COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT, AND THE
PROBATE AND FAMILY COURT
DEPARTMENT OF THE
TRIAL COURT
DOCKET NO. 86E-0018-GI

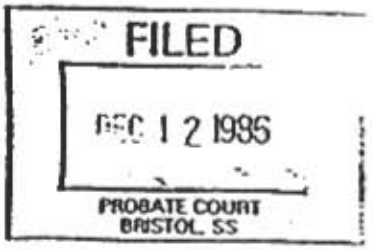
BEHAVIOR RESEARCH INSTITUTE; DR. MATTHEW L. ISRAEL: LEO SOUCY, Individually and as Parent and Next Friend of BRENDON SOUCY; PETER BISCARDI, Individually and as Parent and Next Friend of P.J. BISCARDI; and ALL PARENTS AND GUARDIANS OF STUDENTS AT THE BEHAVIOR INSTITUTE, on behalf of themselves, their children and wards,

Plaintiffs

V.

MARY KAY LEONARD, individually and in her capacity as the Director of the Massachusetts Office for Children,

Defendant



SETTLEMENT AGREEMENT

Preamble

On September 26, 1985, the Massachusetts Office for Children ("O.F.C.") issued an order to show cause why the license of the Behavior Research Institute ("B.R.I.") should not be suspended, revoked or otherwise sanctioned for various violations of O.F.C.'s regulations. Since that time, the parties, O.F.C., B.R.I. and parents of the clients attending B.R.I., have been engaged in a multitude of lawsuits and administrative proceedings. The parties, for the benefit of the clients attending B.R.I., now intend to resolve their differences and end the litigation;

administrative and judicial, between them. For that reason, the parties enter into the following agreement, which is made for this case only. By entering into this agreement, none of the parties admit liability or concede the truth of the allegations made by the other party. The sole intent of each party is simply to resolve this case and the other administrative and judicial cases which are now pending between O.F.C., B.R.I. and the parents.

A. Substituted Judgment for Aversive Procedures

1. Aversive procedures are permitted for use at B.R.I. only when authorized as part of a court-ordered "substituted judgment" treatment plan for an individual client, when such client is either a minor or is not able to provide informed consent thereto. As used herein, the term "aversive procedures" shall include all aversive procedures which are presently used or which may be proposed for use at B.R.I. with the exception of the following:

a) "no";

b) ignore;

c) token fines; and

d) any other procedure found by the court after hearing not to require substituted judgment.

2. Nothing in this agreement shall preclude B.R.I. from developing new reward and aversive procedures.

3. For all clients, B.R.I. shall propose those treatments which are the least intrusive, least restrictive modalities appropriate to each client's needs. For purposes of this section, physical aversive procedures, such as spanks, pinches and muscle

queezes, and the restrained time-out shall be considered the most intrusive, most restrictive forms of treatment.

4. Prior to intake, B.R.I. shall formulate an interim treatment plan based upon clinical information received from the referring agency. The following procedure shall be followed upon the client's arrival at B.R.I.:

a) Where the client is an adult and able to provide informed consent to such interim treatment plan, the plan may be implemented upon his/her acceptance of its provisions; provided, however, that before said plan is implemented D.M.H. shall be notified and shall be afforded the opportunity to evaluate the student. In the event that the student's ability to provide such informed consent is doubted, a petition for the appointment of a temporary guardian shall be filed;

b) Where the client is a minor,

(i) that portion of the interim treatment plan which does not involve the use of aversive procedures or extraordinary procedures determined to require substituted judgment by the Court may be implemented upon the parents' acceptance of its provisions.

(ii) that portion of the interim treatment plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization of the court in a temporary guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

c) Where the client is an adult but is unable to provide informed consent to the implementation of the interim treatment plan,

(i) that portion of the plan which does not involve the use of aversive or extraordinary procedures may be implemented upon its acceptance by a temporary guardian appointed by the court;

(ii) that portion of the plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization of the court in a temporary guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

5. B.R.I. shall formulate a treatment plan within 45 days of a client's arrival at B.R.I. Upon formulation of such a plan for a new client and regarding the treatment plan of a client presently at B.R.I., the following procedure shall be followed:

a) Where the client is an adult and is capable of providing informed consent thereto, the treatment plan may be implemented upon his/her acceptance of its provisions; provided, however, that before said plan is implemented D.M.H. shall be notified and shall be afforded the opportunity to evaluate the student. In the event that the student's ability to provide such informed consent is doubted, a petition for the appointment of a permanent guardian shall be filed;

b) Where the client is a minor,

(i) that portion of the treatment plan which does not involve the use of aversive or extraordinary procedures may be implemented upon the parents' acceptance of its provisions;

(ii) that portion of the treatment plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization by the court in a permanent guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

c) Where the client is an adult but is incapable of providing informed consent to implementation of the treatment plan,

(i) that portion of the plan which does not involve the use of aversive or extraordinary procedures may be implemented upon its acceptance by a guardian;

(ii) that portion of the plan which involves the use of aversive or extraordinary procedures may be implemented only upon authorization of the court in a permanent guardianship proceeding (or, upon motion, to modify an existing guardianship order) utilizing the "substituted judgment" criteria.

6. In any "substituted judgment" proceeding in which authorization to implement aversive or extraordinary procedures is

sought, the petitioner shall present, in addition to evidence concerning the client's inability to provide informed consent to such procedures and the client's present and past psychological and medical circumstances, evidence of the following:

a) the "target behaviors" to be treated by means of such aversive or extraordinary procedures and the clinical reasons why nonaversive or less intrusive aversive procedures are inappropriate;

b) a full description of the procedures to be followed in treating such target behaviors at the B.R.I. School facility, at the child's residence, in transit and on field trips, the process and period of time by which the implementation of such procedures is to be monitored, and the method by which the effectiveness of such procedures is to be determined;

c) the reasonably foreseeable adverse side-effects, if any, associated with the use of such aversive or extraordinary procedures, the likelihood that such side-effects will occur and the likely severity of such side-effects were they to occur;

d) the professional disciplines of the staff members who will implement such aversive or extraordinary procedures, as well as the supervision and training such staff members have had and will receive;

e) the client's prognosis should such aversive or extraordinary procedures be implemented;

f) the client's prognosis should such procedures not be implemented;

g) the opinions and concerns of the client's family and the impact upon the family were the aversive or extraordinary procedures not to be implemented;

h) the treatment previously provided the client at B.R.I. and elsewhere and a clinical assessment of its results;

i) a description of the client's appropriate behaviors, if any, and the procedures to be implemented to reinforce them, which description shall include appropriate functional communication behaviors and behaviors incompatible with the targeted inappropriate behaviors;

j) the client's current I.E.P. or I.S.P.;

k) any other information requested by the court.

7. The Department of Mental Health ("D.M.H.") shall be notified of the referral to and acceptance by B.R.I. of any client as soon as is practicable. Where appropriate, clinicians of D.M.H. shall review the information received from the referring agency and may advise the court of their treatment recommendations in the temporary guardianship proceedings called for in section 4, above. Prior to the hearing on a treatment plan for a new or current student called for in section 5, above, D.M.H. clinicians shall evaluate the client's clinical circumstances and shall provide the court with their recommendations on the issues noted in section 6, above, as well as their assessment as to the client's ability to provide informed consent to treatment. D.M.H. clinicians shall submit their report to the Court within 10 days, if practicable, but in no event more than 20 days following receipt of B.R.I.'s treatment plan. Such clinicians shall also be available for consultation with the guardian ad litem, court-appointed monitor and court-appointed counsel. B.R.I. shall cooperate fully with the D.M.H. clinicians and shall afford them full access to each client, his/her record and the B.R.I. staff working with the client.

B. Monitoring of Substituted Judgment Treatment Plans and B.R.I.'s Treatment Program

1. On each occasion when the Court issues a substituted judgment treatment plan, the Court shall also appoint a monitor

who will report to the Court as to the effectiveness of the treatment plan, adherence to orders by B.R.I., and any proposed modifications to the treatment plan.

2. The Court shall also appoint Dr. John Daignault (or some other suitable person) who shall undertake general monitoring of B.R.I.'s treatment and educational program. Dr. Daignault shall be responsible for overseeing B.R.I.'s compliance with all applicable state regulations, except to the extent that those regulations involve treatment procedures authorized by the Court in accordance with Paragraph A. The relevant state agencies shall, if appropriate, afford Dr. Daignault, at his request, technical assistance necessary to perform his duties. Dr. Daignault shall report to the Court concerning any issues he deems necessary relating to the health, safety or well-being of any B.R.I. client. Dr. Daignault shall arbitrate any disputes between the parties, and in the event that any party disagrees with any decision or recommendation of Dr. Daignault, the matter shall be submitted to the Court for resolution.

3. The fees and expenses of Dr. Daignault shall be assumed by the Trial Court of the Commonwealth.

4. The term of Dr. Daignault shall be for a period of six months unless extended by the Court in accordance with the provisions of Paragraph K.

C. Licensing of B.R.I. and Reopening of Intake

1. Upon the execution of this agreement, the outstanding licenses for the operation of the B.R.I.'s residential

cilities shall be restored. These licenses shall not be revoked nout the approval of the Court or until such time as D.M.H. licenses B.R.I.

2. On or before July 1, 1987, the licensing responsibility for B.R.I. shall be transferred from O.F.C. to D.M.H in accordance with an interagency agreement as authorized by G.L. c. 28A §3 and c. 19 §1. The terms of the interagency agreement shall be enforceable by any party to this litigation.

3. Upon the execution of this agreement, intake at B.R.I. for new clients shall be reopened and shall not be impermissibly obstructed during the pendency of this agreement. The Court may limit intake for good cause shown.

D. Programmatic Standards for B.R.I.

In delineating the following programmatic standards, the ies neither allege nor concede that such standards have been deficient in the B.R.I. program.

1. B.R.I. will retain at least one additional doctoral level psychologist (preferably an individual with behavior modification experience), and it shall continue to make a good faith effort to that end. That individual will assist Dr. Israel, and the duties shall include the design, implementation and modification of treatment plans for individual students, upon demonstration to Dr. Israel of sufficient competence and experience.

2. Ongoing training and supervision of staff will be supervised by a doctoral level psychologist. Training will be conducted by staff who have actual experience in behavior modifi- n techniques. The qualifications and training of staff

having principal treatment responsibilities for each client requiring substituted judgment shall be submitted to the Court as part of the treatment plan described in Paragraph A.

3. B.R.I. will continue to comply with all applicable Department of Education standards regarding certification of staff.

4. B.R.I. will assign clients to staff, classrooms and residences subject to availability, in a good faith effort to assure consistency and continuity of care to clients.

5. B.R.I. will continue to employ the following treatment approaches as a method of minimizing the use of restrictive procedures:

1) passive behavior management;

2) functional communication;

3) analysis of stimulus control;

4) analysis of consequence control.

6. B.R.I. will comply with all D.M.H. regulations concerning restraint (104 C.M.R. §20.08).

7. B.R.I. will comply with D.M.H. regulations concerning human rights committees (104 C.M.R. §20.14 and §24.11) and will contact parents of present and former clients to ascertain their willingness to serve on the human rights committee.

8. B.R.I. agrees to continue its use of a developmental disabilities review committee whose members shall include recognized experts in the field of autism and retardation.

9. B.R.I. will continue to follow all applicable regulations concerning periodic review of individualized educational plans and individual service plans.

E. Notification by O.F.C. to School Districts, Approval Agencies, Placement Agencies and Licensing Authorities

1. Upon execution of this agreement, O.F.C. shall send a letter (in a form approved by the parties) concerning the resolution of this controversy to the following:

a) The special education directors of all Massachusetts public schools districts;

b) All committees on the handicapped in the state of New York;

c) The Massachusetts Department of Education;

d) The Rhode Island Department of Mental Health and Mental Retardation;

e) The Rhode Island Department of Education;

f) The Rhode Island Department of Children and Families;

g) Any out-of-state agency which approves the placement of any client at B.R.I.;

h) Any public school district or placement agency which funds any part of the tuition of any B.R.I. client;

i) The Massachusetts Department of Mental Health;

j) A reasonable number of additional individuals or entities whose name and address is provided to O.F.C by B.R.I. within 10 days of the date of execution of this agreement.

2. The Defendant shall send a letter to all B.R.I. parents in the form attached hereto.

H. Agreement Concerning Attorneys' Fees

Upon execution of this agreement, the parties shall enter into an agreed judgment for attorneys' fees in the amount of, five hundred eighty thousand six hundred and five dollars and twenty-five cents ($580,605.25) payment of which shall be full satisfaction of all monetary claims in this action. The Defendant agrees that, through statutory procedures, she will request the Legislature to appropriate the funds to satisfy the judgment through an FY 1987 Supplemental Budget. The Defendant shall use her best efforts to secure the appropriation. In the event that the Legislature declines to appropriate the funds, nothing in this agreement shall prevent the Plaintiffs from using whatever legal remedies are available to enforce the judgment and, if necessary, to modify its terms to include the personal liability of the Defendant. By entering into this agreement, B.R.I. does not make any acknowledgment as to the adequacy of attorneys' fees for rate setting purposes.

I. Withdrawal of All Litigation and Execution of Releases

Upon execution of this agreement, all pending administrative and judicial actions (with the exception this action and the pending guardianship actions) shall be dismissed with prejudice. Upon payment to the Plaintiffs of the attorneys' fees referenced in Paragraph H, the parties shall exchange mutual releases, in a form to be negotiated by counsel, and all monetary obligations of the Defendant to the Plaintiffs shall be discharged. The parents and guardians agree to hold the Defendant harmless from any causes of

action (including, without limitation, any action under G.L. c. 258) which arise from this agreement, (excepting the breach of this agreement), and hereby release and forever discharge subject to the provisions of paragraph H, O.F.C. and the Defendant in her official and individual capacity from any and all claims which arise from the actions of September 26, 1985.

J. Form of the Agreement

This agreement shall constitute an Order of the Bristol County Probate and Family Court in the case of Behavior Research Institute, Inc., et al. v. Mary Kay Leonard, Civil Action No. 86E-0018-G1. The rights of all parties shall be limited to enforcement of the terms of this agreement. The Court will retain continuing jurisdiction over this action until such jurisdiction is terminated in accordance with the provisions of Paragraph K, at which time an order of dismissal of this action shall enter. During the pendency of this agreement, any dispute between the parties that cannot be resolved by the general monitor shall be submitted to the Court for resolution.

K. Periodic Review

The Probate Court shall conduct a hearing at six-month intervals in order to review the parties' adherence to the provisions of this agreement. This agreement shall be automatically extended at the first six month review unless the Court, upon motion by any party, orders otherwise. This agreement shall automatically terminate at the second review unless the Court, for

good cause shown related to the terms or substance of this agreement, orders otherwise. Upon termination of this agreement, BRI shall continue to employ substituted judgment procedures as ordered by the court.

L. Good Faith

The resolution of this matter depends upon the good faith of all parties and each party shall discharge its obligations under the terms of this agreement, in good faith.

Counsel for the Class of All Students at BRI, Their Parents and Guardians
Robert A. Sherman

Counsel for B.R.I.
Roderick MacLeish, Jr.

o Soucy
Class Representative

Dr. Matthew L. Israel

Counsel for B.R.I. clients
Marc A. Perlin
Max Volterra

Counsel for the
Office for Children,
E. Michael Sloman, A.A.G.

Peter Biscardi
Class Representative

Mary Kay Leonard, individually and as Director of the Massachusetts Office for Children