COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

BRISTOL SS.

NO. 07101
NO. 06956
NO. 07045

JUDGE ROTENBERG EDUCATIONAL CENTER, INC.
f/k/a BEHAVIOR RESEARCH INSTITUTE, *et al.*,
Plaintiffs, Appellees,

v.

PHILIP CAMPBELL, IN HIS CAPACITY AS THE
COMMISSIONER OF MENTAL RETARDATION.
Defendant in Contempt Proceeding, Appellant.

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

BRIEF OF JUDGE ROTENBERG EDUCATIONAL CENTER, INC.

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STATEMENT OF THE ISSUES

1. Whether the Trial Court abused its discretion in finding that the Commissioner of Mental Retardation was in contempt of a court-approved Settlement Agreement by violating its express provisions and overall objectives through a course of bad faith regulatory conduct.

2. Whether the Trial Court abused its broad discretion and caused substantial prejudice to the rights of the Commissioner of Mental Retardation in making evidentiary rulings during the course of the three week trial, requiring reversal of the judgment.

3. Whether the Trial Court's 303 detailed Findings of Fact are clearly erroneous and not supported by the record evidence.

4. Whether the Trial Court abused its discretion in granting equitable relief in the form of a permanent injunction and temporary receivership and in granting reasonable attorneys' fees as remedies for contempt of the court-approved Settlement Agreement.

5. Whether a Single Justice committed an abuse of discretion in denying relief, pursuant to G. L. c. 211, § 3, in the form of a stay pending appeal.

6. Whether this Court should award the Plaintiffs/Appellees appellate attorneys' fees and costs for defending a frivolous appeal from the judgment of contempt which appeal had no basis in law or fact and being reversed on appeal, and involves distortions of the trial record.

7. Whether SJC-06956, the appeal from the issuance of a mistaken preliminary injunction by the Trial Court, is rendered moot by the entry of final judgment in the underlying contempt action.

8. Whether SJC-07045, the appeal from the modification of two interlocutory orders of the Trial Court by a Single Justice of the Appeals Court, is rendered moot by the entry of final judgment in the underlying contempt action.

STATEMENT OF THE CASE

INTRODUCTION

This appeal consolidates three separate matters as ordered by this Court on March 8, 1996. (S.A. 151).[1] First, there is DMR's appeal after trial from a judgment of contempt and order dated October 6, 1995. (App. 1353). Second, DMR appeals from the issuance of a pre-trial preliminary injunction dated March 24, 1995. (App. 128). Finally, JRC appeals from the modification of the preliminary injunction by a Single Justice of the Appeals Court (Brown, J.). (S.A. 137).

A. The Contempt Proceedings

The genesis of this case began on February 28, 1986, when the Behavior Research Institute, now known as the Judge Rotenberg Educational Center, Inc. ("JRC" or "BRI"), and a proposed class of parents acting individually, and on behalf of their children enrolled at JRC, filed a Complaint against the Massachusetts Office for Children and its Director ("OFC"). (App. 52). OFC had issued orders requiring JRC to stop treatments for its severely developmentally disabled student population, closing intake at the school, and threatening suspension of JRC's license. (App. 52). The Complaint asserted civil rights violations and sought injunctive relief for OFC's bad faith regulatory and licensing activities. (App. 52) The action was filed in the Bristol County Probate and Family Court and the late Justice Ernest Rotenberg was specially assigned as a Superior Court Justice to hear all of the claims (the "Trial Court"). (App. 5).

Because of the severe harm being caused to the students, Plaintiffs moved for a preliminary injunction seeking to enjoin OFC from terminating the treatment plans. (App. 81). Following an evidentiary hearing, the Trial Court issued a decision on June 4, 1986 which made extensive findings regarding the

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[1] All references to the record herein are referenced as follows: references to the Appendix cited as "App. ___;" references to the Trial Transcript according to volume and consecutive numbered pages therein cited as "Tr. __, __;" references to Uncontested Trial Exhibits and pages therein cited as "U-__, __;" references to Trial Exhibits admitted by JRC and pages therein cited as "JRC-__, __;" references to Trial Exhibits admitted by DMR and pages therein cited as "DMR-__, __;" and references to the Supplemental Appendix submitted by JRC cited as "S.A. __."

Director's bad faith regulatory practices and granted the requested injunction. (App.107). A Single Justice of the Appeals Court (Greaney, C.J.) denied the Director relief from the preliminary injunction, concluding that there was ample support for the Trial Court's findings of bad faith and the injunction which had been issued. (App. 109-111,113).

Following injunctive relief, BRI, the Plaintiff Class and OFC engaged in settlement discussions which culminated in a Settlement Agreement dated December 12, 1996. ("Settlement Agreement"). (U-2; App. 120,131). The Trial Court approved the Settlement Agreement on January 7, 1987 finding it to be fair and reasonable, and incorporated it as an order of the court. (U-4; S.A. 18). Among its provisions, Part A of the Settlement Agreement provided that treatment decisions for JRC students were to be made by the Court using the substituted judgment criteria. (U-2, 2). Pursuant to Paragraph B, Dr. John Daignault was appointed as Court Monitor ("Court Monitor" or "Dr. Daignault") to undertake "general monitoring of JRC's treatment and educational program," and to arbitrate any disputes between the parties. (U-2, 6). Finally the parties were required to act in good faith in carrying out their responsibilities under the Settlement Agreement. (U-2, 14).

The Trial Court's order provided for the termination of the Settlement Agreement in one year "unless the Court orders otherwise." (U-4). After two six-month extensions, on July 7, 1988, the Trial Court issued an order extending jurisdiction over the Settlement Agreement "until further order of this Court." (App. 135-137). The order noted that there were no objections to the extension of jurisdiction. (App. 137).

On December 29, 1988, the Department of Mental Retardation ("DMR") moved to amend the Settlement Agreement. DMR entered the case as successor to OFC and the Department of Mental Health ("DMH") in regulating JRC. (U-13). The Trial Court specially noted that it was treating DMR's motion as an intervention under Rule 24 and "welcom[ed] [DMR] as a party under the Settlement Agreement." (U-13). DMR did not appeal or otherwise challenge the Court's order.

The proceedings which gave rise to the judgment of contempt, began on September 7, 1993, when JRC filed a complaint for contempt pursuant to Mass. R. Civ. P. 65.3 against DMR Commissioner Philip Campbell claiming violations of the court-approved Settlement Agreement. (S.A. 27). In essence, JRC's claims as amended alleged inter alia that the Commissioner violated the Settlement Agreement by interfering with court-authorized treatment provisions, refusing to mediate disputes with Dr. Daignault, and failing to act in good faith in his regulation of JRC.

On March 23, 1995, the Commissioner decertified JRC and ordered all court-approved treatment procedures stopped as of July 1, 1995. (U-179). The next day, JRC moved for a preliminary injunction seeking to enjoin the Commissioner from revoking JRC's certification, and preserve the status quo pending trial. The Trial Court allowed the motion that same date. (App. 283).[2]

The trial of JRC's contempt claims took place during three weeks in June and July of 1995. The Trial Court heard from seventeen witnesses and admitted over four hundred exhibits. In its Judgment and Order dated October 6, 1995, the Trial Court held the Commissioner in contempt, finding that he had violated the provisions of the Settlement Agreement thereby causing "egregious and irreparable" harm to JRC, its students and their parents. (App. 1340). As a remedy for the contempt, the Trial Court ordered that DMR be enjoined from failing to comply with the terms of the Settlement Agreement, and from interfering with outstanding treatment orders issued by the Court. (App. 1340, 1342). The trial judge also ordered that DMR be stripped of its regulatory authority over JRC and a receiver was appointed to assume DMR's regulatory responsibilities over JRC until further order of the Court. (App. 1342-1348). Plaintiffs were also awarded attorneys fees and expenses. (App. 1341).

Final judgment entered on October 6, 1995. (App. 48). On October 11, 1995, the Commissioner filed his notice of appeal. (App. 1353). Thereafter,

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[2] After Judge Rotenberg's death, Judge Elizabeth O'Neill LaStaiti of the Probate and Family Court was specially assigned in August 1992 as a Justice of the Superior Court to replace Judge Rotenberg with respect to these matters. (App. 1207).

this Court granted Direct Appellate Review and the appeal was docketed as SJC-07101.

The Commissioner filed a Motion to Stay the injunctive and receivership orders pursuant to Mass. R. Civ. P. 62(a), which was denied by the Trial Court on November 6, 1995. (App. 1432). Thereafter, the Commissioner renewed his Motion to Stay in the Appeals Court, pursuant to Mass. R. App. P. 6(a), where a Single Justice, (Smith, J.), denied the motion on November 28, 1995 following a hearing. (App. 1454).

After receiving the Single Justice's decision, the Commissioner filed a petition pursuant to G. L. c. 211, § 3, with a Single Justice of this Court requesting relief from the denial of the stay by both the Trial Court and the Single Justice of the Appeals Court. (App. 1456). On December 5, 1995, this Court (Lynch, J.) denied the motion. (App. 1465). On December 8, 1995, the Commissioner then filed an appeal from the order of the Single Justice pursuant to SJC Rule 2:21, docketed as SJC-07093, as well as a request for a stay of the Single Justice's order. (App. 1466, 1467). On January 12, 1996, the full bench of this Court denied the requested stay pending appeal, and dismissed the appeal as both moot and in violation of SJC Rule 2:21 See Commissioner of Mental Retardation v. Judge Rotenberg Educational Center, Inc., 421 Mass. 1010 (1996). (App. 1471).

B. Appeal From The Preliminary Injunction - SJC-06956

On March 24, 1995, the Trial Court entered a status quo preliminary injunction in favor of JRC and the Plaintiff Class enjoining the Commissioner from decertifying the JRC treatment program pending a trial on the merits of the contempt action. (S.A. 127). The Commissioner appealed the injunction to a full panel of the Appeals Court pursuant to G. L. c. 231, § 118, ¶ 2. (S.A. 128). This Court granted direct appellate review and the appeal was docketed as SJC-06956.

On October 31, 1995, JRC filed a Motion to Dismiss SJC-06956 on the grounds that the final judgment entered by the Trial Court in the contempt case rendered an appeal from an interlocutory preliminary injunction order moot. (S.A. 138). Following a hearing and report of the Single Justice (Greaney, J.),

this Court denied the motion to dismiss on March 8, 1996, and ordered that any issues in SJC-06956 be briefed as part of the appeal from the final judgment of contempt in SJC-07101. (S.A. 151).

C. Appeal From Modification Of Interlocutory Orders By The Single Justice Of The Appeals Court- SJC-07045

In addition to filing an appeal to the full panel of the Appeals Court, the Commissioner filed a petition pursuant to G. L. c. 231, § 118, ¶ 1, seeking relief or modification of the Trial Court's order dated March 24, 1995 granting the preliminary injunction. (S.A. 129). The petition was docketed as 95-J-300. On May 11, 1995, without a hearing and without providing JRC with any opportunity to respond, a Single Justice of the Appeals Court (Brown, J.) modified the preliminary injunction by adding a third subparagraph which ordered that JRC stop using four treatment procedures which had been previously authorized by the Probate Court. (S.A. 133).

In a related matter, the court-appointed counsel in fifty-two guardianship proceedings filed identical motions in the Probate Court to stop these same four treatment procedures ("Global Motion"). (S.A. 40-41). On April 14, 1995, the Trial Court denied the Global Motion. (S.A. 67). Guardianship Counsel then filed a petition with the Single Justice of the Appeals Court for interlocutory relief from the denial of the Global Motion, which was docketed as 95-J-362. (S.A. 135). On June 7, 1995, again without a hearing, the Single Justice (Brown, J.) modified the denial of the Global Motion by incorporating the order of 95-J-300 into the order in 95-J-362. (S.A. 135).

On June 12, 1995, in response to a motion to clarify filed by DMR, the Single Justice issued a supplemental order in 95-J-300 expressly setting forth the four treatment procedures JRC was required to terminate, which were the same as those listed in 95-J-362. (S.A. 134). JRC filed a petition under G. L. c. 211, § 3, with a Single Justice of this Court (Abrams, J.) seeking to vacate the modification of the preliminary injunction and restore the status quo pending trial. The petition was denied. (S.A. 136). JRC then filed an appeal to a full panel of the Appeals Court from the parallel orders entered in 95-J-300 and 95-J-

362. That consolidated appeal was docketed as SJC-07045 after this Court granted directed appellate review. (S.A. 137).

On January 4, 1996, JRC filed a motion to dismiss SJC-07045 with the Single Justice of this Court on the grounds that the entry of final judgment in the contempt action rendered an appeal from the interlocutory orders moot. (S.A. 144). On March 8, 1996, the full bench of this Court, after report by the Single Justice, denied the motion and instructed the parties to brief the issues raised in SJC-07045 in the appeal from the final judgment of contempt. (S.A. 151).

STATEMENT OF FACTS[3]

A. The JRC Program

JRC is a residential school for severely developmentally disabled and autistic individuals with serious behavior disorders. (Tr. VIIA, 51-52). The JRC students exhibit extreme and often life-threatening, self-injurious and aggressive behaviors, which other placements have not been able to treat successfully. (Id.) Behaviors exhibited by the students include banging their heads to the point of causing brain injury, pulling out their hair, rubbing off their skin to the point of bone infection, breaking their own bones, rubbing off parts of their nose, biting off other people's noses, and poking their eyes to the point of causing severe retinal damage and permanent blindness. (Tr. VIIA, 52). Because of these severe behavior problems, the average JRC student has been rejected by five placements and expelled by nine others prior to coming to JRC. (Tr. VIIA, 53). The JRC program is the largest collection of difficult-to-treat clients in one program in the nation, if not the world. (Tr. VIIA, 51-52). In 1993, seventy-five percent of JRC's sixty-five clients were placed and funded by states other than Massachusetts. (Tr. VIIA, 43).

The JRC program utilizes behavioral therapy to suppress the students' severe problematic behaviors, and provide the students with an environment rich in care, affection and opportunities to live as normal a life as possible. (JRC-239; JRC-240). Behavioral therapy utilized at JRC consists of rewards to increase the students' positive behaviors, and "aversive procedures" such as token fines or loss of privileges, or when necessary, electrical skin stimulation to suppress the JRC students' dangerous behaviors. (JRC-239; JRC-240; U-152,10-44). Dr. Matthew Israel, a psychologist and JRC's founder and Executive Director for twenty-four years ("Dr. Israel"), and his staff have successfully treated students with some of the most severe behavior disorders in the nation

[3] Citations in this Statement of Fact are to the trial transcripts and trial exhibits, and not to the Trial Court's Findings of Fact, because the Commissioner argues in his brief that all of the Trial Court's three hundred and three findings of fact are clearly erroneous.

and provided the JRC students an opportunity to live a happy, dignified and productive life. (JRC-239; JRC-240; Tr. VIIA, 51-52). DMR's own licensing evaluation from 1994 praised the JRC program as providing the students with a healthy and stable living environment with close interaction between students and staff which encourages family involvement and improvement in daily living skills. (U-164,2,6,21,27,31-32,40-41,47).

B. The 1986 Litigation and the Settlement Agreement

On December 12, 1986, JRC, the parents of students at JRC, and the students through their legal representatives, entered into a Settlement Agreement with OFC. (U-2). The Settlement Agreement put to rest litigation between the Commonwealth and JRC which had been initiated on September 26, 1985, when OFC issued an order to show cause why JRC's license to operate should not be suspended, and ordered JRC's treatment procedures terminated. (U-2). In the period following September 26, 1985, protracted litigation occurred, including the filing of a civil rights complaint against the director of OFC. (App. 52). Because of the irreparable harm being caused to JRC and its students from the OFC orders, plaintiffs moved for injunctive relief. (App. 78-79). On June 4, 1986, the Trial Court entered a preliminary injunction enjoining OFC from enforcing its orders and concluded in extensive findings that the director of OFC had engaged in bad faith regulation of JRC, and that her termination of JRC's treatment procedures was without medical support leaving the program an "empty shell for those students who require aversives as part of their treatment." (App. 82, 87, 96, 107). The Court further found that the director of OFC attempted to hide the lack of clinical support for her decision by altering her own agency's laudatory report of JRC, and by sending an evaluation team biased against the use of aversive therapy to conduct an "objective" evaluation of the JRC program. (App. 104-107). The Trial Court therefore found that the director's orders constituted arbitrary treatment decisions that "played 'Russian roulette' with the lives and safety of the students at [JRC]." (App. 107).

The preliminary injunction was upheld by a Single Justice of the Appeals Court (Greaney, C.J.) who ruled that there was ample evidence to support both

the Trial Court's entry of injunctive relief and his conclusion that the director acted in "bad faith in the handling of the status of [JRC's] license and its treatment programs." (App. 110). Thereafter, on October 31, 1986, the Trial Court awarded JRC, and the parents, pendente lite, the sum of $580,605.25, which represented the legal fees incurred as a result of OFC's bad faith actions. (S.A. 1).

Following the award of attorney's fees, the parties engaged in settlement discussions which culminated in the execution of a Settlement Agreement on December 12, 1986. (U-2). The Settlement Agreement by its plain terms, was intended to protect JRC's treatment program from bad faith and arbitrary interference by state agencies. (Id.). The keystone was Part A which provided that treatment decisions were to be made by the Court using the substituted judgement criteria. (U-2, 2).

Other provisions of the Settlement Agreement which were important protections for JRC included the following:

- Dr. John Daignault, appointed as Court Monitor, would oversee JRC's compliance with all applicable state regulations, except to the extent those regulations involved treatment decisions, which were reserved for the Trial Court pursuant to Part A of the Settlement Agreement. (¶ B-2). (U-2, 6).

- All regulatory disputes or concerns between the parties were required to be submitted to Dr. Daignault for resolution. In the event that any party disagreed with the resolution of Dr. Daignault, the matter would be submitted to the Trial Court. (¶ B-2). (U-2, 7).

- Intake at JRC was re-opened and "shall not be impermissibly obstructed during the pendency of this proceeding." (¶ C-3). (U-2, 7-8); and

- All parties would be required to act in good faith in discharging their obligations under the terms of the Settlement Agreement. (¶ L). (U-2, 14).

Thus, the Settlement Agreement provided JRC with five forms of protection:

1. Having the Trial Court, not a regulatory agency, authorize and/or disapprove treatment through the substituted judgment procedure described in Part A of the Settlement Agreement.

2. Vesting in the Court Monitor the authority to oversee JRC's compliance with all applicable state regulations;

3. Vesting in the Court Monitor the authority to resolve all disputes between JRC and its regulatory authority (now DMR) with appeals of those decisions submitted to the Trial Court for final resolution;

4. A strict prohibition against impermissibly obstructing JRC's intake of new clients; and

5. A requirement that all parties act in good faith.

On January 7, 1987, the Trial Court found the Settlement Agreement to be fair, reasonable, and adequate, and incorporated the Settlement Agreement as an Order of the Court. (S.A. 18). On February 12, 1987, the Trial Court issued a memorandum to all parties in the case, which addressed the aspects of the Court Monitor's role under the Settlement Agreement. (App. 134). In particular, the Court stated as follows: "Lastly, all parties are reminded of the Monitor's role as outlined in the Settlement Agreement insofar as all conflicts and disputes shall be brought initially to the Monitor for attempted resolution. (emphasis added). (App. 134).

As a result of the Settlement Agreement, regulatory authority over JRC was transferred from OFC to DMR (as the successor agency to DMH). (U-7). On October 24, 1988, DMR filed a motion to modify the Settlement Agreement. (U-10). Plaintiffs, however, citing Mass. R. Civ. P. 15 responded that DMR had no standing to amend the Settlement Agreement unless the agency were a party to the proceeding. On December 17, 1988, the Trial Court accepted the motion filed by DMR as an intervention under rule 24 and welcomed DMR as a "party under the Settlement Agreement." (U-13).

C. For Six Years DMR Acknowledged It Was A Party Under The Settlement Agreement And Abided By Its Provisions

From 1987 to 1993, JRC and its students recovered from the controversy of 1985 to 1986 and thrived. As set forth in innumerable findings of the Trial Court in various guardianship actions, JRC students enjoyed tremendous benefits from JRC's treatment programs. Indeed, the Trial Court made findings in numerous cases that JRC's treatment procedures had been life-saving for the JRC students. (JRC-239, 240).

For six years from 1987 until August 1993, when it abruptly changed its internal position, DMR maintained that it was party to the Settlement Agreement and subject to its commands. For instance, DMR acknowledged in court documents, including memoranda and briefs filed with this Court and the Appeals Court, that it was a party to the Settlement Agreement. Specifically, in both a memorandum to this Court dated April 14, 1989, and a brief to the full bench in the case of In The Matter Of McKnight, DMR refers to the 1985/1986 litigation as follows:

> That action was resolved by Settlement Agreement entered as an Order of the Probate Court on January 7, 1987. 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.

(emphasis supplied). (JRC-253, 5). (In The Matter Of McKnight, 406 Mass. 787 (1990), Appellant's Brief at p.6).

DMR not only acknowledged its status as the party to the Settlement Agreement, but also its limited role in treatment decisions. On February 28, 1992, the director of the Office of Quality Assurance for the Mental Retardation Consent Decrees (an agency established to monitor DMR's compliance with a federal court consent decree) sent a letter to Commissioner Campbell requesting that he carefully scrutinize an application for recertification that JRC had submitted in 1991. (U-40.) At the Commissioner's request, DMR General Counsel Kim Murdock responded on March 17, 1992, that:

> [D]ue to past litigation, the Department is currently bound by a Settlement Agreement with respect to this program. All so-

> called aversive interventions used at BRI must be approved by the Bristol County Probate Court; the Department's involvement in the actual treatment is limited. . . .I suggest you contact the Court Monitor for the BRI case, Dr. John Daignault. He can be reached at (508) 583-0828. Dr. Daignault is in a far better position to provide you with answers to your questions.

(emphasis supplied). (U-41,1).

DMR also recognized the Court Monitor's authority under the Settlement Agreement. Dr. Daignault had a highly collegial and excellent working relationship with Commissioner Campbell's predecessor, Commissioner Mary McCarthy. (Tr. II, 31). Between October 19, 1986, and September 1988, Dr. Daignault had several meetings and numerous telephone calls with Commissioner McCarthy and her staff regarding issues involving JRC. (Tr. II, 31-32). The primary issues concerned JRC's licensure and later, licensure and certification, since those issues were of primary concern to the Trial Court. (Tr. II, 31-33). In the context of those meetings, a number of issues were discussed including the obligations of DMR under the terms of the Settlement Agreement, Dr. Daignault's mediation role, Dr. Daignault's oversight of JRC's regulatory compliance, and the issue of treatment decisions being made by the Trial Court. At no time did either Commissioner McCarthy or General Counsel Murdock, who often attended the meetings, ever dispute the fact that DMR had an obligation to arbitrate disputes with Dr. Daignault, nor did they question his authority to oversee JRC's compliance with DMR regulations. (Tr. II, 36-37). Nor did the DMR officials contest the authority of the Court to make treatment decisions. (Tr. II, 40). Commissioner McCarthy specifically sought out Dr. Daignault's input when DMR promulgated regulations regarding "Level III" procedures, which include interventions such as the aversive procedures utilized at JRC. In particular, the Department was concerned that its proposed regulations be consistent with the terms of the Settlement Agreement. (Tr. II, 40-42). That process resulted in JRC receiving a two-year "Level III" certification on April 20, 1989. (U-15).

With respect to Dr. Daignault's mediation role, in early 1987 an issue arose whether an official of DMH was violating the Settlement Agreement by

interfering with JRC's intake. JRC requested mediation under the Settlement Agreement and Dr. Daignault, under his authority to arbitrate disputes, convened a meeting which was attended by representatives of DMR. The problem was worked out. (Tr. II, 42-45).[4] Later, in May 1987, there was a separate request for mediation when JRC was concerned by a lack of referrals. Again, Dr. Daignault held a meeting under his authority to arbitrate disputes which was attended by officials from DMR and in which the problem was addressed. (Tr. II, 66). Dr. Daignault's mediation role continued in November 1989, when JRC requested a meeting concerning delays in its licensure. Dr. Daignault again convened a mediation session under Paragraph B-2 of the Settlement Agreement attended by DMR which resulted in agreements on several important issues and which ultimately resulted in JRC's licensure two months later. (Tr. II, 55-60; U-25,27).

In addition to Dr. Daignault's arbitration role, DMR also called upon him to oversee JRC's compliance with regulations. On January 19, 1990, General Counsel Murdock wrote to Dr. Daignault concerning two abuse complaints. She stated in her letter:

> I have reviewed these complaints and conclude that the acts described all fall within the category treatments JRC is authorized to use. This being the case, I can see no basis for an investigation by DMR under the abuse regulations at this time. However, I am forwarding these complaints to you as the Court Monitor to look into two matters, whether the treatments described were in fact authorized for the particular students involved; and second was there any truth to the allegation that the spatula spank was used. . .

(U-23).

Dr. Daignault conducted an investigation as requested by DMR and based on his investigation, ultimately concluded that no abuse had occurred, nor was there a violation of the Court-ordered treatment plans. (Tr. II, 67). That

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[4] The terms "mediate" and "arbitrate" were used interchangeably and without distinction by all parties to the Settlement Agreement throughout the course of their dealings. The source of any such request was always Paragraph B-2 of the Settlement Agreement. Dr. Daignault viewed mediation not only as part of, but indeed the first step in the arbitration process. (Tr. IX, 19-20).

information was communicated to Kim Murdock who accepted it without question. (Id.).

Approximately one year later, on January 18, 1991, General Counsel Murdock again referred Dr. Daignault another complaint alleging abuse, and again asked Dr. Daignault to investigate the allegation. (U-31). Dr. Daignault reviewed the matter, spoke with officials at JRC, and concluded again that no abuse had taken place, nor was the treatment plan violated. (Tr. II, 73-74). Attorney Murdock accepted without question Dr. Daignault's conclusion. (Tr. II, 74-75).

The relationship between Dr. Daignault and DMR remained productive and collegial at every level until August of 1993. (Tr. II, 190). In response to a request from Dr. Daignault under a provision of the Settlement Agreement which required DMR to provide technical assistance to the Court Monitor upon his request, DMR arranged for a particular psychologist to serve as a DMR expert. (Tr. II, 69, U-24). In March of 1993, DMR Deputy General Counsel Margaret Chow Menzer sent Dr. Daignault a letter regarding the use of a DMR psychologist to evaluate a particular student. In that letter, Attorney Chow-Menzer set forth clearly her understanding of the respective roles that existed pursuant to the Settlement Agreement. 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 that 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 ability as the Court appointed monitor to make the threshold determination of whether a JRC treatment program is presenting a serious risk to the JRC student. The Agreement clearly places the responsibility on you to alert the Court if in your judgment such a risk existed.

(U-65).

During March of 1993, DMR further acknowledged the restrictions imposed by the Settlement Agreement on its actions. At that time, a bill was pending before the legislature which would prohibit aversive treatment. General Counsel Murdock wrote to counsel for JRC noting that the Commissioner wished

to testify in support of the bill. (U-67). While the letter expressed the Commissioner's strong feelings concerning the bill, it went on to state:

> I advised the Commissioner of my concerns that the Settlement Agreement. . .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 the bill. The Commissioner has assured me that it not his intention to violate a legal obligation.

(U-67). Despite the fact that the Commissioner had "strong" feelings about his desire to testify at the legislative hearing in favor of the bill, he decided not to testify after he received JRC's immediate reply objecting on the ground that such action would be inconsistent with the Settlement Agreement and DMR's regulations which permitted the use of aversives. (Tr. III, pp.48-50; JRC-254).

D. DMR's 1991 Certification Recommendation

Following the execution of 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 104 CMR §20.15). Virtually identical regulations were subsequently adopted by the Department of Mental Retardation. The parties agreed at trial that those regulations had been unchanged since they were first instituted. (Tr. III, 123). Under the DMR regulations, a party utilizing Level III procedures would have to be "certified" to utilize those procedures.

JRC received its initial certification in April of 1989 which expired two years later, in April 1991. (U-15). On December 5, 1990, JRC's Director of Student Services wrote to DMR to request a renewal application for certification, reminding DMR of the upcoming expiration date. (JRC-270). JRC also reminded DMR that it was using "shock procedures" pursuant to court-approved treatment plans. (Tr. VIIA, 9-10). On June 8, 1991, after JRC's certification had technically expired, the Commissioner's designee, Amanda Chalmers, responded by sending a letter to JRC enclosing an application for recertification. The letter stated that upon receiving JRC's recertification application, "a two-person team would visit your program site to complete the recertification as

requested." (Tr. VIIA, 10; U-32, 1). JRC submitted the application for recertification as requested. (Tr. VIIA, 11; JRC-236). Four months later, Commissioner Campbell and General Counsel Murdock finally sent Deputy General Counsel George Casey and Dr. Riley as the two-person team to review JRC, (the "1991 Certification Team"). (Tr. I, 97,99; Tr. III, 44-45; Tr. VIIA, 11; U-37). Deputy General Counsel Casey and Dr. Riley were instructed to visit and evaluate JRC in order to determine if JRC's treatment program conformed to the regulations for certification and to make a recommendation to the Commissioner regarding JRC's application for recertification. (Tr. I, 97-109; U-38).

The review team conducted an on-site evaluation of JRC on December 9 and 10, 1991. (Tr. I, 104-107; U-37, 3). Deputy Counsel Casey conducted a thorough review of JRC records prior to the visit, including the court-approved treatment plans and related Court decrees which involved the use of the Specialized Food Program and GED among other treatment procedures, the minutes of JRC's Human Rights Committee and Peer Review Committee, and JRC's training manuals. (Tr. I, 99). During their on-site evaluation of JRC, Deputy Counsel Casey and Dr. Riley further reviewed JRC's data collection and charting system, the credentials of the individuals developing Level III treatment plans, JRC's Human Rights Committee, JRC personnel files, and the entire case file for one JRC student receiving Level III interventions. (Tr. I, 104-107,118-119; U-37, 2-3). They also conducted personal interviews, including speaking with JRC's Human Rights Officer, JRC psychologists, Dr. Israel, and the directors of many of JRC's departments. (Tr. I, 105-107; U-37, 3-4).

After concluding their evaluation, Deputy Counsel Casey and Dr. Riley drafted a Memorandum to the Commissioner ("the 1991 Certification Report") containing their findings and conclusions regarding the JRC program, which was sent to the Commissioner's "designee," Amanda Chalmers. The extensive 1991 Certification Report, in summary, found that JRC's treatment plans complied with the Orders of the Trial Court and DMR regulations including the behavior modification regulations; that JRC had a high quality staff and training program; that the JRC data collection was thorough; JRC's medical services were adequate;

and JRC's clinical staff were qualified to implement Level III procedures. (Tr. I, 109-110; U-37). As a result of their evaluation, Deputy Counsel Casey and Dr. Riley recommended to the Commissioner in the 1991 Certification Report that JRC be certified to employ Level III behavior modification programs subject to five minor conditions, all relating to the composition and policies of JRC's Human Rights Committee. (Tr. I, 110-114; U-37, 8; U-75, 1).

When JRC still heard nothing from DMR on its application for recertification four months later, JRC's counsel wrote to DMR to inquire into the status of JRC's application. (JRC-271; Tr. VIIA, 13). More than one month later, JRC received a letter dated June 10, 1992, from Amanda Chalmers, the Commissioner's designee, which instructed JRC to fulfill five conditions before recertification could be approved. (U-43; Tr. VIIA, 13). The five conditions mentioned in Ms. Chalmers' June 10, 1992 letter were the same five conditions in the 1991 Certification Report, but Ms. Chalmers' letter did not disclose the existence of the report or the fact that it recommended certification. (U-43). Indeed, the existence of the 1991 Certification Report was not revealed to the Court or to any party until JRC obtained it through discovery in the instant case. (Tr. VIIA, 12).

JRC immediately implemented and satisfied the five conditions and sent a confirming letter to DMR. (Tr. I, 111-112; Tr. VIIA, 14-15; JRC-272). Five days later, Ms. Chalmers sent JRC a letter which stated that since the time of her June 10, 1992 letter, "two new behavior programs," "the Specialized Food Program and the GED Program," had been brought to her attention, and DMR had assembled a review team which included a nutritionist and a physician "to return to BRI with the express purpose of reviewing these two programs." (U-46; Tr. VIIA, 16). JRC's counsel wrote to DMR Deputy Counsel Chow-Menzer protesting the delay in recertification and reminded her that DMR clinicians had been evaluating and reporting on Specialized Food and GED programs since 1991. (Tr. VIIA, 16-17; U-273). Deputy Counsel Chow-Menzer responded by denying knowledge of the contents of the DMR clinicians' evaluations, despite

the fact that in 1990 she had filed a DMR clinician report with the Trial Court which recommended continued use of the Specialized Food Program for one JRC client because of its positive impact. (Tr. VIIA, 17-18; U-53, 2; U-30, 1,4).

For six months, DMR took no further action on JRC's recertification. Therefore, on January 29, 1993, Dr. Daignault with GAL Bettina Briggs wrote to Deputy Counsel Chow-Menzer and requested information regarding the status of JRC's application pursuant to Dr. Daignault's responsibility under Paragraph B-2 to monitor JRC's compliance with regulations. He noted that JRC had informed him that it had complied with all of DMR's requests. (Tr. II, 86-89; U-241). DMR did not respond to Dr. Daignault's request, but Dr. Daignault did receive a telephone call from Deputy Counsel Chow-Menzer sometime between January and August of 1993, during which she requested information about the GED and Specialized Food Program. (Tr. II, 102-103). Dr. Daignault referred Deputy Counsel Chow-Menzer to the reports of the DMR clinicians, the decrees of the Trial Court from the treatment hearings, and additional materials available at JRC all of which documented the use of, and authority for those two treatment programs. (Tr. II, 102-103). Dr. Daignault invited Deputy Counsel Chow-Menzer to call him back if she experienced any problems locating the information. (Tr. II, 103).

Previously, on December 21, 1992, the Commissioner wrote to the DMR Human Rights Advisory Committee in response to its inquiry about JRC's Specialized Food Program, explaining that "[t]he Department has assembled [another] team with the expertise to review this particular Level III program." (Tr. III, 62-68; Tr. VIIA, 18; U-62, 1). DMR's second review team again consisted of Deputy Counsel Casey and Dr. Riley, in addition to two doctors and a nutritionist ("the 1993 Certification Team"). (Tr. I, 119-120; U-75, 2). The purpose of the second review was strictly limited to addressing any health and safety issues concerning the GED-4 and the Specialized Food Program. (Tr. I, 120-122). Private opinions of the team members relative to the issue of aversives were not appropriate considerations. (U-75, 10; Tr. I, 136-137). Deputy Counsel Casey and Dr. Riley were assigned because they had performed the original certification review in 1991. (Tr. I, 120-122).

The 1993 Certification Team requested and reviewed information supplied by JRC in advance of its visit to JRC which did not occur until May 5, 1993, almost one year after Ms. Chalmer's letter. (Tr. I, 122-123,125; U-75, 2). The 1993 Certification Team reviewed extensive documentation while at JRC, observed the JRC students, and conducted lengthy interviews with a JRC psychologist, JRC's head nurse, and JRC's consulting physician. (U-75,2-3). After the visit, Deputy Counsel Casey requested and received additional information from JRC regarding an issue concerning misfires of the GED device. (Tr. I, 124-125; JRC-237). Based on this information, Deputy Counsel Casey and the 1993 Certification Team concluded that the GED misfires posed no health or safety risk. (Tr. I, 133). Following their visit, the 1993 Certification Team drafted and signed[5] a comprehensive report dated July 15, 1993 entitled: "Report of the Certification Team Re: Application of Behavior Research Institute for Level III Behavior Modification Certification" (the "1993 Certification Report"), which was submitted to General Counsel Murdock. (Tr. I, 132-133; U-75). In its report, the 1993 Certification Team concluded that there had been no change in the bigh quality of the JRC program since the 1991 review; that JRC was in compliance with all DMR regulations; that there were no adverse health consequences from the Specialized Food Program or the GED-4 Program due to JRC's meticulous monitoring of the Specialized Food Program; and that the power output on the GED-4 device was extremely low and not harmful. (Tr. I, 127-131; U-75). The 1993 Certification Team found no reason to change the previous recommendation that JRC be certified. The report recommended that JRC be certified to employ Level III interventions with two provisions regarding future reporting of any problems with the GED-4 and the Specialized Food Program. (U-75,11). The Commissioner, however, secreted the 1993

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[5] The 1993 Certification Report was signed by all members of the team except Dr. Riley and there is a footnote in the report which states that Dr. Riley resigned from DMR to move to California after he participated in the May 5, 1993 visit to JRC. (Tr. I, 134-135; U-75, 12). Deputy Counsel Casey testified at trial that he and the other team members considered the 1993 Certification Report complete since Dr. Riley participated in the evaluation even though he was not available to sign the final Report. (Tr. I, 134-137).

Certification Report and did not disclose its existence to anyone -- not JRC, Dr. Daignault, the Trial Court, or even key DMR personnel. (Tr. III, 87-88; Tr. VIIA, 18-19; Tr. X, 141-142). The existence of this report also came to light only during the discovery phase of the contempt proceeding. (Tr. VII, 19).

E. The CBS News Report on JRC and DMR's Abrupt Change Of Position

In April of 1993, the Commissioner received a letter from the producer of the CBS News magazine show, "Eye to Eye with Connie Chung," notifying him that CBS was working on a story about JRC and requesting information about DMR's monitoring of JRC. (Tr. III, 52-53; JRC-255). The CBS producer informed the Commissioner that the show might depict DMR as not doing its job in regulating JRC. (Tr. III, 53-55). Subsequently, the Commissioner had several meetings with his supervisor, the Undersecretary of the Executive Office of Health and Human Services, to discuss the administration's concerns about the upcoming CBS program and how it might negatively depict DMR and the administration as not properly regulating JRC. (Tr. III, 56-59).

Shortly after learning of the CBS program, the Commissioner abruptly reversed the posture DMR had taken for the previous six years and maintained that DMR was not a party to the Settlement Agreement. Therefore, from at least August, 1993 up to the time of trial, the Commissioner's actions were based on his new-found position that DMR was not subject to the mandates of the Settlement Agreement. (Tr. III, 16-18; Tr. IV, 172).

The Commissioner was challenged on his change of position at the trial. He acknowledged on cross-examination that he had read the Settlement Agreement at the time he was appointed Commissioner, and he admitted that the letters his various counsel sent prior to August, 1993 to third parties, as well as DMR's legal position in the McKnight case were completely inconsistent with the position he adopted in the summer of 1993 -- that DMR was not a party to the Settlement Agreement. (Tr. III, 14,22-23,27-30). He further testified that in March of 1993, when he asked JRC for permission to testify before the legislature, he was "not sure" if DMR was a party to the Settlement Agreement,

but then, later that summer, he decided that DMR was not a party to the Settlement Agreement. (Tr. III, 48; Tr. IV, 171).

The Commissioner testified that when it was first brought to his attention that DMR was not a party to the Settlement Agreement, he suggested that DMR take some legal action with the Trial Court to ask for clarification, but no clarification was sought. (Tr. IV, 173). He also said he asked for clarification and/or consultation with the Attorney General's office, but he did not make a written request or take any formal legal steps to determine whether DMR was bound by the Agreement. (Tr. IV, 175,212). The Commissioner also never notified the Trial Court of this new legal position, and it was not included when his counsel filed a comprehensive (but false) Report to the Court concerning DMR's regulation of JRC in September of 1993. (App. 147-182). (DMR's Report to the Court is set forth in more detail infra). Other than the Commissioner's concern for how DMR would be depicted in the upcoming CBS program, no other explanation is evident for his sudden change of position.

F. The August 6, 1993 Letter

On August 6, 1993, three weeks after the Commissioner received the completed 1993 Certification Report, which he never released and which praised the JRC program and recommended certification, he sent a letter (the "August 6 Letter") to Dr. Israel advising him of DMR's "interim" decision on JRC's application for recertification. (U-82). This was the first time JRC had received correspondence directly from the Commissioner concerning an application for certification. Previous correspondence and regulatory decisions on certification dating back to JRC's first application for certification in 1988, were signed and sent by Amanda Chalmers, General Counsel Murdock, or one of DMR's Deputy General Counsel. (U-15; U-32; U-34; U-43; U-46).

The thrust of the August 6 Letter was that JRC had engaged in "continued and repeated non-compliance with DMR regulations," despite the 1993 certification team's contrary finding. (U-82,1). The Commissioner stated that he would only grant JRC twenty-five days of interim certification to use Level III intervention allegedly because: JRC was not fully complying with

DMR's regulations; JRC's treatment plans were not in compliance with DMR's behavior modification regulations; DMR had not reviewed how JRC implemented its Level III procedures; and DMR had no evidence that JRC's GED, Specialized Food and other aversive interventions were professionally acceptable, effective, and in compliance with the regulations. (U-82,1-5). The Commissioner's own attorney, Deputy Counsel Casey, testified at trial that the statements in the Commissioner's letter were false based upon the evaluation done by the 1993 Certification Team. (Tr. I, 142-147,153-160).

The Commissioner's August 6 Letter was issued based upon his new position that DMR was not a party to the Settlement Agreement. (Tr. III, 16-17). Accompanying the letter was a copy of a letter signed by a Dr. Paul Jansen dated August 1, 1993 (the "Jansen Letter") criticizing almost every aspect of JRC's program. (U-82, 4). Simultaneous with sending Dr. Israel the August 6 Letter and the Jansen Letter, the Commissioner also sent the Jansen Letter to the Disabled Persons Protection Commission.[6] ("DPPC"). In his letter to the DPPC, the Commissioner stated that the Jansen Letter "sets forth sufficient facts to support a reasonable belief that the JRC students are being subject to abuse." (U-81). The Commissioner did not send the Jansen Letter to Dr. Daignault for investigation, nor did he investigate or otherwise substantiate the allegations in the Jansen Letter, despite knowing that Dr. Jansen regularly testified in the Trial Court's treatment hearings in opposition to JRC's treatment. (Tr. II, 96-97, 121-122; Tr. VI, 104). Deputy Counsel Casey testified at trial that he saw nothing at JRC during his 1993 visit which would have required him to file an abuse complaint against JRC. (Tr. I, 128,131-140).

The twenty-five days of interim certification granted by the Commissioner in the August 6 Letter, and the possibility of a second twenty-five day extension, were conditional on JRC's providing to DMR in twenty-one days a list of items, including the following: evidence that JRC's treatment is professionally acceptable; a list of all aversives actually in use at JRC; a sample

[6] The Disabled Persons Protection Commission is a state agency that conducts investigations of allegations of abuse against disabled individuals. See G. L. c. 19C, § 2.

treatment plan for a JRC student currently receiving aversives that complies with the regulations; a copy of each current contract between JRC and each of the state agencies from across the country that place or fund a student at JRC ("JRC's Funding and Placement Agencies"); and a substantive and detailed response to the Jansen Letter. (U-82, 5-6). Most of the information sought was unnecessary since Deputy Counsel Casey testified he had already received from JRC all of the treatment information requested in the letter as part of his certification reviews. (Tr. I, 161-164). The Commissioner admitted at trial that he issued the August 6 Letter without reading the 1991 and 1993 Certification Reports, although he was aware, as of August 6 1993, that the reports were written by qualified DMR professionals who found that JRC was in compliance with all of DMR's regulations, and had recommended certification. (Tr. III, 69-71,75-76,84-85,94-95). He also testified that he based his August 6 Letter on the 1993 Certification Report (although he had not read it), Dr. Jansen's unsubstantiated letter, and privileged advice from his counsel. (Tr. VI, 104).

The Commissioner could not give any credible explanation at trial for the discrepancies between the allegations he made in the August 6 Letter and the findings in the 1993 Certification Report dated just three weeks earlier. (Tr. III, 98-99,102-105). When confronted with the 1993 Certification Report at trial, the Commissioner attempted to justify his actions by claiming that he did not consider the report to be "complete." (Tr. III, 78-79). However, he conceded that he never informed the members of the 1993 Certification Team that their report was incomplete, and he never solicited any additional information from, or even spoke with any member of the 1993 Certification Team. He also used selected parts of the "incomplete" 1993 Certification Report as the basis for his decision in the August 6 Letter. (Tr. III, 78-82). Deputy Counsel Casey also undercut the Commissioner's position when he testified that he considered the 1993 Certification Report to be complete when he submitted it to General Counsel Murdock for the Commissioner, and that he was never asked to perform any more work on JRC's Application for Recertification the report was submitted. (Tr. I, 131-140).

The August 6 Letter came as a complete surprise to JRC, which had not received any prior notice from the Commissioner about either regulatory deficiencies, or the alleged professional unacceptability and lack of effectiveness of JRC's treatments. (Tr. III, 107,109). Indeed, JRC's treatment plans in 1993 were the same in form and content as in 1989, when DMR reviewed JRC's sample treatment plan and granted JRC's first certification. (Tr. VIIA, 39; JRC-274). DMR's behavior modification regulations also had not changed since 1988. (Tr. III, 123-124).

The Commissioner admitted at trial that he was aware on August 6, 1993 that the DMR clinicians had written favorable reports from 1987 through 1993 on JRC's treatment programs and procedures, and he was aware that the Trial Court had held numerous evidentiary hearings and had issued findings on the professional acceptability and effectiveness of JRC's treatment. Yet he chose not to consult the DMR clinicians nor mention their reports in his August 6 Letter. (JRC-240,8; JRC-244,10; Tr. III, 37-41,110-111). Significantly, the Commissioner conceded that the findings of the Trial Court, the DMR Clinicians' evaluations, and the findings of the 1991 and 1993 Certification Reports were all relevant to his decision on certification, yet his August 6 Letter contradicted those exact sources. (Tr. III, 43,71,72). Furthermore, Commissioner Campbell's August 6 Letter alleged a problem involving misfires with the GED device. (U-82,3). Yet he failed to disclose that the issue of misfires had already been addressed and determined not to be a problem at a contested evidentiary hearing before the Trial Court in 1992 in which DMR chose not to participate. (JRC-240,3-8). Likewise, Deputy Counsel Casey testified that the 1993 Certification Team had in fact concluded that misfires did not present any health or safety concerns. (Tr. I, 152-153).

The Commissioner's August 6 Letter was a blatant attempt to portray JRC falsely and in a negative light. As described by his own counsel, the letter contained numerous untruths and failed to include material facts. (Tr. I, 143-160). For example, the letter mischaracterized certain findings of the Certification Team and omitted other material aspects, most particularly, that the Team had recommended certification. (U-75,11). The Letter created the overall

impression that JRC had failed to cooperate in the certification process and was out of compliance with DMR regulations. The likely affect, if the Commissioner released the letter to third parties, was nothing less than obliteration of JRC's relationship with its funding and placement agencies and with the parents of its students. And that is exactly what he did. The Commissioner testified at trial that he considered advising the Court Monitor of his actions in advance of the August 6 Letter, but decided against it. (Tr. III, 31,35-36). Instead, he disseminated the Letter not only to JRC, but to also all of JRC's funding agencies, as well as JRC parents. (U-82). Indeed, the Commissioner admitted at trial that he would have serious concerns about placing a student at a school that was the subject of a letter such as the August 6, 1993 certification letter regarding JRC. (Tr. III, 129-130).

G. The Commissioner's Refusal To Mediate, The August 31st Certification Letter, And The Attack Upon The Court Monitor

In response to the August 6, 1993 Letter, JRC requested mediation under Paragraph B-2 of the Settlement Agreement. (JRC-245; JRC-246; U-84; Tr. II, 123,124). Dr. Israel firmly believed that the letter threatened the financial viability of the program and the availability of JRC's life-sustaining treatment for its students. (Tr. VIIA, 33-34). JRC's funding and placement agencies could not place students, nor allow students to remain in a program that had only a 25 day license to offer treatment, and had been accused of a serious regulatory violations as set forth in the August 6 Letter. (Tr. VIIA, 33-34). Contrary to DMR's position in past years, the Commissioner refused to mediate. (Tr. VIIA, 32, 137-139; Tr. VI, 85-86).

As a result, on August 27, 1993, JRC's counsel sent a written request for arbitration directly to Attorney General Scott Harshbarger. (JRC-246). In the letter, JRC counsel provided a brief history of the litigation between JRC and the Commonwealth dating back to 1985, described the purpose and meaning of the Settlement Agreement and its dispute resolution provision, and informed the Attorney General that the Commissioner took the position that he had no obligation to arbitrate the August 6, 1993 certification decision. (JRC-246). JRC counsel concluded his letter by noting that the arbitration provision of the

Settlement Agreement had worked well since 1987 stating, "[W]e have avoided the type of litigation we experienced in the mid 1980's which was so time consuming, expensive and painful to all parties, most especially the parents of the disabled children." (JRC-246). An Assistant Attorney General responded to JRC's request for arbitration as follows: "In any event, as we discussed on the phone yesterday, the historical understanding of the Settlement Agreement - including in this office - is not what your letter sets forth." (U-90).

Despite DMR's refusal to arbitrate, JRC complied with the August 6 Letter and sent to the Commissioner, within twenty-one days, all of the information requested. (DMR-17; Tr. VIIA, 34). The Commissioner's August 6 Letter and the Jansen Letter criticized and sought justification for every aspect of JRC's program, and it required Dr. Israel and fifteen of his top level staff to work full time for three weeks to complete the response. (Tr. VIIA, 36-37; U-81; U-82). The responsive letter to the Commissioner was fifty-two pages in length, contained a point by point refutation of the false allegations, and included three cubic feet of exhibits. (Tr. VIIA, 35). As requested, JRC submitted with its response to the August 6 Letter another sample treatment plan, and again submitted the most recent version of a court-approved treatment plan, which was consistent with the treatment plan previously approved by DMR as part of JRC's 1989 Certification. (Tr. VIIA, 39; JRC-274).

Rather than retracting the allegations or mediating the dispute, the Commissioner sent Dr. Israel another "interim" certification decision on August 31, 1993 (the "August 31 Letter"). The August 31 Letter granted JRC only another twenty-five days of certification, subject to even more alarming conditions. The August 31 Letter alleged that JRC was in violation of additional state regulations. (U-91). The Commissioner ordered JRC to terminate using all aversive treatments which were not in use at JRC as of August, 1993, even though additional aversives procedures had been approved by the Trial Court as part of outstanding substituted judgement treatment plans. (Tr. III 141-146; U-91, 3). The Commissioner also informed JRC that it would be subject to yet another evaluation as part of the certification process this time by an "independent" group to be chosen by the Commissioner. (U-91, 4).

Another of the Commissioner's conditions, Condition 10, required JRC to notify all of its funding and placement agencies to establish within sixty days an alternative available placement for every client placed at JRC should JRC be unable to provide the student with services. (U-91, 5; Tr. II, 140). This condition could have ruined JRC by setting off a panic among JRC parents and placement agencies that JRC may be closed within two months. Moreover, no state funding agency could afford to maintain and fund two placements simultaneously for a student, particularly for a student who was placed at JRC in the first place because there was no safe placement for the student in his home state. (Tr. II, 141; Tr. VIIA, 50-51).

At trial, the Commissioner attempted to justify Condition 10 as a legitimate exercise of regulatory authority because JRC had in the past supposedly unexpectedly discharged a client. (Tr. III, 151). When pressed on cross-examination, the Commissioner could only identify one situation involving a discharge which occurred in 1991, and he could not explain why this condition was imposed in 1993 for an event which occurred two years earlier. (Tr. III, p. 151). The Commissioner also admitted that he had never before imposed the emergency placement condition on any other DMR licensed program. (Tr. III, 154; Tr. VI, 107).

The Commissioner also falsely stated in his August 31 Letter that JRC had failed to report to DMR past problems with misfires of the GED, and that JRC had continually and repeatedly failed to comply with the Human Rights Committee regulations. (Tr. VI, 105-106; U-91, 1-2). Deputy Counsel Casey testified at trial that it was JRC that informed him of the issue of misfires, (Tr. I, 166-167,176), and that the Commissioner's statement that JRC had violated DMR's Human Rights Committee regulations was false. (Tr. 1, 170). JRC again requested mediation of the August 31 Letter under Paragraph B-2 of the Settlement Agreement and the Commissioner again refused. (Tr. VIIA, 53-55; JRC-247; U-98; U-96).

At the same time the Commissioner was refusing to mediate under the Settlement Agreement, he also launched a series of attacks on the Court Monitor. On August 19, 1993, DMR counsel sent a letter to Dr. Daignault raising

concerns about Dr. Daignault providing forensic evaluations for other clients of JRC's counsel's law firm, and requesting copies of Dr. Daignault's billings to the Trial Court for his services as Court Monitor. (Tr. III, 155-157; U-85). The Commissioner admitted at trial that he had no reason to believe that Dr. Daignault was biased in any way and that he knew Dr. Daignault had a similar relationship with DMR because he had provided forensic consulting services to DMR. (Tr. III, 157-158). He "guessed" that the ethical attack on the Court Monitor was simply coincidental with his refusal to engage in mediation. (Tr. III, 157).

On September 2, 1993, JRC filed the original contempt complaint because the Commissioner had refused to engage in arbitration, ordered JRC to stop using important treatment that had been approved by the Trial Court, and made false statements about the imposed conditions in his certification letters of August 6 and August 10 that were threatening the financial viability of JRC. (S.A. 27,86-95; Tr. VIIA, 49).

Following the filing of the Complaint, Dr. Daignault sent a written request to DMR counsel to arbitrate under the Settlement Agreement, stating:

> In accordance with the Settlement Agreement, Paragraph B-2, in this case, I and Bettina Briggs, Esq., Guardian Ad Litem, are writing to invite and request your participation in a meeting to address the issues arising from the Complaint dated 9-2-93 filed by Behavior Research Institute against the Department of Mental Retardation. As you know, the Settlement Agreement requires that the Court Monitor 'shall arbitrate any disputes between the parties' after which, if any party is aggrieved, the matter shall be submitted to the Court for resolution.

(Tr. II, 143; JRC-248). On September 17, 1993, General Counsel Murdock wrote to Dr. Daignault to inform him that DMR had already agreed to meet with JRC directly but would meet with JRC "with others present, including yourself." She further stated:

> As you know, the Department of Mental Retardation does not agree that the Settlement Agreement's provisions concerning the monitor contemplated the monitor's arbitration of disputes such as those alleged in BRI's recent court filing, nor the attendant resolution by a Probate Court referenced in your letter. [citation omitted]. Our attendance on Monday therefore is not to be

> construed as any waiver of any position set forth in our papers in this matter. BRI's attorney has agreed that our attendance would not be taken as such as waiver.

(Tr. II, 145-146; U-98). DMR's counsel confirmed in a letter to JRC's counsel, prior to the meeting with the Court Monitor, that: "We are simply meeting to discuss matters in order to reach agreement on whatever issues can be resolved." (U-96).

A meeting between Dr. Israel and JRC's counsel, DMR Counsel, Dr. Daignault, GAL Briggs and others took place on September 20, 1993. (Tr. II, 146-147; Tr. VIIA, 56). DMR representatives maintained their position at the meeting that the Commissioner was not required to arbitrate disputes with the Court Monitor. (Tr. II, 148-150; Tr. VIIA, 56). Nevertheless, extensive discussions ensued concerning Condition 10 after JRC representatives pressed upon DMR their serious concern about the impact of that Condition on JRC's parents and funding and placement agencies. DMR representatives tentatively agreed to change the emergency placement condition in the August 31 Letter subject to the Commissioner's approval. Pursuant to this agreement, JRC would not have to notify all of its funding and placement agencies as originally ordered, but rather would inquire about each agency's emergency services at the next regularly scheduled yearly service plan meeting for each student. (Tr. II, 148-150,154-155; Tr. VIIA, 56).

On September 21, 1993, DMR's counsel confirmed to JRC in writing that the Commissioner would agree to change the condition on emergency placements. (U-99). However, two days later, DMR repudiated the Agreement and informed JRC that the Commissioner planned to send copies of the August 6 Letter and the August 31 Letter (collectively, the "August Certification Letters") to all of JRC's Funding and Placement Agencies and the JRC parents. (Tr. VIIA, 57; U-102; U-103). The mailing of the August 31 Letter, without referencing the negotiated agreement which was reached on September 20, completely undermined the agreement because it would cause the very harm which the agreement sought to prevent -- notifying funding and placement agencies of the need for a plan of emergency placements. (Tr. II, 157-158).

Prior to the Commissioner's sending these letters, JRC counsel informed DMR counsel in writing that JRC objected to the dissemination of the August Certification Letters, and again requested mediation under the Settlement Agreement before the letters were sent. (Tr. VIIA, 57-58; JRC-249). JRC counsel also informed DMR that JRC considered the August Certification Letters to contain false and defamatory statements about JRC, and, if published to the funding and placement agencies, would cause grievous harm to JRC and its students, especially the emergency placement requirement contained in Condition 10 of the August 31 Letter. (Tr. VIIA, 57-58; JRC-249). Dr. Daignault and GAL Briggs implored Commissioner's General Counsel not to send out copies of the August Certification Letters and to mediate the issue. General Counsel Murdock responded that "DMR is not willing to negotiate with BRI the language of a letter sent by the Commissioner of Mental Retardation to his counterparts in other states. DMR can see no point (except delay) in meeting to discuss this further." (U-103,2). One of the reasons given by General Counsel Murdock for refusing to arbitrate and to publish the August Certification Letters, was the Commissioner's claim that it was "not appropriate for us to withhold information from our sister agencies during this period. . . ." (U-103, 1). Ironically, the Commissioner withheld the 1991 and 1993 Certification Reports from JRC's funding and placement agencies. (Tr. III, 171-173). The Commissioner also never substantiated the allegations in the Jansen Letter before sending copies of it to all of JRC's funding and placement Agencies. (Tr. III, 172-177).

On September 24, 1993, the Commissioner sent copies of the August Certification Letters and the unsubstantiated Jansen Letter to all of JRC's funding and placement agencies without informing them that the emergency placement condition in the August 31 Letter had been rescinded. (Tr. II, 160-163; Tr. III, 129,162-168,170-171; U-102; U-103; U-104; U-105). On September 24, 1993, Dr. Daignault reported to the Trial Court that arbitration under the Settlement Agreement had failed because the Commissioner had refused to arbitrate and had sent the August Certification Letters to JRC's funding and placement agencies. (Tr. II, 167-168; JRC-250).

H. The September 22, 1993 DMR "Report To The Court"

On September 22, 1993, the Commissioner filed an unsolicited "Report To The Court" concerning the status of JRC. (App. 147). The 28 page document purported to summarize in detail the basis for DMR's action as of that date, as well as JRC's alleged violations of various regulations. The report was accompanied by a voluminous exhibit binder referencing regulatory reports -- going back as far as April 9, 1991 -- concerning various actions undertaken by DMR.

The report filed by DMR, which was unsigned but attached to a cover letter dated September 21, 1993 signed by General Counsel Murdock (JRC-256), contained blatant false statements and material omissions. (App. 147-182). The Commissioner reviewed the report before it was submitted. (Tr. III, 178). First, the Report purported to summarize the work of the Certification Team, but did so in a completely misleading manner. Fo · example, it stated on page 6 that the field information, which the Commissioner acknowledged was the report of the 1993 Certification Team, included a recommendation for "further review" by the Commissioner. (App. 157). Yet, the actual 1993 Certification Report made no such recommendation. Deputy Counsel Casey also testified that his team never recommended further review by the Commissioner in the 1993 Certification Report. (Tr. II, pp.14-15). Despite including 20 exhibits with the Report to the Court, DMR never provided the Court with either the laudatory 1991 and 1993 Certification Reports. (Tr. III, 181-182; App. 180-182). The Commissioner admitted at trial that the Report to the Court had misstated the results of the 1991 and 1993 Certification Reports and did not disclose to the Trial Court that the Certification Reports recommended that JRC be certified. (Tr. II, pp.178-183; Tr. VI, pp.102-103).

The Report also falsely characterized the initial part of the certification review. Specifically, the Report stated, "the initial review resulted in a determination that JRC was not in compliance with the rules regarding its Human Rights Committee. . ." (App. 157). That characterization to the Court was completely misleading. The initial review had, in fact, recommended certification of JRC subject to five conditions, all of which attorney Casey

testified were "minor." (Tr. II, 15). Moreover, those conditions had been satisfied at the time of the review in May 1993 by the second Certification Team. (U-75,1). Attorney Casey testified that the description of the initial review in the report was inaccurate. (Tr. III, 13). The Commissioner testified that he was aware at the time the report was submitted that the initial reviewing team had recommended certification. He could not explain the false statement contained in the Report to the Court. (Tr. III, 179-180).

I. The September 24, 1993 Interim Certification Decision

On September 24, 1993, the Commissioner sent JRC another certification letter, this time indicating that certification would be conditionally granted until December 15, 1993, ("the September 24 Letter"). (Tr. III, 186; Tr. VIIA, 61; U-106). In this communication, which was also sent to JRC's funding and placement agencies on October 4, 1993, the Commissioner announced that there were a number of abuse investigations which were in process arising from complaints by former JRC staff, present JRC clients, and their attorneys. The letter went on to state that the "allegations are quite serious on their face, and include claims that you [Dr. Israel] were personally were involved in, or were personally responsible for, abuse against specific JRC clients." (U-106,1). The Commissioner's communication of unsubstantiated abuse investigations to third parties was a blatant departure from established DMR practice, as the Commissioner admitted. (Tr. III, 188-189). Indeed, even though this letter accused Dr. Israel personally of committing abuse, the Commissioner did not allow Dr. Israel any opportunity to answer the allegations before disseminating them to all of JRC's funding agencies. (Tr. VIIA, 63-64). The Commissioner was compelled to concede in his testimony that the allegations of abuse against Dr. Israel, personally, were ultimately investigated and not substantiated. (Tr. III, 192-193). He also admitted that once he found out that the charges were unsubstantiated, he did not bother to apprise JRC's funding and placement agencies of that significant fact. (Tr. III, 191-193). Instead, he allowed the false charges to perpetuate. The Commissioner openly admitted at trial that if he personally had received such a letter such as his September 24, 1993 letter

containing serious allegations against the head of a school, he would be concerned about placing clients in that program. (Tr. III, 187-188).

On page 4 of the September 24 Letter, the Commissioner required that JRC, as a condition of this interim certification, provide DMR with "any reports of deaths" which had occurred since 1989 "by October 5, 1993." ((U-106, 4). (emphasis in original). That sentence was underlined in the letter and implied that clients had died at the JRC program without any report to state licensing agencies. The significance of that allegation became evident later.

J. DMR's "Independent" Evaluation And The Continued Attacks On The Monitor

The Commissioner stated in his August 31 Letter that a new evaluation of JRC would be conducted by an "independent" group. (U-92-4). However, the Commissioner retained a group called Rivendell to conduct the review of JRC, even though DMR knew that Rivendell's co-leader, Dr. Richard Amado had previously taken a strong position against JRC's treatment methods. Dr. Amado was the first signatory on a letter to Amnesty International referencing JRC's program, entitled "A Call to Action," which sought a ban on all aversive procedures. (U-72,7,9). The letter equated aversives with political torture, stating that treatment procedures such as those used at JRC "would not be tolerated if used on prisoners or even animals." (U-72,8). The attachments accompanying the Call for Action made specific references to JRC, including allegations that the Executive Director had mistreated clients stating, "He had "killed two, choked one with a heart attack (sic) and then one with a strangle hold. Everything is so hush hush." (U-72,3; Tr. VIIA, 78-79; Tr. X, 169).

The process which resulted in the selection of Rivendell not only was suspect from the outset, but also violated Commonwealth policy. DMR issued a request for proposals ("RFP") dated August 30, 1993, seeking bids from qualified agencies to review JRC. (U-88). The RFP, however, was circulated only to a limited number of select agencies who were given only ten days (instead of the customary 30 days) to respond. The ten day response time was effectively seven days since it also included the Labor Day holiday weekend. (Tr. X, 149,151; U-88; U-89).

DMR Psychologist, Dr. Mary Cerreto, was responsible for creating and distributing the RFP for the third review team. (Tr. X, 147). She admitted at trial that she had never before seen an RFP with only a ten-day response deadline and she could not give any reason at trial for imposing such a short response deadline. (Tr. X, 150,159-160). Dr. Cerreto declined to extend the ten-day deadline even though she received complaints from other potential bidders seeking more time to make a bid. (Tr. X, 158,159). Dr. Cerreto testified that she was aware the Commonwealth had a policy of encouraging the widest possible response to an RFP but only sent the RFP to a limited, select group of individuals. (Tr. X, 151). She also testified that she and the Commissioner deliberately withheld language from the RFP that would have required potential bidders not to have taken a public position opposing the treatment at JRC. (Tr. X, 151-155,161-162). Finally, she admitted at trial that she was aware several months prior to awarding the RFP to Rivendell of the Call to Action to Amnesty International equating JRC's methods with political torture, and that Dr. Amado was the first signatory to the letter. (Tr. X, 166-171; JRC-305). She later tried to recant that testimony. (Tr. XI, 41).

Dr. Cerreto attempted to justify the decision to conduct another evaluation of JRC by stating that it was her opinion that the 1991 and 1993 Certification Reports were insufficient. (Tr. X, 135-142). However, she admitted on cross-examination that she had not read the 1991 and 1993 Certification Reports when the recommendation was made, and she was not even aware of the 1993 Certification Report until the time of her deposition in 1995. (Tr. X, 136-147).

Rivendell was one of two bids received by DMR by the ten-day deadline. DMR chose Rivendell, even though the price of the other bidder, Fidura, was almost half the price of Rivendell's bid. (Tr. X, 173). Dr. Cerreto testified that she rejected Fidura's bid in part because Fidura's bid had a contingency that their report could only be used for regulatory purposes, and Dr. Cerreto wanted a review team with "experience with the stringencies of Court reporting and testimony." (Tr. X, 173-177; JRC-306). Dr. Cerreto already knew that any evaluators selected would need to testify in the future on behalf of DMR in court,

even though the evaluation was supposed to be independent and not pre-determined. (Id.).

After the Commissioner informed JRC that Rivendell would be conducting the "independent" evaluation, JRC requested a copy of Rivendell's response to the RFP and copies of the resumes of the members of the Rivendell team. (Tr. X, 178-179; Tr. VIIA, 75-77; U-120; JRC-309; JRC-277). DMR and Rivendell refused to provide JRC with resumes. (U-122; JRC-277). Deputy Counsel Chow-Menzer sent JRC's counsel enclosing what she purported to be Rivendell's response to the RFP. (JRC-308). However, the document she actually sent to counsel was a sanitized version of Rivendell's original response. It omitted Rivendell's bid price, which was higher then Fidura's, omitted Rivendell's statement that the short ten-day deadline in the RFP "made it impossible" for Rivendell to assemble a "qualified team," and omitted the name of Rivendell team member Hank Bersani, who was also a well-known anti-aversive advocate. (Tr. X, 177-178; Tr. XI, 61; JRC-310; JRC-308).

Nevertheless, JRC obtained information from other sources which raised concerns that Rivendell team members were hardly "unbiased and independent" but were in fact firmly opposed from the outset to the types of treatment used at JRC. (Tr. VIIA, 77-79). JRC submitted all of the information on the issue of Rivendell's bias to the Trial Court in a motion dated December 19, 1993, and sent the motion to DMR with a request for mediation under the Settlement Agreement regarding the selection of Rivendell, and all the other outstanding disputes between JRC and DMR. (Tr. VIIA, 79-82; JRC-279). DMR's counsel responded to JRC's request by refusing to mediate stating, "In any event, our position on the matter of mediation has been stated to you many times. The Settlement Agreement only contemplates mediation of disputes regarding a BRI student's placement or treatment." (U-124).

Although DMR refused to arbitrate under the Settlement Agreement, General Counsel Murdock commented on the information uncovered by JRC on Rivendell in a letter dated December 10, 1993: "[W]e are appalled by the material in your Memorandum and have asked Rivendell for an immediate response to the allegations contained therein." (U-127, 2). She also claimed that

DMR was not aware of Rivendell's background because DMR did not do "background checks." (Id.). Commissioner Campbell contradicted this account, however, when he testified that his staff undertook efforts to determine that Rivendell was not biased, but admitted that he in fact had been aware that Dr. Amado signed the Call to Action. (Tr. III, 187). Dr. Cerreto and the Commissioner maintained at trial that Rivendell was not biased despite the Call to Action and despite a letter that Dr. Cerreto received from Rivendell's president dated December 1, 1993, (before Rivendell performed the evaluation of JRC), in which he describes Dr. Israel's views on aversives as "out of balance." (JRC-311; Tr. XI, 25). Dr. Cerreto testified that knowing in advance that the president of Rivendell believed Dr. Israel's views on treatment were "out of balance" did not mean there was a bias against JRC. (Tr. III, 197-198; Tr. VI, 138-139; Tr. XI, 19,20,25; JRC-311). On March 2, 1994, DMR notified JRC that the "independent" review would be conducted by Rivendell and that JRC's objections to Rivendell and the materials provided on Rivendell's bias were "irrelevant." (Tr. VIIA, 103; U-147, 2). Not surprisingly, the Rivendell team was highly critical of the JRC program. (DMR-2).

DMR's refusal to mediate the Rivendell issue with the Monitor cannot be explained in light of its actions two months before, when DMR specifically sought the Court Monitor's approval for the Rivendell review. By letter dated October 19, 1993, General Counsel Kim Murdock wrote to Dr. Daignault requesting the Court Monitor's "approval of the independent program review required as a condition to JRC's interim certification." The letter went on to assert that "such approval will both speed the certification process and remove an issue which JRC had unnecessarily placed before the Court." (U-110). Attorney Murdock's letter of October 14, 1993 was sent less than one month after she and Commissioner had specifically rejected further attempts of mediation by the Court Monitor concerning the mailing of the August 6 and August 31, 1993 letters. (JRC-245; U-96). Accordingly, the Court Monitor responded to Attorney Murdock on October 15, 1993, via facsimile, reminding her of DMR's refusal to participate in the mediation sessions. (JRC-251). He further advised Attorney Murdock that he did not see how mediation could be

reinstituted unless the Department were to revise its position, and make an unequivocal commitment to the process of mediation with "the full acknowledgment that the Settlement Agreement mandates the submission of any issue to the Court which fails to be resolved in mediation." (Id.). Moreover, Dr. Daignault weighed the request that he "approve" Rivendell in light of his role under the Settlement Agreement. He concluded that the Settlement Agreement did not give him the authority to approve actions, since his role was to mediate and arbitrate disputes. (Tr. II, 171; JRC-251).

When DMR did not receive the answer it wanted, the agency responded by continuing its attack on the Court Monitor. The same day that Dr. Daignault faxed his letter to General Counsel Murdock, DMR noticed Dr. Daignault's deposition in this case. (U-111). The notice of deposition constituted an escalation of the personal attack which was being conducted by the Department against Dr. Daignault. This was evidenced in a October 19, 1993 letter the Department sent to Dr. Daignault requesting that he "reconsider" his role as Monitor, at least as a matter of conscience." (U-113). Dr. Daignault testified that he felt this letter was further evidence of DMR's campaign to impugn him and that after years of collegiality, he felt badly that the Department would "stoop" to this level. (Tr. II, 174).

On October 22, 1993, Dr. Daignault filed a motion seeking reassignment of his arbitration and mediation responsibilities under Paragraph B-2, because he felt that the Commissioner's challenge to his ethical integrity, although frivolous, was an attempt by DMR to divert attention away from the matters involving DMR, JRC, the JRC students, and the JRC parents. (Tr. II, 176-117; JRC-252; App. 183-184). The Trial Court subsequently appointed counsel for the Monitor and appointed the Honorable George Hurd, as the new mediator in this matter. (App. 213; Tr. II, 180). Dr. Daignault having withdrawn from his mediating function, continued in his role under the Settlement Agreement to monitor JRC's compliance with state regulations.

K. The Tuesday Morning Meetings

In the late spring of early fall of 1993, the Commissioner convened a special JRC meeting, which became known within DMR as the "Tuesday

morning meetings" or "weekly meetings." These meetings began after the Commissioner initially received the inquiry from CBS News. (Tr. III 203-204,207). The Commissioner never held meeting such as these with respect to any other provider. (Tr. III, 200). DMR's staff for these meetings included, among others, the Director of Investigations, Richard Cohen; Public Relations Director, Jerry Ryan; DMR's General Counsel Murdock; and a private attorney from Philadelphia, David Ferleger, Esquire, hired by the Commissioner with public funds to work with him on JRC's application for recertification. (Tr. III, 200-201). The Commissioner did not invite the members of the 1993 Certification Team to the Tuesday morning meetings, nor did he discuss with, or provide copies of the 1991 and 1993 Certification Reports to the group. (Tr. III, 74-89). The 1993 Certification Team was not involved in any way in the weekly meetings.

The Commissioner initially testified at trial, and at his pre-trial deposition, that these Tuesday morning meetings dealt "strictly" with the issue of JRC's certification and that there was no other purpose to, or issues discussed at the meetings except certification. (Tr. III, 72,199-200,203,214; Tr. IV, 120-121). The members of the group kept notes, work plans and agendas for the weekly meetings. (U-193; U-225). DMR counsel, however, did not produce copies of the notes, work plans, and agendas until the week before trial, and even then, the copies were heavily redacted with the words "privileged" and "policy development" boldly stated on the top of each document. (U-190-U-225; Tr. XIII 28-31).

On July 11, 1993, the Trial Court conducted an in camera inspection of the unredacted notes, work plans, and agendas and determined that the attempt by the Commissioner to shield portions of the documents from disclosure to JRC through redaction was unlawful. Thereafter, the judge immediately ordered the full text of notes, work plans, and agendas produced to JRC. (Tr. X, 79; JRC-293-JRC-304; Tr. XIII, 30-33). The documents fully support the Trial Court's findings of bad faith, as well as the findings concerning the untruthfulness of the Commissioner's testimony.

The work plan documents show that, contrary to the Commissioner's sworn testimony, many of the topics discussed at these meetings had nothing to do with JRC's certification nor the legitimate exercise of DMR's regulatory authority. One of the first topics for discussion at the September 7, 1993 meeting, was the Department's attack on the Court Monitor. (JRC-293). Specifically, DMR described in the work plan how it intended to substantiate its attack on the Court Monitor. Dr. Cerreto testified that she suggested looking at the psychology Code of Ethics and filing a Complaint with the APA Ethics Board, regarding Dr. Daignault. (Tr. X, 115-117). Although Dr. Cerreto denied doing anything to follow-up her suggestion, this testimony was belied on cross-examination when she admitted that she did obtain 1987 examples from the Psychology Code of Ethics, presumably to support DMR's attack on the Monitor. (Tr. X, 127-128).

On September 7, 1993, Dr. Cerreto was assigned the task of determining what of JRC's property was leased and what was owned. (Tr. X, 125-126). Dr. Cerreto admitted that she undertook this responsibility even though it had no relationship to her role as a clinician, and was not applicable to the issue of whether JRC should be certified to use Level III procedures. (Tr. III, 126). Moreover, the Commissioner testified that the issue of whether JRC's property was owned or leased had no relation to the issue of certification. (Tr. III, 223). The Commissioner was then forced to concede that the testimony he had previously given under oath was false. (Tr. IV, 152). He did not advance any other legitimate regulatory justification for this activity. However, despite having no legitimate relationship to certification or any other regulatory justification, Attorney, David Ferleger was instructed to run "title searches" on all of JRC's property. (Tr. III, 223). Again, when pressed on cross-examination, the Commissioner admitted that the purpose of these title searches, which utilized significant amounts of public funds, was to determine whether or not there were "undisclosed related-party transactions" with respect to JRC. (Id.). The Commissioner also admitted that he had absolutely no basis to believe that such undisclosed related party transactions involving JRC existed when he commissioned Attorney Ferleger to undertake the title searches. (Tr. III, 224).

Indeed, the title searches ultimately determined that no related party transactions existed. (Tr. III, 225). Another example of a task unrelated to certification is also contained in the September 7, 1993 agenda. There, the Commissioner assigned himself the responsibility to "confirm the financial status" of JRC and to "determine reasons for DMH rate being higher than DMR." (JRC-293). The Commissioner again conceded that this subject did not relate to certification. (Tr. III, 214-215). Moreover, there was no legitimate reason for the Commissioner to question JRC's "financial status" at this time, and there was no reason for the Commissioner to be involved in such an inquiry, unless he was intent upon taking action to disrupt JRC's revenues.

The work plans disclosed activities which not only have no legitimate regulatory function, but also violated a number of DMR policies and procedures. For example, when confronted with a weekly meeting work plan referencing the use of a DMR investigator, the Commissioner admitted at trial that it was a violation of DMR's policy of confidentiality when investigator Cohen gave the Commissioner specific details, conclusions, and other information obtained in a JRC investigation, before the investigation was completed. (Tr. III, 208-209; Tr. IV, 32-46; U-202; U-205).[7] The Commissioner admitted that he had testified falsely earlier in the trial when he said that Investigator Cohen's only purpose in attending the meetings was to provide him with the status of each investigation. (Tr. IV, 36; U-202; U-208).

In September of 1993, a time when the Commissioner was supposedly at an early stage in considering JRC's application for certification, the work plan documents reveal the actual objectives of DMR to destroy JRC. At the September 7, 1993 meeting there was discussion concerning the development of "contingency plans" for placement options for JRC students. (JRC-293). Additionally, the Commissioner requested that the Attorney General's office draw up a plan to put JRC into receivership. General Counsel Murdock was instructed to include in a letter to JRC that DMR would need 60 days advance notice before

[7] The DMR investigation unit is supposed to be independent from the Commissioner's office. (Tr. III, 208). In addition, the Commissioner is charged with deciding appeals from the results of the investigations. 115 CMR §9.11(2).

JRC closes. (JRC-293; JRC-294). It was more than coincidence that the 60 days advance notice that was set forth in the agenda item dovetailed with Condition 10 of the August 31 Letter which required JRC to give 60 days notice to its funding agencies to develop emergency placement plans. (U-91). While the Commissioner had falsely characterized Condition 10 as being based upon an incident which occurred in 1991, the work plans revealed that the Tuesday morning group was considering closure of JRC in 60 days, while purporting to act in good faith on the application for certification.

The Commissioner's true intentions were further revealed in the notes of a meeting which took place on October 29, 1993. (U-220). At the bottom of page 1 of these notes, next to two stars and an underline, is the notation: "December 15, JRC D-day." Appearing on page 2 of the notes is the following line: "What would JRC have to do to not be certified; two areas are capacity to obey laws and efficacy of treatment." (emphasis in original). (U-220). The December 15, 1993 date which DMR characterized as "D-day", was approximately 60 days after the Commissioner had instructed DMR to notify JRC's placement agencies to prepare contingency plans, and was consistent with the time frame for placing JRC in receivership.

The work plans also revealed DMR's concern with the upcoming CBS news report. While the Commissioner insisted on the witness stand that he planned no action in anticipation of the forthcoming show, the work plan documents revealed that this assertion was false. (Tr. III, 206). The October 15, 1993 meeting minutes reflect that DMR was planning to mail communications to JRC parents prior to the CBS news show, as well as a second letter after the show. (U-196). As evidenced from the work plans, the Department anticipated that the combination of its existing regulatory actions, the upcoming Rivendell report, and the CBS news piece would be sufficient to bring about the demise of JRC. Once again, the Commissioner was forced to concede that the communications regarding the CBS news show had nothing to do with the issue of certification. (Tr. III, 250-251).

By late November 1993, DMR embarked on yet another strategy -- the attempt to interfere with JRC's fiscal affairs by attacking its rate of

reimbursement. JRC receives a rate which is calculated by the Division of Purchased Services ("DPS"). (Tr. III, 263). The Commissioner became aware of meetings at DPS concerning JRC's rate, and DMR attempted to arrange a "pre-meeting" with DPS officials. (Tr. III, 263-271). The Commissioner could not explain at trial why there was the necessity for a "pre-meeting." (Tr. III, 268-269). It was clear from the documents, however, that it was DMR's intention to try to convince DPS to transfer control over JRC's reimbursement to DMR. (Tr. III, 270). DMR had never before sought a pre-meeting with DPS prior to what was supposed to be a public meeting on a licensee's rate of reimbursement. Indeed, pre-meetings were not authorized in the regulations. The Commissioner admitted that JRC's rate of reimbursement and DMR's efforts to have a pre-meeting with DPS had nothing to do with JRC's certification, yet that was another topic discussed at the weekly meetings. (Tr. III, 263-271; U-199,2).

The DPS meeting with JRC occurred on December 14, 1993. (JRC-262). DMR took the position at that meeting that JRC's legal costs were being incurred against the Commonwealth and were "non-reimbursable." (Id.). This constituted a deliberate attempt by DMR to interfere with JRC's ability to prosecute this case. When confronted with this issue, the Commissioner was not able to answer how JRC would pay its lawyers if its legal costs were rendered "non-reimbursable." (Tr. IV, 28). Indeed, the Commissioner's attempt to cut-off payments for JRC's counsel were at odds with his simultaneous efforts to increase compensation for his own private counsel, Attorney Ferleger. On February 24, 1994, the Commissioner made a written request to increase the amount of funds that DMR was authorized to pay Attorney Ferleger from $73,000 to $118,000 because of increased litigation with JRC. (Tr. IV, 13-17,27-28; JRC-261; JRC-262,4). In his communications with both the Attorney General's office and the Secretary of Administration and Finance in seeking the increase for Attorney Ferleger, Commissioner Campbell failed to disclose that Attorney Ferleger, who was supposedly hired because of his expertise in the area of disabilities law and his expertise in the "JRC" case, was also being paid at

public expense for coordinating title searches on JRC properties. (Tr. IV, 8,17-18).

At the commencement of his testimony, the Commissioner repeatedly insisted that the weekly meetings were held solely to address JRC's application for certification. His trial counsel had within her possession documents which totally contradicted this assertion. Recognizing the devastating nature of these documents, the Commissioner's counsel improperly invoked the attorney-client privilege to prevent disclosure of the actual facts. (Tr. III, 73). When the documents were finally produced in unredacted form -- only after repeated Court orders (Tr. III, 67,74,75), they showed nothing less than a plan to bring about the demise of the JRC program, through any means possible, regardless of whether that means had any relationship to DMR's regulatory mandate.

L. The December 15, 1993 Interim Certification Letter, And The False Allegations Concerning JRC's Failure To Report The Death Of A Student

Instead of arbitrating under the terms of the Settlement Agreement as requested by JRC, the Commissioner sent to JRC another interim certification decision on December 15, 1993 (the "December 15 Letter") which was also sent to all of JRC's funding and placement agencies. (U-128; Tr. IV, 132; Tr. VIIA, 87).

In the December 15 Letter, the Commissioner granted JRC only sixty additional days of certification, and stated as grounds JRC's failure in the past to report "deaths" to DMR, in particular, the death of former JRC student L.C. who had died in December, 1990. (U-128, 1). Commissioner Campbell admitted at trial that JRC had not failed to report "deaths" to DMR, and he claimed that "deaths" in the plural was a typographical error since he was only referring to the death of L.C. (Tr. IV, 130-135). Nevertheless, the first page of the December 15 letter stated that JRC's "failure to report a death in 199[0] made it impossible for me to fulfill my responsibilities" to investigate the death. (emphasis added). He went on to state that no report was made to the Commissioner's office. (U-128, 1).

The Commissioner at trial initially was forced to admit that JRC had reported the death in 1990, which was received by the Commissioner's office, but attempted to justify the statement in his December 15 letter by claiming that JRC's report incorrectly spelled L.C.'s name and gave no other information about L.C., such as identifying her placement as being at JRC, which made it impossible for DMR to investigate the death. (Tr. IV, 91-101,131). DMR's trial counsel produced the "incomplete" death report to JRC after the Commissioner gave his testimony. (JRC-266; Tr. V, 57-59). The death report explicitly indicated that on the day of L.C.'s death, JRC's report of the death was timely logged in at DMR's General Counsel's office and included L.C.'s name, the address of her JRC group home in Attleboro, the name of the Attleboro detective assigned to investigate the death and his telephone number, the name of the hospital where L.C. died, and the cause of death reported by the emergency room, "a perforated ulcer." (JRC-266). After being confronted with the death log, the Commissioner admitted at trial that at the time he wrote his December 15 Letter, he in fact had all of the information contained in the death log and that DMR could have conducted an investigation in 1990. (Tr. VI, 115-122). He was then compelled to admit that his previous testimony regarding the death of L.C. was false. (Tr. VI, 121-122).

Despite having all the necessary information concerning the death, in his December 15 Letter, the Commissioner not only did not retract his false allegation, but also he disseminated it through the news media. General Counsel Murdock knowingly made these same false allegations to the Boston Globe and Boston Herald which resulted in a derogatory news article about JRC. (Tr. IV,

142-143). After these articles appeared, General Counsel Murdock attempted to clarify her remarks by writing to the Boston Globe and Boston Herald asserting merely that she was alleging that the death was not reported to "the Commissioner or his designee." (U-144). However, the retraction letter went on to state that Attorney Murdock, in her original conversation with the reporter, had "added that JRC's failure to report the death to the Commissioner had resulted in a three-year delay in investigating it." (Id.). Thus, even when she attempted to retract her original allegations, Attorney Murdock made another false allegation blaming JRC for the three-year delay in investigating the death when, in fact, the death had been reported to her own office within nine hours of the time the death occurred. (JRC-266).

M. The Commissioner Obstructed JRC's Intake And Violated The January 28, 1994 Court Order

Following the December 15, 1993 letter, counsel for the student members of the class filed a motion requesting that the Commissioner send out notices to placement agencies that DMR certification process not adversely affect decisions about placement of students at JRC. In response, on January 28, 1994, the Trial Court issued a preliminary injunction ordering the Commissioner to send a letter to all of JRC's funding and placement agencies informing them that the past certification letters were not meant in any way to indicate that JRC's recertification would not be forthcoming, and that the delay in the recertification process should in no way adversely affect any decision about a placement at JRC. (App., 215-217; Tr. VIIA, 87-88). However, the Commissioner's effort to close JRC by ruining JRC's reputation with its funding and placement agencies continued despite the Trial Court's order. JRC learned that the Commissioner planned to meet with JRC's largest funding source, the New York funding and placement agency (the "New York Agency"), on February 7, 1994. (Tr. IV, 60-64; U-208,2; Tr. VIIA, 89). At trial, the Commissioner first testified that the only purpose of the meeting with the New York Agency was to discuss the status of JRC's certification, but then later, when confronted with his counsel's correspondence, the Commissioner admitted that the purpose of the meeting was to discuss the Commissioner's "litigation" with JRC. (Tr. IV, 60-64; U-208, 2).

At a meeting with the new mediator Judge George Hurd, JRC's counsel requested that a neutral party, GAL Briggs, be allowed to attend the meeting between DMR and the New York Agency. (Tr. VIIA, 89; App. 472). DMR's counsel responded by saying that DMR would have no objection to GAL Briggs's attendance. (Id.). However, the next day, General Counsel Murdock informed JRC by letter that DMR had no position on whether a neutral party could attend the meeting, and thereafter the meeting was cancelled. (Tr. IV, 67-69; Tr. VIIA, 90; U-138). JRC's counsel made a written request to DMR that JRC be notified of any rescheduling of the meeting between DMR and the New York Agency whether held in person or by teleconference. (Tr. VIIA, 90-91; JRC-281). The Commissioner then rescheduled the meeting and held it by teleconference, but did not notify JRC or the GAL Briggs of the meeting. (Tr. IV, 70; App. 472). Following the meeting, a communication was sent out to a significant number of parents funded by the New York Agency informing them that their children would be leaving JRC. (Tr. IV, 69; Tr. VIIA, 89-92). The Commissioner also admitted at trial that his staff had encouraged parents to remove their sons and daughters from JRC. (Tr. IV, 238-240).

At the urging of Judge Hurd, during a meeting which took place with JRC and DMR representatives in January, 1994, DMR counsel agreed that the Commissioner would provide JRC a draft of its next certification decision and discuss the proposed conditions of certification with Dr. Israel, prior to making the final decision, in an attempt to agree upon conditions that would be feasible for JRC to satisfy. (Tr. VIIA, 92-93). DMR purported to comply with this agreement when Dr. Israel and his counsel were invited to a meeting with DMR counsel on February 9, 1994 to discuss the proposed conditions of certification. (Tr. VIIA, 93). At the meeting, DMR counsel distributed to Dr. Israel and JRC counsel what the DMR representatives called an "outline" of proposed conditions for JRC's certification. (Tr. VIIA, 93). The conditions as outlined were impossible for any DMR licensed program to complete. One condition required that JRC within eighty days have each of its then over sixty students examined by a new physician and a new psychiatrist, as approved by the Commissioner, and then submit to DMR a written psychiatric report and a written medical

report, in a form acceptable to DMR, for each student examined. Another equally egregious condition required JRC within the same eighty days to rewrite every one of the over fifty court-approved treatment plans for the JRC students, in a form acceptable to DMR, even though the Commissioner had yet to explain why JRC's Court-approved treatment plans no longer conformed to the regulations. (Tr. VIIA, 93-99; Tr. VIIB, 15-19).

Dr. Israel explained to DMR counsel at the February 9 meeting that it would be unethical and highly intrusive to the JRC students to submit them en mass to psychiatric and medical examinations without an indication of which, if any, students needed an examination. (Tr. VIIA, 93-99). The JRC students were already treated and followed in the normal course by physicians and specialists from Boston Children's Hospital, Massachusetts General Hospital and Beth Israel Hospital. (Id.). Dr. Israel also informed DMR counsel at the meeting that it would be impossible for his staff in eighty days to find qualified physicians and psychiatrists to conduct and write the evaluations, and impossible for the JRC psychologists to re-write over fifty treatment plans to meet a new undefined standard. (Tr. VIIA, 93-99). Dr. Israel also informed DMR counsel that JRC could not afford to pay tens of thousands of dollars for new physicians and psychiatrists to conduct over 120 evaluations. (Tr. VIIA, 95). DMR counsel refused to change any of the conditions. (Tr. VIIA, 99).

The meeting with Dr. Israel was not a good faith attempt to resolve the certification conditions. Not only did DMR refuse to address Dr. Israel's concerns, but right after the meeting, on same day the Commissioner issued to JRC and JRC's funding and placement agencies his nineteen-page certification letter (the "February 9 Letter"). The letter contained twelve conditions for certification, including all of the conditions which Dr. Israel had stated were impossible to meet. (U-139). Dr. Israel's concern over the impossibility of fulfilling the conditions in the time frame specified was later vindicated when responsibilities for providing some of the services were shifted to DMR. After six months had passed, DMR had still failed to comply with the requirements. (Tr. IV, 155, 158; Tr. VIIB, 14,22).

The February 9 Letter provided that JRC would automatically be decertified if all twelve conditions were not satisfied by May 8, 1994. (U-139, 1). The Commissioner again falsely accused JRC in the February 9 Letter of repeatedly violating DMR regulations. (U-139, 1). The Commissioner also raised further allegations concerning the "recording of deaths." (U-139). In the February 9 Letter, which was again submitted to funding agencies, JRC was required to report all "deaths of individuals served by the program" to DMR within 24 hours of such death. The effect of this condition was to suggest to funding agencies that deaths were not being reported to DMR, a conclusion which General Counsel Murdock repeated in the newspaper articles.

The Commissioner admitted at trial that he was aware when he signed his February 9 Letter that the JRC students were already seen by physicians and psychiatrists at JRC, and admitted that he had no opinion from a physician or psychiatrist that students needed new evaluations. (Tr. IV, 151-154,157). The Commissioner also admitted at trial that his statement in the February 9 Letter that the JRC treatment plans did not conform with the regulations contradicted the 1991 and 1993 Certification Reports. (Tr. IV, 144-145).

N. The Bad Faith Settlement And The July 5, 1994 Certification Letter

In May of 1994, a new team of DMR lawyers was brought in to handle the JRC matter. (Tr. IV, 215-216). On May 9, 1994, six weeks of intensive negotiations commenced between JRC and DMR over the conditions of certification. The meetings occurred on almost a daily basis. (Tr. IV, 216; U-150). The results of the negotiations were eight written agreements, signed by the Commissioner and Dr. Israel, which detailed DMR's and JRC's obligations in completing the conditions of certification. (Tr. VIIA, 107-109; U-150; U-152). On July 5, 1994, the Commissioner issued another certification letter (the "July 5 Letter") acknowledging that four of the original twelve Conditions had been satisfied by JRC and describing the eight written agreements on the other eight conditions. (Tr. IV, 215-216; U-152, 1-3). The Commissioner stated in the July 5 Letter that he was extending JRC's interim certification until December 31, 1994 and would grant JRC a two-year certification at that time if

JRC complied with its obligations in the eight agreements on the Conditions. (U-152, 1-2). After reading an agreement with JRC, DMR promptly proceeded to violate material provisions of that agreement. Several examples are illustrative.

The condition that JRC re-write all of the court-approved treatment plans was satisfied by having JRC psychologist Robert Worsham and DMR psychologist Dr. Cerreto draft a joint treatment plan which met all of DMR's regulatory requirements for one of JRC's most difficult clients. (Tr. VIII, 135-149). Dr. Cerreto signed the treatment plan, initialed each page, and the treatment plan was attached to the written agreement signed by Dr. Israel and the Commissioner as a model plan for JRC to use in rewriting the other approximately fifty court-approved treatment plans at JRC. (U-152,10-43; Tr. VIII, 85,135-149). The model treatment plan contained similar treatment modalities to the original court-approved plan, and also contained more information about each student and more detailed descriptions of JRC's treatment procedures. (Tr. VIII, 134-137; Tr. VIIB, 5-6). The sample treatment plan on which Dr. Cerreto signed off included authority for JRC to use the Specialized Food Program, the automatic negative reinforcement procedure, behavior rehearsal lessons and programmed multiple application with electrical skin stimulation. (Tr. VIII, 143-147; U-152,32-35).

Another certification condition required JRC to re-write all of its treatment plans by November 21, 1994. Based on the prototype treatment plan negotiated with Dr. Cerreto, Dr. Worsham and Dr. Von Heyn, JRC's only other full time psychologist, spent virtually all their time between June and November 1994 rewriting treatment plans. (U-152,4; Tr. VIIB, 4-6; Tr. VIII, 150-151). Dr. Worsham mailed the rewritten treatment plans to Dr. Cerreto as required. (JRC-290). Dr. Cerreto never responded that any of the treatment plans JRC provided failed to conform to the prototype plan which had been negotiated or to DMR regulations. (U-166). Nevertheless, in an interim certification letter dated January 20, 1995, which will be discussed in further detail later, the Commissioner stated JRC's behavior modification treatment plans did not comply with DMR regulations. (U-166). Dr. Worsham testified that his reaction to this

letter was one of shock since he had negotiated the prototype plan with DMR's chief clinician, Dr. Cerreto, who had never raised objections to the plan or to any of the others he had sent to her between July and November. (Tr. VIII, 152).

The Rivendell review satisfied the need for a independent program review was satisfied according to the Commissioner by the Rivendell review. (Tr. IV 220). The Commissioner, however, also reneged on this agreement and attempted to force JRC to submit to yet another program review by still another set of outside consultants hired by DMR. (U-158; Tr. IV, 218).

The July 5 Letter had set forth a schedule for treatment plan reviews of the JRC students to take place. However, in defiance of the schedule, the Commissioner refused to proceed with those reviews. (Tr. VIIB, 22). Moreover, the letter shifted to DMR responsibility for completing new psychiatric and medical evaluations of each JRC student, which were to be completed by October 1, 1994. DMR, however, failed to complete those evaluations. (Tr. IV, 155,158; Tr. VIIB, 14,22).

Another of the agreements set forth a specific number of treatment plans that would be intensively reviewed by DMR beginning on July 1, 1994. DMR, however, did not even start the reviews until late October 1994, and then attempted to increase the number of plans to be reviewed in violation of the agreement that it made. (Tr. IV, 221-223). Finally, and most importantly, DMR failed to extend DMR its two-year certification on December 31, 1994, as promised in the July 5, 1994 certification letter. (U-165).

The Commissioner's disavowal of his agreements was accompanied by the launching of a regulatory onslaught upon JRC. In the later half of 1994, JRC was besieged by hundreds of visits from an army of DMR psychologists, psychiatrists, physicians, investigators, licensors, service coordinators, and attorneys, who came to the school on a daily basis, putting massive demands on JRC staff and JRC attorneys. (Tr. VIIB, 24-27). JRC was forced to expend enormous resources to respond to DMR's regulatory onslaught. (Tr. VIIB, 25-27). JRC's response both to the ongoing regulatory siege, and DMR's violations of its agreement was to request mediation under the Settlement Agreement in a

letter dated November 28, 1994 (Tr. VIIB 24-27; JRC-282; U-160,2). Despite JRC's request, DMR refused to mediate. (Exhibit 160). On December 30, 1994, Deputy Counsel Chow-Menzer sent a letter to JRC counsel informing him that interim certification for JRC would continue on a "day-to-day basis" until otherwise notified by DMR. (U-165). Once again, the decision caused further damage to JRC's ability to attract and maintain students since no funding or placement agency would be willing to send clients to a program whose certification could lapse at any moment. (Tr. VIIB, 39-41).

O. The January 20, 1995 Certification Letter

The Commissioner's day-to-day certification of JRC continued until January 1995, when he launched his next attack. In a certification letter dated January 20, 1995 (the "January 20 Letter"), the Commissioner stated that JRC had not complied with several of the conditions contained in his earlier July 5, 1994 certification letter. (U-166,1). Nevertheless, he purported to grant JRC a one and a half year certification, but again subject to impossible conditions. (U-166). The Commissioner ordered JRC to stop using four aversive procedures (Specialized Food Program, programmed multiple applications, automatic negative reinforcement and behavior rehearsals) on all students despite the fact that he knew that the Trial Court had previously approved all four procedures, and despite Part A of the Settlement Agreement which vested treatment authority in the Court. (U-166, 12-13; Tr. VI, 200-201). The Commissioner's order also violated his commitment in the Report to the Court on September 22, 1993 that he "has not taken and will not take any action which . . . interferes with any court-approved program." (App. 158). The Commissioner admitted at trial that he had no medical or psychiatric support for his position that the four court-approved procedures he prohibited had any adverse effect on the JRC students. In fact, the physicians and psychiatrists that DMR hired to conduct the medical and psychiatric evaluations of all the JRC clients, including those subject to the procedures, found that the clients were healthy and receiving appropriate care. (Tr. VI, 95,200-202; JRC-284). The Commissioner eliminated Specialized Food even after his own doctors concluded that there were no adverse health effects

from the program. (U-75). Moreover, these very procedures were also the subject of discussions in the fall of 1994 between Dr. Cerreto and Dr. Worsham. At no time, did Dr. Cerreto object to the use of these procedures as either not professionally supported or not in compliance with DMR regulations. (Tr. VII, 143-144; U-152, 31-32). While banning the use of these four procedures outright, the Commissioner admitted at trial that he did consult with any of their medical and psychiatric experts that DMR had hired regarding whether the withdrawal would harm the JRC students. (Tr. VI, 199-200).

As explained in detail, ante, the Commissioner's January 20 Letter also found that the 50 behavior modification treatment plans rewritten by JRC psychologists from June to November 1994, and received by DMR without objection, did not comply with DMR regulations. (U-166,2-6,9-10). In addition, the January 20 Letter excluded authorization for JRC to continue Level III intervention for six individuals, including one who was the recent subject of a five day treatment plan review by a Justice of the Probate Court. (U-166). The Commissioner further admitted at trial that the decision to exclude this student from JRC's certification was based on the report of a psychologist whom the Trial Court, in the treatment plan review held one month prior to the Commissioner's January 20 Letter, had found to be not credible and to have given testimony which lacked adequate factual foundation. (Tr. IV 228-231). The Commissioner acknowledged in his testimony that his letter of January 20 was inconsistent with the treatment orders of the Probate Court in that case. (Tr. IV, 231-232). Perhaps even more alarming was the Commissioner's admission at his pre-trial deposition and at trial, that he was not familiar with the six JRC student whom he excluded from his January 20, 1995 grant of certification. (Tr. VI, 195-196). Indeed, the Commissioner admitted that he did not know whether or not these students needed aversive procedures in order for them to benefit from an effective treatment plan. (Tr. VI, 198).

In addition, the January 20 Letter first introduced the concept of regulatory approval of treatment plans on a "case-by-case basis." There is nothing in the Commissioner's own regulations on certification which gives him the power to apply certification in individual cases. Rather, the regulations at

104 CMR §20.15(4)(f) speak to the question of whether a program as a whole should be certified, and leaves the decision on substituted judgment to the directive of the Probate Court. (Tr. VIIB, 41-44).

In response to the January 20 Letter, JRC requested mediation and arbitration under the Settlement Agreement. (U-169). Demand was again made that the Commissioner adhere to the Settlement Agreement and Paragraph B-2 was specifically invoked. JRC's request for mediation and arbitration was refused. (Tr. IV, 233; U-169).

Once again, the Commissioner sent a copy of his January 20 Letter, as well as copies of a March 3, 1995 letter accusing JRC of putting its clients "jeopardy" to all of JRC's funding and placement agencies. (Tr. VIIB, 44; U-174; U-175). The Commissioner failed to state in those letters that all of JRC's treatments had been approved and monitored by the Trial Court and that DMR's own physicians, psychiatrists, attorneys, and psychologists, including the 1991 and 1993 Certification Teams found nothing wrong with the JRC procedures or its treatment of its students. (Tr. VIIB, 38-39; U-166; U-174; U-175).

P. The QUEST Survey Results And The Commissioner's March 23, 1995 De-Certification Of JRC

An additional aspect of DMR's regulation over JRC is the licensure of the residences JRC provides for its students. (Tr. VIIIB, 30). On November 15, 1994, DMR conducted a licensing survey known as the QUEST survey of JRC's group homes. On March 15, 1995, JRC received results of DMR's so-called QUEST survey. The QUEST report was completed on December 20, 1994, but DMR did not disclose it to JRC until three months later. (Id.). The report faulted JRC in all seven sections of the survey for such illogical reasons as JRC staff engaging in too much affectionate and caring interaction with students; JRC not providing its severely mentally retarded and autistic clients with their own keys to their group homes; JRC using "stigmatizing" school buses instead of transporting its students in individual passenger vehicles; and, perhaps the height of absurdity, JRC not having one of its students on its Board of Directors. (U-164,1,5,7,25,43,45). DMR gave JRC 90 days to cure the deficiencies cited in the QUEST report or JRC's group homes would be de-licensed. (U-183). Once

again, JRC wrote to DMR requesting that DMR arbitrate the results of the licensing survey. (Tr. VIIB, 30-32,38-40; U-283). DMR never responded to this request.

On March 23, 1995, the Commissioner decertified JRC and ordered all court-approved aversive treatment stopped. (U-179). On March 24, 1995, the Trial Court issued a preliminary injunction prohibiting the Commissioner from enforcing his decertification order and interfering with court-approved treatment plans. (App. 283). The preliminary injunction was designed to preserve the status quo pending the trial on the merits.

Q. Damage Caused By The Commissioner's Contemptuous Conduct

The JRC students, parents and JRC itself were all caused egregious harm by the Commissioner's course of conduct. The severity of the JRC students' behavior disorders, and their dependence on JRC's unique program to maintain their health, safety and quality of life, rendered the JRC students extremely vulnerable to harm from any diminution in the quality of the JRC program. (Tr. VIIA, 51; Tr. VIIB, 15-18; Tr. II, 189). The quality of the JRC program did greatly diminish from August 6, 1993 to the time of trial because of the Commissioner's campaign to destroy the school. (Tr. VIIB, 25-27).

The Commissioner attacked JRC in two ways. First, the Commissioner published to the world at large, and to JRC's funding and placement agencies in particular, a stream of false statements about JRC and its Executive Director in an effort to dissuade those agencies from sending new students to JRC, and to persuade them to remove students already placed at JRC. This attack struck at JRC's ability to maintain its students and attract new ones which are the sole source of its revenue. (U-82; U-91; U-106; U-128; U-139; U-166; U-175; U-176; U-179). In August of 1993, seventy-five percent of JRC's students were placed and funded by states other than Massachusetts and most of the students were placed and funded by New York. (Tr. VIIA, 43). In his certification letters, the Commissioner falsely depicted JRC as an unsafe, unlawful, renegade program that could not be trusted with the care of disabled people and certainly not the care of the most vulnerable people in the nation. (Id.). The

Commissioner told JRC's funding and placement agencies that JRC was repeatedly violating regulations, providing professionally unacceptable and ineffective treatment, not reporting deaths, and abusing students. (U-82; U-91; U-106; U-128).

From 1987 until August 6, 1993, JRC had built a national reputation for successfully treating individuals with some of the most severe behavior disorders in the country. (Tr. VIIA, 50-53). JRC's enrollment steadily increased from forty-three in 1987 to sixty-six in August of 1993 and states were paying $161,000 per student in tuition. (Tr. VIII, 133,167-168). In less than two years, the Commissioner destroyed six years of growth by reducing JRC's enrollment from sixty-six to forty-three students by the time of trial. (Tr. VIIB, 55-58; VIII, 168-170). The Commissioner caused a thirty percent drop in JRC's revenues, but he did not stop there in his efforts to destroy JRC. (Tr. VIIB, 55-59; VIII, 170-172).

As the second prong of his attack, the Commissioner taxed JRC's remaining resources by bombarding JRC with a stream of regulatory demands starting with the August 6, 1993 Letter, and continuing until the time of trial with over four hundred visits to JRC from DMR personnel during that period of time. (Tr. VIIB, 25-27). The Commissioner ensured that JRC exhausted its resources to comply with his regulatory demands by keeping an ever-present threat of sudden decertification hanging over JRC. (Tr. III, 162-168, 170-171). On almost a monthly basis, from August 6, 1993 to the time of trial, JRC had to use its staff and its lawyers to respond to the Commissioner's litany of regulatory demands and unfounded accusations. (Tr. VIIA, 34-39,75-78; Tr. VIIB 8-19; JRC-287; JRC-288).

For almost two years the Commissioner preoccupied JRC lawyers, JRC's Executive Director and JRC's top administrators and psychologists with responding to all of the regulatory demands. (Tr. VIIA, 34-39,75-78,104-105; Tr. VIIB, 6-19,25-26; JRC-284; JRC-285; JRC-287; JRC-288). The enormity of the demands placed on JRC by the Commissioner, and the resources expended by JRC to respond, is borne out by over four hundred trial exhibits, which is just a sample of the regulatory nightmare created by the Commissioner in his effort

to bury JRC with regulatory demands. The Commissioner admitted at trial that he knew that his certification decisions would affect the JRC students and the operation of the JRC program. (Tr. VI, 86-87).

JRC was forced to respond to DMR's unprecedented regulatory demands at a time when its revenues were rapidly dropping and its legal fees skyrocketing. (Tr. VIIB, 55,58-59; Tr. VIII, 170-174). JRC would not have survived had it not retained counsel to defend itself against the Commissioner's regulatory onslaught and prosecute this contempt action. (Tr. VIIB, 49-50,51). In order to survive financially and pay its counsel, JRC had no choice but to conduct massive layoffs and reduce expenditures for the JRC students. (Tr. II, 185; Tr. VIIB, 51-52,54; Tr. VIII, 171-174). Even with the lower staffing costs, JRC's projected revenues in 1996 were $3,000,000 less than 1995. (Tr. VII, 171-172). Moreover, JRC's balance sheet surplus has been negatively impacted which affects its ability to access a line of credit. JRC's credit line is essential for the school to maintain its staff and serve its students. Without the line of credit, JRC would be unable to meet ongoing payroll needs. (Tr. VII, 195-196). The legal fees alone required to repel DMR's onslaught exceeded $800,000. (App. 1341).

Although JRC is best-known for its aversive program, the most effective and important part of the JRC program is the elaborate program of rewards and positive programming for the JRC students and JRC's state of the art education program. (Tr. VIIB, 66-67; Tr. II, 184-185). The Commissioner caused harm to the JRC students when his regulatory demands diverted JRC's resources from the students and the program. (Tr. VIIB, 4-7,13-17,25-27,53-54,59-69; Tr. VIIA, 104-107; Tr. II, 184-189; Tr. IV, 92). As a result of staff layoffs, the students had to be taught in large groups which prohibited the teaching of new skills because of the need for one-to-one teacher/student attention for JRC's disabled population. (Tr. VIIB, 61-62,67-69). The students lost the most effective rewards which had been used to keep the students from engaging in their life-threatening behaviors. (Tr. II, 184; Tr. VIIB, 61-69; Tr. IX, 92). JRC simply did not have the funds to finance the field trips and other expensive and staff intensive rewards. (Id.). JRC's psychology staff could not focus on the

students, and monitor and improve the students' programs, because they were needed to respond to the Commissioner's false accusations and redundant regulatory demands. (Tr. VIIA, 105,107; VIIB, 4-7,13-17,58,59). At least two JRC students suffered a substantial increase in their health-dangerous behaviors as a direct and immediate result of the Commissioner's illegal and precipitous prohibition of JRC's Specialized Food Program. (Tr. VIIB, 63-65, Tr. IX, 96). The Commissioner needlessly caused a substantial deterioration in the quality of life of the JRC students when he deprived them of the rewards, education, companionship and affection of the JRC staff. (Tr. VIIB, 4-7,13-17,53-54,59-69; Tr. VIIA, 104-107; Tr. II, 184-189; Tr. IX, 92). Because of their extraordinary disabilities, the JRC students were helpless to replace the human contact and opportunity for advancement that DMR stole from them through its bad faith and contemptuous conduct.

SUMMARY OF THE ARGUMENT

The Trial Court's construction of the Settlement Agreement and enforcement through the contempt sanction against the Commissioner of Mental Retardation were correct as a matter of law, as civil contempt properly lies against the Commonwealth and its branches. The terms of the Settlement Agreement impose unequivocal legal obligations on DMR and the Commissioner as parties. Furthermore, the standard for finding contempt of the Settlement Agreement as a public law consent decree is more flexible, and enforcement through contempt is proper since the Commissioner violated the objectives of the Settlement Agreement. Since the Settlement Agreement is a public law consent decree rooted in ongoing public reform litigation between JRC and state regulatory agencies, this Court should accord great deference to the Trial Court's construction and enforcement of the Settlement Agreement. (pp. 62-65).

The Settlement Agreement created a framework whereby the health and safety of the JRC's students would be adequately monitored, but no longer exclusively entrusted to state officials who had acted in an arbitrary manner in their prior regulation of JRC. The exclusive role of the state administrative agencies in regulating JRC was changed substantively in all respects from the method by which JRC was earlier regulated. DMR became a full party subject to the substantive provisions of the Settlement Agreement in 1988, and the Commissioner and his predecessor in the role of regulator of JRC adhered to its provisions and objectives until 1993. DMR exhibited its full party status under the Settlement Agreement through its conduct and representations to third parties. Until August of 1993, the Commissioner deferred to the Trial Court on all treatment decisions, even after the adoption of the behavior modification regulations which vested him with authority to certify Level III aversive treatments. (pp. 66-74).

The Trial Court correctly concluded that the Commissioner violated the express terms and overall objectives of numerous provisions of the Settlement Agreement. The Commissioner engaged in contempt of Part A of the Settlement Agreement by unilaterally ordering aversive treatment terminated, even those treatments approved by the Probate Court, the exact regulatory power modified

with the signing of the Settlement Agreement. The Commissioner engaged in contempt of Paragraph B-2 by unilaterally enforcing his regulatory authority over JRC in spite of the Court Monitor, and in refusing to arbitrate regulatory disputes. The Commissioner engaged in contempt of Part C of the Settlement Agreement by sending to JRC's Funding and Placement Agencies bogus certification letters containing false allegations of wrongdoing and abuse by JRC's staff thereby interfering with the intake of new clients and the subsidizing of existing clients. The Commissioner violated the good faith provisions in Part L of the Settlement Agreement by violating the substantive provisions of the Settlement Agreement, engaging in corrupt tactics in response to the JRC program, and otherwise failing to substantially comply with the provisions and objectives of the Settlement Agreement from 1993 until trial, which conduct was consistent with a strategy to destroy JRC and eliminate its treatment. The evidence adduced by JRC showing that the Commissioner perpetrated a fraud on the Trial Court by submitting a false Report to the Court in 1993 which negatively depicted JRC's program was sufficient evidence of bad faith on the part of the Commissioner, which then shifted the burden onto DMR to produce evidence to refute JRC's evidence of latent misconduct and bad faith. (pp. 74-86).

The Trial Court did not abuse its discretion in making the limited evidentiary rulings at trial contested by the Commissioner. The Court did not erroneously refuse DMR's request to extend discovery to complete a Rule 30(b)(6) deposition of JRC, after DMR's original notice of deposition did not satisfy the rule. In any event, DMR had ample opportunity to examine JRC's expert witness on the issue of financial harm. DMR also had ample opportunity to rebut the evidence of harm to the students caused by the Commissioner's contempt without the need for additional medical examinations of two students. Likewise, DMR had ample opportunity to offer its own evidence regarding JRC's claim of DMR's disparate treatment of the JRC program through the testimony of a DMR investigator. The judge's instruction to counsel to move on to relevant testimony was a proper exercise of the discretion over the trial process.

Even if there were error, the Commissioner can show no prejudice to his substantial rights requiring reversal. (pp. 86-92).

The Findings of Fact by the Trial Court are not clearly erroneous. A comparison of the Trial Court's Findings of Fact and JRC's proposed findings, submitted at the close of trial and prior to the entry of judgment, reveals that the findings reflect the judge's independent judgment. Even if the Trial Court had adopted JRC's proposed findings verbatim, the Commissioner cannot show that the factual findings of the Trial Court are clearly erroneous. The Trial Judge's findings are presumed to be correct, and will not be reversed where supported by the record evidence, including any reasonable inferences drawn therefrom. This includes the factual findings drawn from the documentary evidence. The Commissioner violates well-established appellate standards by misstating the findings of the Trial Court and distorting the record to support a claim that the findings are clearly erroneous. Despite distorting the record, the Commissioner cannot escape that he was forced to concede to numerous inconsistencies and misrepresentations throughout his trial testimony. Moreover, the record evidence and reasonable inferences drawn therefrom supports all of the findings which the Commissioner attacks, and those he does not. (pp. 92-147).

Likewise, the Trial Court did not abuse its broad discretion in granting as a remedy for contempt equitable relief in the form of a permanent injunction and receivership over DMR in regards to its regulation of JRC. The Trial Court was warranted in affirmatively ordering the Commissioner and DMR to comply with the terms of the Settlement Agreement based upon the conclusion, as supported by the record, that future unlawful conduct by the Commissioner and DMR against JRC was likely to occur. Similarly, the Trial Court was warranted in issuing a broad order completely supplanting the executive regulatory functions of DMR as they related to JRC by appointing a receiver to ensure compliance with the Commissioner's legal obligations under the Settlement Agreement. The broad authority of the receiver is warranted to address the significant damage inflicted upon JRC and its students by the contemptuous conduct of the Commissioner, and to prevent further injury. Because both the contempt finding and the relief granted were well within the broad discretion of the Trial Court,

this Court for the fifth time should deny a stay of pending appeal. There is no likelihood that the Commissioner will succeed on the merits of this appeal, and it is likely that the Commissioner will continue to cause harm to the JRC students if he is allowed to continue with his regulation of JRC. (pp. 147-160).

The amount of attorneys' fees awarded to JRC counsel for defending against the Commissioner's contemptuous conduct since 1993 was reasonable in light of the regulatory and legal bombardment, and was not abuse of discretion. Counsel for JRC provided the Trial Court with ample evidence in the form of extensive affidavits and the actual client bills to define the objective worth of the services provided by counsel on behalf of JRC. The award of attorneys' fees should not be reversed merely because JRC counsel refused to provide to the Commissioner unredacted versions of actual client bills and contemporaneous time sheets. The Trial Court properly reviewed in camera and, thereafter, impounded the actual bills submitted by JRC to protect the attorney-client privileged material contained therein. The Commissioner has shown no compelling need to obtain the bills which overrides the attorney-client privilege. (pp. 161-170).

This Court should award JRC double costs and attorneys' fees for having to respond to the frivolous appeal from the underlying judgment of contempt. There is no basis in law or fact for reversing the judgment. The Commissioner also consistently distorts the findings of the Trial Court in his Brief, thereby necessitating that this Court carefully scrutinize each one of the record citations in the Commissioner's Brief. Furthermore, the Commissioner miscites and misapplies the applicable case law. This case represents egregious appellate misconduct which should not go unpunished by this Court. (pp. 171-173).

The Commissioner's appeal from the Trial Court's status quo preliminary injunction is rendered moot by the entry of final judgment. Likewise, this Court should vacate the interlocutory orders of the Trial Court as modified by a Single Justice of the Appeals Court. The modified status quo preliminary injunction is extinguished by the entry of final judgment. (pp. 174-176).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE COMMISSIONER WAS IN CONTEMPT OF THE SETTLEMENT AGREEMENT

The Commissioner argues that the finding of contempt was erroneous as a matter of law; the conclusion of contempt was not supported by the evidence; and the good faith provision of the Settlement Agreement was not violated. (Brief, pp.37-61). There was no abuse of discretion by the Trial Court in this case.

A. The Trial Court's Construction And Enforcement of the Settlement Agreement Through The Contempt Sanction Were Correct As A Matter of Law

It is well-settled that a finding of civil contempt for violation of a court order properly lies against the Commonwealth and does not implicate the separation of powers of the governmental branches. See Commonwealth v. One 1987 Ford Econoline Van, 413 Mass. 407, 411 (1992); see also Nelson v. Steiner, 279 F.2d 944, 948 (7th Cir. 1980); United States v. Board of Education of City of Chicago, 744 F.2d 1300, 1306-1308 (7th Cir. 1984). The decision to enforce a court order through the sanction of civil contempt is within the discretion of the Trial Court. See AMF, Inc. v. Jewett, 711 F.2d 1096, 1101 (1st Cir. 1983).

The Commissioner argues, however, that the Trial Court erred as a matter of law in not stating his exact conduct which constituted a violation of the Settlement Agreement. (Brief, pp.38-39). This argument is groundless since the Trial Court's voluminous factual findings establish, as will be discussed in detail, clear violations of a number of different parts of the Settlement Agreement. In its Findings of Fact, the Trial Court initially recites the relevant sections of the Settlement Agreement, and then proceeds to recount in explicit factual detail the actions of the Commissioner over nearly two years which violated the cited sections. (App. 1212). The Trial Court in its Conclusions of Law expressly and

rightfully refused to reiterate all of the factual bases constituting a violation of the Settlement Agreement. (App. 1302).[8]

The Commissioner's argument that the mandates of the Settlement Agreement are too ambiguous to force any legal obligation upon him or DMR as a matter of law is also meritless. The terms of the Settlement Agreement impose clear and unequivocal legal obligations on DMR and the Commissioner regarding the regulation of JRC. See Commonwealth v. One 1987 Ford Econoline Van, 413 Mass. at 411.[9] Furthermore, the standard for finding contempt of the Settlement Agreement as a public law consent decree is more flexible, in contrast to the cases relied on by the Commissioner. The test for determining contempt of public law consent decrees is "substantial compliance" with the overall objectives of the decree, see United States v. Commonwealth of Massachusetts, 890 F.2d 507, 509 (1st Cir. 1989), not rigid compliance with its express terms. "A finding of civil contempt must be based not on a mere violation of a court order but on a party's failure to achieve substantial and diligent compliance in meaningful respects with what the court has ordered." Palmigiano v. DiPrete, 700 F. Supp. 1180, 1191 (D. R.I. 1988). In such cases, although in the strictest sense the complainant must prove a violation of the "order," the central inquiry is whether there has been a violation of the spirit of the underlying consent decree in reference to both the terms of the order and the objectives sought by the parties in agreeing to become bound by such a decree. "Consent decrees have a dual nature: they blend a court order with the parties' agreement." Juan F. By and Through Lynch v. Weicker, 37 F.3d 874, 878 (1st Cir. 1994). In other words, the touchstone of contempt of a public law consent decree is a violation of the intent, spirit and objectives of the decree, not a

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[8] Because the Commissioner presented this same spurious argument in his Motion for Stay at the Trial Court level, the judge, in the order denying a stay, again articulated the Commissioner's various violations of the Settlement Agreement, referencing specific paragraphs of the Settlement Agreement to actions of the Commissioner described in the factual findings. (App. 1434-35).

[9] This Court stated In The Matter Of McKnight, 406 Mass. at 791, that an action for contempt by JRC would properly lie against DMR for a violation of the Settlement Agreement.

violation of the strict terms of the order. See United States v. Commonwealth of Massachusetts, 890 F.2d at 510-11; Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1337 (1st Cir. 1991); Langton v. Johnston, 928 F.2d 1206, 1221 (1st Cir. 1991) (contempt upheld despite record indicating not "letter-perfect compliance" with consent decree).

Courts construe the overall objectives of public law consent decrees for contempt purposes by engaging in "a more flexible interpretation in light of the need to achieve their basic purposes and the need to accommodate the differing competencies of different branches of government as well as the differing needs and interests of the parties." Massachusetts Association for Retarded Citizens v. King, 688 F.2d 602, 608-09 (1st Cir. 1981); see also Juan F. By and Through Lynch v. Weicker, 37 F.3d at 878. For this reason, appellate courts have less freedom when reviewing a trial court's enforcement of a public law decree than when reviewing a private consent decree:

> In the context of public law litigation, however, the guidelines are much different. In such cases, the district court's construction of a consent decree should be accorded considerable deference, because broad leeway is often necessary to secure complicated, sometimes conflicting policy objectives.

Langton v. Johnston, 928 F. 2d at 1221; see also AMF, Inc. v. Jewett, 711 F.2d at 1101 (programmatic public law decrees require flexible approach).

The reason behind this "double standard," as articulated by the court in Langton, supra, is that "[i]n a commercial setting, a consent decree is treated like a contract because the court assumes that the private parties understand the economic realities and business consequences of their agreements;" while "[i]n public law litigation, courts typically play a proactive role -- a role which can have nearly endless permutations." 928 F.2d at 1221. The added deference which an appellate court accords a trial court's construction and enforcement of a public law consent decree is borne from the court's role in public law litigation:

> Frequently, the trial court's adjudicative function blends with its service as an instrument for change. The relief requested often involves the restructuring of a state or city program, requiring

> the court to fashion equitable remedies -- *sometimes unique and* often complicated -- in order to secure "complex legal goals."

Ibid. (citations omitted). Citing an authoritative source on a court's role in public reform litigation, the Langton court noted that consent decrees in the public law context provide for a "complex on-going regime of performance rather than a simple, one-shot, one-way transfer," which "prolongs and deepens, rather than terminates, the court's involvement with the dispute." Ibid., quoting Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.L.Rev. 1281, 1298 (1976). Therefore, as the court explained, the construction and manner of enforcement of public law consent decrees requires a "wider view of the litigation" and the rejection of "tunnel vision." 928 F.2d at 1221.

Thus, the First Circuit has held that when examining a finding of contempt of a public law consent decree, an appellate court must defer to the district court's "broad discretion in determining whether the objectives of the decree have been substantially achieved." United States v. Commonwealth of Massachusetts, 890 F.2d at 509; see also Massachusetts Association of Older Americans v. Commissioner of Public Welfare, 803 F.2d 35, 38 (1st Cir. 1986). An appellate court also gives greater deference to the trial court's enforcement of a public law consent decree through the imposition of a contempt sanction where the interest at stake is great, and the consequences of the failure to comply with the consent decree are serious. See Fortin v. Commissioner of Massachusetts Dept. of Public Welfare, 692 F.2d 790, 795 (1st Cir. 1982); see also Massachusetts Association of Older Americans v. Commissioner of Public Welfare, 803 F.2d at 39, 41. The result is that an appellate court, already limited to reviewing the trial court's determination of contempt of a consent decree under an abuse of discretion standard, is further restricted to reviewing the trial court's construction and enforcement of a public law consent decree with "deference to the district court's intimate understanding of the history and circumstances" of the litigation. United States v. Commonwealth of Massachusetts, 890 F.2d at 509-10.

B. This Court Should Afford Great Deference to the Trial Court's Construction And Enforcement of the Settlement Agreement

The Commissioner asks this Court to review de novo the evidence in the light most favorable to the Commissioner and then apply those facts to his interpretation of the Settlement Agreement. This Court should decline the Commissioner's invitation to use "tunnel vision" to interpret a complex document, by extricating portions of the Settlement Agreement and reviewing the evidence in a vacuum, without any deference to the Trial Court's construction of the overall objectives of the Settlement Agreement and its practical implementation by all parties for nearly seven years until the Commissioner abruptly altered his position in 1993.

A deferential standard of review is particularly applicable to the instant case in light of the history of the 1987 Settlement Agreement as a programmatic consent decree rooted in public law litigation. The Settlement Agreement emanated from time-consuming litigation in 1985 and 1986 between a residential treatment program for handicapped children, the parents of those children, and the state agency. In addition to its legal complexity, the earlier litigation involved emotionally charged issues addressing such fundamental concerns as the right of parents to decide on the best treatment program for their handicapped children and the right of licensed programs to fair and impartial regulation by the government. (App. 81).

The Settlement Agreement put an end to the litigation and established a framework defining the respective roles of the parties in balancing the complex treatment needs of the JRC clients with the state's regulatory authority. (S.A. 20). The foundation of this structure was that the state should not be permitted to implement unilaterally its regulatory powers in a way aimed at terminating the JRC program. In 1985, the Director of the OFC ordered JRC to terminate the use of aversive therapies in treating its students, asserting that its powers as regulatory agency gave it the ultimate authority to determine which treatments could be used at JRC. (App. 82-83; S.A. 82). In June of 1986, the Court found that the Director of OFC had acted in bad faith in attempting to terminate the treatment program of JRC and was preliminarily enjoined from taking further

regulatory action against JRC. (App. 107). In issuing the injunction, the Court expressly found that the Director's unilateral and arbitrary regulatory decisions interfered with the treatment received by the severely handicapped students, which conduct directly threatened their lives.[10] (App. 107). The aim of settlement negotiations was to achieve a dual goal whereby the health and safety of JRC students would be adequately monitored but not exclusively entrusted to state officials who had acted in an arbitrary manner in their prior regulation of JRC. (S.A. 20-21).

This dual objective was achieved with the signing of the Settlement Agreement in 1986 and Court approval in 1987. There can be no meaningful debate that the exclusive role of the state administrative agencies in regulating JRC was changed substantively in all respects from the method by which JRC was earlier regulated. The Commonwealth agreed to relinquish its regulatory authority over JRC by agreeing that the Court Monitor would be responsible for overseeing JRC's compliance with state regulations, except for the regulations pertaining to aversive therapies. All regulation of aversive therapies was expressly reserved for the Trial Court which would determine the propriety of any and all such therapies and apply the substituted judgment criteria on an individual student basis. (App. 121). The Commonwealth would have the opportunity to participate in the litigation of aversive therapies in the substituted judgment hearings. The Commonwealth could also raise any concerns over treatment provided by seeking alternative dispute resolution through arbitration with the Court Monitor according to Paragraph B-2. If either party was not satisfied with the decision or recommendations of the Court Monitor, it could appeal to the Trial Court for a final ruling. (App. 126). This dispute resolution system agreed to by the parties was intended to replace the normal route of lengthy and costly administrative remedies, and inevitable judicial review through

[10] These findings were upheld by a Single Justice of the Appeals Court in denying OFC's petition for interlocutory relief. (App. 109).

litigation.[11] In order to end the prior litigation, the Commonwealth agreed to relinquish its prior right to unilateral regulatory power over JRC. Since the execution of the Settlement Agreement, numerous additional Court orders have been issued. In addition, the Trial Court and officials have devoted countless hours to implementing the Settlement Agreement which has "prolong[ed] and deepened[ed] . . . the Court's involvement with the dispute." See Langton v. Johnston, 928 F.2d at 1221.

The Commissioner mischaracterizes JRC's argument by falsely contending that JRC is somehow asserting and that the Settlement Agreement mandates that the Commissioner should have refrained from regulating JRC's treatment program. JRC has never asserted such a position, as the Commissioner well knows. Despite the findings of bad faith and arbitrary conduct by state officials in 1985 and 1986, the Settlement Agreement did not strip the Commonwealth from regulating JRC. Rather, the Settlement Agreement plainly anticipated that DMR would have the ability to license JRC homes, any regulation of JRC by DMR would occur within a new court-supervised framework, and that any differences of opinion would be resolved pursuant to a more streamlined dispute resolution process which was specifically designed to avoid the type of expensive, drawn-out litigation which had so dramatically affected the health and well being of JRC students from September of 1985 to December of 1986.

C. The Commissioner and DMR Followed The Settlement Agreement Until August of 1993

In his Brief, the Commissioner essentially provides a revisionist history of his and DMR's regulatory actions involving JRC. This history is factually

[11] The exhaustion of administrative remedies argument is just a red herring. The concept of exhaustion flies in the face of the spirit and intent of the Settlement Agreement, which expressly states that it was intended to eliminate the "multitude of lawsuits and administrative proceedings." (App. 120). The Commissioner knows that the exhaustion argument has no merit, and for his reason he relegates an argument, which could be dispositive in other contexts, to a footnote, not even rising to the level of appellate argument. See Rate Setting Commission v. Faulkner Hosp., 411 Mass. 701, 707 (1992); Hutchinson v. Hutchinson, 6 Mass. App. Ct. 705, 711 (1978).

inaccurate and fails to mention those acts which demonstrate that DMR and the Commissioner interpreted the Settlement Agreement in the same way as did the other parties and Trial Court until the summer of 1993, when the Commissioner embarked on his plan to disrupt Court-approved treatment and close JRC.

The Commissioner now asserts that the provisions of the Settlement Agreement were much too vague and ambiguous for him to understand his obligations. This argument belies the actions and public statements of the Commissioner and DMR officials when they practiced strict compliance with all of the terms of the Settlement Agreement until August, 1993. The Commissioner's own testimony at trial demonstrated that regulatory action was taken against JRC because the Commissioner purportedly formed the sudden belief in the summer of 1993 that he was no longer a party to the Settlement Agreement, (Tr.III, 16-18), not because the provisions were unclear or ambiguous. This sudden position was in total contrast with prior internal agency and public positions previously taken by the Commissioner and DMR. The Trial Court was fully justified in finding that the Commissioner's position was completely arbitrary and a pretext designed to hide his true motive of utilizing his public power to improperly achieve his predetermined goal of closing JRC.[12]

1. DMR and the Commissioner are full parties to the Settlement Agreement

The Commissioner's argues throughout his Brief that the substantive provisions of the Settlement Agreement do not apply to the Commissioner and ignoring the history of the Settlement Agreement and the conduct of DMR in holding itself out as a full party to the Settlement Agreement from 1988 through 1993. Likewise, assuming, arguendo, that the terms of the Settlement Agreement were somehow vague or ambiguous, the conduct of the Commissioner and his predecessor in the role of regulator of JRC shows that he and his advisors

[12] Perhaps the best evidence of the irrational motive of the Commissioner's "non-party" argument is the fact that the Commissioner has now abandoned this argument on appeal. However, he cannot abandon his prior sworn testimony; that his actions with respect to JRC, the Trial Court, and court officials were guided by his supposed belief that he was not a party to the Settlement Agreement. (Tr.III, 16-18).

understood that DMR was a party to the Settlement Agreement, the Settlement Agreement provided a buffer between JRC and the Commonwealth through the Court Monitor, the Settlement Agreement placed conditions on his regulatory authority over JRC, and the Settlement Agreement granted to the Trial Court exclusive power to determine treatment for the JRC students.

The Settlement Agreement was amended by order of the Trial Court to add DMR as a party on December 29, 1988, in response to a motion to amend filed by DMR after DMR took over regulatory responsibility of JRC from DMH when DMR became a separate agency. (U-13). The Trial Court's order allowing DMR to intervene, thereby making DMR a full party to the Settlement Agreement was not appealed.[13] Thereafter, the Commissioner and other DMR officials represented to third parties, including this Court, that DMR was the state agency which had full party status under the Settlement Agreement. In its brief to this Court in the case In The Matter Of McKnight, 406 Mass. 787 (1990), the Assistant Attorney General explained the procedural history of the case stating, "That action was resolved by Settlement Agreement entered as an order of the Probate Court on January 7, 1987. 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." (See, Appellent's Brief, p. 6; JRC-253,5).[14]

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[13] Even if DMR had not expressly moved to intervene as a party, it would have been bound to the provisions of the Settlement Agreement as the successor agency to DMH. See Cornelius v. Hogan, 663 F.2d 330, 332-35 (1st Cir. 1981) (holding consent decree to apply to social services formerly provided by DPW but transferred to the responsibility of DSS, and fact DSS not an original party to decree did not preclude its being bound by the decree).

[14] Likewise, in a letter dated March 27, 1992 to the Executive Department's Office of Quality Assurance, General Counsel Murdock, on the Commissioner's behalf, stated, "Due to past litigation, the Department is currently bound by Settlement Agreement with respect to this program [JRC]. All so called aversive interventions used at B.R.I. must be approved by the Bristol County Probate Court; the Department's involvement in the actual treatment is limited." (U-41). (Emphasis supplied).

2. DMR and the Commissioner conducted themselves as full parties to the Settlement Agreement

From 1988 to August 1993, DMR consistently through its conduct held itself out as a party to the terms and objectives of the Settlement Agreement. The Trial Court was not bound by the four corners of the Settlement Agreement in determining its mandates. See United States v. ITT Continental Baking Co., 420 U.S. 223, 228 (1975); see also Juan F. By and Through Lynch v. Weicker, 37 F.3d at 878; Massachusetts Association for Retarded Citizens v. King, 688 F.2d at 608-09. The Trial Court was entitled to rely upon circumstances surrounding the signing of the Settlement Agreement in 1986 and the course of action of the parties in implementing the Settlement Agreement once signed to construe the parties expected overall objectives. See Pearson v. Fair, 935 F.2d 401, 409 (1st Cir. 1991); Navarro-Ayala, 951 F.2d at 1343 n. 21;[15] see also 3 Corbin, Corbin on Contracts § 558, at 249-253 (1960). In addition, in public reform litigation, as here, state officials taking office are bound by a consent decree entered into by their predecessors in office; see Newman v. Graddick, 740 F.2d 1513, 1517-18 (11th Cir. 1984), citing United States v. Swift, 286 U.S. 106 (1932); and the practical construction given to the decree as evidenced by the conduct of each successive administration bears upon the parties' objectives of the consent decree for enforcement purposes. See Navarro-Ayala, 951 F.2d at 1356 n. 37 (Cyr, J., concurring in part and dissenting in part).

The DMR leadership abided by the terms of the Settlement Agreement in response to JRC up until August, 1993. For example, between 1986 and 1991, then DMR Commissioner McCarthy had an ongoing working relationship with Dr. Daignault as Court Monitor wherein they resolved numerous issues concerning JRC's licensure and certification pursuant to Paragraph B-2 of the Settlement Agreement. DMR General Counsel Murdock attended a number of these meetings. Likewise, on March 22, 1993, General Counsel Murdock cited Commissioner Campbell's obligations and the Settlement Agreement, when she

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[15] There, however, the court did not construe the actions of the defendants subsequent to the decree as clearly representing that the parties intended it to apply to other hospitals in addition to the one expressly named in the decree, and, therefore, reversed the finding of contempt. Navarro-Ayala, 951 F.2d at 1343 n. 21.

asked for Dr. Israel's consent to allow Commissioner Campbell to testify in favor of a bill before the Massachusetts legislature banning aversives therapies. (U-67). The Commissioner testified at trial that he wanted to support the legislation, but decided not to when Dr. Israel objected, also citing the Settlement Agreement. (Tr. III, 48-50; JRC-254). General Counsel Murdock's letter is further significant, because the Commissioner testified at trial that he based his decision that he was no longer a party to the Settlement Agreement on the advice of Deputy Counsel Murdock. (V. III, 22-23). As will be discussed, infra, there are numerous other examples where the actions of the Commissioner or his advisors evidences a course of conduct showing that the Commissioner and DMR knew that they were a party to the Settlement Agreement, and adhered to all of its the terms and objectives until August of 1993.

3. The Commissioner was aware that his certification regulations were subject to the Settlement Agreement

The Commissioner asserts that since Paragraph B-2 allows the Court Monitor to oversee all regulations "except to the extent that those regulations involved treatment procedures authorized by the Court in accordance with Part A," the certification regulations pertaining to aversive treatments are excluded from the Court Monitor's review under Paragraph B-2 of the Settlement Agreement and, unlike all other state regulations, rest within his exclusive domain.

This argument contradicts the express terms of the Settlement Agreement. At the time the Settlement Agreement was approved, DMH had not yet adopted the behavior modification regulations at 104 CMR §20.15, governing the Commissioner's certification process, which were adopted later in 1987. Part A provides that the Trial Court shall decide the use of aversive treatments on an individual student basis using the substituted judgment criteria. (App. 121-125). The exception in Paragraph B-2 was not a purposeful attempt to restore regulatory power upon the Commonwealth in one area; rather, it was a restriction to prevent an intrusion by the Court Monitor upon a power reserved for the Trial Court. The signatories to the Settlement Agreement did not intend

to reserve to the Commonwealth the same purported regulatory power over treatment decisions which had caused the 1985/1986 controversy. The Commissioner's analysis ignores that it was the conflict between the unilateral regulatory dictates of the OFC regarding aversive treatments and Probate Court substituted judgment orders which gave rise to the preliminary injunction in 1986 and ultimately the Settlement Agreement. (App. 81). To suggest that the parties would have then contemplated a resolution of the case whereby the same issues which gave rise to the original conflict were bound to reoccur is an irrational interpretation of the Settlement Agreement.

This after-the-fact argument that the certification regulations are exempted from the coverage of the Settlement Agreement is also dramatically different from the position which the Commissioner and his staff asserted regarding the application of Paragraph B-2 to his certification regulations subsequent to their adoption and prior to the contempt litigation. (See, e.g., Exhibit U-41) (acknowledging that the Department was bound by a Settlement Agreement and its role in "actual treatment" was limited.)[16] The Commissioner admitted at trial that from 1987 to August, 1993, the Trial Court exercised exclusive control over approving JRC's treatment without participation or objection from DMR. (Tr. III, 36-37).

The Commissioner creates this revisionist argument in an effort to justify his attempt to close the JRC program based on his personal ideological and political views, which action he knows was otherwise impossible under the Settlement Agreement. However, the Commissioner is bound and his regulatory actions are limited by the terms of the Settlement Agreement even if treatment decisions of the Trial Court do not meet his standards. See Palmigiano v. DiPrete, 700 F.Supp. at 1195 (fact that prison conditions meet threshold Eighth

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[16] Similarly, on March 15, 1993, Deputy Counsel Chow-Menzer wrote to Dr. Daignault and stated that under the Settlement Agreement, "the Court Monitor is responsible for overseeing B.R.I.'s treatment and educational program," and that the "settlement agreement clearly reflects the understanding of the Court and the signatory parties in your ability as the appointed Court Monitor to make the threshold determination on whether a B.R.I. treatment program was presenting a serious risk to the BRI student." (U-65).

Amendment standards not applicable where parties agree to different standards in consent decree). Likewise, the Commissioner cannot relitigate the issue of the waiver of certain regulatory powers under the Settlement Agreement, even if he believes that it unlawfully curtails his statutorily-imposed powers as Commissioner or he no longer agrees with its mandates and framework. See United States v. Rylander, 460 U.S. 752, 756-57 (1983) (no collateral attack on judgment underlying orders); accord, Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 312 (1991).

Until August of 1993, the Commissioner deferred to the Trial Court on the implementation of all treatment decisions, even after the adoption of the behavior modification regulations. He did not exercise regulatory authority over JRC in a unilateral fashion, but accepted the framework imposed by the Settlement Agreement both for treatment decisions and dispute resolution. The Commissioner now adopts an interpretation of the Settlement Agreement which is not only textually and legally inaccurate, but also blatantly inconsistent with his prior actions and his previous interpretations of the very same provisions of the Settlement Agreement.

D. The Trial Court Correctly Concluded That The Commissioner Violated The Express Terms And Overall Objectives Of Numerous Provisions Of The Settlement Agreement

1. The Commissioner's regulatory action constitutes contempt of Part A

As DMR itself has acknowledged, the Settlement Agreement resulted in DMR having limited authority in treatment decisions. The Commissioner is correct when he asserts that the substituted judgment determination does not, ipso facto, authorize the use of procedures which are deemed to be violative of state law. However, the Commissioner's analogy to the medical institution operating without state licensure ignores the fact that the Commonwealth in the present case, unlike in the Commissioner's example, waived its right to unilaterally determine which treatments could be used at JRC when it signed the Settlement

Agreement and that it is the Trial Court, not the Commissioner, which is in the position of authorizing particular treatments for particular clients.[17]

The Commissioner, however, was not powerless to voice his concerns in the event that he believed that treatment procedures were being improperly utilized at JRC. In the Memorandum approving the Settlement Agreement in 1987, the Trial Court specifically found that the framework of the Settlement Agreement would provide all parties with an opportunity for adequate review of treatment decisions. (S.A. 20-21). Indeed, under the Settlement Agreement, DMR possessed two avenues for relief. First, DMR could utilize the dispute resolution procedures of Paragraph B-2 by bringing any concerns over approved treatments to the attention of the Court Monitor and, in turn, to the attention of the Trial Court. This process had been followed by DMR in the past. Second, DMR could have participated and presented evidence in the substituted judgment cases pursuant to Part A.[18]

DMR chose neither of these legal approaches. Instead, without seeking to modify the Settlement Agreement, and without even notifying the Trial Court of its changed position, DMR unilaterally ordered JRC to cease using treatment procedures approved by the Trial Court as part of individual treatment plans pursuant to Part A. According to the Commissioner's new position, the Trial Court was powerless to approve the use of any aversive therapy not certified by the Commissioner, and JRC was unable to use any therapy not certified by the Commissioner even where approved by the Trial Court. This is the exact regulatory power which was modified with the signing of the Settlement

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[17] The Commissioner's analogy fails for another reason. There is no state law which prohibits aversive therapy in the Commonwealth of Massachusetts; nor do DMR's behavior modification regulations prohibit the type of treatments at JRC. The behavior modification regulations limit the Commissioner's authority to certifying a "program" to use interventions based on the stated criteria of whether the program "has the capacity to implement" the aversive procedures. 104 CMR 20.15(4)(f)(1). Stated simply, this is not a case where the licensee is arguing that it is permitted to by-pass a state law proscribing certain activities because of language contained in a settlement agreement.

[18] DMR was also aware of this route. Although from 1987 until 1993, there had been virtually no participation in substituted judgment hearings by DMR. Following the commencement of the regulatory barrage in 1993, DMR began to participate in treatment hearing and to contest treatments. (S.A. 45-66).

Agreement in 1987. Part A of the Settlement Agreement was intended to provide the Trial Court with the exclusive authority to determine the propriety of aversive treatments in order: 1) to ensure that treatments which were necessary for the health and safety of the students were not unilaterally terminated by an arbitrary decision by State officials as had occurred in 1985; and 2) to ensure that the rights of the ward were protected by employing substituted judgment criteria in approving approval of any aversive therapy. The Commissioner's unilateral withholding of approval for aversive therapies which therapies had been approved by the Trial Court violated the Settlement Agreement in commencing his regulatory war of attrition against JRC.

The Commissioner undertook a series of bogus regulatory actions to force a piecemeal termination of JRC's use of aversive treatments. First, in August 1993, the Commissioner provided interim certification for a period of twenty-five days of only those aversive treatments currently in use by JRC under Court-approved treatment plans, but denied certification of any additional therapies approved under Part A but not in use on that specific date as part of a treatment plan. (U-91). Second, on January 20, 1995, the Commissioner specifically excluded from his certification all Level III interventions Court-approved for six JRC students. (U-166). In effect, this action by the Commissioner constituted an unlawful administrative "substituted judgment" determination for six JRC students. Third, the Commissioner also ordered JRC in the January 20 Letter to cease using four specified Level III treatments on all students, although all four had been previously approved by the Trial Court pursuant to Part A for certain students.[19]

Finally, on March 23, 1995, the Commissioner completely decertified the JRC program thereby purporting to terminate JRC's ability to use all aversive treatments, (U-179), which forced JRC to seek and obtain a status quo injunction

[19] Apart from a violation of Part A of the Settlement Agreement, the Commissioner's unilateral termination of aversive treatments as ordered in his January 20 Letter, was not authorized or otherwise sanctioned by any of the Commissioner's behavior modification regulations, which speak only to the certification of "programs" employing Level III treatments, and not to the certification of individual treatments or individual clients receiving treatments.

from the Trial Court in order to continue with its treatment program. (S.A. 127). These events were hauntingly reminiscent of the scenario in 1985 and 1986. The Commissioner's unilateral termination of treatments by withholding certification is exactly the type of conduct against which the Settlement Agreement was intended to protect and a direct violation of Part A.

2. The Commissioner's regulatory actions constitute contempt of Paragraph B-2

If the Commissioner had any legitimate concerns over the treatment programs administered at JRC in 1993, he was required under the Settlement Agreement to invoke the dispute resolution procedure and have his concerns addressed according to the process set forth in Paragraph B-2. Instead, in the summer of 1993, the Commissioner simply concluded that he would ignore the mandate of Paragraph B-2. This action was directly contrary to the conduct of the Commissioner prior to August of 1993 and the conduct of his predecessor who did defer to the regulatory authority of Dr. Daignault as the Court Monitor and did adhere to the dispute resolution procedures in Paragraph B-2.

Until August of 1993, all of the parties remained cognizant of the order of Judge Rotenberg issued in his Memorandum on February 12, 1987: "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." (App. 134). Contrary to the Commissioner's argument, it matters little whether JRC invoked the word "mediate" or "arbitrate" when it requested the Commissioner and his Department to resolve disputes under the Settlement Agreement, because in every request JRC and Dr. Daignault specifically invoked or made reference to Paragraph B-2 or the Settlement Agreement.[20] At no time, did the Commissioner or his

[20] Shortly after the Commissioner's August 6 Letter, JRC invoked the dispute resolution provisions of Paragraph B-2 in a communication of August 27, 1993. (JRC-246). The Commissioner's counsel responded by stating, in conclusory fashion, that the Commissioner's "historical understanding" of the Settlement Agreement was "not what your letter sets forth." (U-90). On October 15, 1993, Dr. Daignault sent a letter to General Counsel Murdock which stated the following: "I truly cannot see how mediation can be reinstituted unless the Department revises its position or, at the very least, makes

representatives inform JRC or Dr. Daignault that they did not understand the word "mediation" to refer to the arbitration provisions in Paragraph B-2. Rather, on October 14, 1993, General Counsel Murdock stated in a letter to Dr. Daignault: "The Department has consistently maintained that it does not agree that the Settlement Agreement requires it to submit to mediation or arbitration by our office whenever requested by B.R.I." (U-110, 2).[21] The Commissioner cannot assert that it was JRC's failure to use the key word "arbitrate" which accounted for his refusal to abide by the Settlement Agreement. Indeed, it was the Commissioner's undisclosed position throughout this period that he was not even a party to the Settlement Agreement. From August, 1993 until trial, the Commissioner, as he admitted at trial, consistently refused to resolve disputes pursuant to Paragraph B-2 of the Settlement Agreement, despite repeated requests by JRC. (Tr. II, 30-34).

Until August of 1993, Commissioners McCarthy and Campbell and other high-ranking DMR officials complied with Paragraph B-2 of the Settlement Agreement by, among other things, the following: consulting with the Court Monitor about the proposed behavior modification regulations' consistency with the obligations in the Settlement Agreement prior to promulgating the regulations; attending (in the case of Commissioner McCarthy) at least seven

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an unequivocal commitment to the process of mediation with the full knowledge that the Settlement Agreement mandates submission of any issues to the Court which has failed to resolve in mediation." (JRC-251). JRC made the same request of the Commissioner after he continually refused to arbitrate under the Settlement Agreement: "B.R.I. is prepared to engage in future mediation sessions under Paragraph B-2 of the Settlement Agreement if DMR is prepared to state unequivocally that it will comply with the mediation provisions including the submission of issues to the Court for resolution upon unsuccessful mediation." (JRC-276). In response, the Commissioner's counsel, on October 21, 1993, expressly refused to "waive our interpretation of the Settlement Agreement, as you requested." (U-114).

[21] Similarly, on September 17, 1993, General Counsel Murdock wrote to Dr. Daignault and stated: "As you know, the Department of Mental Retardation does not agree with the Settlement Agreement's provisions concerning the monitor contemplated, the monitor's arbitration of disputes, such as those alleged in B.R.I.'s recent Court filing, nor the attendant resolution by a probate court referenced in your letter." (U-98). On November 16, 1993, the Commissioner's counsel stated in a letter to JRC that "The Settlement Agreement only contemplates mediation of disputes regarding a B.R.I. student's placement or treatment." (U-124).

meetings with Dr. Daignault and holding numerous telephone conversations with Dr. Daignault on her private line regarding JRC's regulatory issues; meeting with Dr. Daignault and allowing him to facilitate the first set of group home licenses issued by DMR to JRC; arbitrating DMR's disputes with JRC with Dr. Daignault over licensing, placement and other regulatory issues; requesting Dr. Daignault's advice in May of 1990 on how to seek termination of the Settlement Agreement; referring abuse allegations regarding JRC's treatment to Dr. Daignault for his investigation; acknowledging to third parties that the DMR's involvement in JRC's treatment is "limited" and referring inquiries to Dr. Daignault; and as recently as March of 1993, seeking guidance under the Settlement Agreement, before testifying on proposed legislation. (U-67). In short, the Trial Court was fully justified in concluding that the Commissioner and DMR complied with Paragraph B-2 of the Settlement Agreement up until August of 1993, and then abruptly and without justification, repeatedly violated Paragraph B-2.

3. The Commissioner's regulatory actions constitute contempt of Part C

The terms of Part C, ¶ 3, prohibit DMR from interfering with JRC's intake of clients, whose funding provides the economic basis for operating JRC. In 1985 when OFC closed intake at JRC, the result was economic deterioration since OFC had shut off JRC's funding sources.

The Commissioner sent contrived certification letters containing false allegations of wrongdoing and abuse by JRC staff (including Dr. Israel) to JRC's Funding and Placement Agencies which referred new clients to JRC and which subsidized existing clients. The Commissioner admitted at trial and the notes of the Weekly Meetings reflected that DMR officials had meetings and discussions with officials from JRC's Funding and Placement Agencies about JRC finding alternative placements for JRC clients and about JRC's "litigation" with DMR. (U-91). The Commissioner admitted to preventing JRC representatives or even neutrals from attending a meeting with JRC's New York funding and placement agency. (U-138). Commissioner Campbell admitted that DMR officials encouraged JRC parents to remove their children from JRC. (Tr. IV, 238-240).

The fact that JRC's enrollment dropped from 66 students to 43 students from 1993 to the time of trial, after a significant growth trend from 1987 to 1993, is ample evidence that the success of the Commissioner's efforts to interfere with intake. The Commissioner admitted that he departed from his usual practice when he sent a letter to JRC and JRC's Funding and Placement Agencies in which he stated that there were serious allegations of abuse involving Dr. Israel personally. (U-106). He admitted that he would have concerns about placing a client in a program if he received such a letter. (Tr. III, 187-188). When the allegations against Dr. Israel were not substantiated, the Commissioner failed to re-contact the funding agencies. (Tr. III, 191-193).

It simply cannot be the case that the Settlement Agreement solely prohibited a literal order to close intake and did not prohibit the type of indirect action of the Commissioner which would achieve the same practical result. The Trial Court properly concluded that the Commissioner's actions constituted a purposeful attempt to financially destroy JRC by cutting off the flow of new students. The Court was fully warranted in concluding that this action interfered with the intake of new students in violation of the objectives of Part C, ¶ 3.

4. The Commissioner violated the good faith provision in Part L

The Commissioner further argues that the good faith provision in Part L of the Settlement Agreement is "too ambiguous" to be the basis for contempt. This view is consistent with his DMR's position at trial, wherein DMR's present counsel stated in her opening statement that DMR had no obligation under the Settlement Agreement to act in good faith. (Tr. I, 66). The Trial Court responded that it was "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." (App. 1293).

The Commissioner mischaracterizes the Trial Court's decision and applicable legal principles when he states on page 54 of his Brief that "any implicit finding of contempt based upon the violation of the good faith provision

alone should be reversed as a matter of law." As discussed above, the evidence supports the Trial Court's finding that the Commissioner violated a number of the substantive provisions of the Settlement Agreement. The evidence also supports that the Commissioner intentionally violated the good faith provision in Part L by engaging in conduct such as: ignoring and secreting the recommendation of the 1991 and 1993 Certification Teams; publishing certification letters and other statements rife with false and defamatory statements about JRC to JRC's Funding and Placement Agencies; misrepresenting information concerning JRC to the Trial Court in the fraudulent Report to the Court; departing from his own regulations by withholding certification of Level III treatments for individual students; departing from his ordinary practice by holding Weekly Meetings to plot strategy to bring about JRC's downfall; and harassing the Court Monitor and Guardian Ad-Litem Briggs with baseless accusations of improprieties. The Commissioner's intention to close the JRC program was not simply a subjective desire. The Commissioner acted on his bad faith by implementing his regulatory authority over JRC in a perverse manner in violation of both the Settlement Agreement and the public interest. It was for this reason that the Commissioner's actions constituted "pervasive public corruption." (App. 1310).

The legal arguments of the Commissioner regarding the application of the express good faith provision are also misplaced. Courts interpreting similar "good faith" provisions in consent decrees have determined that such clauses require the parties to use their best efforts to accomplish the stated and intended objectives of the agreement. See United States v. Board of Education of the City of Chicago, 799 F.2d 281, 292 (7th Cir. 1986). The Commissioner miscites the Seventh Circuit in United States v. Board of Education of the City of Chicago, 717 F.2d. 378 (7th Cir. 1983), when he states at pages 55 and 56 of his Brief that the court held that the good-faith provision in the consent decree was too ambiguous for enforcement. There, although the court ruled that the term "available funds" and what constituted "available" was capable of more than one meaning, the court held that the good faith provision requiring the parties to use their best efforts to effectuate desegregation of the Chicago public schools was

not in the least ambiguous or "nebulous." Id. at 382. Further, the Court in United States v. Board of Education of the City of Chicago, 744 F.2d at 1306-1308, held that legislative lobbying activities by the executive branch intending to decrease funding available to desegregation programs "contraven[ed] the spirit of the decree" and would be a violation of the express good-faith provision subject to contempt sanctions. Nothing in the cases cited by the Commissioner supports his argument that the good faith provision in Part L does not impose any duty upon him.

The Commissioner also relies on Brennan v. The Governor, 405 Mass. 398 (1989), to justify his actions as a proper application of his discretionary regulatory authority which he asserts cannot be attacked on the grounds that he did not act according to the highest standards. In addition to the Commissioner omitting the entire quotation from the opinion in his Brief, the facts and subject matter of Brennan, supra, make it inapplicable to this case. There, this Court held that officials had the authority to give priority to a site for a state prison which the officials believed, in the proper exercise of their discretion, was the best location to address state needs. Id. at 396-398. This is the standard of review applied to challenges to a public official's choice of sites for municipal building contracts, which necessarily involve an element of discretionary decision-making by a public official. The holding in Brennan, supra, is completely inapplicable to this case where the Commissioner as a state officer violated a court-ordered Settlement Agreement in a concerted effort to shut-down a private facility.

Even assuming, arguendo, that the Commissioner's actions were not in bad faith and taken merely as part of the implementation of his regulatory power, which is wholly contrary to the record in this case, the Commissioner as a party had a legal obligation to comply with the Settlement Agreement regardless of his motives. See Palmigiano v. DiPrete, 700 F.Supp. at 1194, citing McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); see also Fortin v. Commissioner of Massachusetts Dept. of Public Welfare, 692 F.2d at 796 ("good faith is not a defense to civil contempt"). It is for this reason that the Commissioner's argument that he acted on advice of counsel also fails.

Likewise, even if this Court somehow determines that the Commissioner did not violate any of the express substantive provisions of the Settlement Agreement, the Commissioner's course of conduct after August of 1993 was action in contravention of the objectives of the Settlement Agreement.[22] As stated by the First Circuit:

> [T]he underlying principle is equally applicable here: officials operating under a public law decree are required to employ good faith efforts to satisfy its demands, and fault should not be found if they have implemented its dictates to the extent practicable.

Langton v. Johnston, 928 F.2d at 1223, citing Board of Education v. Dowell, 498 U.S. 237, 249-250 (1991).

Here, the converse is true. The Commissioner is at fault because he failed to implement the dictates and follow the demands of the Settlement Agreement to any extent following August of 1993. Not only did the Commissioner fail to display any effort to engage in substantial compliance with the overall mandates of the Settlement Agreement after that date, but he also willfully violated its express terms. As set forth above, this is not a case where the Commissioner was confused about his obligations. He and his agency *followed* the Agreement for five years until the Commissioner decided it was no longer in his interests to do so. He ignored warnings from Court officials and violated mediation agreements supervised by Court-appointed officials. The assertion by the Commissioner that the Trial Court should have given him the opportunity to bring his regulatory powers into compliance with the Settlement Agreement ignores the fact that the Trial Court did provide numerous chances for resolution of the controversy. The conduct of the Commissioner, however, showed that he was bent on destroying JRC regardless of who or what was in his way.

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[22] Assuming that the Settlement Agreement did not contain an express and unambiguous good faith provision, the Commissioner had a duty not to breach the implied covenant of good faith and fair dealing contained in all contracts by engaging in conduct intended to contravene the spirit of compromise and circumvent substantive provisions of the Settlement Agreement. See Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 471 (1991).

There is more than sufficient factual evidence to support the Trial Court's findings of lack of good faith. The unambiguous record in this case reveals nothing less than a carefully conceived plan to use every means possible to accomplish indirectly what the Commissioner could not achieve lawfully under the Settlement Agreement -- the destruction of JRC and the elimination of its treatment. The findings of the Trial Court show that the Commissioner undertook a regulatory war of attrition using his unlimited resources to meet his objective of obliterating a non-profit agency. The Commissioner utilized the power of the Commonwealth for a perverse purpose; to lay regulatory siege to a treatment program which was lawfully providing treatment to a vulnerable group of severely handicapped students. It is hard to imagine a more blatant example of bad faith.

5. The Trial Court did not shift the burden of proof to the Commissioner to prove his good faith

The Trial Court did not rule on the first day of trial that the Commissioner would have the burden of proving a good faith basis for his regulatory activities. As is evidenced by review of the testimony, the Trial Court's comments came following the testimony of Deputy Counsel Casey, who described the thoroughness of the 1991 and 1993 Certification Reports and the unequivocal recommendations of certification contained therein. Deputy Counsel Casey admitted that the work of his certification teams and the recommendations contained in the 1991 and 1993 Certification Reports were untruthfully depicted in the Commissioner's Report to the Court which the Commissioner filed with the Trial Court on September 22, 1993. The Trial Court also saw, for the first time, the actual Certification Reports of 1991 and 1993. The results of the 1991 and 1993 Certification Reports were falsely described in the Commissioner's Report to the Court and copies of the 1991 and 1993 Certification Reports were omitted from the exhibit binder (which contained twenty other exhibits). The Report to the Court did not even make reference to the fact that conclusions of the certification team had been reduced to writing.

In response to the testimony of Deputy Counsel Casey in regards to the Report to the Court, the Trial Judge requested an explanation for the "flagrant misrepresentation to the court." (Tr. I, 179). Attorney Judith Yogman, Assistant Attorney General and the Commissioner's trial counsel, rose to address the Trial Court's concerns, and requested from the Trial Court an opportunity to explain the omissions with later testimony from the Commissioner. Attorney Yogman also assured the Trial Court that "there is ample basis for all of the Commissioner's statements and they will be provided by people other than Mr. Casey." (Tr. I, 180). In showing great restraint, the Trial Court responded: "I am faced with misrepresentations to the court and I welcome an explanation why it should not be characterized in that way, and I am looking forward to it and I hope that it is presented soon." (Tr. I, 181). Again, Attorney Yogman assured the Trial Court that the Commissioner would provide the evidence to rebut the obvious fraud stating, "As soon as we have an opportunity to present our case, Your Honor, we will." (Tr. I, 181). The Commissioner never gave a credible explanation for the fraud he perpetrated. Indeed, he was compelled to concede in his testimony that the recommendations of the certification teams were inaccurately set forth in his Report to the Court. (Tr. III, 179-182).

The Trial Court did not shift the burden on the Commissioner to prove his good faith. Rather, the judge rightfully requested DMR to provide an explanation for materials which, on their face and by the testimony of a DMR Deputy Counsel, evidenced that DMR had perpetrated a fraud upon the Court. See Rockdale Management Co., Inc. v. Shawmut Bank, N.A., 418 Mass. 596, 598 (1994) (trial judge has broad discretion to take action in response to fraudulent conduct and to fashion judicial response warranted by fraud). Once JRC presented evidence of a *prima facie* case of fraud, the burden shifted to the Commissioner to present evidence to rebut the evidence of the latent misconduct and bad faith adduced by JRC. See Ford Motor Co. v. Barrett, 403 Mass. 240, 242-43 (1988) (citations omitted); see also Liacos, Handbook of Massachusetts Evidence § 5.6.2, p.225 (6th ed. 1994). It was Attorney Yogman, not the judge, who volunteered the Commissioner's testimony as evidence which would explain

the misstatements to the Court. The argument that the Court shifted the burden of proof to the Commissioner is totally devoid of any merit.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS

The Commissioner's bare assertion that the trial was "replete with evidentiary errors" without arguing any more than three alleged evidentiary mistakes by the Trial Court is not sufficient to raise an issue on appeal regarding any other alleged unnamed errors. See Mass. R. App. P. 16(a)(4); see also Manchester v. Dept. of Environmental Quality Engineering, 381 Mass. 208, 214 n. 7 (1980); Capodilupo v. Petringa, 5 Mass. App. Ct. 893, 894 (1977) (bare assertion of error is not argument). Nevertheless, the Trial Court did not abuse its discretion in making the evidentiary rulings contested by the Commissioner. Even if there were error, the Commissioner has failed to show that such relatively minor evidentiary rulings in the course of a thirteen day trial materially affected the outcome so as to require the reversal of the entire judgment. See Mass. R. Civ. P. 61; see also DeJesus v. Yogel, 404 Mass. 44, 48-50 (1989); Saunders v. Goodman, 8 Mass. App. Ct. 610, 617-18 n. 4 (1979); Cormier v. Grant, 14 Mass. App. Ct. 965, 965 (1982).

A. The Trial Court Did Not Err In Refusing To Extend Discovery

JRC filed its initial complaint on September 3, 1993, yet, the Commissioner did not conduct any depositions of any witnesses until April of 1995, on the eve of trial. He finally noticed depositions for consecutive days which, when combined with JRC's depositions, resulted in successive days of depositions right up to the discovery deadline of May 3, 1995. The Commissioner had noticed nine depositions in October of 1993, which he subsequently cancelled, showing that he was aware of his discovery rights in 1993. (S.A. 96-115). On April 11, 1995, the Commissioner notified JRC of its intention to take the deposition of JRC, pursuant to Mass. R. Civ. P. 30(b)(6), "by the person with the most knowledge with regard to the factual basis of the allegations contained in the Third Amended Contempt Complaint." (App. 510).

(emphasis added). This was the extent of the description of the matters on which the Commissioner proposed to examine at the deposition. The Commissioner served JRC with eight deposition notices on April 11, 1995, and he scheduled the aforementioned 30(b)(6) deposition for the last day of discovery on May 3, 1995.[23] JRC responded to the Commissioner's vague 30(b)(6) deposition request by producing on May 3 and May 10, 1995 Dr. Israel, the Executive Director of JRC, who demonstrated both at the 30(b)(6) deposition and at trial that he was extremely knowledgeable about the allegations contained in the Third Amended Complaint as the signatory on the Verification. Counsel for JRC advised the Commissioner's counsel at the beginning and at the end of the 30(b)(6) deposition that the Notice of deposition lacked particularity. (S.A. 126; App. 531). The Commissioner's counsel acknowledged at the end of the 30(b)(6) deposition that she had run out of time under the discovery deadline. (App. 531).

The Massachusetts version of Rule 30(b)(6), like its Federal counterpart, allows a party to name a corporation as a deponent in a notice of deposition "and describe with reasonable particularity the matters on which examination is requested." The intent of the Federal Rule 30(b)(6), as amended in 1970, in requiring the party seeking to depose a corporation to state with particularity the subject matter of the examination rather than name the actual person to be deposed was to curb prior practice whereby the examining party would designate a corporate official to be deposed, only to find out that such corporate official had no information regarding subjects to be examined. See Notes of Advisory Committee to 1970 Amendment to Federal Rule 30; see also Protective Nat. Ins. v. Commonwealth Ins., 137 F.R.D. 267, 278 (D. Neb. 1989). In keeping with the intent of the rule, however, the party seeking to depose a corporation has the initial obligation to describe with "reasonable particularity" the subject matter of the examination, so that the corporation can prepare and produce the person or

[23] The Trial Court ultimately extended the discovery deadline to May 18, 1995, (S.A. 116) which gave the Commissioner further opportunity to notice the depositions of particular individuals, and he took that opportunity by noticing the depositions of three additional individuals on May 4, 1995. (S.A. 117-122).

persons to satisfy the request. See Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (M.D. N.C. 1989) (citations omitted); Operative Plasterers' and Cement Masons' v. Benjamin, 144 F.R.D. 87, 89-90 (N.D. Ind. 1992).

Here, however, the Commissioner's general notice of deposition to JRC did not state with any reasonable particularity the subjects on which he intended to examine. The request to depose the "person" with the most knowledge of "the factual basis of the allegations contained in a Third Amended Contempt Complaint" is nowhere near particular enough to put JRC on notice of the subject matter of the deposition in order to supply the person or persons who would be able to respond to such questioning. Contrast Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. at 126; see also Protective Nat. Ins. v. Commonwealth Ins., 137 F.R.D. at 278. In United States v. Gahagan Dredging Corp, 24 F.R.D. 328, 329 (S.D.N.Y. 1958), the court held that the defendant's notice to take the testimony of "the plaintiff by its officer familiar with the matters alleged in the complaint" was not sufficient under the prior Rule 30 requiring "reasonable notice" to the person sought to be examined. Similarly, in Park and Tilford Distillers Corp. v. Distillers Co., 19 F.R.D. 169, 171 (S.D. N.Y. 1956), the court ruled that notices seeking to take the deposition of the plaintiff through "such other directors, officers or employees as have knowledge or information concerning the matters or any of them referred to in the complaint" was not sufficient.

It was not the duty of JRC to provide a parade of standby witnesses ready to answer questions on any and all subjects which may have arisen during the course of the deposition or to anticipate the Commissioner's trial strategy or what facts the Commissioner considered relevant to the allegations contained in the contempt complaint. The Commissioner and his counsel cannot and should not blame either JRC or the Trial Court for their improper noticing of the deposition. The Trial Court acted well-within its broad discretion in denying the request for an extension of discovery and delay in the trial. See Bishop v. Klein, 380 Mass. 285, 288 (1980); Solimene v. B. Grauel & Co., KG, 399 Mass. 790, 799 (1987).

Likewise, there is no showing that the Commissioner was prejudiced by the inability to depose Mr. Arthur Mullen, the JRC accountant with knowledge of the impact of the Commissioner's actions since 1993 on JRC's financial condition. The Commissioner was well aware that JRC alleged economic harm as a direct result of the Commissioner's contemptuous conduct, and was on notice that JRC would present evidence of such harm at trial. JRC designated Mr. Mullen as an expert witness and submitted an offer of proof as to the basis and substance of his proposed testimony regarding the financial condition of JRC on June 26, 1995, more than one week before Mr. Mullen testified. (S.A. 68). This is not a situation where DMR was surprised or ambushed by the last minute, bad faith designation of an expert witness whose testimony DMR had no opportunity to counter. See Wilson v. Honeywell, Inc., 409 Mass. 803, 809-10 (1991); Egan v. Marr Scaffolding Co., 14 Mass. App. Ct. 1036, 1036 (1982). In contrast, the Commissioner listed over 120 witnesses, including numerous psychologists and physicians on his pre-trial witnesses, knowing full well that it would be impossible for JRC to depose all the witnesses for trial or even determine which of the witnesses the Commissioner might actually call at trial.

B. The Trial Court Did Not Err In Limiting The Presentation of Evidence

The Commissioner invokes the doctrine of curative admissibility to argue that he had a right to introduce evidence otherwise inadmissible to rebut "prejudicial evidence" presented by JRC, and argues that the Trial Court's denial of this right constituted reversible error. The Commissioner misstates the standard. Curative admissibility is a rule whereby if one party introduces, without objection, evidence that is inadmissible and immaterial, not merely prejudicial, it is within the discretion of the trial court to permit the opposing party to introduce otherwise inadmissible evidence to contradict the party's original submission. See Liacos, Handbook of Massachusetts Evidence, § 3.13.1, pp. 106-107. It is generally not error for a trial court to refuse a party to respond with inadmissible evidence:

> A trial judge cannot be compelled to listen to the trial of immaterial issues which in his judgment would prolong the trial,

> confuse the jury, and make likely an unjust result. The settled rule is that the introduction or exclusion of immaterial evidence to meet immaterial evidence is within the discretion of the court.

Goodyear Park Co. v. Holyoke, 298 Mass. 510, 511-512 (1937) (internal quotations and citations omitted). The Commissioner's reliance on this doctrine is misplaced. In any event, there is no showing that the Trial Court abused its discretion, or denied the Commissioner an opportunity to present his case.[24]

First, the evidence of the negative effect of the termination of the Specialized Food Program on the health and safety of certain students at JRC who relied upon this treatment was not inadmissible, making the doctrine inapplicable to this evidence. The Commissioner had ordered the Specialized Food Program terminated in his January 20 Letter, alleging a good faith basis to do so after investigating the abusive effects which this allegedly scientifically unrecognized aversive treatment was having on the students. The evidence of the debilitating effect which the termination of the program had caused to student J.C. was direct evidence to refute the Commissioner's January 20 Letter and to prove that his certification decision regarding this therapy was unsubstantiated, arbitrary, and a fraudulent imposition of his regulatory authority. In addition, this was direct evidence to show that protection against such unilateral termination of treatments by the state agencies was the exact reason why the parties had entered into the Settlement Agreement in 1987, and that the Commissioner's unilateral regulatory activities directly contravened the terms and overall objectives of the Settlement Agreement. Finally, the evidence was relevant as bearing directly on the multifaceted harm caused by the Commissioner's bad faith regulatory activities.

Also, the argument that the Trial Court failed to allow him to rebut such evidence is not supported by the record. The Commissioner's assertion that the Court improperly denied his request, made during the trial, for an order allowing him to conduct a physical examination of the two students for whom the

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[24] The cases on which the Commissioner relies for the reversal of a verdict based on the Curative Admissibility Doctrine are all criminal cases from which it naturally follows that a criminal defendant has a greater right and interest in being able to address evidence adduced by the Commonwealth.

Specialized Food Program had been terminated ignores that DMR had already conducted multiple examinations of the JRC students. The Commissioner admitted at trial that the psychiatric and medical evaluations that he conducted on all of the JRC students in 1994 echoed the findings of the 1991 and 1993 Certification Reports which all stated that the JRC students were not in any way harmed by JRC's treatment. (Tr. VI, 95,191-192,200-202). The Commissioner also admitted at trial that he had no medical or psychiatric opinion to support his decision in the January 20 Letter to terminate the Specialized Food Program and the other three treatment procedures. (Tr. VI, 95,191-192,199-202). The request was merely another attempt to enlarge discovery in the middle of trial to allow for last minute preparation of cross-examination. The Commissioner was aware that JRC's case consisted of proving harm to the students, and he should have taken steps during discovery when the multiple exams were performed, not during trial, to prepare a defense.

Furthermore, since the Commissioner in his certification letters had stated that the Specialized Food Program was a dangerous therapy and was harming the students receiving such treatment, the Commissioner should have already had available for presentation at trial the factual basis of this conclusion. The issue at the contempt trial, as the Trial Court reminded the parties in denying the request for an examination of these students, was DMR's alleged violation of the Settlement Agreement and the lack of a good faith basis for the Commissioner's unilateral certification decisions at the time they were issued, and not an after-the-fact attack on the propriety of the treatment decisions. The Trial Court was warranted in denying the request for an examination of the students in the middle of trial under the circumstances.

Second, the evidence presented by JRC regarding the Commissioner's disparate treatment of and deviation from normal policies and procedures in regulating the JRC program was also highly relevant and admissible to JRC's claim of the Commissioner's bad faith and corrupt tactics in response to JRC. JRC's questioning concerning the Commissioner's regulatory activities with regards to other providers was juxtaposed with questions regarding his actions towards JRC in an effort to present evidence of a course of conduct of deviating

from normal policies when dealing with JRC. The Commissioner did have an opportunity to present evidence on this issue through the testimony of Richard Cohen, Esq. head of the investigations for DMR, whom the Commissioner called as its witness concerning the normal process of investigating providers. Although characterized as rebuttal evidence, this testimony of Attorney Cohen was actually offered as part of the Commissioner's affirmative case regarding his proper regulatory activity, over which the Trial Court had broad discretion in determining its admission. See Drake v. Goodman, 386 Mass. 88, 92 (1982).

A review of the transcript shows that the Trial Court allowed the Commissioner great leeway in presenting evidence through Attorney Cohen concerning the Department's general investigation practice. (Tr. XIIA, 133-142). The instructions from the Trial Court to limit questions to JRC only came after counsel for DMR continued to question Attorney Cohen regarding general practices instead of turning to an explanation of the specific application and relevancy of such practices to JRC. (Tr. XIIA, 141-142). It was within the Trial Court's discretion to require the Commissioner to provide evidence linking the investigations practice to JRC. See Commonwealth v. Tobin, 392 Mass. 604, 613 (1984) (judge has broad discretion in deciding whether evidence is relevant); Reily v. MBTA, 32 Mass. App. Ct. 410, 414 (1992). The instruction to counsel for DMR to "move along" in order to end the repetitive testimony, (Tr. XIIA, 143), was a proper exercise of the control over the process of the trial and was not an abuse of discretion. See Commonwealth v. Guidry, 22 Mass. App. Ct. 907, 909 (1986). Adoption of Seth, 29 Mass. App. Ct. 343, 350 (1990) (court is "directing and controlling mind of the trial"). Again, there was no abuse of discretion and no prejudice to the Commissioner requiring reversal of the entire judgment.

III. THE FACTUAL FINDINGS OF THE TRIAL COURT ARE NOT CLEARLY ERRONEOUS

A. The Findings Of Fact By The Trial Court Are Not A Verbatim Adoption Of The Findings Of JRC

Contrary to the assertion of the Commissioner, the Trial Court did not merely adopt and reproduce verbatim JRC's proposed findings and conclusions.

An examination of the record contrasting the proposed findings of JRC (App. 634) and the Trial Court's Findings of Fact (App. 1207) shows that the judge significantly reworked the proposed findings of JRC to reflect her independent thinking and judgment prior to deciding the case. See Cormier v. Carty, 381 Mass. 234, 238 (1980), quoting from Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass. App. Ct. 412, 418 (1980). Although the Trial Court did adopt many of the proposed findings in substance, the Trial Court also rejected many of the proposals, deleted much of the language proposed by JRC, and rewrote findings in drafting her own findings. See Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 465 (1991). In particular, the judge painstakingly drafted her own findings regarding the core issues of the case. See Markell, supra, at 418; Edinburg v. Cavers, 22 Mass. App. Ct. 212, 219 n. 7 (1986).

The Commissioner argues that every one of the subsidiary Findings of Fact are erroneous. (Brief, p.75). However, the Commissioner's Brief addresses only a small portion of the 303 findings. The Commissioner's assertion that all of the findings are erroneous is evidence that this is merely an unreasonable, baseless, and contrived argument. The record supports that there was not a mere typing or signing of JRC's proposed findings by the Trial Court, as the Commissioner asserts. Contrast Marr v. Back Bay Architectural Commission, 23 Mass. App. Ct. 679, 681 (1987).

It stands to reason that the substance of many of the Trial Court's findings reflect JRC's proposed findings, including findings regarding the credibility of witnesses, since both counsel and the judge heard the same evidence at trial. The Trial Court simply determined that JRC's proposed findings accurately expressed the testimony, especially since every one of JRC's proposed findings contained a specific reference to the trial testimony. (App. 634). The Trial Court was justified in relying on the substance of JRC's proposed findings in drafting her own findings since they "accurately expressed" [her] decision after [her] consideration of the evidence and [her] evaluation of the credibility of the witnesses." Edinburg v. Cavers, 22 Mass. App. Ct. at 219. Moreover, a review of the trial transcript shows that the Trial Court was "engaged in the proceedings

and in command of the issues" throughout the trial. Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. at 465 n.18; see also Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302, 314 (1988). The record in this case makes "clear that the findings are the product of [her] independent judgment," Anthony's Pier Four, supra, at 465, and evidence a "badge of personal analysis" by the Trial Judge to be afforded deference by this Court. See Cormier v. Carty, 381 Mass. at 237, quoting from In Re Las Colinas, Inc., 426 F.2d 1005, 1010 (1st. Cir. 1970).

In addition, this case differs from those where the courts have criticized or reversed a trial judge's findings because of verbatim adoption of a party's submittals. First, the Trial Court in this instance requested and received proposed findings from all parties, not just JRC. Contrast Cormier v. Carty, 381 Mass. at 235. See also Sico v. Sico, 9 Mass. App. Ct. 882, 882 (1980); Edinburg v. Cavers, 22 Mass. App. Ct. at 218. Again, the fact that the Trial Court rejected the Commissioner's distorted review of the evidence, and instead accepted the substance of JRC's proposals complete with citations to the testimony, was proper where the Trial Court determined that JRC's review of the evidence was accurate. See Edinburg v. Cavers, 22 Mass. App. Ct. at 218-219. Second, the Trial Court issued her findings on October 6, 1995, within three months of the close of trial, which meant that the Trial Court was relying on her memory of the evidence still fresh in her mind, rather than depending on the testimony as recounted by the parties in their submittals. See Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. at 314-315.

Finally, the Trial Court requested proposals from the parties at the close of the trial and prior to issuing the final version of her findings together with the Judgment and Order. The court in Cormier v. Carty, supra, specifically ruled that it did not condone the pro forma adoption of "[f]indings and conclusions prepared ex post facto by counsel," since the reliance on submission of findings after a decision is reached defeats the purpose of preparing findings, including insuring the quality of the decision by "requiring simultaneous articulation of the judge's underlying reasoning" and assuring full and fair consideration of the parties' claims. 381 Mass. at 236-237. See also Markell v. Sidney B. Pfeifer

Foundation, Inc., 9 Mass. App. Ct. at 416, quoting from Robert v. Ross, 344 F.2d 747, 751-752 (3rd Cir. 1965); Ramey Construction Co., Inc. v. Apache Tribe of the Mescalaro, 616 F.2d 464, 466-467 (10th Cir. 1980). In contrast, the court in Cormier v. Carty, supra, expressly approved, as occurred here, the pre-decision submission of proposed findings, in recognition of the practical necessity of a trial judge facing an ever-expanding docket:

> Nothing we say in this opinion should be construed as criticism of the practice of soliciting proposed findings of fact and conclusions of law from all parties at the close of evidence before a decision has been reached. Nor are we unaware of the concern for 'efficient administration [of justice] that leads hard-pressed judges to turn to counsel for help.'

381 Mass. at 237 n.5, quoting from In Re Las Colinas, Inc., 426 F.2d at 1008; see also Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass. App. Ct. at 416, quoting from Louis Dreyfus & Cie. v. Panama Canal Co., 298 F.2d 233, 738 (5th Cir. 1962) ("In a workaday world...it may often be necessary for a hard-pressed district court to take assistance from counsel in articulating his decision."). The circumstances of this case, together with the fact that the Trial Court was engaged in the issues throughout the trial and drafted her own distinctive findings, evidences that the Trial Court exercised independent thought and analysis in deciding this case, and did not merely adopt JRC's findings.

B. The Commissioner Can Not Satisfy The Rigorous Clearly Erroneous Standard

Even if the Trial Court had adopted verbatim JRC's proposed Findings of Fact, it is well-settled that copying from a set of proposed findings is not "tantamount to reversible error." See Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. at 314. As this Court has stated, "Even if a judge adopts verbatim findings prepared by prevailing counsel, '[t]hose findings, though not the product of the workings of the judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by the evidence.'" First Pennsylvania Mortgage Trust v. Dorchester Savings Bank, 395 Mass. 614, 622 (1985), quoting from United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964); see also, Commonwealth v. DeMinico, 408 Mass.

230, 238 (1990). "[T]he adoption of proposed findings, even verbatim, does not void the findings nor automatically displace the 'clearly erroneous' standard." Commonwealth v. Hawkesworth, 405 Mass. 664, 670 (1991), quoting from Abbott v. John Hancock Mutual Life Ins. Co., 18 Mass. App. Ct. 508, 522 (1984); see also, Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass. App. Ct. at 417. In fact, in Cormier v. Carty, supra, even though the partes stipulated that the trial judge had adopted verbatim the prevailing party's ex post facto submissions in direct contravention of the purpose of Rule 52, this Court affirmed the trial judge's findings because they were supported by the record. 381 Mass. at 238; see also Edinburg v. Cavers, 22 Mass. App. Ct. at 218 n. 6.

Thus, even where the trial judge has adopted verbatim a party's findings of fact, which did not occur in the instant case, the appellate court "carefully scrutinizes the record, but does not change the standard of review." Hawkesworth, supra, at 669 n.5, citing United States v. Marine Bancorporation, 418 U.S. 602, 615 n.13 (1974); see also Cormier v. Carty, 381 Mass. at 237; Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. at 465; Commonwealth v. DeMinico, 408 Mass. at 238. In such cases, "[t]here remains the fundamental question whether the judge's findings of fact pass the clearly erroneous test of Mass. R. Civ. P. 52(a)." Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. at 314; see also, Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. at 463. "If a judge's findings of fact are adequate under the 'clearly erroneous' test articulated by Mass. R. Civ. P. 52(a) [ ], even though taken largely from findings proposed by counsel, then the central purpose called for by the need to prepare findings has been satisfied." Edinburg v. Cavers, 22 Mass. App. Ct. at 219; see also, Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass. App. Ct. at 416-418; Commonwealth v. DeMinico, 408 Mass. at 238. Essentially, since the judge and counsel participate in and observe the same trial, the factual findings are correct if supported by the record evidence regardless of who has actually prepared the written documented findings: "Whether a finding of fact is clearly erroneous is not a function of diction or style." Makino, U.S.A., Inc. v. Metlife Capital Credit Corp. 25 Mass. App. Ct. at 314.

This Court has enunciated the "clearly erroneous" standard of review of the factual findings of a trial court under Mass. R. Civ. P. 52(a) as the following:

> In applying the clearly erroneous standard to the findings of a [judge] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. The question of the appellate court under Rule 52(a) is not whether it would have made the findings the Trial Court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.

First Pennsylvania Mortgage Trust v. Dorchester Savings Bank, 395 Mass. at 621, quoting from Zenith Radio Corp. v. Hazeltime Research, Inc., 395 U.S. 100, 123 (1969). "What this means is that the judge's findings 'come here well armed with the buckler and the shield.'" First Pennsylvania Mortgage Trust, supra, at 621. (citations omitted).

Under the rigorous clear error test, "[i]t is not enough that an [appellate court] might give the facts another construction or resolve ambiguities differently and find a more sinister cast to actions which the district court deemed innocent." United States v. Natl. Association of Real Estate Boards, 339 U.S. 485, 495 (1950). In reviewing factual findings of a trial judge, an appellate court will not permit "appellate review of complex fact-dominated issues... to descend to the level of Monday-morning quarterbacking." Anderson v. Beatrice Foods, Co., 900 F.2d 388, 392 (1st Cir. 1990). The trial judge sitting as the fact finder is in the best position to weigh and determine the credibility of evidence, and a reviewing court is "bound by his findings of fact which are supported by the evidence, which includes interferences reasonably drawn therefrom." Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc., 14 Mass. App. Ct. 396, 405 (1982), quoting from Lawton v. Dracousis, 14 Mass. App. Ct. 164, 169 (1982).

The Commissioner essentially argues that the Trial Court, confronted with choices on conflicting facts which are equally supported in the record, chose

wrong. However, the Trial Court had the opportunity to hear all of the evidence and, in exercising its role as fact-finder under Rule 52(a), rejected the Commissioner's one-sided version of the relevant facts. "If the trial judge makes one of several possible choices of what facts are supported by the evidence, the judge's choice is not clearly erroneous." W. Oliver Tripp Co. v. American Hoechst Corp., 34 Mass. App. Ct. 744, 751 (1993), citing Edinburgh v. Edinburgh, 22 Mass. App. Ct. 199, 203 (1986); see also Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

The Commissioner also argues that this Court should review de novo and draw its own conclusions from the substantial documentary evidence presented in this case. However, this exact argument was rejected by this Court in First Pennsylvania Mortgage Trust, supra, stating, "Rule 52(a) requires that the clearly erroneous' test apply to 'all findings, regardless of the nature of the evidence.'" 395 Mass. at 621 n. 11. Likewise, contrary to the Commissioner's argument, the court in Markell v. Sidney B. Pfeifer Foundation, Inc., supra, ruled that a less deferential standard of review was not appropriate in reviewing findings based on documentary evidence in that case, because the documentary evidence was interpreted through live trial testimony which provided a backdrop for understanding the documents and necessarily involved issues of credibility. 9 Mass. App. Ct. at 429-430. Such is the situation in the present case, where the testimony of the numerous witnesses at trial provided a context for understanding the documents in light of the history and actions taken by the parties throughout the litigation. The Commissioner argues that the Trial Court's findings are clearly erroneous because certain exhibits purportedly demonstrate that the Commissioner acted well within his broad statutory and regulatory authority in making certification decisions regarding JRC as documented in the certification letters.[25] What the Commissioner does not state, however, is that the Trial Court was warranted, based upon the entire testimony, in finding that

[25] The Commissioner's additional argument that the entire contents of the certification letters must be deemed as true by the factfinder by virtue of the letters being offered into evidence is wholly without merit and warrants no further discussion.

the statements in these documents were false or made in reckless disregard for the truth.

C. The Trial Court's Findings Of Fact Were Supported By Evidence And Should Be Upheld By This Court

Throughout the trial, Commissioner Campbell's testimony was inconsistent with, or directly contrary to other statements he had made in his official certification letters, in his deposition testimony, or other trial testimony.[26] In fact, on numerous occasions throughout the trial, the Commissioner conceded to such inconsistencies and misrepresentations, particularly in regard to his Weekly Meetings regarding JRC.[27] The Commissioner also testified on numerous occasions throughout the trial that he departed from normal practice, policies, and procedures in response to JRC.[28] Similarly, Dr. Cerreto's testimony was riddled with inconsistencies.[29] Based upon all of this evidence produced by JRC at trial directly through the testimony of the Commissioner himself and his Deputy Commissioner, Dr. Cerreto, the

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[26] (Tr. III, 32-33 and Tr., 85-86; Tr. III, 37; Tr. III, 69-70; Tr. VI, 108; Tr. III, 105; Tr. III, 75-78; Tr. III, 53; Tr. III, 206, 250-251; Tr. III, 48; Tr. III, 103-104; Tr. III, 108-109; Tr. IV, 213-214; Tr. III, 118-119; Tr. III, 125; Tr. III, 129-130; Tr. III, 131; Tr. VI, 105-106; Tr. III, 163-164; Tr. III, 179-180; Tr. III, 176-177; Tr. VI, 145-149; Tr. VI, 112-115, 119; Tr. XIII, 15-21, 52; Tr. XIII, 64-65, 109; Tr. XIII, 66-67, 69-70; Tr. XIII, 75-76; Tr. XIII, 82-83; Tr. XIII, 86, 87, 92-94; Tr. XIII, 103, 105; Tr. XIII, 99, 100-101; Tr. XIII, 63, 109-110; Tr. XIII, 113-114, 116, 119-120; Tr. VI, 195-196).

[27] (Tr. III, 72, 215-216; Tr. III, 77-78; Tr. VI, 102-103; Tr. III, 182; Tr. III, 215; Tr. III, 220-221; Tr. III, 224; Tr. III, 228; Tr. III, 233; Tr. III, 235; Tr. III, 251; Tr. III, 255, 262; Tr. III, 266; Tr. IV, 36; Tr. IV, 40-41; Tr. IV, 41-43; Tr. IV, 86; Tr. IV, 92-93; Tr. VI, 100; Tr. IV, 123, 126; Tr. IV, 127; Tr. IV, 129-130; Tr. IV, 131-132; Tr. VI, 91-92; Tr. VI, 122; Tr. XIII, 83-85; Tr. XIII, 100-101).

[28] (Tr. III, 11; Tr. III, 154-155; Tr. III, 188, 193; Tr. III, 190; Tr. III, 193-194; Tr. III, 200; Tr. III, 209-211; Tr. III, 226; Tr. III, 227; Tr. III, 250; Tr. III, 258; Tr. III, 265; Tr. IV, 35; Tr. IV, 46; Tr. IV, 55; Tr. IV, 84; Tr. IV, 211-212; Tr. VI, 109-110; Tr. VI, 192-194).

[29] (Tr. X, 116, 117-118; Tr. X, 120, 128; Tr. X, 124, 126, 130; Tr. X, 131; Tr. X, 136, 137-138, 142, 144; Tr. X, 152, 162; Tr. X, 166, 171; Tr. X, 164-181; Tr. X, 172-173; Tr. X, 181, 182; Tr. XI, 13, 27; Tr. XI, 14-15; Tr. XI, 8-13, 19; Tr. XI, 19, 25; Tr. X, 186-187).

Trial Court was well warranted in giving no weight whatsoever to any of the testimony of the Commissioner, and was warranted in finding perjury and fraud.

In his attack upon the Trial Court's findings, the Commissioner repeatedly violates well-established standards of appellate review. The Commissioner distorts the record before the Trial Court, and the Trial Court's findings are consistently misstated and are frequently sensationalized by the Commissioner. The Trial Court is accused of making "inferences" or "suggestions" which do not appear in its decision, but which are attacked as clearly erroneous. Evidence is described by the Commissioner in a completely inaccurate fashion and evidence which is material to the particular argument made by the Commissioner is omitted. Since many of the factual assertions of the Commissioner are not even supported in the record and are contrary to the evidence at trial, this Court should not give any consideration whatsoever to these factual inaccuracies and should strike them from the Commissioner's Brief. See Service Publications Inc. v. Goverman, 396 Mass. 567, 580 (1986). Cambridgeport Savings Bank v. Binns, 5 Mass. App. Ct. 205, 205 (1977).

1. The Commissioner ignored the significance of his testimony about not being a party to the Settlement Agreement

The Commissioner is not correct when he asserts that he never argued "in the Trial Court" that he was not a party to the Settlement Agreement.[30] (Brief, p.79). However, as a defense to JRC's claims of contempt, the Commissioner testified at trial that he determined that his regulation of JRC was not limited under the Settlement Agreement following 1993, and did not believe that the Settlement Agreement affected any of his regulatory responsibilities with respect to JRC. (Tr. III, 15,18). The Commissioner was forced to concede that the position he took in August of 1993 was totally inconsistent with the

[30] It is noteworthy, however, that in his Answer and his Motion to Dismiss the Third Amended Contempt Complaint, the Commissioner asserted that he was "not a proper party" to the contempt complaint. (App. 361, 486). This defense is consistent with the Commissioner's position that he was not a party to the Settlement Agreement.

representations and conduct of DMR prior to August of 1993. There was uncontroverted evidence at trial that the Commissioner, and his predecessor, Commissioner McCarthy, complied with every section of the Settlement Agreement from 1987 to August, 1993, and made public statements that DMR was bound by the Settlement Agreement and that DMR's authority over JRC's treatment was limited. (U-41; JRC-253, 5; Tr. III, 23-25). Thus, the Trial Court was warranted in concluding based on the voluminous evidence, including DMR's own records, and concluding that the Commissioner did not have a rational basis for his belief, and was only concocted after the fact in order to explain conduct otherwise violative of the Settlement Agreement. The fact that this argument has been permanently discarded on appeal is only further evidence that the "non-party" rationale was not the true reason for the Commissioner's decision to ignore the Settlement Agreement. From August, 1993 up to the time of trial, the Commissioner never disclosed to JRC or the Trial Court that he did not consider himself a party to the Settlement Agreement. The Commissioner violated the Settlement Agreement after 1993 because he decided it was no longer in his interest to comply, not because he did not understand his obligations.

The Commissioner argues in his Brief that "DMR considered taking the position that it was not a party but, apparently, that suggestion was either never communicated to or was rejected by the Attorney General, who has the sole authority to represent state officials in litigation and to formulate litigation strategies on their behalf." (Brief, p.79). This is disturbing because it implies that the Attorney General's Office knew and developed the non-party argument but never provided this explanation to the Trial Court. Instead, the Attorney General attempted to present a number of contrived explanations for the Commissioner's activities from 1993 to trial.

2. The Commissioner acted in bad faith by rejecting the recommendations of the 1991 And 1993 Certification Teams and secreting their laudatory findings

The Commissioner attacks findings of the Trial Court concerning the Commissioner's reason for rejecting the recommendations of the staff review

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The Commissioner attacks findings of the Trial Court concerning the Commissioner's reason for rejecting the recommendations of the staff review

team. (Brief, p.80). The Commissioner cites Finding 49 and Finding 52 as the basis for his assertion that the Trial Court erred in finding that the Commissioner's rejection of the 1993 Certification Report was made in bad faith.[31] However, these two findings do not relate to the 1993 Report, as the Trial Court only stated in these two cited findings that the failure of the Commissioner to include members of the 1993 Certification Team in subsequent JRC discussions was "strong evidence of the bad faith purpose" of the Weekly Meetings. The Trial Court made extensive other findings concerning the bad faith nature of the Weekly Meetings, many of which are not challenged by the Commissioner. The Commissioner mischaracterizes these two findings.

Regardless of the mischaracterization, the Trial Court was fully warranted in finding that the Commissioner's basis for rejecting the 1991 and 1993 Certification Reports was done in bad faith and that the reasons asserted for rejecting them were pretextual. The Commissioner attacks the findings of the Trial Court (F. 42; F. 45) that DMR dispatched the 1993 Certification Team to JRC "unnecessarily and under false pretenses." Those two findings likewise contain no such language. In Finding 42, the Trial Court found that Deputy Counsel Casey and Dr. Riley had reviewed the Specialized Food and GED program during their visit to JRC in December of 1991. The 1991 Certification Report itself states that the Team reviewed the GED device and recommended certification. (U-37, 3). Likewise, Amanda Chalmers' letter of July 21, 1992, claiming that another review would be required to evaluate the "new" Specialized Food and GED Program was inconsistent with her earlier letter that she had accepted the 1991 Certification Report which had reviewed these programs. (U-43; U-46). DMR's own documents support Finding 45 that, contrary to the assertion of Ms. Chalmers, the Specialized Food Program and the GED Program were known to DMR at the time of the initial visit by the 1991 Certification Team. (U-37; U-35). The Trial Court also correctly found that Commissioner

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[31] In this section dealing with the clearly erroneous argument, references to the Findings of Fact of the Trial Court are cited as "F. ___" or "Finding, __" referencing the specific paragraph number. The Findings of Fact collectively are located in the record at App. 1207-1293.

Campbell admitted that he had been informed of these two programs from his Director of Human Rights. (U-35; Tr. III, 46). The Commissioner's argument that these two findings are clearly erroneous is frivolous.

The Commissioner next argues that the Trial Court erred in finding that the review team conducted a "thorough" investigation of the GED and Specialized Food Programs. Again, the Commissioner inaccurately cites the findings of the Trial Court. The Trial Court did not conclude that the review team, in the Trial Court's opinion, conducted a "thorough investigation" of these programs. Rather, the Trial Court, in Finding 48, merely noted that the report of the 1993 Certification Team itself stated that it had undertaken a "thorough" investigation. (U-75).

Furthermore, the Trial Court's findings regarding the completeness of the 1993 Certification Report are supported by the record. (Brief, p.81). In Finding 51, the Trial Court concluded that the 1993 Certification Report was complete. Contrary to the statement of the Commissioner, Deputy Counsel Casey, testified that he considered the 1993 Certification Report to be "complete," and, therefore, forwarded to General Counsel Murdock at the central office of DMR. (Tr. I, 128-129,137). Thereafter, no one at DMR ever spoke to him about the 1993 Certification Report and, to his knowledge, no one spoke with any members of the 1993 Certification Team concerning the 1993 Certification Report. (Tr. I, 140). No one ever told him the 1993 Certification Report was incomplete. (Tr. I, 136). The fact that Dr. Riley was not able to review the information on the misfires alone does not affect the validity of Deputy Counsel Casey's position of when the 1993 Certification Report was complete. The purpose of the 1993 visit was "strictly focused on health and safety issues" raised by the GED-4 and Specialized Food Program, and Dr. Riley's role was limited as a clinical psychologist. (U-75, 10). Indeed, Deputy Counsel Casey testified that he was unclear why Dr. Riley was on the second team to start since he was not involved in any health or safety issues. (Tr. I, 121).

The Commissioner argues that the Trial Court erred in finding that the Commissioner's only justification for considering the 1993 Certification Report

to be incomplete was the fact that it was not signed by Dr. Riley. (Brief, p.82). The Commissioner argues that he received "advice" from the General Counsel in describing the 1993 Certification Report and its deficiencies. Yet, at trial, the Commissioner was compelled to acknowledge his deposition testimony where he stated that his General Counsel told him only that the report was "incomplete." (Tr. III, 76-77). The fact that the Commissioner acknowledged the work of these two teams, both in his August 6 Letter and his Report to the Court, further demonstrates that the 1991 and 1993 Certification Reports were not "rejected" by the Commissioner because of lack of completeness or any other reason. Finally, the Commissioner attacks the finding of the Trial Court (F. 52) that the 1991 and 1993 Certification Reports were never read until 1995 by the Commissioner, Dr. Cerreto, or any of the key individuals who were making decisions on JRC's certification. (Brief, p.82). However, both the Commissioner and Dr. Cerreto testified that they did not read the 1991 and 1993 Certification Reports until 1995. (Tr. III 70-72; Tr. X, 166; Tr. X 145-146). The Trial Court was fully justified in discounting the pretextual reasons from the Commissioner as to why he "rejected" the recommendations of the 1991 and 1993 Certifications Teams.

3. The Commissioner and his Deputy Counsel admitted to false statements in the Commissioner's August 6, 1993 Certification Letter

The Commissioner argues in this Brief at page 84 that the Trial Court ignored the evidence which demonstrated, according to the Commissioner, that he had a good faith basis for the statements contained in his August 6 Letter. Again, the record supports that there was no good faith basis for this letter, as principally supported by testimony from the Commissioner and his own Deputy General Counsel.

The Commissioner first attacks (Brief, p.86) Finding 70 of the Trial Court that the Commissioner misrepresented the findings of 1993 Certification Team. On page three of his August 6 Letter, Commissioner Campbell stated that the 1993 Certification Team "felt unable to reach a conclusion on whether the issue of GED misfires presented a problem for [JRC's] ability to comply with

§ 20.15." The Trial Court concluded that this assertion was false. (F. 70). The Commissioner testified that this statement was based upon his belief that the 1993 Certification Team had met and discussed the issue of GED misfires. (Tr. III, 93). However, Deputy Counsel Casey testified that the 1993 Certification Team never discussed GED misfires, so it obviously reached no such conclusion. (Tr. I, 152). Indeed, the only material finding relative to the issue of misfires was the cardiologist, Dr. Lauridsen's, conclusion that the misfirings were infrequent and did not present a danger to the health and safety of the JRC students. (U-75,6). Moreover, the 1993 Certification Team never stated that there was a "problem" concerning JRC's ability to comply with § 20.15, insofar as the Team recommended that JRC be certified. (U-75, 11).[32]

The Commissioner next argues at page 87 that the Trial Court "criticized" the Commissioner for asking JRC to provide a list of aversive procedures. (F. 73). In the August 6 Letter, JRC was required to provide DMR, within twenty-one days, a "list of aversive techniques and an existing description of how such techniques are used at JRC." (U-82, 5). As the Trial Court noted, Deputy Counsel Casey testified that JRC provided the Certification Team with this information and was reviewed by the Team. (Tr. I, 160).

In Finding 67, the Trial Court found that the Commissioner's August 6 Letter conflicted with evidentiary hearings in the Probate Court which established that the procedures utilized at JRC were effective. This testimony was supported by the evidence. (JRC-240). The August 6 Letter also falsely implied that

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[32] DMR quotes selectively from the testimony of Attorney Casey on this issue. (Brief, p.86). However, Attorney Casey never stated that the Commissioner's characterization of the Team's conclusion was correct. Indeed, Attorney Casey testified as follows:

> Q: You would agree with me, would you not, then that the issue of clinical -- of the misfires didn't affect your opinion that BRI should be given recertification, did it sir?
> A: Not as long as they gave information about it, no.
> Q: And you have no reason to think that they wouldn't give the information, Is that correct sir?
> A: No, that's correct.

(Tr. I, 155).

evidence concerning professional acceptability had been requested from JRC but had not been forthcoming. The Commissioner was unable to identify any facts to suggest that JRC had been asked and refused to provide evidence that the GED-4 and the Specialized Food Program were professionally acceptable. (Tr. III, 107). Likewise, Deputy Counsel Chow-Menzer made no request for information concerning the effectiveness of the procedure or professional acceptability of Specialized Food in a 1992 letter requesting information on this program. (Tr. III, 107). In his deposition, the Commissioner stated that he had concern that the statement implied that he had attempted to conclude that JRC's treatment was professionally accepted, but could not find any evidence; yet at trial he testified that he saw no problem with the statement in the August 6 Letter. (Tr. III, 108-109). The Trial Court's findings were fully warranted.

The Commissioner then argues that the Trial Court faulted the Commissioner for "contradicting those Probate Court findings" and for "deliberately ignoring the opinions of psychologists hired by the Department to report to the Probate Court on an individual's substituted judgment proceedings." (Brief, p.87). Again, the Commissioner deliberately mischaracterizes the findings of the Trial Court. The Trial Court did not "fault the Commissioner for contradicting Probate Court findings." What the Trial Court stated was that Probate Court findings had established that the procedures were effective and there was therefore evidence which was available for the Commissioner to examine, which was true. (JRC-239; JRC-240).

Likewise, the Trial Court's finding (F. 69) that the Commissioner's testimony was in "deliberate ignorance" of clinical information "prepared by psychologists retained by him, and contained in his office files" was fully justified by the record. For example, on April 29, 1993, less than four months before the Commissioner's letter, the Commissioner's legal department received a report from DMR psychologist, Dr. Frederic Krell, expressing the opinion that the GED was "more effective than any other intervention which was applied over the previous seventeen years" for this client. (JRC-244, 10). The Commissioner acknowledged that this was the type of information which was relevant to the

issue of effectiveness, (Tr. III, 111), but it was not considered even though it was in DMR's own files.

In short, the Trial Court was more than justified in concluding in Finding 64 that the August 6 Letter was the "first volley" in a series of actions designed to put JRC out of business.

4. The Commissioner was acting in response to the anticipated CBS broadcast

The Commissioner contends that the Trial Court erroneously concluded that the Commissioner's position concerning both the Settlement Agreement and the JRC program were improperly motivated by his concern as to how his agency might be depicted in an upcoming television program on JRC, and that the Commissioner testified falsely on this subject. (Brief, p.88). The Commissioner asserts that these findings are not only "without any basis in the evidence" but also "grossly mischaracterized the little evidence presented on this subject." (Brief, p.89). It is the Commissioner who mischaracterizes the Trial Court's finding. The Trial Court concluded that the Commissioner's concern as to how he 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. In any event, the Trial Court's findings (F. 61; F. 62) were not clearly erroneous. The Commissioner admitted at trial that both he and his superiors in the administration were concerned that DMR might be depicted as not properly monitoring JRC in the upcoming CBS broadcast. (Tr. III, 52-53,58).

The Commissioner blatantly misrepresents the record when he asserts that the Trial Court erred in finding (F. 61) that "Commissioner Campbell testified that he never did anything in anticipation of the upcoming CBS television program." On page 89 of his Brief, the Commissioner states that the Trial Court's "adverse findings on this subject all rest on the erroneous premise that the Commissioner testified that he 'never did anything' in anticipation of the television program," but that he "never denied doing anything in anticipation of that show." (Brief, p.89). During his testimony, the Commissioner testified that

he "was not motivated by [the Connie Chung Show about JRC]." (Tr. III, 58-59). In stark contrast, the Commissioner's own workplan agendas, which are not discussed in his Brief on this issue, revealed that he had proposed mailing letters to parents which were strategically planned "in anticipation" of the "Chung" program. (U-208). Likewise, the Trial Court drew a reasonable inference in concluding that concerns about how the administration would be depicted on a national television program was at least part of the reason for the Commissioner's abrupt and radical change in position on his obligations under the Settlement Agreement, since the uncontroverted evidence showed that the Commissioner's position on the Settlement Agreement changed dramatically from years past at about the same time that the Commissioner learned of the CBS program. Given this testimony, the Trial Court was warranted in linking the Commissioner's actions to the upcoming television program.

5. The Commissioner did not have a good faith basis when he investigated the Court Monitor and the Guardian *Ad Litem*

The Commissioner contends that the Trial Court mischaracterizes DMR's "good faith attempts" to learn the nature and extent of Dr. Daignault's relationship with JRC's attorneys and its clients. (Brief, p.90). The fact that the Commissioner believes the Trial Court's decision "mischaracterizes his good faith attempts" is not a basis for concluding that the Trial Court findings were clearly erroneous.

In any event, the Trial Court made no mischaraterizations. On August 19, 1993, in response to JRC's first request for arbitration with the Court Monitor, the Commissioner's privately-retained counsel, David Ferleger, wrote a letter to the Court Monitor requesting information regarding Dr. Daignault's financial and/or consulting relationship between him and JRC's law firm, and requested copies of the bills submitted to the Trial Court for his services as Court Monitor. (JRC-85; Tr. III, 156). The attack was based upon an alleged conflict of interest involving Dr. Daignault. Commissioner Campbell "guessed" that is was just coincidental that he raise he raised the conflict of issue at the same time JRC first requested arbitration. (Tr. III, 157). This attack upon Dr. Daignault

culminated in accusations in a "conflict of interest" letter to Dr. Daignault because he had performed consultations on clients at the Eckert Seamans law firm, the law firm which represents JRC. (Tr. III, 156). At the time these attacks were made, however, Dr. Daignault had been retained not only by counsel for JRC, but by counsel for the wards to consult on various matters, as well as various agencies of the Commonwealth including DMR. (Tr. II, 158-159). The Commissioner conceded that Dr. Daignault had been utilized as a consultant by his own Department as recently as June, 1993. (Tr. II, 158-159; Tr. IX, 50-51). The attack upon Dr. Daignault's "ethics" was particularly remarkable, since the Commissioner testified both in his deposition and at trial that he did not believe that Dr. Daignault had any bias against DMR. (Tr. III, 158). The allegation of a conflict was merely a pretext to remove a court official whom the Commissioner perceived as a potential obstacle to his plans.

Even though DMR lawyers felt Dr. Daignault had a conflict of interest in August of 1993, they did not hesitate to utilize Dr. Daignault to suit their own purposes. On October 14, 1993, General Counsel Murdock sent a letter to Dr. Daignault requesting the Court Monitor's "approval of the independent program review required as a condition of JRC's interim certification." (The independent program review related to the Rivendell matter described infra). (U-110). General Counsel Murdock's letter of October 14, 1993, came less than one month after she and the Commissioner had rejected the further attempts of arbitration by the Court Monitor concerning the mailing of the August 6 and August 31 Letters. Accordingly, Dr. Daignault advised General Counsel Murdock that mediation could not be reinstituted unless DMR revised its position and made an unequivocal commitment to the process of mediation in compliance with the Settlement Agreement. (JRC-251). On that same day, DMR noticed Dr. Daignault's deposition. (U-111). On October 19, 1993, DMR sent a letter to Dr. Daignault, requesting that he "reconsider" his role as Court Monitor for "at least as a matter of conscience." (U-113).

6. The Commissioner gave false testimony about his 1991 telephone conversation with Henry Clark, Esquire

The Commissioner contends at page 93 of his Brief that the Trial Court erred in accepting the testimony of Henry Clark, Esq. ("Mr. Clark") over the testimony of the Commissioner. The Trial Court found that the issue pertaining to Mr. Clark's conversation arose in response to questioning by Attorney Yogman who made an effort to justify the "enormous legal resources devoted to the JRC certification process" by DMR. (F. 92). The Commissioner testified that Mr. Clark had contacted the Commissioner once he assumed office to "warn" him not to do anything to JRC. (F. 93). Mr. Clark's version of the events was much different, and he testified that he called Commissioner Campbell as a former colleague to congratulate him on his appointment. Mr. Clark testified that the Commissioner stated that because Mr. Clark was an attorney, and because Mr. Campbell was going to be the Commissioner, "we can't talk to each other anymore." (Tr. VIII, 156-158). The Trial Court had the opportunity to observe the demeanor of the witnesses and chose to believe Attorney Clark. Furthermore, the Trial Court was entitled to consider the numerous other inconsistencies in the Commissioner's testimony, many of which were admitted by the Commissioner, in assessing his testimony as not credible. The Commissioner's attacks on the Trial Court's findings regarding the credibility of witnesses ignores the proper standard under rule 52.

7. The Commissioner's August 31, 1993 Certification Letter was also rife with false and defamatory statements about JRC and another product of the Commissioner's bad faith

The Commissioner asserts that he had a good faith basis for sending the August 31 Letter. The Commissioner first mischaracterizes Finding 98. Contrary to the statement of the Commissioner at page 94 of his brief, the Trial Court neither suggested that the August 31 Letter was unnecessary, nor found that the August 27 materials successfully rebutted the factual allegations in the Commissioner's August 6 Letter. The Trial Court only found that JRC had served a rebuttal to the August 6 Letter and did not, as suggested by the Commissioner, determine the merits of the rebuttal in Finding 98.

The Commissioner next argues (Brief, p.96) that the Trial Court improperly concluded as being false the assertion in the August 31 Letter that the source of the information concerning GED misfires was some one other than JRC. (F. 102). The August 31 Letter states that the source of information on GED misfires was not JRC. (U-91,1). The Commissioner's statement that the issue of misfires had been brought to the attention of DMR from a source "other than BRI," was categorically false. Deputy Counsel Casey testified that he remembered reviewing information provided by JRC on the issue of misfires, (Tr. I, 133), as well as discussing misfires with staff and JRC doctors. (Tr. I, 154,166). Deputy Counsel Casey conceded that the Commissioner's statement in the August 31 Letter about the source of misfire was inaccurate, (Tr. I, 167), reiterating that as "far as I'm concerned, I knew about it, and I knew about it from BRI." (Tr. I, 176). The Trial Court's Finding 102 said nothing about the Commissioner's "good faith" basis for making this statement (although it is clear that the Commissioner had none) and simply stated that his statement in the letter was not true. The Trial Court's finding merely tracked the testimony of the Commissioner's own lawyer.

The Commissioner attacks Finding 109, (Brief, p.98), asserting that the Trial Court erred when it stated that Condition 1 restricted JRC to the use of procedures which were actually in use as of August 27, 1993. The Commissioner's assertion is false. The August 31 Letter was a so-called "interim certification" letter. Under the Commissioner's view, certification was a prerequisite to JRC utilizing aversive procedures. The first sentence of Condition 1, omitted in the brief, states that, "effective immediately, BRI's interim certification extends only to the use of the aversive techniques under Level III listed in Exhibit 7-2 to your August 27, 1993 letter to me."
(U-91,3). This sentence could not be clearer. JRC was only certified to use those Level III procedures presently in use. The language quoted in the Commissioner's Brief merely sets forth a process that would be followed in the event that JRC wanted to utilize aversive procedures that it was not utilizing.

The Commissioner misrepresents the facts to this Court when he argues that there was no restriction on aversive procedures in his August 31 Letter.[33]

The Commissioner next challenges the findings of the Trial Court relative to the issue of restraint. (F. 107). The Commissioner argues that the August 31 Letter set forth "in full detail" the factual basis for DMR's conclusion that JRC had consistently and repeatedly violated DMR's mechanical restraint regulation. (Brief, p.99). The Trial Court's decision stated that there was no evidence adduced that JRC had utilized mechanical restraint without a substituted judgment order or in circumstances other than those recognized as appropriate as set forth in a memorandum by DMR's General Counsel. (F. 106; F. 107). The Trial Court was fully justified in making this finding. Contrary to the statement in the Commissioner's Brief, Dr. Israel never admitted that JRC violated DMR's restraint regulations. The Commissioner testified in his deposition and at trial that JRC was cited for not complying with the restraint regulations because there were situations when JRC was using mechanical restraint and JRC had not received substituted judgment orders. (Tr. III, 147). In a memorandum prepared by General Counsel Murdock concerning the behavior modification regulations, DMR acknowledged that in emergency situations, Level III Plans (which the Commissioner acknowledged can include restraint) can be implemented without the necessary court approval. (U-15). There was no evidence to show that JRC violated DMR's restraint policy, and the Trial Court's finding was correct.

The Commissioner also attacks (Brief, p.100) the Trial Court's findings concerning Condition 10 in the August 31 Letter, which provided that JRC had to notify its Funding and Placement Agencies within sixty days of an "emergency

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[33] The Commissioner was aware on August 31, 1993 that JRC was authorized to utilize procedures which it might not be using on any particular day. (Tr. III, 142). The Commissioner decided to issue his directive of August 31, even though Trial Court orders permitted JRC to utilize procedures other than those that were specifically in use on August 27, 1993. Instead of seeking to modify outstanding Court orders in the case to avoid a conflict between Executive Department action and judicial orders, the Commissioner departed from the Settlement Agreement and his established course of action, (U-15,¶14), and simply administratively overruled outstanding orders of the Trial Court.

plan" for each resident to address the funding and logistics of any unexpected medical, personal or programmatic situation which JRC deems are beyond the capacity of JRC to address. (Emphasis supplied). The Trial Court was warranted in finding (F. 111) that this condition was purposefully designed to alarm JRC's Funding and Placement Agencies and obstruct JRC's intake of new students.

The Commissioner testified that Condition 10 was based upon "prior situations" where JRC had unexpectedly discharged students who then became the responsibility of DMR. But, when pressed by JRC counsel, the Commissioner could only identify one situation involving a discharge which allegedly occurred in or about 1991, and could offer no explanation as to why this Condition was being imposed in 1993 as a result of an event which supposedly occurred in 1991. (Tr. III, 151,157). Moreover, the Commissioner also acknowledged that no conditions similar to this had ever been imposed in the case of other programs which had unexpectedly terminated clients. (Tr. III, 154).

The Trial Court's finding concerning the impact of Condition 10 was reasonable. At the tin.e the August 31 Letter was sent out by the Commissioner, (Tr. II, 157-158), JRC's Funding and Placement Agencies had already received from DMR allegations of a host of alleged JRC misdeeds, including allegations that JRC was consistently violating DMR regulations. The Trial Court was fully justified in concluding that under these circumstances, a Funding or Placement Agency would not seek new placements when emergency plans were being developed to remove existing clients from a program allegedly in violation of state regulations.[34]

The Commissioner asserts that the Trial Court also incorrectly concluded (F. 112) that Condition 10 was "part of a plan to place JRC into receivership or to close JRC down." (Brief, pp.101-102). The Trial Court's finding was

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[34] In addition, the Trial Court had the benefit of the testimony of Dr. Daignault, who stated that when he was apprised of this condition, he was also concerned because, based upon his contact with funding sources, he felt that the condition would cause great alarm. (Tr. II, 141).

supported by the evidence. The Attorney General's office had been instructed to prepare a receivership petition, and the Weekly Meeting Group was actually discussing what had to occur before "BRI closes." (JRC-293, 5). At a time when the Commissioner was informing JRC parents and Court officials that he had no plans to close down JRC, (U-92; App. 147), it is apparent that he did have such plans. Based upon the fact that JRC was required to draw up "emergency plans" in the event of "unexpected medical, personal or programmatic situations," the Trial Court was fully justified in concluding that Condition 10 was part of the Commissioner's plan to place JRC into receivership or to close JRC down.

8. The Commissioner's false and defamatory statements to the JRC Parents and JRC's Funding and Placement Agencies were established at trial

The Commissioner argues that the Trial Court "mischaracterizes the evidence" in Finding 116. (Brief, p.105). It is not clear from the Commissioner's Brief which specific part of Finding 116 he is challenging. The Trial Court correctly found that the Commissioner mailed copies of his August 6 and August 31 Letters to all of JRC's Funding and Placement Agencies on September 24, 1993 and, further, that the mailing included the original version of the August 31 Letter, as well as Condition 10, "the very requirement concerning emergency placements which JRC wished to avoid." (JRC-105; Tr. III, 167). The Trial Court also correctly concluded that the Commissioner rejected the request for arbitration with the Court Monitor. (U-34; Tr. III, 166).

The Commissioner argues that in fact he did attempt to mediate this dispute by telephone and facsimile on September 23, 1993. (Brief, p.106). JRC requested arbitration with the Court Monitor before DMR mailed out the letters to JRC's Funding and Placement Agencies. (JRC-249). In response to JRC's request for arbitration, Dr. Daignault and GAL Briggs wrote to General Counsel Murdock "imploring" her to agree to arbitration under the Settlement Agreement prior to the letters being sent. (JRC-250). Despite both requests, the Commissioner elected to proceed unilaterally, rejecting the request of the Court Monitor for even a meeting. (U-54; Tr. III, 166-167). Dr. Daignault thereupon

reported to the Trial Court that arbitration under Paragraph B-2 had failed. (JRC-250). The assertion of the Commissioner that there had been a form of mediation is patently frivolous.

Likewise, the evidence supported the Commissioner's intention to send only negative information regarding JRC. The Commissioner testified that he could not offer an explanation as to why JRC's Funding and Placement Agencies had not been advised that Condition 10 had been modified, (Tr. III, 171), or included the unsubstantiated allegations of Dr. Jansen, castigating the JRC program, (U-105; Tr. III, 173), or made absolutely no mention of the favorable 1991 and 1993 Certification Reports. He never adequately corrected the false allegation about "deaths" not being reported at JRC, and the false allegation that Dr. Israel had personally engaged in a serious abuse of JRC clients. (Tr. III, 192-193; JRC-266). The Court's findings that the mailing of September 24, 1993 was part of a pattern to spread false allegations about the JRC program and Dr. Israel was warranted.

9. The Commissioner's Report to the Court was a fraud

The Commissioner argues that the Trial Court's findings (F. 120-124) on the unsolicited "Report to the Court" concerning the "Status of Behavior Research Institute" were erroneous. The Commissioner falsely characterizes the "basis" of the Trial Court's decision as resting upon the failure of the Report to the Court to describe or include as exhibits the two "internal reports of DMR field staff." (Brief, p.109). These "internal reports" were actually the 1991 and 1993 Certification Reports which recommended certification. Although there was reference to these Reports, they were never submitted for the Trial Court to review at any time prior to trial. In his Brief, the Commissioner states that the 1991 and 1993 Certification Reports were "immaterial" since they had been rejected by the Commissioner and were not the official position of DMR. (Brief, p.109). But, given that the Commissioner described (albeit falsely) the conclusions and recommendations of the 1991 and 1993 Certification Teams, it is apparent that he did not view them as irrelevant and immaterial, and it was incumbent for him to have included these official agency documents with the

Report to the Court. (App. 180-182). Moreover, the fact that the Commissioner failed to include the 1991 and 1993 Certification Reports in the Report to the Court was not the sole basis for the findings of fraud onthe Court. The Trial Court also found that the Report to the Court contained false statements, (F. 124), as the Commissioner's own lawyer testified. (Tr. II, 13-15; Tr. I, 175-176).

10. The Commissioner acted in bad faith by appointing Dr. Gunner Dybwad to JRC's Human Rights Committee and further violated the Settlement Agreement by refusing to arbitrate the issue

The Commissioner asserts the Trial Court erred in finding (F. 128) that the appointment of Dr. Gunnar Dybwad was "calculated . . . to disrupt the operations of [BRI]." (Brief, p.111). The Commissioner also attacks as clearly erroneous the fact that DMR declined to mediate the issue of Dr. Dybwad's appointment to the Human Rights Committee.

First, the Trial Court reasonably concluded that Dr. Dybwad was appointed to disrupt JRC. The Commissioner testified at trial that Dr. Dybwad did not support the use of aversive procedures, and stated in his deposition that he was unable to identify any aversive procedures that Dr. Dybwad supported. (Tr. III, 130, 131). Dr. Israel also testified that Dr. Dybwad was a well-known opponent of aversive therapy. (Tr. VIIA, 65). In addition, the Trial Court received into evidence a letter which JRC's counsel had sent to the Commissioner documenting Dr. Dybwad's longstanding hostility toward JRC. (JRC-275).

Second, the Trial Court correctly determined that DMR declined to arbitrate the subject of Dr. Dybwad's appointment to the Human Rights Committee. On October 8, 1993, JRC requested arbitration under Paragraph B-2, (JRC-275), but was rejected by General Counsel Murdock who noted that, "The Department has consistently maintained that it does not agree that the Settlement Agreement requires it to submit to mediation or arbitration by your office whenever requested by BRI." (U-110).

11. The Trial Court correctly found that the Commissioner's September 24, 1993 Letter was a further act of bad faith and a violation of the Settlement Agreement

On September 24, 1993, the Commissioner sent a further certification letter to Dr. Israel on behalf of JRC, again copying JRC's Funding and Placement Agencies. (U-106; U-107). In this communication, the Commissioner announced that there were "14 abuse investigations which are in process arising from complaints by former BRI staff, present BRI clients, and/or their attorneys, and information presented by BRI to DPPC." The letter also accused Dr. Israel personally for such abuse. (U-106,1). The Trial Court found that it was the normal practice of DMR not to reveal allegations of abuse to third parties without first having had them substantiated, and therefore, concluded that this communication "constituted a startling departure from DMR's acknowledged practice with respect to abuse investigation." (F. 132). DMR argues that this factual finding is "clearly erroneous," citing the Commissioner's testimony that it was DMR's practice to release such information in response to a "Freedom of Information Act (FOIA) request." (Brief, pp.112-113). However, the Commissioner admitted at trial that his normal practice was not to communicate allegations of abuse to third parties until substantiated. (Tr. III, 188-189). Thus, he agreed that it would be unfair to publish such allegations. (Tr. III, 188-189). The Trial Court's findings are supported by the testimony of the Commissioner himself,[35] and it is inexplicable why the Commissioner has not directed this Court to the relevant testimony.

On page 4 of the September 24 Letter, the Commissioner required JRC, as a condition of certification, to 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 original). (U-106). The Trial Court was fully justified in concluding that this was misleading and likely to produce the damaging impression that deaths had been occurring at JRC and that JRC had not

[35] The Commissioner does not attack the finding of the Trial Court, again based on the Commissioner's own testimony, that he never sent out a letter advising JRC's Funding and Placement Agencies of Dr. Israel's vindication when the allegations were found to be unsubstantiated. (Tr. III, 192-193).

been reporting them, particularly when this letter was read together with the other frivolous allegations made against JRC.[36]

12. The Commissioner engaged in bad faith and violated the Settlement Agreement by concocting a biased review of JRC's Program

a. The Decision to Acquire a Program Review

The Commissioner attacks the Trial Court's findings (F. 136-137) concerning the basis for the independent program review. (Brief, p.116). He again fails to direct this Court to the relevant testimony. The Trial Court found that Dr. Cerreto's testimony was not truthful when she stated that the reason for recommending the independent program review in 1993 was because prior evaluations, including the 1991 and 1993 Certification Reports, were insufficient. (Tr. X, 44). At trial, Dr. Cerreto testified that she knew what Deputy Counsel Casey and Dr. Riley had done in the 1991 evaluation, and had the insufficiency of the certification team evaluation in mind when she made her recommendation to the Commissioner for an independent review in 1993. (Tr. X, 136,137). However, she stated in her deposition that she was not even aware at that time that there was a Certification Team comprised of Deputy Counsel Casey and Dr. Riley who were designated to do a certification review of JRC, and was not even aware of the existence of the 1991 Certification Report until the day of the deposition on April 21, 1995. (Tr. X, 137-139). In addition, Dr. Cerreto testified on cross-examination that she never read the 1993 Certification Team Report until two days before the deposition. (Tr. X, 142). When confronted with her testimony, Dr. Cerreto then responded by saying she could not recall whether she testified that her recommendation to review JRC was based on the 1991 and 1993 Certification Reports. (Tr. X, 147). The Trial Court was fully justified in reaching the conclusion which it did concerning the false nature of Dr. Cerreto's testimony.

[36] The Commissioner also admitted at trial that if he had received a letter, such as the September 24 Letter, making allegations of abuse against the head of a program, he would be concerned about placing clients in that program. (Tr. III, 187-188).

b. Request for Proposals (RFP)

In its findings, the Trial Court noted that Dr. Cerreto, who was in charge of selecting a new "independent evaluation" team, conceded that she knew of no other instance in which an RFP with a ten-day turnaround time had been sent out by DMR, and that she could not provide an explanation for the necessity of such a short turnaround. (Tr. X, 150,159-160). After the RFP was sent out, Dr. Cerreto received letters from interested bidders complaining that there was insufficient time to respond. (Tr. X, 158-159). Despite her claimed desire for a fair process, she did nothing to expand the deadline. (Tr. X, 158-159). Dr. Cerreto also testified that it was the "policy" in the Commonwealth to encourage the widest response to an RFP, yet she sent the RFP only to a select group of potential bidders. (Tr. X, 151). For this reason, the Trial Court properly concluded that Dr. Cerreto's RFP process was inconsistent with Commonwealth policy.

c. Rivendell's Proposal

The Commissioner attacks the Trial Court's findings on the Rivendell proposal as being "abound with mischaracterizations." (Brief, p.116). The Commissioner first attacks the Trial Court's finding (F. 145) that Dr. Cerreto inaccurately testified that she never requested that Rivendell alter or modify its response to the RFP. The testimony on this point was uncontroverted. Dr. Cerreto initially testified that she never requested that Rivendell alter or modify its response to the RFP. (Tr. X, 164-165). In response to a request from JRC dated October 8, 1993, Deputy Counsel Chow-Menzer provided JRC with a document that she falsely represented to be Rivendell's "response" to the RFP. (U-308; Tr. X, 163-164).[37] Significantly, however, the revised Rivendell response provided to JRC included a fax from Dr. Angela Amado of Rivendell to Dr. Cerreto stating, contrary to Dr. Cerreto's sworn testimony, that the

[37] The representation was utterly false and, as the Trial Court found, the actual response by Rivendell to the RFP (JRC-310) was never disclosed to JRC until the discovery process commenced.

Rivendell response had in fact been revised at Dr. Cerreto's request. (JRC-307). The fact that Dr. Cerreto offered a frivolous explanation for the discrepancy in her testimony does not, contrary to the Commissioner's contention, mean that the Trial Court was in any way compelled to believe Dr. Cerreto.

The Commissioner then attacks as clearly erroneous the Trial Court's "imput[ing] a bad faith motive for DMR's simply providing BRI with the then current version of the Rivendell proposal in response to BRI's request for a copy of the RFP and Rivendell's proposal." (Brief, p.117). Again, the Commissioner mischaracterizes the relevant exhibits. JRC did not request a copy of "Rivendell's then current proposal." Deputy Counsel Chow-Menzer's letter of October 20 falsely stated that the document which was provided was the "responsive proposal submitted by Rivendell."[38] (U-307). There is no doubt that the actual response (U-310) of Rivendell was not produced until discovery commenced as found by the Trial Court.

d. Selection of Rivendell

In attacking Finding 151, the Commissioner criticizes the Trial Court on the ground that "trial court found (using the exact language proposed in BRI's proposed finding 238, App. 839) that the presence of one individual, Dr. Richard Amado, on the six-person team rendered Rivendell 'incapable of doing a fair, impartial and unbiased review' of BRI." (Brief, p.117). First, even a casual review of the record shows differences between proposed finding 238 of JRC and the Trial Court's Finding 151. Second, the Trial Court's finding was not clearly erroneous. The Commissioner neglects to point out in his Brief that the allegation of bias pertained not simply to one member of the team, but the co-leader of the team. (JRC-310, 4). Moreover, the "Call To Action" referred to in Finding 150 not only equated aversives to political torture, but was also a

[38] Nor was this an insignificant matter. The actual response contained several provisions which, when Dr. Cerreto asked Angela Amado to revise the document, were dropped out. Among those provisions were the cost of the evaluation, the fact that Hank Bersani, who militantly opposed the use of aversives, was one of the first proposed evaluators, and, most significantly, on the first full page of that document, a statement that says "the assembly of a sufficiently qualified team on such notice is close to impossible." (Tr. X, 186-187,198).

document which was plainly directed at JRC. The attachments to the Call To Action made serious claims of mistreatment by JRC, including accusations that the Executive Director "killed two, choked one with a heart attack [sic], then one with a strangle-hold. Everything is so hush, hush." (U-70).[39]

Dr. Cerreto testified that she knew when she received the Call To Action that the document equated the use of aversives with political torture. (Tr. X, 170). Dr. Cerreto also knew in July of 1993 that Dr. Richard Amado, the co-leader of Rivendell, was listed as the first individual signatory on that document. (Tr. X, 170). Incredibly, the following day, during her testimony, Dr. Cerreto totally contradicted her earlier testimony and denied being aware in July of 1993 that Dr. Amado was a signatory to the Call to Action. (Tr. XI, 41). The Trial Court was not required to credit Dr. Cerreto's testimony concerning Dr. Amado's lack of bias.

e. Dr. Cerreto's Role

The Commissioner argues (Brief, p.118) that the Trial Court erred in its findings concerning the inconsistency in Dr. Cerreto's testimony. Significantly, however, the Commissioner only challenges one of the many inconsistencies in Dr. Cerreto's testimony, but not the others which are well-documented and articulated in the Trial Court's Findings. The Trial Court did not err in finding that Dr. Cerreto testified that she was the only person from DMR who conducted the review of the Rivendell bias issue. (F. 162). In her direct examination by Assistant Attorney General Lucy Wall on July 11, 1995, Dr. Cerreto testified that she was the one at DMR assigned to "review the issue of bias and advise the Commissioner about whether I thought Rivendell could provide an unbiased review." (Tr. X, 53-54). That testimony was contradicted the next day on cross-examination when she was confronted with her deposition in which she testified that she had nothing to do with the "Rivendell bias issue" since that issue was handled by the Commissioner's special assistant, Jean Tuller. (Tr. XI, 19-

[39] The "independence" of Rivendell is perhaps best summarized by the letter of December 10 of General Counsel Kim Murdock. On that date, she wrote a letter to counsel for JRC indicating that she was "appalled" at the materials contained in the JRC motion that had been filed the day before concerning Rivendell and was requesting a response from Rivendell. (U-127).

22). When confronted with the inconsistency, Dr. Cerreto stated that she could not recall her testimony from the previous day without seeing the transcript. (Tr. XI, 22-24). The Trial Court's findings were justified.

13. The Commissioner and his attorneys improperly attempted to conceal the subjects discussed at the Weekly Meetings

a. The Commissioner's Testimony

The Commissioner argues (Brief, p.121) that he never testified at his deposition or at trial that the "Tuesday Morning Meetings [Weekly Meetings] related exclusively to the issue of certification." The Commissioner then cites Finding 170 and 176. In Finding 170, the Trial Court stated that the Commissioner testified at his deposition and at trial that these meetings dealt "strictly" with the issue of certification. In Finding 176, the Court used the word "exclusively" instead of "strictly."

The statements of the Commissioner which appear at page 121 of his Brief are categorically false. The following colloquy is illustrative of just one of the examples of the Commissioner's testimony on this subject:

Q: Commissioner, starting in the summer or fall of 1993, you started having weekly meetings concerning BRI's application for certification; is that correct?
A: Yes.
Q: Those meetings dealt strictly with the issue of BRI's application for certification?
A: Yes.
Q: They were not assembled for any other purpose?
A: That's correct.

(Tr. III, 72-73). Further, there was ample basis for the Trial Court's finding on this issue of the substance of the Weekly Meetings based on his deposition testimony, submitted at trial, where the Commissioner confirmed that the sole purpose for forming the Weekly Meetings was to gather information about the certification application. (Tr. IV, 120-121).

In addition, to the extent that the Commissioner is attempting to argue in his Brief that the Trial Court incorrectly used the word "exclusively" instead of "strictly," this distinction was insignificant for the Commissioner. When the

Commissioner was presented with the Weekly Meeting workplan documents which showed the patent falsehood of his testimony, he was asked and he answered the following question:

> Q: And you would agree with me that you testified two times, I think in fact, three times yesterday, before I presented these documents to you that the exclusive subject of these meetings was certification only? That was your testimony before I presented these documents to you; correct?
>
> A: Yes.

(Tr. IV, 120) (emphasis supplied). The Commissioner's argument that he never used these words is factually inaccurate and a gross misrepresentation of the proceedings below. The fact that on examination by his counsel the Commissioner attempted to proffer an explanation for his misstatements after the "cat was out of the bag" and the Trial Court declined to believe the patently false explanation is irrelevant. The Trial Court was fully justified in its characterization of the Commissioner's false testimony concerning the alleged purpose of the Weekly Meetings.

b. Dr. Cerreto's Testimony

The Commissioner again mischaracterizes the record when he argues (Brief, p.123) that the Trial Court erred in its finding on Dr. Cerreto's deposition testimony regarding the purpose of the Weekly Meetings. The Commissioner acknowledges in his Brief at page 123 that Dr. Cerreto responded "Yes" to the question at her deposition whether the Weekly Meeting's charge was "strictly" to determine whether JRC's use of Level III interventions complied with DMR regulations. (Tr. X, 113). The Commissioner then notes that Dr. Cerreto attempted to correct at trial the "misinterpretation of her deposition testimony" offered by JRC's counsel by citing two examples of topics discussed at the meetings which did not relate to JRC's certification, and argues that it was incorrect for the Trial Court to conclude that she lied on this subject in her deposition since Dr. Cerreto "readily acknowledg[ed]" the discussion of issues unrelated to JRC's certification.

The Trial Court made no finding that Dr. Cerreto lied on this subject. The Trial Court merely stated that the Commissioner's testimony was "echoed" by Dr. Cerreto, who testified in her deposition that the purpose of the Weekly Meetings was limited strictly to the issue of certification. (F. 170, n.34). The Commissioner's statement that the Trial Court found that Dr. Cerreto had lied is a distortion of the actual findings so that they can be attacked as "clearly erroneous". Even if the Trial Court had made this conclusion, Dr. Cerreto's direct testimony that the Weekly Meetings were limited to certification issues was hardly an indication of her candor, since she testified after the Commissioner was forced to admit that the Weekly Meetings were used to plot strategy on how to close JRC.

c. The Attorney-Client Privilege

The Commissioner characterizes as "unfounded" the Trial Court's findings that the Commissioner attempted to conceal the subject of the Weekly Meetings from the Trial Court. (Brief, p.124). The Commissioner goes on to state that the Trial Court's findings on this subject "form the basis" for conclusions of perjury, governmental malfeasance and misconduct. Contrary to the Commissioner's argument, it is plain that the misconduct in this case was not based exclusively on the efforts to conceal the subject of the Weekly Meetings from the Trial Court and counsel. The Trial Court's Corollary Findings speak for themself, and they involve many more examples of misconduct than the attempts to hide the subject of the Weekly Meetings from the Trial Court.

The Commissioner first asserts that the Trial Court found that the notes, workplans and agendas from the Weekly Meetings were produced by DMR in discovery. The Trial Court did not make this finding. Rather, the Trial Court found that the existence of these meetings did not become known until the eve of trial, as part of the discovery process. (F. 169).

The Commissioner acknowledges on page 124 of his Brief that the documents were originally produced in a redacted form. When the exhibits relating to the Weekly Meetings were first presented to the Trial Court, the Commissioner was ordered, upon JRC's request, to produce unredacted versions. (Tr. III, 230-231). Assistant Attorney General Yogman represented that the

unredacted documents would be produced the following day. (Tr. III, 230-231). They were not produced on that day. On July 7, 1995, DMR produced a number of additional documents which had fewer redactions than the first documents produced, but still contained numerous redactions. (JRC-321). The Trial Court then ordered DMR to produce the fully-unredacted documents, which DMR did on July 11, 1995. (Tr. X, 79; JRC-293 thru JRC-304). Even on this date, however, DMR did not fully comply with the Trial Court's order, and four unredacted documents were subsequently produced on July 12, 1995. (JRC-322).

The Commissioner argues (Brief, p.124) that the difficulty concerning the production of unredacted documents was the basis for the Trial Court's Finding 177 that the Commissioner attempted to conceal the subject of the Weekly Meetings from the Trial Court. It is clear from reading Finding 177 that the Trial Court's findings do not relate exclusively to the controversy surrounding the "redaction" of documents.[40] Rather, the more salient finding concerning the redaction issue is the Trial Court's Corollary Finding 16 that counsel acted with "intransigence and defiance" with respect to the Trial Court's order to produce these documents, and the Trial Court's concern that 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. The fact that there continued to be redactions in the documents produced on July 7, 1995, and even redactions in the set of documents produced on July 11, 1995, demonstrates the obvious frustration which the Trial Court felt concerning the non-compliance with its orders. (Tr. X, 79).

The Commissioner surprisingly blames JRC for DMR's improper redactions by not immediately objecting to DMR's redactions as not legitimate under the attorney-client privilege. However, JRC was justified in expecting counsel for the Commissioner to make a good faith effort to comply with the rules of discovery and not omit the material which was not actually protected by any privilege. As the documents were revealed to the Trial Court, however, it

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[40] Indeed, the Trial Court's Finding 177 relates to the Trial Court's view that Commissioner Campbell was attempting to conceal activities from the Trial Court. It also refers to the Commissioner's false testimony.

became clear that counsel for the Commissioner had misrepresented the existence of the attorney-client privilege in an attempt to withhold damaging information.

A party has a duty not to respond to discovery in a way which creates a fraud on the trial court and "sentiently sets in motion an unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." See Rockdale Management Co., Inc. v. Shawmut Bank, N.A., 418 Mass. at 600, quoting from Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989). Once JRC made a proper request for production of documents, the Commissioner through counsel could not intentionally "avoid its obligations by filing misleading or evasive responses." Anderson v. Cryovac, Inc., 862 F.2d 910, 929 (1st Cir. 1988). The purpose of discovery is to "make trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Procter & Gamble, 356 U.S. 677, 682 (1958). The Commissioner's counsel withheld damaging information from JRC and the Trial Court under the guise of privilege. The fact that the Commissioner on appeal presses only two entries as being privileged, although the original documents contained scores of redacted entries (see U-190 through U-225) for which the Commissioner alleged attorney-client privilege, shows that counsel for the Commissioner did not have a good faith basis for claiming the privilege in the first place.

The Commissioner as the party claiming the protection of the attorney-client privilege had the burden "to establish those facts that are the essential elements of the privileged relationship." Martin v. Valley National Bank of Arizona, 140 FRD 291, 302 (S.D. N.Y. 1991), quoting from Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2nd Cir.), cert denied, 481 U.S. 1015 (1987). As the proponent of the privilege, the Commissioner was required to establish not merely the privileged relationship, but all essential elements of the privilege. Martin v. Valley National Bank of Arizona, 140 F.R.D. at 302. The Commissioner only claims that two specific entries (see JRC-293,1,5) regarding Dr. Daignault and the JRC receivership were protected by the attorney-client

privilege, and never argued below that these documents were protected by any other privilege. (Brief, p.126).

The Trial Court did not err in ruling that the attorney-client privilege did not apply to these two entries. First, any communication between the non-legal staff of DMR and the Commissioner regarding regulatory decisions was not a communication between the attorney and the client subject to a privilege. See Barnes v. Harris, 61 Mass. (7 Cush) 576 (1851) (no privilege if client discloses to non-attorney). Second, to the extent that there were conversations between the Commissioner and his attorneys documented in the workplans, the Trial Court was warranted in finding such discussions were in furtherance of future public corruption and the interference with the orderly administration of justice. The Trial Court specifically found that the Commissioner's investigation into the role of Dr. Daignault was baseless and a bad faith attack on a Court official. Likewise, the plans regarding the receivership of JRC was part of the overall plan to regulate JRC out of business, which was also in bad faith and part of the pervasive public corruption found in this case. The attorney-client privilege only attaches to communications necessary to the proper conduct of legitimate legal business, and does not protect communications regarding future fraudulent or unlawful conduct. See Panell v. Rosa, 328 Mass. 594, 596 (1917). Third, the conversations between the Commissioner and his attorneys documented in the workplan of September 7, 1993 occurred during a Weekly Meeting when all of the DMR staff, including the DMR Press Secretary, were present to discuss JRC. This was a meeting to discuss DMR policy regarding JRC; it was not a closed session whereby the Commissioner and his attorneys shared legal advice. The words "Policy Development" appears in bold print on top of the document. (JRC-293). The entries involve tasks ordered by the Commissioner to attorneys and non-legal staff alike. The Commissioner's assertion that the attorney-client privilege attached to these meetings merely because his attorneys were present is a back-door attempt to assert an executive privilege, which is neither recognized in Massachusetts, see Babets v. Secretary of Human Services, 403 Mass. 230, 232-39 (1988), nor raised by the Commissioner. There was no error by the Trial Court in deciding that these entries, like the scores of others

originally redacted by the Commissioner's counsel, were not protected by the attorney-client privilege.

In any event, the decision that these entries did not constitute attorney-client privileged material and were discoverable in unredacted form, was a discovery matter within the discretion of the Trial Court. Based upon the entire record of bad faith, fraud on the Trial Court, and public corruption, even if there were error, the discovery of these two entries did not impact on the Commissioner's substantial rights requiring reversal. See G. L. c. 231, § 119; see also Symmons v. O'Keefe, 419 Mass. 288, 303 n.13 (1995); Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 355 (1995).

14. The Commissioner's December 15, 1993 Certification Letter contained false and defamatory statements about JRC and constituted another act of contempt and bad faith by the Commissioner

The Commissioner attacks findings that the Trial Court made concerning the Commissioner's letter of December 15, 1993, as being speculative and not supported by the contrary evidence. (Brief, p.130).

On the first page of the December 15 Letter, the Commissioner stated that JRC's "failure to report a death in 1991 made it impossible for me to fulfill my responsibilities under this regulation." (U-128,1). (Emphasis supplied). The following paragraph stated as follows: "JRC has in the past failed to report deaths and serious injuries as required by law. Instead, you have admitted that even when a young woman died, JRC's response was to leave a telephone message with the secretary in the local office and to speak briefly with a non-management local employee. . . No report was made to the Commissioner's office. No written report was ever submitted." (U-128, 1). The Trial Court made a number of findings concerning this letter. First, the Trial Court concluded that the Commissioner inaccurately stated that JRC had failed to report "deaths" in the plural. The Trial Court was warranted in not believing the Commissioner's explanation that this was a typographical error but rather intentional based upon

the Trial Court's observance of the demeanor of the Commissioner and his other inconsistent testimony.[41]

Second, the Trial Court also correctly found that, contrary to the Commissioner's statement at trial on June 29, 1995, there was more than sufficient information to permit DMR to have investigated the death. (F. 58). During his testimony on June 29, 1995, the Commissioner emphatically contended that JRC's failure to report the death made it impossible for his office to investigate the matter.[42] The Commissioner's testimony was not, as he now argues, based on inadmissible speculation. The Commissioner had undertaken an inquiry into this matter and had seen fit to make an allegation in the December 15 Letter concerning JRC's alleged failure to report the death. It was entirely proper for the Trial Court to allow questions to the Commissioner on this subject.[43] At the end of his trial testimony, the Commissioner admitted that he was aware on December 15, 1993 that DMR had sufficient information to

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[41] Indeed, the Commissioner's various certification letters are remarkably free from typographical errors.

[42] For example, he testified that this office did not receive information about the death that was "discernable." (Tr. IV, 191). He testified that "misinformation" had prevented DMR's General Counsel's office from investigating the death and from determining "who it was." (Tr. IV, 97). He testified that before the December 15 Letter was sent out to funding agencies, he had undertaken an inquiry to find out the actual facts. (Tr. IV, 98). He also testified that the information which was obtained concerning this death "only identified the approximate time of the month and the person," but did "not identify anything beyond that." (Tr. IV, 101). He reiterated on June 29, 1995 that it was "impossible" for his agency to have investigated the death. (Tr. IV, 130).

[43] As the Trial Court notes (F. 214), a document was faxed to the court house on June 30, 1995 from DMR which was the "actual client death report form" for L. C.. (JRC-266). When the trial resumed on July 5, 1995, DMR counsel, now knowing that there was a document which completely contradicted the Commissioner's testimony, engaged in "damage control" with the Commissioner by having him admit, contrary to his testimony on June 29, 1995 that the document did contain sufficient information to conduct an investigation. (Tr. VI, 36). The Commissioner then attempted to testify that the death was not investigated because there was an on-going law enforcement investigation of the same incident. (Tr. VI, 37). Attorney Yogman was obviously aware of this document, since she stated on July 5, 1995 that the document was produced in discovery and contained an identification number of DMR, (Tr. VI, 31), but did not interject while the Commissioner gave his original false testimony of this subject.

conduct an investigation in 1991. (Tr. VI, 115,118-119,122). The finding was correct.

15. There was uncontroverted evidence at trial that the Commissioner's stream of false and defamatory statements about JRC in his certification and other letters caused a dramatic reduction in JRC's student census and revenues

The Commissioner argues that the Trial Court made clearly erroneous findings concerning efforts by DMR officials to interfere with JRC's relationship with its Funding and Placement Agencies in a 1994 meeting. (Brief, pp.132-133). There was no error. The circumstances surrounding this meeting were as follows. On January 28, 1994, the Trial Court issued a preliminary injunction requiring the Commissioner to send out notices to JRC's Funding and Placement Agencies that the DMR certification process should not adversely affect decisions about the placement of students at JRC. (App. 215). However, after the order was issued, JRC learned that DMR had arranged a meeting with a New York Agency that funds students at JRC to be held in Worcester, Massachusetts. (Tr. VIIA, 88). The New York Agency provides seventy percent of JRC's students. (Tr. VIIA, 89). JRC requested that GAL Briggs be allowed to attend the Worcester meeting as a neutral party. (Tr. VIIA, 89).

The Commissioner's counsel initially agreed that there would be no problem with GAL Briggs attending the meeting with the New York Agency. (Tr. VIIA, 89). DMR subsequently changed its position and informed JRC that it had "no position" on GAL Briggs attending the meeting. (Tr. VIIA, 90; U-138). After an exchange of correspondence between counsel, the meeting was suddenly cancelled. (Tr. VIIA, 90). Essentially, after the Commissioner had reflected on his counsel's agreement to allow a neutral party to attend, he abruptly cancelled the meeting. DMR then held a separate telephone conference with the New York Agency officials without notifying JRC, the parents, or GAL Briggs. (App. 472; Tr. IV, 70; DMR-80,¶12). This private telephone conference defeated the entire purpose of the original agreement to allow a

neutral party to attend the meeting with the New York Agency.[44] After the meeting, communications were sent out to a significant number of OMRDD clients of JRC advising them that the children would be leaving JRC. (DMR-80). There was a more than adequate basis for the Trial Court's finding (F. 221) that the meeting with New York Agency was a continuation of the Commissioner's campaign of interfering with JRC's relationship with its Funding and Placement Agencies.

16. The Commissioner had no good faith basis for imposing the conditions contained in his Certification Letter of February 9, 1994

The Commissioner asserts that the Trial Court made clearly erroneous findings with respect to the Commissioner's February 9 Letter. (Brief, p.134). In particular, the Trial Court found that there was no basis for the requirement that JRC conduct independent psychiatric reviews for all of its clients. The Trial Court also found that the Commissioner did not even read the reports of the psychiatrists. (F. 229). The Trial Court also concluded that the Commissioner could not identify any credible reason for the imposition of a further condition regarding the need for medical evaluations of all JRC students.

With respect to the psychiatric evaluation, the Commissioner testified that no psychiatrist gave him any information which suggested a need for these evaluations or information that the client's behavioral problems could be treated psychiatrically. (Tr. IV, 152-153). In addition, to the extent that any of these clients had unmet psychiatric needs, the Commissioner failed to consider filing motions for psychiatric evaluations in the ongoing substituted judgment proceedings. (Tr. IV, 153). Furthermore, he required evaluations for all sixty JRC students, even though he admitted on the witness stand that he had no evidence that there were unmet psychiatric needs. (Tr. IV, 153-154). Finally,

[44] The Trial Court had before it, as an exhibit, an internal memorandum of DMR concerning the proposed meeting with New York Agency. The memorandum described the purpose of the meeting to discuss the "status of the litigation" between DMR and JRC. (U-132). There was no indication why a New York funding agency would be so interested in this litigation that it was necessary to travel to Massachusetts for a face to face meeting with DMR officials.

the imposition of this requirement contained no provision as to how JRC was supposed to pay for these evaluations.[45]

With respect to the medical evaluations, the Trial Court's findings were fully supported by the record. This condition had to be completed within eighty days and involved all JRC students in the JRC program. (Tr. IV, 155). This condition was imposed even though JRC possessed a comprehensive system for medical monitoring, which included a number of full-time nurses, as well as a number of consulting physicians from some of the leading teaching hospitals in the world. (Tr. VIIA, 93-99). The Commissioner could not identify any physicians who had advised DMR that there were unmet medical needs for JRC students, (Tr. IV, 157), and he concurred that when the medical evaluations were undertaken, all JRC students were found to be in good health. (Tr. VI, 95-96).

The Commissioner falsely states in his Brief at page 136, footnote 119 that JRC's own medical examinations of the JRC students were "cursory and superficial", citing DMR-31, and that the medical examinations conducted by the physicians hired by DMR in 1994 found that the JRC students had unmet medical needs. There is nothing in DMR-31 that remotely supports those assertions. In fact, the medical evaluations stated the opposite. (JRC-284).[46] The

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[45] It was only after the negotiations in May of 1994 that the Commissioner agreed that the Department would pay for these evaluations. The letter of February 9th made no provision as to how JRC would pay for these evaluations.

[46] The Commissioner names 22 students in footnote 199 of his Brief to support his fallacious argument that the physicians hired by DMR in 1994 found unmet medical needs. For purposes of brevity, JRC will address the first six names cited by the Commissioner in footnote 199 of his brief. The medical report on Paul M. actually stated the following: "This is a slightly obese, but otherwise healthy looking young man with marked gynecomastia. He is obviously followed closely by various specialists which reflects the good medical care that he is receiving in his present setting." (JRC-284, 30). For student Terry P., the medical evaluation actually stated: "Terry P.'s medical needs seem to be well addressed." (JRC-284, 59). For JRC student Peter B., DMR's medical evaluation actually stated: "Patient with mental retardation in good health and adequate nutrition status with seizure disorders controlled by medication. Continue present medical and nutritional management." (JRC-284, 62). For JRC student Janine C., DMR's medical evaluation actually stated: "On examination Janine is a well-developed, well-nourished white female who is 5'2" tall . . . physical examination revealed no problems." (JRC-284, 63,65). For JRC student Michael S., DMR's medical evaluations actually stated: "Patient in good physical health, well-nourished, not overweight." (con'd)

Commissioner also incorrectly states (Brief, p.135, n.198) that the psychiatric examinations conducted by DMR psychiatrists in 1994 recommended discontinuation or reduction in the use of aversives.[47] Taken by themselves, the requirements of psychiatric and medical examinations might not be unreasonable depending on the circumstances. However, the Trial Court was fully justified, by taking this evidence together with other evidence which it had before it, in determining that these costly procedures were not the result of a good faith regulatory action, but a baseless continuation of the regulatory war of attrition which the Commissioner was waging against JRC.

17. The Commissioner Violated The July 5, 1994 Agreement

(con'd) (JRC-284, 98). For JRC student Antonio S., DMR's medical evaluation actually stated: "This is a well-built young man who appears in excellent physical health, however, he is quite overweight. He does not exhibit any psychiatric or behavioral problems." (JRC-284, 106). Although only six of the evaluations are cited herein, the other DMR medical evaluations similarly found the students in good health and receiving good medical care with statements and reports such as: "The patient receives excellent health maintenance services." (JRC-284, 71). The DMR medical evaluations, as a whole, establish unequivocally, that the JRC medical services for its students are excellent.

[47] Again, for the purposes of brevity, the first six examples cited by the Commissioner in his brief will be addressed. DMR psychiatric evaluation for William M. actually stated: "At the present time it appears that Mr. M. is doing extremely well at BRI and has made good progress in this well-structured setting." (JRC-285, 10). DMR's psychiatric evaluation on Mary Claire J. actually stated: "Overall Mary Claire appears to have made very significant progress during her time at BRI. All self-injurious behaviors have almost vanished and other behaviors appear to be decreasing as Mary Claire feels more in control of some aspects of her behavior, contract and her life. The current program of not having her GED on her at all times also appears to be moving along satisfactorily." (JRC-285, 19). For JRC student Edward F., DMR's psychiatric evaluation actually stated: "It appears that Mr. F. has done very well during the course of his stay at BRI. There is no doubt that his behaviors have significantly improved over the course of this period." (JRC-285, 23). The DMR psychiatric evaluation of John C. actually stated: "Mr. C. is a thirty year old male with autism and mental retardation who appears to have done relatively well during his stay at JRC. It appears that most disruptive behaviors have been adequately addressed with behavior program in place. Consideration should be given to weaning the GED in order to provide care in the least restrictive environment." (JRC-285, 28). For JRC student Antonio S., the DMR psychiatric evaluation report actually stated: "Overall, it appears that Tony has done quite well in the well-structured environment of BRI." (JRC-285, 36). Finally, the DMR psychiatric evaluation for Korren C. stated: "Overall, Korren appears to be doing quite well in his current placement." (JRC-285, 54). The other DMR psychiatric evaluations conducted in 1994 contain similar laudatory statements regarding the JRC program.

The Commissioner argues (Brief, p.137) that the July 5 Letter did not include agreements, but was something that merely imposed conditions upon JRC. This argument is false. The Trial Court concluded that "agreements were reached and were embodied in the letter of July 5, 1994." The Commissioner states in the first paragraph of his July 5, 1994 letter that: "This extension is granted to permit BRI to comply with detailed plans set forth in the attached agreements reached between BRI and the Department in the course of the last seven weeks." (Emphasis supplied). (U-152,1). In the second paragraph of the letter, the Commissioner stated that the "agreements are the result of good faith discussions between BRI and the Department and set forth a clear course of action." (U-152,1). (Emphasis supplied). Contrary to the Commissioner's assertion, the individual agreements concerning the eight remaining conditions imposed obligations upon DMR which were subsequently violated. The Commissioner offers no explanation as to why he utilized the term "agreement" in the July 5 Letter, if there were no obligations imposed upon his agency. The Trial Court was fully justified in concluding that there was an agreement which was breached by DMR.

With respect to the violation of Condition 1, the Trial Court made findings concerning the treatment plan for student W.M. In order to avoid confusion over Condition 1, Dr. Worsham met with Dr. Cerreto to develop a prototype treatment plan. After extensive discussions, an agreement was reached concerning a prototype treatment plan and Dr. Cerreto signed off by initialling each page of the treatment plan. (Tr. VIII, 136-146). The prototype treatment plan became the model by which every other treatment plan was written. (Tr. VIII, 147). Between June and November of 1994, Dr. Worsham of JRC spent virtually all of his time rewriting treatment plans. (Tr. VIII, 150). Dr. Worsham mailed the rewritten treatment plans to Dr. Cerreto as required. (JRC-290). Dr. Cerreto never responded that any of the treatment plans that JRC provided failed to conform to the prototype plan, or to the DMR regulations. (Tr. VIII, 149-150). The Trial Court made no clearly erroneous finding with respect to the treatment plan issue, and the Commissioner identifies no particular finding as clearly erroneous.

The Trial Court also made findings concerning the Commissioner's violation of subparagraph 6 of Condition 1. (F. 242-244). That agreement required that for a "period of one year beginning July 1, 1994, the Department would review the implementation of the behavior modification plan for six individuals served at BRI for the purpose of monitoring BRI's compliance with the Department's behavior modification regulations." (U-152). In the fall of 1994, DMR selected six students and assigned psychologists to conduct a review of their plans. Ultimately, those psychologists produced six reports upon which the Commissioner relied in his January 20 Letter, finding that JRC had not met the conditions of certification. (U-166).

On November 17, 1994, the Commissioner asked Drs. Thomas Linscheid and Brian Iwata to conduct a "systems" review of the JRC program and a review of two additional individuals in the program, despite the fact that the six implementation reviews as agreed were already underway. (U-158; Tr. IV, 218). On November 23, 1994, the Commissioner mailed a letter to Dr. Israel informing him that these two new psychologists were coming to JRC in order to review "the implementation of behavior modification plans and the JRC program, pursuant to our agreement under Condition 1 of the July 5, 1994 Certification Letter and [various DMR regulations]." (U-150). It is significant that the Commissioner again referred to the July 5 Letter as an "agreement." The Commissioner conceded in his testimony that the six individual assessments required by Condition 1 had been completed by the time Drs. Linscheid and Iwata were assigned to undertake the two additional reviews. (Tr. IV, 221). The Commissioner could offer no credible reason for his breach of the July 5 agreement. The fact that the Commissioner ultimately decided to back down on this issue does not make the Trial Court's finding that the additional review was in violation of the July 5 agreement was clearly erroneous. The Trial Court's conclusion that the additional review was a violation of the July 5 agreement was warranted and essentially admitted to by the Commissioner during his testimony.

The Commissioner also argues that the Trial Court made a clearly erroneous finding that DMR refused to mediate this dispute. (Brief, p.139, n.203). In a letter of November 28, 1994, JRC requested arbitration under

Paragraph B-2 regarding the breach of the July 5 agreement. (JRC-282). In response, JRC received a communication from Deputy Counsel Margaret Chow-Menzer declining to mediate. (U-60).[48] The Trial Court's finding was supported by the record.

18. The Commissioner's January 20, 1995 Certification Letter and his March 23, 1995 Decertification of JRC were further acts of bad faith and violations of the Settlement Agreement

In his Brief at page 140, the Commissioner first attacks the Trial Court's finding (F. 249) that the January 20 Letter required JRC to discontinue Level III certification for six individuals. The Commissioner argues that this finding is not correct since the certification letter gave BRI a meaningful choice either to conform to DMR's regulations on Level III aversives or to exclude Level III aversives from these individuals' treatment plans. The Trial Court's factual finding was not clearly erroneous. The January 20 Letter itself made plain that JRC was not permitted to utilize Level III procedures for six clients indefinitely, and that if there was no certification application pending for these six individuals within thirty days of January 20, 1995, JRC would have to begin modifying the treatments to delete Level III procedures. (JRC-166, 9). While it is technically true that JRC was provided with the opportunity to reapply for certification, the record supports that the Trial Court was fully warranted in believing that this "reapplication" was not a fair or meaningful process. JRC had already submitted voluminous treatment plans to DMR following the prototype plan approved by Dr. Cerreto. Yet, it was precisely this prototype that the Commissioner found to be deficient in his January 20 Letter. Moreover, given the past bad faith regulatory actions, it could hardly be anticipated that the re-application for certification process described in the January 20 Letter had even a remote chance of being granted.

[48] While Deputy Chow-Menzer went on to state that the matter could be mediated "not withstanding our legal position," the point of the Trial Court's finding is that it was not mediated pursuant to Paragraph B-2 of the Settlement Agreement. Moreover, the Commissioner cited JRC in his letter of January 20 for allegedly "barring Dr. Linscheid and Dr. Iwata in violation of Condition 1." (U-166, 7).

The Commissioner next argues that the Trial Court incorrectly concluded that there was a "conflict" between the Trial Court's approval of B.S.'s individual treatment plan in the substituted judgment proceedings conducted by the Trial Court and the Commissioner's January 20 Letter. (Brief, p.140). However, the Trial Court's finding on this conflict (F. 249) is taken almost verbatim from the testimony of the Commissioner himself. (Tr. IV, 231-232).[49] The Commissioner acknowledged in his testimony that the actions which he took in this letter were inconsistent and in conflict with treatment orders of the Trial Court, including the substituted judgment treatment plan decision in the case of JRC student B.S. (Tr. IV, 231,232).[50] The Commissioner's contention that there was an incorrect legal conclusion drawn by the Trial Court concerning this conflict is not supported by his own testimony.

In addition, the Commissioner cannot deny that his January 20 Letter was in complete conflict with the assurances he gave to the Trial Court in the Report to the Court. In his Report to the Court of September 22, 1993, the Commissioner stated that, "DMR has not taken and will not take any action which jeopardizes the health and welfare of JRC clients, or which interferes with any court-approved program." (App. 158). (Emphasis supplied). Despite this assurance, the certification letter issued on January 20, 1995 purported to grant JRC a one and one-half year certification, but again imposed a set of conditions and terminated treatments in violation of the Settlement Agreement. (U-166). The Commissioner admitted that he ordered specific treatments terminated on January 20 without reviewing all of the medical reports, even though he testified that he had spent tens of thousands of dollars on the medical and psychiatric

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[49] The Commissioner admitted at trial that his decision to exclude student B.S. from JRC's certification was based on the report of psychologist Dr. Angela Duarte, and that the Trial Court, at a treatment plan review held for B.S. one month before the January 20 Letter was signed, found Dr. Duarte's testimony on B.S. to lack adequate factual foundation, and that it was not credible. (Tr. IV, 228-231; S.A. 56)

[50] DMR fully participated in the five-day treatment plan review of B.S.. Significantly, the psychologist, Dr. Angela Duarte, upon whom the Commissioner relies for his decision on B.S. in the January 20 Letter, was found not credible by the judge in the B.S. case, and her testimony on B.S. lacked an adequate foundation. The full text of the Findings in the B.S. case are at S.A. 45-66.

reports. He also conceded that he was aware on January 20, 1995, that the medical evaluations showed no evidence that any of the students for whom treatments were terminated suffered adverse health effects from such treatments, but that the medical care provided at JRC was satisfactory. (Tr. VI, 95-97). In addition, the Commissioner did not read the psychiatric evaluations, although he testified that they did not identify any "significant problem" and he did not think that they contained any criticism of the treatments terminated. (Tr. VI, 191-192).

The Commissioner next attacks the Trial Court's finding (F. 250) that there was nothing in DMR regulations which gives the Commissioner the power to grant or deny certification on a client-by-client basis. (Brief, p.141). However, the regulations at 104 CMR §20.15(4)(f) set forth that a program should be certified, and leave the decision on substituted judgment for individuals to the directive of the Trial Court.[51]

Finally, the Commissioner attacks the Trial Court's finding concerning the Specialized Food Program. (F. 251). Again, it is unclear which specific portion of the finding the Commissioner is contending is clearly erroneous, since the only finding that was made concerning this program -- that the Commissioner's team of doctors concluded that there were no adverse health effects and that the Commissioner failed to identify any medical evidence to support this decision -- is taken from DMR documents and the Commissioner's

[51] The regulations at 104 CMR 20.15(4)(f), state: "No Behavior Modification Plans employing Level III interventions may be implemented except in a program or a distinct part of a program that meets the standards established by 104 CMR 20.15(4) and that is therefore specially certified by the Department as having authority to administer such treatment . . . Only those programs or facilities which meet the following standard shall be certified under 104 CMR 20.15(4): the program or facility must demonstrate that it has the capacity to safely implement such Behavior Modification plan in accordance with all applicable requirements of 104 CMR 20.15. Any program seeking such certification shall submit a written application to the Commissioner or designee." (Emphasis added).

own testimony.[52] In his Brief, the Commissioner attempts to justify this condition based upon the alleged fact that JRC was depriving its students of a "nutritionally-sound diet." (Brief, p.142). Yet the truth, as the Commissioner's own medical and certification teams found, was that there was no adverse health effects from the Specialized Food Program.[53] The medical evaluations demonstrate that the clients at JRC were well nourished. (JRC-284). The Commissioner attempts to read inferences into the Trial Court's decision and then attacks those inferences as clearly erroneous. Neither the Trial Court's findings of fact nor the inferences which the Commissioner alleges the Trial Court made were clearly erroneous.[54]

19. The Commissioner attempted to damage JRC financially by attempting to reduce its rate of reimbursement and obstructed justice by attempting to prevent JRC from paying its trial counsel

The Commissioner asserts, in a completely conclusory fashion, that DMR dealt fairly with JRC on contract issues and that its efforts to negotiate a contract with JRC were "well-intentioned." (Brief, p.143). As the Commissioner acknowledges at page 142, JRC's rate of reimbursement has historically been set by DPS. In December of 1993, some three months after DMR commenced regulatory war of attrition, DMR questioned whether DPS should continue to set

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[52] As noted supra, the Commissioner testified that he was aware that the medical evaluations showed no evidence that any of the students had suffered adverse health affects from this procedure. In addition, the Commissioner further acknowledged 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 students, and even though his own teams of physicians, psychiatrists, attorneys and psychologists had found no adverse affects from this procedure. (Tr. VI, 199-200).

[53] The 1993 Certification Team concluded that 90% of the non-obese students had gained weight or remained stable and concluded that the Specialized Food program is safe and presents no medical risk. (U-75).

[54] In response to the January 20, 1995 letter, JRC requested mediation and arbitration under Paragraph B-2 of the Settlement Agreement. (U-169). There was no response to the request until April 7, 1995, by which time the Commissioner had already decided to decertify JRC, rendering the response to the April 7th letter meaningless. (U-179; U-182).

JRC's rate or whether DMR should set JRC's rate of reimbursement. (JRC-262). The Commissioner acknowledged at trial that he was aware that JRC's financial viability depends upon its rate of reimbursement. (Tr. III, 263-265). The Commissioner admitted at trial that during the latter part of 1993, he and his staff arranged to have a private "pre-meeting" at the DPS prior to DPS's upcoming public meeting with JRC on JRC's rate of reimbursement. (Tr. III, 263-271). The Commissioner admitted that the purpose of DMR's pre-meeting with DPS was to convince DPS to relinquish control over JRC's reimbursement to DMR. (Tr. III, 263-71). The Commissioner testified that this type of a pre-meeting had never been sought with any other provider and, further, that the pre-meeting with DPS was not permitted by the applicable regulations. (Tr. III, 263-271). The Commissioner also admitted that his staff could have discussed JRC's rate issues with the DPS at the public meeting regarding JRC. (Tr. III, 268).

These efforts to gain control over JRC's finances were a part of a larger plan to force financial ruin upon JRC. Other events reflect efforts designed to disrupt the financial operations of JRC including: assigning Dr. Cerreto the task of determining which of JRC's property was leased and what was owned; performing title searches on JRC property; determining reasons why the DMH rate was higher than the DMR rate for JRC; and confirming the "fiscal status" of JRC, an assignment that was given to the Commissioner at the September 7, 1993 Weekly Meeting. (Tr. X, 125; Tr. III, 214-215,223-224).

The Trial Court found that in past years, negotiations for contracts tended to be purely ministerial tasks with no discussions regarding substantive issues of the contract. There was evidence to support this finding. (Tr. XIIA, 24-26). The Trial Court also found that during fiscal year 1994/1995, DMR changed its position with respect to JRC and introduced into the contract negotiations matters which had been submitted to the Trial Court for resolution. There is evidence to support this finding, including the fact that DMR had attempted to coerce JRC into accepting its determination of "access" issues which were raised in DMR's counterclaim and, further, that DMR attempted to condition payment to JRC upon JRC's acceptance of the "QUEST" principles (JRC's group home survey by DMR), another matter in controversy in this case. (Tr. XIIA, 28-33). Even

though the Commissioner does not identify which findings he contends are clearly erroneous, there was nonetheless ample evidence to permit the Trial Court to reject DMR's characterization of its contract efforts as "well-intentioned."

The Commissioner challenges the Trial Court's conclusion that DMR purposely interfered with on-going Trial Court proceedings and attempted to disrupt JRC's ability to retain its counsel. (Brief, p.146). The Trial Court's findings were not clearly erroneous. At the meeting of the DPS Pricing Committee on December 14, 1993, DMR officials took the position that JRC's legal costs incurred in the action against DMR were "non-reimbursable" because JRC was "engaged in litigation against the Commonwealth . . . ." (JRC-262, 34). This position was first taken by DMR three and a half months after JRC filed its contempt claim. DMR was fully aware that if legal fees were non-reimbursable, JRC would have no way to compensate its counsel and would be forced to halt the litigation. When confronted on this matter, the Commissioner responded that such a position would not compromise JRC's right of access to the Trial Court, since the Trial Court could always award fees if JRC were successful in its contempt claim. (Tr. IV, 28-29). The Commissioner was "not able" to answer the questions as to how JRC would pay its lawyers during the course of the litigation and on appeal, in the event that his argument had been accepted by the DPS. (Tr. IV, 28-29).[55]

On June 30, 1995, the fifth day of trial, DMR sent a letter to JRC. The letter was mailed after the Commissioner had been subjected to vigorous examination by JRC's counsel on June 28 and 29, 1995. (F. 257; JRC-267). DMR's communication of June 30, 1995, indicated that JRC was "to cooperate with and be responsive to" an attached memorandum from the DPS. This DPS memorandum (dated June 28, 1995, two days after trial began) found JRC's legal fees to be non-reimbursable. (JRC-267). On page 3 of the memorandum, the

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[55] In contrast, the Commissioner's privately retained counsel, Attorney Ferleger, was not prepared to condition his receipt of fees upon success in the case on an award from the Trial Court. Within one month after his effort to preclude JRC from paying its counsel by requesting action from DPS, the Commissioner filed requests (which were granted) with the Executive Office for Administration and Finance, increasing Attorney Ferleger's contract from $73,000 to $118,000. (JRC-261; Tr. IV, 15).

Assistant Commissioner of DPS "reiterated" that "public funds received through a Massachusetts approved program price may not be used for non-reimbursable operating costs, including non-program expenses and litigation costs against the Commonwealth." (JRC-267). The letter also warned JRC that in the event these funds were used for litigation purposes, they could be "subject to recoupment." (JRC-267). Commissioner Campbell was compelled to admit when confronted with this communication on July 5, 1995, that he was aware that such a communication would be sent. (Tr. VI, 169-170). This letter placed JRC in the Hobson's Choice of either terminating the litigation, or continuing with the litigation with the understanding that any amounts paid to counsel were considered by DMR and DPS to be "subject to recoupment."

The Commissioner inaccurately states that the letter of June 30, 1995 was improperly considered by the Trial Court because it was admitted de bene subject to JRC's ability to offer testimony linking DMR to DPS's request for information on JRC's legal expenses. (Brief, p.144). The Commissioner falsely portrays the actual events. When the letter was first offered as an exhibit, the Trial Court asked whether counsel expected to offer testimony connecting DMR to the decision by the DPS. (Tr. VI, 168). After counsel for JRC responded that there was a connection (including the fact that the DPS memo was attached to DMR's letter), the Trial Court decided to "accept this evidence subject to [DMR's] motion to strike." (Tr. VI, 168). The Commissioner never made a motion to strike and the evidence stood as admitted. Moreover, JRC was able to establish the link between the DPS communication and actions of DMR when the Commissioner was compelled to admit that he was aware, prior to July 5, 1995, that this communication would be sent to JRC.[56]

[56] After a later colloquy with Attorney Yogman, the Trial Court indicated that the evidence had been taken de bene. Nonetheless, the transcript does not reveal that the Trial Court amended or altered its prior ruling that the evidence had been accepted subject to a motion to strike. In any event, no efforts were undertaken by DMR to strike JRC-267.

20. The Commissioner's failure to grant a license to JRC's group homes was another attempt to cause harm to JRC and close the school

The Commissioner contends that the Trial Court made clearly erroneous "adverse findings" concerning DMR's "QUEST" results. (Brief, p.143). It is difficult to respond to the Commissioner's argument since he does not identify which of the "adverse QUEST findings" were clearly erroneous. Many of the Trial Court's findings concerning QUEST are quoted directly from the QUEST survey itself.

The QUEST survey was dated December 20, 1994, but was not provided to JRC until March 15, 1995. (Tr. VIIB, 30). As indicated by the QUEST Provider Certification Report (the "QUEST Report"), DMR gave JRC group homes a "non-certification." (U-164). On April 10, 1995, DMR notified JRC that it faced a non-certification if the deficiencies identified in the QUEST Report were not corrected by the end of ninety days. (U-193). On May 23, 1995, JRC's counsel requested in writing that DMR provide written confirmation that it would arbitrate with the Court Monitor, under the terms of the Settlement Agreement on QUEST. (JRC-283). DMR never agreed to arbitrate under Paragraph B-2. (Tr. VIIB, 30-32).

DMR attacks the finding as clearly erroneous on the grounds it creates a false impression that all of the deficiencies as set forth in the QUEST survey are related to client dignity. The Commissioner cites footnote 65 of the Trial Court's findings in support of this contention. Footnote 65 does not state that all of the deficiencies related to client dignity, but merely set forth examples of some of the deficiencies which the Trial Court found to be arbitrary and capricious and in ignorance of the severe physical and mental deficiencies of JRC's client population.[57] DMR also incorrectly represents to this Court that the "only

[57] For example, DMR cited JRC as deficient in the QUEST Report because it did not provide its students with keys to their homes. (U-193, 5). Dr. Israel testified that many of the clients in the JRC program would, due to their disabilities, probably swallow the house key if it were given to them. (Tr. VIIB, 34). Moreover, since the Trial Court had before it significant evidence concerning the severe disabilities of the JRC students, it was entirely appropriate for the Trial Court to conclude that many of the QUEST

evidence on the QUEST survey were the survey findings themselves." This statement is not correct. The Court heard testimony from Dr. Israel concerning the QUEST survey. (Tr. VIIB, pp. 29-38). The Court made no clearly erroneous findings with respect to the QUEST survey.

21. JRC, its Students and Parents were harmed by the Commissioner's contemptuous and bad faith actions

The Commissioner characterizes as clearly erroneous at page 146 of his Brief the Trial Court's finding (F. 269-270) that the Commissioner's actions have financially devastated JRC and caused it to suffer loss of revenues of such magnitude that its financial viability is in peril. The Commissioner also contends that the Trial Court's findings concerning JRC's perilous financial situation are unsupported by the evidence. Prior to August of 1993, JRC had built a financially successful residential program with a reputation for successfully treating the most severe and dangerous behavior disorders in the nation. (Tr. VIIA, 50-53). After the settlement of the OFC controversy in 1987, JRC built its program from an enrollment of forty-three students to an enrollment of sixty-six students in August of 1993. (Tr. VIII, 133). However, in August of 1993, DMR began publishing to JRC's Funding and Placement Agencies a series of false and defamatory regulatory decisions which falsely depicted JRC as an unsafe program operating in chronic violation of the law and using painful treatments on its clients which were not effective and not supported by psychology principles. DMR's regulatory decisions and other correspondence published to JRC's Funding and Placement Agencies unjustifiably created the appearance of the ever-present threat of imminent JRC decertification through its stream of false statements about JRC and by granting JRC only interim certification.

Dr. Israel presented testimony to the Trial Court that, starting in August of 1993, referrals of new students from JRC's largest client -- the state of New York -- dropped dramatically, and an important placement agency in New York

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requirements were arbitrary or capricious; for example, the requirement that a JRC student should be placed on the board of directors of JRC.

City dropped all referrals to JRC on two occasions. (Tr. VIIB, 57-58). As a result, JRC's enrollment decreased from sixty-six students in August of 1993 to forty-three by the time of trial. (Tr. VIII, 170). The Trial Court also heard extensive testimony from JRC's accountant and financial adviser, Arthur Mullen, a certified public accountant, concerning the economic damage to JRC's program. (Tr. VIII, 163).

The Commissioner argues that there was no financial damage to JRC because there was no evidence that JRC actually paid or "ever intends to pay" the more than eight hundred thousand dollars of fees assertedly billed by its counsel. (Brief, p.147). The Trial Court found, however, that JRC would not have survived had it not been for JRC's ability to have access to legal counsel in order to defend itself against the Commissioner's actions. (F. 286). In addition, Dr. Israel testified that JRC staff were laid off in order for JRC to pay counsel. (Tr. VIIB, 54). There was no evidence to suggest that this matter was simply handled pro bono. JRC submitted redacted portions of its legal bills to the Commissioner's attorneys and an unredacted copy of the legal bills with the Trial Court for in camera inspection supporting the hours billed in representing JRC. DMR's argument that JRC could avoid its financial difficulties by simply not paying its attorneys is frivolous. Certainly, Attorney Ferlerger was not willing to work for DMR for free. The Trial Court's findings concerning the precarious financial situation of JRC are well supported by the evidence.

This Court should also reject the Commissioner's argument that the Trial Court's finding of harm to the students is clearly erroneous. The Trial Court heard extensive testimony regarding the harm to students which occurred after August 1993. As Dr. Israel testified, the program was cut, including cuts in direct care, in order to meet attorney's fees incurred after July of 1993. (Tr. VIIB, 51-54). In fiscal year ("FY") 1994, DMR's wrongful conduct caused JRC to reduce its staff to thirty percent, as compared to FY 1993. By the end of FY 1995, JRC was again forced to reduce its staff by fifty percent from FY 1993 in order to pay attorney's fees necessary to respond to DMR's wrongful conduct.

Separate and apart from the financial impact of fending off DMR and its legion of regulators and attorneys, is the fact that JRC staff were essentially preoccupied during a large portion of 1993 to 1995 with responding to the regulatory actions of DMR. Within days after receipt of the August 6, 1993 letter, ten to fifteen JRC staff members worked full-time over a three-week period gathering and organizing all the information ordered by the Commissioner as a condition of JRC keeping its twenty-five days of certification. (Tr. VIIA, 36-37). Significant demands were placed upon JRC staff in responding to the Rivendell visit, the revision of the treatment plans, and visits by DMR employees. Starting in late October 1994 and continuing through the end of the year, JRC was besieged with literally hundreds of visits from DMR employees, including DMR psychologists reviewing treatment plans, DMR investigators, DMR service coordinators, DMR "QUEST" teams, DMR psychiatrists conducting psychiatric evaluations, and DMR attorneys reviewing records. (Tr. VIIB, 25-26). From August of 1993 to December of 1994, there were over four hundred visits to JRC by DMR agents, attorneys and employees. (Tr. VIIA, 26-27).[58] The Trial Court heard testimony from a variety of witnesses concerning the harm which had been visited upon JRC, JRC students, and JRC staff by DMR, including from Dr. Israel, Dr. Von Heyn, Dr. Worsham and Dr. Daignault. The Trial Court's findings are not clearly erroneous.

The Commissioner attacks as clearly erroneous the findings of the Trial Court relative to JRC students W.M. and J.C. (F. 298). The Trial Court found that DMR's refusal to allow JRC to continue the Specialized Food Program made JRC's program less effective in treating behavior disorders. The Trial Court heard testimony from Dr. Israel and Dr. Worsham that W.M. and J.C. were currently suffering an increase in their health-dangerous behaviors and additional applications of the GED as the result of being taken off the Specialized Food Program when ordered terminated in the January 20 Letter. (Tr. VIIB, 63-65; Tr. IX, 96). The Trial Court's findings of harm to JRC and its student were

[58] The efforts of JRC to respond to the regulatory demands of DMR are set forth in detailed findings with record references in JRC's Proposed Findings of Fact. (App. 932-946).

neither exaggerated nor clearly erroneous. There was more than sufficient evidence to support the Trial Court's finding. The fact that the Trial Court did not accept the Commissioner's arguments does not mean that the Trial Court's conclusions are clearly erroneous.

IV. THE REMEDIES ORDERED BY THE TRIAL COURT FOR CONTEMPT ARE PROPER

A. Affirmative Injunctive Relief and the Appointment of the Receiver are Proper as a Matter of Law

A trial court has broad discretion to determine the nature and scope of the coercive remedy "designed to achieve compliance with the judge's order for the benefit of the complainant" in an action for civil contempt. See Commonwealth v. One 1987 Ford Econoline Van, 413 Mass. at 414; see also Ciannetti v. Thomas, 32 Mass. App. Ct. 960, 961-962 (1992), citing United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947); Labor Relations Commission v. Fall River Educators' Assn., 382 Mass. 465, 475-476 (1981). Likewise, the decision to grant equitable relief and the scope of such relief rests within the sound discretion of the trial judge. See Johnson v. Martignetti, 374 Mass. 784, 794 (1978). The Commissioner has not shown palpable error in either the Trial Court's choice of remedies for contempt of the Settlement Agreement, or in granting equitable relief in the form of a permanent injunction and receivership.

The Commissioner incorrectly argues that the Trial Court committed legal error in ordering affirmative injunctive relief against a public official because it violates the separation of powers contained the in Massachusetts Declaration of Rights, Article 30.[59] This Court in the case of Perez v. Boston Housing Authority, 379 Mass. 703 (1980), rejected the same argument made on behalf of the public authority:

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[59] The Commissioner's argument, that the injunctive relief fails because the Trial Court's twelve page order does not conform to Mass. R. Civ. P. 65(d) since it, inter alia, refers to the separate treatment plans and Settlement Agreement rather than repeating those orders verbatim and does not set forth with specifically the actions DMR attorneys are enjoined from taking to avoid unethical conduct, is meritless.

> It is true that injunctions going against public officials . . . and especially injunctions that require the officials to take affirmative remedial steps, have been resisted on the [ ] grounds that they would have the affect of cancelling the discretion or latitude of action supposed to be inherent in the offices held (i.e. - separation of powers) and would present awkward or difficult problems of enforcement. But it is now clear that such injunctions are not prohibited for those reasons alone.

Id. at 739-730 (internal citations omitted). Here, permanent injunctive relief was warranted based upon the Trial Court's conclusion supported by the record that future unlawful conduct by the Commissioner and DMR against JRC was likely to occur. See Cleary v. Commissioner of Public Welfare, 21 Mass. App. Ct. 140, 150 (1985), citing Vegelahn v. Guntner, 167 Mass. 92, 104 (1896) (Holmes, J. dissenting) ("an injunction is not granted except with reference to what there is reason to expect in its absence").

Similarly, the Commissioner's argument that a court should always presume that a public official will comply with a court order before issuing affirmative relief does not apply where the official has acted unlawfully:

> When a government official denies rights in contravention of a court order, the executive department intrudes upon the judicial departments's authority in violation of art. 30. . . . Where, the record shows that a public official or department of government has violated a court order, a judge is warranted in continuing it, perhaps even strengthening that order, to assure protection of the rights violated.

Hoffer v. Commissioner of Correction, 397 Mass. 152, 157 (1986) (internal citations omitted); see also Blaney v. Commissioner of Corrections, 374 Mass. 337, 343 (1978). In other words, while the interest in preserving separation of powers may outweigh issuing an order in the first place, the balance shifts in favor of the exercise of judicial power over the public official once there has been a violation of an existing court order. Indeed, it is within the inherent judicial function to order the executive branch to carry out its lawful obligations, and the failure of the executive branch to carry out judicial orders contravenes art. 30 "by abrogating judicial decrees, an exclusively judicial function." Blaney v. Commissioner of Corrections, 374 Mass. at 343 n. 4.

Similarly, although courts normally must take care not to interfere with the discretionary implementation of an agency's own regulations, "[w]hen an agency's implementation of its regulations violates the law, however, it is entirely appropriate for a court to order relief." Correia v. Dept. of Public Welfare, 414 Mass. 157, 163 (1993), citing Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 631 (1985); see also In The Matter Of McKnight, 406 Mass. 787, 792 (1990). The usual deference to an agency's interpretation of its regulations or statutory duties does not extend to an unreasonable interpretation, and "[t]his Court has overridden agency interpretations where, for example, an agency is found to be acting in bad faith, or contrary to its statutory directive." Correia v. Dept. of Public Welfare, 414 Mass. at 165. In the present case, the Trial Court was warranted in stripping the Commissioner and DMR of their discretionary statutory and regulatory authority over JRC because of the Commissioner's unlawful conduct and repeated violations of the Settlement Agreement.

The Commissioner also argues that the Trial Court should have limited the scope of any relief granted for a violation of the Settlement Agreement, claiming that this Court has previously ruled on the propriety of injunctive relief in regards to DMR's regulation of JRC in In The Matter Of McKnight, supra. This Court did not reach the issue of a proper remedy for a violation of the Settlement Agreement. The Court, however, did expressly state that it was vacating the preliminary injunction in favor of BRI "without prejudice to [JRC's] right to pursue any violation of its rights under the settlement agreement on a proper complaint or motion [for contempt]." 406 Mass. at 791. Implicit in the Court's decision is that an action for injunctive relief by JRC would properly lie against DMR if there had been a contempt claim for a violation of the Settlement Agreement. Furthermore, even though this Court vacated the preliminary injunction on the grounds that DMR and not the Probate Court had the regulatory discretion to decide at which location the plaintiff student received treatment, this Court also noted that injunctive relief against DMR would be proper if it had acted unlawfully in exercising its discretion: "On the other hand, a court has the right to order [DMR] to do what it has a legal obligation to do." Id. at 792.

In his dissenting opinion, Chief Justice Liacos expanded on the same legal principles reviewed in the majority opinion, and took issue with the deference accorded DMR's regulatory authority under the facts as contained in the record from the hearing on the preliminary injunction:

> It is true that judicial deference to the expertise of public agencies is a vital characteristic of our constitutional government, one which invokes the principle of separation of powers contained in art. 30 of the Massachusetts Declaration of Rights. The tradition of judicial deference to agency decision making represents an important social policy decision that public agencies are generally in a better position than courts to make particular technical decisions. However, this policy rests on an assumption that public agencies will act properly when making their decisions.
>
> Where agencies have been shown to have acted improperly in the execution of their regulatory, statutory, or constitutional duties, this court has been willing to uphold the exercise of judicial oversight of agency functions.
>
> The rule that a court will not order an agency to act in a particular way, unless there are no other methods by which the agency may fulfill its legal obligations is drawn directly from the policy of judicial deference to agency expertise. This rule is not absolute; it gives way in the face of agency misbehavior.

Id. at 807 (Liacos, C.J., dissenting) (internal citations omitted). Thus, the Chief Justice, applying the evidence of bad faith and misconduct by DMR to settled legal principles, rejected the exact arguments the Commissioner raises here to attack the Trial Court.

Furthermore, the Commissioner's reliance on Missouri v. Jenkins, 495 U.S. 33 (1990), for the proposition that a court's equitable powers are limited in respect to state officials does not apply to the present case. The Court in Jenkins was faced with review of an order issued by a Federal district court compelling a local government to levy taxes in excess of limits set by the state statute in order to finance a school desegregation plan. Although it upheld the order, the Court nevertheless was mindful of the concern for the Federal courts intruding on the autonomy of state governments and interfering with local affairs stating, "One of the most important considerations governing the exercise of [federal] equitable power is a proper respect for the integrity and function of

local governmental institutions." Id. at 51. Here, the Trial Court's equitable power to order relief against the Commissioner is not limited by a concern over state's rights and concepts of federalism, and the warning set forth in Jenkins has no application to a review of the remedy provided by a state trial court in response to the unlawful conduct of a state official.

The Trial Court's decision to grant equitable relief in the form of a receivership was also correct as a matter of law. "It is beyond dispute that a court with equity jurisdiction has the power to appoint a receiver. Generally, the appointment of a receiver rests within the sound discretion of the court." Lopez v. Medford Community Center, Inc., 384 Mass. 163, 169 (1981) (citations omitted).

In Perez v. Boston Housing Authority, supra, this Court held that a trial court has the inherent equitable power to appoint a receivership over the public agency, where the facts justify the need to effectuate the orders of the court through a third party acting as the court's arm, in instances of a:

> [R]epeated or continuous failure of the officials to comply with a previously issued decree, a reasonable forecast that the mere continued insistence by the Court that these officials perform the decree would lead only to 'confrontation and delay' a lack of any leadership that could be expected to turn the situation around within a reasonable time.

379 Mass. at 729-736. The Court in Perez, supra, also held that ordering a public authority into receivership does not contravene art. 30:

> But if it is a function of the judicial branch to provide remedies for violations of law, including violations committed by the executive branch, then an injunction with that intent does not derogate from the separation principle, nor, by extension, does a receivership otherwise properly instituted. To the contrary, when the executive persists in indifference to, or neglect or disobedience of court orders, necessitating a receivership, it is the executive that could more properly be charged with contemning the separation principle.

Id. at 739-40; see also Blaney v. Commissioner of Correction, 374 Mass. at 342; Attorney General v. Sheriff of Suffolk County, 394 Mass. at 631.

Faced with the Commissioner's broad abrogation of his legal duties under the Settlement Agreement, his false statements to the Trial Court, and lack of

concern for the welfare of the JRC students, the Trial Court here was warranted in exercising its legal authority and issuing a broad order which supplanted completely the executive functions of DMR as they related to JRC by appointing a receiver to ensure compliance with the legal obligations under the Settlement Agreement. See Perez, 379 Mass. at 733; see also Blaney v. Commissioner of Correction, 374 Mass. at 342-43. This includes court control over the expenditure of DMR funds regarding JRC once the Commissioner demonstrated his continued unwillingness to comply with the Settlement Agreement: "The inherent power of courts to enter orders concerning the expenditure of funds extends only to matters essential to the courts' functions, to the maintenance of their authority, and to their capacity to determine the rights of the parties." Bradley v. Commissioner of Mental Health, 386 Mass. 363, 365 (1982). In Bradley, supra, this Court struck down the broad order of the trial court supplanting the executive branch function of the expenditure of funds only because, unlike in the present case, there was no showing in the record that DMH "broadly abrogated its duties in the face of a judicial direction to fulfill them." Id. at 365. Implicit in this Court's decision in Bradley, however, is that a trial court has the power to supplement any and all executive functions where, as here, the record indicates the need for such sweeping relief.

B. Affirmative Injunctive Relief And The Broad Powers Of The Receivership Are Warranted Under The Facts

The affirmative injunctive relief orders DMR and the Commissioner to comply with the terms of the Settlement Agreement. Additional collateral relief of enjoining any retaliatory action against JRC by DMR and enjoining interference with outstanding treatment orders is merely a restatement of specific requirements or duties of DMR and the Commissioner. "Courts have traditionally issued orders and injunctions directing public officials to carry out their legal obligations." Attorney General v. Sheriff of Suffolk County, 394 Mass. at 631. The Trial Court was not in error to impose an affirmative order requiring that DMR abide by the Settlement Agreement, particularly since the Commissioner had taken the position that he was not bound by the Settlement

Agreement and was clear that he was intent on violating his obligations under the Settlement Agreement to destroy JRC. See Hoffer v. Commissioner of Correction, 397 Mass. at 156; see also Bradley v. Commissioner of Mental Health, 386 Mass. at 366; In The Matter Of McKnight, 406 Mass. at 807 (Liacos, C.J., dissenting)("[F]indings that the department acted in bad faith, knowingly misled the court, considered improper political motivations in making its decision, and failed to provide any competent clinical evidence to support its proposal. . . certainly warranted a conclusion that the department had abandoned its proper role.").

Likewise, the remedy of a receivership was well warranted on the facts of this case. The long-standing, contemptuous conduct of the Commissioner coupled with the egregious harm being caused to the JRC students, made it impossible for the Trial Court to risk giving the Commissioner any more time to terminate, or continue, his unlawful behavior. The Commissioner and DMR demonstrated through a course of corrupt conduct and consistent, blatant disregard of the Settlement Agreement that they were "unable or unwilling" to comply with their legal obligations in undertaking the proper regulation of JRC. See Bradley v. Commissioner of Mental Health, 386 Mass. at 366; In The Matter Of McKnight, 406 Mass. at 807 (Liacos, C.J., dissenting).

The combination of circumstances and facts justifies the appointment of a receivership in this instance. The Trial Court found that the Commissioner and his attorneys, in their regulation of JRC: violated his own Department's regulations; perpetrated a fraud upon the Trial Court; obstructed justice; intimidated and harassed Court officials; purposely disseminated knowingly false information for the purpose of destroying a special education provider; used state investigators to conduct baseless investigations of Court officials; compromised the independence of DMR's investigations unit; breached agreements made in the Court's arbitration process; disseminated false statements about JRC to the newspapers; used state funds, earmarked for the care and treatment of disabled citizens, to rig a self-styled "independent" review of a special education school; used state funds to conduct unnecessary title searches; formulated and executed a plan to disrupt the operations of a special education provider by every

conceivable means; arranged secret pre-meetings with other state agencies; made critical regulatory decisions based upon a concern on how DMR might be depicted on a television program; committed perjury; illegally used the attorney-client privilege in an attempt to hide incriminating evidence from the Trial Court; misused the legal process in an effort to drive up JRC's legal bills; and violated Court orders in an effort to prevent the disclosure of "smoking gun" documents. The Commissioner and DMR's conduct not only exceeds the "malfeasance" of the agency as in Perez, supra, but it amounts to, as the Trial Court found, pervasive public corruption. (App. 1310).

While the authority of the receiver is broad, such authority is warranted to address the significant damage inflicted upon JRC and its students and to prevent further injury. This Court must view the specific powers of the receiver in light of the contempt and harm the Trial Court intended to remedy. The Commissioner attempted to put JRC out of business because of political and ideological differences and concern over how he would be depicted in a television program. He came very close to succeeding. Based upon the litany of misconduct of DMR, in addition to the fraud upon the Trial Curt, the corruption, and the disingenuous conduct of DMR's trial counsel, the Trial Court had no basis to trust that DMR could responsibly exercise its obligations under the Settlement Agreement. As a result, the receiver has the full authority to administer, manage, and operate DMR in all its relationships with JRC. Given that the receivership was properly ordered, it is necessary that the receiver have the proper authority to achieve his mandate. The Trial Court had the authority to provide the receiver with powers necessary to correct the problems for which the receivership was created, which, in general, was DMR's attempts to regulate JRC out of business. See Spence v. Reeder, 382 Mass. 398, 413-419 (1981). ("Judicial authority to enter implementing orders is inherent in the equity powers of the courts.").

The Trial Court's numerous references in its Judgment and Order to DMR's powers "as they relate to JRC" prove that the powers granted to the receiver were tailored by the Trial Court to remedy the specific harm caused to JRC by DMR. In fact, the Trial Court, in ¶ 11 of its Judgment and Order,

makes clear that the receivership of DMR is limited to JRC activities: "DMR's powers, as they relate to JRC, its students and families, shall be totally superseded by the Receiver." (Emphasis supplied). (App. 1342). The remainder of the specific enumerated powers of the receiver fall under and are subject to the catch-all provision in ¶ 11.

The Commissioner attempts to minimize the basis for a receivership, arguing that the damage wrought by the Commissioner's actions has not reached "crisis proportions." This assertion is categorically false, and it impermissibly ignores the Trial Court's express findings of fact that the welfare of JRC clients was profoundly affected by the actions of the Commissioner. (App. 1276-1286). Moreover, the devastation wrought to the JRC program can hardly be disputed. After successfully building up its enrollment following the last litigation in the mid-1980's, JRC's student enrollment has precipitously dropped by more than thirty percent since the summer of 1993, staffing has been cut by fifty percent, and projected revenues have decreased by almost $3 million. (App. 1281, 1282, 1285). Clearly, no private facility can indefinitely withstand the type of onslaught perpetrated by a state agency with unlimited resources that is bent upon achieving its illegitimate end.

The Commissioner's suggestion that the Trial Court's order supplants the authority of the Department of the Attorney General to prosecute, defend, and settle litigation on behalf of DMR is unsupported. The Department of the Attorney General, by illustration, possesses the authority to prosecute the instant litigation on behalf of DMR. There is nothing in the Trial Court's order to indicate that the receiver could not under certain circumstances be represented by the Department of the Attorney General, even though such representation seems inconceivable at the present time in light of the Attorney General's representation of the Commissioner.

The Commissioner also takes issue with the Trial Court granting the receiver immunity from lawsuit. However, the receiver was already vested with inherent immunity an extension of the Trial Court itself. See Perez, 379 Mass. at 729-736. It is "too well settled to require discussion, that every judge, whether of a higher or lower court, is exempt from liability to an action for any

judgment or decision rendered in the exercise of jurisdiction vested in him by law." Commonwealth v. O'Neil, 418 Mass. 760, 766-767 (1994). See also Pulliam v. Allen, 466 U. S. 519, 529 (1984). The receiver also has immunity as a quasi-judicial officer charged with implementing the Trial Court's Judgment and Order, and ultimately ensuring compliance with the Settlement Agreement. See Commonwealth v. O'Neil, 418 Mass. at 767; see also Lalonde v. Eissner, 405 Mass. 207, 210 (1989). Such tasks are necessarily essential to the judicial function. See Commonwealth v. O'Neil, 418 Mass. at 767, and cases cited.

In short, the Commissioner attempts to create a nightmarish scenario whereby an out-of-control receiver is busy disaffirming valid contracts[60], wrongfully firing DMR employees, and stripping independent state agencies of their authority to conduct abuse investigations. Not only is this a misstatement of the order, but there is no basis for assuming that the receiver will unreasonably exercise his authority. In addition, it is plain that the powers of the receiver are all "subject to future orders of this court." If the receiver intends to take an action which the Commissioner believes is improper, the Commissioner may bring his concerns to the attention of the Trial Court which would then have the authority to modify the receiver's powers. If the Trial Court did not adequately address the matter, the Commissioner could then petition the Appeals Court. In fact, the Commissioner has already followed this route in recently filing a petition for interlocutory relief to a Single Justice of the Appeals Court seeking relief from the Trial Court's orders concerning the sources of payment of the receiver. (S.A. 82). The Commissioner's exaggerated concerns in an attempt to scare this Court into reversing the judgment are unwarranted and unsupported.

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[60] As the Trial Court points out in its Order on Motion to Stay (App. 1432), DMR has misquoted the text of the order concerning the execution of contracts. On page 158 of his brief, the Commissioner states that the receiver has the power to unilaterally "disaffirm, reject or discontinue at any time any . . . personal or professional services and material contracts;" yet the Commissioner's counsel neglects to mention the end of that sentence which continues, "when he [the receiver] finds the performance of such contract or portion thereof will materially interfere with the achievement of the purposes of this order, or otherwise not be in the best interest of DMR."

C. This Court Should Not Stay the Judgment Or any Portion of the Relief Granted By The Trial Court Pending Resolution of the Appeal

1. The Commissioner cannot show an abuse of discretion in the denial of a stay pending appeal

This Court directed the Commissioner, if he so chose, to renew his application for a stay pending appeal in his brief on the merits of the contempt judgment, as set forth in Commissioner of Mental Retardation v. Judge Rotenberg Educational Center, Inc., 421 Mass. 1010, 1010 (1996). The direction to renew the motion for stay in the brief on the underlying appeal could be construed as an instruction to the Commissioner to consolidate an appeal from the denial of relief by the Single Justice, which was the subject of the above-cited decision, with the appeal on the merits. See Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 614 (1980) (appeal from denial of stay pending appeal must be consolidated with appeal from denial of preliminary injunction). This is even more likely in light of the fact that the Trial Court judge who heard the case, a single justice of the Appeals Court, a single justice of this Court, and the full panel on appeal pursuant to SJC Rule 2:21, all denied a stay pending appeal. It seems unlikely that this Court would give the Commissioner a fifth bite at the apple and allow him to advance de novo a motion for stay pending appeal.

Thus, the Commissioner's renewal of a request for a stay should be treated as an appeal from the order of a single justice of this Court (Lynch, J.) entered pursuant to G. L. c. 211, § 3. The Commissioner must either prove that the Single Justice abused his discretion in denying a stay pending appeal, or abused his discretion in denying extraordinary relief from the orders of the Trial Judge and Appeals Court Single Justice. See Healy v. First District Court of Bristol, 367 Mass. 909, 910 (1975); Cefalu v. Globe Newspaper Co., 377 Mass. 907, 907 (1979); Spence v. Reeder, 382 Mass. at 422 (issuance or denial of stay pending appeal is discretionary). In either case, the Commissioner has made no showing that the Single Justice committed an abuse of discretion. The Commissioner's request that this Court review the above record de novo and

grant a stay is not the correct standard, and the Commissioner cannot meet his burden of showing palpable error by the Single Justice.

2. The Commissioner does not meet the criteria for a stay pending appeal

A party seeking a stay of an order granting an injunction or appointing a receiver pending appeal has the burden of proving the following four criteria:

> (1) a strong showing that he is likely to succeed on the merits of the appeal; (2) a showing that unless a stay is granted he will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties and (4) a showing that a stay will do no harm to the public interest.

Martinez Rodriguez v. Jimenez, 537 F.2d 1, 2 (1st Cir. 1976); see also Hilton v. Braunskill, 481 U.S. 770, 776-777 (1987).[61] The same standards apply to a stay of a judgment of civil contempt. See Patterson v. Lumbard, 16 F.R.D. 140, 140-141 (S.D. N.Y. 1954), citing In Re Manufacturers Trading Corp., 194 F.2d 948, 957 (6th Cir. 1954).

An applicant for a stay bears a heavy burden: "The judgment of the Court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that Court not to stay its judgment." Craddick v. N.H. Newman, 453 U.S. 928, 933 (1981), quoting from Wise v. Lipscomb, 434 U.S. 1329, 1333-1334 (1976). Moreover, the applicant's already heavy burden is even greater where, as here, a stay has already been denied in the lower court: "[W]hen a party seeking a stay makes application to an appellate judge following the denial of a similar motion by a trial judge, the burden of persuasion on the moving party is substantially greater than it was before the trial judge." Long v. Robertson, 432 F.2d 977, 979 (4th Cir. 1970) (citations omitted). The trial court's decision not to grant a stay in an action for an injunction or in a receivership is afforded such great deference that an appeal from the denial of

[61] There appears to be no Massachusetts case law on the standard for granting a stay. However, since the Massachusetts rule on a stay pending appeal, Mass. R. App. P. 6(a), is identical in its wording to Fed. R. App. P. 8, cases construing the Federal Rule are applicable to the state rule. Burger Chef Systems, Inc. v. Servfast of Brockton, Inc., 393 Mass. 287, 289 n.3 (1984).

motion to stay pending appeal pursuant to Mass. R. Civ. P. 62(a) and G. L. c. 231, § 116, is reviewed under an abuse of discretion standard. See Spence v. Reeder, 382 Mass. at 422.

As already discussed in the body of this brief regarding the merits of the appeal from the contempt judgment, there is absolutely no record evidence to support that the Commissioner will prevail on appeal. The Trial Court's voluminous findings are amply supported by the trial record. The record likewise supports the Trial Court's ultimate conclusion of contempt by the Commissioner, and also supports that the remedies were well within the Trial Court's discretion to ensure compliance within the Settlement Agreement. DMR cannot meet its heavy burden of proving a stay pending appeal of either the order of contempt or the remedies granted.

DMR will simply continue to engage in its regulatory "war of attrition" if this Court grants a stay.[62] Indeed, the fact that the Commissioner believes that he has done nothing inconsistent with his regulatory authority despite the express findings of bad faith, fraud and corruption shows that the Commissioner is likely to continue with the egregious conduct, if the judgment and relief is stayed pending appeal. The fact that the Trial Court saw the need in its Judgment and Order to expressly order the Commissioner and DMR to refrain from retaliation against JRC is indicative of the continuing threat posed to JRC and the students. (App. 1341). The Trial Court found that the parents of JRC students would be "faced with a genuine concern for [their children's] very survival." (App. 1437). This conclusion is more than amply supported by the record

In a complete mischaracterization of the Trial Court's order, the Commissioner makes a number of inaccurate and exaggerated representations in his Brief concerning the power of the receiver to bolster his argument that a stay pending appeal is warranted. The receiver is not, for example, "directed to

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[62] The Trial Court concluded in denying a stay of the judgment that there was more than sufficient evidence in the case to indicate that JRC, the students and their parents would be immediately and irreparably harmed during the pendency of this appeal if a stay were granted. (App. 1457).

ensure that anti-JRC bias is eliminated." (Brief, p.161). Rather, the receiver is required to use his best efforts to ensure that this bias is eliminated. The purpose of this directive is that it is contemplated that the receivership will ultimately be terminated and that DMR will again regulate JRC in compliance with the 1987 Settlement Agreement. In short, there is no "ideological purge" as the Commissioner asserts. In addition, the receiver's authority over DMR personnel is limited by the fact that the receivership extends only to DMR's regulation of JRC. (App. 1342). Since DMR personnel are available to the receiver to assist him in his regulation of JRC, the receiver must have the corollary power to reassign those individuals from their JRC-related duties. This power, however, does not mean that the receiver has the ability to discharge at will DMR employees from employment at DMR.

The mischaracterization of the receiver's power continues at page 162 of the Commissioner's Brief. There, he argues that the Trial Court's order "supplants" the authority of the Disabled Persons Protection Commission (DPPC) to conduct investigations. The order contains no such authority, but simply directs the receiver to oversee DMR's investigations unit with respect to JRC. (App. 1346). The plain basis for this provision is that DMR was found by the Trial Court to have misused its investigations unit as part of its overall strategy to destroy the JRC program. (App. 1259-60). Indeed, DMR's supposedly "independent" investigations unit was utilized by the Commissioner to conduct an unwarranted investigation of the Guardian Ad Litem. (App. 1262-63).

There is no basis for the determination, as asserted by the Commissioner in his Brief at page 161, that absent a stay, students will be harmed or injured as a result of DMR's inability to conduct investigations of abuse or neglect, or to ensure that aversive procedures are used pursuant to behavior modification regulations. Rather, it is simply the case that the regulatory functions will be undertaken by the receiver, and any treatment plan authorizing aversive procedures is permitted only after the entry of a substituted judgment order. If JRC uses aversive procedures improperly, then counsel for the students, the Guardian Ad Litem, the Court Monitor or the receiver is free to bring such matters to the attention of the Trial Court.

V. THE COURT DID NOT ERR IN THE AMOUNT OF ATTORNEY'S FEES ASSESSED AGAINST THE COMMISSIONER

A. The Attorney's Fee Award As Decided By The Trial Court Is Reasonable And Supported By The Record

It is well settled that the amount of an award of reasonable attorney's fees in all actions, including an action for contempt, is presumed to be correct, and will not be reversed on appeal absent a showing that the trial court's findings are clearly erroneous. See Olmstead v. Murphy, 21 Mass. App. Ct. 664, 665 (1986)(citations omitted); see also Kennedy v. Kennedy, 400 Mass. 272, 274 (1987). As the court stated in Fontaine v. Ebtec Corp., "The amount of a reasonable attorney's fee, . . . is largely discretionary with the judge, who is in the best position to determine how much time was reasonably spent on a case, and the fair value of the attorney's services." 415 Mass. 309, 324 (1993); see also Stowe v. Bologna, 417 Mass. 199, 203 (1994).

This Court has followed federal fee award decisions in deciding that the basic measure of a reasonable fee award consists of a calculation based on a multiplication of the fair market rates by the reasonable time spent. See Stratos v. Department of Public Welfare, 387 Mass. 312, 322 (1982), relying on Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); see also Torres v. Attorney General, 391 Mass. 1, 16 (1984); Society of Jesus of New England v. Boston Landmarks Commission, 411 Mass. 754, 759 (1992); Fontaine v. Ebtec Corp., 415 Mass. at 326; Stowe v. Bologna, 417 Mass. at 203. This calculation "provides an objective basis on which to make an initial estimate of the value of the lawyer's services." Hensley v. Eckerhart, 461 U.S. 426, 437 (1983).

The Commissioner's assertion that counsel for JRC provided no evidence on which the Trial Court could determine the fee award is not correct. The judge expressly stated that the award was based on two sources: "This Court has reviewed the affidavits submitted by counsel for JRC . . . [and] has reviewed in camera, time slips and other documentation submitted to support their affidavits." (App. 1341). The extensive affidavits from counsel for JRC set forth each attorney's normal hourly rate, years of legal experience and education, and the

total hours expended on the litigation all related to the Commissioner's contemptuous conduct commencing in 1993, which was buttressed by the actual unredacted bills of JRC counsel. See Stratos, supra at 323. Counsel for JRC provided the Trial Court with ample evidence to determine the objective worth of the services of the JRC attorneys in regards to this litigation.

First, the Trial Court was warranted in determining that the flat fee of $175 per hour was reasonable. The bulk of the work, as detailed in the documentation supplied by JRC counsel to the Trial Court, was performed by senior litigation associate, Michael Flammia, Esq., and senior litigation partners, Roderick MacLeish, Jr., Esq. and Robert Sherman, Esq., whose normal hourly rates according to the affidavits averaged between $160 per hour and $270 per hour. (App. 587). The hourly rate of $175, therefore, was actually a reduced rate. Moreover, the Trial Court was warranted in finding that $175 per hour was reasonable in light of the experience of these attorneys.[63] For example, Attorney MacLeish and Attorney Sherman have a long history of representing JRC and the JRC Students and Parents in their relationships with the state agencies dating back to the 1985/1986 controversy, and were architects of the Settlement Agreement. (App. 133). Also, $175 per hour was reasonable in light of the fact that the JRC litigation consumed the bulk of the time of JRC counsel for months at a time from 1993 through the trial in 1995, thereby limiting the amount of time counsel could devote to other clients. See Stratos, supra, at 323. Although the Commissioner nitpicks at the rates charged for "routine" tasks, the Trial Court was not required to apply different hourly rates to the various tasks performed by each individual attorney. See Handy v. Penal Institutions Commissioner of Boston, 412 Mass. 759, 767 (1992).

Second, the Trial Court was also warranted in determining that the total time expended by counsel chargeable to JRC, as documented in the affidavits and copies of the unredacted legal bills, was reasonable in light of the difficulty of the case and results obtained. See Stratos, supra at 323. The Trial Court

[63] DMR's prior counsel in this case, David Ferleger, has received fee awards of as high as $250/hour in other similar contempt cases in other jurisdictions. See Helderman v. Pennhurst School & Hosp., 899 F.Supp. 209, 214 (E.D. Pa. 1995).

expressly found that all of the legal work performed on behalf of JRC between 1993 through 1995 in response to both regulatory matters and litigation matters was directly related to the Commissioner's bad faith regulatory activity commencing with his letter of August 3, 1993: "The fees were spent as a direct result of the Defendant's contemptuous conduct over the last two years." (App. 1341). The Trial Court also found that the amount of hours expended by JRC counsel was reasonable in light of the constant bombardment of regulatory edicts and litigation effected by the Commissioner against JRC:

> This Court finds that the enormous expenditure of legal resources by DMR in its contemptuous attack on JRC more than justifies the legal commitment JRC was obligated to make to repel these efforts, The Commissioner himself testified that he authorized an inordinate and unusual amount of legal resources to be devoted to the pursuit of JRC.

(App. 1315).

In fact, the Trial Court in its Findings of Fact found that JRC was forced to spend so much on attorneys fees to respond to the constant regulatory barrage from 1993 to 1995 that the costs drained program resources causing JRC to cut back on staff, including direct-care staff. (App. 1281). Indeed, the litigation was so overwhelming right before trial in 1995 that counsel for JRC was forced to recruit the aid of two associates from the Eckert Seamans Cherin & Mellott's Washington office to respond to the filings of the Commissioner. (App. 563). Despite facing this constant war of attrition by the Commissioner for over two years, JRC counsel was able to stave off the closure of JRC, force the Commissioner to comply with his legal obligations, and expose the corruption of a high ranking public official within a state agency. See Stratos, supra at 323 (results obtained and benefit to public interest considered in fee award).

The findings regarding the fee award also show that the Trial Court exercised its discretion and independent judgment in determining the reasonable fee award:

> The amounts sought by the parties as reimbursement for the attorney's fees they have been forced to expend as a result of the Defendant's conduct over the last two years is fair and reasonable. The court makes this finding, incorporating the affidavits of the above mentioned parties based on the attorney's

> years at the bar, standing in the legal community, the caliber of their work in this case, the difficulty of the matter, and the fact that there was minimal duplication of effort.

(App. 1314, 1341). The Trial Court did not merely accept the rates and time documented by JRC counsel. Rather, the record supports that the Trial Court determined that counsel for JRC demonstrated "billing judgment" and did not include in the fee request any hours for time expended that was excessive, redundant, or otherwise "not properly billed to one's client." Hensley, 461 U.S. at 434, quoting from Copeland v. Marshall, 641 F.2d 889, 891 (D.C. Cir. 1980); see also Handy, 412 Mass. at 766-767.

Furthermore, not only did the Trial Court have the opportunity to observe the abilities of counsel throughout the trial, the Trial Court was intimately involved with the entire litigation from its inception in 1993 and had first hand knowledge of the litigious conduct of the Commissioner and the able response of JRC counsel. See Fontaine v. Ebtec Corp., 415 Mass. at 324; see also Olmstead v. Murphy, 29 Mass. App. Ct. at 665. ("A judge's firsthand knowledge of the work performed . . . is a weighty factor."). The Trial Court was not obliged to identify and justify each hour or "announce what hours [were] permitted for each legal task." New Mexico Citizens for Clean Air v. Espanola Mercantile Co., Inc., 72 F.3d 830, 834 (10th Cir. 1996), quoting from Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1202 (10th Cir. 1986). The Trial Court in its order articulated clearly and concisely that the fee award was reasonable and based upon the entire record and circumstances of the litigation. See Hensley, supra, at 437; see also New Mexico Citizens, supra, 834; Handy, supra, at 766-767. There was no error.[64]

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[64] The Commissioner contends that this court should automatically reverse the trial judge's award of attorney's fees on the grounds that there are no express findings as to the reasonableness of the fee, citing Strand v. Herrick & Smith, 396 Mass. 783 (1986). This statement is not correct. Since the Trial Court concisely articulated the basis for its award in this instance (App. 1314, 1341), Strand, supra, has no application to the present case. Furthermore, the reliance on Strand, supra, is misplaced since the Court there was reviewing the award of attorney's fees to the defendant pursuant to G. L. c. 231, § 6(f), applicable to fees for frivolous lawsuits, which statute expressly requires the judge to include in his order "specific facts and reasons" for his findings, as well as "the method by which the amount of award was computed."

The submissions of the Commissioner's counsel in his own request for attorney's fees undercuts and contradicts all of the Commissioner's arguments against JRC's fee award. First, the argument that JRC attorneys should not be reimbursed for any of their work dating back to 1993 ignores the Trial Court's finding that the Commissioner's contemptuous conduct started in August of 1993 and continued through the trial, and contradicts that the Commissioner's attorneys as well request in their affidavits reimbursement for this entire time period. (App. 1153-1170). The Commissioner also claims that JRC's having a total of eight attorneys (not 18 and 25 as he incorrectly states in his Brief) working on the case was not reasonable. The Commissioner himself had at least nine attorneys who filed affidavits attesting that they had worked on the litigation on his behalf. (App. 1153-1172). The Commissioner also ignores that the bulk of the legal work on behalf of JRC was actually performed by three attorneys. (App. 563). It is no coincidence that the amount of documented time and expenses spent by the Commissioner's attorneys on the contempt litigation only was equal to the amount of time and expenses spent by JRC's lawyers on both the contempt action and in responding to the Commissioner's regulatory activity. In fact, the Trial Court found that counsel for the Commissioner had misrepresented the extent of DMR's constant litigation of this case: "The affidavits filed by Assistant Attorney General Yogman, Assistant Attorney General Wall, and Deputy General Chow-Menzer understate the expenditure of the legal and financial resources by DMR." (App. 1315). Moreover, the Trial Court also found that the number of attorneys devoted to the JRC litigation was reasonable in light of the constant bombardment of litigation effected by the Commissioner. See Statsny v. Southern Bell Telephone & Telegraph Co., 77 F.R.D. 662, 663-64 (W.D. N.C. 1978) (legal work of opposing counsel relevant to reasonableness of fee award).

The Commissioner also criticizes the role of counsel for the Plaintiff class and counsel for the student members of the class, calling into question their necessity and right to compensation. However, the Commissioner conveniently ignores that he supported the motion brought by a group of intervenors that would have tripled the amount of attorneys representing the JRC students. This

contradicts the current position of the Commissioner that counsel for the students and class were not necessary and merely along for the ride.

B. The Trial Court Did Not Err In Denying Review Of Counsel's Contemporaneous Time Records

As discussed, counsel for JRC filed and served the Commissioner with lengthy affidavits setting forth in detail all of their legal work performed on behalf of JRC based on a review of contemporaneous time records. This Court has approved, and even suggested, the use of affidavits to prove fee awards: "In the interest of economy of time and expense, the litigants may agree to offer. . . affidavits as to this issue, perhaps including, with the approval of the judge, affidavits of the counsel of record." Stratos, 387 Mass. at 323 n.10; see also Stowe, 417 Mass. at 201 n. 3 (plaintiffs submissions for attorney's fee included 18 affidavits, including affidavits of counsel); Torres, 391 Mass. at 15 (claim for attorney's fees presented on affidavits of three counsel who worked on behalf of plaintiff).

Likewise, in Handy v. Penal Institutions Commissioner of Boston, supra, this Court rejected objections regarding a fee application by the defendants similar to those raised by the Commissioner. There, the Court held that an affidavit of one counsel for the plaintiff attesting to the fact that the compilation of time devoted to the case by attorneys in his firm was based upon a review of contemporaneous time records was a proper basis for assessing a reasonable fee award. 412 Mass. at 768. The Court, reviewing federal decisions, rejected the argument that the fee award was latently improper because the actual time records were not produced for the court: "It is not the law that a request for attorney's fees must be entirely denied when a fee applicant does not submit contemporaneous time records to the court." Id. at 767. Therefore, the affidavits filed by counsel for JRC are not, as the Commissioner contends, "patently insufficient" to support the fee award in this case. See also Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988), afm'd. sub. nom. Commissioner, INS v. Jean, 496 U.S. 154 (1990) ("contemporaneous time records are not indispensable where there is other reliable evidence to support a claim for

attorney's fees"). Contrast Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 527 (1st Cir. 1991) ("application was bereft of contemporaneous time records or any other suitable documentation").

Indeed, the Commissioner himself made an application for attorney's fees on his counterclaim, knowing that his own counsel did not keep contemporaneous time records. The Commissioner's counsel could only provide sketchy affidavits broadly outlining the total hours spent on the case without any additional support. (App. 1153-1172). It is wholly inconsistent for the Commissioner to claim that affidavits do not provide a proper means for determining a fee when his own application was based solely on affidavits. (S.A. 74). The Commissioner makes no showing as to why his review of the unredacted bills of JRC counsel was required.

It is the Trial Court, not the Commissioner, which had the duty of assessing the reasonableness of the fee. The quotation by Chief Justice Berger in his concurring opinion in Hensley v. Eckerhart, supra cited by the Commissioner in his Brief at page 171 does not relate whatsoever to providing an adversary with the time records in a fee application. Rather, the quotation was merely a recitation of the Chief Justice's view on what materials he believed should be presented to a court for basing its initial estimate of the value of a lawyer's services. The Commissioner omits the continuation of the quote:

> As a result, the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.

461 U.S. at 441 (emphasis added). The other cases relied upon by the Commissioner likewise do not speak to an opposing party's right to review the time sheets or billing records of a party claiming attorney's fees in situations comparable to this case. Moreover, since this Court has expressly held that a party is not mandated to submit contemporaneous time records to the court in order to obtain a fee award, see Handy, supra at 767-68, it is illogical that an opponent would have an absolute right to access time records.

Finally, the Commissioner contends that the Trial Court erred in engaging in an in camera inspection of the records and subsequently issuing an

order impounding the contemporaneous time records of JRC counsel. The Trial Court determined that an in camera review of the time records was "necessary and appropriate in order to inspect and consider the confidential billing information under the circumstances of this litigation where attorney-client privilege applies." (App. 1201). The decision to review the bills, in camera, in order to preserve the attorney-client privileged material is consistent with holdings by other courts in similar situations. See Licensing Corp. of America v. National Hockey League Player's Association, 580 N.Y.S.2d 128, 129 (1992); see also Federal Trade Commissioner v. Cambridge Exchange Ltd., Inc., 845 F. Supp. 872, 874 (S.D. Fla. 1993) (information regarding attorney's fees is privileged if it would reveal other privileged information such as trial strategy or the nature of legal services performed); Gonzales Trespo v. Wella, 774 F. Supp. 688, 690 (D. P.R. 1991) ("courts have routinely rejected demands to reduce bills for legal services that reveal the nature of the work performed").

In fact, in the case of Real v. Continental Group, Inc., 116 F.R.D. 211 (N.D. Cal. 1986), the court, faced with an almost identical request as here, denied the plaintiff's attorney the ability to review itemized bills of counsel for the defendant which were sought for the purpose of proving the reasonableness of the plaintiff's demand for attorney's fees following a successful employment discrimination case. Id. at 213. There, the court held that, the actual itemized bills for legal services performed on behalf of the defendant were privileged and not available for inspection because of the attorney-client information contained in the narratives of such bills, although information regarding the number of hours billed and total fees paid was not protected. Id. at 214-15.

In the present case, the narrative portion of the unredacted legal bills of counsel for JRC were highly detailed and, if divulged to counsel for the defense, would provide insight into legal strategy, the work product of counsel, and communications between lawyer and client. (App. 1201). JRC properly divulged adequate information regarding the numbers of hours billed and the total amount of the fee charged through the detailed affidavits compiled upon a review of the bills, as well as supplying copies of the redacted version of the bills omitting the narrative portion.

Once the Trial Court determined that the unredacted bills should be reviewed in camera, it was necessary for the Trial Court to impound the bills, otherwise the purpose of the in camera inspection to preserve the attorney-client privilege would have been frustrated. Even though the Uniform Rules of Impoundment Procedure were in effect, the Trial Court had the inherent power to enter an order sua sponte, impounding the documents contained in its files. See Newspaper of New England v. Clerk Magistrate of the Ware Division of the District Court, 403 Mass. 628, 631-633 (1988) (sua sponte order of impoundment upheld despite application of Uniform Rules). It is well-settled that a trial court has the inherent power "to impound its files in a case and deny public inspection of them when justice so requires." George W. Prescott Publishing Co. v. Register of Probate of Norfolk County, 395 Mass. 274, 277 (1985), quoting from Sanford v. Boston Herald-Traveller Corp., 318 Mass. 156, 158 (1945); see also O'Harvey Newspapers, Inc. v. Appeals Court, 379 Mass. 539, 546 (1977) (impoundment within sound discretion of trial judge). In Newspaper of New England, supra, this Court held that a judge must determine whether good cause exists to order impoundment, and must tailor the scope of the order so that it does not exceed the need for impoundment. Id. at 631-633 (citations omitted).

The Trial Court's order of impoundment in this case was narrowly tailored to achieve the express goal of protecting the confidential attorney-client privileged material in the contemporaneous time records. Of the more than 400 exhibits submitted during the trial, the Trial Court ordered a mere six of those exhibits impounded. The Trial Court's narrowly tailored order is reasonable in light of the information sought to be protected, and in light of the circumstances of this case, in accordance with Uniform Rules on Impoundment Procedure.

Moreover, the Commissioner has shown no compelling need for the unredacted bills which outweighs the necessity for impounding such bills to protect the attorney-client privilege. See Newspaper of New England, 403 Mass. at 631-633. His only purported need for a review of the bills is to attack the reasonableness of the fee award on appeal. However, the Trial Court's clear and concise basis for the award as articulated in the Judgment and Order as well as

the materials submitted by JRC to the Commissioner, provide the Commissioner with an adequate basis for challenging the reasonableness of the award without requiring the need to challenge specific entries in the bills.[65] Cf. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 719-20 (3rd Cir. 1989) (party challenging fee award need not point to each individual excessive entry).

The Commissioner has not attempted to explain why the total amount of time JRC's attorneys spent responding to his unlawful regulatory actions and prosecuting the contempt action should be less than the total time spent by the Commissioner's eight attorneys on the litigation only. In addition, it is difficult to understand how the Commissioner can claim an overwhelming dire necessity for the unredacted bills when he himself applied for a fee award without ever requiring his own counsel to maintain contemporaneous time records. Finally, the impounded exhibits are always available for this Court's review, if it deems them necessary, pursuant to Mass. R. App. P. 9(b) and 18(a). See also Iverson v. Board of Appeals of Dedham, 14 Mass. App. Ct. 951, 951 (1982). There is no prejudice and no reason to vacate any part of the attorney's fee award as ordered by the Trial Court in response to the Commissioner's contemptuous and corrupt course of conduct since August 6, 1993.

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[65] In fact, despite having all of this material at his disposal, the Commissioner never made any challenge in the Trial Court to any portion of the fee award as being unreasonable. Federal courts have deemed any ground attacking the reasonableness of a fee award not raised in the district court in the first instance to be waived and unavailable as a grounds for attacking the award on appeal. See New Mexico Citizens, 72 F.3d at 835 n. 3. Contrary to the implication of the assertion in footnote 238 of his Brief, the Commissioner never challenged the reasonableness of any of portion of the fee award in his response to the Second Post-Trial Order of the Trial Court, but rather challenged only the validity of JRC's decision not to make time sheets available for inspection. (S.A. 74). Even following the trial, the Commissioner moved to lift the impoundment order but never attacked the reasonableness of any portion of the fee award or requested the Trial Court to reduce the award.

VI. THIS COURT SHOULD AWARD JRC ITS APPELLATE ATTORNEY'S FEES FOR HAVING TO DEFEND THIS FRIVOLOUS APPEAL FROM THE JUDGMENT AND ORDER OF CONTEMPT

JRC requests this Court to impose double costs and attorney's fees on the Commissioner, DMR, and their counsel pursuant to Mass. R. App. P. 25 and G. L. c. 211, § 10, for having to respond to this frivolous appeal. See Avery v. Steele, 414 Mass. 450, 45 (1993); Symmons v. O'Keefe, 419 Mass. 288, 303 (1995). "An appeal is frivolous when the law is well settled [and] when there can be no reasonable expectation of a reversal." Symmons, 419 Mass. at 303 (internal quotations and citations omitted). The Commissioner asserts at page 56 of his Brief that this appeal raises "novel and complex" issues regarding the relationship between DMR's regulatory authority and the power of the Trial Court. This is not the case. This case only involves an express order of the Trial Court embodied in the Settlement Agreement, and the Commissioner's blatant contempt of that order by flouting his regulatory authority and engaging in corrupt tactics. There may be no law greater settled than that a public official can not violate an order of a court with impunity. The "novel issue of law defense" is as much a pretext as is the Commissioner's contrived argument before this Court that the provisions of the Settlement Agreement were vague and ambiguous, and the argument before the Trial Court that he was not a party to the Settlement Agreement. The Trial Court, after hearing live testimony for three weeks, sanctioned the Commissioner and his attorneys for contrived explanations of his conduct which were described as "sophistry," "Alice in Wonderland," and "a tissue of fabrications." This Court should view his appellate arguments in the same dubious light.

Much of the same conduct of the Commissioner and his attorneys is carried over into his appellate argument. The Commissioner has abused the appellate process by filing a 178 page Brief, consisting of 247 footnotes,

highlighting every picayune occurrence over a three week trial.[66] The appeal has been a perpetuation of the same type of scorched earth strategy aimed at exhausting JRC's financial resources which the Commissioner and his staff have pursued against JRC since August of 1993. It seems incredible that the Commissioner could assert that every one of the Trial Court's 303 express findings of fact, are clearly erroneous. As JRC has set forth in its clearly erroneous argument, many of the factual arguments are based on factual snippets of testimony, and includes taking the evidence out of context, misrepresenting many of the facts, and distorting the testimony and the factual findings of the Trial court without proper substantiation in the record. See Avery v. Steele, 414 Mass. at 456, quoting from Romala Corp. v. United States, 927 F.2d 1219, 1224 (Fed. Cir. 1991). The Trial Court's factual findings are consistently distorted and sensationalized by the Commissioner, who then attacks the distortions as "clearly erroneous". Perhaps the most telling example of such distortion and misrepresentation is on page 152 of the Commissioner's Brief where he states, that the Trial Court found the Commissioner and his staff "to have aggressively monitored and regulated BRI's compliance with state regulations." Even if the Commissioner's Brief had any merit, which it does not, "[i]nappropriate argument and unsubstantiated statements in a brief may infect an otherwise meritorious appeal so pervasively to make it frivolous." Avery, supra, at 456. Likewise, as JRC has established throughout its argument section, the Commissioner misapplies legal principles and cites out of context many of the cases on which he relies. Such a continued pattern of miscitation of authority can only be attributed to an intentional attempt to deceive this Court, just as the Commissioner perpetrated below. Where, as here, "appellate tactics. . . consist [ ] almost entirely of irrelevant and misleading arguments as well as outright misrepresentation, [such tactics] exceed all permissible bounds of zealous

[66] The Commissioner exacerbated his appellate intransigence in his attempt to stay the judgment pending appeal on five occasions, including a petition for extraordinary relief pursuant to G. L. c. 211, § 3 and an appeal from denial of such relief to the full panel pursuant to SJC Rule 2:21. JRC seeks an award of its fees occurred in these appeals as well.

advocacy and have been repeatedly condemned." Avery, supra, at 456, quoting from Romala, supra, at 1224.

This case represents an egregious example of appellate misconduct for which sanctions are highly appropriate. See Symmons, supra, at 303 (citations omitted). JRC should be compensated for having to respond to 178 pages of "sophistry," for being forced to recreate an accurate account of the findings to counter the distorted view of the facts and trial testimony by reviewing fifteen volumes of trial transcript and hundreds of exhibits, and for having to retry this case on appeal. Furthermore, not only is JRC faced with defending this frivolous appeal, this Court is burdened with having to exhaust judicial resources to review every case as well as every factual citation to the record since the Commissioner has misrepresented the findings and conclusions of the Trial Court. "By forcing the court to expand extra time and effort in carefully double-checking every reference to the record and opposing counsel's briefs, lest [this court] be misled, such argumentation threatens the integrity of the judicial process and increases the waste of resources." Avery, supra, at 456, quoting from, Romala, supra, at 1225. The Commissioner and his attorneys have carried into the appellate realm the same conduct which caused the Trial Court to make findings of bad faith and corruption, and compelled the Trial Court to make references to the district attorney for witness perjury and to the Board of Bar Overseers for attorney misconduct. This Court should not allow the egregious misconduct of the Commissioner, DMR, and their attorneys in this appeal to go unpunished.

VII. SJC-06956 AND SJC-07045 - APPEAL FROM THE INTERLOCUTORY ORDERS

A. SJC-06956 Has Been Rendered Moot By Entry Of Final Judgment

It is well-settled that a preliminary injunction does not survive the entry of final judgment in the action in which the injunctive relief was originally granted:

> When a final decree is entered, a preliminary injunction has served its purpose. If the Plaintiff is then deemed entitled to an injunction, the final decree can provide it... [A] preliminary injunction does not survive the entry of a final decree [which becomes effective as soon as entered], whether relief is thereby granted or denied.

Carlson v. Lawrence H. Oppenheim Co., 334 Mass. 462, 465 (1956), quoting from Lowell Bar Association v. Loeb, 315 Mass. 176, 189-190 (1943); see also, In The Matter Of McKnight, 406 Mass. at 792 n.4 (preliminary injunction remains in effect only until a final judgment is rendered). Thus, an appellate court will normally refuse to undertake any review of a preliminary injunction once final judgment has entered because all issues concerning the propriety of the preliminary injunction are extinguished and rendered moot by the entry of a final order. See Mahony v. Board of Assessors of Watertown, 362 Mass. 210, 216 n.3 (1972); see also 8A Smith & Zobel, Rules Practice §65.10, p.92 (1984) (full determination of case by Trial Court renders appellate review of preliminary injunction moot).

Even if the Trial Court had not expressly dissolved the status quo preliminary injunction in its Judgment and Order, (App. 1342), the entry of final judgment in the underlying contempt proceeding on October 6, 1995, immediately and automatically extinguished the preliminary injunction as a matter of law leaving nothing for this Court to decide regarding to the propriety of preliminary injunctive relief. In practical terms, this Court cannot grant any relief in either vacating or affirming the preliminary injunction which will not be subsumed in the decision on the appeal on the merits from the contempt judgment. The entry of final judgment expressly and by operation of law, has

rendered an appeal from the preliminary judgment moot and SJC-06956 does not present any live issues for this Court to decide.

B. SJC-07045, the Modified Interlocutory Orders of the Trial Court Should Be Vacated

1. The modified preliminary injunction is moot

The order of the Single Justice of the Appeals Court in 95-J-300 is merely a modified preliminary injunction. There is no question that, as already discussed in regards to SJC-06956, had the Single Justice not modified the status quo preliminary injunction, it would have been rendered moot by the entry of the final judgment. Thus, it logically follows that the entry of final judgment in the underlying contempt proceeding automatically extinguished the modified version of the preliminary injunction as a matter of law leaving nothing for this Court to decide in regards to the first prong of the consolidated appeal.

2. The modified order on the global motion is vacated by the final judgment

The Appeals Court Single Justice expressly incorporated the order on the modified preliminary injunction in 95-J-300 into his order partially vacating the denial of the Global Motion in 95-J-362. (S.A. 135). Although the Single Justice of the Appeals Court issued no opinion and did not give JRC an opportunity to respond to the Commissioner's petition, both orders on their face show that they were both based upon and connected with the modification of the original preliminary injunction. Thus, the order modifying the Global Motion was likewise vacated when the underlying preliminary injunction, as subsequently modified by the Single Justice, was extinguished upon entry of final judgment.

Furthermore, the Single Justice in modifying the Global Motion approved and upheld condition 96-1 in the Commissioner's January 20 Letter, by ordering the four specific Level III aversive therapies decertified in the letter terminated and removed from all treatment plans. (S.A. 135). Although the Trial Court did not revoke any of the outstanding certification decisions by the Commissioner in issuing its judgment, the Trial Court ordered the receiver to review all such

regulatory decisions imposed on JRC by the Commissioner to ensure that such regulation complied with the Settlement Agreement and the law, and to revoke any that did not. (App. 1343-44). Allowing the order of the Single Justice, which upholds the Commissioner's decision terminating the four treatments, to stand would result in an irreconcilable conflict with the express relief granted in the Judgment and Order. The inconsistency is exemplified by the fact that the receiver has since rescinded the January 20 Letter in whole, yet JRC is unable to apply any of the four court-approved Level III therapies in condition 96-1 because the receiver has deferred to the outstanding order of the Single Justice. (S.A. 81). The untenable result is that an interlocutory order controls where a final judgment exists, and that the full relief of the Judgment and Order cannot be enjoyed because of the modification of the Global Motion. Likewise, the order of the Single Justice upholding the Commissioner's termination of these four treatments continues to violate Part A of the Settlement Agreement, which requires that the Trial Court, not the Commissioner, make treatment decisions. The modified Global Motion can no longer stand in light of the entry of final judgment, the relief granted and the terms of the Settlement Agreement, must be vacated by this Court.

CONCLUSION

For the reasons set forth above, the Judge Rotenberg Educational Center, Inc, requests this Honorable Court to:

1. Affirm the judgment of contempt and relief granted by the Trial Court;

2. Award them costs and appellate attorneys' fees;

3. Dismiss with prejudice the appeal from the preliminary injunction; and

4. Vacate the interlocutory orders of the Trial Court as modified by a Single Justice of the Appeals Court.

Respectfully submitted,

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