of concrete physical harm to individual students concern the effects on two students of the cessation of the specialized food program in June of 1995".[35] The Commissioner's argument not only misstates the record below, but it also demonstrates a disturbing indifference to the highly vulnerable population of Students whose welfare is his responsibility.

The record below documents a history of the sacrifice of the health, safety, and welfare of the JRC Students upon the altar of the preservation of the Commissioner's regulatory prerogatives. The record below documents that the Commissioner and his staff pursued an "unrelenting stream of bad faith regulatory demands" . F. 268, App. 1276. These demands included the requirement that JRC staff conduct research related to the so-called "Rivendell team" which diverted staff

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[33] Commissioner's Brief at 149-150.

[34] Judgment and Order, ¶ 2, App. 1340.

[35] Commissioner's Brief at 148. The fact that the Commissioner is willing to acknowledge that the Trial Court made any finding of injury constitutes a remarkable concession. Later in his brief, the Commissioner argues that "there are *no* findings that this regulatory activity resulted in any *serious* or pervasive harm to the health or safety of BRI's clients". *Id.* at 153 (emphasis supplied). While the Commissioner may not consider a finding that, as a result of his misconduct, there has been "a dramatic increase" in the health threatening behaviors of two students (F.298, App. 1284-1285) to be a serious matter, the JRC Families beg to differ.

time from the care of the Students (F.272-275, App. 1278), the diversion of the time of Dr. Israel and staff psychologists from care of Students (F.276-280, App. 1278-1279), and a requirement that the JRC Staff undergo a training program that "did not provide the JRC Staff with anything new and useful beyond the job training already received at JRC" (F.283-284, App. 1280). In an effort to show that the JRC was not providing adequate care, the Students were subjected to medical and psychiatric evaluations "without an analysis or even a regard to whether any of these were clinically indicted".[36] F. 281, App. 1279.

The Commissioner's regulatory assault, and the financial losses suffered by the JRC, had the effect of seriously compromising the ability of the JRC to provide the services necessary to the health and well-being of the Students. The budget cuts and diversion of staff resources resulting from the Commissioner's regulatory assault "adversely affected the quality of the most important aspect of JRC's program -- the positive programming and educational components of the program". F. 268, App. 1276-1277. Staff reductions and budget cuts have harmed the ability of the JRC to provide one-on-one training, the student reward program, and the community education program. F. 291-293, App. 1283. The staff reductions have not only affected the number of staff, but also the quality of the JRC staff. The Trial Court found that one consequence of the Commissioner's contemptuous conduct was that the more marketable and qualified staff left the JRC for fear that it would not survive. F. 294, App. 1283.[37] As a result, there is a "less skillful and

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[36] Rather then demonstrating that there were any unmet medical needs or indications of abuse, these medical examinations demonstrated "unequivocally that that the students as a group are healthy, well-nourished, receiving excellent care with no signs of abuse or mistreatment". F. 282, n.9. App. 1280.

[37] The Commissioner's simplistic assertion that staff reductions have not injured the students "because if staff are laid off in proportion to the drop in enrollment, then the student to staff ratio should remain approximately the same" (Commissioner's Brief at 148) demonstrates a remarkable lack of concern for staff quality and the importance of continuity in the relationships between staff and students. See Peterson. Tr. IX 79-80 (lack of continuity in staff had a deleterious impact on his son, a student at JRC).

quality staff available to respond to a crisis" which has had the effect of placing "the JRC students and staff at risk for more injuries due to low staffing". F. 294, App. 1283-1284.

The most striking illustration of the Commissioner's obvious lack of concern for the welfare of the JRC Students is his decision to ban the specialized food program. In a glaring parallel to the decision of the OFC to terminate treatment at BRI without any medical justification F. 59, App. 101, the Commissioner terminated the specialized food program "after his own team of doctors had concluded that there were no adverse health effects from the program".[38] F. 251, App. 1271.

The Commissioner attempts to justify his decision by claiming that the specialized food program "denies the client basic sustenance" in violation of DMR regulations[39]. The Commissioner's claim is directly contradicted by conclusions of his 1993 Certification team, which found that ninety percent of the non-obese students who in the specialized food program had either gained weight or remained stable, that there were "no adverse health consequences of the Specialized Food Program", and that the Specialized Food Program was being operated in a manner consistent with DMR regulations. F.47-48, App. 1220-1221. Moreover, if the specialized food program did, in fact, violate DMR regulations, one would hardly expect that the Commissioner's chief deputy, Dr. Cerreto, to approve a treatment plan that included the specialized food program as *the prototype* for all treatment plans at JRC. Yet as part of the July 1994 agreement between DMR and the JRC, Dr. Cerreto approved the plan of W.M., which included use of the specialized food program, as a prototype for JRC treatment plans. F. 235-239, App. 1268-69.

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[38] The Commissioner terminated JRC's authority to administer the specialized food program in his January 20, 1995 "certification" letter, which also terminated JRC's authority to administer three other procedures, programmed multiple applications, automatic negative reinforcement, and behavior rehearsals with electrical skin stimulation. Exhibit U-166, 12-13.

[39] *Commissioner's Brief at 142.*

The Commissioner's claims that the medical and psychiatric evaluations of JRC Students "raised concerns about the adverse effects of this program on the students being evaluated"[40] that constituted a good faith basis for terminating the specialized foods program is equally without record support. As a preliminary matter the Commissioner's claim must be recognized as the post-hoc rationalization that it is. At trial, the Commissioner testified that the medical and psychiatric evaluations found no adverse health effects from the specialized food programs and other procedures terminated by his January 20, 1995 letter. Tr.VI: 191-192. Apparently unintimidated by his own trial testimony, the Commissioner claims in his brief to this Court that these concerns voiced in these reports constituted a good faith basis for his decision to terminate the specialized food program.[41] The Commissioner's more recent contention is directly contradicted by the Trial Court's conclusions that "[n]ot one of these evaluations [the psychiatric evaluations] recommended the discontinuance of Level III aversive procedures for JRC clients" and that the medical examinations concluded that all JRC students were in "good health". F. 229-230, App. 1267-1268.

The Commissioner's decision to terminate the specialized food program was made not only with a complete disregard for the available medical and psychiatric evidence, but also in direct violation of his obligations under the Settlement Agreement. If the Commissioner, in fact, had evidentiary support for his contention that the specialized food program was having adverse effects upon individual students, the Settlement Agreement mandates that the proper method for changing the treatment plans of individual students was to seek a modification of the Student's treatment plan in the Probate Court.[42] The Commissioner was aware of the terms of the Settlement Agreement and had previously represented to the Trial

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[40] Id.
[41] Commissioner's Brief at 142.

Court that he would not undertake any action which "interferes with any court-approved program". App. 138. The Commissioner was also aware that the specialized food program had been approved by the Trial Court. Tr.VI: 200-201.

The Commissioner's decision to terminate the specialized food program had a devastating impact upon two students in particular. The Trial Court found that these two students suffered "a dramatic increase in their health-dangerous behaviors" as a result of the termination of the specialized food program. F. 298, App. 1284-1285. It is particularly tragic that one of those students, J. C., had regressed to a life-threatening state as a result of the OFC's termination of treatment in 1985.[43] App. 82-83.

In his attempt to minimize the injury that his contemptuous conduct has inflicted upon these students, the Commissioner mischaracterizes the testimony of Dr. Von Heyn and J.C.'s father. The Commissioner misquotes Dr. Von Heyn to suggest that because restraints had been used with one student, W.M. in January of 1995, Dr. Van Heyn's testimony that W.M.'s condition had deteriorated after cessation of the specialized food program was inaccurate.[44] However, the fact that W.M. had been in restraints in January of 1995 does not contradict Dr. Von Heyn's testimony that W.M. had suffered an increase in crises of self-destructive behavior and that increase was caused by the termination of the specialized food program. Tr. IX: 94, lines 10-24; 95, lines 1-4; 96, 10-19.

Similarly, the Commissioner argues that the fact that J.C. engaged in self-destructive behaviors prior to the termination of the specialized food program somehow invalidates the testimony of Dr. Von Heyn concerning the impact that the termination of the specialized food program had on J.C.'s condition. However, neither Dr. Von Heyn nor J.C.'s father testified that J.C. had not engaged in self-

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[42] App. 121.

[43] Her father testified at trial that J.C. never fully recovered from have regressed as a result of the OFC's termination of treatment. Tr. Vol. X at 10.

destructive behaviors prior to termination of the specialized food program. Their testimony was that J.C.'s self-destructive behaviors increased as result of the specialized food program. Thus, the testimony of Dr. Von Heyn and the father of J.C. support the Trial Court's conclusion, which is entitled to great deference, that the termination of the specialized food program had critical impact on W.M. and J.C.

The fact that the Commissioner fails to acknowledge in his argument that his actions have injured the family members of the JRC Students is entirely consistent with the lack of respect for the JRC Families exhibited by the Commissioner throughout the certification process.[45] Notwithstanding the Commissioner's failure to acknowledge the injury he has inflicted on the JRC Families, that injury is amply documented in the record of this proceeding.

In light of the importance of the JRC program to the JRC Families, it should come as no surprise that the prospect that the Commissioner might succeed in his efforts to terminate the JRC program would be the source of considerable and justified anxiety.[46] For some of the JRC Families, this was the second time the health and well-being of a family member was threatened by the bad faith actions of an agency of the Commonwealth.[47] As was recognized by Judge Rotenberg, it is the Students and their families, not the agencies of the Commonwealth and their employees who will bear the consequences of the termination of the JRC treatment option. F. 48, App. 96-97.

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[44] Commissioner's Brief at 142.

[45] Although the Commissioner gives short shrift to the interests of the JRC Families in his brief, his communications with the JRC families are notable for the self-serving claims of concern for the their interests. In fact, DMR has had the presumption to describe itself as the *ally* of the JRC Families. Exhibit U109 at 5 ("we see our function as one of alliance with families to secure appropriate needed services for those Massachusetts citizens who are at BRI, and, for people at BRI from other states"]. As the Commissioner recognizes, the JRC Families do not share his sense of solidarity. Commissioner's Brief at 108-109).

[46] See, e.g. Washington, Tr.IX: 106.

[47] The Commissioner was aware of this fact. Tr. Vol. IV: 181-182.

The natural distress experienced by the JRC Families was exacerbated by the manner in which the Commissioner perpetrated his regulatory assault. As has been previously been discussed, the Commissioner's penchant for inflammatory statements and failure to be honest in his communications with the JRC Families inflicted injury on them. Peterson, Tr. Vol. IX: 65-67. The Commissioner's choice of the Rivendell team to conduct an "independent review" of the JRC program and his decision to proceed over the objections of the JRC Families appears to nothing less than a calculated insult to the JRC Families.[48] It was offensive to the JRC Families that Students were subjected to intrusive and unnecessary examinations.[49] Perhaps most offensive is the fact the JRC Families had to endure the deterioration of the JRC program and witness the effect that deterioration has had on the Students.

The most quantifiable injury inflicted on the JRC Families is the expenditure required for attorneys fees. The Trial Court concluded that the JRC Families had incurred "legal fees and expenses in connection with DMR's certification process and in bringing this contempt action through August of 1995" in the amount of $119,676.98. App. 1314-1315.[50].

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[48] See, Peterson, Tr. IX: 73-74.

[49] Id. at 76.

[50] The Commissioner's challenge to the Court's award of attorneys fees to compensate the JRC Families for this obligation is testimony to the Commissioner's abiding lack of concern for the injury that he has inflicted on the JRC and the JRC Families. The Commissioner repeatedly contends that the Trial Court's award of attorney's fees will be a payment to the attorneys representing the JRC and the JRC Families. Commissioner's Brief at 165. To the contrary, the award of attorney's fees is reimbursement to the parties injured by the Commissioner for expenses they incurred in order to defend themselves from his wrongful conduct. F. 303, App. 1268, App. 1321. In awarding fees to compensate the JRC and the JRC Families for the injury that they have suffered, the Trial Court acted in accordance with the principle that the "fine is designed to compensate the injured party for actual losses sustained by reason of the contumacious conduct of the defendant, i.e., for the pecuniary injury caused by the acts of disobedience". Lynn v. Bromfield, 355 Mass. 738, 744 (1969).

IV. THE RELIEF GRANTED BY THE TRIAL COURT IS JUST AS A MATTER OF EQUITY AND PROPER AS A MATTER OF LAW.

The Commissioner contends that even if the Trial Court's contempt findings were legally and factually sound, the relief order by the Trial Court is unwarranted and should be vacated by this Court. There is no question that the relief ordered by the Trial Court, which includes appointment of a receiver to assume regulatory authority over DMR, an injunction against the Commissioner and his agents from taking any action to frustrate the Receiver's in the performance of his duties and from attempting to do so through the individual guardianship proceedings, and an award of attorneys fees,[51] is extraordinary. However, the risk of injury to the JRC Families in the absence of the Trial Court's relief mandates rejection of the Commissioner's argument.

A. *In Issuing the Receivership Orders and Injunctive Relief, the Trial Court Acted Properly and Within its Discretion and Authority.*

The Commissioner, relying to a large extent on a remarkable comparison between the circumstances of this case, as found by the Trial Court, and the circumstances that justified the appointment of a receiver in Perez v. Boston Housing Authority, [52] argues that the Trial Court had no basis for appointment of a receiver. [53] However, the comparison has the opposite of its intended effect,

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[51] App. 1341-1342.
[52] 379 Mass. 703 (1980).
[53] In the Commissioner's brief, the Commissioner does not contend that the Trial Court lacks the authority to appoint a receiver Rather, the Commissioner argues that the circumstances of this case do not justify exercise of the "extraordinary" remedy of receivership. Commissioner's Brief at 150-154.

making a compelling demonstration that appointment of a receiver is well within the Trial Court's authority and is necessary in this case to effectuate the Trial Court's order.

Appointment of a receiver is warranted when there is "a repeated or continuous failure of the officials to comply with a previously issued decree, reasonable forecast that the mere continued insistence by the Court that these officials perform the Decree would lead only to 'confrontation and delay' a lack of leadership that could be expected to turn the situation around in a reasonable time". Perez, 379 Mass. at 736 (citations omitted). Before the remedy of receivership is employed other less drastic remedies should be explored. Id.

An application of these criteria to the findings of the Trial Court compel the conclusion that appointment of a receiver with broad powers is warranted. The Trial Court made repeated findings that the Commissioner and DMR staff violated the terms of the Settlement Agreement. The fact that these violations included fraud upon the Court, intimidation and harassment of Court officials, violations of agreements made during the course of mediation, and perjury provides a reasoned basis for forecasting that "confrontation and delay" would be the likely results if the Trial Court limited its remedy to merely insisting that the Commissioner comply with orders of the Trial Court. Moreover, based upon the findings of the Trial Court, it cannot be said that there is leadership in DMR that would turn the situation around in a reasonable time. To the contrary, it is DMR's existing leadership that abrogated the Settlement Agreement and initiated the regulatory assault on the JRC. If any confirmation of the need for a receiver was necessary, the Commissioner's objection to instruction to the receiver to eliminate "anti-BRI bias" at DMR provides it.[54] Finally, the findings of the Trial Court make it plain that appointment of a receiver is a remedy of last resort. Neither the arbitration process established by the

[54]Commissioner's Brief at 155.

Settlement Agreement nor the mediation process imposed by the Trial Court have been successful in protecting the JRC and the JRC families from the bad faith of the Commissioner.

The Commissioner's contention that his conduct is less egregious than that of the Boston Housing Authority[55] resolves any doubts in favor of appointing a receiver. While the Court in Perez found "incompetence", "indifference", and "gross mismanagement" among the members of the Boston Housing Authority[56], there were no findings "that high ranking government officials have been deliberately untruthful on the witness stand, have expended public funds in order to pursue baseless allegations, have authorized unfounded ethical attacks, and launched investigations of Court personnel, [which] constitutes pervasive public corruption".[57] Particularly, disturbing to the JRC Families is the Commissioner's assertion that "there are no findings that [his] regulatory activity directly resulted in any serious or pervasive harm to the health or safety of BRI's clients".[58] The Commissioner's inability to distinguish between intentional wrongdoing and incompetence and his blantant disregard for the injury that he has inflicted on the JRC Families make a compelling case for appointment of a receiver to assume the Commissioner's responsibility to regulate the JRC in order to secure the benefits of the Settlement Agreement for the JRC Families.

B. *The Commissioner Has Failed To Demonstrate That He Is Entitled To A Stay Of The Relief Granted By The Trial Court.*

Having been denied a stay pending appeal at every turn, the Commissioner renews his request for a stay,[59] essentially advancing the same arguments

[55] Commissioner's Brief at 152-153.
[56] Perez, 379 Mass. at 725.
[57] Conclusions of Law ¶52, App. 1310.
[58] Commissioner's Brief at 153.
[59] Commissioner's Brief at 160-163.

previously found to be unpersuasive. While the Commissioner proves none of the four elements that he must establish to demonstrate that he is entitled to a stay,[60] the most compelling reason for denying the Commissioner's request is the risk of harm to the JRC and the JRC Families. Staying the relief ordered by the Trial Court would expose the vulnerable JRC Students to punitive and retaliatory actions by the Commissioner. As is discussed previously the record below amply documents the injury inflicted upon the JRC Families by the Commissioner and his agents. The fact that the Commissioner refuses to acknowledge the injurious consequences of his actions conclusively demonstrates that the Commissioner will not be constrained by the risk of further injury to the JRC Families from continuing his regulatory assault on the JRC. As the Commissioner has provided no basis for concluding that the Trial Court erred in concluding that "[i]f a stay were granted, there is every indication that DMR will continue its effort to shut down JRC, leaving a most vulnerable population of students untreated" (App. 1437), he has failed to demonstrate that no substantial harm will come to the JRC Families. Accordingly, his motion must be denied.

[60] In order to be entitled to a stay, the Commissioner must demonstrate must make "(1) a strong showing that he is likely to succeed on the merits of an appeal; (2) a strong showing that unless a stay is granted he will suffer irreparable injury; (3) a showing that no substantial harm is will come to other interested parties; and (4) a showing that a stay will do no harm to the public interest". Hilton v. Braunskill, 481 U.S. 770, 776-777 (1987).

V. THE TRIAL COURT PROPERLY ORDERED THE COMMISSIONER TO COMPENSATE THE JRC FAMILIES FOR ATTORNEYS' FEES AND EXPENSES INCURRED IN VINDICATING THE RIGHT OF THE JRC STUDENTS TO TREATMENT.

A. *The Commissioner's Contemptuous Conduct Justifies Compensating The JRC Families For Attorneys Fees And Expenses*

The Commissioner maintains that the Trial Court's award of attorney's fees should be vacated in its entirety, "even if the underlying contempt judgment is upheld".[61] The Commissioner's argument displays a fundamental misunderstanding of the purpose of an award of attorneys fees. Contrary to the Commissioner's position, this Court has held that "a prevailing party should recover attorneys fees absent special circumstances rendering such an award unjust". Society of Jesus of New England v. Boston Landmarks Commission, 411 Mass. 754, 758 (1992). Moreover, with respect to awards for contempt actions, it has been said that:

> The formula for awarding attorney fees in the contempt context is usually the more generous [than an award under ¶1988]. In that setting, the innocent party is entitled to be made whole for the losses it incurs as the result of the contemnors' violations including reasonable attorneys fees and expenses.

Halderman v. Pennhurst State School & Hospital, 49 F.3d 939, 941 (3rd Cir. 1995)(citations omitted). Although, the Commissioner apparently believes that awards of attorneys fees constitute a windfall, awards of attorneys fees are intended to create "an incentive to vindicate ...protected rights". Stratos v. Commissioner of Public Welfare, 387 Mass. 312, 317 (1982).

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[61] Commissioner's Brief at 164.

B. ***The Trial Court Properly Exercised Its Discretion in Awarding Attorneys' Fees and the Amount Awarded is Reasonable.***

The Commissioner, as he must, acknowledges that "trial courts have broad discretion in determining the amount of court-awarded attorneys fees".[62] As this Court has recognized, it is the trial judge who is in "the best position to determine how much time was reasonably spent on the case, and the fair value of the attorney's services. Fontaine v. Ebtec Corp., 415 Mass.309, 324 (1993). The Trial Court concluded that the JRC Families incurred "legal fees and expenses in connection with DMR's certification process and in bringing this contempt action through August 1995" in the amount of $119,676.98 and ordered the Commissioner to pay that amount. App. 1314-1315. In making its award, the Trial Court concluded that:

> The amount sought be the Parties as reimbursement for the attorneys' fees they have been forced to expend as a result of the defendant's conduct over the last two years is fair and reasonable. The Court makes this finding, incorporating the Affidavits of the above mentioned parties [including the JRC Families] based upon the attorneys' years at the bar, standing at the legal community, the caliber of their work in the case, the difficulty of the matter, and the fact that there was a minimal duplication of effort.[63]

App. 1314-1315.

The Commissioner contends that this award constituted an abuse of discretion.[64] The Commissioner's challenge to the award of attorneys fees not only misstates the law and the record, but is also self-contradictory. The Commissioner

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[62] Commissioner's Brief at 165.

[63] Although the Commissioner contends that the Trial Court's finding is inadequate basis for an award of attorneys fees (Commissioner's Brief at 166), the Trial Court's finding in support of the award of attorneys fees is remarkably similar to the finding upheld by the Court in Handy v. Penal Institutions Commissioner of Boston, 412 Mass. 759, 766-767 (1992).

[64] Commissioner's Brief at 173-175.

fails to meet his burden of showing that the Trial Court's award was clearly erroneous, see Kennedy v. Kennedy, 400 Mass. 199, 203 (1994), and this Court should therefore affirm the award.

The fundamental contention underlying the Commissioner's argument is his assessment that counsel to the JRC Families[65] (as well as counsel for the Student members of the Class) played a "very limited role"[66] in the proceedings below. To support his argument, the Commissioner claims that the Trial Court's award of attorney's fees was solely for trial preparation, conduct of the trial and preparation of post-record documents.[67] The Commissioner's statement is directly contradicted by the record. The Trial Court's award was based upon its conclusion that for a period of two years the Commissioner conducted the certification process in bad faith and that the expenditure of attorneys fees was necessary to protect the interests of the JRC Families. App. 1314. As is documented in the Affidavit In Support Of Attorneys Fees, these efforts included attendance at numerous motions, participation in the mediation sessions conducted by Judge Hurd, negotiations with DMR concerning implementation of the May 1994 agreement, and two arguments before a Single Justice of the Supreme Judicial Court. App. 1178. See also App. 1150-1151. The Commissioner fails to articulate why these efforts to vindicate the interests of the JRC Families, undertaken at a time when the Commissioner had "authorized an inordinate and unusual amount of legal resources to be devoted to the pursuit of JRC" (App. 1315), should not be compensated.

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[65]The Commissioner also professes confusion as to the representation of the Class. Commissioner's Brief at 173, n.241. The Commissioner, however, was not so confused earlier in his Brief when he acknowledged that "first Kenneth Kurnos and then Eugene Curry had succeeded Mr. Sherman as counsel for the certified 'class of all students, their parents and guardians'". Id. at 4, n.6.

[66] Commissioner's Brief at 175.

[67] The Commissioner claims that the Court awarded fees to the counsel for the JRC Families and for the Student Members of the Class "for more than 1,000 hours, largely spent sitting silently at counsel table or at depositions or drafting documents that added little or nothing to of substance to those submitted by BRI". Commissioner's Brief at 175.

The Commissioner's criticism of the role played by counsel to the JRC Families during trial preparation and the trial itself consists of broad and unsupported assertions that provide no basis for concluding that the Trial Court erred. See Bell v. United Princeton Properties, Inc., 884 F.2d 713, 721 (3rd Cir. 1989) (stating that "we emphasize that the adverse parties submissions cannot merely allege that the time spent was excessive"). The Commissioner's contention that the witnesses presented by the JRC Families added little to the proceeding ignores the fact that the testimony of these witnesses directly addressed injury suffered by Students at the JRC.[68] The lack of importance that the Commissioner attaches to this evidence in his argument on attorneys fees is contradicted by his earlier argument that the Trial Court's reliance on this evidence is highly prejudicial.[69]

Similarly, aside from his own unsupported assertions, the Commissioner offers no basis for challenging the Trial Court's conclusion that "there was minimal duplication of the record". App. 1341.[70] A careful examination of the record shows that in their trial preparation,[71] presentation of evidence,[72] cross-examination, and post-trial documents, counsel for the JRC Families raised issues

[68] See, e.g., Testimony of Dr. Von Heyn, Tr.IX:96.
[69] Commissioner's Brief at 67-68.
[70] The Trial Court's findings regarding lack of duplication of effort make the Commissioner's reliance upon Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), misplaced. Commissioner's Brief at 175. In Donnell, the Court stated that "a special circumstance that creates "an exemption to the ordinary presumption in favor of granting attorneys fees to a prevailing party is 'where, although the plaintiffs received the benefits sought in the lawsuit, their efforts did not contribute to achieving those results'". Id. at 247 (citations omitted).
[71] Counsel for the JRC Families attended the depositions of the Parents of three Students at the JRC and Commissioner Campbell. App. 1178. The Commissioner's contention that it was duplicative for more than one attorney to attend these depositions ignores the fact that the Commissioner was represented by more than one attorney. S. App. 7.
[72] The Commissioner inaccurately states that the witnesses called by the JRC Families were on the BRI witness list. Commissioner's Brief at 175. In fact, in the interests of avoiding duplication, the JRC Families and JRC submitted a joint list of witnesses. App. 434.

of particular concern to the JRC Families.[73] It is plain that the evidence presented by counsel to the JRC Families was of value to the Trial Court, which stated that the testimony of the parents who testified at trial "was credible and compelling. There was dignity in each parent's demeanor. Their testimony spoke eloquently to the best interest of their children, and thus stood in sharp contrast to the testimony elicited from the Department". App. 1237, n. 27.[74]

The Trial Court's award of attorneys fees manifestly demonstrates the exercise of the "billing judgment" required to sustain an award. As this Court has stated, "in determining reasonable time expenditure, the judge should begin with the time documented by the attorney, and consider whether it was reasonable in light of the difficulty of the case and the results obtained". Stratos, supra, 387 Mass. at 323 (citations omitted). The record documents that the Trial Court followed the Court's instruction. In making the award, the Trial Court reviewed the affidavits submitted by counsel for the JRC Families as well as contemporaneous time records, including unredacted bills of counsel to the JRC Families. App. 1341. Counsel for the JRC Families devoted 754.2 hours to this matter during the period

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[73] For example, the cross-examination of the Commissioner focused principally on his lack of honesty in his communications with the JRC Families. Tr.IV: 180-210. See also, App. 1113-117 (proposed findings of fact concerning interest of the JRC Families), 1117-1125 (proposed findings of fact concerning Commissioner Campbell's dishonesty in his communications with the JRC Families, and 1125-1129 (proposed findings of fact concerning injury to JRC Families).

[74] The Commissioner's challenge to the award of attorneys fees on the ground that neither the parents or the students are parties to this proceeding (Commissioner's Brief at 174) fails on two grounds. First, it is legally inaccurate. The Class Of All Students, Their Parents and Guardians were named as Plaintiff in the complaint that initiated this proceeding. App. 284. See Mass. R. Civ. Pro. 10 (stating that "In the complaint, the title of the caption shall include the names of all parties ...".). Moreover, since even the Commissioner concedes that the JRC Families have an interest in the outcome of the certification process (Tr.IV:182), it would be difficult for the Commissioner to contend that the JRC Families do not have a sufficient interest in this proceeding to warrant their participation as plaintiffs. See 3 Smith Zobel, Rules Practice § 143, p.175 ("As to the nature of the interest sufficient to enable a person to be a party, the general rule is applicable that the persons must have an interest affecting his liberty, rights or property.). Second, even if the JRC Families were not parties, the contribution that they made to proceeding warrants an award of attorneys fees. See. Halderaman, supra, 49 F.2d at 941, 945-945 (upholding an award of $188,486.59 in attorneys fees to intervenor).

from December of 1993 through August of 1995.[75] App. 1177. The fact that the Trial Court chose to award fees for substantially all of the time that was required to represent the interests of the JRC Families (App. 1321) does not, in and of itself, support the Commissioner's contention that the Trial Court failed to carefully scrutinize the billing records submitted. As a preliminary matter, the Trial Court did not award the full hourly rate charged by counsel to the JRC Families.[76] More importantly, the Trial Court was entitled to consider the difficulty of the case, and the results achieved, which support the Court's award of attorney's fees. See Stratos, supra, 387 Mass. at 322; see also Halderman, supra, 49 F.3d at 944 ("The reality is that both liability and remedy were contested and that the district court did grant substantial relief to the plaintiffs".).

C. *The Trial Court's In Camera Review Of Contemporaneous Time Records Of Counsel To The JRC Families Was Not An Error.*

The Commissioner's contention that the affidavits submitted by counsel and the *in camera* review of the contemporaneous time records does not constitute an adequate basis for an award of attorneys' fees is without merit. It must be recognized that an award of attorneys fees could have been made upon the basis of the affidavits submitted by counsel to the JRC Families. The affidavits submitted by counsel to the JRC Families were based upon contemporaneous time records and provided the hourly rates of counsel and the total number of hours devoted by each attorney to defending the JRC Families against the Commissioner's bad faith

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[75] The amount of time spent by counsel to the JRC Families is not excessive when compared to awards cited by the Commissioner to support his argument that the hours spent were excessive. See, Grendel's Den v. Larkin, 749 F. 2d 945, 954 (1'st Cir. 1984) ("Spending 308 hours for a claimed $84,700 to produce a seventeen page motion to affirm, a thirty-seven page response brief and a two page supplemental abstract and to prepare for oral argument would appear to be unreasonable for almost any case."); Society of Jesus, supra, 411 Mass. at 760 (stating that "we find unreasonable four hundred fifty hours spent producing twenty pages").

conduct. App. 1341. In Handy v. Penal Institutions Commissioner Of Boston, this Court upheld an award of attorneys fees based upon the "affidavit of one of the counsel for the plaintiffs [that] attests that an attached compilation of time devoted to the case by attorneys in his firm was based on contemporaneous records maintained by his office". 412 Mass. 759, 767 (1992). Thus, the affidavits provided by counsel to the JRC Families constituted an adequate basis for the Trial Court's award of attorneys' fees and expenses.

Instead of limiting its inquiry to the affidavits submitted by counsel, the Trial Court decided to review the contemporaneous time records of counsel and determined that *in camera* review was necessary in order to preserve attorney client privilege. App. 1201. The Trial Court's *in camera* review constituted a proper means of determining whether the attorneys fees claimed were reasonable while preserving the attorney client privilege. See, Federal Savings And Loan Corp. v. Ferm, 909 F.2d 372, 374 (9th Cir. 1990) ("*in camera* review protects the confidentiality of communications between attorney and client, thereby preserving important interests secured by the attorney client privilege")(citations omitted). The Commissioner's attempt to extract from Stastny v. Southern Bell Tel. and Tel.[77] and Blowers v. Lawyers Co-Op Publishing Co.[78] a broad rule that information contained in an attorneys fee application is not privileged[79] is not supported by a carefully reading of those cases law. In both cases, the Courts properly rejected a claim of privilege asserted to prevent the disclosure of name and number of hours worked by each attorney on the case. Stastny, supra, at 663; Blowers, supra at

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[76] Although counsel to the JRC Families charged $160.00 per hour for the services of Eugene Curry, which represented a discount from the customary hourly rate of $175.00, [App. 1179], the Trial Court made its award based upon an hourly rate of $150.00 per hour.

[77] 77 F.R.D. 662 (W.D.N.C. 1978).

[78] 526 F.Supp. 1324 (W.D.N.Y. 1981).

[79] Commissioner's Brief at 171.

1326.[80] In the instant case, the Commissioner has already been provided with this information and is not prejudiced by the withholding of other, privileged information that is contained in the contemporaneous time records.[81]

VI. THE ORDER OF THE APPEALS COURT SINGLE JUSTICE IMPLEMENTING THE COMMISSIONER'S BAD FAITH DECISION TO TERMINATE TREATMENT OPTIONS SHOULD BE VACATED

SJC-07045 is an appeal of an order of a Single Justice of the Appellate Court which grants the relief sought by counsel (hereinafter referred to as "the Guardianship Counsel") representing fifty-one residents of the JRC in substituted judgment and guardianship proceedings of the denial of their Emergency Motion For Order Directing JRC To Stop Using Certain Level III Aversives. JRC S. App. 135.[82] By his order, the Single Justice has implemented the provisions of the Commissioner's January 20, 1995, letter which ordered the JRC to stop using four aversive treatment methods, including the specialized food program. U-166,12-13. Thus, the order of the Single Justice implements a decision of the Commissioner that was undertaken in bad faith and which has caused and continues to cause injury to Students at the JRC.

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[80] In fact, in Blower, the Court observed that the claim of privilege was "not with much vigor". Id. at 1326, n.4.

[81] The Commissioner's reliance upon the Uniform Rules of Impoundment as a basis for his argument for denial of an award of attorneys' fees is misplaced. Notwithstanding the adoption of the Uniform Rules, courts in Massachusetts have retained the power to impound its files in a case and to deny public inspection of them when justice requires. See, Newspaper of New England, Inc. v. Clerk Magistrate of the Ware Division of the District Court, 403 Mass. 628, 632 (1988), (upholding a *sua sponte* impoundment order after adoption of the Uniform Rules stating "[i]t is within the discretion of a court to impound its files in a case and to deny public inspection of them, and that is often done when justice so requires".) In considering an impoundment order, the Court must balance the parties' privacy concerns against "the general principle of publicity" and "must determine whether good cause to order impoundment exists and must tailor the scope of the impoundment order so that it does not exceed the need for impoundment." Id. at 632 (citations omitted).

An examination of the proceedings below compels the conclusion that the Single Justice's order exceeds the limited authority to review orders entered by the Trial Court. The Single Justice had only a limited authority to review the Trial Court's order. The standard for review of the denial for a request for injunctive relief is whether the Trial Court "abused its discretion. An appellate court role is to decide whether the [trial] court applied proper legal standards and whether there was reasonable support for its evaluation of factual questions ...". Commonwealth v. Mass. CRINC, 392 Mass. 79, 86-87 (1984). When the Guardianship Counsel moved for their mandatory order, they had the moving party's burden to "show that, without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail on the merits". Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980).

Because the Guardianship Counsel failed to meet their burden, the Trial Court acted properly in denying their motion. Neither the Guardianship Counsel nor DMR have the authority to simply order wholesale changes in treatment plans of the JRC students. To the degree that there are legitimate changes required to the treatment plan of any student, the Guardianship Counsel remain free to seek those changes in the context of the individual substituted judgment proceedings and are required, under the terms of the Settlement Agreement to do so.

The Single Justice's wholesale amendment of fifty-one treatment plans violates well-settled principles of Massachusetts law that hold that treatment plans for incompetent individuals must be tailored to the unique needs of each person. See, In The Matter Of Moe, 385 Mass. 555, 432 N.E. 2d 712, 720. As is recognized by Trial Court's order, this is accomplished in substituted judgment proceedings in which a judge makes treatment decisions for mentally ill or mentally

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[82] In order to avoid unnecessary duplication, the motion, which is part of the Supplemental Appendix submitted by JRC, will not reproduced as part of this brief. Instead, reference will be made to the JRC Supplemental Appendix.

retarded individuals who are incompetent by determining "what the patient would choose if he were competent". Guardianship of Roe, 411 Mass. 666, 672 (1992). The determination of what treatment decision that each individual student would make requires a highly specific evaluation that is fundamentally inconsistent with the *en masse* approach urged by the Guardianship Counsel and adopted by Single Justice.

VII. THE CLASS OF ALL STUDENTS AT THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC., THEIR PARENTS AND GUARDIANS, ARE ENTITLED TO ATTORNEYS' FEES AND COSTS INCURRED ON APPEAL AS A MATTER OF LAW AND EQUITY.

The Class of All Students at the Judge Rotenberg Educational Center, Inc., Their Parents and Guardians, does hereby request that this Court order the Commissioner pay all attorneys' fees and such other costs as this Court deems just and proper incurred in defense of the Commissioner's several appeals of the Trial Court's contempt judgment. In light of the numerous misstatements of law, fact, and the record below (including misstating his own motions) contained in the Commissioner's voluminous brief, the JRC Families request that this Court impose double costs and attorneys fees incurred by the JRC Families in responding to the Commissioner's multiple appeals in this matter, pursuant to Mass. R. App. P. 25 and M.G.L. Ch.211, § 10.

CONCLUSION

For all of the above reasons, this Court should affirm the contempt judgment of the Trial Court and allow the relief granted by the Trial Court. Pending this Court's decision on this appeal, the Court should continue the Trial Court's receivership and injunctive orders.

Respectfully submitted,
THE CLASS OF ALL STUDENTS AT THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC., THEIR PARENTS AND GUARDIANS,

Eugene R. Curry
BBO#549239
Christopher S. Fiset
BBO#567066
Eugene R. Curry & Associates
The Barnstable House
3010 Main Street
Route 6A
Barnstable, MA 02630
(508) 375-0070

Dated: May 21, 1996

1 COMMONWEALTH OF MASSACHUSETTS

2 BRISTOL, ss. SUPERIOR COURT DEPARTMENT OF THE
No: 86E-0018-GI TRIAL COURT, and THE PROBATE AND
3 FAMILY COURT DEPARTMENT OF THE
TRIAL COURT

4

5

MEDIATION HEARING -- J. Hurd

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7 IN RE:

8 BEHAVIOR RESEARCH INSTITUTE, INC. et al

9 vs.

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

11

12

13

APPEARANCES: Roderick MacLeish, Jr., Esquire
14 Michael P. Flammia, Esquire
ECKERT, SEAMANS, CHERIN & MELLOTT
15 One International Place, 18th Floor
Boston, MA 02110
16 Representing Behavior Research Institute

17 Judith S. Yogman, Esquire
Margaret Chow-Menzer, Esquire
18 Commonwealth of Massachusetts
One Ashburton Place
19 Boston, MA 02108
Representing Department of Mental
20 Retardation

21

22

23 December 12, 1994, 9:30 a.m.
Taunton Probate Court
24 Mediation Hearing, J. Hurd

25

FORM LASEF PENGAD • 1-800-631-6989 9/94

1 ALSO PRESENT: Bettina A. Briggs, Esquire
FRIEDMAN & BRIGGS
2 39 Taunton Green
Taunton, MA 02780
3 Guardian Ad Litem

4 Eugene R. Curry, Esquire
LARSON and CURRY
5 1185 Falmouth Road, Route 28
Post Office Box 2730
6 Hyannis, MA 02601

7 Richard Ames, Esquire
90 Canal Street, 5th Floor
8 Boston, MA 02114

9 John J. Crowne, Esquire
81 Hawthorn Street
10 New Bedford, MA 02740

11 John M. Coyne, Esquire
BARROS & COYNE, P.C.
12 258 Main Street
Buzzards Bay, MA 02532
13
Ms. Jackie Berman
14 Department of Mental Retardation
160 North Washington Street
15 Boston, MA 02110

16 Allegra E. Munson, Esquire
Department of Mental Retardation
17 P.O. Box 144
Wrentham, MA 02093
18 On behalf of the Department of Mental Retardation
19
20
21
22
23
24
25

FORM LASER PENGAD • 1-800-631-6989 12/94

1 We're not seeking reimbursement for that from
2 anybody. Another -- the psychiatric evaluations
3 that are governed by Condition 6, the Department is
4 paying for those themselves and is not seeking
5 reimbursement from anybody.
6 The letters to the funding agencies
7 concern only the evaluations that are conducted in
8 order to assist the court, the probate court, in the
9 substituted judge proceedings on individual students
10 and those are by way of outside experts that assist
11 the Court. The Department is willing to continue
12 and is obligated to continue to fund those.
13 However, with Dr. Daignault's
14 endorsement the Department intends to seek
15 reimbursement from the funding agencies for the cost
16 of those evaluations and those evaluations only
17 THE COURT: I wonder if Dr.
18 Daignault's endorsement means anything anymore? I
19 suppose he did it while he was still in good odor
20 with everyone.
21 Anyway, it's a matter of record. Go
22 ahead.
23 MR. CURRY: To finish, it is my -- I
24 just wanted to state a couple of things for the
25 record.

FORM LASER A PENGAD • 1-800-631-6989 9/94

1 It is my view that the Judge
2 Rotenberg Center has complied with its obligation
3 under Condition 6.
4 It was obligated to send out letters
5 to the parents. It sent those letters out. The
6 letters were received.
7 There are parents that have profound
8 objections to these evaluations. And I want to be
9 absolutely clear in case anybody has any doubts
10 about this, that these doubts come from the parents.
11 They are not being manipulated by anybody at the
12 JRC.
13 The JRC has done what it needed to
14 do. It sent out a follow up letter urging the
15 parents to consent.
16 But this is an issue that is a hot
17 button here, and I don't blame them, and I don't
18 think its one that's going to go away easily.
19 The process is ongoing. I got a
20 letter late Friday afternoon from one of the parents
21 raising three questions that I intend to discuss
22 with Margaret at some point.
23 They may turn around to consent. So
24 it's a relatively small group who was refused at
25 this point.

1 And I frankly don't see that it --
2 that that issue should be barred to the
3 certification of the Judge Rotenberg Center.
4 That's all I have to say at this
5 point.
6 MS. YOGMAN: On that point, Your
7 Honor, the Department does not intend to do any
8 psychiatric evaluations without the consent of the
9 parents. The correspondence concerns what BRI might
10 or might not do to obtain the consent or an order of
11 the Court to have the evaluations without consent.
12 But the Department did not intend to
13 force BRI to do any of these things, and certainly
14 not to have the -- force the clients to undergo the
15 evaluation without the parent or guardians' consent.
16 And with respect to the holding this
17 against BRI, what the Department -- the only way
18 that this might indirectly effect the Department's
19 ability to evaluate BRI is that this is that much
20 less information that the Department has available.
21 It's not BRI fault that this
22 information is not available but, nevertheless, the
23 Department will have to make a decision about the
24 psychiatric status of the population of BRI without
25 the benefit of these additional evaluations. That's

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COMMONWEALTH OF MASSACHUSETTS

Bristol, ss. Superior Court Department of the Trial Court
Civil Action No. 86E-0018-GI

THE JUDGE ROTENBERG EDUCATIONAL CENTER, INC., f/k/a THE BEHAVIOR RESEARCH INSTITUTE, INC., DR. MATTHEW L. ISRAEL, LEO SOUCY, Individually and as Parent and Next Friend of BRENDON SOUCY; PETER BISCARDI, Individually and as Parent and Next Friend of P.J. BISCARDI, and ALL PARENTS AND GUARDIANS OF STUDENTS at the BEHAVIOR RESEARCH INSTITUTE, INC., on behalf of themselves, their children and wards,
Plaintiffs,

vs.

PHILLIP CAMPBELL, in his capacity as Commissioner of the Department of Mental Retardation,
Defendant.

DEPOSITION OF ARTHUR DUNCAN McKNIGHT, a witness called on behalf of the Defendant, taken pursuant to Rule 30 of the Massachusetts Rules of Civil Procedure, before Lisa A. Moreira, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the Offices of the Attorney General, One Ashburton Place, Boston, Massachusetts, on Wednesday, April 19, 1995, commencing at 2:15 p.m.

(Continued on Next Page)

6

DORIS O. WONG ASSOCIATES, Inc.
50 FRANKLIN STREET, BOSTON, MASSACHUSETTS 02110 TELEPHONE (617) 426-2432

1 PRESENT (Continued):

2 Eckert Seamans Cherin & Mellott
(by Robert A. Sherman, Esq.)
3 One International Place, Boston, MA 02110
for the Plaintiff Judge Rotenberg
4 Educational Center f/k/a/ Behavior Research
Institute.
5
Eugene R. Curry, Esq.
6 1185 Falmouth Road, Centerville, MA 02632
for the parents' association and
7 all parents individually.

8 Commonwealth of Massachusetts
Office of the Attorney General
9 (by Judith S. Yogman, Esq., and
Margaret Chow-Menzer, Esq.)
10 One Ashburton Place, Boston, MA 02108 for
the Defendant.
11
Also Present: Dr. Matthew L. Israel
12
* * * *
13

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