COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss

No. 06990

BEHAVIOR RESEARCH INSTITUTE, INC.,
AND THE STUDENT MEMBERS OF THE CLASS

Plaintiffs-Appellees

v.

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

Defendant

ON DIRECT APPELLATE REVIEW FROM AN ORDER OF
THE BRISTOL COUNTY PROBATE/SUPERIOR COURT

BRIEF OF THE STUDENT MEMBERS OF THE CLASS - APPELLEES

C. Michele Dorsey
Dorsey & Dorsey
207 Front Street, P.O. Box 319
Scituate, MA 02066
617-545-9770
BBO #542155
and
Paul A. Cataldo
Paul A. Cataldo & Associates
55 W. Center Street
P.O.Box 435
Franklin, MA 02038
508-528-2400
BBO #078940

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I. Issues Presented

1. Whether the trial court's denial of a Motion to be Appointed as Next Friend of each individual student at the Behavioral Research Institute, Inc. submitted pursuant to Mass.R.Civ.Pro. 17(b) and M.G.L. Chapter 201, §37 filed by counsel appointed to represent those students in guardianship and substituted judgment proceedings was an abuse of discretion.

2. Whether the individual students at the Behavioral Research Institute, Inc. are entitled to intervene in a Complaint for Contempt when they are already parties within a class in that action.

3. Whether the individual students at the Behavioral Research Institute, Inc. should be permitted to intervene in a Complaint for Contempt when they are already parties in that action.

II. Statement of the Case

The action in which guardianship counsel seek to be appointed as next friend of each individual student and to intervene is a *Complaint for Contempt* filed by the Behavioral Research Institute, Inc. ("BRI") on September 2, 1993. The *Complaint for Contempt* alleges that the Department of Mental Retardation ("DMR") violated the terms and provisions of a settlement agreement entered by all parties to an action filed by BRI in 1986 against the Massachusetts Office for Children ("OFC") and

its director. At that time, OFC was the state regulatory agency responsible for the certification and licensure of BRI. That function was later transferred to the Department of Mental Health and has since been given to the Department of Mental Retardation.

Guardianship counsel filed a Motion to Be Appointed Next Friend (App.137), Motion to Intervene (App.79) and a Complaint in Intervention (App.86) in the Probate Court on March 31, 1994 which were apparently later refiled on June 17, 1994 in an effort to comply with Rule 9A (Sup.Ct.) The Complaint in Intervention demands relief which has limited relationship, if any, to the Complaint for Contempt filed by BRI against DMR.

On May 18, 1995, the court (LaStaiti, J.) denied both the Motion to be Appointed Next Friend and the Motion to Intervene. (App.241) On May 25, 1995, a Notice of Appeal was docketed relative to the denial of both motions. (App.245)

The proposed intervenors appealed to a Single Justice (Perretta, J.) of the Appeals Court pursuant to G.L. c.231, §118, para. 1, requesting interlocutory review of the denial and a stay of the contempt trial. They were denied relief on June 5, 1995. (App.245)

On June 6, 1995, guardianship counsel filed a petition in the Supreme Judicial Court pursuant to G.L.c. 211 §3 seeking a stay of the contempt trial pending a report of the denial of the motions to the full bench from a Single Justice (Abrams, J.). The request was denied on June 21, 1995. (App.250)

Guardianship counsel filed a petition with a Single Justice of the Appeals Court (Laurence, J.) which asked that the clerk of the trial court be required to assemble the record for the taking of an appeal to the full

bench of the Appeals court. An order was entered on July 25, 1995 allowing the petition. (App.254)

Guardianship counsel moved for Direct Appellate Review which was allowed by this Court on September 10, 1995.

III. Statement of Facts

BRI is an institute which provides treatment programs for individuals with extreme mental disabilities. BRI operates a school for these students in Providence, Rhode Island and several group homes in Massachusetts. BRI employs the use of behavior modification to treat the students. One of the more controversial methods of behavior modification is the use of aversive techniques.

In 1985 while OFC still had the responsibility for regulating BRI, BRI and parents of students at BRI filed a suit in equity against OFC, alleging bad faith on the part of the agency in executing its regulatory duties over BRI. The paramount concern in the suit was the fact that the Director of OFC had issued a directive which resulted in the disruption of students' treatment programs and that the students were suffering irreparable harm as a result of that order.

On June 4, 1986, Judge Rotenberg issued a preliminary certification of a Class consisting of Students at BRI and their Parents for the purposes of issuing a Preliminary Injunction. (App.41) Attorneys Marc Perlin and Max Volterra were appointed by the court to represent the "potential class of all students at BRI" on or about April 29, 1986. (App.72)

On the same day, Judge Rotenberg issued a Preliminary Injunction against OFC after having held four days of evidentiary hearings. (Supp.

App.1)[1]. The court entered extensive findings in support of the Preliminary Injunction. (Supp.App.3) In describing the nature of the case as being "utterly unique", Judge Rotenberg found:

> ...it involves the care and treatment of 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 disorders, and all of whom are grievously mentally ill. Their illness is commonly characterized by aberrant behavior, including violence toward others, self-abuse, destruction of property, danger to themselves and others and, in short, behavior that it is so abnormal is in many cases life-threatening by nature. (Supp.App.3)

The court further found that BRI employed the use of rewards far more than aversive techniques and that aversives were used "in lieu of anti psychotic medication and other more restrictive procedures, such as seclusion and electric-shock." (Supp.App.15) The Court attributed instances of students who had become incoherent and had mutilated themselves to a point where the injuries were life threatening to the cessation of the students' treatment programs under the direction of OFC. (Supp.App.16) The Court noted the marked improvement in such students when their treatment programs were resumed (Supp.App.17)

OFC appealed the preliminary injunction to a Single Justice (Greaney, C.J.) of the Appeals Court. That petition was denied on July 30, 1986. (Supp. App.31) Attorney Perlin argued as counsel for the students. (Supp.34)

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[1]Supp. App. refers to a Supplemental Appendix filed by the Student Members who were not consulted by the Appellants regarding the contents of the Appendix. The Student Members of the Class have moved for leave to file such a supplemental appendix to enhance the understanding of the background of this case which has had such a long history and is quite complex in nature.

The parties next entered negotiations aimed at settlement. In December 12, 1986 a proposed settlement agreement was filed with the court. (App.51) The same day, after hearing, the court entered an order certifying the class action and made findings in support of the order. (App. 49-50) Specifically, the Court found that:

(1.) the Class is so numerous that joinder of all members is impracticable;
(2.) there are questions of law and fact which are common to all members of the Class;
(3.) the claims of the representative parties, Leo Soucy, Brendon Soucy, Peter Biscardi, and P.J. Biscardi, are typical of the claims of the Class;
(4.) the representative parties will fairly and adequately protect the interests of the Class;
(5.) the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members; and
(6.) a class action is superior to other available methods for the fair and efficient adjudication of the controversy between the parties. (App.49-50)

The Order Certifying Class Action was never appealed.

The Students had participated in the negotiations which lead to the Settlement Agreement through their counsel, Attorneys Perlin and Volterra. All parties to the action, including the students, entered the Settlement Agreement which was later approved by the court. (App.51-64) Both Attorneys Perlin and Volterra executed the Agreement as Counsel for the BRI clients. (App.64) A separate attorney, Robert A. Sherman, executed the Agreement as counsel for the Class of All Students at BRI, Their Parents and Guardians. (App.64) Leo Soucy and Peter Biscardi signed as the named representatives of the Class. (App.64)

The Settlement Agreement provided a number of mechanisms to protect students not only from future cessation of treatment but also to safeguard students from treatment that was more intrusive or restrictive than necessary. Aversive procedures are permitted for use at BRI only when authorized as part of a court ordered "substituted judgment." (App.52) Treatment plans must be court approved. A monitor was appointed to generally monitor BRI's treatment and educational program and to report to the Court any issues deemed necessary to the health, safety or well-being of any BRI clients. (App.57)

The Court entered Findings of Fact and Conclusions of Law in Support of Approval of Settlement Agreement[2] pursuant to Mass.R.Civ.P. 23 (c) on January 7, 1987. (App.65-70). Two students and their parents or guardians had submitted written objections to the agreement. They were the only class members to object to the proposed Settlement Agreement. (App.66) The objectors[3] appeared before the court on January 7, 1986 through their counsel, Steven J. Schwartz, Esq. and were heard. The Court rejected the arguments as raised by the objectors and further noted that Attorney Schwartz had previously filed an appearance in the court 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 objectors he represented on that date. (App.68)

Following the approval of the Settlement Agreement, a period of relative calm continued until September, 1993 when BRI filed a Complaint for Contempt against Philip Campbell, Commissioner of DMR. DMR had

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[2]Although not listed separately in the Table of Contents, the findings can be found in the Appendix at pages 65 -70 following the Settlement Agreement.

[3]One of the objectors had been discharged from BRI prior to the hearing and the court was disturbed at counsel for his failure to inform the court of this. (App. 68)

succeeded OFC and the Department of Mental Health as the regulator of BRI. BRI alleged in its complaint that DMR had violated the terms of the Settlement Agreement (Supp.App.40) in a number of ways and of acting in bad faith. BRI claimed, among other things, that DMR was using the certification process to close BRI, that DMR had failed to submit to mediation with the court Monitor, that DMR made specious and defamatory allegations and accusations about BRI, hired an unqualified and biased team to review BRI, made the treatment decisions for BRI students, decertified BRI, and engaged in bad faith. (Supp.App.99)

On September 25, 1993, Attorneys Perlin and Volterra filed motions for leave to withdraw from the contempt action. (App.71) A court order entered on November 8, 1993, appointing Attorneys Paul Cataldo and C. Michele Dorsey as successor counsel to "the class of the students"[4]. (App.74.) Within that same order, the Court found that "This class of individuals previously represented by Attorneys Perlin and Volterra continues to have the most vital interest in the process and outcome of any litigation that occurs in the above cited matter, given the vulnerability that the class suffers due to severe developmental disabilities and/or mental illness." (App.74)

No one objected to or appealed from the order appointing Attorneys Cataldo and Dorsey. Although neither were members of the Committee for Public Counsel Service ("CPCS") list of attorneys approved for appointment to mental health cases, both received waivers for such. Guardianship counsel has continued to point to the fact that

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[4]As will be discussed later, reference to the "class of students" in this case technically is one to the student members of the Class of All Students at BRI, their Parents and Guardians.

Attorneys Cataldo and Dorsey are not lawyers on the CPCS list in an apparent effort to discredit them and to continue a controversy surrounding that issue which has already been determined by the trial court and which was upheld by a single justice of the Appeals Court. In April, 1993, the Committee for Public Counsel Service had challenged the Probate Court judge (LaStaiti, J.) for making appointments of attorneys outside the approved list in cases involving guardianships of students at BRI. CPCS was denied relief by the Single Justice (Kass, J.) who determined that the trial judge could make such appointments if she found exceptional circumstances and that the judge had done so in that case. (Supp.App.114) The Probate Court judge had found, among other things, that "a history of active disapproval and opposition to some of the treatment methods (forms of aversive therapy) employed by the institution (Behavioral Research Institute) where the wards resided gave concern that the particular lawyers designated by CPCS might be disabled from giving disinterested advice and representation. (Supp.App.114-115) The Single Justice found that papers filed in opposition to the CPCS petition for review suggested that the trial judge's concern about possible bias from the CPCS designees was not entirely speculative. (Supp.App.115)

Guardianship counsel are the attorneys who represent individual students at BRI in substituted judgment proceedings and in guardianships. These attorneys, who refer to themselves collectively as "guardianship counsel", seek to be appointed as next friend of each individual student for the purpose of intervening in the contempt action. It is noteworthy that a number of guardianship counsel represent more than one student and yet seek to be appointed as next friend for each of the students whom they represent. (App.88-103) The thrust of the motions filed by guardianship

counsel is that after guardianship counsel have been appointed as next friend of each individual student, they will intervene, if permitted by this court, in the contempt action which was heard in the Bristol Probate Court in June and July, 1995. (A judgment in that matter entered on October 6, 1995 and is currently the subject of a number of appeals which are pending before this Court.) Attorney Steven Schwartz would then serve as the legal representative of all "next friends" of BRI students in this matter. Two of the existing guardianship counsel, John Coyne and Richard Ames, would act as the legal representatives for all guardianship counsel, providing a liaison to Attorney Schwartz. (App.84)

Through this legal maneuvering, Attorneys Cataldo and Dorsey would effectively be replaced as counsel for the student members of the Class. Both the Motion to be Appointed as Next Friend and the Motion to Intervene actually seek to replace counsel for the Student Members of the Class chosen by the court with counsel selected by guardianship counsel. Essentially, guardianship counsel's motions are substantively motions to reconsider the appointments of Attorneys Cataldo and Dorsey.

IV. Argument

A. The trial court acted within its discretion when it denied the Motion to be Appointed as Next Friend of each individual student at the Behavioral Research Institute, Inc. filed by counsel appointed to represent those students in guardianship and substituted judgment proceedings.

1. The Student Members of the Class Have Already Been Protected by the Court's Order Appointing Attorneys Cataldo and Dorsey as Counsel and by the Appointment of Guardians for Each Individual Student.

The threshold issue in this case is whether the trial court committed an abuse of discretion when it denied the Motion to Appoint Next Friend for the Individual Students. If a next friend is not to be appointed for an individual student, then the issue of intervention is moot because there is no standing for guardianship counsel to bring such a motion. Each student at BRI has a court appointed guardian who is in most instances a parent. (App.241) The trial judge found that since each student had a guardian and was further directly represented by counsel appointed to represent the Student Members of the Class independent of the Parents and Guardians, they were adequately protected and appointment of next friend would be redundant. (App.242-243)

Guardianship counsel relies upon Mass.R.Civ.Pro. 17(b) in support of their motion to be appointed as next friend. Mass.R.Civ.Pro. 17(b) provides for the appointment of a next friend or guardian ad litem or an infant or an incompetent person as follows:

> *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 guardian ad litem. The Court shall appoint the guardian ad litem for an infant or incompetent person* ***not otherwise represented in an action*** *or shall make such order as it deems proper for the protection of the infant or incompetent person. (emphasis added)*

The rule grants discretion to the court in entering an order it deems proper for the protection of the infant or incompetent person. The order of this court dated November 8, 1993, appointing Attorneys Cataldo and

Dorsey to represent the interests of all the "Class of Students"[5] at BRI in the contempt provides the appropriate protection for the students at BRI. The court has the authority to determine whether or not to appoint a next friend or guardian ad litem within its sound discretion. *N.O. v. Callahan* 110 F.R.D. 637, 648 (D. Mass. 1986) The trial court has exercised such discretion as supported by its *Findings and Orders on Motion to Withdraw of Max Volterra, Esq. and Marc Perlin, Esq.* dated November 8, 1993 (LaStaiti, J.) where the Court stated "this 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."

As a general rule, the court will not appoint a next friend for a person who has duly appointed representative. *Callahan* at 649. Unless the interest of the guardian and the ward in a case are conflicting, courts are reluctant to appoint a next friend for a ward who is already adequately represented in an action. *Mansur v. Pratt* 101 Mass. 60, 61 (1869) Although no such actual conflict has been alleged within guardianship counsel's motion, nor are there facts to support such an allegation, the students are already adequately represented and protected should such a conflict arise. It was, in fact, in recognition that a potential conflict might arise between the students and their parents or guardians, that lead the court to appoint independent counsel for the Student Members of the Class in 1986.

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[5]Guardianship counsel maintain that no such class exists. However, this is contradicted by the Order Certifying Class Action entered on December 12, 1986 which made the requisite findings necessary under Mass.R.Civ.Pro. 23(b) (App.49-50) It is clear from the proceedings from 1986 to present that any reference to the "Class of Students" refers to the Student Members of the Class of Students at BRI, their Parents and Friends. Guardianship counsel attempt to distort this nomenclature as demonstrating some deficiency in the certification of the Class.

Yet, guardianship counsel rely almost exclusively upon case law in which the possibility for conflict between the interest of the ward and legal representatives were found and in which the interest of the ward remained potentially unprotected. While the court must consider whether it is necessary to appoint a guardian ad litem to protect the interest of an infant or an incompetent person, the court is not required to make such an appointment if it feels that the interests of the infant or incompetent person are otherwise protected. *Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) Here, the court articulated its recognition for the needs of the students to be protected both in its order appointing Attorneys Cataldo and Dorsey (App.74) and in its denial of the Motion to Be Appointed Next Friend (App.241-244). The Court recognized both the potential for conflict and the vulnerability of the students. The court has already provided protection by the appointment of independent counsel for the student body at large (within the Class) as well as the appointment of a guardian and of an attorney for each individual student. (App.244)

In *M.S. v. Wermers*, cited by guardianship counsel, a minor brought an action for declaratory judgment regarding the policy of the county to deny contraceptives to minors. Once the court recognized the potential conflict between the minor and her parents, it was not an abuse of discretion for the court to find that the minor needed a guardian ad litem in order to proceed. 557 F.2d 170, 175 (8th Cir. 1977) In this case, the court long ago recognized the potential conflict between the parents or guardians and the students, and made provisions for protecting the students interests by providing independent counsel within the Class and by appointing each individual student an independent attorney for the guardianship and substituted judgment proceedings. In other words, the protection found

necessary in *Werner* and in other cases cited by guardianship counsel has already been provided here. Guardianship counsel suggest that the facts and decision in *Horacek v. General Motors* Corporation, 356 F.Supp. 71 (D.Neb. 1973) support their proposition that they be appointed as next friend for each individual student. Horacek involved a civil rights action brought by parents on behalf of their children who were residents at a state home for the mentally retarded. The court recognized the potential for a conflict.

> While the parents in all good conscience may desire one remedy, or specific type or style of treatment for their children, it would not necessarily be in the best interests of the children. Therefore, it seems to me that a discreet course would be to provide for the appoint of a guardian ad litem who would not displace the parents as representatives of the plaintiffs but would be alert to recognize potential and actual differences in positions asserted by the parents and positions that need to be asserted on behalf of the plaintiffs. Id. at 74

The court in *Horacek* did much what the court has done in this case since 1986 which is to recognize the potential for conflict and provide protection so that the interests of the students will be protected.

2. The Students Are At Greater Risk from Conflict of Interest Under the Proposal by Guardianship Counsel.

Indeed, the potential for conflict between the individual students and guardianship counsel, if appointed next friend, would be heightened by their proposal. Guardianship counsel, if successful in their motion, intend to proceed through Attorney Schwartz as the legal representative of each next friend. If one student through his next friend takes a particular position regarding an issue that is in direct conflict with the position of

another student taken through his next friend, the dilemma for Attorney Schwartz who would act as both the legal representative for both next friends is fraught with potential conflict and would serve only to confound the already complex proceedings presently in progress. An even more confusing situation potentially arises when guardianship counsel is appointed as next friend for more than one individual student. If the interest of one individual student is at odds with the interest of another individual student and both students have the same guardianship counsel acting as next friend, how does guardianship counsel direct Attorney Schwartz? It would appear that troublesome ethical considerations would arise under such circumstances. A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing different interests. S.J.C. Rule 3:07 DR 5-105(B).

The court has long had concerns regarding the independence of counsel for the students. As early as 1986, Judge Rotenberg noted in his Findings of Fact and Conclusions of Law in Support of Approval of Settlement Agreement Pursuant to Mass.R. Civ. P. 23(e) that Attorney Schwartz, who represented objectors to the Proposed Settlement Agreement, had previously filed an appearance with the court on behalf of various organizations that advocated the closure of BRI and termination of its program, a position markedly different from that of the objectors he was then representing. (App.68)

Seven years later when appointing successor counsel for Attorneys Perlin and Volterra in November, 1993, the court (LaStaiti,J.) stressed the continuing need for the court to remain "vigilant to ensure this Class is

represented by counsel who are as independent and objective as can be from any influence of any state agency." (App.74) The court's concern for students at BRI is well deserved. The extreme mental disabilities of the students at BRI render them both fragile and vulnerable. Considering the bellicose history of this ten year controversy, the court was well within its discretion when it sought to provide protection for the students by persons who were truly independent. "However worthy and high-minded the motives of 'next friends' may be, they inevitably run the risk of making the actual [party] a pawn to be manipulated on a chess board larger than his own case." *Chrissy F. v. Mississippi Dept. Of Public Welfare*, 883 F.2d 25, 27 (5th 1989) citing *Lenhard v. Wolff*, 433 U.S. 1306, 1312, 100 S.Ct. 3, 61 L.Ed 885,890 (1979). It would have been inappropriate for the trial judge to approve a proposal that guardianship counsel engage Attorney Schwartz in light of his previous involvement in this matter. The fact that guardianship counsel made this request provides insight, reinforcing the court's continuing concern about independence.

3. BRI Students Are Well Protected In Several Ways.

Guardianship counsel point to the vulnerability and disability of the individual students as reasons which require that they be appointed as next friend. However, this court has ensured protection of the students by several means. Each individual student is appointed an attorney who represents him or her in individual substituted judgment proceedings. All of the students at BRI have been appointed a legal guardian. In addition, the parents of BRI students have actively participated in proceedings dating back to the original action filed in 1986. (App.241-244) A guardian ad

litem, Bettina Briggs, was appointed in the original action and has acted in that capacity to this date. The Court Monitor provides vigilance for the court and is mandated to report to the court any issue significant to the health, safety and well-being of the students. Finally, the court has provided legal representation to the Student members of the Class since April, 1986.

The students, therefore, have been well represented in both legal actions which effect them as individuals and in actions which effect the general student body of BRI.

It is important to remember the fact that this is a contempt action which relates to alleged violations of the settlement agreement entered in the original equity action filed in 1986. In that 1986 equity action, the students were represented independently as a part of the Class by order of the court. There is no reason to suggest that the students who continue to be represented independently as Members of the Class are not well protected in an action derived from the original equity action. As the trial judge noted, the contempt action does not deal with issues related to the individual treatment plans.

"-Treatment Issues are separately litigated in the Substituted Judgment Proceedings in the individual Guardianship case.

-Treatment Decisions, with reference to 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)

It is more likely that the Class would be harmed by the appointment of next friends by the convolution of issues and conflict

between next friends that likely would take place. The interests and issues of the individual students which guardianship counsel seek to advance are appropriately addressed within the substituted judgment hearings.

B. The individual students at BRI are not entitled to intervene in a Complaint for Contempt when they are already parties within a class in that action.

1. The Students At BRI Are Presently A Party To This Action As A Class

Guardianship counsel claim that the individual students should be permitted to intervene as a matter of right pursuant to Mass.R.Civ.Pro 24(a). They assert that the students have never been formally afforded party status in this matter which they claim directly effects the rights of those students. Guardianship counsel appear to claim that no class was permanently certified, that the class effectively does not exist and the attorneys appointed to represent the class apparently have no clients to represent under this argument. This argument ignores the history of the case dating back to the original equity action in which the Class was preliminary certified for the purpose of the issuance of preliminary injunctive relief and later given permanent certification as discussed earlier. (See pages 4-6 infra) The prequisites for a class action may be found in Mass.R.Civ.Pro.23(a).

(1) The class is so numerous that joinder of all members is impracticable,
(2) There are questions of law or fact common to the class,
(3) The claims or defenses of the representative parties are typical al of the claims or defenses of the class, and
(4) The representative parties will fairly and adequately protect the interest of the class.

All of these prerequisites were met by the Order Certifying Class Action which was entered after hearing on December 12, 1986 and which was never appealed. (App.49) In addition, the Order fulfilled the requirements under Mass.R.Civ.Pro.23(b) which are necessary for a class action to be maintained. Specifically, Judge Rotenberg found that the questions of law and fact common to the Class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy between the parties. (App.49-50)

More recently, when addressing the Motion to be Appointed Next Friend, the trial judge restated that the students "are already a party to this action by virtue of their membership in the Plaintiff Class - The Students' rights under the Settlement Agreement will be enforced as a Class." (App.243)

There is nothing in the record to suggest that the Students have not fully participated in the contempt proceeding as parties. The Students have filed pleadings, appeared and argued before the court on various matters including the trial itself and attended mediation sessions held by the court appointed mediator. No other party to this action has questioned the party status of the Students who have been accorded the full rights of a party since 1986. The Students at all times have been treated separately by the court and by all other parties, including the Parents and Guardians. In short, it is only guardianship counsel who deny the party status of the Students.

C. The Individual Students Cannot Intervene as a Matter of Right Under Mass.R.Civ.Pro. 24(a)(2)

The individual students have failed to meet the requirements of Mass.R.Civ.Pro. 24(a)(2) to intervene as a matter of right. To do so, the following must be affirmatively shown:

1. *The application is timely;*

2. *The intervenor possesses an interest relating to the property or transaction which is the subject of the action....;*

3. *The intervenor is so situated that the disposition of the action may as a particular matter impair or impede his ability to protect that interest...; and*

4. *The applicant's interest is not adequately represented by existing parties..*

Federal Rule of Civil Procedure 24(a) mirrors the words of the Massachusetts rule and may be considered for guidance. All four (4) requirements of the rule must be satisfied before an application to intervene is allowed. *Mayflower Development Corp. v. Town of Dennis* 11 Mass. App. Ct. 630 (1981).

a. The Application for Intervention is Not Timely.

The application for intervention is not timely. Guardianship counsel are well acquainted with the Judgment that approved the Settlement Agreement entered on January 7, 1987 because it is that document which defines many of the rights of the students as parties to the agreement. This includes the requirement for certain protection for the students through the

court's review of each individual treatment plan. Guardianship counsel are the attorneys who seek to enforce the rights of the students in those proceedings. Guardianship counsel could have sought intervention at any time since 1987, but failed to do so. Guardianship counsel cannot now seek to appear "in any future hearing before the court." (Brief of Guardianship Counsel, 8) They seek to intervene now, not only in the Complaint for Contempt, but also in the future in an effort to enforce students rights "to safety, freedom from harm, freedom from unnecessary restraint, freedom from cruel and unusual punishment, to adequate treatment in the least restrictive setting, to appropriate education and to compliance with DMR regulations." (Brief of guardianship counsel, 35-36) While all of these are laudable objectives[6], they are properly the subject of the individual substituted judgment hearings where the facts and circumstances of each individual student's situation may be fully explored. These rights are not the subject matter of the Complaint for Contempt which was filed by BRI on September 2, 1993. Guardianship counsel have been well aware of the ongoing controversy between BRI and DMR since that time and the details of the proceedings are well known to the individual students through them. Despite representations to the contrary, there has been no pivotal event or moment at which time the individual students' interests were suddenly known to be threatened. Cf. *McDonnell v. Quirk* where the court found that if the underlying action takes an unexpected turn, no reason could be perceived why the third party could not intervene. 22 Mass.App. 126, 491 N.E.2d 646, 651 (Mass. App. 1986)

[6] It is noteworthy that guardianship counsel do not recognize the danger which may result to the Students if BRI is closed which the Complaint for Contempt alleges is the real objective sought by DMR for its actions. Nowhere does guardianship counsel urge that treatment programs at BRI remain available for the individual students.

The determination of timeliness is within the sound discretion of the (district) court and cannot be disturbed unless an abuse of discretion has been demonstrated. *Garrity v. Gallen*, 697 F.2d 452, 455 (1st Cir. 1983) In determining timeliness of a petition to intervene, the court must consider the length of time the intervenor knew or should have known of his interest before filing a petition, prejudice to the existing parties due to his failure to petition for intervention promptly, the prejudice to the intervenor if not allowed to intervene and the existence of unusual circumstances which would require or not require intervention. *Culbreath v. Dukakis*, 630 F.2d 15 (1st 1980)

Not only did guardianship counsel know of the interest they seek to advance through intervention for more than seven years before filing their petition, intervention would result in real prejudice to the Student Members of the Class and to other parties. The trial has already been completed and a retrial would be extremely time consuming and prejudicial to the students. The students have already suffered and would be further harmed as a result of the likelihood of continued and protracted litigation that intervention would cause. Counsel for the Student Members of the Class filed a Motion on January 28, 1994, for Emergency Relief in which they represented to the court that the resources even then available to the students had been greatly diluted as a result of the depletion of staffing and funding caused by the litigation. (App.24) This was two months prior to guardianship counsel filing the request to intervene. The survival of BRI as an institute after two additional years of intense litigation is precarious. As the court in *Culbreath* recognized, "(a)s long as this suit remains unresolved, the public and private resources invested in it lie fallow and

opportunities to rectify the wrongs of which the plaintiffs complain are unrealized." *Culbreath* at 22.

The court may consider the chance for success on the merits which the proposed intervenors may have when considering timeliness. *Culbreath* at 23 Because guardianship counsel misperceive the issues at dispute in the Complaint for Contempt, there is little chance for their success. Further delay would likely result, compounding the injuries the Student Members of the Class have already experienced. Indeed, any prejudice to the proposed intervenors is outweighed by the unlikelihood for their success on the merits.

b. The Interests of the Individual Students Should be Asserted Through Proceedings Designed for that Purpose Not Through the Contempt Action

To have an interest that justifies intervention, that interest must be directly not tangentialy related to the subject matter of the lawsuit. *U.S. v. Metropolitan Dist.Com'N*, 147 F.R.D. 1, 4 (D.Mass. 1993) Guardianship counsel insist that the individual students must be permitted to intervene in the *Complaint for Contempt* in order to protect their rights as individuals. They further claim that representatives of the existing Class cannot possibly understand their individual needs and disabilities. For the most part, the interests asserted by guardianship counsel on behalf of the individual students (to safety, freedom from harm, freedom from unnecessary restraint, freedom from cruel and unusual punishment, to adequate treatment in the least restrictive setting, and to appropriate education) are fully addressed within individual hearings designed to deal with the unique circumstances and needs of each student. To the extent that guardianship

counsel seek broad compliance with DMR regulations, that same concern was expressed by Attorney Schwartz in 1987. The court concluded that the Settlement Agreement had numerous provisions to ensure monitoring of BRI. (App.67-68, para.8) The court rejected the argument that the substituted judgment hearings were inadequate to secure the rights of individual students at BRI as being "without merit." (App.68, para.9)

The overall well-being and interest of the Student Members of the Class may not be identical to the interests of each individual student. For each individual student to raise his own concerns in a *Complaint for Contempt* is inappropriate where a more suitable forum has already been provided for that purpose.

Moreover, the Motion to Intervene filed by the individual students demonstrates a lack of understanding about what the *Complaint for Contempt* actually seeks. It is a *Complaint for Contempt* filed by BRI alleging certain violations of the settlement agreement by DMR. It was filed when DMR threatened to decertify BRI[7]. It is not an appropriate forum in which individual students should assert their particular grievances against BRI or DMR. The Complaint in Intervention states as causes of action that each of the students at BRI have had numerous individual rights guaranteed by them under the Fourteenth Amendment of the U.S. Constitution and under Articles X and XII of the Massachusetts Declaration of Rights violated. Further, many of the students allege

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[7] Guardianship counsel include in the Appendix correspondence between BRI and DMR and others (App.116-136,160-173) to support a number of arguments, including for the proposition that DMR's decision to decertify BRI came after an exhaustive review of practices at BRI. These documents present only a partial and distorted picture and ignore the fact that DMR was found at trial to have had two earlier reviews of BRI which supported certification of BRI. The favorable reviews were found to have been concealed by DMR from BRI and from the court itself.

violations of the Eighth Amendment of the U.S. Constitution, the Code of Massachusetts Regulations , the Individuals with Disabilities Act, The Massachusetts Special Education Law, the Medical Devices Amendments of the Federal Food, Drug and Cosmetic Act. (App.28-29) These allegations are not even tangentialy related to the Complaint for Contempt which alleges specific violations of the Settlement Agreement and could not possibly be heard with the Complaint for Contempt without great delay and prejudice to all parties. This is not a situation such as found in *Sargeant v. Commissioner of Public Welfare* where the court found that the complaint in intervention closely paralleled the plaintiff's complaint in the action, the complaint in intervention raised no substantive issues that had not been raised before or that all of the factual issues which were relevant to the intervenor's claim had to be resolved in the trial of the plaintiff's claim. 423 N.E.2d 755, 762 (1981). It is questionable why guardianship counsel has not brought a separate cause of action for the individual students they represent if grievances of the magnitude alleged have occurred.

5. The Interests of Individual Students Are Already Adequately Represented in this Matter.

In order to intervene as a matter of right, guardianship counsel must demonstrate that the interests of the individual students are not adequately represented. Mass.R.Civ.Pro. 24(a) The question of whether the prospective intervenor is adequately represented necessarily turns to a comparison of the interests asserted by the applicant and the existing party. *Mayflower Develop. v. Town of Dennis,* 418 N.E.2d 349, 354. (Mass.App.

1981) If this interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate. *Mayflower*, 354, citing 7A Wright & Miller, Federal Practice and Procedure §1909. The court has found that the interest of the individual students is adequately represented by their Parents or Guardians as next friends, that the Students are Members of a Plaintiff Class in the issue of contempt, and that they are represented by separate counsel. Independent legal representation of the students protects them from any potential conflict with the interest of the parents and guardians who are also members of the Class. Further each student has an independent court-appointed counsel to represent them in guardianship and substituted judgment proceedings. (App.244).

The burden of showing the inadequacy of the representation is on the applicant. *Attorney General v. Brockton Agr.Soc.*, 1130 N.E.2d 1130, 1131 *Trbovich v. United Mine Workers*, 404 U.S. 528, 538, n. 10, 92 S.Ct. 630, 636 n.10, 30 L.Ed.2d 686 (1972) Guardianship counsel have failed to meet this burden. They make unsupported allegations that attorneys for the Student members of the class have no familiarity with the individual needs and conditions of the students and have spent little time with the individual students.[8] (App.32, footnotes 42-43).

Guardianship counsel suggest that the students were not adequately protected at the trial of the contempt because counsel for the Student

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[8] During oral argument in the trial court, counsel for the Student members of the Class represented to the court that she had been to BRI, spent an extensive amount of time there and met a number of the students only to be castigated by guardianship counsel in the court for doing just that. Attorney Dorsey further informed the court that she had received communications from guardianship counsel demanding that she not communicate with the students any longer. (App.219-220)

Members of the Class presented no evidence whatsoever. (Brief of Guardianship Counsel, footnote 27) Although the contempt proceedings are not before this court, guardianship counsel's misleading suggestion must be addressed. The trial of the Contempt took several weeks. The court was presented with numerous witnesses who were called by BRI or DMR. Counsel for the Student members of the Class were present and questioned many of those witnesses. The fact that additional witnesses were not called by counsel for the Student members of the Class or that counsel did not seek to enter any exhibits beyond the several hundred entered by the other parties only means that the attorneys representing the students did not need to do so in order to adequately represent the students. Where the parties, who know the actual circumstances, present no basis for concluding that the representation might be inadequate and where on the record the representation appears adequate, it is not for us to speculate concerning possible inadequacies in that representation. *Attorney General v. Brockton Agr.Soc.*, 1134 .

D. The Individual Students Should Not Be Permitted to Intervene - Under Mass.R.Civ.Pro. 24(b)(2)

The court may permit intervention under Mass.R.Civ.Pro. 24(b)(2) "when an applicant's claim or defense in the main action may 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 original parties."

While the court has the power in its discretion to permit the individual students to intervene, the motion was properly denied.

Guardianship counsel argued to the trial court that all of the individual students at BRI have significant disabilities and suffer from mental impairments. They further noted that the individual students are vulnerable to abuse and neglect and need assistance in protecting their legal rights. However, this is true of the population of BRI students at large, as well as for each individual student. If each individual student is permitted to intervene and assert his individual rights within a contempt action, it may be at the expense of the other students as members of the Class. The delay, confusion, potential for conflict, expense and depletion of resources available for the student body at large were sound reasons for the trial court to deny the Motion to Intervene under Mass.R.Civ.Pro. 24(b)(2). To do otherwise would have resulted in compromising the rights of a vulnerable population at large in order to advance the interest of a particular vulnerable individual. This is unwarranted and unnecessary as the rights and interests of individual students may be vigorously advanced in the substituted judgment hearings. The interests of the Student members of the Class at BRI are best represented in the contempt by the attorneys appointed to represent them at large. Permissive intervention is a matter wholly within the discretion of the trial court. *Mass. Fed. of Teachers v. School Com.*, 564 N.E.2d 1027, 1031 (Mass. 1991) The trial judge must consider whether allowing intervention might delay or prejudice the adjudication of the rights of the parties. *Id.* Additional parties inevitably result in delay in the proceedings as well as increased complexity. *Id. citing additional authorities.*

V. The Student Members of the Class Are Entitiled to Attorneys Fees

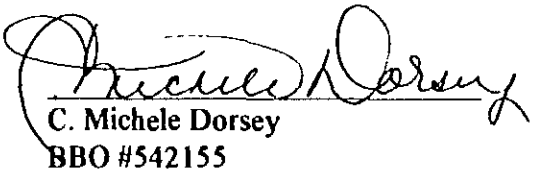
In the event that they prevail, the Student Members of the Class respectfully request that appellate attorney's fees be awarded as provided in *Yorke Management v.Castro*. 546 N.E.2d 342, 344 (Mass. 1989) Guardianship counsel have sought relief based upon a lack of adequate representation, claiming no class exists. They did so knowing that the trial court had certified the Class in 1986. The attorney representing guardianship counsel participated in the proceedings in 1986-1987. He was chastised by the court then for raising certain claims. His own indpendence was questioned by the trial court at the time. Attorney Schwartz essentially raises the same issues before this Court The only didffereuce is the passage of almost ten years. The appeal is totally lacking in merit and counsel had to be aware that the appeal was foredoomed. *VMS Realty Investment, Ltd. v. Keezer*, 34 Mass.App 119, 606 N.E.2d 1352 (Mass.App. 1993). It is entirely frivolous for guardianship counsel to attempt to relitigate issues lost nearly ten years ago in a complaint for contempt which is only remotely related to their claims.

VI. Conclusion

Guardianship counsel's requests to be appointed as next friend for each individual student and to intervene, both as a matter of right and permissively, should be denied as being within the sound discretion of the court The students at BRI are presently parties to the action as members of a Class and are adequately represented in that action.

The Student members of the Class are entitled to counsel fees and costs relative to this appeal which was both frivolous in nature and without chance for success.

January 30, 1996



C. Michele Dorsey
BBO #542155
Dorsey & Dorsey
207 Front Street, P.O. Box 319
Scituate, Massachusetts 02066

and

Paul A. Cataldo
BBO #078940
Paul A. Cataldo & Associates
55 West Central St. P.O. Box 435
Franklin, Massachusetts 02038