COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BRISTOL, ss.

No. SJC-06990

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

Plaintiff - Appellee

and

JANINE CASORIA, ET AL.

Proposed Intervenors - Appellants

V.

PHILIP CAMPBELL, IN HIS CAPACITY AS COMMISSIONER
OF THE DEPARTMENT OF MENTAL RETARDATION

ON DIRECT APPELLATE REVIEW
FROM AN ORDER OF THE PROBATE AND FAMILY AND SUPERIOR COURTS
BRISTOL COUNTY

Brief of Appellee, The Class of All Students at the Judge Rotenberg Educational Center, Inc., Their Parents and Guardians

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STATEMENT OF ISSUES

1. Whether the Trial Court abused its discretion by denying the appellant's motion to be appointed, pursuant to Mass. R. Civ. Pro. 17(b), as next friend of the Student members of the Plaintiff class when the interests of those Students was already represented by Court-appointed Guardians and by independenT counsel?

2. Whether the Trial Court abused its discretion by denying the appellant's motion to intervene, pursuant to Mass. R. Civ. Pro. 24, on behalf the Student members of the Plaintiff Class when Students were already members of the Plaintiff class and the interests of the Student members of the class were already adequately represented?

STATEMENT OF THE CASE

On September 3, 1993, a verified complaint for contempt was filed on behalf of the Plaintiff, Behavior Research Institute[1] and the Class of all Students at the Behavior Research Institute and their Parents and Guardians (hereinafter referred to as "the Class") against Philip Campbell, Commissioner of the Department of Mental Retardation (hereinafter referred to as "the Commissioner"). App. 19.[2] The complaint sought to enforce the terms of a settlement agreement (hereinafter referred to as "the Settlement Agreement") which resolved litigation brought by BRI and the Class against Mary Kay Leonard, director of the Massachusetts Office for Children. App. 241. The Complaint alleged *inter alia* that the Commissioner was attempting, in bad faith and in violation of the Settlement Agreement, to terminate the BRI program. App.72.

On September 15, 1993, attorneys Marc Perlin and Max Volterra, who had represented the Students members of the Class in the previous litigation and who had negotiated and executed the Settlement Agreement on behalf of the Students, filed motions to withdraw as appointed counsel to the Student members of the Class. App. 64, 71. The Honorable Elizabeth O'Neill LaStaiti granted their motion on November 8, 1993 and appointed attorneys C. Michelle Dorsey and Paul A. Cataldo to replace Attorneys Perlin and Volterra. App.74.

The Appellants (hereinafter referred to as "the Guardianship Counsel") are a group of nine court-appointed attorneys who represent the Students in individual substituted judgment and guardianship proceedings. App. 137, n.1. On March 31, 1994, they filed a motion, pursuant to Mass. R. Civ. P. 17(b) and G.L. c.201§37,

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[1] The Behavior Research Institute subsequently changed its name to the Judge Rotenberg Educational Center, Inc. App. 241. For purposes of convenience, the initials "BRI" will be used throughout the brief to refer to the Behavior Research Institute.

to be appointed as next friend to the individual Students. App. 137. On the same day, claiming to act as the next friend of the Students, the Guardianship Counsel filed a motion to intervene in this contempt action. App. 79.

After a hearing on April 5, 1995, Judge LaStaiti denied both motions on May 18, 1995 . App. 241-244.

On May 25, 1995, the Guardianship Counsel filed a notice of appeal of the denial of both motions. App. 245. On June 5, 1995, the Guardianship Counsel's request for relief from Judge LaStaiti's ruling was denied by a Single Justice of the Appeals Court (Perretta, J.). App. 248-249. On June 21, 1995, the Guardianship Counsel's request for relief from that order was denied by a Single Justice of this Court (Abrams, J.). App. 250. This Court granted direct appellate review on September 10, 1995.

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[2] References to the Appendix are set forth as "App. ___". References to the Supplemental Appendix filed by the Class, which includes additional documents that were before the lower court, are set forth as "S.A.___".

STATEMENT OF FACTS

On September 26, 1985, the Massachusetts Office For Children (hereinafter referred to as "the OFC") undertook a series of actions that precipitated the extended controversy of which this appeal is but a part. On that date the OFC issued an order to show cause why the license of BRI should not be "suspended, revoked, or otherwise sanctioned for various violations of O.F.C.'s regulations". App. 51. The OFC also ordered the abrupt termination of treatment programs, which included so-called aversive treatments, for six BRI Students. S.A. 2-3 ¶¶ 1, 3. The Students at BRI are "a select, special-needs class of desperately afflicted students, many of whom suffer from autism, brain damage, psychosis, developmental disability, mental retardation and severe behavioral disorder, and all of whom are grievously mentally ill". S.A. 1. Each Student has a Court-appointed Guardian, who is in most cases the Parent of the Student. App. 88-103, 241. As result of the termination of treatment, the six Students regressed into self-abusive behavior that, in some cases, was life threatening. S.A. 2-3 ¶¶ 1, 3.

The OFC's actions led to a "multitude of lawsuits and administrative proceedings" involving the OFC, BRI, the Students and their families. App. 51.[3] Civil litigation was commenced in the Bristol County Probate and Family Court by BRI and the families of the students. S.A. 2 ¶¶ 1,3. On April 29, 1986, the Honorable Ernest J. Rotenberg appointed attorneys Marc Perlin and Max Volterra to represent "the potential class of all students at the Behavior Research Institute, Inc.". App. 71.

On June 4, 1986, the Honorable Ernest J. Rotenberg preliminarily certified a class of students and their parents and guardians in this proceeding for purposes

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[3] The multitude of lawsuits had its genesis in a petition filed in the Probate Court by the parents of a student whose treatment had been terminated, Janine C., and BRI in December of 1985. S.A. 2 ¶ 1. Janine C. is still a student at the JRC. App. 89 ¶ 8.

of issuing a preliminary injunction against the OFC. App. 41-43. The class was represented by Robert A. Sherman, Esquire. App. 47-48. In his order, Judge Rotenberg held that:

> The parties are too numerous to proceed individually to obtain the preliminary relief which is so desperately needed...;
>
> The students were, as a class, threatened with the deprivation of treatment, and are now preliminarily certified as a class in order to maintain their treatment.
>
> The questions of law and fact, as they directly relate to this interlocutory ruling, are common to students and parents alike. Their claims are the same; that is, their desperate need for maintenance of their current status while further action is contemplated and taken.;
>
> It is also clear and irrefutable to this Court that the parents and/or guardians should be joined preliminarily as members of the this class as they speak for their children who cannot speak for themselves; and their concerns are identical, the preservation of the lives of these disadvantaged human beings".

App. 42. In his Findings In Support Of Preliminary Injunctive Relief, Judge Rotenberg found the orders terminating treatment issued by the OFC were based on no medical foundation and constituted treatment decisions that played "Russian Roulette" with the lives of the Students. S.A. 27, ¶ 82. Judge Rotenberg found that the executive director of the OFC had acted in bad faith during the course of litigation that followed the September 26 orders. Id. at ¶ 84.

On December 12, 1986, Judge Rotenberg certified a Plaintiff Class in this action consisting of the students at the Behavior Research Institute, their parents and guardians. App. 49-50. There was no appeal of the class certification. App. 243.

On the same day, the parties to the proceeding filed a Settlement Agreement to resolve the issues outstanding among the parties. App. 51-64. The Settlement Agreement was executed on behalf of the Class Of All Students at BRI, Their

Parents and Guardians by Attorney Sherman. App. 64. Attorney Volterra and Attorney Perlin participated in the negotiations that led to the Settlement Agreement and executed the document on behalf of the students. App. 71, 64. The Settlement Agreement, *inter alia,* aversive procedures would be used at BRI when "part of a court-ordered 'substituted judgment' treatment plan" App. 52. .

Judge Rotenberg approved the Settlement Agreement on January 6, 1987. App. 65-70. In his Findings Of Fact And Conclusions Of Law In Support Of Approval Of Settlement Agreement Pursuant To Mass. R. Civ. P. 23(c), Judge Rotenberg rejected contentions filed on behalf of the families of two students that the Settlement Agreement failed to guarantee that the treatment of the Students would be safe, effective and professionally acceptable and that the substituted judgment proceedings were inadequate to secure the rights of the individual Students. App. 67-68, ¶¶ 7, 9.

In addition, Judge Rotenberg noted that two class members were represented by Steven V. Schwartz, Esquire. App. 67, ¶ 5. Judge Rotenberg stated, with respect to the objection of Robert Collins, that Attorney Schwartz "failed to inform the Court in his written objections that his client no longer attends BRI", which rendered his objections moot and that in previous hearings, Attorney Schwartz had "filed an appearance on behalf of various organizations that advocated the closure of BRI, a position which differed markedly from that of the current objectors". App. 68, ¶¶ 10-11. Judge Rotenberg criticized Attorney Schwartz, stating that:

> This Court looks askance at the objections filed at the eleventh hour in this case which relate primarily to factual matters earlier fully and fairly litigated and determined by this Court. Moreover, the Court questions the role of counsel for the objectors who had earlier propounded a point of view contrary if not directly adverse to the persons whom he now purports to represent.

App. 69.

On September 3, 1993, BRI filed a Complaint for Contempt seeking to enforce the terms of the Settlement Agreement. App. 241. The Complaint and subsequent amendments alleged that DMR was acting in bad faith. App. 72.

On September 15, 1993, Attorneys Perlin and Volterra filed motions to withdraw as counsel to the Student members of the Class. App.72. Judge LaStaiti granted their motions on November 8, 1993. App. 71-74. Judge LaStaiti stated the Court remained "acutely aware of the occurrences of bad faith demonstrated by agencies and officials of the Commonwealth against BRI, parents, and wards", making an explicit reference to Judge Rotenberg's Findings of June 4, 1986. App. 73-74. Judge LaStaiti found that:

> This class of individuals who had previously been represented by Attorneys Perlin and Volterra continue to have a most vital interest in the process and outcome of any litigation that occurs in the above referenced matter, given the vulnerability that the class suffers due to severe developmental disabilities and/or mental illness. *This court must remain vigilant to ensure that this class is represented by counsel who are as independent and objective from the influence of any state agency.*

App. 74, ¶ 14(c) (emphasis supplied). Accordingly, the Court appointed Paul A. Cataldo, Esquire and C. Michelle Dorsey, Esquire to replace Attorneys Perlin and Volterra as "successor counsel to the class of students". App. 74, ¶ 15. Eugene Curry, Esquire filed his notice of appearance on January 6, 1994. S.A. 29-30.

Prior to being represented by Eugene Curry, the interests of the Class were represented by Kenneth V. Kurnos, Esquire. App. 25, 239.[4]

On January 28, 1994, Attorneys Dorsey and Cataldo filed a motion for emergency relief on behalf of the Students. App. 24. The motion, which was allowed by the Court, sought an order requiring DMR to provide out-of-state funding agencies with accurate information concerning the status of BRI's certification. App. 154.

On March 31, 1994, the Guardianship Counsel filed their motion to be appointed as next friend to the Students and to intervene on behalf of the Students. App. 79, 137. After a hearing on April 5, 1995, Judge LaStaiti denied both motions. App. 241-244. In so doing, Judge LaStaiti concluded:

> 1. that "The Students are adequately represented by their Parents or Guardians as Next Friend.";
>
> 2. that "The Students are members of a Plaintiff Class in the issue of Contempt before this Court.";
>
> 3. that "The Students are represented by separate counsel, namely Attorney Cataldo and Attorney Dorsey, thereby protecting the students from any potential conflict with the interests of the Parents and Guardians, who are also members of the class."; and
>
> 4. that "Each student has an independent court appointed counsel to represent them in the guardianship and substituted judgment proceedings, which proceedings are not part of the Contempt Action".

App. 244. With respect to the representation of the Plaintiff Class, Judge LaStaiti ruled that "[t]he entire class is adequately represented by Eugene Curry, Esquire". App. 243.

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[4] Attorney Kurnos is a member of Gaffin & Krattenmaker. App. 239. Attorney Sherman was a member of the same firm at the time he represented the Class. App. 48.

ARGUMENT

I. JUDGE LASTAITI PROPERLY EXERCISED HER DISCRETION IN DENYING THE MOTION OF THE GUARDIANSHIP COUNSEL TO BE APPOINTED AS NEXT FRIEND TO THE INDIVIDUAL STUDENTS.

As even the Guardianship Counsel must concede[5], the appointment of a next friend is a decision that rests within the sound discretion of the trial court and is a decision that will not be disturbed unless there has been an abuse of authority. See N.O. v. Callahan, 110 F.R.D. 637, 648 (D. Mass. 1986) (citations omitted). Courts are reluctant to appoint a next friend or guardian where an infant or incompetent person is already represented by someone that is considered appropriate. Id. at 649. This reluctance is entirely consistent with the plain language of Rule 17(b) of the Massachusetts Rules of Civil Procedure, which governs the appointment of a next friend or guardian ad litem for an infant or incompetent person. Rule 17(b) states that:

> Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, *the representative may sue or defend on behalf of the infant or incompetent person.* If an infant or incompetent person does not have a duly appointed representative, he may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or an incompetent person *not otherwise represented* in an action or make such other order as it deems proper for the protection of the infant or incompetent person.(emphasis supplied).

Thus, the plain language of Rule 17(b) contemplates that when, as is true in the instant case, an incompetent individual is represented by a guardian, that guardian will represent the incompetent person in litigation.

The Parents and Guardians have represented the interests of the Students are since the inception of this litigation over ten years ago. S.A. 2; App. 42. Of

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[5] See Guardianship Counsel Brief at 41-42.

course, the court's inquiry does not end with the determination that an incompetent person is represented in an action. In the face of an allegation of conflict of interest between the guardian and the incompetent person, the court has an obligation to assure itself that the interests of the ward are properly represented. See Adelman On Behalf Of Adelman v. Graves, 747 F.2d 986, 988 (5th Cir. 1984). In the instant case, Judge LaStaiti has done so and has found that the interests of the students are adequately represented. Specifically, the Court made the following findings:

> -Each individual student has a Court appointed Guardian, who in most cases is a Parent.
>
> -At all times, the Parents are aware of BRI's program and have demonstrated a strong commitment to the welfare and best interests of the Students.
>
> -Since the Parents and Guardians are already adequately represented the Students as Next Friend, it would be redundant and wasteful to allow an appointment of a second Next Friend for each individual student.

App. 241-242. It is significant that the Court made its' finding concerning the strong commitment of the Parents to the welfare and best interests of the Students on May 18, 1995. App. 244. By that time, Judge LaStaiti had over twenty months to observe the nature of the representation of the Students by their Parents and Guardians in this proceeding. As is evident from the docket in this proceeding, during this period of time, the Court had ample opportunity to assess the nature of the representation by the Parents and Guardians of the Students. App. 19-38.

Rather than provide factual support for their contention that a conflict of interest exists between the court appointed Guardians and the Students at the BRI, the Guardianship Counsel rely on the bald assertion that differences may exist between the Guardians and the Students concerning consent to aversive treatment to justify their appointment as next friend. Perhaps if consent to aversive treatment was an issue in this case (and if there was some evidence supporting the existence

of the claimed difference), the Guardianship Counsel's argument would have merit. However, Judge LaStaiti understood what the Guardianship Counsel fail to understand (or simply refuse to concede). The question of whether an individual student would consent to aversive treatment, or to any other treatment, is irrelevant to this case and is decided in the individual substituted judgment hearings conducted for each individual student. App. 241. In denying the Guardianship Counsel's motion to be appointed as Next Friend, the Court stated that:

> The matter before this Court is a Complaint for Contempt filed by BRI against the Department of Mental Retardation (DMR) and concerns enforcement of the Settlement Agreement.
>
> Treatment Issues are separately addressed in the Substituted Judgment Proceedings in the individual Guardianship Case.
>
> Treatment Decisions, with reference to aversive therapies, particularly Level III aversives (including the GED) are strenuously litigated in the Guardianship proceedings and such decisions will not be part of the Contempt Action brought by BRI against DMR.

App. 241.

The Students, Parents, and Guardians have a direct and shared interest in the contempt action: avoiding the precipitous termination of the BRI program. Indeed, the Guardianship Counsel acknowledge the importance of this interest when they claim that their decision to file their motion to intervene was triggered by their realization that there was a risk of decertification of the BRI program.[6] The brief submitted by Guardianship Counsel is remarkable in that it devoid of any basis whatsoever for concluding that the interests of the Students and the Parents and Guardians conflict with respect to the question of the Commissioner's compliance, or lack thereof, to the terms of the Settlement Agreement. Accordingly, the Guardianship Counsel have provided no basis for reversing the judgment of Judge LaStaiti.

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[6] Guardianship Counsel Brief at 12.

The selection of by the Guardianship Counsel of Steven Schwartz to represent them in this proceeding makes a mockery of their stated concern for protecting the Students from a conflict of interest and confirms the wisdom of Judge LaStaiti in denying the Guardianship Counsel motion. In contrast the Parents and Guardians, Mr. Schwartz has a documented conflict of interest with the Students at the BRI. Mr. Schwartz is the very same attorney who filed objections to the approval of the Settlement Agreement in 1987. App. 66-67. In rejecting those objections, Judge Rotenberg criticized Mr. Schwartz for failing to disclose that one of the students he represented no longer attended BRI, which made the objections moot. App. 68. More importantly, for purposes of the matter before this Court, Judge Rotenberg found that the interests of Mr. Schwartz were in conflict with those of his clients. Judge Rotenberg stated that :

> In previous hearings before this Court, counsel for the objectors filed an appearance on behalf of various organizations that advocated the closure of BRI and termination of its program, a position which differed markedly from that of the current objectors.

App. 68. Judge Rotenberg further observed that:

> Moreover, the Court questions the role of counsel for the objectors who had earlier propounded a point of view contrary if not directly adverse to the persons whom he now purports to represent.

App. 69. Thus, Mr. Schwartz is on record as having advocated termination of the treatment program offered by BRI and as having opposed acceptance of the Settlement Agreement.

Since the Plaintiffs in the contempt action have invoked the protections embodied in the Settlement Agreement (which Mr. Schwartz opposed) in order to prevent the termination of the treatment option offered by the BRI program (which Mr. Schwartz has advocated), it is difficult to imagine a more direct conflict between the interests of the Students and Mr. Schwartz. In light of this conflict, Judge LaStaiti denial of the Guardianship Counsel's motion was well-founded.

See Lenhard v. Wolf, 443 U.S. 1306, 1312 (1979) (stating that "[h]owever worthy and high-minded the motives of next friends, they inevitably run the risk of making the [ward] a pawn to be manipulated on a chess board larger than his own".).

Even if the Guardianship Counsel had identified a potential conflict of interest between the Parents and Guardians and the Students, Rule 17(b) does not limit the court's options to appointment of a guardian ad litem or next friend. As an alternative, the court has the authority to "make such other order as it deems proper for the protection of the infant or incompetent person". Mass. R. Civ. Pro. 17(b). In this case, the court has done so, having appointed Attorneys Dorsey and Cataldo as an additional protection for the rights of the Students. App. 74.

II. JUDGE LASTAITI PROPERLY DENIED THE MOTION OF THE GUARDIANSHIP COUNSEL TO INTERVENE ON BEHALF OF THE STUDENTS AT THE BRI.

The Guardianship Counsel motion to intervene in the contempt action was filed in their capacity as "next friend" to the Students. As a consequence, the denial of their motion for appointment as next friend deprives the Guardianship Counsel of standing to pursue a motion to intervene. Even if the Guardianship Counsel had standing, they have failed to demonstrate that Judge LaStaiti abused her discretion in denying their motion. Therefore, there is no basis for granting the relief that the Guardianship Counsel request.

A. Rule 24(a) Of The Massachusetts Rules Of Civil Procedure Precludes Intervention By The Guardianship Counsel.

Judge LaStaiti's denial of the Guardianship Counsel's motion to intervene as a matter of right will be upheld unless she abused her discretion in denying the motion. Cosby v. Department of Social Services, 32 Mass. App. Ct. 392, 395, n.

8 (1992) (stating that "a trial court judge enjoys a full range of reasonable discretion in evaluating whether the requirements for intervention [of right] have been satisfied") (citations omitted). In order to intervene as a matter of right, a moving party must:

> (a) make a timely application; (b) claim an interest relating to the property or transaction which is the subject of the transaction; and (c) be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id. at 394 (citing Mass.R.Civ.P. 24(a)(2)). Judge LaStaiti properly denied the Guardianship motion to intervene because the Students are already members of the Plaintiff Class and because that Class is adequately represented in this proceeding. App. 243-244. Neither the brief of the Guardianship Counsel nor the record in this proceeding provide any basis for concluding that Judge LaStaiti abused her discretion. Accordingly, their appeal must be denied.

1. The Guardianship Counsel Failed To Make A Timely Application.

The Guardianship Counsel's argument that their motion to intervene, filed nearly seven months after the Complaint was filed in this proceeding[7], was timely rests upon a specious premise. The Guardianship Counsel contend that "the critical event triggering the students request to intervene was DMR's February 9, 1994 certification decision" because it was only after that letter was issued that it became "manifestly clear that this dispute could have severe ramifications for the students, including decertification of BRI by early August of 1994". Guardianship Counsel Brief at 12. The Guardianship Counsel further contend that it was only after this "unexpected turn of events" that these issues "were identified as directly affecting the students' rights and interests, rather than the sole interests of BRI". Id. at 13,

[7] The Complaint was filed on September 3, 1993. App. 19. The Guardianship Counsel filed their Motion To Intervene on March 31, 1994. App. 137.

n.18. If the letter of February 9, 1994, had truly been the first indication of "severe ramifications" to the students, the justification offered by the Guardianship Counsel for the delay in filing their motion would have some merit. In light of this history of findings of bad faith in the regulation of BRI, with which Mr. Schwartz is certainly familiar, it is difficult to understand how the Guardianship Counsel failed to perceive complaints filed by BRI in September and October of 1993 alleging bad faith on the part of the Commonwealth as portending anything less than severe ramifications for the Students.

2. The Guardianship Counsel Have No Interest In This Proceeding

There is no dispute that the Students at the BRI have a direct interest in this contempt proceeding. However, the fact that the Students have an interest in this proceeding does not translate into the Guardianship Counsel having an interest in this proceeding. Notwithstanding the argument of Mr. Schwartz that the Students should be allowed to participate in the Contempt proceeding through counsel of their choice (App. 200), there is no evidence that suggests that the Students have chosen the Guardianship Counsel to represent them in the contempt action or in any other action. The Students have not chosen the Guardianship Counsel to represent them in the substituted judgment proceedings. They have been appointed by the Probate Court. App.137. Nor do the Guardianship Counsel contend in their Complaint For Intervention that they have been chosen by the Students. App. 137. Instead, the Guardianship Counsel state that they are acting as next friend to the Students. Id. Thus, the record in this proceeding shows the only interest that the Guardianship Counsel are advancing is their own.

Unlike the Guardianship Counsel, the Students, Parents and Guardians have a direct and shared interest in the contempt action. As Judge Rotenberg

recognized it is the Students and their families that will suffer the consequences of an unjustified termination of the BRI program. S.A. 16-17.

3. The Interests Of The Students Are Already Adequately Represented In This Proceeding.

The most compelling reason for denying the Guardianship Counsel's Motion To Intervene is that the interests of the Students are adequately represented in this proceeding. Under Rule 24(a), "[t]he burden of showing the inadequacy of the representation is on the applicant". Attorney General v. Brockton Agricultural Society, 390 Mass. 431, 434 (1983) Satisfying that burden would have required the Guardianship Counsel to show that the structure of representation that has been repeatedly found effective in protecting the rights of the Students in this lengthy and complex proceeding is somehow inadequate. Because the Guardianship Counsel failed to meet their burden, Judge LaStaiti properly denied their motion.

From the very early stages of this proceeding, the Students have participated as members of the Class, with their interests represented by their Parents and Guardians.[8] As Judge Rotenberg observed when preliminarily certifying the Class:

> It is also clear and irrefutable to this Court that the parents and/or guardians should be joined preliminarily as members of the class as they speak for their children who cannot speak for themselves; and their concerns are identical, the preservation of the lives of these disadvantaged human beings.

App. 42. Robert A. Sherman, Esquire initially represented the Class and executed the Settlement Agreement on behalf of the Class. App. 64.[9] The Parents and Guardians of the BRI Students continue to speak as the voice of the Students through the vehicle of the BRI Parents and Friends Association, Inc.. which has

[8] In fact, while initially disputing the certification of the Class, the Guardianship Counsel now concede that "the students are part of a unified class comprised of all students and parents". Guardianship Counsel Brief at 23.

retained and directs counsel. App. 228-229. Judge LaStaiti determined that the Parents continue to adequately represent the interests of the Students, stating:

> At all time, the Parents are aware of BRI's program and have demonstrated a strong commitment to the welfare and best interests of the Students.

App. 242. Judge LaStaiti further determined that "[t]he entire class is adequately represented by Eugene Curry, Esquire". App. 243.

As an additional protection, the interests of the Students within the Class have, from the early stages of the litigation, been represented by Counsel appointed by the Court. Initially, attorneys Marc Perlin and Max Volterra were appointed by Judge Rotenberg on April 29, 1986 "to represent the potential class of all students at the Behavior Research Institute, Inc.". App. 71. Although no class of Students was ever certified, Mr. Perlin and Mr. Volterra continued to represent the Students in the BRI litigation and the negotiations that led to the Settlement. Id. Both attorneys executed the Settlement Agreement on behalf of the "B.R.I. clients". App. 64. In November of 1993, Judge LaStaiti, recognizing that the Students have "the most vital interest in the process and outcome of any litigation", appointed attorneys Paul A. Cataldo and C. Michelle Dorsey to represent the class of students. App. 74.

In order to support their claim of lack of adequate representation, the Guardianship Counsel strain unsuccessfully to fashion an illusory conflict of interest between the Parents and Guardians and the Students themselves. The argument rests principally on the contention that cases such as Rogers v. Commissioner of the Department of Mental Health, 390 Mass. 489 (1983) which restrict the ability of parents and guardians to consent to certain treatments, including the administration of anti-psychotic medication. The Guardianship Counsel argue Rogers represents 'an implicit determination that parents and

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[9] Even Mr. Schwartz agrees that Mr. Sherman "at that time represented the class of parents and

guardians cannot adequately represent the interest of their wards in these situations".[10]

The reliance of the Guardianship Counsel on cases such as Rogers is misplaced. As a preliminary matter, Rogers does not stand for the proposition that a presumptive conflict exists between an institutionalized individual and his or her guardian. To the contrary, the Court in Rogers stated that in contrast to medical staff, who may have a conflict of interest, "if an incompetent has a guardian, the guardian is presumably in a neutral position since the guardian is not living with the patient at the time that treatment decisions are being made". Id. at 504. More fundamentally, the issue at stake in Rogers, whether an incompetent individual would consent to certain treatment, is irrelevant to the issue in the contempt action. As Judge La Staiti recognized, this case "concerns enforcement of the terms of the Settlement Agreement" while "Treatment Decisions, with reference to Level III aversive-therapies, particularly Level III aversives, (including GED) are strenuously litigated in the Guardianship proceedings and such decisions will not be part of the Contempt Action brought by BRI against DMR". App. 241.

The Guardianship Counsel have failed to identify any actual conflict between the interest of the Parents and Guardians and the Students with respect to enforcement of the Settlement Agreement. The contention that a conflict exists between the status of the BRI Parents and Friends Association, Inc. as a corporate intervenor and as class representative rests on several inaccurate (and unsupported) assertions. Guardianship Counsel Brief at 25-26. First, as is clear from the docket in this proceeding, the Parents and Guardians do not participate as intervenors, but as members of the Class. App. 1-40. Second, in direct violation of Rule 16(e) of

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students". App. 190.

[10] Guardianship Counsel Brief at 25.

without citation to the record, that the parents and guardians participation in this proceeding is the result of a contractual obligation to cooperate with BRI. Guardianship Counsel Brief at 26. It is not surprising that the Guardianship Counsel are unable to cite any record support for this attack on the integrity of the families of the BRI Students, as it has no basis in fact. Most fundamentally, the Guardianship Counsel's argument ignores the extensive history of involvement in this and related proceedings by the Parents and Guardians on behalf of the Students.

Equally meritless is the contention advanced by the Guardianship Counsel that the appointment of attorneys Cataldo and Dorsey constitutes a recognition by Judge LaStaiti that the Parents and Guardians cannot represent the Students within the Class. Guardianship Counsel Brief at 26, n. 36. There is no question that Judge LaStaiti recognized the potential for a conflict within the Class and appointed attorneys Dorsey and Cataldo to protect the Students from "any potential conflict with the interests of the Parents and Guardians, who are also members of the Class". App. 243. However, the interpretation that Guardianship Counsel would attach to Judge LaStaiti's order is at odds with Judge LaStaiti's conclusion that "the Students' rights under the Settlement Agreement will be enforced as a Class" and that "[t]he entire class is adequately represented by Eugene Curry, Esquire". App. 243.

The record unquestionably demonstrates that Judge LaStaiti was concerned a real, rather than potential, conflict of interest when she appointed attorneys Cataldo and Dorsey. Judge LaStaiti stated that she "remained acutely aware of the occurrences of bias and bad faith demonstrated by agencies of the Commonwealth against BRI, parents, and wards of the Court" and, therefore, "[t]his Court must remain vigilant to ensure that this class is represented by counsel who are as independent and objective as can be from the influence of any state agency". App

74. The concerns expressed by Judge LaStaiti are particularly relevant to considering the Guardianship Counsel motion. Attorney Schwartz's advocacy of terminating the BRI program in the earlier litigation calls into question his independence from the influence of DMR.

The record before Judge LaStaiti clearly supported her conclusion that Attorneys Cataldo and Dorsey were adequately representing the BRI Students within the Class. Both counsel are highly qualified and have acted zealously to protect the interests of the Student members of the class. App. 24, 75-78. Most importantly, unlike the counsel proposed by Guardianship Counsel, neither Attorney Dorsey or Cataldo have any conflict of interest with the interests of the Students.[12]

B. Rule 24(b) Precludes Permissive Intervention By The Guardianship Counsel

Under Rule 24(b), the question of "whether a party should be allowed to intervene is a matter that that is largely left to the discretion of the judge below". Corcoran v. Wigglesworth Machinery Co., 388 Mass. 1002, 1003 (1983) (citations omitted). The "decision of the trial court will be reversed only for a clear abuse of discretion". Massachusetts Federation of Teachers, AFT, AFL-CIO v. School Committee of Chelsea, 409 Mass. 203, 209 (1991). Because intervention by the Guardianship Counsel would unduly delay and prejudice the adjudication of rights of the existing parties, Judge LaStaiti properly exercised her discretion in denying the Guardianship Counsel's Motion For Permissive Intervention.[13]

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[12] The Guardianship Counsel's principal argument with respect the adequacy of the representation of the attorneys for the Students is their contention that Attorneys Cataldo and Dorsey cannot represent the Students because no class of Students has ever been certified. Guardianship Counsel Brief at 26-32. The Guardianship Counsel's contention is not only without merit, it is predicated on numerous factual contentions for which there is no record support in violation of Rule 16(e) of the Mass. R. App. Pro.

[13] Mass.R.Civ.P. Rule 24(b)(2) states in pertinent part that "Upon timely application anyone may be permitted to intervene in an action: ... when applicant's claim or defense and the main action

The most powerful argument against that allowing the Guardianship Counsel to intervene permissively may be found in the Guardianship Counsel's own brief. The Guardianship Counsel contend that:

> Permitting intervention by the students would assist in determining whether BRI has consistently acted within the requirements set forth in the Settlement Agreement, *particularly with respect to whether the treatment given was the least restrictive treatment possible in each individual case*.

Guardianship Counsel Brief at 36-37 (emphasis supplied). The Guardianship Counsel's own words make it plain that if allowed to intervene, they would seek the review of the treatment plans of each and every Student at the BRI as part of the Contempt litigation. As Judge LaStaiti recognized, the treatment decisions that affect individual students are litigated in the individual Substituted Judgment proceedings and are irrelevant to the question of whether the Commissioner has violated the terms of the Settlement Agreement. App. 241. Courts have recognized that "interventions, although aimed at accomplishing economies of scale, threaten to some degree, small or large to complicate the procedure, increase expenses, and engender delays". Care and Protection of Zelda, 26 Mass. App. Ct. 869, 872 (1989). It is beyond serious question that expanding the scope of the Contempt litigation as contemplated by the Guardianship Counsel would significantly complicate the litigation, increase the expense and engender delays to the obvious detriment of the existing parties.

In essence, the Guardianship Counsel's argument is a restatement of the failed objections advanced by Attorney Schwartz against the Settlement Agreement. Then, as now, Attorney Schwartz sought to raise the issue of individual treatment decisions in the context of the overall Settlement Agreement. App. 67. Then, as now, Attorney Schwartz claimed that two Students objected to the Settlement

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have a question of law or fact in common. ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the

Agreement without disclosing to the Court that one of those Students had left BRI. App. 68, 191 lines 2-10. It is beyond serious question that allowing the Guardianship Counsel to relitigate "objections filed at the eleventh hour in this case which relate primarily to factual matters earlier fully and fairly litigated and determined" (App. 69) would prejudice the rights of the existing parties to adjudicate this matter.

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individual parties".

III. THE APPELLEES SHOULD BE AWARDED DAMAGES FOR THIS FRIVOLOUS APPEAL

The Appellee, The Class of All Students at The Judge Rotenberg Educational Center, Inc., Their Parents and Guardians, respectfully requests that this Court award the Appellees damages pursuant to G.L. c. 231, §6F, G.L. c. 211A, §15, and Mass. R. App. P. 25, and double costs. The Class should be awarded said damages and costs required in defending this frivolous appeal brought forth without basis in law or fact.

CONCLUSION

For the reasons stated herein, the BRI Parents request that the petition of the Guardianship Counsel be denied.

Respectfully submitted,
The Class of All Students At JRC,
Their Parents and Guardians
by their attorney,

Dated: 2 February 1996

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