6-4-86-

COMMONWEALTH OF MASSACHUSETTS

BRISTOL COUNTY DIVISION

PROBATE & FAMILY COURT
DEPARTMENT
NO. 86E 0018-G1

BEHAVIOR RESEARCH INSTITUTE, INC. and LEO SOUCY, Individually and as Parent and Next Friend of BRENDON SOUCY: PETER BISCARDI, Individually and as Parent and Next Friend of P. J. BISCARDI; on behalf of the Class of all Students at the Behavior Research Institute, Inc., Their Parents and Guardians

VS

MARY KAY LEONARD, in her capacity as the Director of the MASSACHUSETTS OFFICE FOR CHILDREN

FINDINGS IN SUPPORT OF PRELIMINARY INJUNCTIVE RELIEF

PROCEDURAL HISTORY

At the threshold, let it be noted that this case presents as plaintiffs' request for a preliminary injunction devolving from their Amended Verified Complaint filed with this Court on March 4, 1986.

The history of the litigation between these parties is complex; has been undertaken in several forums; has facets of first impression, and is utterly unique in that 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 is so abnormal that it is in many cases life-threatening by nature.

1. These parties first appeared before this Court in December, 1985, when Behavior Research Institute, Inc. (BRI) and the parents of Janine C., a student at BRI, petitioned the Probate and Family Court of Bristol County for the issuance of guardianship and substituted judgment orders returning Janine C. to the treatment program which had been abruptly terminated by the order of the Office For Children (OFC) of September 26, 1985, and whose condition had deteriorated to the extent of being life-threatening. In Re: Janine C., 85P 2137-G1. On December 18, 1985, this Court issued a guardianship and substituted judgment determination, with the agreement of all parties, including the OFC, which was represented by the Department of the Attorney General. Under this agreement, Janine C.'s previous treatment program, including physical aversives and contingent food, was resumed.

2. As a result of the resumption of treatment ordered by the Bristol Probate Court through the guardianship and substituted judgment proceedings, Janine C. increased her self-care, academic, educational and work skills. Janine also made rapid progress in eliminating her self-abusive and injurious behaviors. Due to the Probate and Family Court's Order of December 18, 1985, the serious regression and behavior of Janine C. was abruptly halted, and the quality of her life dramatically improved.

3. On January 22, 1986, BRI and five parents of students at BRI filed guardianship and substituted judgment proceedings in the Bristol Probate Court. In Re: Wayne M., 86P 0192-G1;

In Re: Abby G., 86P 0195-G1; In Re: Brett L., 86P 0211-G1; In Re: Brendon S., 86P 0193-G1; and In Re: Michael S., 86P 0194-G1. The guardianship and substituted judgment petitions sought resumption of the program as it existed prior to September 26, 1985, for these five students. Even though OFC had agreed that treatment could resume for Janine C., and even though Janine C. had dramatically improved as a result of the resumption of treatment, OFC now refused to agree that any of the five students could be returned to treatment. This refusal was never explained by OFC, even though all five students had severely regressed in their self-abusive, aggressive and destructive behaviors after the September 26, 1985, Order of OFC prohibiting physical aversive therapies and contingent food reward therapies. For some of these students, the regression had become life-threatening.

4. On January 31, 1986, the Probate and Family Court entered guardianship and substituted judgment orders returning the five students to a program which included physical aversives, contingent food rewards, and in one case also a restrained-time-out procedure known as Automatic Vapor Spray (AVS). In making determinations of guardianship and substituted judgment the Court viewed video tapes which were admitted into evidence and clearly revealed the contrast between the anguished, frenzied and violent behavior of the ward at the time of admission to the Behavior Research Institute, and then the normalized, contented, smiling and nonviolent demeanor following treatment and, finally, the substantial deterioration to the ward's former anguished condition when the

treatment was proscribed by the order entered by the Office For Children on September 26, 1985. The Court additionally took views at BRI and heard detailed testimony concerning the unique circumstances of each particular student, as well as made detailed findings in each case.

5. Not one scintilla of affirmative evidence was offered at these guardianship hearings by the OFC, even though the agency was requested by the Court to produce any reasonable available alternative or less intrusive treatment that might be adopted.

6. Since the Probate and Family Court Orders of January 31, 1986, and the resumption of physical aversives, contingent food and restrained-time-out programs, the five students have substantially improved. The self-abuse, violence, aggression and destructive behavior of the five students, as well as other life-threatening behaviors, have decreased while their self-care and academic skills have increased. The quality of life for the five students has improved due to the January 31, 1986, Orders of the Probate and Family Court.

7. On February 7, 1986, the Department of the Attorney General, on behalf of OFC, petitioned the Probate and Family Court for a stay of the guardianship substituted judgment orders, presenting the claim that the provision in the substituted judgment orders allowing physical aversives and contingent food was illegal because the Emergency Order to Correct Deficiencies, issued by the OFC on September 26, 1985, banned these therapies. The Probate Court denied this motion for a stay on February 24, 1986.

8. The OFC appealed the denial of its motion for a stay on the guardianship and substituted judgment orders to the Massachusetts Appeals Court. On March 5, 1986, after a full hearing, a Single Justice of the Appeals Court denied the OFC appeal, upholding the Probate Court guardianship and substituted judgment orders.

9. The Single Justice of the Appeals Court, in upholding this Court's actions, admonished all parties in effect that they shared a common responsibility and duty to go back to the lower court and with the judge's assistance put in place a mechanism to resolve this litigation and settle this matter in the best interests of the students.

10. In accordance with the appellate direction given to this Court, on or about March 7, 1986, a conference of all parties was convened by the judge in the Probate and Family Court Department for Bristol County at Attleboro in order to address the emergency treatment needs of some eighteen students at BRI, in light of the September 26, 1985, Orders of the Massachusetts Office For Children and the recently filed class action complaint for equitable relief.

11. At this conference the Court specifically detailed the philosophy of a fair and competent settlement process, which had to be grounded in the good faith of all parties being committed and willing to establish a settlement dialogue, in effect, a treatment dialogue.

12. The Court specifically elicited from each party an acknowledgement and a commitment that each would enter the process

in good faith; the parties did so, and also acknowledged that the affected students were in a state of emergency.

13. On this date of March 7, 1986, the parties entered into an agreement. Pursuant to that agreement, a "team" was assembled to assess and evaluate the treatment plans for eighteen of the most handicapped students then enrolled in the BRI program. The "team" was to include representatives of the Office For Children, the Department of Education, the Department of Mental Health and the Department of Social Services. The parents also designated a representative to the "team". James A. Casey, the Chief Probation Officer of the Bristol Probate and Family Court, was appointed Chairman of the "team" on a temporary basis.

The Agreement also stated, inter alia, that:

> "It is the intention of the parties to negotiate in good faith and to act in the best interests of the children of BRI."

In fact, such representations were made by the parties to the Court.

14. It was understood and expressly agreed between the parties that the "team" would have full authority to design treatment plans for eighteen BRI students and that the "team's" authority would not be affected by the "variance" decision pending before defendant Leonard, or by the report of the OFC Advisory Panel.

15. The "team" designed new treatment programs for the students Vincent M., Abby G., John C., Heather S., Brett L., Martin A., Philip D. and Stephen G., which included, in some cases, a contingent food program, physical aversives and a modified

automatic vapor spray procedure. All of the "team's" decisions were by unanimous vote. The team's members included a clinical psychologist, Dr. Myrna Libby; an educational specialist, Dr. Edward Mitton; and Bette McClure, an OFC supervisory employee. According to the testimony of the court-appointed expert, as well as the testimony of the "team's" temporary chairman, Mr. James Casey, the "team" was effectively addressing the clinical needs of BRI students.

16. On April 24, 1986, the Defendant Leonard issued decisions concerning BRI's application for variances, concerning the relicensing of BRI and concerning the resumption of intake of new students at BRI.

17. The April 24, 1986, decisions in effect would terminate the treatment plans as used by BRI.

18. As part of the OFC Decisions, the Defendant Leonard purported to agree to continue with the "team" process; however, the "team" was to be restricted in its choice of treatment programs for BRI students by the OFC Decisions of Defendant Leonard. Specifically, the "team" was prohibited from designing a treatment program which included contingent food, physical aversives, the automatic vapor spray station or any of its modifications and, in addition, was precluded from designing a treatment program which included water vapor aversives, helmets, taste aversives, or certain other procedures used in the BRI program. Within forty-five days of the Decisions, BRI would be permitted by OFC to use only the following aversives: "ignore", "no" and "token

fines". The defendant's actions were completely inconsistent and contrary to OFC commitments made in the agreement of March 7, 1986.

19. Throughout all of the aforesaid proceedings, the Court's goal has been to identify and put in place competent care and treatment for the BRI students and to restore for them an orderly process so that their day to day lives would transpire in a safe, useful and effective fashion, leading to productive lives. rather than being placed in human warehousing.

20. In view of the emergency nature of the needs of the students, and the excruciatingly detailed judicial processes required to meet those needs, the Court relied upon the parties' acknowledgement of good faith activity and their undivided and collective commitment to the settlement process.

21. Now, however, events have transpired such that this Court is now obliged to consider whether or not there has indeed been a good faith effort by these parties to follow the direction charted by this Court and the Appellate Justice.

22. Accordingly, after four extended days of hearing, close to forty hours of testimony, and after scrutiny by this Court of the credibility of the witnesses, whom he personally observed in the giving of their testimony, the Court makes the following findings, which are specifically addressed to the issues of preliminary injunctive relief with the understanding that the merits will be fully addressed at further hearings.

FINDINGS OF FACT

23. The Court finds that these students, who number approximately 62, are severely handicapped persons in need of constant supervision who reside in Behavior Research Institute, Inc.'s group homes in Bristol County and attend the institute's school facility in Providence, and are admitted to BRI from several jurisdictions, including Delaware, New Jersey, New York, Maryland and Massachusetts. They average twenty years of age and share the common feature that they have typically, on the average, been rejected or ejected from at least four prior facilities within their home jurisdictions.

24. The Court finds that their prior care and treatment have generally featured the use of behavioral therapy consisting of positive reinforcement or rewards, and commonly substantial amounts of antipsychotic medication and physical restraint. The students' rejection or ejection from their prior placements demonstrates the testimony in these proceedings that such treatment methods have utterly failed to ameliorate the violence of their behavior.

25. The Court finds the witness Dr. J. L. Matson to be one of the foremost psychologists in the United States, well versed in the matters under review, whose testimony stands unrefuted by any competent or credible witness.

26. The Court finds that Dr. Matson's qualifications include specific full-time experience over eleven years in clinical psychology and behavior modification, designing hundreds of treatment programs for developmentally disabled individuals. In addition,

he has authored over two hundred publications in reviewed journals; approximately fifteen books, either published or in process thereof; approximately thirty chapters in medical texts in his field. He will present the keynote address this year in Washington at the American Psychological Association annual meeting. He has served as consultant in this country and abroad, including consultant to the U. S. Justice Department on issues of Right to Care and Right to Treatment. He has lectured by invitation at academic and professional societies and organizations internationally; he holds professional and academic degrees and appointments; his forensic experience is substantial and includes a major Alabama case involving right to treatment for developmentally disadvantaged individuals. He has personally visited and inspected facilities for care and treatment of such individuals internationally, including such facilities within every geographical region within the United States; he served as consultant in the development of the Diagnostic and Statistical Manual III.

27. The Court finds that Dr. Matson's knowledge and experience of BRI and its students includes two consecutive days of investigation at the BRI school and group home facilities, during which he examined student records on a random basis, both generally and specifically; observed the monitoring systems; observed the residents and spoke with those capable of speaking; spoke with parents, staff and administration. No limitations whatsoever were placed upon him in regard to his investigation of the facilities. He read materials, including the defendant's Decisions, the Panel Report upon which she relied; BRI admissions policy; and

its treatment policies and procedures.

28. The Court finds Dr. J. L. Matson qualified to serve as an expert witness in these proceedings.

29. The Court further finds that although Dr. Matson testified as a witness for the plaintiffs over the objection of defendant's counsel, Dr. Matson's expertise had been earlier recognized by defendant's counsel, who had suggested that he be invited to serve as court-appointed expert in this very case.

30. The Court finds that the students of BRI are much more impaired than students at other institutions, and there is no other facility within the United States that is willing or capable of assuming competent care of individuals as grievously afflicted as the student population of BRI. There is no other program known to Dr. Matson that has an open-door admission policy of accepting such students, regardless of the severity of their behavior.

31. The Court finds that other programs tend to be designed for student populations that are substantially younger and less grievously afflicted than the BRI student population. Professional literature and experience tend to be directed toward that younger population. Unfortunately, the BRI students are those who have failed to respond to those more commonly available modes of treatment. Without the unique program at BRI, such students are typically served in far more restrictive facilities, which depend upon exceedingly high doses of antipsychotics, physical restraint, and seclusion for days at a time, an environment of empty rooms, locked wards and, oftentimes, a staffing ratio of one high school educated attendant per twenty or thirty residents.

32. The Court finds that the nature and quality of care and treatment that BRI provides to its special class of students is vastly superior to any other known program for this particular population.

33. The Court finds that the quality of the interaction between the students and their direct care staff and staff supervision is superior; staff training is vastly superior. BRI's novel staff reward program is unique and not even possible in a state facility; record keeping is extraordinarily good; and there is no other known program employing video monitoring. There are adequate and appropriate safeguards over the rights, interests and safety of the BRI students.

34. The Court finds that the physical plant is outstanding and the quality and habitability of the group homes rank as vastly superior, given the severity of the population. The fact that BRI is able to maintain this population in such a normalized group home environment in turn is conducive to staff quality. The simple fact that one student has his own t.v. is quite remarkable. The staff-to-student ratio at BRI is remarkably high, at times exceeding one to one.

35. The Court finds that BRI has been serving developmentally disadvantaged individuals since 1975, and applied for its first license from the Massachusetts Office for Children in 1977.

36. The Court finds that the education and treatment program provided by BRI since its inception has employed a variety of behavior management techniques, including the use of rewards to encourage

progress toward education and treatment goals. Given the extreme levels of aggressive, self-destructive and other inappropriate behavior exhibited by the students, BRI has also employed certain aversive techniques since its inception. The aversive techniques employed by BRI to decrease student aggressiveness, self-destructiveness and other inappropriate behavior consist of the application of stimulation that BRI students will seek to avoid, such as water sprays, taste aversives and muscle squeezes. BRI employs these aversive techniques not as a punishment, but as part of a systematic behavior modification program.

37. The Court finds that BRI employs aversive techniques in lieu of antipsychotic medication and other more restrictive procedures, such as seclusion and painful electric-shock. BRI's treatment modalities have been very effective in that students (who have been unsuccessfully treated in more restrictive settings than BRI) have made significant improvement in their behavior, educational skills and self-care skills.

38. The Court finds that in all instances the BRI program, by definition, requires that rewards outnumber any aversive technique by a ratio of ten or fifteen to one. The program in this regard is very sophisticated and effective, and remarkable in that the behavior of the students can be so violent that it is impossible to use reward or positive reinforcement unless the violent behavior can be controlled and decelerated, something other programs have typically failed to do for these students. In other words, the BRI program for these students makes it possible to make positive

reinforcement a meaningful and effective treatment technique.

39. The Court finds that the characterization of this program as one of punishments is a misrepresentation. Aversives are only used to decelerate targeted behaviors and by definition the aversives decelerate as the behaviors decelerate. There are students at BRI whose treatments, begun with aversives, are now substantially free from aversives, consisting of rewards and positive reinforcement. At all times, use of aversives is only a fraction of the total program, for at all times, for every student, there are constant demonstrations of affection, approval and rewards.

40. The Court finds that the aversive techniques and procedures used at BRI are consistent with professional practice.

41. The Court finds that Dr. Matson specifically observed those students who have been returned to treatment by order of this Court and noted that the child Janine, for example, not only conversed with him, but hugged him and told him that she liked being there, behavior he judged unlikely from an abused or distressed individual.

42. The Court notes that this is the same fifteen-year-old child who, when first observed by this Court, was incoherent and had mutilated herself to a life-threatening degree as a result of the cessation of her treatment following the September 26, 1985, OFC order. On a follow-up view, after her treatment was restored, this Judge also was greeted and hugged by this formerly desperate child. This is an experience this Judge will carry with him for the rest of his life. It is significant to note that the defendant

in these proceedings has never herself met this child or any of the others whose lives she affects with the stroke of a pen.

43. The Court finds that all the students who have been restored to treatment by order of this Court following the abrupt termination of their treatment by the September 26, 1985 order of the defendant and the deterioration in their condition caused by that intrusion, have substantially improved in their behavior and resumed their education and self-care, so that the quality of their lives has been improved. This improvement is so basic and essential to them that it literally involves their opportunity to enjoy blessings of humanity that other individuals are likely to take for granted. One such student's life, for example, without treatment, required imposition of four-point restraint to prevent him from tearing and lacerating his own prolapsed intestines. With treatment, this young man enjoys the simple pleasure of going to a restaurant; the simple pleasure of meaningful communication with another human being; the simple satisfaction of completing a meaningful task; the dignity of the achievement of basic self-care skills. These are typical of the benefits derived by these students as a consequence of their BRI program.

44. The Court finds that the defendant, Mary Kay Leonard, is the Director of The Office For Children, a Massachusetts agency within the Executive Office of Human Services, whose duties arise under the provisions of Massachusetts General Laws, Chapter 28A. She is responsible for implementing all policies of the Office For Children, in particular for issuing group care licenses to facilities such as BRI.

45. The Court finds that the defendant, by her testimony, is solely responsible for the decisions of her agency at issue in this litigation.

46. The Court finds that on September 26, 1985, the defendant issued orders that, among other things, attenuated the modes of treatment available to the students at BRI by abruptly terminating the use of any physical aversives and contingent food programs. The school was also prohibited from admitting any further students.

47. The Court finds that on April 24, 1986, the defendant issued decisions which in effect further reduce modes of treatment to such a degree that the BRI program became an empty shell for those students who require aversives as part of their treatment.

48. The Court finds that these decisions of the defendant are, in effect, treatment decisions.

The Court adopts Dr. Matson's (and other witnesses') views and finds that the consequences of these treatment decisions by the defendant are as follows:

A. The students will deteriorate such that self-abuse, violence, destruction, aggression and all aberrant behaviors will increase.

B. There is substantial danger that affective modes of treatment abruptly terminated, even if restored, may never work again.

C. Students will lose education opportunities and advancements; self-care skills, quality of life; and there is substantial danger that these benefits will never be restored or achieved.

D. Students will lose or fail to develop verbal skills.

E. Students will lose their opportunity to graduate into less restrictive environments.

F. Caretakers of the students, faced with the escalation of life-threatening behavior, will be obliged to resort to physical restraint, seclusion, antipsychotic medications, or other chemical restraints. (BRI never uses antipsychotic medications to restrain its students.)

G. The normalized environment of the school facility and the group homes will of necessity be disrupted and stripped of amenities.

H. Danger of physical assault and injury to staff and fellow students will increase. (Already there has been a four-fold increase in injury to staff.)

I. Staff time otherwise devoted to all the positive aspects of the program will be distracted and consumed by the need to restrain and control dangerous behaviors.

J. Parents of the students will suffer the consequences of all of the aforesaid circumstances, and these consequences will be manifest by increased marital and personal stress, increased divorce rates, and the loss of positive expectations in their children's behalf.

K. Work skills of the students will deteriorate further.

L. A 1983 follow-up study of students who have graduated from BRI revealed that seventy-five percent had become capable of living in less restrictive settings, once they had completed their course at BRI. Stripped of its program, BRI will no longer achieve

such results for its graduates. If BRI were no longer available, these students would for the most part be transferred to state hospitals or state developmental centers substantially more restrictive than the BRI environment and sometimes called "warehousing".

49. The Court finds that there is substantial evidence that all of the aforesaid deterioration has occurred already as a consequence of the September 26, 1985 orders..

50. The Court appointed Dr. John Daignault as Guardian ad Litem for the specific purpose of investigating and reporting to the Court as follows:

> "For the purpose of making a preliminary evaluation of the clinical needs of the Behavior Research Institute, Inc., students and the effect of the defendant Mary Kay Leonard's orders of September 26, 1985, and April 23, 1986, upon their status. Said evaluation shall consider the relationship between such orders and any regression of the Behavior Research Institute students including any life-threatening behavior, violence, self-abuse, loss of self-care skills or loss of educational opportunity. The evaluation shall focus primarily on those students who are now under temporary guardianship under the jurisdiction of this Court and shall apply only generally and as is possible to the remaining students."

(See Appointment of Guardian ad Litem dated May 1, 1986.)

51. The Court finds Dr. Daignault to be fully qualified as an expert for these matters, with commendable background and experience, including the fact that he holds degrees in psychology, has both clinical and academic experience in the treatment of developmentally disadvantaged individuals and holds appointments at McLean Hospital, Harvard Medical School, and at Bridgewater State Hospital.

52. The Court finds that the scope of Dr. Daignault's investigation of these matters included review of the defendant's orders and decisions of September 26, 1985 and April 24, 1986; visits to the BRI premises May 7, 8 and 9, 1986; clinical examination of all students being treated under purview of this Court's orders; review of current treatment programs; review of behavioral data charts at selected points, namely, the baseline data at time of admission; at six-month points; and the weekly data from January, 1985, through April, 1986. Dr. Daignault focused his attention upon behaviors currently being treated by any aversive that would be eliminated by implementation of the defendant's orders. He reviewed the students' psychological and psychiatric evaluations, interviewed administration, teachers and direct care staff; reviewed the report of the Panel upon which the defendant has relied; the work of the team established as a means of settlement by this Court; and spoke with a member of that team. He also selected and reviewed at random the records and history of a student at BRI not yet specifically involved in guardianship.

53. The Court finds that the current state of treatment of students at BRI is being adversely affected by the lack of collaboration of all parties involved in the students' treatment, because of the disruptive interjection of the defendant into the treatment processes.

54. The Court finds that Dr. Daignault developed his investigation in a detailed, thorough and extremely systematic manner, and he articulated his findings and conclusions in the same manner. The full presentation of his testimony to this Court comprised the better part of a full day.

55. The Court summarizes, finds and accepts Dr. Daignault's conclusions as follows:

A clinician who assumes the responsibility of the treatment of any patient such as a BRI student must be aware of the environmental factors involved in the patient's status. The competent clinician must consider the entire range of positive reinforcement, negative reinforcement and aversive consequences that actually occur in the development of any human being. There are potentially negative side effects to any treatments, including those treatments characterized as positive reinforcement. All of us live in an environment where we are constantly subjected to both reinforcements and aversives. At BRI, which provides a consistently controlled therapeutic environment where all positive reinforcements, negative reinforcements and aversive consequences are carefully defined, measured, controlled and documented so that they may be safely measured out and employed effectively to achieve nothing but therapeutic results, the institute achieves a total program of behavioral psychology that eliminates problem behaviors, builds new behaviors, and eliminates altogether the dangerous use of antipsychotic medications in the process. The BRI program has been effectively successful for each of the specific students examined and reviewed by Dr. Daignault. The effect of the defendant's orders and decisions is to destroy this program.

56. The Court finds that Dr. Daignault has documented the existence of the same damaging and dangerous consequences that Dr. Matson has articulated to be a direct consequence of the defendant's orders. The Court adopts Dr. Daignault's conclusion that implementation of defendant's orders will cause such substantial regression that the students will eventually make their way to less comprehensive state facilities where restraint and medications are employed primarily for management purposes, and not for educative purposes.

57. The Court finds that Dr. Daignault's examination of the present condition of the students restored to treatment under purview of this Court was exhaustive, and the Court adopts as its finding his conclusion in each instance that the condition of each student was substantially improved as a consequence of the restoration of treatment.

58. The Court finds that Dr. Daignault made an examination of the effectiveness of the work of the "team" that restored treatment to certain students under purview of this Court, and the Court adopts as its finding his conclusion that the team has been highly effective as a working group to restore therapeutically effective treatment.

59. The Court finds that no competent scientific basis exists for the treatment limitations the defendant's orders and decisions have imposed upon the clinical practice at BRI.

60. This Court finds that Dr. Matthew Israel, the Director of BRI, is eminently qualifed in psychology and the clinical practice of behavioral therapy, both through his academic training at Harvard and his

professional experience; and that he has devoted his clinical practice for more than a decade to the care and treatment of a unique and desperately vulnerable population largely ignored in the professional literature and in clinical practice.

61. This Court finds that Dr. Israel's testimony has been corroborated by the experts Matson and Daignault and is consistent in all substantial respects; and further, that this body of evidence has not been refuted by any competent or credible witness.

62. This Court finds that Mr. Leo Soucy, the parent representative on the team, corroborates that the team process was effective in its approach to addressing critical needs of the students whose treatment plans came under its consideration.

63. This Court finds that Dr. Edward Sassaman serves as medical consultant to the students at BRI, and in fact follows their medical care personally on a weekly basis. His qualifications include his medical education at Harvard University and his training at Children's Hospital. His appointments in addition to BRI include an academic appointment at Brown University Medical School. It is his professional opinion that the health and safety of the BRI students has been adversely affected and endangered by the actions of the defendant. The Court adopts this as its finding.

64. This Court finds that Bette McClure is the Director of Substitute Care of the Licensing Program of the Office for Children, and thus administers licensing authority for all out of home residential care. In this capacity she was directly responsible for the preparation and editing of the Licensing Re-Study dated August, 1985, (plaintiffs' exhibit #12). It is incumbent to remember that this crucial exhibit is the one

wherein the word "DRAFT" has been stamped on every page, as shall be later observed.

65. This Court finds that this report was completed somewhere between August 1 and August 31, 1985, after a study of some nine months, involving two hundred fifty hours of examination of BRI by Defendant's employees, and this report, which speaks for itself, is laudatory to BRI in all substantial respects and substantially consistent with the expert testimony heard by this Court regarding the status of BRI in August, 1985. However, with this laudatory report in hand, twenty-six days later the Defendant entered an order terminating the aversive therapies being utilized by BRI.

66. The Court finds that BRI was never notified of this impending, devastating action prior to its announcement at a press conference by the Defendant on September 26, 1985.

67. The Court further finds that this report had been disseminated by OFC, its agents, servants, employees or its attorneys, without the word "DRAFT" stamped thereon, to at least two state agencies, the Department of Education and the Executive Office for Human Services.

68. The Court finds that it has not been and was not the usual and customary procedure of the Defendant to disseminate such reports to other agencies in draft form.

69. The Court finds that on October 1, 1985, the Plaintiffs' counsel made a demand under the state version of The Freedom of Information Act to the deputy general counsel of OFC for the production of the document now numbered plaintiffs' exhibit #12,

and it is stipulated by the parties and found by this Court that said deputy counsel of OFC stamped the word "DRAFT" on each page of this instrument on October 2, 1985, one day after plaintiffs made their request for production. The significance of this event becomes obvious. In its original form, the report did not have the stamp "DRAFT" on every page. Indeed, the report had not been stamped "DRAFT" by Ms. McClure or any of the OFC's licensing staff. Rather, the report was stamped "DRAFT" by Robert Kubacki, Deputy General Counsel of the OFC, on the day that Mr. Kubacki received plaintiffs' request. This fact was not disclosed to plaintiffs' counsel.

70. The Court finds that the action of the OFC counsel in stamping the August 1985 report "DRAFT" was highly improper and constitutes not only a recent contrivance, but also a deliberate attempt to alter a document which OFC knew would be damaging in later proceedings. This conduct by a state official constitutes bad faith by the Office For Children.

71. The Court finds that plaintiffs' exhibit #12 has been substantially altered, which alteration was made by an employee of the defendant after it was delivered to the Department of Education and the Executive Office for Human Services. The thrust of such alteration is to anticipate that at some future time OFC would not be compromised or embarrassed by this laudatory report.

72. The Court asked the person who made this alteration to appear and explain the reason for this alteration. The Deputy General Counsel never appeared. I, therefore, find that had he appeared, the Deputy General Counsel's testimony would have been damaging to the defendant.

73. The Court finds from the testimony of Bette McClure that no further written reports were ever made or received by her or the Defendant on the subject of BRI from the date of the August report to the date of the Defendant's Decision of September 26, 1985.

74. The Court finds that Bette McClure was the OFC's representative and participant in the "team" initiated by the Court who repeatedly voted with the "team" to reinstitute aversives to the students whose cases were reviewed. Two days prior to the Defendant's April 24, 1986, Order which bans aversives, Bette McClure voted to restore aversives to at least two students, Steven G. and Heather S. By her own testimony she did this for two reasons: she found the students had regressed and she found that all appropriate questions had been asked and answered regarding the existing alternatives for these children.

75. This Court finds that at the time Bette McClure voted for the restoration of aversives for these two students, she knew that the decision of the OFC to ban these aversives had been made and was about to be implemented. She voted to restore treatment because it was in the best interests of the children.

76. This Court now turns to the pivotal area which is decisive on the issue of the preliminary injunction. We must examine the Defendant's background, experience and action taken during the critical time with particularity.

77. This Court finds that the Defendant, Mary Kay Leonard, is an attorney by profession, formerly General Counsel to another state agency, who possesses no substantial education, training or experience in the fields of psychology, psychiatry, and the

behavioral sciences. She became the Director of OFC on July 15, 1985. She was thus thrust upon the scene with little preparation to assume the myriad administrative duties of this agency. On July 22, 1985, she learned of the death of a BRI student and an investigation was inaugurated. She took no formal administrative action in August of 1985 because she believed that BRI was acting within the scope of its license. In mid September of 1985, she changed her mind, although her September 26, 1985 Orders did not grow out of concerns regarding the student's death. This Court can thus find no justification for the entry of the September 26, 1985 Order.

78. The Court finds that at some point in time, the Defendant realized that she did not possess sufficient skills to make treatment decisions for these students, and also realized that she would have to some day explain on what basis she had made such decisions.

79. The Court finds that accordingly, she recruited a panel, claiming it was her intention to recruit a group who were objective about (a) the use of aversives; (b) the use of aversives at BRI; and (c) Dr. Matthew Israel. She managed, however, to recruit a panel that was the exact antithesis of her claimed intention. The composition of the panel was objected to by both BRI and the parents. The Defendant chose to ignore both, and proceeded to try to buttress her position.

80. The Court finds that the panel was not impartial, and that the Defendant knew or should have known her panel was not impartial nor fairly chosen. Because of this, the parents declined to permit examination of their children's records by the panel.

81. The Court finds any report made by that panel to be deficient and of little value because of the paucity of the material examined by them, their failure to interview personally the students, and their complete reliance upon reports submitted to them by the defendant, who sought their approbation. The conclusions reached by the defendant's panel are of no value and have indeed been rejected by the medical experts who testified in this case, Dr. Matson and Dr. Daignault.

82. The Court finds that the defendant in this case, by her institution of these unsubstantiated Orders, based upon no medical foundation and without regard to the consequences of such Orders, has made, as Dr. Matson has stated, treatment decisions that "play Russian Roulette" with the lives and safety of the students at BRI.

83. The decisions of the defendant, insofar as they are treatment decisions, are arbitrary, capricious and beyond the scope of her authority.

84. The Court finds that the bad faith demonstrated by this defendant has obliged this Court to enter preliminary injunctive relief in these proceedings.

CONCLUSION

This Court has issued a preliminary injunction, having found that the plaintiff students and their parents will suffer irreparable harm if it is not issued. This Court has balanced the harm that will affect all of the parties, the deterioration of the health and safety of the students and the anguish of the parents versus

the absence of harm to the defendant. The defendant's statutory mandate is as a licensing authority. By her own testimony, she is not permitted to make treatment decisions. This injunction does not speak to the licensing function of the defendant and, therefore, harms her in no way. The equities in this case demand relief. These students cry out for help, and there is every likelihood that the plaintiffs will prevail at a hearing on the merits. The public interest is the final consideration for the issuance of a preliminary injunction. It should be apparent from the findings made herein that the public interest can only be served by the allowance of the plaintiffs' requests. The best interests and welfare of children are in the public interest.

June 4, 1986

Ernest Rotenberg

Ernest Rotenberg, First Judge
Probate and Family Court Department
Bristol County Division
Massachusetts Trial Court