

~~FINDINGS OF FACT~~

1. This matter was heard by the Court on a Complaint for Contempt Pursuant to Rule 65.3 of the Massachusetts Rules of Civil Procedure, as amended, brought by The Judge Rotenberg Educational Center, Inc. (JRC) and parents and guardians of students at Judge Rotenberg Center against Philip Campbell, in his capacity as Commissioner of the Department of Mental Retardation (DMR).[1]

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Footnote [1] Judge Rotenberg Center (JRC) was formerly known as the Behavior Research Institute (BRI). Judge Rotenberg, who presided over this litigation, died July 1992. This Judge was designated to succeed him by order dated August 1992.

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2. Trial in this case began on Monday, June 26, 1995, and continued through July 14, 1995, for a total of thirteen trial days. Four hundred and eight exhibits[2] were introduced and seventeen witnesses testified.

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Footnote [2] This litigation was somewhat unusual due to the fact that the actions of all parties are fully documented in these exhibits. Exhibits referred to herein are as follows: Entered by Agreement 1-235, offered by JRC and entered by the Court 236-326.

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3. This matter came before the court as a Contempt Complaint brought by JRC against DMR to enforce the terms of a Settlement Agreement that “resolved” extensive and difficult litigation. The Settlement Agreement was entered as an Order of the Court on January 7, 1987. DMR voluntarily entered into the Settlement Agreement on December 29, 1988. For this reason, the critical issue in this litigation is not that of the authority of the Administrative Agency versus the authority of the Judiciary.

4. Further, this litigation is not concerned with the use of aversive therapy. The many issues surrounding the use of aversive therapy, both in the abstract and in the particular, are addressed through Substituted Judgment Proceedings in Individual Guardianship cases.

PROCEDURAL BACKGROUND

5. On December 12, 1986, JRC, the parents of students at JRC, and the students through their legal representatives, entered into the Settlement Agreement with Mary Kay Leonard, individually, and in her capacity as Director of the Massachusetts Office for Children (“OFC”). The Settlement Agreement ended litigation between the Commonwealth and JRC which began on September 26, 1985, when OFC issued an order to show cause why JRC’s license to operate should not be suspended. On June 4, 1986, this Court entered a preliminary injunction against the Director of OFC finding that she had engaged in bad faith in her regulatory activities concerning JRC.[3]

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Footnote [3] This Court’s order, as well as its Findings in Support of Preliminary Injunctive Relief dated June 4, 1986, were affirmed in a decision by the Single Justice of the Appeals Court (Greaney, J.) dated July 30, 1986 (Docket No. 86-0318).

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On October 31, 1986, this Court awarded JRC, and the parents, the sum of \$580,605.25 which represented the legal fees incurred as a result OFC’s bad faith actions. Shortly thereafter, the parties engaged in settlement discussions which culminated in the execution of the Settlement Agreement.

6. On January 7, 1987, the Court found the Settlement Agreement to be fair, reasonable and adequate, and incorporated the Settlement Agreement as an Order of this Court. (Exhibit 4). In accordance with the terms of the agreement, John Daignault, Ph.D., was appointed Court Monitor.[4]

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Footnote [4] Indeed, the parties had agreed in the Settlement Agreement that Dr. Daignault would be the general monitor of BRI’s treatment program, and that Dr. Daignault “shall undertake general monitoring of BRI’s treatment and educational program.” (Exhibit 2, p.7). The parties also agreed in the Settlement Agreement that Dr. Daignault “shall be responsible for overseeing BRI’s compliance with all applicable state regulation, except to the extent that those regulations involve treatment procedures authorized by the Court in accordance with Paragraph A.”

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7. On February 12, 1987, this Court issued a memorandum to all parties in this case, restating material provisions of the Settlement Agreement concerning the Court Monitor.[5]

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Footnote [5] This memorandum stated that in order to insure full consideration to the guardianship and substituted judgment issues for each appropriate JRC student, while at the same time maintaining an orderly process based on clinical need in addressing the large JRC population, the Court is requesting that all interested parties initially channel information through the Court Monitor. The Monitor will assist the Court in scheduling matters to be heard before the Court according to the primary criterion of urgency and clinical need. In addition, the Monitor will keep the Court appraised of all developments in his regular reports to the Court. Lastly, all parties are reminded of the Monitor's role as outlined in the Settlement Agreement insofar as ~~all conflicts or disputes shall be brought initially to the Monitor for attempted resolution~~. (Emphasis supplied).

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8. On July 7, 1988, the Court Monitor filed a report with this Court in compliance with the six-month review required by the Settlement Agreement. (Exhibit 9). It stated that the parties were complying with the Settlement Agreement, but that JRC had yet to be licensed by the Department of Mental Retardation (which had assumed the responsibilities under the Settlement Agreement from the Department of Mental Health, "DMH").[6]

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Footnote [6] At the time of the 1985 litigation OFC was responsible for licensing JRC. That responsibility was transferred by the legislature to DMH in July 1, 1987. Finally, said function was transferred to DMR on December 29, 1988.

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9. In response thereto, this Court issued an order July 7, 1988, extending jurisdiction over the Settlement Agreement "until further order of this Court." The Court's order noted that there were no objections to the extension of jurisdiction.

10. On October 24, 1988, the Department of Mental Retardation filed a motion with this Court to modify the Settlement Agreement by deleting the Department of Mental Health whenever appearing in the Settlement Agreement, and inserting the Department of Mental Retardation.

11. On December 29, 1988, the Court accepted the motion filed by the Department of Mental Retardation as an intervention in the action under Rule 24 (b)(2) and the Court welcomed DMR as a "party under the Settlement Agreement." (Exhibit 13) No party appealed this order.

12. DMR consistently held itself out as a party to the Settlement Agreement until August of 1993. At that time, DMR abruptly changed its position without any attempt to bring this change to the attention of the Court.

13. The Settlement Agreement was designed to protect JRC, the Students and their families from future bad faith conduct by state officials while safeguarding the state's interest in the welfare of children.

STATEMENT OF THE CASE

14. On September 2, 1993, JRC filed a Complaint for Contempt alleging that DMR was in violation of the Court Ordered Settlement Agreement.

15. On March 28, 1995, JRC filed its Revised Verified Third Amended Complaint pursuant to Rule 65.3 of the Massachusetts Rules of Civil Procedure. The amendments alleged additional acts of contempt which had occurred since the filing of the original action.

16. In its Contempt Complaint, as amended, JRC alleged that Defendant Commissioner Campbell and the Department were in contempt for violating the following provisions of the Settlement Agreement:

A) ¶ A of the Settlement Agreement in which decisions on treatment were reserved for the Court,[7]

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Footnote [7] "Aversive procedures are permitted for use at JRC 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 not able to provide informed consent thereto...[T]hat 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." (Exhibit 2, at ¶¶ A-1, A-5 and A-4 (c) (ii)).

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B) ¶ B-2 of the Settlement Agreement in which Dr. Daignault was appointed Court Monitor and was to undertake a general monitoring of BRI's treatment and educational program,[8]

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Footnote [8] The Settlement Agreement states, ‘Dr. John Daignault shall be responsible for overseeing JRC’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.’ (See Exhibit 2, ¶ B-2).

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C) ¶ B-2 of the Settlement Agreement, in which Dr. Daignault was also responsible for arbitrating any disputes between the parties. In the event that any party disagreed with Dr. Daignault’s decision or recommendation, he was to submit the matter to the Court for resolution,

D) ¶ L of the Settlement Agreement which state that “[E]ach party shall discharge its obligations under the terms of this agreement in good faith.” (Exhibit 2 at ¶ L), and

E) ¶ C-3 of the Settlement Agreement which states, “Upon the execution of this agreement, intake at JRC for new clients shall be reopened and shall not be impermissibly obstructed during the pendency of this proceeding.” (Id. at ¶ C-3).

17. DMR has asserted that it is not a party to the Settlement Agreement and, even if it is, that it has not engaged in any violations of the Settlement Agreement. DMR has also argued that the “good faith” provisions of the Settlement Agreement require DMR to engage in good faith in only with respect to the Settlement Agreement and, to the extent that DMR has engaged in bad faith (which DMR does not concede), it is bad faith which is not covered by the Settlement Agreement.

18. The Settlement Agreement allowed JRC and its students to recover from the damage caused by the controversy of 1985-1986. From 1987 through 1993, JRC and its students enjoyed tremendous benefits from the JRC treatment programs. (These are set forth in the findings of this Court in the various individual guardianship actions.)

19. Following the Settlement Agreement, the Department of Mental Health drafted regulations concerning the use of “Level III” procedures, which included certain aversive procedures utilized at JRC. See 105 CMR 20.15. The parties have agreed that those regulations have been unchanged since they were first instituted. The regulations were written after extensive discussion and consultation with Dr. Daignault who was instrumental in their formulation.

20. DMR regulations require that programs utilizing Level III procedures be “certified” by the Department of Mental Health (which authority was subsequently transferred to the Department of Mental Retardation).[9]

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Footnote [9] The certification process was intended to certify “programs”. Individual treatment decisions utilizing Level III Aversive were reserved for the Court in the Individual Guardianship Proceedings.

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JRC applied for certification in 1988. On April 20, 1989, JRC was granted certification for a two year period.

21. Attached to the initial grant of certification was a memorandum prepared by DMR General Counsel Kim Murdock concerning the behavior modification regulations. (Exhibit 15). ¶ 14 of the memorandum addressed the potential for a conflict between substituted judgment orders of the Probate Court and DMR regulations. ¶14 of the memorandum noted that the Department’s treatment plans should not be amended until after a substituted judgment hearing before this Court, and stated that such interpretation of the regulation “is necessary to prevent conflicting decisions by Departmental Hearing Officers and the Probate Court, ~~since obviously an Executive Branch Hearing Officer cannot overrule Court decisions.~~” (Emphasis added.) The memorandum also noted that such a practice was “consistent with Departmental practice in ~~Rogers~~ cases.” (Id. at p. 4, ¶14).

22. Although allowed to do so, DMR did not participate in the innumerable substituted judgment proceedings involving JRC clients in this Court until sometime after August 1993 when DMR adopted a drastically different JRC policy.

23. The evidence in this case establishes that DMR has represented to the Courts of the Commonwealth, including the Supreme Judicial Court, as well as third parties, that it is a party to the Settlement Agreement and bound by its terms. ~~See, In Re: McKnight~~, Brief of Appellant DMR, p. 6.[10]

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Footnote [10] The brief was originally filed in the Appeals Court. The Supreme Judicial Court took the case on direct appellate review.

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In DMR’s brief to the full bench, the Assistant Attorney General stated on p. 6:

“That action was resolved by a Settlement Agreement, entered as an order of the Probate Court, on January 7, 1987 (App. 37-57). DMR is a party to that Settlement Agreement, having been joined by order of the

Probate Court dated December 29, 1988, in response to DMR's motion, which was grounded on DMR's role in licensing and regulating providers of treatment for autism."

DMR's course of conduct prior to August of 1993 established that it was a party to the Settlement Agreement.

24. After execution of the Settlement Agreement, the Court Monitor, Dr. Daignault, had several meetings with Mary McCarthy, who at the time was the Deputy Commissioner for the Department of Mental Retardation.[11]

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Footnote [11] DMR was then part of the Department of Mental Health. Later Mary McCarthy became the Commissioner of the Department of Mental Retardation when DMR became an independent agency.

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25. Dr. Daignault had a good working relationship with Commissioner McCarthy. Between October 1986 and September of 1988, he had numerous meetings with her regarding JRC. The primary issues concerned JRC's licensure and certification. (Licensure relates to the facilities; certification relates to the program.) General Counsel of DMR, Kim Murdock, attended a number of these meetings.

26. In 1987 Dr. Daignault successfully exercised his role as mediator in a dispute wherein JRC alleged a DMH official was wrongfully interfering with intake. DMR representatives attended the mediation meeting.

27. JRC requested mediation under ¶B-2 of the Settlement Agreement which resulted in another mediation meeting on or about May 1987, concerning the lack of referrals from DMR.

28. At no time did DMR question Dr. Daignault's authority in acting as Court Monitor.

29. On October 30, 1989, Deputy General Counsel of DMR, Margaret Chow-Menzer, who is counsel of record herein, wrote a letter to Dr. Daignault specifically invoking the provisions of the Settlement Agreement "as amended on December 29, 1988."

30. On or about November 18, 1989, counsel for JRC requested Dr. Daignault convene a mediation meeting concerning 'licensure' of JRC. Within two months, JRC received licenses for its facilities which, the

Court finds, were the direct product of the mediation session.

31. Dr. Daignault was also required to oversee JRC's compliance with regulations. On January 19, 1990, General Counsel Murdock wrote to Dr. Daignault concerning abuse complaints stating that she had reviewed the complaints and concluded that the acts fall within the category of treatment JRC is authorized to use (See Exhibit 23, p.2). She forwarded the complaints to Dr. Daignault as the Court Monitor, and indicated that if the treatments were not authorized, DMR would be required to conduct its own investigation. Based on his investigation, Dr. Daignault ultimately concluded that no abuse had occurred nor was there a violation of the Court Ordered treatment plans.

32. The relationship between Dr. Daignault and DMR remained productive. On February 14, 1990, Attorney Chow-Menzer wrote to Judge Rotenberg notifying him that the Department had arranged for a particular psychologist to serve as a "DMR expert" in response to a request from Dr. Daignault.[12]

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Footnote [12] The Settlement Agreement states that DMR is obligated to provide technical assistance to Dr. Daignault as he might request.

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33. On February 28, 1992, the Office of Quality Assurance for the Mental Retardation Consent Decrees ("OQA") sent a letter to Commissioner Campbell concerning two clients who were members of the class of students protected by Federal Court consent decrees. The letter raised questions concerning JRC's use of behavior modification procedures with respect to these two clients who were now at JRC. Commissioner Campbell authorized General Counsel Murdock to prepare a response.

34. On March 27, 1992, Attorney Murdock responded as follows:

"As you know, due to past litigation, the Department is currently ~~bound by a Settlement Agreement~~ with respect to this program. All so-called aversive interventions used at JRC must be approved by the Bristol County Probate Court; ~~the Department's involvement in the actual treatment is limited~~. If you still desire details on the treatment of the two class members mentioned in [your] letter, I suggest that you contact the Court Monitor for the JRC case, Dr. John Daignault." (Emphasis supplied).

This letter constituted a candid acknowledgment that the Department was a party to the Settlement Agreement and therefore did not have unilateral authority over treatment interventions approved by this Court.

35. With respect to the statement quoted above, it should be noted that Commissioner Campbell testified it was Ms. Murdock who had advised him that he was not a party to the Settlement Agreement.

36. As late as March 1993, DMR continued to acknowledge the Court Monitor's authority. On March 15, 1993, DMR Deputy General Counsel, Margaret Chow-Menzer, sent Dr. Daignault a letter regarding the use of "DMR expert" Dr. Frederick Krell. (Exhibit 65) In this letter she stated :

"In my reading of the Settlement Agreement, it is the Court Monitor who is responsible for overseeing JRC's treatment and educational program and to 'report to the court concerning any issues he deems necessary relating to the health, safety, or well-being of any JRC client.' The Settlement Agreement clearly reflects the understanding of the court and the signatory parties in your [Dr. Daignault's] ability as the court appointed monitor to make the threshold determination of whether a JRC treatment program was presenting a serious risk to the JRC student. The Agreement squarely places the responsibility on you to alert the court if in your judgment such a risk existed."

37. In a letter dated March 22, 1993, General Counsel Murdock noted that Commissioner Campbell wished to testify on a bill before the legislature which would "prohibit aversive treatment." (Exhibit 67) Ms. Murdock stated in this letter, "As Commissioner of the Department of Mental Retardation, he feels strongly that the Commonwealth should follow the lead of other states that have prohibited such treatment, as a matter of public policy."

It went on to state as follows:

"I have advised the Commissioner of my concern that the Settlement Agreement in the original JRC/OFC litigation (while it does not specifically address the situation) may be interpreted by some to prohibit him from taking the position on the legislation. As you know, the Department has historically been neutral on this bill. The Commissioner has assured me that it is not his intention to violate a legal obligation."

38. JRC responded by registering its objection to Commissioner Campbell's testimony. Accordingly, the Commissioner did not testify on the bill.

39. JRC received its certification in April of 1989, due to expire April 1991. On December 5, 1990, JRC wrote to DMR, requesting an application for recertification.

40. It took DMR more than six months to respond by finally mailing the application for recertification. The Department then gave JRC only thirty days to submit the application with its supporting documentation.

JRC complied on July 31, 1991.

41. Following the receipt of JRC's application for recertification, the Department assigned a team to evaluate the application and make a site visit to JRC. The team consisted of George Casey, Esq., an attorney employed by DMR, and Dr. Kevin Reilly, the Chief Psychologist at the Wrentham State School. Dr. Reilly and Attorney Casey made a site visit to JRC on December 9-10, 1991. They reviewed voluminous materials and met with a number of employees at JRC.

42. On December 21, 1991, Attorney Casey prepared a report concerning JRC's request for certification. The report recommended that JRC be recertified to employ aversive procedures, subject to five conditions which Attorney Casey characterized as "minor" and which concerned the functioning of the Human Rights Committee. The report also included compliments about JRC which concluded that the programs at JRC were in conformity with DMR regulations and the directives of the Bristol County Probate Court. Attorney Casey and Dr. Reilly had reviewed the specialized food program and the GED program during the site visit to BRI.

43. DMR took no action regarding the certification report dated December 21, 1991. Finally, almost six months after the report was submitted, Amanda Chalmers, the Department's designee, notified Dr. Israel, the Director of JRC, by letter dated June 10, 1992, that DMR had "accepted the recommendations of the team headed by Attorney Casey", and incorporated the five minor conditions in the Casey Report. DMR did not grant certification to JRC at this time even though this was the major recommendation of the Casey Report.

44. On July 21, 1992, Ms. Chalmers sent another letter to Dr. Israel stating that, since her letter of June 10, 1992, two new behavioral programs had been "brought to my attention which should be reviewed as part of the recertification process": the Specialized Food Program and the GED Program. Ms. Chalmers also announced in this letter of July 21, 1992, (Exhibit 46) that she would be assembling a review team, which would include a nutritionist and a physician, to return to JRC with the express purpose of reviewing the Specialized Food Program and the GED Program. [13]

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Footnote [13] The GED Program is a Court-approved procedure which involves an electrical stimulus which is utilized when a client engages in a maladaptive behavior. Likewise, the Specialized Food Program was Court-authorized.

45. Contrary to her assertion, the Specialized Food Program and the GED Program were known to the Department of Mental Retardation at the time of the visit by the Casey Certification Team in December of 1991. Commissioner Campbell himself had been informed of these two programs in a memorandum of

October 31, 1991 from his Director of Human Rights, Neil R. Lazara.

46. On May 5, 1993, the second full review team came to JRC to conduct its evaluation of JRC's application for recertification. The team included Dr. Anne Myers, a DMR physician working at the Fernald School, Dr. Jens Lauridsen, a DMR physician also working at the Fernald School, Irene Whalen, R.D., a nutritionist working at the Fernald School, as well as Dr. Kevin Reilly and Attorney George Casey.

47. The second review team determined that JRC had complied with all five prior conditions of certification in the December 21, 1991 report. The team also concluded that there were no adverse health effects from either the GED-4 (a stronger version of the GED) or the Specialized Food Program. The team concluded that a majority (90) percent of the non-obese students in the Specialized Food Program had actually gained weight or remained stable under the program. (Exhibit 75, p. 4). The team could discern "no adverse health consequences of the Specialized Food Program" as currently practiced at JRC and as practiced over the past three years. With respect to the GED-4, it was the opinion of the team and, in particular, the opinion of Dr. Lauridsen, that the amount of power utilized was "extremely low and not harmful to anyone". Furthermore, the GED-4 was found to have all the safety features of the original GED device, as described in Court papers.

48. The second review team concluded that after a "thorough" investigation, the present use of the GED-4 Program and the Specialized Food Program were being carried out "within the mandate of the regulations of the Department of Mental Retardation", and stated "there is no reason to change the previous recommendation that JRC retain its certification to employ Level III interventions in behavior modification programs." (Id. at p. 11). The team recommended that JRC be certified to employ Level III interventions with two minor provisions [14].

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Footnote [14] One provision would require JRC to inform DMR in the event that changes were made to the GED device (such as an increase in power), and the other would require an enhanced record keeping for the Specialized Food Program . (Exhibit 75 at p. 11)

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It was clear that the team found JRC to be in full compliance with the regulations.

49. Attorney Casey considered the July 15, 1993 report to be "complete". He forwarded the report to General Counsel Murdock at the Central Office of the Department of Mental Retardation. No one in the Department spoke to him about the report and, to his knowledge, no one spoke with any members of the team concerning the report. No one ever suggested to him that the report was incomplete.

50. After the second team visit, Attorney Casey also requested certain information concerning “misfires” of the GED device. [15]

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Footnote [15] “Misfires” are situations where the device is activated spontaneously because of some electrical interference.

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Attorney Casey discussed this issue with a variety of JRC staff members and reviewed certain materials from JRC relative to the “misfires”. The team concluded that the misfires were “not frequent enough to have an impact on the safety aspect of the GED, but the information concerning the misfires had been requested after the site visit”.

51. With the exception of Dr. Riley, who had since left DMR, all members of the review team signed the report which was submitted to Attorney Murdock. This court finds that the report was complete.

52. The report of the Certification Team was never read by Commissioner Campbell, Dr. Mary Cerreto or any of the key individuals who were making decisions on JRC’s certification until 1995. In fact, Commissioner Campbell never read the certification report until after his deposition in 1995. As Commissioner Campbell testified, no member of the Certification Team was brought into any of the subsequent discussions about certification and none of them were contacted to analyze or assist in the evaluation of follow-up information presented by JRC. This fact alone is strong evidence of the bad faith purpose of those discussions.

53. Commissioner Campbell gave contradictory testimony between his deposition and trial concerning his awareness of the certification reports. [16]

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Footnote [16] The Commissioner testified at trial that he received the first report of the certification team in December of 1991. (Tr. June 28, p. 69, 1. 22-24). However, he testified in his deposition that he did not ever recall receiving a report from Mr. Casey or Dr. Riley concerning their review of JRC in 1991. Nor had he read the 1991 report as of the date of his deposition. (Tr. June 2, p. 70 to p. 71). He also testified in his deposition that he had not read the report of the second review team on the day of his deposition. Id. He testified that at the weekly certification meetings concerning JRC which commenced in the summer of 1993, the 1991 and 1993 reports of the certification team were never discussed. (Tr. June 28, p. 74.) While the Commissioner attempted to testify at trial that he was informed by his General Counsel that the July 1993 report recommended certification, the only thing he could recall about the reports in his deposition was that Attorney Murdock told him that the report was incomplete. (Tr. June 28, p. 74 & 76).

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Commissioner Campbell admitted that there was an inconsistency between the testimony in his deposition and his testimony at trial. Dr. Mary Cerreto, the Commissioner's chief clinical advisor on recertification, also never read the 1991 and 1993 reports, even though she knew three members of the second team.

54. Commissioner Campbell asserted that the 1993 certification team report was not "complete". His only justification for considering the report incomplete was the fact that it was not signed by Dr. Riley.

55. Commissioner Campbell's testimony, regarding the lack of completeness of the Certification Team Report, is striking in light of the fact that he did not even know what instructions were given to the certification team and, indeed, had no idea what the team was asked to do.

~~56. Commissioner Campbell never revealed the existence of or sent a copy of the 1991 or 1993 certification reports to the Court Monitor, JRC, the funding agencies of JRC, the parents of JRC students, or the Court. (Emphasis supplied). [17]~~

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Footnote [17] In fact, the very existence of these reports did not become known until days before the start of trial, as part of DMR's response to Discovery Requests.

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57. In spite of all this, Commissioner Campbell acknowledged that he used some of the information of the certification team reports in his subsequent communications to parents, funding agencies and this Court.

58. In the spring of 1993, CBS News contacted the Department of Mental Retardation concerning an upcoming program which CBS wanted to do on JRC for the "Eye-to Eye" program and requested certain information relative to JRC. (~~See~~ Exhibit 255).

59. Commissioner Campbell spoke to the producer and was concerned that the show might depict the Department as not doing its job in regulating JRC.

60. Commissioner Campbell met with Under Secretary of Executive Office of Health and Human

Services (EOHHS), Janet George, concerning the upcoming CBS program.

61. Commissioner Campbell testified that he never did anything in anticipation of the upcoming CBS television program. This testimony was false. It was given before the Commissioner was presented with notes and agendas of his "Tuesday Morning Meetings" (discussed *infra.*). These notes demonstrate that various DMR actions, such as the mailing of letters to parents, were strategically planned "in anticipation" of the Chung program.

62. This Court finds that Commissioner Campbell's concern as to how his agency might be depicted in the upcoming CBS television program was at least part of the reason why he abruptly changed his position concerning both the Settlement Agreement and the JRC program. The Commissioner's concern in that regard had absolutely nothing to do with the welfare of JRC clients, but was a material part of the Commissioner's decision making.

63. On August 6, 1993, Commissioner Campbell mailed the first in a series of letters, the "August 6 Letter" to JRC, which was ultimately sent to all JRC out-of-state funding agencies, as well as JRC parents. (Exhibit 82). The August 6 Letter was also provided to the Court in the Report filed by DMR on September 22, 1994 and appended to the Commissioner's Affidavit filed with this Court on February 16, 1995.

64. While this letter purported to grant "interim certification" to JRC, it was in reality the first volley in a series of actions designed to put JRC out of business. The Letter contained calculated statements which Commissioner Campbell and his staff knew were false, or which were made in reckless disregard of the truth.

65. Commissioner Campbell's August 6 Letter was based upon the Commissioner's "new" position that he was no longer a party to the Settlement Agreement. This "new position" has no factual or legal merit. The Commissioner testified that he was relying upon legal advice during this period of time. Such legal advice, however, is not a defense to a contempt action.

66. Commissioner Campbell stated in the August 6 letter that JRC had engaged in "continued and repeated noncompliance with [Department of Mental Retardation] regulations." This of course was contrary to the report of the DMR certification teams lead by Attorney Casey. The second certification team report was dated July 15, 1993, approximately three weeks prior to this letter. Prior to the August 6 Letter, the Department had never given any notice to JRC that its treatment plans were no longer in compliance with the behavior modification regulations.

67. Commissioner Campbell further stated in the August 6 letter that his agency had been unable to conclude that the Specialized Food Program or other 'painful interventions' were supported by professionally-acceptable evidence for use on clients, or were "effective in such use". The Commissioner made this statement even though Court decisions upon Evidentiary Hearings firmly established that the procedures utilized at JRC were effective. [18]

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Footnotes [18] (See, e.g., Findings of Fact of March 12, 1992, (Exhibit 240) ¶ 20, finding that there was a "notable unanimity of professional opinion in that case" that the GED was an "effective and medically-safe behavioral treatment technology." This Court decision was entered after four days of hearings which the Department of Mental Retardation chose not to attend. Reports from psychologists retained by the Department of Mental Retardation to participate in JRC proceedings establish that, as of August 6, 1993, the Department had in its files compelling evidence that the GED procedures and other procedures utilized at JRC were professionally-acceptable and effective. On April 29, 1993, less than four months before the Commissioner's letter, the Commissioner's legal department received a report from a psychologist retained by the Department in ongoing JRC treatment plan reviews. This psychologist, Dr. Frederick Krell, had sent the Department a report in this case for a profoundly-handicapped young man, whose initials are J.V., expressing his opinion that the treatment program at JRC, including the GED device, was "more effective than any other intervention which was applied over the previous 17 years" for this client. (Exhibit 244, p. 10). The Commissioner acknowledged that this was the type of information which was relevant to the issue of effectiveness, (Tr. June 28, p. 111, l. 12-19), but it was not considered even though it was in the Department's own files.

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68. Commissioner Campbell was unable to show that JRC had ever been asked to provide evidence that the GED-4 and the Specialized Food Program were professionally acceptable.

69. This Court concludes that Commissioner Campbell's testimony that he had been unable to conclude whether the treatment at JRC was effective, was without factual basis and in deliberate ignorance of clinical information prepared by psychologists retained by him, and contained in his office files.

70. On page 3 of the August 6 Letter, Commissioner Campbell asserted that the certification team headed by Attorney Casey "felt unable to reach a conclusion on whether the issue of GED misfires presented a problem for [JRC's] ability to comply with Section 20.15." This assertion was also false. The team obviously reached no such conclusion. The only material finding relative to the issue of misfires was Dr. Lauridsen's conclusion that the misfirings were infrequent and did not present a danger to the health and safety of the clients in the JRC program.[19]

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Footnotes [19] In his August 6 Letter, Commissioner Campbell failed to acknowledge the findings of this Court on March 12, 1992, wherein this Court found that JRC had made a variety of technical changes to the GED device significantly reducing the number of misfires and that "there is notable unanimity of professional opinion here -- i.e., the GED is an effective and medically safe behavioral treatment technology." (Exhibit 240 at pp. 7-8)

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71. Commissioner Campbell also determined in the August 6 Letter that a "review of the Human Rights Committee showed that there was little or no discussion, questioning, or analysis of treatments proposed to JRC clients." Yet, Attorney Casey had reviewed the minutes of six Human Rights Committee meetings in 1991 and had spoken with the Human Rights officer. In fact, Attorney Casey testified that when he returned to JRC in 1993, he found that JRC was complying with the five recommendations for change he had made in the 1991 report concerning the Human Rights Committee.

72. On page 5 of the August 6 Letter, Commissioner Campbell imposed several conditions upon JRC based upon JRC's alleged "continued and repeated non-compliance with the requirements of the regulations." (This statement contradicts the 1991-1993 DMR certification reports that JRC was in full compliance with regulations of the Department and, indeed, was operating "within the mandate of the regulations of the [DMR]....")

73. Also included in the August 6 letter was the requirement that JRC provide DMR, within 21 days, a "list of aversive techniques and an existing description of how such techniques are used at JRC." Yet, Attorney Casey testified that this information had been given to the certification team by JRC and reviewed by the team. A further condition of approval was that JRC provide copies of any published "peer-reviewed professional research," even though Attorney Casey remembered that some of this material had already been reviewed by Dr. Riley. Commissioner Campbell undertook no inquiry to determine whether the Certification Team already had this information.

74. Although Attorney Casey and Dr. Riley had already reviewed behavior treatment plans and had determined that the plans were in conformity with the regulations, Commissioner Campbell required that JRC provide, within 21 days, a sample treatment plan for Level III interventions "which complies with the regulation."

75. After taking no action for more than two years on JRC's application for recertification (submitted in July 1991,) Commissioner Campbell in his August 6 letter, implied that JRC had failed to make its case for certification and granted JRC only twenty-five days of conditional certification. The letter also implied that JRC failed to respond to the Department's requests for information. In fact, JRC had fully complied with all of

DMR's requests for information. The Commissioner's letter falsely implies to the contrary.

76. The August 6 letter was calculated to portray JRC in a false and negative light. The letter misrepresents the findings of the certification team and fails to disclose other material findings of the certification report, particularly, the fact that the team had recommended certification.

77. The significance of the August 6 letter and later certification letters, is that it was not simply a communication between two parties, an Administrative Agency and an entity subject to its regulatory authority. The August 6 letter was widely distributed to parties who would be alarmed and misled by its contents: the Court, Out of State Funding Agencies and JRC Parents.

78. Attached to the August 6 letter was a copy of a letter from Dr. Paul Jansen[20] (Exhibit 81) which made certain allegations against JRC.

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Footnote[20] Dr. Jansen is a psychologist who was retained by counsel for the wards in a number of JRC cases.

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79. In the August 6 letter, JRC was directed to respond to the allegations of Dr. Jansen. The allegations of Dr. Jansen's letter were never substantiated by the Department, nor had the Department followed through and requested from Dr. Jansen the documentation which Dr. Jansen indicated in his letter he would be prepared to provide.[21]

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Footnote[21] At trial, the Commissioner testified that steps were undertaken to substantiate the allegations of Dr. Jansen's letter prior to the time that it was communicated to funding agencies. Yet in his deposition he testified in a completely contrary fashion stating that no steps were taken by him to substantiate the allegations of Dr. Jansen. The Commissioner was again compelled to acknowledge the inconsistency between his sworn deposition testimony and sworn trial testimony.

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80. Commissioner Campbell testified that he considered contacting the Court Monitor prior to writing the letter of August 6, 1993, but elected not to.

81. This Court finds it significant that the August 6 Letter was sent by Commissioner Campbell prior to any attempt to apprise the Court, or the Court Monitor, of the serious allegations which were made in the letter. Moreover, the Commissioner failed to inform this Court, the Court Monitor, or any other party that he had decided that he was no longer a party to the Settlement Agreement and was not bound by any of its provisions.

82. In response to the August 6, 1993 letter, JRC requested a meeting with DMR. The Department of Mental Retardation declined to meet with JRC if the Court Monitor was to participate in the meeting.

83. On August 19, 1993, JRC's counsel sent a letter to counsel for the Department, David Ferleger, Esq., requesting mediation pursuant to ¶B-2 of the Settlement Agreement. Mediation was again requested by JRC on August 24, 1993. Counsel for the Department, David Ferleger, Esq., informed JRC's counsel that it would not meet with either Dr. Daignault or Attorney Briggs present.

84. On August 19th, in response to JRC's first request for mediation with the Court Monitor, Attorney Ferleger wrote to the Court Monitor alleging a conflict of interest. Specifically, Attorney Ferleger requested information regarding the Court Monitor's financial and/or consulting relationships with JRC's law firm. Commissioner Campbell "guessed" that it was coincidental that the issue was raised when mediation was first requested.

85. This issue with the Court Monitor culminated in accusations of a "conflict of interest" on the part of the Court Monitor because he had performed consultations for clients of the Eckert Seamans law firm which represents JRC. At the time these attacks were made, however, Dr. Daignault had been retained not only by counsel for the wards to consult on various unrelated matters, but by other agencies of the Commonwealth, including (as Commissioner Campbell conceded in his direct examination) the Department of Mental Retardation. Dr. Daignault is a highly respected and highly qualified forensic psychologist. [22]

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Footnote [22] Dr. Daignault's curriculum vitae is Exhibit 260.

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86. The attack upon Dr. Daignault by Attorney Ferleger constituted nothing more than an attempt to intimidate and harass a court official. It was Dr. Daignault who had been overseeing JRC's compliance with state regulations during the period from 1989 to 1993 when the Department's role in its regulatory activity and

substituted judgment cases was virtually non-existent. Attacks upon court officials in on-going proceedings are extremely rare, and the attack which took place in this case is demonstrative of the Commissioner's bad faith. Commissioner Campbell would later use his own investigators to conduct an unwarranted inquiry concerning the GAL, Bettina Briggs, Esq.

87. In response to the refusal of DMR to meet with the Court Monitor, counsel for JRC wrote a letter to Attorney General Harshbarger on August 27, 1994, again requesting a mediation pursuant to ¶B-2 of the Settlement Agreement.

88. In response, Assistant Attorney General Douglas Wilkins sent a letter on August 31, 1993 responding that the "historical understanding" of the Settlement Agreement is "not what your letter sets forth." (Exhibit 90)

89. It is incomprehensible why the Commissioner would have rejected even a meeting with the Court Monitor or the GAL, given the past practices of the Department in mediating issues with the Court Monitor.

90. Commissioner Campbell gave inconsistent statements as to whether or not he had ever agreed to mediate.

91. According to the testimony of Commissioner Campbell, Attorney Ferleger of Philadelphia, PA was contracted and retained privately by the Department in July of 1993 to handle the JRC certification process. Commissioner Campbell testified that it was a departure from ordinary practice for private counsel to be retained in connection with a certification application.

92. Commissioner Campbell, in response to questioning by Attorney Yogman, attempted to justify the enormous legal resources devoted to the JRC certification process by DMR. The Department had many attorneys from its own legal staff from the A.G.'s office involved in this litigation.

93. Specifically, Commissioner Campbell testified that he was forced to have many lawyers "heavily involved," because just prior to becoming Commissioner, he received a telephone call from Henry Clark from Eric MacLeish's office to "warn me... not to do anything to JRC on Monday when I became Commissioner." [23]

Footnote [23] Commissioner Campbell became Commissioner of DMR in July 1991.

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94. The Court, however, heard testimony on rebuttal from Henry W. Clark, who is currently a partner in the law firm of McNamara & Clark, P.C.[24]

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Footnote [24] Mr. Clark has a Masters of Divinity degree from Harvard Divinity School and is an ordained minister in the United Church of Christ. Mr. Clark also has a Doctorate from Boston College in Religion and Society with a concentration in ethics. He has taught ethics at Boston College. Prior to becoming a partner at McNamara & Clark, Mr. Clark worked at the law firm of Eckert Seamans Cherin & Mellott for four years, and prior to that at Fine & Ambrogne. JRC has been a client of all three law firms.

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95. Mr. Clark testified he recalled a conversation that took place in the spring or early summer of 1991. He initiated that call to Philip Campbell to congratulate him on being named the Commissioner of DMR. Mr. Clark and Philip Campbell had been colleagues for five or six years in the private sector when Mr. Clark was the Director of MAAPS, the Massachusetts Association of Approved Private Schools, and Mr. Campbell was the Executive Director of MARC, the Massachusetts Association of Retarded Citizens.

96. Commissioner Campbell responded to the offer of congratulations by saying that now that Mr. Clark was an attorney and Mr. Campbell was going to be Commissioner, “We can’t talk to each other anymore”. The conversation then abruptly ended. Mr. Clark remembered this conversation very distinctly because he was stunned by the Commissioner’s response.

97. Mr. Clark was a credible witness. Commissioner Campbell’s testimony on this subject was blatantly false, designed to offer justification, albeit untruthful, for the enormous legal expenses DMR has incurred in its unlawful pursuit of JRC.

98. On August 27, 1993, JRC delivered a written response to DMR’s August 6 Letter. The response was a point by point refutation of the false allegations contained in the Commissioner’s August 6 Letter. It was accompanied by three cubic feet of significant documentation, which rebutted most of the factual allegations of the Commissioner.

99. Instead of retracting the allegations contained in the August 6 Letter, Commissioner Campbell sent

another letter to JRC on August 31, 1993, which was also subsequently sent to JRC's funding agencies upon which it depends for its referrals. The August 31 letter also contained false information concerning JRC.

100. The letter of August 31, 1993 found that JRC was "in violation of DMR regulations," but stated the willingness of the Commissioner "to give JRC further opportunity to provide further information." (Exhibit 91, p. 2).

101. Commissioner Campbell stated that the field review has learned from a source "other than JRC" that there were problems with misfires of the GED device. This statement was intended to imply that JRC was being less than forthcoming concerning the issue of misfires of the GED device.

102. The statement of Commissioner Campbell concerning misfires was false. [25]

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Footnote [25] Commissioner Campbell testified that it was his understanding that the source of this information was General Counsel Murdock. Yet, Attorney Casey testified that he remembered reviewing information provided by JRC on the issue of misfires and had a conversation about misfires the first time he visited JRC in 1991. Moreover, the issue of these infrequent "misfires" had been the subject of evidentiary hearings and expert testimony in substituted judgment court proceedings in which the Department had elected not to participate. (See findings of March 12, 1992; Exhibit 240).

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103. The August 31, 1993 letter also set forth a number of further conditions that JRC was required to meet in order to receive interim certification.

104. Condition 1 restricted JRC to the use of procedures which were actually in use as of August 27, 1993. This directly contradicted orders of this Court which authorized JRC to utilize procedures other than those which were specifically in use on August 27, 1993. Instead of seeking to modify outstanding court orders, the Commissioner departed from the established course of practice (embodied in Exhibit 15, ¶14) and simply administratively overruled outstanding orders of this Court. It was also a direct violation of the Settlement Agreement in which decisions on treatment were to be made only in the Substituted Judgment Proceedings in the Court.

105. Commissioner Campbell was aware on August 31 that JRC was authorized by this Court to utilize

procedures which it might not be using on any particular date. These orders have been entered after careful consideration and solely for the reason that a number of JRC students can suddenly engage in life-threatening behavior which required a varied “menu” of authorized treatment modalities.

106. The letter of August 31, 1993 also ordered JRC to comply with all DMR regulations regarding the use of mechanical restraints and other devices. (Exhibit 91, p. 6). In footnote 6 of this letter, Commissioner Campbell stated that mechanical restraint which is part of Court-approved behavior modification plan is not considered “prohibited restraint”.

107. There was no evidence adduced in this case that JRC had utilized mechanical restraint without a substituted judgment order or in circumstances other than those recognized as appropriate in a memo of the Department’s General Counsel. (Exhibit 15).

108. The August 31, 1993 Letter also required JRC to “cooperate fully” with an “independent” performance and program review of JRC to be arranged by DMR. This program review will be discussed in more detail *infra*.

109. Condition 10 of the August 31 letter required JRC to notify “all funding sources” that there must be in place within 60 days an emergency plan designed to address unexpected medical, personal, or programmatic situations which JRC deems beyond the capacity of JRC to address. The condition went on to state that the plans “must provide evidence of the funding agency’s ability to immediately provide all needed services for such clients so as to insure that the client is not substantially endangered.” Condition 10 could only be expected to produce alarm in funding agencies and panic in parents of students at JRC.

110. Commissioner Campbell testified falsely that this condition was not intended to alarm funding agencies, but was based upon prior situations where JRC had unexpectedly discharged students who then became the responsibility of the Department. When pressed by JRC counsel, the Commissioner could only identify a situation involving discharge which allegedly occurred in 1991. Moreover, the Commissioner acknowledged that other providers had unexpectedly terminated clients, and that no conditions similar to this had ever been imposed in the case of other providers.

111. This Court finds that Commissioner Campbell gave false testimony when he asserted that Condition 10 was a legitimate exercise of regulatory authority in response to JRC’s unexpected discharge of a client back in 1991. This Condition was purposely designed to alarm funding agencies and obstruct JRC’s intake of new clients. No funding agency would ever place a client in a private program for services when that provider was being compelled at the same time to develop plans for emergency placements.

112. On the last day of the trial before the Court, July 14th, 1995. Commissioner Campbell was confronted with a document (Exhibit 293) which had been previously redacted by the Department when it was first introduced in evidence. In this document (which was the September 7, 1993, workplan from the Tuesday Morning meetings discussed in more detail ~~infra~~), it was made evident that Condition 10 was, in fact, part of a plan to place JRC into receivership or to close JRC down. Even when presented with this document, Commissioner Campbell declined to retract this obviously false testimony. The Commissioner's testimony under oath concerning the purpose of this condition and whether or not it was designed to alarm funding agencies about the closure of JRC was categorically false and inconsistent with the stated purpose of the letter, as reflected in Exhibit 293.

113. On September 7, 1993, JRC again requested mediation concerning the August 31 letter. On September 10, 1993, the Court Monitor wrote to all parties requesting their participation.

114. On September 16, 1993, DMR agreed to meet "without waiver to our argument that the issues you have raised are not subject to mediation under the Settlement Agreement." DMR still had not disclosed that it was now taking the position that it was not in fact a party to the Settlement Agreement.

115. At the September 20, 1993 mediation meeting held by the Court Monitor, BRI and DMR reached an agreement whereby JRC would not have to comply with Condition 10, but could take up the plan for emergency placement of students at the regularly scheduled "Individual Service Plan" (ISP) meetings which are held on a periodic basis. This agreement was confirmed in a letter from Douglas Wilkins to JRC dated September 21, 1993. Once again the Commissioner testified inconsistently as to whether or not he had authorized this agreement. [26]

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Footnote [26] At trial Commissioner Campbell testified that he approved the agreement in advance of the time that it was reached. (Tr. June 28, p. 163, 1. 23-164, 1.5). However, in his deposition he testified that he did not remember approving the agreement. (Tr. June 28, p. 164, 1. 6-165, 1. 12).

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116. On September 24, 1993 Commissioner Campbell mailed copies of the August 6 and August 31, 1993 letters to all of BRI funding agencies(Exhibit 105) after having advised counsel for JRC of his intention to do so only one day prior. The letter of August 31, 1993 contained Condition 10, the very requirement concerning emergency placements which JRC wished to avoid. Although JRC requested mediation with the Court Monitor before the Department mailed the letters out to JRC's funding agencies, the Commissioner rejected the request. The Commissioner acted in total disregard for the pleas and concerns expressed by the

parents of the students at JRC. [27].

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Footnote [27] The court heard testimony of three parents during the course of these proceedings. The testimony of these parents 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 stark contrast to the testimony elicited from the Department.

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117. On September 24, 1993, the same day Commissioner Campbell mailed the letters of August 6 and August 31 to all of JRC's funding agencies(Exhibit 105), the Court Monitor reported to this Court that mediation under ¶B-2 of the Settlement Agreement had failed.

118. It was not customary practice to keep funding agencies advised of the certification process. Commissioner Campbell could not explain why it was important to send these letters out. Moreover, Commissioner Campbell could not offer an explanation as to why funding agencies were not advised in this mailing that Condition 10 had been modified. [28]

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Footnote [28] The funding agencies were not advised of the change in Condition 10 until a communication of October 4, 1993 (Exhibit 107) which referred to such change by attaching a letter of September 24, 1993. However, the damage had long been done.

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This Court concludes that the mailing of September 24, 1993 was deliberately made in bad faith with the intent to interfere with JRC's relationship with its funding agencies. The letters of August 6 and August 31, 1993 contained false information which the Commissioner and his staff knew was false of at the time of sending. [29]

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Footnote [29] Commissioner Campbell conceded in his testimony that on the same date that he sent out an inaccurate letter to funding agencies that failed to include the agreement reached four days earlier, he sent a separate letter to BRI and assorted counsel that accurately set forth the true status of the agreements that had been reached. (See Exhibit 106; Tr. June 28, p. 169, 1. 20 - p. 170, 1. 3).

119. The August 6 (with Dr. Jansen's letter attached) and August 31, 1993 letters were also sent to the parents of JRC's students, allegedly to keep them informed of the status of JRC's certification. However, Commissioner Campbell failed to include either of the earlier favorable certification team reports which might

alleviate some of the concerns that the parents would have upon receiving the letters. These mailings were designed to alarm the parents, and were written in an effort to interfere with JRC's relationship with the families. This Court therefore rejects Commissioner Campbell's testimony that the purpose of this communication was to keep the parents informed.

120. On September 22, 1993, Commissioner Campbell filed an unsolicited "Report to the Court" concerning the "status of Behavior Research Institute, Inc." The 28-page document purported to summarize in detail the basis for the Department's actions as of that date, as well as JRC's alleged violation of various regulations. This report sent by DMR, which was unsigned but was attached to a cover letter to this Court dated September 21, 1993 signed by General Counsel Murdock, contained blatant false statements and material omissions. The report was reviewed by Commissioner Campbell before it was submitted. This Court concludes that the report constituted a fraud upon the Court and was filed with the Court by DMR and its Counsel knowing it was false, for the express purpose of creating the false impression that the Department was exercising its regulatory duties.

121. Although the appendix filed with the report contained numerous reports of DMR concerning JRC going back as far as April 9, 1991, (including the August 6 and August 31, 1993 letters), Commissioner Campbell intentionally omitted the two critical certification reports of December 21, 1991 and July 15, 1993 which were relevant to the very issues before the Court at that time.

122. Commissioner Campbell cannot report to the Court concerning the subject matter of these two reports, yet fail to accurately describe their conclusions and recommendations. Yet, this is precisely what Commissioner Campbell did. No credible explanation was advanced by the Commissioner to explain this conduct and the false impression that is created on the Court.

123. Commissioner Campbell failed to include these reports because they would have contradicted his report to the Court. This action constitutes a serious interference with the administration of justice.

124. None of the numerous counsel associated with the case for DMR took any steps whatsoever to correct the false statements contained in the report to the Court. This Court is not referring to subtle issues of interpretation. Important material information in this report was false. It was incumbent upon all counsel in this case, including General Counsel Murdock, who provided the report to the Court, to bring the false information contained in this document to the attention of the Court.

125. This Court cannot accept that counsel was unaware of the false contents and material omissions of this document because the mistakes were so clear and obvious. The Court, therefore, also concludes that

counsel in this case, including General Counsel Murdock, made misrepresentations to the Court and knowingly perpetrated a fraud on the Court.

126. After the August 6, 1993 letter, Commissioner Campbell announced he had appointed Gunnar Dybwad to the Human Rights Committee.

127. Commissioner Campbell made this appointment knowing that Gunnar Dybwad had a long-standing philosophical opposition to all aversive procedures and had been a long-standing foe of Dr. Matthew Israel, the Executive Director of JRC, and the JRC program.

128. While this Court recognizes the value of members of the Human Rights Committee with differing positions, the appointment of Gunnar Dybwad was calculated, together with other actions, to disrupt the operations of JRC.

129. In response to the appointment JRC, on October 8, 1993, requested mediation and the Department refused.

130. On September 24, 1993, Commissioner Campbell sent JRC another certification letter addressed to Dr. Israel, indicating that certification would be conditionally granted until December 15, 1993. (Exhibit 106).

131. In this letter, copies of which were sent to funding agencies, Commissioner Campbell announced that there were fourteen abuse investigations arising from complaints by former JRC staff, present JRC clients and/or their attorneys, and information presented by JRC to DPPC(The Disabled Persons Protection Committee). The letter characterized them as “quite serious on their face, and included claims that you personally(Dr. Israel) were involved in, or responsible for, abuse against specific JRC clients.” (Exhibit 106 at 1).

132. It is the normal practice of Commissioner Campbell and DMR ~~not~~ to reveal allegations of abuse to third parties without first having had them substantiated. This communication constituted a startling departure from the Department’s acknowledged practice with respect to abuse investigations.

133. While Commissioner Campbell conceded that the allegations of abuse against Dr. Israel personally

were investigated and not substantiated, the Commissioner never sent out a letter advising funding agencies of Dr. Israel's vindication but simply let the allegations stand.

134. In the letter Commissioner Campbell required that JRC provide him with reports of any incidents which had occurred since 1989 ~~"except that any reports of deaths shall be provided by October 5, 1993."~~ (Emphasis not supplied). This was misleading and likely to produce the damaging impression that deaths had been occurring at JRC and that JRC had not been reporting them.

135. The September 24, 1993 letter also announced that an "independent" consulting firm- Rivendell - would be arriving at JRC to conduct a "independent" program review. As discussed ~~infra~~, this review was in no way independent.

136. In August, 1993, Dr. Mary Cerreto, the Assistant Commissioner for Quality Assurance, Chief Clinician at DMR and a member of the Tuesday Morning Group, had recommended to the Commissioner that an independent program evaluation be done of JRC allegedly because prior evaluations which included the certification reports of 1991 and 1993 were not sufficient.

137. Dr. Cerreto's testimony in this regard was not truthful since she acknowledged that she had not even seen the 1993 certification report until sometime in April of 1995.

138. Dr. Cerreto was in charge of selecting the new "independent" evaluation team. On August 30, 1993, she sent out a "request for a proposal" ("RFP"), soliciting bids for an independent program review on JRC.

139. The response to the RFP was due on September 9, 1993 which was only ten days after the RFP was issued and included a holiday weekend.

140. Under cross-examination, Dr. Cerreto testified that she knew of no other instance in which an RFP with a ten-day turnaround had been sent out by DMR, nor could she provide an explanation for the necessity of this short ten-day turnaround. Moreover, despite the fact that the policy in the Commonwealth is to encourage the widest possible response to an RFP, Dr. Cerreto sent the RFP to only a select group of recipients. Dr. Cerreto's RFP process was inconsistent with Commonwealth policy.

141. Although Dr. Cerreto received letters regarding the short turnaround time, complaining that there was insufficient time to respond, she did nothing to expand the deadline.

142. Given the short time to respond to the RFP, only two bids were received, Rivendell and Fidura & Associates. Fidura & Associates' bid was about 40% less than Rivendell(\$19,000 vs \$33,000), but Fidura & Associates restricted the use of any evaluation it did to the certification process. This restriction was significant because DMR was looking for a bidder who had "experience with the strigencies of Court reporting and testimony."

143. When the two bids were received, Dr. Cerreto distributed a memorandum to various Department employees indicating that Rivendell was her preferred choice, but requested input from the others by September 27, 1993. [30]

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Footnote [30] Dr. Cerreto provided inconsistent sworn testimony with respect to the responses to this Memorandum. At her deposition, Dr. Cerreto testified that she only received two responses both of which were unanimous in favor of Rivendell. Once again, that testimony contradicts her trial testimony. The documentary evidence is clear that she received three responses including one from Debra Grywacz who did not vote in favor of Rivendell. The responses were not, as she testified at deposition, unanimous. (Tr., July 12, pp. 14,15).

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144. In response to a request from JRC dated October 8, 1993, Margaret Chow-Menzer, Deputy General Counsel of DMR, provided JRC with a document, dated October 14, 1993 (Exhibit 307) that she falsely represented to be the Rivendell response to the RFP. [31]

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Footnote [31] Moreover, that document was attached to a fax from Angela Amado of Rivendell to Dr. Cerreto, stating, contrary to Dr. Cerreto's sworn testimony, that the Rivendell response had in fact been revised at Dr. Cerreto's request. (See Exhibit 307).

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145. Although Dr. Cerreto testified that she never requested that Rivendell alter or modify its response to the RFP, the fax from Angela Amado of Rivendell revealed that the response had in fact been revised at Dr. Cerreto's request. This fully shows that the process was far from independent since DMR was involved in the selection process.

146. Indeed, the actual response by Rivendell to the RFP, (Exhibit 310), was never disclosed to JRC until the discovery process. DMR attempted to conceal the actual response because the actual response contains several provisions which were later dropped, when Dr. Cerreto asked Angela Amado to revise the document. Among those provisions were: the cost of the evaluation, the fact that Hank Bersani, who was militantly opposed to the use of aversives, was one of the proposed evaluators and, most significantly, on the first full page of that document, a statement that says “The assembly of a sufficiently qualified team at such short notice is close to impossible.”

147. Despite the fact that Rivendell complained, like others, that they could not put together a sufficiently qualified team on such a short notice, and despite the fact that their bid was one and a half times higher than Fidura & Associates, Dr. Cerreto awarded Rivendell the contract.

148. The co-leader of the Rivendell team was a psychologist by the name of Richard S. Amado. Dr. Cerreto knew Dr. Amado prior to receiving the RFP response from Rivendell.

149. In July, 1993, two months before the RFP, Dr. Cerreto had requested and received a document which was a “Call to Action by Amnesty International” from a woman named Nancy Weiss. (See Exhibit 72). The “Call to Action” pertained to the use of aversive procedures with individuals with developmental disabilities. The attachments to the document were directed at JRC. They made serious and outrageous claims of mistreatment by JRC.

150. Dr. Cerreto knew when she received the “Call to Action”, that the document equated the use of aversives with political torture. Dr. Cerreto also knew in July of 1993 that Richard Amado was listed as the first individual signatory to that document. The following day during her testimony, Dr. Cerreto totally contradicted her earlier testimony and denied being aware in July, 1993 that Dr. Amado was a signatory to the document.

151. A team in which the co-leader has signed a document, such as the “Call to Action”, which equates the use of aversives to political torture, is incapable of doing a fair, impartial and unbiased review of a program that uses those very techniques. Dr. Cerreto’s testimony that she was still convinced, despite knowing that Richard Amado had signed the “Call to Action”, that the Rivendell review could be fair and impartial is simply not credible.[32]

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Footnote [32] The Commissioner was also aware that Dr. Amado was a signatory to the Call to Action

document.

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152. The Court finds that Dr. Cerreto's statement that she wanted the program review to be independent is also false.

153. General Counsel Kim Murdock wrote a letter on October 14, 1993, to Dr. Daignault requesting the Court Monitor's "approval of the independent program review required as a condition to JRC's interim certification."

154. Dr. Daignault advised Ms. Murdock that the Settlement Agreement did not provide him with the authority to approve actions, but rather to mediate and arbitrate disputes.

155. On the same day that Dr. Daignault faxed his letter to General Counsel Murdock, there was a notice from DMR that Dr. Daignault's deposition was to be taken. On October 19, 1993, the Department wrote to Dr. Daignault, requesting that he "reconsider" his role as Monitor "at least as a matter of conscience."

156. Dr. Daignault testified that this letter was "further evidence to me that the Department was embarking upon a campaign to impugn me and I felt badly that they, after years of collegiality, would stoop to this level."

157. The Department's attack upon Dr. Daignault was completely without foundation and was based solely upon an unwarranted attempt to remove him as "Monitor". It was at this point (October of 1993), that Dr. Daignault requested reassignment of his responsibility to conduct mediation/arbitration under the terms of the Settlement Agreement. Dr. Daignault concluded that withdrawing from the mediation and arbitration duties would "remove a distraction that the Department apparently was going to utilize." Dr. Daignault also requested that counsel be appointed to represent him. This Court appointed counsel for the Monitor, and appointed the Honorable George Hurd, as the new Mediator in this matter.

158. JRC counsel wrote to DMR in October and November of 1993 requesting copies of resumes of the Rivendell Team. JRC also requested mediation in November of 1993 but DMR failed to respond. On November 12, 1993, Attorney Murdock wrote back to counsel for JRC indicating that DMR had no copies of the resumes of the Rivendell team, and requested that such information be provided by Rivendell. (Exhibit

122). This Court does not understand how Attorney Murdock could have reasonably asserted that the award of that contract was made without receiving the ~~curriculum vitae~~ of the professionals involved.

159. By December 9, 1993, JRC had accumulated substantial evidence to demonstrate that the Rivendell team was anything but independent and forwarded that information to DMR by filing a Motion with this Court.

160. On December 10, 1993, General Counsel Kim Murdock wrote a letter to JRC indicating that she was “appalled” at the materials contained in the JRC motion that had been filed the day before (Exhibit 127). The Department then purported to undertake a review to determine whether the Rivendell team was sufficiently independent and free from bias to conduct the program review.

161. Although DMR’s General Counsel initially stated in the letter of December 9, 1993, that she was appalled by the background information uncovered by JRC regarding Rivendell’s bias, DMR abruptly changed its position in March of 1994 and instructed JRC by letter dated March 2, 1994, that JRC’s objections to Rivendell were “irrelevant” and that Rivendell would conduct the so-called “independent” review of JRC. (Exhibit 147)

162. Dr. Cerreto testified, under oath, in her direct examination by Assistant Attorney General Lucy Wall, that she was the person from the Department who conducted the review of the Rivendell “bias” issue. That testimony was totally contradicted the next day on cross-examination.[33]

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Footnote [33] Dr. Cerreto was referred to her deposition wherein she testified that she had nothing to do with the review of the Rivendell “bias” issue, since that issue was handled by the Commissioner’s Special Assistant Jean Tuller. When confronted with the inconsistency, Dr. Cerreto then stated she could not recall her testimony from the previous day.

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163. The selection of Rivendell was the antithesis of a fair, unbiased and independent review. DMR’s selection of Rivendell was purposeful and is an example of bad faith. Indeed, Rivendell requested indemnification from the Commonwealth for their evaluation of JRC. (See Exhibit 310.)

164. Dr. Cerreto’s earlier testimony that there was no urgency in the timing for the response to the RFP

was also patently false.

165. Dr. Cerreto expected the Rivendell report to be completed by December 7. That date coincides with the so-called “JRC D-Day” which has been referred to in Exhibit 220.

166. It was DMR’s plan to get a biased review of JRC in time for the December 15 deadline, which is the date DMR planned to de-certify JRC. The review would be used to justify DMR’s decision which is precisely what DMR fully expected, even before the group was selected, which is why there was a need to choose a group that had experience testifying in Court.

167. It was Dr. Cerreto who was the source of working group notes which questioned what JRC would have to do “not to be certified.” The desire not to certify JRC was consistent with the selection of the biased review team and consistent with DMR’s overall plan to put JRC out of business.

168. Dr. Cerreto repeatedly and without hesitation lied to this Court.

169. In the late spring or early fall of 1993, Commissioner Campbell began to hold meetings which became known as the “Tuesday Morning Meetings” which were typically held at 8:00 a.m. on Tuesday mornings. The Commissioner had never held meetings such as these with respect to any other provider. The existence of these meetings did not become known until the eve of trial, as part of the Discovery Process.

170. Commissioner Campbell testified in his deposition and at trial that these meetings dealt “strictly” with the issue of certification, and that there was no other purpose to the meetings except certification.[34]

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Footnote [34] The Commissioner’s testimony was echoed by Dr. Cerreto who testified in her deposition almost identically that the purpose of the Tuesday morning group was “strictly to determine...whether BRI’s use of Level III aversives complied with the Departmental regulations.”

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There was no evidence to suggest that Commissioner Campbell attempted to invoke the attorney-client privilege with respect to the discussion of these meetings at his deposition.

171. There were a number of individuals who attended these Tuesday morning meetings. There was a “large group” and a “small group.”[35]

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Footnote [35] The “large group” consisted of Commissioner Campbell, Deputy Commissioner Misilo, Dr. Mary Cerreto, Jean Tuller, Michael Kendrick, General Counsel Kim Murdock, Richard Cohen (Director of Investigations), Gerry Ryan (Director of Public Relations), and Rick O’Meara. There were other DMR officials who attended some, but not all of the meetings, such as Area Director, Randall Webster and Attorney David Ferleger. The “small group” consisted of Commissioner Campbell, Deputy Commissioner Misilo, Dr. Cerreto, General Counsel Kim Murdock, Jean Tuller, and Director of Investigations Richard Cohen.

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172. When the exhibits relating to the Tuesday Morning Meetings were first presented to this Court, there were numerous “redactions” which had been undertaken by the Department with respect to particular topics discussed at the meetings. In response to JRC’s request, on June 28, 1995, the Court ordered the Department to produce unredacted documents. Although Assistant Attorney General Yogman represented that the unredacted documents would be produced the following day, she failed to produce them on that day. On July 7, 1995, the Department produced a number of additional documents which revealed certain of the “redactions” which had appeared in the original documents. (Exhibit 321). The Department was then ordered to produce fully-unredacted documents, which the Department did on July 11, 1995. (Exhibits 293 to 304). Even on this date, however, the Department had not fully complied with the Court’s order, and four subsequent unredacted documents were produced on July 12, 1995. (Exhibit 322).

173. The Department failed to promptly follow the orders of this Court to produce these documents. Moreover, much of the information for which the attorney-client privilege was originally invoked in support of these “redactions” was done so without any basis in fact or in law. Clean copies of the documents indicate invocation of the attorney-client privilege to hide information akin to a smoking gun.

174. Despite Commissioner Campbell’s continued assertion that these meetings related strictly to certification, Attorney Richard Cohen, the DMR Director of Investigations, was a part of the “large group” and the “small group.” The Division of Investigations is supposed to be separate from the Operation Division headed by the Commissioner.

175. Commissioner Campbell testified that Mr. Cohen’s presence at these meetings was justified because Mr. Cohen was merely there to inform Operations as to the “status of investigations.” This Court finds the Commissioner’s testimony concerning the reason for the presence of Attorney Cohen at these weekly meetings was false.

176. This Court concludes that the Commissioner of the Department of Mental Retardation, Philip Campbell, testified falsely under oath when he stated at his deposition and at trial that Tuesday Morning meetings related exclusively to the issue of certification. When confronted with the documents concerning these meetings, Commissioner Campbell was compelled to admit on numerous instances that there were items discussed at those meetings which had absolutely nothing to do with certification.

177. Much of the additional evidence concerning the Tuesday morning meetings disclosed regulatory activity of the Department which was highly questionable and inconsistent with the Department's representations to the parents, third parties and court officials. Clearly, Commissioner Campbell was attempting to conceal from this Court that these activities took place, and his counsel did nothing to correct testimony that was false.[36]

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Footnote [36] Assistant Attorney General Judith Yogman, who had agreed prior to trial to Exhibits demonstrating unequivocally that the meetings were not confined to certification, did nothing to correct the Commissioner's testimony at his deposition or during trial on June 28, 1995, when the Commissioner gave his false testimony.

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This court must therefore conclude that the Commissioner's false statements were undertaken knowingly and willfully.

178. From the start of these meetings, it was apparent that there were many topics that had nothing to do with the issue of certification.[37]

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Footnote [37] Again, it must be emphasized that as of September 7, 1993 (the date of the first agenda for one of these meetings), the only issue of significance before the Department was JRC's certification status. JRC had just finished responding to the Commissioner's August 6 Letter by providing a detailed letter to General Counsel Murdock on August 27, 1993 accompanied by three cubic feet of information.

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179. One of the first topics for discussion at the September 7, 1993 Tuesday morning meeting which had nothing to do with the issue of certification, was the Department's attack on the Court Monitor.[38]

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Footnote [38] The version of this exhibit (Exhibit 190) was improperly redacted by DMR's counsel to delete damaging information concerning the Department's plans with respect to Dr. Daignault, purportedly under the "attorney-client privilege." Yet, the actual document, produced on July 11th, demonstrated that the privilege was improperly invoked. (Exhibit 293).

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Dr. Cerreto suggested looking at the psychology code of ethics and filing a complaint with the APA Ethics Board, regarding Dr. Daignault. Despite Dr. Cerreto's testimony to the contrary, she did follow-up by obtaining "1987 examples" from the psychology code of ethics. There is also a September 13, 1993 document which reveals that Dr. Cerreto advised not doing anything with respect to the APA Ethics Board "for awhile." In light of these documents, this Court concludes that Dr. Cerreto testified falsely under oath when she asserted that she did nothing to follow-up on the agenda item of September 7, 1993.

180. Dr. Cerreto was also assigned the issue of determining whether JRC's property was leased or owned. She undertook this responsibility even though it had nothing to with the issue of certification or her role as the clinician on the team. Even Commissioner Campbell testified that this issue had no relationship to the issue of certification.

181. Attorney David Ferleger was instructed at the Tuesday morning meetings to run "title searches" on all JRC's property. Commissioner Campbell admitted that the purpose of these title searches was to determine whether or not there were "undisclosed related-party transactions" with respect to JRC.[39]

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Footnote [39] Related-party transactions are transactions between parties having an affiliation with one another. Under state law, such relationships must be disclosed when filing applications for rates of reimbursement with public agencies, see 808 CMR 1.04(5).

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182. The title searches determined that there were no related party transactions. Commissioner Campbell admitted he had absolutely no basis to believe that there were undisclosed related-party transactions involving JRC, yet he commissioned the title searches on all JRC property.

183. Commissioner Campbell also conceded that the issue of related party transactions is the responsibility of the Division of Purchased Services and not the Department of Mental Retardation.

184. Commissioner Campbell was unable to provide an explanation to this Court as to why he departed from his standard practice to undertake the title searches for JRC. The inability of the Commissioner to offer any justification for conducting title searches, which were paid for by public funds, demonstrated bad faith and constitutes abuse of governmental power.[40]

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Footnote [40] As set forth above, the Commissioner testified that the issue of title searches was discussed during the Tuesday Morning meetings which the Commissioner previously characterized as relating strictly to certification. On the afternoon of July 5, 1995, the Commissioner made admissions that were more than sufficient to establish that he had knowingly given false testimony in this case. Specifically, the Commissioner admitted that he was aware before he testified in the case that he commissioned title searches on JRC property and that this issue did not relate to certification. He indicated that he had not forgotten that testimony and that he remembered before his direct testimony that he had commissioned the title searches. (Tr. July 5, p. 152, l. 20 to p. 153, l. 13.)

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185. Commissioner Campbell was assigned certain responsibilities from the Tuesday morning meetings (which he also had to concede did not relate to the issue of certification.) One such task was the Commissioner's responsibility to "confirm the fiscal status" of JRC and to "determine reasons for DMH rate being higher than DMR." There was no reason for Commissioner Campbell to question JRC's "fiscal status" at this time, and there was no reason for him to become involved in an inquiry to determine why the DMH rate was higher than DMR's.

186. This Court concludes that a plan was developed at the September 7, 1993 meeting which was implemented over the next year and a half to disrupt the financial operations of JRC. There were many parts of this plan, including interfering with JRC's fiscal condition, which are discussed *infra*. Generally, a plan was formulated to disrupt the operations of JRC by every conceivable means - to allege that clients were being abused; to interfere with financial operations; to disrupt JRC's relationship with funding agencies, as well as parents; and other activities which have absolutely no bearing on the legitimate exercise of regulatory authority. The plan also included requiring JRC to expend extraordinary funds for legal services in this litigation and in the related guardianship cases. DMR attorneys suddenly became very active in these proceedings. For example, motions were filed in JRC Guardianships challenging treatment plan reviews by a Master and motions were filed in said Guardianships challenging Attorney Bettina Briggs' role as GAL.

187. The September 7, 1993 agenda indicates that it was the task of Commissioner Campbell's Special Assistant, Jean Tuller, to obtain "contacts" with states that provide funding to JRC. (Exhibit 293). As discussed in other parts of this opinion, the Department then undertook a concerted effort to spread knowingly false information to JRC's funding agencies in an effort to prevent new clients from being referred, as well as disrupting current placements.

188. Another significant item from the September 7, 1993 meeting agenda was a task assigned to General Counsel Kim Murdock requiring that the Attorney General's office prepare a "receivership petition in case of emergency." General Counsel Murdock was to include in a letter to JRC (which this Court concludes to be the August 31st letter) stating that "DMR would need 60 days advance notice before JRC closes." [41]

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Footnote [41] Once again, DMR counsel redacted this information from the original documents produced to JRC and redacted versions were again produced on July 7th, contrary to the Court's Order. It took until July 11th for the unredacted versions to be produced.

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(Exhibits 293 and 294). This was a plain reference to Condition 10 of the August 31st letter which required 60 days notice to JRC funding agencies of emergency plans. When, on July 11, 1993, Exhibit 293 was finally produced in an unredacted form (almost two weeks after this Court's order of June 28, 1993), it indicated that the Tuesday Morning Group was targeting the closure of JRC as early as September 7, 1993.

189. Commissioner Campbell testified in this proceeding that the group discussed the receivership issue because he had been informed by General Counsel Kim Murdock that JRC, during a 1985 controversy with the Office for Children had precipitously withdrawn all treatment from students and that he was concerned that JRC would do this again placing the students in an emergency situation.

190. This testimony was patently false and constituted an absurd attempt to explain this entry in the September 7, 1993 agenda item. [42]

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Footnote [42] Commissioner Campbell previously testified in Court on June 29, 1995, that in September of 1993 he wanted to minimize any anxiety that the families might have with respect to an abrupt termination of JRC. Commissioner Campbell testified that he was aware that in 1985 the Office for Children abruptly terminated service for some of the students at JRC. Commissioner Campbell sent out a letter on September 3, 1993, to assure the parents that their services would not be terminated at JRC.

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In the 1985 licensing dispute, treatment had been interrupted for clients of JRC, because of orders of the Director of the Office For Children. (See Preliminary Injunction Opinion of Judge Ernest Rotenberg of June 4, 1986, at p. 16, ¶ 46). Commissioner Campbell's General Counsel, Kim Murdock, Esquire, (who allegedly provided this information) served as counsel for OFC during that litigation. Again, this Court concludes that the Commissioner purposefully misstated the facts.

191. At the same time Commissioner Campbell and his Tuesday Morning group were considering the closure of JRC and the imposition of a receivership, he and his attorneys were attempting to assure court officials and parents that this was not their true intent. (See Exhibit 324 letter from Murdock to Dr. Daignault and GAL 9/2/93.) Approximately two weeks after the September 13th meeting Commissioner Campbell addressed parents of JRC students at Brandeis University in Waltham, Massachusetts, denying plans to close JRC. A document summarizing the Commissioner's remarks was introduced as Exhibit 109.

192. The documents which are in existence for meetings conducted subsequent to September 7 and September 13 reveal the utter and complete falsity of Commissioner Campbell's testimony that the meetings only related to certification. These items include: documenting former BRI residents' experiences after discharge from BRI, investigating whether BRI was pursuing FDA approval for the GED device, researching former BRI staff and a plan to distribute profiles on seven Massachusetts citizens who had transferred out of BRI and which DMR intended to release to the press through its Public Relations Director.

193. The notes from the meeting of October 19, 1993 include the notation "~~December 15-BRI D-Day~~" and (underlined in original) "what would BRI have to do ~~not~~ be certified: two areas a ~~capacity~~ to obey laws and ~~efficacy~~ of treatment." Commissioner Campbell and Dr. Cerreto failed in their efforts to justify and adequately explain these notes. Clearly, as of October 19, 1993, the Department was expecting that the Rivendell team would be coming in November of 1994 and that the Rivendell report would be completed by December 7, 1993. Moreover, JRC's certification would expire on December 15th. Commissioner Campbell attempted to testify that "D-Day" signified "a decision day." This Court finds that if Commissioner Campbell was lawfully exercising his regulatory authority and undertaking a fair and impartial decision on JRC's certification, it would be improper to discuss what JRC would have to do not to be certified. There is no justification for this matter as a topic of discussion, and it demonstrates Commissioner Campbell's bad faith and predetermination of the certification issue.

194. At the meeting of October 19, 1993, there was an agenda item[43] on the issue of how Rhode Island was able to "turn over its clients to the Groden Center."

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Footnote [43] Again, this item had nothing to do with certification.

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This issue related to the formulation of a strategy to remove DMR clients from JRC. Commissioner Campbell testified that a number of years ago the state Rhode Island had stopped sending clients to JRC and instead sent them to the Groden Center.

195. The Connie Chung Show was also a topic of discussion at the Tuesday morning meetings.[44]

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Footnote [44] Commissioner Campbell was forced to concede that this subject had nothing to do with the issue of certification

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Minutes from the October 18, 1993 meeting reveal that DMR was planning to mail a communication to parents “prior to the Chung Show” as well as a second letter “after Chung Show” (Exhibit 196, p.3). At the meeting of January 25, 1994, DMR staff were explicitly directed to draft letters “in anticipation” of the Chung show. (Exhibit 208). The reference to the Chung show is repeated in other work plan agendas. (Exhibit 197 and 198).

196. Since Commissioner Campbell had testified earlier in the day in Court that he never did anything at the meetings in reference to the Connie Chung Show, he was specifically asked whether he would like to correct his now inaccurate testimony. He declined.

197. Several work plan agendas of the November 30, December 7 and December 14, 1993 meetings indicate an attempt by DMR to interfere with JRC’s rate of reimbursement, which would in turn damage the fiscal health of JRC. JRC receives a rate of reimbursement which is calculated by the Division of Purchased Services (“DPS”).

198. At the Tuesday morning meeting of November 16, 1993, the question of whether Rhode Island could set a day rate while Massachusetts sets a residential rate was raised. Underneath that entry is a further agenda item which states as follows: “Pre-meeting needed with DPS and DOE” (Exhibit 199) which concerned an upcoming “pricing” meeting which was scheduled to take place between the DPS and JRC. The Department of Education (“DOE”) was also to be in attendance at that pricing committee meeting. By law, such meetings are public. (Exhibit 292). A pre-meeting would be unlawful.

199. Commissioner Campbell testified that the established practice is that the issues would be discussed in an open meeting with the provider present.

200. The agenda item updated on December 14, 1993, reflects the intention of the committee to initiate a “challenge process for rate review given that MA has no one under 22 at JRC.” (Exhibit 202). As explained by Commissioner Campbell, the Department of Mental Retardation was suddenly taking the position that because there were no children from Massachusetts under the age of 22 that JRC’s rate should not be set by

DPS but should be negotiated between DMR and JRC. This result would give DMR direct financial control over JRC. DMR was unsuccessful in persuading DPS to change its regulatory stance of JRC.

201. The meeting of the "DPS pricing committee" occurred on December 14, 1993. In attendance at that meeting were officials from DPS, DOE, and JRC. DMR officials participated in the pricing committee meeting and took the position that JRC's legal costs which were being incurred against the Commonwealth were "non-reimbursable" because JRC was "engaged in litigation against the Commonwealth..." (See Exhibit 262, p. 4).[45]

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Footnote [45] Evidence presented later in the trial indicate that these 1993 efforts by DMR may be bearing fruit now. DPS is currently questioning JRC's rate and the issue of legal fees being "reimbursable" for litigation against the Commonwealth.

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This action constituted nothing less than a deliberate attempt by DMR (with the full knowledge of the Commissioner) to interfere with JRC's prosecution of this case.

202. Commissioner Campbell's attempts to cut off payments for JRC's ability to retain counsel, were at direct odds with his simultaneous efforts to increase compensation for his own counsel, David Ferleger. Within one month after his efforts to stymie JRC's ability to retain counsel in this action, he filed requests (which were granted) with the Executive Office for Administration and Finance, increasing Attorney Ferleger's contract from \$73,000 in fiscal year 1994 to \$118,000. (Exhibit 261). Commissioner Campbell also arranged for Attorney Ferleger to be appointed as special assistant attorney general.

203. Commissioner Campbell conceded that the DPS rate review of JRC (as referenced in Exhibit 202) had "nothing whatsoever" to do with certification.

204. The work plan updates of December 14, 1993 and January 4, 1994, also reveal substantial departures from the Department's practice with respect to investigations.[46]

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Footnote[46] With respect to the evidence contained in the December 14, 1993 update, Commissioner Campbell started his testimony by acknowledging that it would have been a violation of practice for the Tuesday Morning Group to have discussed the results of an investigation before the investigation had been completed. He then changed his testimony to state that it "may have been" a violation of ordinary practice concerning the confidentiality of investigations before they were completed.

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Although the results of the E.P. investigation [47] were not released until January 13, 1994, the December 14, 1993 update reveals that Richard Cohen, the Director of Investigations (who was allegedly at the meetings just to provide "status updates"), informed the group that the medical care issues in the E.P. investigation "are significant." (Exhibit 202).

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Footnote[47]E.P. refers to a student at JRC.

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When asked to justify why he released information concerning the conclusions of his investigation in advance, Investigator Cohen stated that he needed to do so to protect the health and welfare of the client. Yet, he could identify no action which was taken in December 1993 to address the unmet medical needs of this client.

205. Commissioner Campbell agreed that he had given incorrect testimony when he testified on June 28th that the only thing that Mr. Cohen discussed in the certification meetings was the status of investigations. Richard Cohen was an active member of the Tuesday AM small group. This Court finds that he was a key member of the DMR Team, assembled solely for the purpose of putting JRC out of business. It is totally incredible that he merely reported on the status of investigations.

206. The updated agenda of January 4, 1994, references as an agenda item that in the week ending 1/14/94, "Phil" (meaning the Commissioner) would brief a District of Columbia official, named Vincent Gray on the results of the E.P. investigation, even though the results of the E.P. investigation were still nine days away. (Exhibit 205). Commissioner Campbell acknowledged that the Tuesday Morning Group had these discussions concerning E.P. prior to the time that the E.P. investigation had been completed. Commissioner Campbell acknowledged that this would have been a violation of DMR policy with respect to investigations. This Court therefore finds that, with respect to JRC, the DMR investigations unit breached its own investigation protocol by informing senior administration officials of the results of the investigation ten days before the report was released.

207. The Tuesday morning work plans also included other issues which clearly are not related to certification of JRC. Reference to contacts with out-of-state funding agencies infer to this Court that DMR was attempting to advocate to out-of-state funding agencies that their clients be removed from the JRC program.[48]

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Footnote[48]Commissioner Campbell attempted to testify that his agency never advocated to out-of-state funding agencies that any particular client be removed from JRC prior to JRC's decertification.

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It is plain that such advocacy did occur through the series of certification letters which contain numerous false statements which were calculated to alarm funding agencies. The work plan updates of January 24 and January 25, 1994 (Exhibit 207 and 208) further demonstrate that DMR was fully engaged in such advocacy. The January 24, 1994 update assigns to Commissioner Campbell and his Special Assistant, Jean Tuller, the issue of whether or not the District of Columbia had "placement plans" for E.P. The January 25, 1994 update contains the same language and also references various "contacts" in the District of Columbia, including a "Dr. Hutchinson and Norma Hatot." In his testimony, Commissioner Campbell argued that even though the task of discussing "placement plans" for E.P. was assigned to him and Ms. Tuller, he does not remember discussing or advocating such plans. This Court finds the testimony of Commissioner Campbell on this issue not credible in light of Exhibits 207 and 208.

208. On March 1, 1994, Richard Cohen, the Director of Investigations was assigned the task of investigating whether the Commonwealth's Forensic Pathologist who performed an autopsy on a particular student of JRC, was related to the GAL in the case. This assignment was given to Mr. Cohen even though Commissioner Campbell did not have any basis to believe that the GAL was biased in any way. Once again this assignment had nothing to do with the issue of certification. Commissioner Campbell failed to give any coherent explanation as to why this information was useful or why the Director of Investigations needed to be assigned to this task. It was ultimately determined that there was no relationship.[49]

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Footnote[49] This Court takes judicial notice of the various motions which have been filed by counsel for the Department of Mental Retardation in pending guardianship cases to remove Attorney Briggs as the GAL in these cases. The Department takes the hypocritical position that Attorney Briggs has not been doing her job, even though the Department has admitted in *ex parte* communications to this Court that it was not involved in the substituted judgment proceedings to any degree prior to July of 1993. (See Exhibit 79). The efforts to investigate the GAL constituted an abuse of governmental power in an effort to intimidate court officials and remove individuals from this case that the Department regarded as obstructionist or as road blocks to the Commissioner's aim of closing the JRC program.

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209. Up until January of 1994, notes were taken during the Tuesday morning meetings, some of which were maintained by a DMR employee named Deb Grywacz. However, there is a memorandum to Ms. Grywacz in December of 1993 confirming that she would no longer be attending these meetings. (Exhibit 322). Agendas for the Tuesday Morning meetings and work plans were kept through the spring of 1994, when Commissioner Campbell asserted originally that the "large group" and "small group" meetings stopped. However, the Commissioner was later confronted with excerpts from his own diary scheduling a JRC "large group" meeting as late as December of 1994. (See Exhibit 325). Commissioner Campbell testified that he does not recall any other notes being taken at these later meetings. Commissioner Campbell also testified that at some point there was concern about the "discoverability" of notes being taken at these meetings. This Court

concludes that these meetings continued to take place throughout this litigation and the Department has either failed to produce notes which were taken or issued instructions that not further notes were to be taken at these meetings, in an effort to prevent the facts of what was occurring at these meetings from being revealed.

210. On December 15, 1993, Commissioner Campbell falsely accused JRC of not reporting a death. The Commissioner sent a copy of this letter to all of JRC's funding agencies, and Parents of JRC students even though it contained false information which was shown to be false by records which were in the possession of the Department at that time.

211. The first page of the letter of December 15, 1993, stated as follows: "Your failure to report a death in 1991 made it impossible for me to fulfill my responsibilities under this regulation...JRC has in the past failed to report deaths and serious injuries as required by law." (Exhibit 128).

212. Contrary to this assertion, JRC had not failed to report "deaths." Indeed, there was no evidence of any deaths of students at JRC since Commissioner Campbell assumed his duties of July of 1991. The Commissioner admitted in his testimony that his reference in the letter of December 15th to JRC's failure to report "deaths " was "an error," and he attempted to contend that the reference to "deaths" was typographical error. This Court finds that the error was not typographical but was intentional. In fact, no student had died at JRC in 1991. The only death remotely involved was the death of a student L.C. in 1990 which was reported by JRC to DMR.[50]

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Footnote[50] L.C., a JRC student, died on December 19, 1990 at the Sturdy Hospital in Attleboro, Massachusetts from natural causes. (Exhibit 266). The death was investigated at the time by the GAL (who submitted a report to this Court), as well as by the Office of the Chief Medical Examiner and police department. No wrongdoing by JRC was found. (Exhibit 264).

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213. During his testimony on June 29th, Commissioner Campbell acknowledged that his General Counsel's office had received some report of the death. He nevertheless testified that his office did not receive information that was "discernible", and that it was impossible for his agency to have investigated the death.

214. On June 30th, a document was faxed to Court which was the actual "Client Death Report Form" for L.C.[51]

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Footnote[51] During Attorney Yogman's subsequent cross-examination of Commissioner Campbell, the

document was brought to the attention of the Court by counsel for JRC and was marked as Exhibit No. 266.

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On July 5, Commissioner Campbell admitted contrary to his testimony on June 29th, that the document did contain sufficient information to permit an investigation.

215. Counsel for the Department informed this Court that the death report had been produced during the discovery process.[52]

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Footnote[52] The existence of this document was clearly known to the Department insofar as General Counsel Murdock referred to it on page 2 of a letter of February 25, 1994 which was marked as Exhibit No. 146.

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216. Yet, on June 29, 1995, counsel for the Department of Mental Retardation permitted Commissioner Campbell to falsely testify.[53]

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Footnote[53] The death was reported to the Office of the General Counsel of the Department of Mental Retardation, within nine hours after it had occurred. (Exhibit 266). The Client Death Report clearly identified JRC as the program where the student was residing. It gave the name of a JRC staff member and it gave the name and telephone of the Attleboro police officer who was investigating the death, and listed the name of the hospital where the surgery was performed. The only error was a slight misspelling in L.C's last name.

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217. Not only did Commissioner Campbell fail to retract the allegations in his letter of December 15, 1993, But his General Counsel disseminated this false accusation to the ~~Boston Globe~~ and the ~~Boston Herald~~.

218. On February 25, 1994 Ms. Murdock mailed a letter to JRC (copied to funding agencies) which again criticized JRC for failing to report the death. (Exhibit 146).

219. Late January 1994, JRC learned of a Worcester meeting DMR had planned with a New York agency that funds students at JRC. New York is JRC's major funding source providing seventy percent of JRC's clients. At a meeting with DMR and Judge Hurd on January 31, 1994, JRC and Parent's Counsel

requested that ~~Guardian ad litem~~, Bettina Briggs, be allowed to attend the Worcester meeting. Assistant Attorney General Doug Wilkins agreed.

220. The meeting was suddenly canceled by DMR. JRC then requested in writing that DMR notify it of any future meeting or telephone conference with OMRDD. [54]

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Footnote[54] OMRDD stands for Office of Mental Retardation Developmental Disability.

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(Exhibit 281). DMR subsequently held a telephone conference with OMRDD officials. DMR did not notify JRC, the parents or the GAL of this meeting. On February 28, 1994, OMRDD wrote to the parents of all OMRDD clients at JRC advising them that OMRDD intended to offer alternative placements for their children in the State of New York. Similar communications were not sent out to parents of OMRDD clients funded in other out-of-state placements.[55]

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Footnote[55]The Department produced a stipulation concerning the testimony of Richard Wolf, Esquire, a witness whom the department attempted to call without adequate notice to JRC, and a witness who was not on the DMR list of more than 140 witnesses. This Court would not permit Mr. Wolf to testify when initially offered by DMR in response to an objection by JRC and ordered the parties to meet. The parties agreed to a stipulation as to what Mr. Wolf's testimony would have been. The department apparently submitted the testimony of Mr. Wolf in an effort to explain that it was not an action of DMR that accounted for this letter to parents and the subsequent transfer of many OMRDD students away from JRC. However, the testimony of Mr. Wolf completely contradicts that assertion. The law upon which the Department relied was not even passed by the New York Legislature as of February of 1994, and contains no requirement that New York students were to leave JRC. Rather, the testimony of Mr. Wolf establishes that no other parents of OMRDD clients were sent communications similar to the letter of February 28th, and it is clear from the stipulation that OMRDD was concerned about JRC being "decertified."

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221. This Court concludes that the meeting with New York officials was a continuation of the Commissioner's campaign of interfering with JRC's relationship with its funding agencies.

222. At Judge Hurd's request, DMR met with JRC February 9, 1994, in an attempt to work out the conditions of certification. That same day DMR issued its 19-page letter to Dr. Israel announcing the February 9, 1994 "final" certification decision.

223. At the February 9 meeting, the Department showed Dr. Israel, the Director of JRC, an outline of the conditions which required that JRC rewrite all of its behavior modification treatment plans (approximately 55) and locate two new psychiatrists and physicians to conduct independent psychiatric and medical evaluations on every JRC student (approximately 60 students) within 80 days. [56]

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Footnote[56] The two psychiatrists and physicians would have to be approved by DMR.

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224. Dr. Israel protested that it was unethical to require all students to submit to these examinations regardless of their condition or need for another evaluation, and that the cost of conducting these unnecessary medical and psychiatric evaluations would be prohibitive.

225. Dr. Israel informed DMR that it would be impossible for his staff to rewrite approximately 55 Court-approved treatment plans within 80 days and that the attempt to do so would remove key psychological staff from their duties of monitoring and supervising student treatment plans.

226. The February 9, 1994 letter was again copied and mailed to funding agencies, as DMR's "final decision on the application of JRC for certification." (Exhibit 139).

227. This February 9 letter certified JRC through August 8, 1994 but required JRC to comply with twelve more conditions by May 8, 1994. (If JRC fully complied by May 8, 1994, DMR would certify JRC for a two-year period from that date.)

228. As a result of the condition regarding the rewriting of the treatment plans, two staff psychologists at BRI spent extensive time (between June and November of 1994) doing so. During this time, Dr. Worsham, a JRC clinician, was unable to attend to his client caseload which consisted of 16 students.

229. There was no basis for the requirement that JRC conduct independent psychiatric reviews for all of its clients, whether or not these clients were receiving Level III procedures. Commissioner Campbell did not even read the reports of these psychiatrists. Not one of these evaluations recommended the discontinuation of Level III treatment procedures for JRC clients.

230. Commissioner Campbell could not identify any credible reason for the imposition of the condition regarding medical evaluations.[57]

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Footnote[57] JRC possesses a comprehensive system for medical monitoring, which includes a number of full-time nurses, as well as a number of consulting physicians.

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In fact, all JRC students were found to be in good health. The imposition of this condition was unnecessary and was designed to disrupt the operation of JRC and cause needless expense.

231. On May 9, 1994, DMR and JRC began six weeks of intensive negotiations over the conditions of certification of the February 9, 1994 letter.

232. As a result, agreements were reached and were embodied in a letter of July 5, 1994. (Exhibit 152).

233. As discussed later, DMR then promptly proceeded to violate material provisions of this agreement.

234. For example, DMR and JRC agreed to revise Condition 1 so that rewritten behavior modification plans would be submitted on a weekly basis. JRC complied with this requirement.

235. Dr. Worsham met with Dr. Mary Cerreto to develop a prototype treatment plan, which was one of the certification conditions.

236. Prior to meeting, Dr. Worsham sent Dr. Cerreto the treatment plan for W.M., one of the most difficult students at JRC. [58]

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Footnote[58] W.M.'s treatment plan had the widest range of treatment options, allowing it to be the most appropriate model.

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237. After very extensive discussions, W. M.'s treatment plan was modified to include Dr. Cerreto's comments and suggestions. She signed off by initialing each page of the treatment plan.

238. This because the model by which every other treatment plan was to be written. (Exhibit 152)

239. Dr. Cerreto never requested any major changes in the specialized food program.

240. Likewise, Dr. Cerreto did not question the use of negative reinforcement, programmed multiple applications, or behavioral rehearsal lessons as not being in compliance with DMR regulations.

241. Thereafter, Dr. Worsham mailed the rewritten treatment plans to Dr. Cerreto who did not respond further. Later, when Dr. Worsham received Commissioner Campbell's interim certification of January 20, 1995, he was shocked to find that Commissioner Campbell alleged that JRC's behavior modification plans did not comply with DMR regulations.

242. DMR and JRC had also agreed that DMR would review the implementation of the behavior modification plans for six individuals. (Exhibit 152). DMR selected these six individuals. The reviews were done and reports were produced.

243. In spite of this, Commissioner Campbell announced that Drs. Thomas Linscheid and Brian Iwata would undertake a "systems" review of the JRC program and review two additional JRC students (despite the fact that the six implementation reviews were already underway). (Exhibit 158).

244. Dr. Iwata and Dr. Linscheid's review of the JRC program was in violation of the July 5 agreement.
[59]

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Footnote [59] The agreement specifically stated that JRC complied with Condition 9, which mandated the "independent" program review which had been done by Rivendell in March of 1994. (Exhibit 152).

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Commissioner Campbell could offer no credible reason for his breach of the July 5th agreement. This is yet a further example of how JRC tried reasonably to meet the demands of DMR and how DMR made it impossible for said demands to be met.

245. JRC responded by requesting a meeting with the Mediator to discuss the situation. (Exhibit 282). The Department declined to mediate the issue concerning the violation of Condition 1. (Exhibit 160)

246. The agreement of July 5, 1994 (Exhibit 152) extended JRC's certification to December 31, 1994. By that time, the Department had alleged it had yet to complete its "review" of JRC and, accordingly, extended JRC's certification on a day-to-day basis. (Exhibit 165).

247. On January 20, 1995, Commissioner Campbell sent a letter to JRC indicating that JRC had not fully complied with certain conditions previously imposed by DMR upon JRC for certification.

248. The January 20th letter purported to extend JRC's certification, provided that six new conditions were satisfied.

249. One condition required that JRC discontinue Level III interventions for six individuals, including B.S., the subject of a recent five day treatment plan review by Judge Jones of the Probate Court. (Exhibit 166, p.9)[60]

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footnote [60] Judge Jones conducted a Treatment Plan Review, commencing on October 31, 1994 and concluding December 21, 1994, specifically approving Level III Aversive Therapy for B. S. who was one of the most difficult to treat students at JRC. DMR filed a motion for a new trial which was denied. This is currently on appeal.

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Commissioner Campbell acknowledged that there was an "obvious conflict" between his findings of January 20, 1995 regarding B.S. and Judge Jones' findings. Nonetheless Commissioner Campbell chose to continue with enforcement of his order.

250. In addition, the January 20, 1995 letter first introduced the concept of regulatory approval of

treatment plans on a "case-by-case" basis. There is nothing in Commissioner Campbell's own regulations which gives him the power to apply certification in individual cases. Rather, the regulations speak to the question of whether the program should be certified, and leave the decision on substituted judgment to the directives of this Court. (~~See, e.g.~~, 104 C.M.R. 20.15(4)(f)).[61]

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Footnote [61] Yet, Commissioner Campbell ignored regulations by making individual certification decisions, specifically excluding authorizations for JRC to use Level III interventions for six individuals, but not the other students in the program.

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251. Another condition of the January 20 letter was the Commissioner's decision to prohibit the Specialized Food Program. He made this decision after his own team of doctors had concluded that there were no adverse health effects from the program (Exhibit 75), and he failed to identify any medical evidence to support this decision.[62]

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Footnote [62] The Commissioner testified that he banned specialized food even though he did not consult any medical professional about the possible effects that such an action might have on the clients.

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252. In response to the January 20, 1995 letter, JRC requested mediation and arbitration under ¶B-2 of the Settlement Agreement. (Exhibit 169). There was no response to the request for mediation until April 7, 1995, when Ms. Chow-Menzer stated that DMR remained "open to addressing with you directly or through an alternative dispute resolution any issue JRC may have regarding the certification process." (Exhibit 182). By that time, the Commissioner had decided to decertify JRC, effective July 1, 1995, rendering the response of April 7 meaningless. (~~See~~ Exhibit 179).

253. JRC was decertified to use Level III treatment procedures on March 23, 1995, which was to become effective on July 1, 1995.

254. On March 24, 1995, this Court issued its decision granting JRC's request for preliminary injunction.[63]

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Footnote [63] Although a portion of this Court's ruling related to the Specialized Food Program was reversed

by a Single Justice, the injunction restraining DMR from proceeding with decertification was in effect. In any event, the preliminary injunction is dissolved in its entirety as of the date of this decision and replaced with a new remedial order.

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255. On April 25, 1995, this Court issued a pretrial order, requiring that discovery be completed by May 18, 1995 and ordering that the case proceed to trial June 26th.

256. Prior to the June 26 trial, DMR began negotiations with JRC for an FY96 contract. In past years, the negotiations for contracts tended to be a ministerial task, and there were no issues of substance in negotiation regarding the contract. However, the Department changed its position this year with respect to JRC. The Department has introduced into the contract negotiation matters which have been submitted to this Court for resolution.[64]

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Footnote [64] The Department has attempted to coerce JRC (by threatening to cut off funds in 1996) unless JRC accepts its determination of the "access" issues which have been raised in the Department's counterclaim. (Exhibit 313). In addition, the Department has attempted to condition payment upon JRC's acceptance of the "QUEST" principles, which is a matter in controversy in this litigation. On the last day of trial, the parties presented a stipulation to the effect that the Department did not "intend" to hold up payments to JRC if JRC did not agree to a contract concerning issues which are pending before this Court in this litigation. Nonetheless, the Department's position prior to that time was extremely unclear, and caused justifiable anxiety for JRC.

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257. A letter was sent on June 30, 1995, the fifth day of trial in this matter, after Commissioner Campbell had been subjected to vigorous examination by JRC's counsel on June 28 and June 29.

258. The letter directed JRC to "cooperate with and be responsive to" an attached memorandum from the DPS dated June 28 two days after trial began, which found JRC's legal fees to be non-reimbursable. (Exhibit 267). The letter warned JRC that in the event public funds were used for litigation purposes, they could be "subject to recoupment." (Exhibit 267).

259. The letter constituted a purposeful attempt by DMR to interfere with on-going court proceedings and disrupt JRC's ability to continue to retain its counsel. Commissioner Campbell was compelled to admit on July 5, 1995 that he had some awareness that a communication like this would be sent out. This type of

communication placed JRC in the unhappy position of continuing with this litigation and paying its counsel, knowing that any amounts paid to counsel would be considered by DMR and the state to be "non-reimbursable" and "subject to recoupment."

260. This is a deliberate interference with the orderly administration of justice and constitutes further bad faith. The fact that the bad faith and contemptuous conduct of DMR continues during the very course of this trial indicates to this Court the DMR regards itself "above the Law", not bound by contractual obligations and answerable to no one for its actions except itself.

261. DMR is the licensor for the single family group homes operated by JRC in southeastern Massachusetts for the JRC student's residences. In 1994, DMR changed its "license" for group homes to a "certification" and instituted a new survey tool to regulate and certify the homes which is termed "QUEST".

262. In November of 1994, DMR conducted a QUEST survey of JRC's group homes for purposes of determining whether or not the group homes should be certified and, therefore, approved for continued use as group homes for disabled individuals. Although the QUEST survey was conducted in November of 1994 and the report was dated December 20 1994, DMR did not give JRC the QUEST report or any information about it until March 15, 1995. DMR gave JRC group homes a "non-certification". By letter dated April 10, 1995, DMR gave JRC ninety days to substantially correct the alleged deficiencies. (Exhibit 183).

263. The reasons given in the QUEST report for JRC's non-certification are arbitrary and capricious and ignore the severe physical and mental disabilities and needs of the JRC population.[65]

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Footnote [65] For example, DMR faulted JRC staff for the affectionate and caring interaction with the students because "they were not reflective of positive adult roles." (Exhibit 64, p. 1). DMR cited JRC as deficient in the QUEST report because it did not provide its students with keys to their homes. (Exhibit 64, p. 5). Dr. Israel testified and this Court so finds that many of his clients would, due to their disabilities, probably swallow the house key if it were given to them. JRC was cited in the QUEST report as deficient for transporting the JRC students in a school bus which the report characterizes as "stigmatizing" and the report requires JRC to purchase passenger vehicles as a substitute for the school bus. (Exhibit 164 at p. 7). JRC was cited by DMR in the QUEST report as deficient because JRC does not seek out JRC's students' opinions on administrative decisions, staff hiring and staff evaluations.

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264. The QUEST report also makes extremely positive findings about the quality of the JRC group

homes and staff, which findings stand in sharp contrast to the derogatory certification letters issued by Commissioner Campbell and the decision in the QUEST Report to give the JRC group homes a non-certification.[66]

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Footnotes [66] The extremely positive findings of the QUEST team included in the December 20, 1994 QUEST Report state: "Overall staff demonstrated a caring rapport with the students they served; generally, people were supported to present a pleasant, attractive appearance; the homes in the agency were well maintained and blended in with the neighborhood; the agency supported people to communicate with staff; all individuals surveyed received general health services from JRC and the staff were knowledgeable about each individuals medical concerns."

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265. On May 23, 1995, JRC requested mediation concerning JRC's non-certification by the QUEST team. DMR never responded to this request for arbitration under ¶B-2 of the Settlement Agreement, and has never given JRC any information on the status of its group home licenses since the 90-day grace period expired on June 15, 1995.

266. DMR violated the Settlement Agreement by not certifying JRC's group homes for the reasons given in the QUEST report and by allowing JRC's 90-day grace period to lapse without any written notification as to the status of the group home licenses. In addition, DMR violated ¶ B-2 of the Settlement Agreement by not responding to JRC's request for arbitration of the QUEST issue.

267. The JRC program, which has an extremely vulnerable population, is the largest collection of difficult to treat clients in one program in the nation. The JRC students exhibit extremely self-injurious and aggressive behaviors which have generally been resistant to all forms of treatment prior to their admission to JRC. [67]

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Footnote[67] 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.

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Due to the severity of behavior problems, the average JRC student had been rejected by five placements and expelled by nine prior to coming to JRC.[68]

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Footnote[68] It is JRC's policy not to deny admission because a student has been difficult or impossible for others to deal with in prior placements. Therefore, JRC accepts many students no other provider would or could accept due to behaviors dangerous to themselves and others.

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268. As described ~~intra~~, the Department's acts of contempt and other wrongful conduct, imposed a severe and essentially constant burden on the JRC staff by having to respond to an unrelenting stream of bad faith regulatory demands and other bad faith conduct over twenty-two months. The Department's contemptuous conduct also caused a severe and almost constant drain on JRC's revenues by forcing JRC to pay almost one million dollars in attorneys fees and other expenses to defend the school from the Department's contemptuous conduct. The Department has caused even greater financial damage to JRC by reducing JRC's enrollment by attacking JRC's reputation and competency, which were directed to JRC's only source of revenue: its funding and placement agencies. With ever increasing attorneys fees and dropping revenues, JRC had no alternative but to cut staff and reduce purchases in order to maintain financial viability. These cuts along with the staffs' preoccupation responding to DMR's bad faith regulatory demands, adversely affected the quality of the most important aspect of JRC's program--the positive programming and educational components of the program. While aversive therapies are the best known and most controversial aspect of treatment, it is in fact the positive rewards that are the most pervasive and important to the students.

269. DMR caused grievous harm to the JRC students when its contemptuous and wrongful actions financially devastated the school and left JRC unable to provide the sophisticated reward and educational aspects of the program. It has been the JRC students that have suffered the most from DMR's conduct.

270. JRC has also been greatly harmed by DMR's conduct. DMR's publication of false and defamatory decisions and other correspondence has caused extensive damage to JRC's reputation as a reliable, effective and safe program for this nation's most afflicted individuals. The damage to JRC's reputation and good will with its funding and placement agencies has caused JRC to suffer a loss of revenues of such magnitude that its financial viability is in peril.

271. As previously discussed, DMR's assault on JRC's program began with the August 6, 1993, "Interim Certification" Order. (Exhibit 82). Critical staff such as clinicians, case managers, and the Director of Treatment had to put aside their usual duties of providing care and treatment to the students and spend three weeks responding to Commissioner Campbell's regulatory demands. The needless and wasteful condition that JRC respond in detail to Commissioner Campbell's August 6 Letter harmed the students and the program by consuming the staff's attention during that period of time.

272. After completing the response to the August 6 Letter, JRC researched the Rivendell group to determine the partiality and capability of this group. The JRC students and the JRC program were harmed by JRC having to divert staff resources to conduct Rivendell research rather than provide care and treatment to the students.

273. The eight-person Rivendell team occupied the JRC facilities for the week of March 20 through March 25, 1994, looking at files and observing staff and students.

274. The demands of the Rivendell team at JRC drew staff away from their normal duties in order to submit to interviews and respond to document demands made by the Rivendell team. The Rivendell team also withdrew students from classrooms and removed them from their normal daily activities in order to subject the students to interviews.

275. The Rivendell Group, as previously discussed, was not an independent and unbiased review team. The review conducted by Rivendell was unnecessary and harmed JRC and its students by creating a chaotic state at the school for a one week period, bringing treatment to a near standstill to the great harm and detriment of the JRC students and the program.

276. From August of 1993 up to the time of trial, half of Dr. Israel's time, as well as half of the time of the psychology staff, was devoted to dealing with the Department's regulatory activity.

277. Dr. Israel also spent substantial amounts of time meeting with, corresponding with, and talking to JRC's out-of-state funding and placement agencies in an effort to convince them DMR would not be able to close JRC, that students currently in the program should remain and referrals should continue to be made to the program.

278. Dr. Israel was even more preoccupied in May and June of 1994 when the Department, after months of refusing to do so, finally agreed to negotiate modifications to the conditions of the February 9th certification letter.

279. From June of 1994 through December of 1994, almost all of the attention of two of JRC's full-time clinicians, Drs. von Heyn and Worsham, who have a case load of sixteen students each, was diverted away from the students in order to respond to DMR's regulatory demands including the rewriting of fifty-two behavior modification treatment plans that had been previously approved by this Court. (Exhibit 152). During

this period of time, the students were deprived of essential services provided by the JRC clinicians and case managers. Furthermore, there was no therapeutic benefit to the students from the changes required by DMR in the treatment plan.

280. Drs. von Heyn and Worsham were also required to respond, within thirty days to the fifty-six medical and forty-two psychiatric evaluations written by the psychiatrists and physicians retained by the Department who examined all of the JRC students.

281 This Court finds that it was unnecessary, intrusive and highly unethical for the Department to have conducted medical and psychiatric evaluations on all JRC students without an analysis or even a regard to whether any of these were clinically indicated.

282. The Department had conducted only two abuse investigations in the 22-year history of JRC prior to July, 1993. DMR conducted, initiated or referred more than fifty abuse investigations, between August 6, 1993 and the time of trial. [69]

-Footnote [69] In fact, the fifty-six medical evaluations (Exhibit 284) completed by DMR on all of the JRC students and JRC's responses thereto (Exhibit 287) establish unequivocally that the JRC students as a group are healthy, well-nourished, receiving excellent care with no signs of abuse or mistreatment.

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283. It was also unnecessary and detrimental to the JRC students and the JRC program when DMR required the JRC staff to undergo training, including behavior modification training, conducted by the Department during the summer and fall of 1994.

284. The behavior modification training did not provide the JRC staff with anything new and useful beyond the job training already received at JRC. This training caused further harm to the students since it took place during the same period of time that the JRC staff was preoccupied with medical examinations, psychiatric examinations, rewriting treatment plans and responding to other regulatory demands of the Department. As a result, large groups of staff had to be removed from their normal program responsibilities to attend these sessions leaving the students with substantially less staff attention.

285. From late October through the end of December 1994, JRC was besieged with visits from DMR employees.[70] All of these DMR agents and employees were placing demands upon the JRC staff to respond to requests for information, interviews and other demands which left the JRC staff unable to attend to

the JRC students depriving them of the treatment, education, rewards and attention they needed and deserved. From August of 1993 to December of 1994 there were over 400 visits to JRC by DMR agents and employees.

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Footnote [70] Including: the DMR psychologist reviewing the six plans; DMR investigators; tandem service coordinators; the QUEST review team; the psychiatrists conduction psychiatric evaluations; and DMR attorneys reviewing records for substituted judgment actions.

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286. This Court finds that the JRC program would not have survived to this point if it had not hired attorneys to respond to the onslaught of regulatory activity which began on August 6, 1993 and continued to the time of this contempt trial. JRC reasonably and necessarily incurred \$1,098,087.50 in attorneys' fee through July of 1995 in responding to DMR's regulatory demands and prosecuting this contempt action.

287. These attorney fees were not in JRC's budget and, prior to August of 1993, JRC had never before incurred attorneys' fees in this magnitude in order to respond to the regulatory activities of DMR. (DMR's certification process, which took place in 1988 and 1989, was conducted and resolved without the need for significant attorney involvement.)

288. In order to pay the attorneys fees incurred after July of 1993, cuts in the program had to be made, and since three-quarters of JRC's budget is staff salary, cuts had to be made to staff.[71] The staff cuts deteriorated the staff-to-student ratio in all departments, reducing the overall quality of the program.

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Footnote[71] In fiscal 1994 (July 1, 1994 to June 30, 1994), the Department's wrongful conduct caused JRC to reduce its staff by thirty percent as compared with fiscal year 1993. From the end of fiscal year 1993 to the end of fiscal year 1995, JRC was forced to reduce its staff by fifty percent in order to pay the attorneys fees necessary to respond to the Department's wrongful and contemptuous conduct. The staff cuts also included reductions in direct-care staff.

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289. By the end of fiscal year 1995, student enrollment was down thirty percent when compared to the end of fiscal year 1993. The thirty percent drop in enrollment reduced JRC's revenues by approximately \$3 million, causing further harm to the JRC students and the program through a lack of funds to maintain staffing and purchases to care and treat the students.[72]

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Footnote [72]-The drop in revenue caused by the drop in enrollment of students, as well as the need to pay attorneys fees, caused the school: to have insufficient funds for outside consultants to improve the treatment programs; to eliminate the case manager position for a period of time and place that burden on the JRC clinician, to increase case manager case load by fifty percent when the position was re-instated; to eliminate the position of Quality Control Monitors; to lay off one part-time clinician; and to suspend the staff evaluation process. These effects from DMR's wrongful and contemptuous conduct have caused a substantial reduction in the quality of the JRC program to the great harm and detriment to the JRC students, and have greatly reduced the morale of the JRC staff causing further harm to the students.

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290. From 1987 to August of 1993, JRC's enrollment grew from 43 to 66. After DMR began publishing its stream of false and defamatory communications and certification decisions, the growing trend in JRC's enrollment changed to a decreasing trend and JRC's enrollment decreased from 66 in August of 1993 to 43 at the time of trial. In August of 1993 the referrals of new clients to JRC from JRC's largest client, the State of New York, dropped dramatically, and an important placement agency in New York City on two occasions stopped all referrals to JRC. The Department's regulatory decisions and other correspondence sent to JRC's funding and placement agencies [73] harmed JRC's reputation and goodwill with its funding and placement agencies which resulted in a reduction of JRC's enrollment by thirty percent, reduction in referrals and a loss in revenue which has significantly lessened the quality of the JRC program, all to the great harm and detriment of JRC and the students.

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Footnote [73] Two glaring examples include: the condition in the August 31st certification letter requiring JRC to have emergency plans in place for each student which damaged JRC's ability to retain and attract clients, and the December 15th certification letter which cast JRC in a false light as a program that fails to report deaths to its licensing agency and as not being trustworthy or competent to accept and care for disabled individuals.

291. DMR's contemptuous conduct has damaged the educational component of JRC's program. Due to the staff reductions, the teachers are managing large groups of students instead of providing more of the one-to-one teaching that occurred prior to August of 1993 and is necessary to teach new skills to JRC's disabled clientele. JRC has been forced to suspend its precision teaching systems because there is not enough staff to chart performance.

292. In addition, JRC does not have the fiscal resources to be able to maintain the reward program at its pre-August 1993 level. DMR's conduct has caused grievous harm to the JRC students by draining the funds from the school that were previously available and used to fund the JRC students' most desirable

awards. For example, the students used to earn trips with preferred staff off campus when passing a two to three day contract for not engaging in behavior such as self-abuse. The JRC students and the program have been harmed because the program is now less capable of motivating the students through positive programming. The result is that current treatment of the students is not as effective.

293. There are currently not enough staff at JRC to bring the students into the community for education such as making transaction at banks, purchases at malls, and other community involvement. Even the students involvement in the Special Olympics has been significantly reduced.

294. The Department's contemptuous conduct has also placed the JRC students and staff at risk for more injuries due to low staffing. The dropping student enrollment has caused the more qualified and marketable staff to leave JRC, out of fear it will be closing and that they will be left without a job. The result is a less skillful and quality staff available to respond to a crisis (such as student tantrums and aggressive outbursts) and maintain the care and safety of other students during a crisis.

295. The Department's contemptuous conduct has caused a deterioration in the quality of life for the JRC students. The students do not have the opportunity to travel home to visit their families as they did prior to August of 1993, because there is not sufficient staff available to bring the students home for visits. The students are spending less time at the JRC group home residence and more time at the school building in Providence, Rhode Island, because it is safer, due to low staffing levels, for the students to be in one building closer to all of the staff than to disperse staff and students amount the group homes.

296. The actions of DMR to discredit Dr. Daignault's professional competency and credibility have affected his ability to perform his duties under the Settlement Agreement.

297. As a result, students of JRC were deprived of the prior existing benefit of a collegial and productive relationship between the Court Monitor and DMR, which had in the past resulted in comprehensive treatment information being brought to the attention of the Court, and resolution of licensing issues in a manner which served the best interests of the students.

298. DMR's refusal to allow JRC to continue the Specialized Food Program has made JRC's program less effective in treating behavior disorders. This decision has critically impacted two students who are currently suffering a dramatic increase in their health-dangerous behaviors. J.C. is now engaging in more self-abuse and receiving more applications of contingent electric shock, where before the Specialized Food Program had successfully suppressed those behaviors through the student's love of food. DMR is directly responsible for the recent regression of this student and the increased shocks she is receiving.

299. The Court heard testimony on damages from Arthur Mullen who is a certified public accountant and a principal in the accounting firm of Mullen, Scorpio and Cerilli located in Providence, Rhode Island. This firm has been JRC's accountant for approximately 22 years. Mr. Mullen is responsible for auditing JRC, as well as preparing certain financial reports. The firm has a specialty in not-for-profit organizations and a familiarity with regulations, and the practices and procedures of the DPS.

300. In August of 1993, JRC's financial condition was relatively strong. JRC had a surplus, which is the accumulation of profits over time, in the amount of \$585,000, and annual revenues of approximately \$10.4 million. JRC's surplus is extremely important, because surplus is a factor that JRC's lender, Fleet National Bank, relies on in order to grant JRC access to credit. JRC's access to its line of credit is essential for maintaining its staff and serving its students. Without it, JRC would be unable to meet ongoing payroll needs.

301. JRC's financial condition as of June 30, 1995 was substantially down. Total revenue were down to \$8.7 million from \$10.4 million in June of 1993. Moreover, the number of students has dropped from 66 to 43. JRC has had to adjust to the drop in revenue by restructuring, which means JRC had to reduce expenses. For a non-profit organization like JRC, that mean cutting staff.

302. Even with lower staffing costs, JRC's loss for fiscal year 1995 is expected to be \$50,000, dropping the surplus down to approximately \$520,000. Assuming that the census of 43 students stays stable for fiscal year 1996, projected revenues will be \$7.3 million, which is approximately \$3 million less than the 1993 revenues. This will necessitate further cost cutbacks and even further reductions of staff.

303. Total legal fees incurred by JRC, the parents and the class of students as a result of this litigation, which were necessary and reasonable in response to the wrongful conduct of DMR, are 1,098,087.50.

303. The only way for JRC to pay these legal fees is to continue to reduce costs and lay off staff. Money can not be taken out of the surplus, because the surplus would be wiped out, which would constitute a default on JRC's loan agreements and terminate JRC's lending arrangements which would result in JRC's inability to fund payroll.

COROLLARY FINDINGS

IMPROPER CONDUCT BY DMR AND ITS ATTORNEYS

1. These findings are contained in a separate section in order to set forth the Contempt Findings in as straight forward a manner as possible. The fact that there is a separate section devoted to the improper conduct of attorneys should in no way diminish the significance of these Findings.

2. The Court is very disturbed by the conduct of counsel for DMR, and it is with great regret and disappointment that reference must be made to them.

3. One of the strategies undertaken by the Department was to inappropriately waste judicial and financial resources in an effort to exploit JRC's deteriorating financial resources in an effort to exploit JRC's deteriorating financial situation. This Court takes judicial notice of the conduct of the Department in the substituted judgment treatment plan review for JRC client, B.S.[74]

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Footnote [74] See In Re: B.S., Docket No. 89P1073-GI, decided February 10, 1995. This case involved a treatment plan review conducted over a period of five days, commencing October 31, 1994 and concluding on December 21, 1994. In his decision of February 10, 1995, Judge Jones of this Court found that the conduct of the Department of Mental Retardation in that proceeding was improper and resulted in an unnecessarily prolonged proceeding. The Court also made particular note of its awareness of these proceedings, and stated that the Court was "concerned that Brandon's interests may have been made secondary by DMR to this ongoing dispute." (Decision, p. 19).

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4. This Court also takes judicial notice of the Memorandum of Judge Jones of March 23, 1995 in response to DMR'S Motion For Reconsideration.[75]

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Footnote [75] In the Memorandum, Judge Jones found that DMR was in violation of ¶B-2 of the Settlement Agreement, and also found that the Department could not by implementation of its certification process subvert the provisions of the Settlement Agreement and also the jurisdiction of the Court to render substituted judgment determinations on a case-by-case basis. (Decision, p. 1-2)

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By that time the Commissioner had issued his letter of January 20, 1995, which decision ordered JRC to stop utilizing procedures approved by substituted judgment orders of this Court.

5. The Court finds that the conduct of Department's attorneys in this case was consistent with the findings of Judge Jones in the B.S. decision concerning the conduct of DMR counsel.

6. There were a number of attorneys who appeared on behalf of DMR. Many have been involved in this litigation since its inception, (e.g. General Counsel Kim Murdock and Assistant General Counsel Margaret Chow-Menzer.)

7. On September 22, 1993, General Counsel Kim Murdock, Esq. filed a document which she characterized as a report to the Court. This report, which has been previously summarized, contained blatant false statements, and omitted material information.

8. On the first day of trial, June 26, 1995, this Court requested that an explanation be provided to the Court concerning the false statements and mischaracterizations which appeared in that Report to the Court. No credible explanation was advanced, and the individual who prepared the Report and submitted it to this Court, General Counsel Kim Murdock, did not present herself to testify in these proceedings.

9. DR 7-102(A)(5) as appearing in 382 Mass 784 (1981) precludes counsel from knowingly making a false statement of law or fact to a tribunal. In addition, DR1-102(A)(4)(5) as appearing in 382 Mass. 769-770 (1981) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit and misrepresentation, or in conduct that is prejudicial to administration of justice. See also In the Matter of McCarthy, 416 Mass. 423 (1993). In this case, the September 22, 1993 Report to the Court was filed by General Counsel Kim Murdock. Attorney Murdock knew of the two Casey Team Certification Reports of 1991 and 1993 in so far as they were addressed to her. As previously discussed, these reports were favorable to JRC and recommended certification. Despite the fact that Attorney Murdock had attached several exhibits to her report, the two Casey Certification Team Reports were deliberately withheld from the Court. This Court therefore concludes that when General Counsel Murdock presented this report to the Court she provided the Court with a document that she knew contained false statements and which omitted material facts which were necessary to give the Court a full and accurate picture of the matters that were allegedly being described.

10. There were numerous documents which were marked as exhibits which demonstrated the falsity of the Commissioner's testimony. These exhibits were in the possession of DMR counsel and known by DMR counsel.

11. When a client testifies falsely under oath, counsel has an obligation to insure that a fraud is not perpetrated upon a tribunal. ~~See~~ DR 7-102 (A)(4) and (B)(1). As found in the findings, some of Commissioner Campbell's testimony was deliberately false. At certain points, counsel for DMR, knowing the testimony was false, had the opportunity to correct the information given to the Court but failed to do so.

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12. Not only did DMR counsel fail to correct false testimony, DMR counsel elicited false testimony. By introducing documents containing false information into court, by filing a report to the Court that contained false information and by failing to correct the record when they had the opportunity to do so, the Department's attorneys perpetrated a fraud on a tribunal. As ~~McCarthy~~ makes clear, and effective judicial system depends on the honesty and integrity of the lawyers who appear before its tribunals. A fraud on the Court is a "wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." ~~Hazel-Atlas Glass Co. v. Hartford-Empire Co.~~, 322 U.S. 238, 246 (1944).

13. Assistant Attorney General Yogman compounds said false testimony by endorsing and submitting it to this Court in DMR's proposed findings of fact. Said proposed findings of fact totally misrepresent the 13 day trial and present a proposed factual picture that was totally contradicted by the evidence. The Court was shocked during trial by Attorney Yogman's conduct, but allowed that she may have had a difficult client and may have been consumed by the heat of trial. This allowance was dispelled by the receipt of patently false proposed findings of fact that were filed ten days after the conclusion of trial, with more than sufficient time for careful reflection.

14. When exhibits relating to the Tuesday Morning Meetings were first presented to this Court on the first day of trial, there were numerous "redactions" which had been undertaken by DMR counsel with respect to particular topics disused at those meetings which, according to DMR Counsel, were based upon DMR's attorney/client privilege.

15. In response to JRC's request, DMR was ordered to produce unredacted documents. Attorney Yogman represented that the unredacted documents would be produced on the following day. They were not produced on that day. On July 7, 1993, DMR produced a number of additional documents which deleted some but not all of the "redactions" which had appeared in the original documents. DMR was then ordered for a second time to produce fully redacted documents which DMR did on July 11th. (Exhibits 293-304). Even on that date, however, DMR had not fully complied with the Court's order, and subsequent unredacted documents were produced on July 12, 1993. (Exhibit 322).

16. DMR's counsel acted with intransigence and defiance with respect to the Court's orders to produce these documents. Moreover, much of the information for which the attorney-client privilege was originally

invoked in support of these 'redactions' was done so without any basis in fact or in law.

17. In sum, therefore, DMR's counsel not only failed to comply with the Court's Order concerning the production of these documents in the unredacted form but also made the decision to redact information which was plainly not protected by the attorney-client privilege in a transparent effort to prevent discovery of documents which were harmful to the Defendant's case. DMR counsel's disregard for an order of this Court and its frivolous invocation of the attorney-client privilege to protect information which DMR's lawyers considered to be damaging to their case will not be tolerated by this Court. This Court concludes that DMR's counsel willfully violated orders of this Court.

18. In its Pre-trial Memorandum, DMR listed more than 140 individual witnesses in this proceeding. Yet, the Department called only six witnesses. (Commissioner Campbell was called by the Plaintiffs. He was originally on the Department's list).

19. The listing of more than 140 witnesses contributed to the incursion of unnecessary legal expense by the Plaintiffs in their preparation of this case. The Court concludes that the listing with such a large number of witnesses was a purposeful attempt to cause the plaintiffs to incur unnecessary legal expenses in an effort to delay and frustrate this proceeding.

20. The Court also concludes that DMR has undertaken retaliatory action against Court officials. For example, the Findings discuss DMR action against Court Monitor Dr. Daignault and Attorney Bettine Briggs, GAL. This Court concludes that these actions were undertaken with the participation of DMR's attorneys in an effort to intimidate and harass officials of this Court.

21. The misrepresentations of DMR's lawyers were not confined to the courtroom. For example, Attorney Margaret Chow-Menzer misrepresented to counsel for JRC that a document which was sent to them for the plaintiffs was the response of Rivendell to the RFP. In fact, however, the document was not Rivendell's response to the RFP but one which had been prepared by Rivendell after Rivendell's bid had been accepted.

22. This Court found most of DMR's witnesses not to be credible, and the Court felt the need on numerous occasions, after repeated instances of contradictory sworn testimony, to remind witnesses that they were under oath and had to tell the truth.[76]

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Footnote[76] One notable exception was Attorney George Casey whose testimony this Court found to be

credible.

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23. The sophistry of the Department's counsel was also exemplified on the first day of the trial when in her opening statement, Assistant Attorney General Yogman indicated that the Department had no obligation under the Settlement Agreement to act in good faith. This Court is appalled that a senior member of the Office of the Attorney General, representing an agency which is supposed to serve the people of the Commonwealth could seriously contend that there was no obligation for her client to act in good faith. Attorney Yogman's remarks were representative of the manner in which the Department and its counsel conducted these proceedings as well as their lack of respect for the judicial process.

24. This Court specifically finds that counsel for DMR failed, in a number of different areas, to comply with the standards expected of attorneys practicing before this Court. This Court concludes that the conduct of counsel unnecessarily prolonged these proceedings.

25. For the reasons stated herein, copies of these Findings have been forwarded to the Board of Bar Overseers.

Date: Oct. 6, 1995

Hon. Elizabeth O'Neil LaStaiti