COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

BRISTOL SS. NO. 06956

BEHAVIOR RESEARCH INSTITUTE, INC., ET AL.,
Plaintiffs-Appellees,

v.

DIRECTOR, OFFICE FOR CHILDREN,
Defendant-Appellant.

ON DIRECT APPELLATE REVIEW FROM
A PRELIMINARY INJUNCTION OF THE
BRISTOL SUPERIOR/PROBATE COURT

BRIEF FOR THE DEFENDANT-APPELLANT COMMISSIONER OF MENTAL RETARDATION

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from the Issuance of
a Preliminary Injunction

BRIEF FOR THE DEFENDANT-APPELLANT, COMMISSIONER OF MENTAL RETARDATION

ISSUE PRESENTED

Whether the trial court abused its discretion and erred as a matter of law in issuing a preliminary injunction prohibiting the Department of Mental Retardation ("DMR") from enforcing its decertification of the Judge Rotenberg Educational Center, formerly known as the Behavior Research Institute, Inc. ("JRC" or "BRI"), where JRC established neither (1) a likelihood of success on the merits of its

underlying contempt claim nor (2) a threat of immediate or irreparable harm.

STATEMENT OF THE CASE

Statement of Facts

By letter dated March 23, 1995 (the "Decertification Letter"), the Commissioner of DMR (the "Commissioner") decertified JRC from utilizing Level III aversive behavior modification techniques.[1/] R.A. 476, 501. In order to allow for a gradual phasing out of the use of such techniques or for transfer of

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1/ Under DMR regulations, "Level III Interventions" are defined as follows:

1. Any intervention which involves the contingent application of physical contact aversive stimuli such as spanking, slapping or hitting.

2. Time out wherein an individual is placed in a room alone for a period of time exceeding 15 minutes.

3. Any Intervention not listed in 104 CMR 20.00 as a Level I or Level II Intervention which is highly intrusive and/or highly restrictive of freedom of movement.

4. Any Intervention which alone, in combination with other Interventions, or as a result of multiple applications of the same Intervention poses a significant risk of physical or psychological harm to the individual.

104 C.M.R. § 20.15(3)(d).

clients to other facilities that are certified to use Level III aversives, this decertification was not to become effective until July 1, 1995, more than three months after the date of the letter. R.A. 501. As stated in the Decertification Letter itself, the grounds for the decertification were JRC's stated refusal and actual failure to comply with the conditions set forth in the Commissioner's letter of January 20, 1995 (the "Conditional Certification Letter"), R.A. 501, in which the Commissioner had granted JRC a two-year certification to use Level III aversives, provided that JRC complied with the conditions stated therein. R.A. 261, 408.[2/]

As stated in the Conditional Certification Letter, the Commissioner approved JRC's application to use Level III interventions on

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2/ The conditions imposed in the Conditional Certification Letter were supported by findings included in the letter itself as well as more specific and detailed findings set forth in an accompanying Report on Compliance by the Judge Rotenberg Educational Center, Inc. with the Requirements of the Behavior Modification Regulations and the Terms of Certification to Use Level III Interventions (the "Report"). R.A. 422.

all individuals currently receiving such treatments, with the exception of six individuals. R.A. 408-09. With respect to those six individuals, whose treatment had been closely monitored by DMR over the preceding six months, DMR determined that the implementation of their treatment plans does not comply with DMR's behavior modification regulations, in that the Level III interventions used to treat these individuals are not the least intrusive and most appropriate for each individual and pose an unreasonable degree of intrusion, restriction of movement, and physical or psychological harm. R.A. 409-13.

Accordingly, DMR conditioned its certification to use Level III interventions by requiring JRC either to modify the treatment plans of these six individuals to comply with DMR regulations and to reapply for certification to utilize Level III aversives pursuant to the revised plans or to modify the treatment plans of these individuals to provide for treatment with Level I or II, rather than Level III, aversives. R.A. 416-17. In either case, the modified treatment plans were not to be implemented without the approval of the JRC

human rights and peer review committees; the consent of the guardian; Probate Court authorization using the substituted judgment criteria for the use of Level III interventions; and, for Massachusetts clients, compliance with the procedural requirements of DMR's ISP regulations, which require either the guardian's consent or prior administrative hearings before changing a client's ISP. R.A. 417. Thus, other than requiring JRC to modify its written treatment plans, this condition had no immediate effect on JRC operations or on JRC clients. And, absent all of the requisite approvals, including that of the Probate Court, of any revised plans calling for the use of Level III aversives, this condition would never affect the actual treatment of any JRC client.

The only other condition relating directly to treatment required that JRC not use certain specified Level III interventions, including the "specialized food program," a food deprivation program under which a client may receive as little as 20% of his minimum daily caloric requirement unless he earns additional food by not exhibiting problem behaviors. R.A. 419. This condition was based on DMR's findings that

there is no professional literature to support the use of these specified procedures as treatment for human beings in general or for the problems exhibited by JRC clients in particular, and that the specialized food program deprives a client of basic sustenance. R.A. 419.

The remaining conditions addressed JRC's obligation to permit DMR to have access to JRC facilities and records so that DMR could continue to monitor JRC's compliance with the certification conditions and with DMR regulations in general. R.A. 417-18. These conditions were based on DMR's findings that, since July 5, 1994, JRC had failed to permit such access. R.A. 415-16. The manner in which JRC was to comply with each of these conditions was set forth in agreements entered into by JRC and DMR after six weeks of intensive negotiations. R.A. 349-406.

The Conditional Certification Letter informed JRC that, if it was aggrieved by the certification decision, it had a right to appeal to the Division of Administrative Law Appeals ("DALA"), pursuant to 104 C.M.R. § 20.15(4)(f)(8), G.L. c. 19B, § 15(d), and G.L. c. 30A, § 13. R.A. 420. JRC did not take such

an appeal, nor did it seek relief in any other administrative or judicial forum from the certification conditions.

Rather, based solely on its counsel's opinion that the certification conditions were "illegal," JRC simply refused to comply with them. Shortly after receiving the Conditional Certification Letter, JRC's counsel informed DMR's counsel that "JRC regards the communication and the orders contained in this communication as having no force and effect and, therefore, . . . that JRC will not comply with any of the Commissioner's orders." R.A. 478, 498.

Not wanting to rely exclusively on the representations of JRC's counsel as to JRC's refusal to comply with the certification conditions, the Commissioner wrote directly to Matthew Israel, the Board President and Executive Director of JRC, on March 3, 1995, inviting him to disavow his attorneys' statements of JRC's intention not to comply with the certification conditions and specifically informing him of DMR's determinations, based on observations of DMR staff, that JRC was presently in violation of several important

certification conditions. R.A. at 477-78, 493. On March 23, 1995, having received no response from Dr. Israel, the Commissioner issued the Decertification Letter that gave rise to JRC's request for preliminary injunctive relief. R.A. 478, 501.

Prior Proceedings

On March 24, 1995, JRC filed a third amended contempt complaint, R.A. 41, and a motion for preliminary injunctive relief, seeking, among other things, to preliminarily enjoin DMR from revoking JRC's certification to use Level III aversives. R.A. 113, 114. JRC sought and obtained a hearing on that motion the same day. At that hearing, both JRC and the Commissioner relied upon their written submissions, which included JRC's motion, R.A. 113, 114; supporting memorandum; and the Israel Affidavit and exhibits thereto, R.A. 124; and the Commissioner's opposing memorandum; Affidavit, R.A. 255; and First Supplemental Affidavit and exhibits thereto. R.A. 476. The same day, the court entered the preliminary injunction (the "Injunction") at issue. R.A. 504. The Injunction enjoined the Commissioner from

> enforcing decertification of Behavior Research Institute, Inc. (sometimes called the Judge Rotenberg Educational Center, Inc.) as set forth in a letter dated March 23, 1995 provided:
>
> > a. that during the terms of this order or any extensions thereof, the BRI, alias, shall comply with the conditions contained in the Commissioner's letter dated January 20, 1995 granting conditional certification to said BRI, alias; and
> >
> > b. that any changes in treatment plans to be made shall be subject to the approval of the Court in a substituted judgment proceeding after due notice and an opportunity to be heard.

R.A. 504. Other than the conclusory statement, which is part of the printed form used by the court, that it appears that the Commissioner "is committing or threatens to commit the acts set forth below to the irreparable injury of the plaintiff," the court made no findings and stated no reasons for entering an Injunction or for the particular terms of the Injunction entered. R.A. 504.

After the issuance of the Injunction, it appeared, from correspondence between the parties and comments made by the court at a subsequent hearing, that the Commissioner's interpretation of the Injunction might differ from that of JRC and, perhaps, that of the court

itself. Therefore, the Commissioner attempted to obtain clarification of the Injunction by filing a motion to clarify it. R.A. 505.[1/] However, by letter dated April 18, 1995, the Clerk returned that motion and supporting memorandum to the Commissioner's counsel "in accordance with Judge LaStaiti's request." R.A. 513. In her letter, the Clerk stated her own belief that "[the Commissioner's] concerns were addressed in the preliminary injunction entered on March 24, 1995 and in the order entered April 14, 1995." R.A. 513. The trial court's April 14, 1995 Order, to which the Clerk presumably referred in her letter, stated as follows:

> All treatment decisions or changes in treatment plans must be addressed in the

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[1/] The issue on which the Commissioner sought clarification was whether the second proviso of the Court's order requires Probate Court approval of "changes in treatment plans," as the proviso literally stated, or whether the proviso further requires Probate Court approval prior to any change in treatment, including the cessation of certain types of aversive treatments (e.g., the specialized food program) that are presently included in treatment plans previously approved by the Probate Court but are not permitted under Condition 95-6 of the Commissioner's January 20, 1995 certification letter. This clarification was ultimately sought and obtained from a Single Justice of the Appeals Court, pursuant to G.L. c. 231, § 118, ¶ 1. R.A. 508, 517, 523.

> substituted judgment proceedings in the individual guardianship cases after due notice and an opportunity to be heard. Said proceedings are not governed by the January 20, 1995 letter from DMR to BRI re: certification. The Department of Mental Retardation's contention that their letter of January 20, 1995 supercedes this Court's order of January 7, 1987 is at odds with the plain language of the settlement agreement filed with this Court on December 12, 1986. The Department of Mental Retardation cannot by implementation of its certification process subvert the provisions of said settlement agreement and also the jurisdiction of this Court to render substituted judgment determinations on a case by case basis.

R.A. 515.

On or about April 21, 1995, the Commissioner filed a timely notice of appeal, pursuant to G.L. c. 231, § 118, ¶ 2, of the Injunction that was entered on March 24, 1995. R.A. 507. The Commissioner also filed a Petition for Interlocutory Relief from or Modification of Preliminary Injunction Pending Appeal, pursuant to G.L. c. 231, § 118, ¶ 1. R.A. 508. That petition was unopposed. On May 11, 1995, a Single Justice of the Appeals Court (Brown, J.) issued an order modifying the Injunction, by adding at the end of the Injunction as issued the following additional proviso:

> c. that any changes in treatment that do not require changes in treatment plans, including but not limited to cessation of

> the treatments specified in Condition 95-6, do not require prior approval of the Court in substituted judgment proceedings.

R.A. 517.

On June 8, 1995, the Commissioner requested clarification of the May 11, 1995 Order. R.A. 518. In response to that motion, the Single Justice (Brown, J.) issued a Supplemental Order as follows:

> It is ordered that the Judge Rotenberg Educational Center is enjoined from using the following Level III aversives, pending a further order of this Court or a Single Justice thereof: automatic negative reinforcement with electric shock, programmed multiple application of electric shock, the specialized food program, and behavior rehearsal lessons using Level III interventions.

R.A. 512.

JRC then sought relief from the Supreme Judicial Court for Suffolk County, under G.L. c. 211, § 3, from the above order (and a similar order in a related case). After a hearing on that petition, a Single Justice (Abrams, J.) denied the requested relief, "conclud[ing] that there was no abuse of discretion and there was a supportable basis for the single justice's Orders." R.A. 524.

SUMMARY OF ARGUMENT

By entering the Injunction at issue here, which enjoins the Commissioner of DMR from executing his statutory and regulatory duties to strictly regulate the use of Level III aversives by JRC, a licensee of DMR, the trial court erred as a matter of law in assessing JRC's likelihood of success on the merits of its contempt complaint, abused its discretion in balancing the equities, and impermissibly intruded on the Commissioner's exercise of discretion. For these reasons, the Injunction should be vacated in its entirety or, in the alternative, modified in accordance with the orders of the Single Justice of the Appeals Court, which were entered pending this appeal.

JRC is unlikely to succeed, as a matter of law, on the merits of its contempt complaint, because the provisions of the Settlement Agreement on which JRC relies are not sufficiently clear and unequivocal to form the basis for contempt sanctions, particularly against an executive branch official who is attempting to carrying out his statutory duties as he understands them. Pp. 17-30. To the extent that JRC is utilizing its contempt

complaint as a vehicle for obtaining judicial review of the Commissioner's regulatory actions, such an attempt is also bound to fail on jurisdictional grounds (because of JRC's failure to exhaust its administrative remedies) as well as on the merits (because the Commissioner's decisions are well within his statutory and regulatory authority and correct as a matter of law). Pp. 30-44.

The Injunction is also unwarranted as a matter of equity, in that any harm that JRC would have suffered absent the Injunction is far outweighed by the risk of harm to DMR and, more important, to JRC's clients, resulting from the Injunction as entered by the trial court. To the extent that the Injunction permits JRC to continue to utilize aversive procedures that it is not certified to use by DMR, the Injunction intrudes impermissibly on the Commissioner's exercise of his discretion in carrying out his statutory duties. For that reason as well, The Injunction should either be vacated or modified by this Court. Pp. 44-54.

ARGUMENT

I. THE STANDARD OF REVIEW UNDER G.L. c. 231, § 118, PAR. 2

Under G.L. c. 231, § 118, par. 2,

> [a] party aggrieved by an interlocutory order of a trial court justice . . . granting . . . a preliminary injunction, . . . may appeal therefrom to the appeals court . . . which shall affirm, modify, vacate, set aside, reverse the order or remand the cause and direct the entry of such appropriate order as may be just under the circumstances. . . . Pursuant to action taken by the appellate court the cause shall be remanded to the trial court for further proceedings.

Appellate review under section 118 is governed by the standard of review set out in Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609 (1980). See Commonwealth v. Mass. CRINC, 392 Mass. 79 (1984).

Under Cheney, the applicable standard for review of the grant or denial of a request for preliminary injunctive relief is whether the Court abused its discretion. However,

> [w]hile our standard of review is thus framed in terms of abuse of discretion, the Legislature would not have exempted orders granting or denying preliminary injunctions from the final judgment rule "if it intended appellate courts to be mere rubber-stamps save for the rare cases when a [trial] judge has misunderstood the law or transcended the bounds of reason." Therefore, in assessing whether a judge erred in granting or denying a request for preliminary injunctive relief, we must look to the same factors properly considered by the judge in the first instance. Evaluation of these factors turns

> on "mixed questions of fact and law. On review the trial court's . . . conclusions of law are subject to broad review and will be reversed if incorrect."

Cheney, 380 Mass. at 615-16 (citations omitted). In addition, "while weight will be accorded to the exercise of discretion by the judge below, if the order was predicated solely on documentary evidence we may draw our own conclusions from the record." Id.

Under Cheney,

> when asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. . . . Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.

Cheney, 380 Mass. at 617. Furthermore, BRI must demonstrate that the public interest would not be adversely affected by the injunction and that the harm to it outweighs the harm to the public interest. Mass. CRINC, 392 Mass. at 87-90. The proper application of these standards clearly demonstrates that the trial court abused its discretion and erred as a matter of law in issuing the Injunction.

II. THERE IS NO LIKELIHOOD THAT JRC WILL SUCCEED AS A MATTER OF LAW ON ITS CONTEMPT CLAIMS.

In order to succeed on a claim of contempt, the complaining party must demonstrate "a clear and undoubted disobedience of a clear and unequivocal command." Warren Gardens Housing Coop. v. Clark, 420 Mass. 699, 700 (1995); Commonwealth v. One 1987 Ford Econoline Van, 413 Mass. 407, 411 (1992); Allen v. School Committee of Boston, 400 Mass. 193, 194 (1987); Manchester v. DEQE, 381 Mass. 208, 212 (1980). JRC cannot meet this standard.

A. The Settlement Agreement Does Not Prohibit DMR from Regulating JRC.

The Settlement Agreement in this case, R.A. 264, contains no "unequivocal command" that the Commissioner refrain from regulating JRC in general or from conditioning or revoking JRC's certification to utilize Level III aversives or licenses to operate group homes in particular. To the contrary, while no mention is made in the Agreement of "certification," the Agreement expressly authorizes DMH (DMR's predecessor agency) to revoke BRI's licenses without court approval, once BRI became licensed by DMH. R.A. 271. Not only are such express commands absent

from the Agreement, construing the agreement to exempt JRC from DMR's certification and licensing requirements would be contrary to one of the salient purposes of the Agreement, to ensure that JRC complies with all applicable state regulations. R.A. at 270.

In the absence of any command, equivocal or otherwise, concerning certification or licensure, JRC alleges that, by closely monitoring JRC's compliance with DMR's regulations and, where noncompliance was found, taking various regulatory actions to enforce its regulations, the Commissioner violated the provisions of the Agreement that require: (1) that "each party shall discharge its obligations under the terms of this agreement, in good faith"; (2) that the court monitor arbitrate disputes between the parties; (3) that JRC's intake of new clients "not be impermissibly obstructed"; and (4) that JRC's use of Level III aversives on incompetent adult clients be approved by the Probate Court in substituted judgment proceedings. R.A. 101. In making these conclusory allegations, JRC fails to specify which of its hundreds of factual

allegations purportedly constitute "clear and unequivocal disobedience" of what particular language of the Settlement Agreement provisions cited.

B. The Good Faith Provision Is Too Ambiguous to Form the Basis for a Finding of Contempt or for the Imposition of Contempt Sanctions.

The provision of the Settlement Agreement on which JRC primarily relies as a basis for its contempt charges is the provision that requires "each party [to] discharge its obligations under the terms of this agreement, in good faith." R.A. 277. In order to establish the Commissioner's contempt of this provision, JRC would have to identify an "obligation under the terms of this agreement" that the Commissioner has failed to discharge in good faith. Since, as discussed above, the Agreement imposes no obligation on the Commissioner to refrain from regulating JRC and, as will be shown below, the Commissioner cannot, as a matter of law, be held in contempt of any of the other provisions cited by JRC, any contempt charge based on a violation of the good faith provision of the Agreement must fail. United States v. Board of Education of Chicago, 744 F.2d 1300, 1307 (7th Cir. 1984)

(where party found not in violation of substantive requirement of consent decree, party could not be found in contempt of requirement to use good faith efforts to comply with that provision), cert. denied, 471 U.S. 1116 (1985); 799 F.2d 281, 292 (7th Cir. 1986) (good faith "not a term that exists in a vacuum"; nature and circumstances of underlying obligation must be considered in determining good faith compliance).

Moreover, even if Paragraph L of the Settlement Agreement could be construed as requiring the Commissioner generally to act "in good faith" (apart from any specific obligations under the Settlement Agreement), the inherent subjectivity and ambiguity of that phrase precludes the imposition of contempt sanctions for a violation of this provision, which cannot be characterized as an "unequivocal command" to do or refrain from doing any particular act. United States v. Board of Education, 717 F.2d 378, 382 (7th Cir. 1983) (good faith provision not unambiguous), 799 F.2d at 289, 291 (good faith provision "inherently nebulous" and "ambiguous" and therefore not enforceable by contempt sanctions, absent prior judicial

clarification and opportunity to comply with provision as judicially clarified).

Particularly where, as here, the alleged contemnor is a state official, who is attempting to carry out his statutory duties as he understands them, contempt sanctions are not an appropriate means of redressing any violation of his obligation to act in good faith. United States v. Board of Education, 717 F.2d at 385. Indeed, imposing such sanctions on the Commissioner for the making of policy decisions in the exercise of his statutory authority would raise serious separation of powers problems. Id. at 383; 799 F.2d at 289 (discussing "inherent problems of ordering remedial relief against the government"); Alves v. Town of Braintree, 341 Mass. 6, 12 (1960) (fact that town official acted on advice of counsel "does not dispense with compliance with the decree . . . but it is of decisive effect in determining what disposition to make in the contempt proceedings"). Accordingly, even if the Commissioner's interpretation of his authority is held to be erroneous, rather than impose contempt sanctions, the court should

assume that, as a public official, he will henceforth act in accordance with the law as judicially construed. United States v. Board of Education, 717 F.2d at 384; Alves, 341 Mass. at 12.

C. None of the Other Provisions Relied upon by JRC Imposes a Clear and Unequivocal Obligation on the Commissioner.

1. Settlement Agreement, Part A.

Part A of the Settlement Agreement imposes no obligations on DMR, other than to provide clinicians to advise the court under Part A, ¶ 7, R.A. 269; and JRC does not contend that DMR has violated the latter provision. In the absence of a "clear and undoubted disobedience of a clear and unequivocal command," neither the Commissioner nor DMR may be held in contempt of Part A. Warren Gardens, 420 Mass. at 700.

Under Part A, JRC is required to obtain authorization from the Probate Court in substituted judgement proceedings in individual guardianship cases prior to using aversive behavior modification techniques. However, the fact that the Settlement Agreement, like DMR's own regulations, 104 C.M.R. § 20.15(4)(e)(3), requires that JRC use Level III aversives only

when authorized to do so by the Probate Court utilizing substituted judgment criteria, Settlement Agreement, Part A, ¶ 1, does not mean that once a treatment plan providing for the use of Level III aversives is approved by the Probate Court, JRC is thereby insulated from DMR's other regulatory requirements, including the requirement that the provider be certified by DMR to utilize such procedures, 104 C.M.R. § 20.15(4)(f).

Rather, as indicated by the term "substituted judgment," those proceedings function only as a substitute for a ward's own informed consent. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 752 (1977). Just as a competent adult's consent would not enable JRC to administer treatments in violation of DMR's other regulatory requirements, a substituted judgment order similarly has no such legal effect. Rutherford v. United States, 616 F.2d 455, 457 (10th Cir.) ("decision by the patient whether to have a treatment or not is a protected right; but his selection of a particular treatment . . . is within the area of governmental interest in

protecting public health"), cert. denied, 449 U.S. 937 (1980).

In other words, a determination that a ward, if competent, would consent to aversive treatment, is a necessary, but not a sufficient condition for the utilization of such treatment under state law. See 104 C.M.R. § 20.15(4)(d) and (e) (listing other required approvals, in addition to a client's consent or substituted judgment). By analogy, the fact that a particular medical procedure was approved by a Probate Court in substituted judgment proceedings would not "legalize" the administration of that procedure by a physician or hospital that did not meet state licensing requirements, as determined by the appropriate state regulatory agency.

Thus, the fact that some of the certification conditions imposed by the Commissioner require JRC to cease utilizing certain aversive treatments that have been approved by the Probate Court in substituted judgment proceedings cannot, as a matter of law, constitute contempt of Paragraph A of the Settlement Agreement. Nor do such certification

conditions violate the Probate Court's orders in those individual cases. The Probate Court's determination that a ward, if competent, would consent to the use of the treatments contained in his treatment plan, does not require that JRC utilize every treatment contained in the plan and approved by the Probate Court. While a particular Level III aversive cannot be used without Probate Court approval, the converse is not true; the fact that the Probate Court has approved the use of a particular treatment does not mean that it must be used. Nor does the Probate Court's approval of a treatment plan require that the authorized treatment be provided by a particular provider, such as JRC, especially where that provider is not certified to provide the treatment in question.

Moreover, to the extent that JRC contends that the certification conditions violate Probate Court orders in individual cases, the appropriate remedy would be to seek contempt sanctions in those cases, rather than in the present case, in which the court's remedial powers are limited to enforcing the Settlement Agreement in this case. R.A. 276.

2. Settlement Agreement, Part B, ¶ 2.

Part B, ¶ 2, of the Settlement Agreement imposes no obligations on DMR, other than to, "if appropriate, afford [the court monitor], at his request, technical assistance necessary to perform his duties." R.A. 270. Given the subjective and inherently ambiguous nature of the qualifying phrases "if appropriate" and "necessary," this obligation cannot be characterized as providing clear and unequivocal notice to DMR as to when such assistance is required or what form such assistance must take. Cf. Warren Gardens Housing Coop., 420 Mass. at 701 (the phrase "adequately supervise" did not provide clear and unequivocal notice concerning what steps the defendant was required to take). Moreover, even if the technical assistance provision were enforceable by contempt, there is no contention that DMR has violated this provision.

The remaining provisions of Part B, ¶ 2, either impose obligations on the Court Monitor ("Dr. Daignault . . . shall undertake general montoring . . ."; "Dr. Daignault shall be responsible for overseeing B.R.I.'s compliance

with all applicable state regulations . . ."; "Dr. Daignault shall report to the Court concerning any issues he deems necessary . . ."; and "Dr. Daignault shall arbitrate any disputes between the parties . . .") or are in the passive voice ("matter shall be submitted to the Court for resolution"), making it unclear who is required to make such a submission, Dr. Daignault or the party disagreeing with an arbitration decision or recommendation of Dr. Daignault. Again, in the absence of a clear and unequivocal court order directed at the Commissioner, there is no likelihood that he can properly be found to be in contempt of this provision.

Even if the requirement that "Dr. Daignault shall arbitrate any disputes between the parties" could be deemed to impose a clear and unequivocal obligation on DMR to submit certain disputes to arbitration, it is unclear what disputes are covered by this provision, since earlier in the same paragraph of the Settlement Agreement an exception to the Court Monitor's duties is carved out for the oversight of BRI's compliance with regulations that "involve

treatment procedures authorized by the Court in accordance with Paragraph A." R.A. 270. Since most, if not all, of the disputes that are the subject of the present complaint involve BRI's compliance or noncompliance with DMR's behavior modification regulations, which govern certification to use Level III aversives and therefore "involve treatment procedures authorized by the Court in accordance with Paragraph A," these disputes appear to fall within the above-quoted exception to the Court Monitor's jurisdiction. Accordingly, Part B, ¶ 2, cannot be said to impose a clear and unequivocal obligation to submit such disputes to arbitration by the Court Monitor.

3. Settlement Agreement, Part C, ¶ 3.

Part C, ¶ 3, of the Settlement Agreement provides, in pertinent part, that "intake at B.R.I. for new clients shall be reopened and shall not be impermissibly obstructed during the pendency of this agreement." R.A. 271. It is not clear on the face of this provision, which is in the passive voice, who has the obligation to open intake of new students and not to impermissibly obstruct it during the pendency of

the agreement, which was anticipated to automatically terminate one year after its execution. R.A. 276. However, since it was the Office for Children that closed intake in the first place, it is reasonable to assume that this provision was intended to impose a requirement on OFC, rather than any other party. In any event, this provision does not clearly and unequivocally impose such an obligation on DMR, or even DMH, DMR's predecessor as licensor of BRI.

Furthermore, on its face, this provision does not unequivocally prohibit the closing of intake of new clients but rather provides that such intake shall not be "impermissibly obstructed." Since this provision thus provides no clear and unequivocal notice of what conduct might be deemed to be an "impermissible obstruction" of intake, this provision is not enforceable by contempt. Cf. Warren Gardens, 420 Mass. at 701 (phrase "adequately supervise" not enforceable by contempt for this reason).

Nor can this provision be deemed to provide clear and unequivocal notice to DMR that its conduct with respect to existing students at BRI

could be punishable as contempt of this provision, which expressly relates only to "intake at B.R.I. for new clients." Similarly, to the extent that JRC seeks to hold DMR responsible for any indirect effect of its conduct on other funding agencies' declining to refer new students to BRI, any such indirect violation of this provision would not be punishable as contempt, which requires a direct violation of a court order.

Thus, there is no likelihood that JRC will succeed, as a matter of law, on any of its claims for contempt.

III. TO THE EXTENT THAT JRC SEEKS JUDICIAL REVIEW OF THE COMMISSIONER'S CERTIFICATION AND LICENSING DECISIONS, SUCH CLAIMS MUST FAIL ON JURISDICTIONAL GROUNDS AND ON THE MERITS.

A. JRC Has Failed to Exhaust Its Administrative Remedies.

To the extent that JRC is utilizing the vehicle of a contempt complaint to seek judicial review of the merits of the Commissioner's conditional certification, decertification, or licensing decisions, there is no likelihood that such an attempt will succeed. As stated in the Commissioner's Conditional Certification and Decertification Letters themselves, JRC's avenue

for seeking judicial review of those decisions, pursuant to G.L. c. 30A, § 14, was, first, to seek an administrative hearing before DALA within 21 days of the dates of those decisions. R.A. 420, 503. Having failed to avail itself of its administrative remedies in a timely manner, JRC is precluded from seeking judicial review. East Chop Tennis Club v. MCAD, 364 Mass. 444 (1973); cf. School Committee of Franklin v. Commissioner of Education, 395 Mass. 800, 808 (1985) (party who fails to comply with the procedural prerequisites for seeking judicial review under chapter 30A cannot seek such review in an action for declaratory relief). Similarly, if and when DMR takes any adverse action with respect to JRC's group home licenses, it will be required to exhaust its administrative remedies before seeking judicial review. 104 C.M.R. § 23.24(3); G.L. c. 19B, § 15(e); G.L. c. 30A, §§ 13, 14.

Furthermore, whether or not exhaustion of administrative remedies would be required here, any petitions for judicial review of DMR's certification or licensing decisions would have to be filed as independent actions in Superior

Court, which has exclusive jurisdiction over such petitions, G.L. c. 30A, § 14, rather than in the present case, in which the court's continuing jurisdiction is limited to enforcing the Settlement Agreement. R.A. 276.

B. The Commissioner's Certification and Decertification Decisions Were Well Within the Scope of His Statutory and Regulatory Authority.

If, despite these jurisdictional impediments, the court were to adjudicate, as part of a contempt proceeding, JRC's claims that the Commissioner's conditional certification and decertification decisions were in excess of his authority or otherwise unlawful, those claims should be rejected on their face.

In issuing the Decertification Letter, the Commissioner was acting pursuant to his statutory authority, under G.L. c. 19B, § 1, to "exercise exclusive supervision and control of the department [of mental retardation]," which, in turn, has "general supervision of all private facilities for [mentally retarded] persons." More specifically, the Commissioner was acting pursuant to DMR's behavior modification

regulations, 104 C.M.R. § 20.15, which are expressly premised on the following underlying policies concerning the use of highly intrusive aversive treatments:

> It is the purpose of the Department . . . to assure the dignity, health and safety of its clients. . . .
>
> As a general matter, it is the Department's strong policy that behavior modification procedures which pose a significant risk of physical or psychological harm to the clients or which are highly intrusive or restrictive should be used only as a last resort, subject to the most extensive safeguards and monitoring. . . .
>
> It is the Department's policy that the use of such procedures in such exceptional circumstances must meet the heaviest burden of review among all treatments. The use of such procedures for a particular individual will be allowed for a particular client only after a rigorous review and approval by clinicians, human rights committees, and the Department. This process will insure, before the client can be subjected to this type of extraordinary procedure, that clinicians have exhausted other less intrusive, restrictive or risky procedures and further, that the likely benefit of the procedure to the individual outweighs its apparent risk, intrusiveness, or restrictiveness.
>
> In addition, it is the Department's policy that such procedures are only to be used in programs which are specially qualified and certified to use such procedures with appropriate care. It

> is further the policy of the Department that the application of a procedure for clients even after it has been approved must be strictly monitored by the program as well as by the Department itself. In summary, it is the purpose of [the Behavior Modification regulations] to insure that behavior modification procedures are used to enhance the dignity, health, and safety of clients and that extraordinary procedures which pose a risk to such health, safety and dignity may only be used as a last resort, by certified programs, subject to the strictest safeguards and monitoring.

104 C.M.R. § 20.15(1)(c).

The behavior modification regulations set forth general requirements for the use of behavior modification treatments, including the following, which are particularly pertinent here:

> 1. No behavior modification plan may provide for a program of treatment which denies the individual . . . a nutritionally sound diet . . .
>
> 2. No Interventions shall be approved in the absence of a determination . . . that the behaviors sought to be addressed may not be effectively treated by any less intrusive, less restrictive Intervention and that the predictable risks, as weighed against the benefits of the procedure, would not pose an unreasonable degree of intrusion, restriction of movement, physical harm or psychological harm. . . .
>
> 3. Only those Interventions which are, of all Interventions, least restrictive of the individual's freedom of movement and most appropriate given the

> individual's needs, or least intrusive and most appropriate, may be employed.
>
> . . .
>
> 5. Level III Interventions may be used only to address extraordinarily difficult or dangerous behavioral problems that significantly interfere with appropriate behavior and or the learning of appropriate and useful skills and that have seriously harmed or are likely to seriously harm the individual or others.

104 C.M.R. § 20.15(4)(b). The regulations further require that "[a]ll proposed uses of Level II or Level III Interventions shall be set forth in a written plan" and specify what that plan must contain and what reviews, approvals, and consents are required prior to the implementation of any such plan. 104 C.M.R. § 20.15(4)(c), (d), and (e).

Finally, the behavior modification regulations set forth the requirements for certification to use Level III interventions and the procedures for granting, conditioning, denying, and revoking such certification. 104 C.M.R. § 20.15(4)(f). These procedures include the requirements that an applicant for certification provide DMR representatives with full access to its records, physical plant, and employees and permit DMR representatives to

observe fully the treatment used. 104 C.M.R. § 20.15(4)(f)(6). Once a program is certified to use Level III aversives, its performance is subject to the periodic inspections required of all licensed facilities as well as "such additional inspections as the Commissioner in his or her discretion deem appropriate." 104 C.M.R. § 20.15(4)(f)(10).

As will be shown in the balance of this section, the Commissioner's decision to revoke JRC's certification fully accords with these policies and regulatory requirements. Because the decision to revoke JRC's certification was based on JRC's refusal to abide by the conditions of its conditional certification, the factual and legal basis for those conditions will be addressed first, focusing on those conditions to which JRC has voiced particular objections.

At the outset, there can be no question that the Commissioner has the authority to impose conditions on a provider's certification to use Level III aversives. The behavior modification regulations expressly authorize the Commissioner to "certify [a] program subject to any

applicable conditions based upon his or determination of the program's compliance with all applicable requirements." 104 C.M.R. § 20.15(4)(f)(7).

The primary set of conditions imposed in the Conditional Certification Letter, Conditions 95-1.1 through 95-1.8, required JRC either to modify the treatment plans of six specified individuals to comply with DMR regulations and to reapply for certification to utilize Level III aversives pursuant to the revised plans or to modify the treatment plans of these individuals to provide for treatment with Level I or II, rather than Level III, aversives. R.A. 416-17. In either case, the modified treatment plans were not to be implemented without the approval of the JRC human rights and peer review committees; the consent of the guardian; Probate Court authorization using the substituted judgment criteria for the use of Level III interventions; and, for the Massachusetts clients, compliance with the procedural requirements of DMR's ISP regulations, which provide for objection by a client's parent or guardian and require administrative hearings when a change to a client's ISP is proposed.

R.A. 416-17. Although the Commissioner set deadlines for compliance with these conditions, he further authorized JRC to seek an extension of these deadlines for good cause shown. R.A. 417.

These conditions were based on DMR's specific and detailed findings, contained in the Conditional Certification Letter itself and further elaborated upon in the accompanying Report, that JRC's implementation of these individuals' treatment plans and the written plans themselves violated DMR's regulations. R.A. 409-14, 426-49. Specifically, DMR found that JRC's use of Level III interventions to punish minor behaviors, such as staring at thumb or fingers or tearing paper, violated the requirement that such interventions "be used only to address extraordinarily difficult or dangerous behavioral problems that significantly interfere with appropriate behavior and or the learning of appropriate and useful skills and that have seriously harmed or are likely to seriously harm the individual or others." 104 C.M.R. § 20.15(4)(b)(5). R.A. 409. In so finding, DMR specifically rejected, as unsupported by empirical fact, JRC's contention

that such minor behaviors were precursors to an extraordinarily difficult or dangerous behavior and that each such minor behavior had seriously harmed or was likely to seriously harm the individual or others. R.A. 409.

DMR further found that, in implementing these individuals' treatment plans, JRC violated the requirements that "[o]nly those Interventions which are, of all available Interventions, least restrictive of the individual's freedom of movement and most appropriate given the individual's needs, or least intrusive and most appropriate, may be employed," 104 C.M.R. § 20.15(4)(b)(3); and that the rationale for the use of each Level III intervention be "based on a comprehensive functional analysis of the antecedents and consequences of the targeted behavior." 104 C.M.R. § 20.15(4)(c)(3). R.A. 410. Instead, citing many examples, DMR found that JRC's use of Level III interventions was based on "outdated functional assessments that are neither comprehensive nor specific, and are not used appropriately in formulating treatment." R.A. 410-12.

In further support of Conditions 95-1.1 through 95-1.8, DMR found that JRC's data collection procedures do not provide for monitoring, evaluating, and documenting the use of each intervention, as required by 104 C.M.R. § 20.15(4)(c)(5). As further found by DMR, these are not merely technical record-keeping violations but, rather, result in Level III interventions being used for impermissible purposes and without the requisite approvals and consents. R.A. 412. Again, numerous examples of such violations are cited in the Conditional Certification Letter and the accompanying Report. R.A. 412-13.

Another set of conditions to which JRC specifically objected, Conditions 95-6.1 through 95-6.3, required that JRC not use certain specified Level III interventions, including the "specialized food program," a food deprivation program under which a client may receive as little as 20 percent of his minimum daily caloric requirement unless he earns additional food by not exhibiting problem behaviors. R.A. 419. These conditions were based on DMR's finding that there is no professional literature

to support the use of these specified procedures as treatment for human beings in general or for the problems exhibited by JRC clients in particular. R.A. 419. With respect to the specialized food program in particular, DMR found that this program "denies the client basic sustenance," thereby violating the regulatory requirement that "[n]o Behavior Modification plan may provide for a program of treatment which denies the individual . . . a nutritionally sound diet." 104 C.M.R. § 20.15(4)(b)(1). R.A. 419. In further support of this condition, the Report outlines and documents specific nutritional and sanitation problems with the specialized food program as well as evidence that this intervention is not only ineffective in controlling the targeted problem behaviors but may actually increase or cause other problem behaviors that are then treated with other Level III interventions. R.A. 469-75.

The remaining conditions in the Conditional Certification Letter addressed JRC's obligation to permit DMR to have access to JRC facilities and records so that DMR could continue to

monitor JRC's compliance with the certification conditions and with DMR regulations in general, as required by 104 C.M.R. § 20.15(4)(f)(6) and (10). R.A. 417-18. These conditions were based on DMR's specific and detailed findings as to JRC's repeated and continuing failure to permit such access. R.A. 415-16.

In sum, each of the conditions imposed by the Commissioner is amply supported by the specific and detailed findings contained in the Conditional Certification Letter itself as well as in the accompanying Report. Given these findings (over which JRC has foregone its right to administrative and judicial review), these conditions were required to ensure that the health, safety, and dignity of JRC's clients were protected; and the conditions were narrowly tailored to address the particular deficiencies found.

However, rather than either comply with these conditions or seek administrative and judicial review of review of them, JRC simply refused to comply with them and defiantly continued to use Level III aversives without the reasonable safeguards imposed by the

Commissioner. R.A. 477-78. As outlined in the Decertification Letter, JRC failed to comply with several important conditions, including the requirement to submit the revised treatment plans imposed by Condition 95-1, the requirement to cooperate fully with DMR's inspections imposed by Condition 95-4, and the requirement to discontinue use of the specialized food program imposed by Condition 95-6. R.A. 501.

In light of the resulting risk to the health, safety, and dignity of JRC's clients, the Commissioner had no choice but to take the next step of revoking JRC's certification. This sanction is expressly authorized by DMR's regulations, which provide that "a certification may be revoked . . . upon a finding that the conditions for certification are no longer met." 104 C.M.R. § 20.15(4)(f)(10). Since the Commissioner has expressly so found and JRC does not contest this finding, there is no factual or legal basis for a reviewing court to overturn the Commissioner's decertification decision. Therefore, JRC cannot establish a likelihood of success in challenging the merits of that decision.

IV. JRC FAILED TO DEMONSTRATE THAT IT WOULD SUFFER ANY LEGALLY COGNIZABLE OR IRREPARABLE HARM ABSENT THE REQUESTED PRELIMINARY INJUNCTIVE RELIEF.

As indicated in the Commissioner's Decertification Letter, JRC's decertification was not to become effective until July 1, 1995, three months after the issuance of the letter. R.A. 501. Even after the effective date, JRC would continue to be fully licensed by the Commonwealth and therefore able to continue serving new and existing clients, albeit with less intrusive treatments. R.A. 503. Also, as further stated in the Decertification Letter itself, the Commissioner's decision to decertify JRC is subject to administrative and judicial review, pursuant to 104 C.M.R. §§ 20.15(4)(f)(8) and 23.24(3); G.L. c. 19B, § 15(d); and G.L. c. 30A, §§ 13 and 14, including the right to seek a stay of DMR's decision on the administrative appeal from DMR, DALA, or from the Superior Court. G.L. c. 30A, § 14(3). R.A. 503. If JRC were successful in such administrative or judicial proceedings, the decertification decision would be stayed and then vacated.

In these circumstances, JRC failed to establish the requisite immediate or irreparable harm that would warrant the extraordinary relief sought. Any harm that JRC would suffer as a result of the decertification would not have occurred until July 1, 1995, three months after the preliminary injunction was sought and granted. Therefore, at the time the trial court heard the motion, any such harm would not have been immediate. Nor would such harm have been irreparable. To the contrary, JRC had ample opportunity to seek reversal of such action, first before DALA and then, if necessary, before the Superior or appellate courts.

Moreover, the harms that JRC alleged fell far short of constituting the type of legally cognizable harm that would warrant the extraordinary remedy of preliminary injunctive relief. Certainly, the burden of exhausting administrative remedies, even if substantial, does not constitute a sufficient basis for such relief. FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980). Nor does any damage that BRI may suffer to its reputation among potential or present clients as a result of DMR's issuance of

the Conditional Certification Letter, warrant the relief sought. Rather, any such harm, which would flow from any adverse agency decision, is a necessary consequence of conducting a highly regulated operation. If this were a proper basis for preliminary injunctive relief, then the government could never issue an adverse decision without prior judicial review, which would stand the doctrine of exhaustion of administrative remedies on its head.

Moreover, any harm that JRC will suffer as a result of being decertified from using any Level III aversives is self-inflicted. Simply by complying with the narrowly tailored and relatively unburdensome conditions imposed in the Conditional Certification Letter, JRC could have avoided this harm entirely. Only because it chose not to do so did it incur the more drastic sanction of decertification.

In the absence of the requisite showing of immediate and irreparable harm, JRC's motion for a preliminary injunction should have been denied. Cheney, 380 Mass. at 616-18.

V. ANY HARM THAT JRC WOULD SUFFER ABSENT THE REQUESTED RELIEF IS FAR OUTWEIGHED BY THE RISK OF HARM TO DMR AND TO THE PUBLIC BY ENJOINING DMR FROM EXERCISING ITS STATUTORY MANDATE TO PROTECT THE HEALTH, SAFETY, AND DIGNITY OF THE CLIENTS OF JRC.

In decertifying JRC from using Level III aversives, the Commissioner was carrying out DMR's policy, as reflected in its behavior modification regulations, "to insure that behavior modification procedures are used to enhance the dignity, health, and safety of clients and that extraordinary procedures which pose a risk to such health, safety and dignity may only be used as a last resort, by certified programs, subject to the strictest safeguards and monitoring." 104 C.M.R. § 20.15(1)(c). It was on the basis of such strict monitoring that DMR imposed the safeguards that JRC chose to ignore. In the face of JRC's failure to comply with the certification conditions set forth in the Commissioner's Conditional Certification Letter, which were specifically designed to protect the dignity, health, and safety of JRC's clients, DMR had no choice but to decertify JRC from using Level III aversives. For the trial court to enjoin that decertification, and thereby permit JRC to use these extraordinary procedures without the safeguards imposed by DMR, subjects

the clients to the very risk to their health, safety, and dignity that the certification conditions were designed to avoid.[3/] See Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1035 (1st Cir. 1982) (public interest would be adversely affected by preliminary injunction enjoining enforcement of valid statute). This very real risk to this particularly vulnerable population, which is thoroughly documented by the findings set forth in the Conditional Certification Letter and the Report that accompanied it, far outweigh any harm to JRC's business interests.

The injunction that JRC sought would thus thwart the Department in meeting its statutory and regulatory responsibilities. The public interest, as expressed by the Legislature in G.L. c. 19B, is in favor of Departmental

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3/ Although the substituted judgment proceedings also serve to protect the interests of the wards, the scope of DMR's regulatory authority is broader and therefore encompasses considerations, such as compliance with DMR's restraint, abuse and neglect, record-keeping, and access regulations, which are not necessarily pertinent to a substituted judgment determination but are nevertheless essential to protect the health, safety, and dignity of the clients.

oversight of programs like JRC, particularly where the use of highly intrusive and restrictive behavior modification treatments is concerned. An injunction against the fulfillment of legislative mandates runs against the public interest and should not have been granted. Agency Rent-a-Car, 686 F.2d at 1035; cf. Mass. CRINC, 392 Mass. at 88-90 (government need not demonstrate irreparable harm to itself when it seeks an injunction to enforce compliance with a statute).

VI. TO THE EXTENT THAT THE PRELIMINARY INJUNCTION EXEMPTS JRC FROM COMPLYING WITH THE CERTIFICATION CONDITIONS, IT IMPERMISSIBLY INTRUDES ON THE COMMISSIONER'S STATUTORY AND REGULATORY AUTHORITY AND IS UNWARRANTED AS A MATTER OF EQUITY.

To the extent that the preliminary injunction permits the use of treatment procedures that JRC is not certified to utilize--i.e., the specialized food program and the other procedures excluded from JRC's certification by Condition 95-6--it intrudes unduly on the Commissioner's statutory and regulatory authority and obligation to regulate the provision of services to mentally retarded individuals. As discussed above, the Commissioner's imposition of the condition in question was well within the scope of his

statutory and regulatory authority. Therefore, to the extent that the Injunction, as issued by the trial court, exempts JRC from complying with this condition unless specifically ordered to do so by the Probate Court in individual guardianship proceedings,[4/] it intrudes unduly on the Commissioner's regulatory authority, and was therefore appropriately modified by a Single Justice of the Appeals Court, to clarify that JRC is not permitted to use these procedures, pending this appeal.

As consistently held by the Supreme Judicial Court, despite the existence of some judicial oversight, state agencies retain the authority and discretion to determine how to perform their statutory and regulatory duties. Care and Protection of Jeremy, 419 Mass. 616, 622-23 (1995); Care and Protection of Isaac, 419 Mass. 602, 606-07 (1995); Charrier v. Charrier, 416

[4/] Although it is not clear from the face of the Injunction that it permits JRC to continue to utilize those procedures unless ordered to cease doing so by the Probate Court in an individual case, that is the way the Injunction was interpreted by JRC and the trial court, R.A. 505, 508, 518, until it was modified and clarified by an order and supplemental order of the Single Justice of the Appeals Court. R.A. 517, 523.

Mass. 105, 110 (1993); In re McKnight, 406 Mass. 787 (1990); Guardianship of Anthony, 402 Mass. 723, 727 (1988); Bradley v. Commissioner of Mental Health, 386 Mass. 363, 365 (1982). A preliminary injunction that intrudes on that discretion is therefore improper and should be modified by this Court on that ground, Correia v. Department of Public Welfare, 414 Mass. 157, 169 (1993) (ordering modification of preliminary injunction that "infringes too drastically on the department's authority to administer its program as it chooses"), if not vacated entirely.

Modifying the preliminary injunction to require compliance with Condition 95-6 is also warranted by the balance of harms. In seeking to enjoin the operation of Condition 95-6, the only concrete harm JRC alleged with respect to elimination of the specialized food program is the importance of having food reinforcers available for use on its clients. R.A. 136. However, the Commissioner's Conditional Certification Letter expressly authorized the continued use of the "contingent food program," another Level III aversive that delays but does

not entirely eliminate the provision of a client's minimum delay caloric requirements. R.A. 419. Given the health and safety risks posed by the more drastic specialized food program, R.A. 419, 469-75, the risk of harm of ceasing the specialized food program is far outweighed by the risks of continuing it.

With respect to the other forms of treatment prohibited by Condition 95-6, JRC made only the generalized claim, which would apply to any aversive treatment, that these procedures are important in treating serious self-injurious behavior. R.A. 135. Since, absent these procedures, JRC would still have at its disposal the other Level III aversives authorized by Condition 95-6, including odor aversive, time out, movement limitation, restraint, contingent food program, and electric shock, R.A. 419, the risk of ceasing to use these particular procedures does not appear to be significant. This is particularly true of behavior rehearsal lessons, which are rarely used, and programmed automatic electric shock, which is not even technologically available at this time. R.A. 135-36. On the other hand, the risk of

continuing to use these treatments, for which there is no professional literature supporting their use for treatment on human beings, R.A. 419, is grave indeed.

Thus, the balance of harms and, particularly, the public interest weigh heavily in favor of the modification granted by the Single Justice of the Appeals Court, pending the present appeal. Agency Rent-a-Car, 686 F.2d at 1035; Mass. CRINC, 392 Mass. at 88-90. Accordingly, if the preliminary injunction is not vacated in its entirety for the reasons discussed above, the orders issued by the Single Justice of the Appeals Court should be continued in effect by this Court.

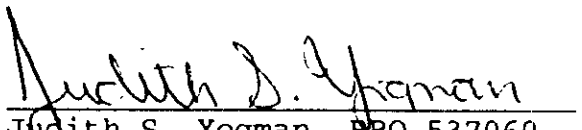
CONCLUSION

For all of the above reasons, this Court should vacate the preliminary injunction issued by the trial court or, in the alternative, continue in effect the modification and

clarification of that injunction entered by the Single Justice of the Appeals Court.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL



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Dated: September 8, 1995

A D D E N D U M

G.L. c. 19B, § 1
(1994 ed.)

19B:1. Department of mental retardation; creation; powers of department and commissioner.

Section 1. There shall be a department of mental retardation, in this chapter called the department, and a commissioner of mental retardation who shall have and shall exercise exclusive supervision and control of the department. All action of said department shall be taken by the commissioner, or under the direction of said commissioner, by such agents or subordinate officers as he shall determine.

The department shall take cognizance of all matters affecting the welfare of the mentally retarded citizens of the commonwealth. The department shall have supervision and control of all public facilities for mentally retarded persons and of all persons received into any of said facilities, and shall have general supervision of all private facilities for such persons; provided, however, that this sentence shall not be deemed to interfere with or supersede any other provision of general or special law which grants or confers supervision and control of certain public facilities for mentally retarded persons and persons admitted to such facilities or which grants or confers supervision over certain private facilities for such persons, to any other department of the commonwealth or to any political subdivision. The department shall have supervision and control of all mental retardation facilities established within the department and, subject to appropriation, may further develop additional mental retardation facilities under commonwealth operation or, subject to appropriation, may contract with any private agency furnishing complementary or community mental retardation services to pay it the ordinary and reasonable compensation for such services actually rendered or furnished to persons in need thereof. The department may, subject to appropriation, enter into agreements with nonprofit charitable corporations, partnerships or collaboratives for the providing of mental retardation services. Such agreements may provide for the retention of all revenues resulting from all billings and third party reimbursements by such organizations, provided, that the expenditure of such funds is made in conformance with applicable state and federal law and subject to the approval of the commissioner.

The department shall be a corporation for the purpose of taking, holding and administering in trust for the commonwealth any grant, devise, gift or bequest made to the commonwealth, to it, or to any state school or other mental retardation facility of the department for the use of persons under its control in any such facility or for the use of such school or facility, or, if the acceptance of such trust is approved by the governor, for expenditure upon any work which the department is authorized to undertake.

The department shall select the site of any new state mental retardation facility and any land to be taken or purchased by the commonwealth for the purposes of any new or existing state mental retardation facility.

The department of highways shall construct and maintain roads on the grounds of property of a state mental retardation facility; and expenses so incurred shall be paid from appropriations for the maintenance of such facility.

20.15: Behavior Modification

(1) Authority, Applicability and Policy.

(a) Authority. 104 CMR 20.15 is promulgated under authority of M.G.L. c. 9, M.G.L. c. 123 and St of 1986 c. 599, §§ 54 through 62..

(b) Application. 104 CMR 20.15 applies to all mental retardation programs which are operated, funded or licensed by the Department of Mental Health (hereinafter "the Department") or by the Department of Mental Retardation.

In accordance with the requirements of St 1986, c. 599, § 60, 104 CMR 20.15 shall remain in force and effect until superseded, revised, rescinded, or cancelled in accordance with law, by the Department of Mental Retardation.

(c) Policy. It is the purpose of the Department, reflected in 104 CMR 20.15, to assure the dignity, health and safety of its clients. Behavior modification is a widely accepted and utilized treatment which in many cases has enabled clients to grow and reach their maximum potential. Behavior modification emphasizes the use of positive approaches but in some cases involves the use of negative procedures. It is the Department's expectation that, in the vast majority of cases, particular procedures used to modify the behavior of clients will not pose a significant risk of harm to clients and will not be unduly restrictive or intrusive. Indeed, the Department believes that it is both sound law and policy that in individual cases the only procedures which may be used are those which have been determined to be the least restrictive or least intrusive alternatives.

As a general matter, it is the Department's strong policy that behavior modification procedures which pose a significant risk of physical or psychological harm to the clients or which are highly intrusive or restrictive should be used only as a last resort, subject to the most extensive safeguards and monitoring. Such interventions, under normal circumstances, would be considered to be corporal punishment and ordinarily would not be permitted in facilities operated, licensed or funded by the State. However, the Department recognizes that there are extraordinary cases in which there is a need to treat the most difficult or dangerous behavioral problems (which often involve serious self-mutilation or other self-destructive acts). In such cases it may be necessary to use extraordinary behavior modification procedures which would otherwise involve too much risk or potential harm to the dignity, health or safety of the client to be permitted.

It is the Department's policy that the use of such procedures in such exceptional circumstances must meet the heaviest burden of review among all treatments. The use of such procedures for a particular individual will be allowed for a particular client only after a rigorous review and approval by clinicians, human rights committees, and the Department. This process will insure, before the client can be subjected to this type of extraordinary procedure, that clinicians have exhausted other less intrusive, restrictive or risky procedures and further, that the likely benefit of the procedure to the individual out-weighs its apparent risk, intrusiveness, or restrictiveness.

In addition, it is the Department's policy that such procedures are only to be used in programs which are specially qualified and certified to use such procedures with appropriate care. It is further the policy of the Department that the application of a procedure for clients even after it has been approved must be strictly monitored by the program as well as by the Department itself. In summary, it is the purpose of 104 CMR 20.00 to insure that behavior modification procedures are used to enhance the dignity, health, and safety of clients and that extraordinary procedures which pose a risk to such health, safety and, dignity may only be used as a last resort, by certified programs, subject to the strictest safeguards and monitoring.

(2) Definitions.

Behavior Modification means treatment using Interventions designed to increase the frequency of certain behaviors and to decrease the frequency of or eliminate other behaviors which behaviors have, as a result of a behavior analysis by persons experienced in such analysis, been identified as needing to be changed in order to enable the individual to attain the most self-fulfilling, age appropriate and independent style of living possible for the individual.

20.15: continued

Intervention or Interventions means one or more of the following Behavior Modification procedures:

Aversive Stimuli means procedures involving things or events that, when presented contingent upon some specified target behavior(s), have a decelerating effect upon that behavior.

Deprivation Procedures means procedures which withdraw or delay in delivery goods or services or known reinforcers to which the individual normally has access or which the individual owns or has already earned by performing or not performing specified behavior.

Positive Reinforcement Programs means procedures in which a positive reinforcer (*i.e.*, any consequent action which increases the likelihood of the immediately precedent behavior) is contingent on a specified behavior.

Time Out means socially isolating an individual by removing the individual to a room or an area physically separate from, or by limiting the individual's participation in, ongoing activities and potential sources of reinforcement, as a suppressive consequence of an inappropriate behavior.

(3) Classification of Interventions. Interventions used for Behavior Modification purposes shall be classified by Level pursuant to the provisions of 104 CMR 20.15(3).

(a) Advisory Panel for Classification of Behavior Modification Interventions. The Commissioner of Mental Retardation acting jointly with the Commissioner of Mental Health shall establish a joint Advisory Panel for the Classification of Behavior Modification Interventions for the purpose of ensuring that all Behavior Modification Interventions are properly classified by level.

1. The Advisory panel shall be composed of no fewer than five individuals, a majority of whom shall possess doctoral level degrees in psychology, with significant training and experience in applied behavior analysis and behavioral treatment. Such individuals shall be appointed for such terms as the Commissioners shall jointly designate.

2. The Advisory Panel shall meet as often as may be necessary to ensure the proper classification of Interventions.

3. The Advisory Panel shall assist the Commissioner or designee in responding to requests for advisory opinions pursuant to 104 CMR 20.15(3)(e) and in ensuring that the provisions of 104 CMR 20.15 are met.

(b) Level I Interventions. The following shall be deemed Level I Interventions for purposes of these regulations, 104 CMR 20.15, provided that use of such Level I procedures shall conform to the applicable standards specified in 104 CMR 20.15(4)(b):

1. Positive Reinforcement Programs utilizing procedures which have no discernible aversive properties, pose minimal risk of physical or psychological harm, and that do not involve significant physical exercise or physical enforcement to overcome the individual's active resistance, including but not limited to the following:

a. Positive reinforcement: procedures wherein a positive reinforcer is provided following a particular behavior.

b. Differential reinforcement of other behavior: procedures wherein a positive reinforcer is given after a specific behavior has not occurred for a certain period of time.

c. Differential reinforcement of incompatible behavior: procedures wherein a positive reinforcer is provided following a given behavior which is physically incompatible with the occurrence of one or more inappropriate behaviors.

d. Differential reinforcement of alternative behavior: procedures wherein a positive reinforcer is provided after a given behavior which is designed to replace one or more inappropriate behaviors.

e. Satiation: continued or repeated presentation of a positive reinforcer that poses no risk to health and is made available until it no longer is effective as a positive reinforcer.

20.15: *continued*

f. Token/point gain: procedures wherein a symbol or physical object or other tokens or points are provided after a given behavior and a given number of these tokens or points can be exchanged for a positive reinforcer.

2. Aversive Stimuli or Deprivation Procedures that involve no more than a minimal degree of risk, intrusion, restriction on movement, or possibility of physical or psychological harm, and that do not involve significant physical exercise or physical enforcement to overcome the individual's active resistance, including but not limited to the following:

a. Corrective feedback and social disapproval: the use of disapproving facial expressions and verbal statements such as "no", "wrong" or "stop that" following the occurrence of an unacceptable behavior.

b. Relaxation: procedures wherein, following the occurrence of unacceptable behavior with and agitated component, the individual is requested to assume and maintain a relaxed posture in a quiet location, with staff present.

c. Restitution: procedures wherein, following the occurrence of unacceptable behavior that disturbs the environment, the individual is requested to restore the environment to its original condition (or to a cleaner and/or more orderly state) by, for example, picking-up fallen objects, cleaning, apologizing, or otherwise providing restitution.

d. Ignoring: physical and social inattention during the occurrence of an unacceptable behavior.

e. Extinction: failing to supply (or otherwise arranging the absence of) the accustomed consequence(s) after a given inappropriate behavior occurs.

f. Token fines: procedures wherein points or tokens (which were previously earned or otherwise supplied) are removed or lost, contingent upon the occurrence of an inappropriate behavior.

g. Reinforcement Restriction: the withholding or decrease in the availability of positive reinforcements such as tea, coffee, desserts or edible treats that a dietician would find to be nonessential to a nutritious diet or specified leisure activities that are not part of the facility's or program's daily living routine.

h. Positive Practice: procedures wherein an individual is required to undertake repeated performances of an appropriate behavior.

i. Negative Practice: procedures wherein an individual is required to undertake repeated performances of an inappropriate behavior for a given time or repetitions following the occurrence of the inappropriate behavior.

j. Contingent exercise: procedures wherein a designated exercise or physical activity is performed for a given period of time or number of repetitions following the occurrence of an inappropriate behavior.

3. Time Out wherein:

a. the individual is moved away from the location where positive reinforcement is available, but remains in the same area and in view; or

b. the material, activity or event providing positive reinforcement is removed for a given period; or

c. the individual is placed in a room alone for brief periods of time, in no case more than 15 minutes, provided that the door of the room is open and that staff are present at or near the door of the room to monitor the individual's behavior while in the room; or

d. the individual is placed in a room with the door closed, with staff present in the room, for brief periods of time, in no case more than 15 minutes.

(c) Level II Interventions. The following shall be deemed Level II Interventions for purposes of these regulations, 104 CMR 20.15, provided that no such Level II Interventions may be used except in accordance with the applicable standards and procedures set forth in 104 CMR 20.15(4):

1. All Positive Reinforcement Programs, Aversive Stimuli and Deprivation Procedures, with the exception of those classified as Level I or Level III, including but not limited to the following:

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a. Any Intervention otherwise classified as level I where the procedure must be physically enforced to overcome the individual's active resistance.

b. Any Intervention otherwise classified as Level I where the procedure involves significant physical exercise.

c. Contingent application of unpleasant sensory stimuli such as loud noises, bad tastes, bad odors, or other stimuli which elicit a startle response.

d. Short delay of meal for a period not exceeding 30 minutes, as a result of inappropriate meal related behavior, designed specifically to teach appropriate meal related behavior.

2. Time Out wherein an individual is placed in a room alone with the door closed (but not locked) for brief periods of time, in no case more than 15 minutes; provided that staff are present at or near the door of the room to monitor the individual's behavior in the room.

(d) Level III Interventions. The following shall be deemed Level III Interventions for purposes of 104 CMR 20.15, provided that no such Level III Intervention may be used except in accordance with the standards and procedures set forth in 104 CMR 20.15(4), including without limitation the special certification requirement of 104 CMR 20.15(4)(f) and the general requirement of 104 CMR 20.15(4)(b) that a determination be made that the predictable risks, as weighed against the benefits of the procedure, would not pose an unreasonable degree of intrusion, restriction of movement, physical harm or psychological harm:

1. Any Intervention which involves the contingent application of physical contact aversive stimuli such as spanking, slapping or hitting.

2. Time Out wherein an individual is placed in a room alone for a period of time exceeding 15 minutes.

3. Any Intervention not listed in 104 CMR 20.00 as a Level I or level II Intervention which is highly intrusive and/or highly restrictive of freedom of movement.

4. Any Intervention which alone, in combination with other Interventions, or as a result of multiple applications of the same Intervention poses a significant risk of physical or psychological harm to the individual.

(e) Advisory Opinions. Any person may request the Commissioner or designee to provide an advisory opinion regarding the proper classification of particular Interventions by Level for Interventions not set forth in 104 CMR 20.15, or for clarification of proper classification by Level in a particular instance involving a specific individual.

1. Upon receipt of any such request, the Commissioner or designee shall refer the request to the Advisory Panel.

2. The Commissioner or designee shall facilitate the Advisory Panel's review of the request and shall seek to obtain such additional information regarding the request as the Advisory Panel shall deem necessary.

3. Upon completing its review of the request, the Advisory Panel shall advise the Commissioner or designee regarding the matter and the Commissioner or designee shall thereupon issue an advisory opinion responding to the request and classifying the Intervention as appropriate.

4. The Commissioner or designee, and the Advisory panel, shall respond to each request as expeditiously as possible, and shall prioritize those requests that allege either that inappropriate treatment is resulting from an improper classification or that there is an urgent need for treatment that may be jeopardized if a prompt response is not received.

(4) Requirements for Behavior Modification.

(a) Scope. 104 CMR 20.15(4), establishes requirements for Interventions that are used, or that are proposed for use, for Behavior Modification purposes.

1. Interventions that limit an individual's freedom of movement and that are consented to, approved, and implemented for treatment purposes as part of a Behavior Modification plan for an individual in accordance with the requirements of 104 CMR 20.15(4), constitute reasonable limitations on freedom of movement. Such Interventions are not subject 104 CMR 20.02(54) and 104 CMR 20.08.

20.15: continued

2. Procedures that are used, or that are proposed for use, for the purpose of protecting an individual or others from harm and not for Behavior Modification purposes may be used subject to 104 CMR 20.02(54) and 104 CMR 20.08, and are not subject to the provisions of 104 CMR 20.15.

3. The prescription and administration of psychotropic medication are not subject to 104 CMR 20.15.

(b) General Requirements.

1. No Behavior Modification plan may provide for a program of treatment which denies the individual adequate sleep, a nutritionally sound diet, adequate bedding, adequate access to bathroom facilities, and adequate clothing.

2. No Interventions shall be approved in the absence of a determination, arrived at in accordance with all applicable requirements of 104 CMR 20.00, that the behaviors sought to be addressed may not be effectively treated by any less intrusive, less restrictive Intervention and that the predictable risks, as weighed against the benefits of the procedure, would not pose an unreasonable degree of intrusion, restriction of movement, physical harm or psychological harm.

In the case of Level II and Level III Interventions, such determination shall be made and the Interventions shall be approved and consented to in accordance with the special requirements of 104 CMR 20.15(4)(d) and (e).

3. Only those Interventions which are, of all available Interventions, least restrictive of the individual's freedom of movement and most appropriate given the individual's needs, or least intrusive and most appropriate, may be employed.

4. Any procedure designed to decrease inappropriate behaviors such as Aversive Stimuli, Deprivation Procedures and Time Out may be used only in conjunction with Positive Reinforcement Programs.

5. Level III Interventions may be used only to address extraordinarily difficult or dangerous behavioral problems that significantly interfere with appropriate behavior and or the learning of appropriate and useful skills and that have seriously harmed or are likely to seriously harm the individual or others.

6. No Intervention may be administered to any client in the absence of a written Behavior Modification plan.

In the case of Level II and Level III Interventions, the plan shall conform to the special requirements of 104 CMR 20.15(4)(c) and shall be subject to the special consent requirements of 104 CMR 20.15(4)(e).

7. Programs using Time Out shall conform such use to the following standards and restrictions:

a. The head of the facility or program or his/her designee shall approve the room or area as safe and fit for the purposes of Time Out.

b. Behavior Modification plans employing forms of Time Out that involve placing an individual alone in a room with an open or closed door shall comply with all safety, checking, and monitoring requirements set forth at 104 CMR 3.12(6) and 3.12(9).

c. An individual may not be maintained in Time Out alone in a room the door of which is closed and locked (*i.e.*, secured by a key, bolt or door stop).

8. All Behavior Modification plans shall be developed in accordance with 104 CMR 20.15 and in accordance with the policies of the facility or program within which the plan is to be implemented, insofar as those policies do not conflict with 104 CMR 20.15.

9. In the event of a serious physical injury to or death of a person who is the subject of a Level II or Level III Intervention, whether or not such injury or death occurs during the implementation of the Behavior Modification program, the injury or death shall be reported immediately to the Commissioner or designee who may thereupon initiate an investigation pursuant to 104 CMR 24.00.

(c) Written Plan. All proposed uses of Level II and Level III Interventions for treatment purposes shall be set forth in a written plan which shall contain at least the following:

20.15: continued

1. A clear specification of the behaviors which the treatment program seeks to decelerate or decrease, a specification of the methods by which the behaviors are to be measured (using measures such as frequency, severity, duration, etc.) and the available data concerning the current state of the behaviors with respect to these methods of measurement.

2. A clear specification of the behaviors which the treatment program seeks to have replace the behaviors targeted for deceleration, the methods by which these behaviors are to be measured, and available data concerning the current state of the behaviors with respect to these methods of measurement.

3. A description and classification by Level of each of the Interventionn to be used; a rationale, based on a comprehensive functional analysis of the antecedents and consequences of the targeted behavior, for why each Intervention has been selected; the conditions under which each Intervention will be employed; the duration of each Intervention, per application; the conditions or criteria under which an application of each Intervention will be terminated; in measurable terms, the behavioral outcome expected from the use of each proposed Intervention; the criteria for measuring success of each Intervention and the Behavior Modification plan as a whole and for revising and terminating the plan; the risks of harm to the individual with each Intervention and the plan as a whole; the individual's prognosis if the treatment is not provided; feasible treatment alternatives; and, a statement indicating the nature of the less restrictive or less intrusive Interventions which have been employed and the clinical results thereof, or those which have been considered and the reasons they have not been tried.

4. The name of the treating clinician or clinicians who will oversee implementation of the plan.

5. A procedure for monitoring, evaluating and documenting the use of each Intervention, including a provision that the treating clinician(s) who will oversee implementation of the plan shall review a daily record of the frequency of target behaviors, frequency of Interventions, safety checks, reinforcement data, and other such documentation as is required under the plan. Such treating clinician(s) shall review the plan for effectiveness at least weekly and shall record his/her assessment of the plan's effectiveness in achieving the stated goals.

(d) Review and Approval. In addition to consent requirements stated in 104 CMR 20.15(4)(e) the following reviews and approvals are required prior to the implementation of any Behavior Modification plan involving the use of level II or Level III Interventions:

1. All such plans shall be developed by those clinicians who provide services to the individual, and such other clinicians as they may designate (the treating clinician(s)).

2. All such plans shall be classified, reviewed and approved prior to implementation by a clinician designated by the head of the program. Such clinician shall have a demonstrated history of experience and training in applied behavior analysis and behavioral treatment. Such clinician may be the same clinician as the clinician who develops the plan pursuant to 104 CMR 20.15(4)(d)1.

3. Each such plan shall be reviewed by the program's human rights committee (*i.e.*, a committee established in accordance with the provisions for human rights committees set forth at 104 CMR 20.14). The committee's review shall occur no later than the next meeting following the meeting at which the plan is first presented to the committee, provided that the committee shall further expedite such review on request of the program head or designee for cases where the program head or designee determines that there is an urgent need for treatment that may be jeopardized if prompt attention is not given to the proposed plan. Except in an emergency (*i.e.*, in circumstances where the treating clinician, subject to the approval of the program head, determines that the immediate application of the Interventions provided for by the proposed plan is necessary to prevent serious harm to the individual or to others), such review shall occur and the comments (if any) of the human rights committee shall be addressed by the treating clinician(s) prior to implementation of the plan.

20.15: continued

a. The committee shall review a plan to determine if it conforms to the requirements for protection of human rights established by 104 CMR 20.15.

b. The committee's review of a plan may be based on such record reviews, interviews, inspections, and other activity as the Committee may in its discretion deem necessary and may include requests that the plan be resubmitted for such periodic review as the Committee may deem appropriate.

c. In the event that the human rights committee concludes that the plan or a part of the plan violates the requirements of 104 CMR 20.15 the plan or part thereof shall not be implemented unless:

i. the problem is resolved informally with the treating clinician(s), or

ii. the client or his or her representative or guardian or the treating clinician(s) initiate(s) an appeal under 104 CMR 21.40 through 21.90, and the plan or part thereof is determined pursuant to such appeal to conform to 104 CMR 20.15.

4. Each such plan shall be reviewed by a physician or by a qualified health care professional working under a physician's supervision who shall determine whether, given the individual's medical characteristics, the Intervention is medically contraindicated. No Intervention that is medically contraindicated shall be implemented.

5. Each such plan shall, in addition to other requirements set forth in 104 CMR 20.00, be reviewed by a Peer Review Committee appointed by the program head or designee. The Peer Review Committee shall conduct such review in a timely manner consistent with the individual's needs for treatment as represented by such plan, and shall further expedite its review on request of the program head or designee in cases where the program head or designee determines that there is an urgent need for treatment that may be jeopardized if prompt attention is not given to the proposed plan. Except in an emergency (*i.e.*, in circumstances where the treating clinician, subject to the approval of the program head, determines that the immediate application of the Interventions provided for by the plan is necessary to prevent serious harm to the individual or to others), such review shall occur and the comments (if any) of the peer Review Committee shall be addressed by the treating clinician(s) prior to implementation of the plan.

a. For each such review, the Peer Review Committee shall be composed of three or more clinicians with combined expertise in the care and treatment of individuals with needs similar to those served by the facility or program and in behavior analysis and behavioral treatment, at least one of whom shall be a licensed psychologist.

b. For reviews of Level III Interventions, the Committee shall be specially constituted so as to exclude any clinician serving as a treating clinician within the program proposing to use the Intervention.

c. The Committee shall review a plan to determine if it conforms to the requirements for appropriate treatment established by 104 CMR 20.15.

d. The Committee's review of a plan may include such record reviews, interviews, inspections, and other activity as the Committee may in its discretion deem necessary and may include requests that the plan be resubmitted for such periodic review as the Committee may deem appropriate.

e. In the event that the Peer Review Committee concludes that the plan or a part of the plan violates the requirements for appropriate treatment established by 104 CMR 20.15, the plan or part thereof shall not be implemented unless:

i. the problem is resolved informally with the treating clinician(s), or

ii. the client or his or her representative or guardian or the treating clinician(s) initiate(s) an appeal under 104 CMR 21.40 through 21.90, and the plan or part thereof is determined pursuant to such appeal to conform to 104 CMR 20.15.

6. The head of any program using or proposing to use a Level III Intervention shall notify the Commissioner of Mental Retardation or designee upon the filing of any guardianship petition, temporary or permanent, seeking authorization by substituted

20.15: continued

judgment for such Intervention. The Commissioner may upon receipt of such notice, provide for an independent clinical review by one or more clinicians designated by the Commissioner or designee of the proposed treatment and may advise the court having jurisdiction of the matter of said clinician's treatment recommendations. Said program shall cooperate fully with said clinicians and shall afford full access to each individual, his/her record and the staff working with the individual.

7. In lieu of having the human rights and/or peer review functions specified above performed by committees appointed by the same program that is proposing to use Level II or level III Interventions, the director of such a program may request the Commissioner or designee to provide for the performance of such reviews by human rights committees and/or peer review committees established by the Commissioner or designee. The Commissioner or designee may provide for such reviews in response to such a request in the event that he or she determines that the program is unable to provide itself for such reviews or that the purposes of 104 CMR 20.00 will be served by the provision of such reviews by committees established by the Commissioner or designee.

(e) Consent. In addition to consent requirements generally applicable to individual service plans, a Behavior Modification plan employing Level II or Level III Interventions may not be implemented unless it has been consented to in accordance with the following requirements:

1. Where the individual is 18 years of age or older, or is deemed a mature minor under the applicable law, and is able to provide informed consent to a plan of treatment, the plan may be implemented upon his/her acceptance of its provisions.

a. Before a plan involving the use of Level III procedures is implemented pursuant to such consent, the head of the program shall notify the Commissioner of Mental Retardation or his/her designee who shall be afforded an opportunity to evaluate the individual. In the event that the Commissioner or designee doubts the individual's ability to provide informed consent, a petition for the appointment of a temporary or permanent guardian shall be filed by the Commissioner or designee or by some other suitable person.

2. Where the individual is a minor and is not deemed a mature minor capable of giving informed consent:

a. that portion of the plan which does not involve the use of Level III Procedures may be implemented upon a parent's or legal guardian's informed consent to its provisions.

b. in the event that no parent or legal guardian exists or is available, then that portion of the plan which does not involve the use of Level III Procedures may be implemented upon its approval by the head of the program, provided that actions to initiate proceedings for the appointment of some suitable person as guardian or, where applicable, actions to provide for the availability of a temporarily unavailable parent or legal guardian are commenced by the head of the program concurrently with such approval.

c. that portion of the plan which involves the use of Level III Interventions may be implemented only upon authorization of a court of competent jurisdiction utilizing the substituted judgement criteria.

3. Where the client is an adult but is unable to provide informed consent to the implementation of the plan,

a. that portion of the plan which does not involve the use of Level III Interventions may be implemented when informed consent is provided by the individual's temporary or permanent guardian.

b. is the event that no permanent or temporary guardian has been appointed or is available, then that portion of the plan which does not involve the use of Level III Interventions may be implemented upon its approval by the head of the program, provided that actions to initiate proceedings for the appointment of some suitable person as guardian or, where applicable, actions to provide for the availability of a temporarily unavailable parent or legal guardian are commenced by the head of the program concurrently with such approval.

c. that portion of the plan which involves the use of Level III Interventions may be implemented only upon authorization of a court of competent jurisdiction utilizing the substituted judgement criteria.

20.15: continued

(f) Special Certification Requirement for programs Utilizing Level III Interventions. No Behavior Modification plans employing Level III Interventions may be implemented except in a program or a distinct part of a program that meets the standards established by 104 CMR 20.15(4) and that is therefore specially certified by the Department as having authority to administer such treatment. The following standards and procedures shall govern all such certifications:

1. Only those programs or facilities which meet the following standard shall be certified under 104 CMR 20.15(4): the program or facility must demonstrate that it has the capacity to safely implement such Behavior Modification plan in accordance with all applicable requirements of 104 CMR 20.15.
2. Any program seeking such certification shall submit a written application to the Commissioner or designee.
3. Such application shall include a comprehensive statement of the program's policies and procedures for the development and implementation of plans employing Level III Interventions, including a description of the program's actual use, or proposed use, of such procedures, and of the program's policies and practices regarding the training and supervision of all staff involved in the use of such procedures, and further including current resumes of all members of the Peer Review Committee required by 104 CMR 20.15(4)(d)5. and a description of the review procedures followed by such Committee.
4. Such application shall further include a certification by the program of its ability to comply with the department's Behavior Modification regulations.
5. The Commissioner or designee shall review such application upon its receipt and, after a determination that the written application is complete and satisfies all applicable requirements, shall provide for an inspection of the program by authorized Department representatives.
6. In the course of any inspection pursuant to 104 CMR 20.15(4)(f)5 or 104 CMR 20.15(4)(f)10., inspection staff shall have access to the records of the program's clients (including any written plans required by 104 CMR 20.15(4)(c) and data and information developed pursuant to such plan), the physical plant of the facility, the employees of the program, the professional credentials of such employees, and shall have the opportunity to observe fully the treatment employed by the program and to review with the program's staff the procedures for which certification was granted or is sought and the manner in which such procedures have been or are to be implemented.
7. After such review and inspection, the Commissioner or designee shall approve, approve with conditions, or disapprove the program's application and, if approved, shall certify the program subject to any applicable conditions based upon his or her determination of the program's compliance with all applicable requirements.

The Commissioner or designee may, as a condition of approval, require appointment of one or more persons approved by the Commissioner or designee to the program's peer review committee or human rights committee in the event that he or she determines that such appointment or appointments are necessary to ensure performance by such committees of their review responsibilities consistent with the requirements established by 104 CMR 20.15.

8. If disapproved, or if certification is revoked in accordance with 104 CMR 20.15(4)(f)10., programs not operated by the Department shall have the right of appeal established by the applicable provisions of M.G.L. c. 19 and M.G.L. c. 30A.
9. Any such certification of a program shall be effective for a maximum of two years and may be renewed thereafter upon the Commissioner or designee's approval of a renewal application pursuant to the standards and procedures set forth in 104 CMR 20.15(4)(f).

20.15: continued

10. The performance of a program pursuant to any such certification shall be reviewed as part of the periodic inspections of licensed facilities required by 104 CMR 23.25, and shall further be subject to such additional inspections as the Commissioner may in his or her discretion deem appropriate. Such certification may be revoked, and the Department may revoke, suspend, limit, refuse to issue or refuse to renew a program's license pursuant to 104 CMR 23.25, upon a finding that the conditions for certification are no longer met.

11. A program shall be eligible for consideration for certification for use of Level III Interventions only if, prior to the effective date of 104 CMR 20.15, the program had been using one or more level III Interventions pursuant to a Behavior Modification plan for one or more clients of the program. This restriction on eligibility shall continue in effect indefinitely and shall be modified only by amendment of this regulation, 104 CMR 20.15. Such amendment shall only be proposed or adopted by the Commissioner in the event that he or she finds that there exists a compelling need for treatment with such Interventions that cannot be met within existing programs or through alternative programs.

12. When necessary to prevent discontinuity in existing programming or to provide for an emergency, the Commissioner may in his or her discretion provide for the interim certification of a program, provided that the application and review process required for certification by 104 CMR 20.15 shall be initiated and completed as soon as possible thereafter.

(5) Relationship to ISP Process. Behavior Modification treatment plans are subject to the ISP planning requirements of 104 CMR 21.00 to the following extent only:

(a) Behavior Modification treatment plans employing Level II and III Interventions are subject to the procedural requirements concerning the development and implementation of individual service plans as set forth in 104 CMR 21.40 through 21.49, the modification of such plans as set forth in 104 CMR 21.60 through 21.62 and the requirements concerning periodic review as set forth at 104 CMR 21.70 through 21.74. Furthermore, such plans are subject to ISP appeal as provided for in 104 CMR 21.85 through 21.90.

(b) Behavior Modification treatment plans employing Level I Interventions are subject to the requirements concerning periodic review as set forth at 104 CMR 21.70 through 21.74 and are subject to ISP appeal as provided for in 104 CMR 21.85 through 21.90.

20.20: Scope and Purpose

(1) Scope. 104 CMR 20.20 through 20.24 applies to:

(a) Persons within the Commonwealth who are mentally retarded and who the Department has determined to be in need of specialized care, treatment, training, or supervision;

(b) The Department of Mental Health with respect to its obligations to provide, purchase, arrange, monitor, and coordinate services for mentally retarded persons; and

(c) Providers of mental retardation services, including the Department of Mental Health and private agencies that are under contract with, and subject to licensure and Regulation by the Department to provide specialized care, treatment, training, or supervision to mentally retarded persons.

(2) Purpose. The purpose of 104 CMR 20.20 through 20.24 is to describe the relationships among mentally retarded persons in need of services, the Department of Mental Health as the lead agency for providing, purchasing, arranging, monitoring, and coordinating such services, and public and private agencies which provide mental retardation services on a day-to-day basis.

20.21: Rights and Responsibilities of Clients

In addition to other rights and responsibilities set forth elsewhere in 104 CMR 20.00 through 23.00 or under other applicable State or Federal laws or judicial decrees, clients shall have the following rights and be subject to the following responsibilities: