COMMONWEALTH OF MASSACHUSETTS
**SUPREME JUDICIAL COURT**

BRISTOL, ss. NO. 06990

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BEHAVIOR RESEARCH INSTITUTE, INC., et al.
*Plaintiffs-Appellees*

and

JANINE CASORIA, et al.
*Student Intervenors-Appellants*

v.

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

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

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# REPLY BRIEF OF THE INDIVIDUAL STUDENTS, INTERVENORS - APPELLANTS

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### 1. INTRODUCTION

The individual intervenors filed their brief with this Court on October 19, 1996. Briefs were filed on behalf of the Behavior Research Institute (BRI) and the "student members of the class" on January 26, 1996 (hereafter Brief of "Student Class").[1] Although no further extension of time had been previously approved by the Court, a brief was filed on behalf of the "class of students, parents, and guardians" on February 2, 1996. For the first time in the history of this litigation, these briefs (hereafter Appellees' Briefs) collectively argue yet another configuration of the parties in this case: that there is one certified class of students, parents, and guardians,[2] which is represented by an attorney (Eugene Curry) who also represents an unrecognized corporate intervenor, the BRI Parents and Friends Association, Inc. and that there are two other attorneys (C. Michele Dorsey and Paul Cataldo) who represent an uncertified, undefined, and unrecognized subgroup of the plaintiff class comprised only of the students at BRI.

Based upon this novel reconstruction of the history and alignment of the parties in this

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[1] The lower court appointed these attorneys explicitly to represent the "class of students." App. 74. Throughout the proceedings in the trial court and on appeal, these lawyers have consistently referred to themselves as counsel for the "Class of Students." App. 143, 255. In the face of the individual students' challenge to their role, for the first time in the history of this litigation and this dispute, these attorneys have now reconstructed their role and renamed their clients "the students members of the class."

[2] This class was permanently certified on December 12, 1986. App. 47. Contrary to various assertions in appellees' briefs, see Brief of "Student Class" at 28, there is no dispute that this class -- and only this class -- exists. The individual students have repeatedly acknowledged that a class of students, parents, and guardians was created by the lower court. See Brief of the Individual Students' at 5, 23. Finally, so too have Ms. Dorsey and Mr. Cataldo. See Brief of "Student Members of the Class" at 7, n.4

At the time the individual students filed their motion to intervene, the status of the class was less clear. Ten months after BRI and the other parties filed their initial oppositions, the parties jointly discovered the permanent certification decision of the lower court and made it available to trial court just prior to the April 5, 1995 hearing on the motion.

case, the Appellees' basically argue two points: (1) that the individual students should not be permitted to intervene both because they are members *of* the plaintiff class and because they have separate representation *from* the plaintiff class; and (2) the fact that they have involved guardians precludes the appointment of independent next friends. This reply brief challenges the procedural and practical propriety of the first argument and the incorrect legal assumptions of the latter claim.

## II. THE STUDENTS OF BRI DO NOT HAVE COUNSEL IN THIS CASE WHICH COMPORTS WITH THE REQUIREMENTS OF MASS. R. CIV. P. 23.

Mass. R. Civ. P. 23 imposes strict requirements upon the certification of a class action. *Sniffin v. Prudential Ins. Co. of America*, 11 Mass. App. 714 (1981). Among other criteria, the trial court must determine, both at the time of certification and on an ongoing basis, that the class is adequately represented. *Key v. Gilette Co.*, 782 F.2d 5 (1st Cir. 1986); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979)(trial court has ongoing responsibility to undertake stringent examination of adequacy of representation by class counsel at all stages of litigation). The primary factors which courts consider in assessing adequacy are the qualifications and experience of the proposed class counsel and the fact that the attorney's sole loyalty and responsibility is to the class. Newberg on Class Actions, §3.07. (1992)(hereafter "Newberg"). While there is no question that at the time of certification of the class of students, parents, and guardians the then class counsel, Robert Sherman, satisfied these criteria, there is substantial question whether the current class counsel, Eugene Curry, does so, since his primary loyalty is to his corporate client, the BRI Parents and Friends Association, Inc.

A parallel criteria for class certification is that there are no conflicts or distinct and different interests between classmembers. To the extent that such conflicts or differences are

identified, the proper approach either is to deny certification or to create subclasses which satisfy the requirements of Rule 23. Although the lower court apparently believed that a separate class of students existed, which it appointed attorneys C. Michele Dorsey and Paul Cataldo to represent,[3] it subsequently discovered this was error. In response to this belated recognition, the trial court, without notice to anyone, unilaterally realigned the parties and their counsel. It denominated Mr. Curry as the attorney for the single class of students, parents, and guardians, even though his appearance in this case and every pleading he filed thereafter was on behalf of his corporate client, the BRI Parents and Friends Association, Inc. BRI S.A. 63.

In its opinion denying the motion to intervene, the lower court acknowledged the distinct interests of the students, declaring that "direct representation of the Students, independent of any Guardian or Next Friend authority, is considered by this Court to be important in protecting the Students from potential conflict with the interests of the Parents and Guardians." App. 243. It then proceeded to relabel the role of Messrs. Dorsey and Cataldo as counsel for the student members of the class, *id.*, as opposed to the student class, as originally described in its appointment order. App. 74. This it cannot do under Rule 23, without formally certifying a separate class or at least a subclass. In effect, in disregard of established class action procedures and requirements, the lower court, by judicial fiat, declared that there are three attorneys for the same class, one of whom (Mr. Curry) is responsible for representing the interests of the entire class and the other two of whom are informally authorized to assert the interests of certain members of that same class. This unilateral realignment of counsel and the class ignores the

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[3] These attorneys were explicitly appointed to represent the "class of students in the above captioned proceeding" as the successor counsel to attorneys Max Volterra and Marc Perlin, who had been appointed to represent "the potential class of all students at the Behavior Research Institute, Inc." App. 71, 74.

important procedural and underlying interests of Rule 23. Whatever else its deficiencies, it should not now be considered as a barrier to meaningful participation in this case by individual BRI students who seek to intervene to protect their interests in this matter.

### *A. There Is No Attorney in this Case Who Exclusively Represents the Interests of the Plaintiff Class.*

In 1991, the attorney for the plaintiff class, Robert Sherman, withdrew from this litigation.[4] No successor class counsel was ever formally appointed. No alternative class counsel was even identified, by the lower court or by the parent class representatives, until May 18, 1995, when the court entered its order on the intervention motion. App. 243. What did occur between that time is highly significant to this appeal.

On January 12, 1994, more than three years after Mr. Sherman's withdrawal, Eugene Curry, Esq. entered his appearance "for the Parents Association of the Behavior Research Institute, Inc." BRI S.A. 63. That appearance explicitly acknowledged that the Association did *not* include all parents and guardians of the BRI students, but rather only eighteen named parents. Interestingly, the parent class representatives, Peter Biscardi and Leo Soucy, were not members of the Association. Moreover, the Association never filed a motion to intervene or complaint in intervention, as required by Mass. R. Civ. P. 24. Nevertheless, without questioning the role of the Association or the status of its counsel -- in fact, without a hearing or any decision -- the Parents and Friends Association became a party to this litigation. Its counsel, Mr. Curry, thereafter filed pleadings in all relevant matters on behalf of his corporate client, including an opposition and other responses to the individual students' intervention

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[4] Mr. Sherman has subsequently, and without obtaining the consent of class representatives or absent members of the class, reappeared in this case as counsel for BRI.

motion, as well as assents to BRI's various motions with the Appeals Court and this Court, in this and related proceedings during the summer and early fall.[5] Mr. Curry candidly admits that it is the BRI Parents and Friends Association, Inc. which has retained him and which currently directs his efforts. Brief of Plaintiff Class at 16-17.

There is a serious question of whether an attorney who represents a corporate "intervenor," comprised of selected members of a broadly defined class, can properly and simultaneously serve as counsel for the entire class, at least where these joint roles do not arise at the inception of the litigation, are never the subject of notice to the class and a hearing by the court, and are never specifically determined by the court to be free of conflict. There is also a serious question of how Mr. Curry can properly devote his undivided loyalty to his newly-identified class clients when he has a previous loyalty and responsibility to his corporate client in this case. This is particularly true since the lower court has consistently recognized the potential or actual conflict between the interests of the parents and the students.[6] App. 243. But there is no question that, given Mr. Curry's role as corporate counselor and the resultant divided loyalty, there is no attorney who exclusively represents the plaintiff class. Therefore, the fact that the students of BRI are members of the plaintiff class should not preclude them from intervening in this case.[7]

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[5] Virtually all docket entries concerning Mr. Curry reference the BRI Parents and Friends Association, Inc. App. 027-30, 35.

[6] It is significant that even after learning of his new assignment as class counsel, Mr. Curry has never withdrawn from his role as corporate counsel.

[7] As more fully explained previously, class membership is not generally considered a bar to intervention. See Individual Students' Brief at 39-40. Rather, it is the most appropriate method for absent classmembers to participate in complex litigation, where their interests diverge from those of the class representatives. *Id.* Here, the conflicting responsibilities and newly created role of Mr. Curry constitute additional reasons for allowing

### B. *There Is No Attorney in this Case Who Has Been Properly Designated As Counsel for the Class of Students, Parents, And Guardians.*

The individual students do not challenge Mr. Curry's role as counsel for a putative intervenor, although the corporation's interest in this case is probably adequately represented by BRI or by the class of students, parents, and guardians. Nor do the individual students question the apparent conflict between eighteen parents being members of an incorporated association, which has been accorded *de facto* party status by the lower court, and their simultaneous membership in a certified class. But there is at least a serious question of how counsel who appeared solely on behalf of this corporation can be transformed automatically, informally, and without even the semblance of conformity with the prerequisites of Rule 23, into counsel for the plaintiff class.[8]

Trial courts are afforded considerable discretion in managing class actions. That discretion is necessary in part because of the evolving nature of these cases.[9] But that discretion is not boundless or completely without procedural requirements. *Sniffin, supra*; *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982)(court's discretion must be based upon a "rigorous analysis that the prerequisites of Rule 23(a) have been satisfied"). When class counsel

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intervention by the individual students.

[8] It was in part because the class had no representative for three years and because no actions were taken on behalf of the students between 1991 and 1994 that the individual students filed their motion to intervene on March 31st of that year.

[9] While it is true that no party ever appealed the trial court's certification decision of December 12, 1986, there was no reason to do so, at least from the perspective of the then parties to the litigation. There was one attorney who represented only the interests of the plaintiff class and who was actively involved in the case from its inception. Thus, at that time, there was no absence of counsel for the plaintiff class and no dual representation of different and potentially conflicting parties, as there now is. Moreover, while certain students and their parents who were attempted to intervene questioned the appropriateness of the class definition, the class representatives, and the commonality of interests and claims, they had no standing to appeal the certification decision when their intervention motion was denied. App. 13. See Brief of Individual Students at 4, n.7.

withdraws, new counsel should be promptly appointed, consistent with the criteria set forth in Rule 23(a). Courts should scrutinize substitute counsel with the same care with which they approve initial counsel at the time of certification. Obvious conflicts and divided loyalties should be avoided. Newberg, §3.42 at 3-229. To the extent other attorneys claim to represent the class, or a portion thereof, considerable caution should be exercised to ensure that the Rule 23 findings which justified the original certification remain uncontested. Finally, and most importantly, some minimal process is due. Courts should not unilaterally, on their own motion and without notice and hearing, simply designate an attorney who represents another party in the same case to be counsel for a broad plaintiff class, at least where that same court had just previously appointed other attorneys to represent an undefined portion of that class. At a minimum, the extraordinary procedural irregularities which are reflected in the recent history of this litigation and the lower court's May 18, 1995 Order on Intervention should not be considered valid justifications for denying the individual students a right to intervene.

### C. *Since There Is No Separate Class or Subclass Comprised Solely of Students, No Counsel Was or Could Be Properly Authorized to Represent Solely the Interests of the Students.*

The individual students previously have discussed in detail the fact that there never has been, nor should there be, a separate class or subclass comprised of all students at BRI.[10] See Individual Students Brief at 26-32. None of the appellees now challenge the fact that no distinct student class or subclass exists, even though the trial court appointed C. Michele Dorsey and Paul Cataldo to represent precisely that class and even though these attorneys have consistently

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[10] This is particularly true when there is antagonism or conflict between members of the class, as there is in this case. *American Timber & Trading Co. v. First National Bank*, No. 70-687-SK (D.Or. 1979), *aff'd.* 690 F.2d 781 (9th Cir. 1982).

claimed to be counsel for this class. Their creative reconstruction of this history and their solution to this procedural problem is to argue that the plaintiff class actually has two sets of attorneys -- one who represents the entire, undivided class of students, parents, and guardians and the other two who represent the extemporaneously undefined group of students. That solution, while intriguing and purportedly in the students' interests, is a belated attempt to defeat the individual students' right to intervene in a manner which twists the requirements of class actions beyond recognition.

Classes may certainly have more than one lawyer, with the understanding that they jointly represent the same interests and members. Separate classes certainly must have more than one attorney. Distinct subclasses usually do not have separate counsel from the class attorney, although arguably they may. But *one* unified class cannot have *two* separate counsel, one charged with representing everyone and the other with protecting the interests of only some classmembers. The confusion is obvious, as is evident by the supposedly separate assents to BRI's motion to consolidate proceedings in this and related appeals that were filed by Ms. Dorsey on behalf of the Class of Students and Mr. Curry on behalf of the Class of All Students, Parents, and Guardians.[11] App. 255-56.

The individual students have not challenged the appointment of Ms. Dorsey and Mr. Cataldo, although the status and meaning of that appointment has dramatically changed in the course of this intervention dispute and even in the course of this appeal. While their role is ambiguous, it arguably can serve some useful purpose. But it cannot constitute, by judicial fiat,

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[11] That confusion is more dramatic and potentially paralyzing when the issue is substantive and the different attorneys take different positions on an fundamental issue in the case.

either the creation of a *de facto* subclass or the appointment of counsel for a nonexisting subclass. Nor can it circumvent the jurisprudential limitations or procedural requirements of Rule 23. See *General Telephone Co.*, 457 U.S. at 161. As such, it does not constitute meaningful protection of the students' interests nor adequate representation of those interests, which appellees argue should preclude intervention by the individual students.

## III. THE INDIVIDUAL STUDENTS SHOULD BE PERMITTED TO INTERVENE, EVEN THOUGH THEY ARE MEMBERS OF THE PLAINTIFF CLASS.

### *A. The Individual Students' Have a Direct and Immediate Interest in the Pending Litigation, Enforcement of the Settlement Agreement, and Implementation of the Contempt Decision.*

The lower court and all parties to this case have consistently recognized the distinct and important interests of the students in this litigation, the Settlement Agreement, and various enforcement proceedings thereunder. App. 243-244. Counsel for the "student members of the class" assert that they played a significant role in the contempt trial.[12] Yet the appellees argue, for the first time on appeal, that the individual students actually have no interests deserving protection or justifying intervention in the dispute between BRI and DMR concerning the types of aversive interventions which may be employed by the school on its students, and the types of safeguards which should be instituted to protect the students from harm at the school.

This argument is inconsistent with the appellees' positions throughout this litigation, and borders on being frivolous. The original complaint filed by BRI in this case asserted a number of constitutional and statutory rights of persons with disabilities. The lower court found that the defendants' actions had probably violated these rights. BRI S.A. 17-18. The Settlement

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[12] The individual students strongly dispute this characterization, as set forth in section III(B) below.

Agreement sought to secure these rights. App. 51. The contempt complaint referred to these rights. Students' S.A. 45, 103. Throughout the entire decade of this litigation, BRI has consistently claimed that it was acting to protect and enforce the rights of its students. It is incongruous, to say the least, that it now asserts that this entire case, and particularly the egregious facts which it asserts in its seventy-one page contempt complaint, do not implicate or affect the rights and interests of the students. BRI Brief at 36-37. It is remarkable that counsel for the "student members of the class" concur, thereby raising a serious doubt about the adequacy of their representation of the BRI students.

There can be little question that this entire proceeding revolves around the rights and interests of the students.[13] The trial court has repeatedly so held. App. 69; BRI S.A. 29. While the specific aversives which may be involuntarily administered to a specific student is determined in a substituted judgment proceeding,[14] it is the Settlement Agreement itself which created this structure. App. 52. The essential dispute which gave rise to the BRI's contempt motion focused on the authority of DMR under the Settlement Agreement to circumscribe which aversives may be utilized safely at BRI and thus what interventions could lawfully be incorporated in a substituted judgment treatment plan.[15] Students S.A. 87-88. Most

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[13] If this was simply a licensing dispute between a private provider and an executive agency, attorney's fees awards against the government in excess of $1,500,000 would be difficult to justify.

[14] It is significant that most of the fundamental rights violations alleged in the Complaint in Intervention are never considered in these guardianship proceedings. See App. 112-14. That counsel for the "student members of the class" assert that they are regularly litigated in the substituted judgment cases demonstrates their lack of familiarity with the very proceedings to which they seek to delegate their clients' rights. Brief of "Student Class" at 22.

[15] DMR's various certification letters and particularly its January 20, 1995 decision banned the use of food deprivation and the next generation of BRI's home-made electroshock machine. App. 169. It further prohibited the use of all painful aversives on six named students. App. 166.

significantly, the lower court's decision directly addresses and implicates the rights of the individual students, BRI S.A. 137-44, and even the ability of their guardianship counsel to act independently in the substituted judgment proceedings. BRI S.A. 147, 156.

Intervention is the preferred means of addressing possible or actual conflicts between classmembers or disagreements which often arise at the remedial stage of complex litigation. *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 34 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1982); *Bolden v. Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978). See Newberg, §3.42 at 3-229. Intervention is *explicitly* permitted under Rule 23, even when the representation of classmembers may be adequate. *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987)(second group of residents permitted to intervene in prison case where class of other residents already certified); *Rota v. Brotherhood of Railway, Airline, and Social Security Clerks*, 64 F.R.D. 699, 706, 708 (N.D.Ill. 1974). See Newberg, §16.07. Given the more relaxed standards for permissive intervention, courts have regularly allowed intervention by absent classmembers under Rule 24(b). *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359 (D.Del. 1990); *Epstein v. Weiss*, 50 F.R.D. 386 (E.D.La. 1970). See Newberg, §16.08 at 16-47-49. Finally, intervention by individual classmembers has been approved in many protracted injunctive actions to challenge implementation of settlement agreements. *Hines v. Rapides Parish School District*, 479 F.2d 762 (5th Cir. 1973); *Brown v. Board of Educ.*, 84 F.R.D. 383 (D.Kan. 1979).

The individual students clearly have an interest in this case as a whole,[16] as well as

[16] While the triggering event for the individual students' intervention motion was the resumption of serious disputes between DMR and BRI concerning the operation of the program, the students' motion was never limited solely to BRI's contempt motion. See Individual Students' Brief at 8. The students retain an interest in participating in all other aspects of this litigation, including the interpretation and enforcement of the Settlement Agreement and

DMR's licensing and certification decisions,[17] which have been and will be impeded by decisions in this litigation.[18] The individual students need to intervene to protect those interests, which have been and will continue to be impeded by ongoing decisions in this litigation[19] and which are clearly not addressed in substituted judgment proceedings.

### B. *The Interests of the Individual Students Have Not Been and Will Not Be Adequately Represented by Counsel for the BRI Parents and Friends Association, Inc., or Any Separately Appointed Counsel for an Undefined and Uncertified Class of Students.*

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the trial court's contempt decision. BRI S.A. 154. In fact, given the current reality that the entire oversight of the students' safety, welfare, treatment, and legal rights is now in the hands of a court-appointed receiver, the individual students have an even greater interest in participating in this case, now that the contempt motion has been decided.

[17] It was not so much BRI's contempt motion which prompted the filing of the individual students' motion as it was DMR's certification decision of February 9, 1994. The students were far more concerned with DMR's actions threatening to decertify BRI, close its program, or restrict its treatment options than they were with BRI's actions under the Settlement Agreement, although they all were inextricably intertwined. Thus, the students' motion was clearly timely, since it was filed within forty-five days of DMR's formal decision. The appellees contention that the motion should be denied on this ground because students with profound disabilities should have been able to anticipate that decision some months earlier should be rejected by this Court, as it was by the trial court. Moreover, the guardianship counsel who seek appointment as next friends for the individual students were not even appointed until November and December of 1993. It is not unreasonable and certainly not untimely for these attorneys to take ninety days to familiarize themselves with their clients and the lengthy legal proceedings in this and the substituted judgment cases, to determine that intervention in the equity case was necessary, to formulate and implement a collective strategy, to secure counsel for the intervenors, and to prepare the motion, memo, and complaint.

[18] See Individual Students' Brief at 15-18.

[19] From the filing of their intervention motion, the individual students have proposed various approaches to avoid any delay or prejudice to the parties. When the motion was first filed in March 1994, they offered to forego any separate discovery or other activity which might delay the contempt trial. Since the trial was not even scheduled for another year, allowance of their motion in a timely manner clearly would not have prejudiced the parties. Now that the contempt trial is completed, and in light of this Court's denial of a stay last June, App. 250, permitting the individual students to intervene at this stage would not result in a retrial of the contempt matter, unless this Court reverses the lower court's contempt decision in a separate appeal. There being no other major, pending proceedings in this litigation, there can be no argument that the students' intervention would prejudice or delay adjudication of the parties' claims.

The appellees primarily argue that the individual students should not be permitted to intervene both because they are members of the plaintiff class comprised of students, parents, and guardians, and because the lower court has provided them protection from the acknowledged conflict of interest between the students and the parents by appointing separate counsel for the students. In essence, they claim that the students are provided protection by the appointment of separate counsel to represent their distinct interests.

It is well established that absent members of a class are permitted to intervene to protect their own interests, particularly where there is reason to believe that some conflict may exist between and among classmembers, as the lower court found here. App. 243. See *Shults v. Champion International Corp.*, 35 F.3d 1056 (6th Cir,. 1994) and the Individual Students' Brief at 39. Where that class has had no counsel for three years and where the attorney who was belatedly appointed to assist the class is the same lawyer who represents an incorporated association that includes some classmembers from one subgroup of the class, there is an especially compelling reason to allow absent members of the other subgroup to intervene to protect their distinct interests. Similarly, the "additional protection" afforded to the students by the appointment of other lawyers to represent them is of questionable value and certainly does not constitute adequate representation, when: (1) there is no defined class or subclass of students to represent and no separate representatives of this subclass to direct, guide, and even influence the attorneys; (2) there is no finding that the *students* share common claims or interests; (3) there is overwhelming evidence of obvious conflicts between the student class representatives and most of the other students concerning their views, preferences, and legal positions with respect to

aversive interventions, the actions of DMR, and the interpretation of the Settlement Agreement;[20] and (4) there is no delineation between the role and responsibilities of counsel for the class of students and counsel for the student members of the class.

The most recent and compelling evidence of the inadequacy of the representation assigned to the students is the virtually nonexistent role the students played in the trial on BRI's contempt motion. While BRI, DMR, and the BRI Parents and Friends Association, Inc. each called between four and seven witnesses, the students called none. While BRI, DMR, and the BRI Parents and Friends Association, Inc. each introduced between one and ninety of their own exhibits, the students introduced none. All of the witnesses called by the BRI Parents and Friends Association, Inc. were parents, even though the same counsel was also representing the class of students, parents, and guardians. Even when issues concerning the risks of certain aversives to the students, the harm to certain students from the lack of aversives,[21] and the abuse to other students at the BRI program were being litigated, the students took no initiative, introduced no evidence, never challenged any of the evidence produced by BRI, never cross-examined any of DMR's witnesses, and barely participated at all.

This Court should not countenance the *ad hoc* reconfiguration of counsel in this case or the contravention of the purposes and strict requirements of Rule 23. Instead, it should conclude that the individual students are entitled to a *meaningful* voice in this litigation and should be permitted to intervene to assert their views and to protect their interests.

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[20] For a fuller description of the differences which preclude the certification of a class of students, see the Individual Students' Brief at 26-31.

[21] In fact, the C. Michele Dorsey *objected* to the students being examined by an expert to assess the clinical harm of DMR's ban on certain aversives.

## IV. THE INDIVIDUAL STUDENTS NEED INDEPENDENT AND IMPARTIAL NEXT FRIENDS TO PARTICIPATE IN LITIGATION INVOLVING EXTRAORDINARY AND INTRUSIVE AVERSIVE INTERVENTIONS.

### *A. The Pending Litigation, the Settlement Agreement, and the Contempt Decision Directly Affect and Determine the Nature and Types of Extraordinary, Painful, and Intrusive Interventions Which May Be Involuntarily Administered to Incompetent Students at BRI.*

BRI asserts that because the contempt action is concerned only with the question of whether DMR violated the consent decree, it will have no affect on the treatment decisions which are the subject of the individual guardianship proceedings, and that participation by the guardianship counsel is therefore unnecessary. But this argument ignores the inextricable link between the outcome of the contempt action and the scope of treatment interventions available for consideration at a substituted judgment proceeding. For example, if DMR's interpretation of the Settlement Agreement is correct, then it had authority to order BRI to discontinue the specialized food program as well as a number of other aversive interventions. App. 169. In fact, the nature and scope of the aversives which may be employed by BRI and included in its proposed substituted judgment treatment plans is a critical issue in the equity proceeding, in which the individual students seek to intervene. It was the central issue raised by BRI's contempt motion and decided by the trial court in its contempt decision. Currently, it is at the core of DMR's appeal of that decision. *See* SJC No. 07107. Thus, there can be little question that decisions of the lower court in this case profoundly and directly control what can and will occur in the related guardianship proceedings.

Any doubt about the far reaching implications of the contempt action on the students' individual substituted judgment proceedings is removed by the provisions in the trial court's Judgment prohibiting both DMR and "anyone acting in concert with them" from aggressively

litigating treatment plan reviews in the individual guardianship proceedings. BRI S. A. 156. There can be no question that this ruling will profoundly chill the efforts of the guardianship counsel to advocate for the best interests of their individual student clients in the related substituted judgment matters.

### *B. Parents and Guardians Can No More Determine their Wards' Rights and Preferences Concerning Extraordinary Treatment Interventions in This Case Then They Can in a Medication Guardianship Matter.*

BRI asserts that the next friend motion was properly denied "since the parents already are representing the interests of their children as they have all along." BRI Brief at 29. This simplistic analysis disregards the inherent conflict that is deemed to exist as a matter of law between the parents and their children with respect to treatment modalities that are considered "extraordinary and intrusive," such as the administration of antipsychotic medication, sterilization, or the removal of life-sustaining mechanisms. *See Guardianship of Richard Roe*, 383 Mass. 415 (1981); *In Matter of Moe*, 385 Mass. 555 (1982); *In Matter of R.H.*, 35 Mass. App. Ct. 478 (1993). As the court stated in *Roe*:

> Decisions such as the one the guardian wishes to make in this case pose exceedingly difficult problems for even the most capable, detached, and diligent decisionmaker. We intend no criticism of the guardian when we say that few parents could make this substituted judgment determination ... in which the decisionmaker is called upon to ignore all but the implementation of the values and preferences of the ward ... . Those characteristics laudable in a parent might often be a substantial handicap to a guardian faced with such a decision but who might in all other circumstances be an excellent guardian.

*Guardianship of Roe*, 383 Mass. at 442-443. For these reasons, a parent or guardian has no authority to consent to the administration of extraordinary and intrusive medical treatment; the decision must instead be made by a court at a substituted judgment proceeding. *Id.*

The inherent conflict between the parents and the students is not only embedded in

Massachusetts law, it is also established by the Settlement Agreement, which provides that BRI may not use aversive interventions on any individual student without the approval of the probate court. App. 52. In so agreeing, the parents themselves acknowledged that the nature of these highly intrusive and painful interventions makes it inappropriate for them to make decisions about their use, no matter how subjectively concerned they may be about the welfare of their children.

Given that Massachusetts courts and the parties in this case have constructed a decisionmaking scheme which explicitly precludes the parents and guardians from deciding whether aversive therapies may be administered to their child or ward, it is illogical to allow them to be the exclusive voice for the students in the contempt action, where the same issues have been and will continue to be frequently litigated. Where parents and guardians cannot determine which extraordinary and intrusive interventions, including aversives, can be involuntarily administered to their wards, so too the parents and guardians cannot exclusively determine the views, preferences, and positions of their wards in this equity case, which essentially determines what aversives may be lawfully used at BRI and incorporated in its substituted judgment treatment plans for consideration in the guardianship cases.

Just as at a substituted judgment hearing it is required that the student have independent counsel, so too it is vital that the students have similar protections in the contempt action. To treat the parents or guardians as adequate surrogates for the students so as to prevent the appointment of next friends in this case serves only to deprive the court of hearing viewpoints which may conflict with those of the parents. This is expressly contrary to the teaching of *Roe*, which admonished the courts to ensure that it is "the ward's values and preferences" which are

determinative, as opposed to what the parents may believe is in his best interest. *Roe* at 443.

The need for *independent* next friends -- not the parents or guardians -- is particularly acute in the present case because the parents have consistently taken positions identical to those of BRI. Thus, the denial of the appointment of next friends creates a real danger that the court would not hear a full or complete presentation of the actual views of the students. *Cf. In Matter of R.H.* 35 Mass. App. Ct. 478, 488 (1993) (substituted judgment determination overruled because guardian ad litem effectively delegated the treatment decision to the family of the retarded ward). This danger would be avoided by the appointment as each student's next friend the attorney who represents him in the substituted judgment proceedings. Since these lawyers are intimately acquainted with the students they represent, and particularly about their needs and preferences with respect to aversive interventions, they are the most objective and appropriate persons to serve as their next friends.

### C. *The System Suggested By The Proposed Intervenors Is An Efficient Means to Insure That The Interests of All The Students Are Fairly Presented to the Court.*

The guardianship counsel have retained Steven J. Schwartz of the Center for Public Representation to represent their collective interests, if appointed as next friends for the individual students and allowed to intervene. This method was chosen as an efficient, flexible, and streamlined approach to spare the court and the parties unnecessary time and expense. Contrary to BRI's assertion, it would not diminish the voice of the individual students because each of them would be consulted by his own next friend who would transmit his views to Mr. Schwartz. Thus, there is far less likelihood that the individual preferences of any student would be ignored than if the students had to rely exclusively and collectively on attorneys Dorsey and Cataldo.

Nor is there merit to the claim that the intervenor's system ignores the potential for conflict among the individual students who may have opposing views. This claim is merely speculative and contrary to history and experience. In the more than two years since the arrangement between Mr. Schwartz and the guardianship counsel was implemented, no such conflict or divergence of opinion has arisen. More importantly, Mr. Schwartz,[22] as well as the other guardianship counsel, are governed by the Rules of Professional Responsibility and there is no reason to assume that they would not act in accordance with those rules if confronted with an actual conflict.

Finally, in light of the students' profound disabilities and extreme vulnerabilities, it is particularly appropriate that they be represented by an attorney who knows them and is familiar with their circumstances, rather than an attorney who has not had the opportunity to build a relationship of trust and confidence over a period of years.

## V. AWARD OF ATTORNEY'S FEES AND COSTS IS NOT APPROPRIATE FOR THIS APPEAL.

Without any argument, or even identification of any objectionable passages in the appellant's brief, BRI seeks attorneys' fees and costs under Mass. R. App. P. 25 and G.L. c. 211, § 15, because it claims the appeal is frivolous.[23] It is well established that courts are "hesitant to deem an appeal frivolous except in egregious cases." *Symons v. O'Keefe*, 419 Mass. 288, 303 (1995); *Avery v. Steele*, 414 Mass. 450, 456 (1993). It takes much more than "unpersuasive arguments" to render an appeal frivolous. *Symons*, 419 Mass. at 303; *Avery*, 414

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[22] The appellees repeatedly challenge Mr. Schwartz' motives in representing the individual students. The lower court completely ignored thse arguments. This Court should do the same.

[23] The fact that BRI stapled its request for sanctions at the end of its Brief, and refers to itself as "her," suggests that the request was an afterthought which even it does not take seriously.

Mass. at 455. An appeal is frivolous only "when the law is well-settled and there can be no reasonable expectation of a reversal." *Id.* It is not "frivolous because it presents an argument that is novel, unusual or ingenious, or urges adoption of a new principle of law or revision of an old one." *Allen v. Batchelder*, 17 Mass. App. Ct. 453, 458 (1984).

Appellees have not, and cannot, point to any "well-settled" law that makes this appeal futile. Nor do they present a shred of evidence that the appeal was pressed for an improper purpose. Given the flagrant irregularities in the procedures chosen by the trial court to safeguard the interests of the students, the appeal raises substantial issues that are at least sufficiently meritorious to warrant rejection of the claim for sanctions.

## CONCLUSION

For the reasons set forth above and those incorporated in the Individual Students' initial brief, the decision of the lower court should be reversed and the individual students should be permitted to intervene through their next friends, their guardianship counsel.

THE INDIVIDUAL STUDENTS,
THROUGH GUARDIANSHIP COUNSEL
AND NEXT FRIENDS

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