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BRI v. Leonard: The Role of the Courts in Preserving Family Integrity

I. INTRODUCTION

Surely the family must be at the top of the list of these institutions or infrastructures and, so long as it is a going concern, must be treated very gingerly by the law, avoiding any intrusion into the traditional family decision-making process. It is not a question of developing rules of law deferential to the family, it is the need to recognize that there should rarely be judicial intervention at all in families which are "going concerns."¹

The family² is recognized as a pivotal and basic institution in society³ — the glue which holds the other institutions together.⁴ In the early years of America, it was firmly believed that "families are the nurseries of church and commonwealth, ruin families and you ruin all."⁵ The family was responsible for the education,⁶ moral character,⁷ discipline,⁸ health⁹ and economic well-being¹⁰ of other members of the

1. Lecture of Chief Justice William Rehnquist, sponsored by *American Family Institute* in Washington, D.C. (June 5, 1980) *reprinted in* 126 CONG. REC. § 7920 (daily ed. June 23, 1980).

2. "Family" as used in this Comment is defined as a group of people living together consisting of adults and children related by blood, marriage or adoption with the adults taking responsibility for the children in the household. J. PERRY & E. PERRY, *THE SOCIAL WEB: AN INTRODUCTION TO SOCIOLOGY* 420 (4th ed. 1983).

3. *Id.* at 415. See G. GILDER, *MEN AND MARRIAGE* (1986) for a contemporary study of how the traditional and stable family promotes the economic, psychological and physical well-being of the individual as well as society as a whole. Gilder, a writer of political and social issues, concluded that "[m]ost achievement in the world . . . reflects the force of family, first the patience and patrimony of parents and relatives, then the inspiration and support of husband or wife, finally the challenge and responsibility of the next generation." *Id.* at 193.

4. J. PERRY & E. PERRY, *supra* note 2, at 417.

5. J. WHITEHEAD, *PARENTS' RIGHTS* 63 (1985) (quoting I A. CALHOON, *A SOCIAL HISTORY OF THE AMERICAN FAMILY FROM COLONIAL TIMES TO THE PRESENT* 75 (1973)).

6. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("natural duty of parent to give his children education suitable to their station in life"). See J. WHITEHEAD, *supra* note 5, at 63-64, 73-77 (families' contribution to education and nurture of young was of great significance to development of colonial society).

7. J. WHITEHEAD, *supra* note 5, at 64 (moral training synonymous with religious training).

8. J. WHITEHEAD, *supra* note 5, at 66-70.

9. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("high duty" of parents to recognize symptoms of illness and to seek and follow medical advice).

10. J. WHITEHEAD, *supra* note 5, at 72.

household. Because of this heritage,¹¹ the family has traditionally been accorded protection from encroachment into its particular functions by the state.¹²

However, there has been a growing departure from this safeguarding of the family unit with a trend toward *parens patriae*¹³ — the state's claim to authority over children. This is in sharp contrast to *in loco parentis*¹⁴ which construes the state as acting in the place of, or as the agents for, the parents. Because of this shift to *parens patriae*¹⁵ and children's rights,¹⁶ a tension between family and state has developed re-

11. The Supreme Court articulated this heritage in *Parham*, when the Court stated:

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is the mere creature of the state and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.

Parham, 442 U.S. at 602 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)). See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (supporting the basic right "to marry, establish a home and *bring up children*") (emphasis added).

12. "State" in this Comment refers to the generalized political unit whose function of social control over persons within its jurisdiction are carried out by government. J. PERRY & E. PERRY, *supra* note 2, at 584.

13. *Parens patriae* literally means "parent of the country" and has been adopted from English law to justify the state's prerogative to act as guardian over those legally incompetent. BLACK'S LAW DICTIONARY 1003 (5th Ed. 1979).

14. *Id.* at 708. For a discussion of the concepts and history of both *parens patriae* and *in loco parentis*, see J. WHITEHEAD, *supra* note 5, at 108-13.

15. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 511 (1969) (students possessed fundamental rights which public school officials must respect as "neither the Fourteenth Amendment or the Bill of Rights is for adults alone"). It must be noted, however, that *Tinker* is somewhat of a hybrid inasmuch as the school officials were also being required to support the parents. The first amendment rights being respected (the wearing of black arm bands by the children in opposition to the Vietnam war) was done with the encouragement and approval of their parents. *Id.* Thus, in *Tinker*, the Court placed the state (public schools) in the position of both *parens patriae* (guardian of the child's rights) and *in loco parentis* (as the agent of the parents). The basic and often relied upon holding of the *Tinker* Court is that children "are 'persons' under the Constitution" with rights to be protected by the state. *Id.* at 511. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) ("school officials act as representative of state, not merely as surrogate parents"); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("state also has independent interest in the well being of *its youth*") (emphasis supplied).

16. *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1978) (right of 15 year old girl to leave family at her request on grounds that parent-child relationship had broken

sulting in court adjudication of the conflict.

An example of this tension between family and state with regard to the parents' obligations to provide proper health care and education for their children is the case of *Behavior Research Institute, Inc., v. Mary Kay Leonard*, (*BRI v. Leonard*).¹⁷ Part II of this Comment provides background information concerning the growing tension between family and state, a history of *BRI v. Leonard*, and some of the issues of the case as they apply to the preservation of family integrity. Part III analyzes these issues from the perspective of the parents. Part IV reviews the judge's order issued in *BRI v. Leonard* in light of Massachusetts case law and recent decisions in other jurisdictions. Part V examines the usefulness of alternate dispute resolution in settlement of family-state disputes to protect children while maintaining family integrity. This Comment concludes that the court's primary function is to protect the integrity of the family and this end might better be served with the use of court supervised alternate dispute resolution.

II. BACKGROUND OF FAMILY-STATE TENSION, HISTORY OF *BRI v. LEONARD* AND ISSUES TO BE PRESENTED

A. *Background of Family-State Tension — From Tradition to Equivocation*

The American concept of the family as a primary social, economic and governing unit in society has its roots in the common law.¹⁸

down and child preferred not to be subject to parents' authority). For a discussion of this case, see Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605, 607-09 (1976-77). See *Carey v. Population Services International*, 431 U.S. 678 (1977) (no duty on part of family planning center to notify parents of contraceptives being supplied to minors as a protection of minor's right to privacy); *Hehman v. Hehman*, 13 Misc. 2d 318, 321, 178 N.Y.S.2d 328, 331 (Sup. Ct. 1958) (in custody suit court held child should determine his own religious preference and not "be forced to enter a religion against his wishes").

17. The case of *Behavior Research Inst., Inc., v. Mary Kay Leonard*, individually and in her capacity as the Director of the Massachusetts Office for Children, No. 86E-OO18-G1 (Bristol County Sup. Ct. & Bristol County P. & Fam. Ct. filed Feb. 28, 1986) is a class action suit brought by Behavior Research Institute [hereinafter BRI], the parents of the students at BRI facilities and the students themselves. There are also the companion cases seeking guardianship of the students and requesting substituted judgment orders for six of the students residing at BRI group homes. For the history of these cases, see *supra* notes 33-75 and accompanying text. Copies of all pleadings and papers of the unpublished case of *BRI v. Leonard* are on file with New England Law Review.

18. J. WHITEHEAD, *supra* note 5, at 85. Whitehead described the common law as "an age-old doctrine that developed by way of court decisions which applied the principles of Christianity to everyday situations." *Id.* (citing J. WU, FOUNTAIN OF JUSTICE 65 (1980) (advantage common law has over other systems is by virtue of its Christian foundation)). See Hafen, *supra* note 16, at 615 ("common law recognized parental rights as a key concept [and] . . . as a fundamental cultural assumption about the family as a basic social, economic and political unit").

Although these common law cases¹⁹ centered on disputes concerning parental rights,²⁰ it is from these cases we learn of the importance of maintaining family integrity²¹ and the family's position within our culture.²²

These court decisions²³ appear to affirm the traditional family structure — but the rhetoric of these opinions is somewhat clouded by the substance of other decisions.²⁴ This second line of cases seems to view the family as individuals in conflict with one another.²⁵ The underlying theme in this developing conflict is the child's right to make choices concerning lifestyle preferences²⁶ and the child's right to privacy.²⁷ The "choice" of the child regarding friends, dating, smoking or other

19. *Commonwealth v. Armstrong*, 1 Watts & Serg. 393, 395-97 (Pa. 1842) (doctrines of common law conform to principles of duty of children to parents; duty of parents to educate, discipline and prepare children for useful and virtuous life; right of parents to command and duty of children to obey). See *In re Guardianship of Faust*, 239 Miss. 299, 305-07, 123 So. 2d 218, 220-21 (1960) (presumption that democratic government protects parental rights is based on common law principles); *Matarese v. Matarese*, 47 R.I. 131, 132-33, 131 A. 198, 199 (1925) (fundamental principle of father's authority in family traceable to decisions of the courts).

20. *Armstrong*, 1 Watts & Serg. 393 (Pa. 1842) (father's right to determine child's religion); *Faust*, 239 Miss. 299, 123 So. 2d 218 (1960) (right of parents to determine moral and intellectual education of children); *Matarese*, 47 R.I. 131, 131 A. 198 (right of family through parents to remain a self-governing unit in society except as modified by legislature).

21. See *supra* notes 19 & 20 and accompanying text. See also *Maynard v. Hill*, 125 U.S. 190 (1888) (Court indicated "there would be neither civilization nor progress" without the family). *Id.* at 211. See generally G. GILDER, *supra* note 3 (a study of the socio-economic impact the traditional family has on society in general and on men in particular).

22. "[T]he family was the center of the wheel of society with all the other institutions being mere spokes." J. WHITEHEAD, *supra* note 5, at 71. Attorney John W. Whitehead, a recognized specialist in constitutional law, traces the history of the importance given to family life in America from the patterns established in the Bible and adopted by the Pilgrims and Puritans through to the establishment of the Republic and settling of the West. *Id.* at 54-82. See *supra* note 11 and accompanying text.

23. See *supra* notes 11 & 19 and accompanying text.

24. See *supra* note 15 and accompanying text. More recently, the Massachusetts Appeals Court ruled that adoptive parents of a 15 year old girl were barred from the decision-making process regarding the minor's right to an abortion. *In re Moe*, 23 Mass. App. Ct. 902, 498 N.E.2d 1358 (1986).

25. See *supra* note 16 and accompanying text. See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (regarded marriage as a tenuous union where two individuals remain autonomous and independent). The decision in *Eisenstadt* "represents a radical departure with little or no constitutional foundation or development either in American legal history or in case law" in encouraging the breakdown of the family unit. Riga, *The Supreme Court's View of Marriage and the Family: Tradition or Transition?*, 18 J. FAM. L. 301, 302-03 (1979-80).

26. See *supra* note 16 and accompanying text.

27. See *supra* note 16 and accompanying text.

purely personal decisions may take priority even when harmful to family stability.²⁸ Also, a daughter's "right to privacy" permits her to have access to contraceptives²⁹ or an abortion without parental consent or knowledge,³⁰ even though it deprives parents of the opportunity to counsel and instruct their child — a parental right recognized by the Supreme Court.³¹

It is because of the equivocation on family integrity³² that the courts are now finding themselves embroiled in controversies that would have been at an earlier time considered family prerogatives.

B. *History of BRI v. Leonard*

Behavior Research Institute³³ (BRI) provides residential group homes, treatment and educational facilities for students suffering from

28. *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1975) (child could separate self from parents on basis of incompatibility even though parents had not been found unfit). As of this writing, there has been no subsequent use of *Snyder* accepting "incompatibility" as a grounds to remove a child from the parents' home. However, *In re Polochak* cited *Snyder* to support what constituted sufficient evidence to substantiate a finding that parents had lost power and control over their minor child. *In re Polochak*, 97 Ill. 2d 212, 225, 454 N.E.2d 258, 263 (1983).

29. *Carey v. Population Serv. Int'l.*, 431 U.S. 678 (1977) (contraceptives may be supplied to minor without knowledge or consent of parents).

30. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (statute requiring written consent of parent or guardian of an unmarried woman under age of 18 to obtain abortion during first trimester of pregnancy deemed unconstitutional). *Contra H.L. v. Matheson*, 459 U.S. 398 (1981) where it was held that parental notice was required: (1) to safeguard daughter's welfare, (2) to preserve state's interest in assisting family unity and consultation on important family issues and (3) to provide doctor with medical history. *Id.*

31. *Quilloin v. Walcott*, 434 U.S. 255 (1978) (parents have primary right to raise their children in accord with parents' own consciences).

32. *See supra* notes 18-31 and accompanying text.

33. BRI is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts, licensed to operate group homes in Seekonk, Attleboro and Rehoboth, Massachusetts by the Office for Children [hereinafter OFC] pursuant to chapter 28A of the Massachusetts General Laws, and is an approved "Chapter 766" school by the Massachusetts Department of Education. Memorandum of Respondents at 4-5, *Leonard v. BRI*, No. 86-0318-CV (Mass. App. Ct. Bristol County filed July 15, 1986).

"Chapter 766" is chapter 71B of the Massachusetts General Laws and was added to the General Laws by section 11 of chapter 766 of the 1972 Acts and Resolves of Massachusetts. It was promulgated to ensure that school age children with special needs (temporary or permanent adjustment difficulties arising from physical, mental or emotional factors, cerebral dysfunctions or learning disabilities) would be provided with educational services developed to meet the child's individual educational potential. MASS. GEN. LAWS ANN. ch. 71B, § 1 (West 1982). Pursuant to this statute, parents are to be given the opportunity to accept or reject programs that have been designed for their child as a result of evaluations made jointly by the department of mental health, department of education, school committee and such professionals as these agencies consider necessary to make an appropriate recommendation. *Id.* at § 3.

autism, brain damage, psychosis, developmental disabilities, mental retardation and severe behavioral disorders.³⁴ The student population in BRI homes has been described as "grievously mentally ill"³⁵ persons who are characterized as having "behavior that is so abnormal that it is in many cases life-threatening by nature."³⁶ Because of the severity of their behavior, students at homes operated by BRI require around-the-clock care and supervision.³⁷

BRI accepts students without regard to the gravity of their problems or past placement difficulties.³⁸ Treatment procedures consist of (1) rewards for approved behavior³⁹ and (2) aversives⁴⁰ for inappropriate

34. The students being served by BRI suffer from one or more of these disorders. Autism, which is least understood by society and the medical profession, has been defined as:

[A] severe disorder of communication and behavior, characterized by profound withdrawal, constant rocking movements, head banging and violent tantrums and a marked delay in the development of a [sic] virtual absence of speech. Its victims are usually children and for them and their families it comes close to being a living hell.

Findings in Support of Order for Temporary Guardianship and Treatment [hereinafter "Findings and Order"], *In re Janine Casoria*, No. 85P2137 (Bristol County P. & Fam. Ct. filed Dec. 18, 1985). See *Kate School v. Department of Health*, 94 Cal App. 3d 606, 156 Cal. Rptr. 529 (1979). The court in *Kate School* described autism as a psychosis that totally separates the afflicted person from reality. *Id.* at 610-11, n.6, 156 Cal. Rptr. at 531, n.6. Autistic children are usually unsocial as well as anti-social, having no concern about other people - even their parents. *Id.* They have multiple handicaps and physical defects. *Id.* Communication, as many are deaf and/or blind, is extremely difficult. *Id.* They also engage in self-sensory conduct; such as, flapping their arms, staring at objects or staring out of the corner of their eyes. *Id.* In addition, the autistic abuse themselves and others with head-banging, scratching, hitting, biting and throwing objects. *Id.* They appear to have no fear or regard for pain or death. *Id.* However, some do have isolated areas where they behave normally and are trainable, though retarded, at most levels of functions. *Id.*

35. Findings in Support of Injunctive Relief [hereinafter Findings] at 1, *BRI v. Leonard*, No. 86-0018-G1 (Bristol County P. & Fam. Ct. filed June 4, 1986).

36. For example, the life-threatening behavior of one student at BRI included head-banging, hitting, rectal gouging, prolapsing his bowel, eating of feces, putting his fist through windows and thrusting objects into eyes and ears. Memorandum of Law of BRI in Opposition to Motion for Stay [hereinafter BRI Memorandum] at 5, *In re Wayne M.*, No. 86-0318 (Bristol County App. Ct. (1986)).

37. Memorandum of Respondents, *supra* note 33, at 2.

38. Findings, *supra* note 35, at 9.

39. Findings, *supra* note 35, at 12-13. Some of the more common rewards used at BRI include: token rewards, monetary rewards, clothing rewards, physical affection including hugs and kisses, food rewards and praise. Agreement at 1-2, *In re Janine Casoria*, No. 85P2137 (Bristol County P. & Fam. Ct. filed Dec. 18, 1985).

40. See *Knecht v. Gilman*, 488 F.2d 1136 (8th Cir. 1973). In *Knecht*, the court defined aversive therapy as being founded on "pavlovian conditioning." *Id.* at 1137. The court explained:

Pavlovian conditioning is based on the theory that when environmental stimuli or the kinetic stimuli produced by the incipient movements of the punished act are made contiguous with punishment, they take on some of the aversive properties of the punishment itself. The next time the organ-

ate behavior with the ratio of rewards to aversives being ten to one at the minimum.⁴¹ BRI does not employ psychotropic drug⁴² or electro-shock therapy.⁴³ Furthermore, all treatment plans are consented to by parents or guardians of the students in compliance with state law.⁴⁴

ism begins the act, particularly in the same environment, it produces stimuli which through classical conditioning have become aversive. It is these aversive stimuli which then prevent the act from occurring.

Id. at 1137 n.2 (citing Singer, *Physiological Studies of Punishment*, 58 CALIF. L. REV. 405, 423 (1970)).

Aversive therapy is also known as "behavior modification" and is based on the theories of B.F. Skinner, professor emeritus of psychology at Harvard University, Cambridge, Mass. It is Prof. Skinner's belief that human behavior is largely determined by environment and that a person's behavior can be manipulated by positive reinforcements (rewards), and to a lesser degree by negative reinforcement (punishment). Although Professor Skinner does not favor punishment, he concedes that "some people are temporarily out of reach of positive reinforcement, and a small amount of punishment may help bring them within reach of therapy." *School's Use of Physical Punishment as Therapy is Challenged*, N.Y. Times, Nov. 19, 1985, § 1, at 20, col. 1.

For a list of aversives used at BRI facilities, see Appendix A annexed to this Comment.

41. Findings, *supra* note 35, at 13.

42. Prolonged drug therapy results in undesirable side effects which have been known since 1950. *Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981) (forced administration of anti-psychotic drug for ward required a judicial substituted judgment determination). This court reviewed the adverse effects of these mind-altering drugs and stated that they included:

temporary muscular side effects (extra-pyramidal symptoms) which disappear when the drug is terminated; dystonic reactions (muscle spasms, especially in the eyes, neck, face, and arms; irregular flexing, writhing or grimacing movements; protrusions of the tongue); akathisia (inability to stay still, restlessness, agitation); and Parkinsonism (mask-like face, drooling, muscle stiffness and rigidity, shuffling gait, tremors). Additionally, there are numerous other non-muscular effects, including drowsiness, weakness, weight gain, dizziness, fainting, low blood pressure, dry mouth, blurred vision, loss of sexual desire, frigidity, apathy, depression, constipation, diarrhea, and changes in the blood. Infrequent, but serious, non muscular side effects such as skin rash and skin discoloration, ocular changes, cardiovascular changes, and occasionally sudden death, have also been documented.

Id. at 438, 421 N.E.2d at 53-54 (citing Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Rights to Refuse Treatment*, 72 NW. U.L. REV. 461, 475-77 (1977)).

43. Electro-shock therapy, though frequently used and routinely accepted as a form of treatment, poses significant problems. Richmond & Martin, *Punishment as a Therapeutic Method with Institutionalized Retarded Person* in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED 467 (T. Thompson & J. Grabowski eds. 1977). Richmond and Martin listed some of these problems as: (1) "dangerous if administered carelessly;" (2) inability to control outcome thus obtaining undesired results; and (3) long-term follow-up of months or possibly years which requires equipment to be assigned for a specific client. *Id.* at 485-86, 491. In addition, the side effects from electro-shock therapy may be as irreversible as those from psychosurgery. *Roe*, 383 Mass. at 436-37, 421 N.E.2d at 53.

44. Memorandum of Respondents, *supra* note 33, at 4-5. MASS. GEN. LAWS

In July, 1985, a student at a BRI facility died⁴⁵ while being administered white noise⁴⁶ aversive therapy. Although an autopsy did not specifically indicate that the student's death was caused by the aversive therapy,⁴⁷ the Massachusetts Office of Children (OFC) conducted its own investigation into conditions at BRI.⁴⁸ As a result of this investigation, OFC concluded that BRI's use of aversives constituted abuse of the students and it was a threat to the life, health and safety of the students who experienced this type of treatment.⁴⁹ Consequently, OFC issued a Notice to Show Cause why the license of BRI should not be revoked and prohibited further use of aversive therapy at BRI's group homes in Massachusetts.⁵⁰

When BRI and parents of the students could not receive relief from this order by way of the administrative hearing⁵¹ granted by OFC,⁵² the

ANN. ch. 28A, § 10 (West Supp. 1986) (licensing and approval of day-care homes and systems).

45. Vincent Milletich, 22 years old of Astoria, New York, was a BRI student on a field trip to a BRI group home in Seekonk, Massachusetts. Inquest Report in the Matter of Vincent Milletich, at 2, No. 18981 (Dist. Ct. Dept. Taunton Div. Filed Jan. 7, 1987). While being administered aversive therapy, Vincent went limp and appeared to have "suffered a seizure." *Id.* at 13-14. He was immediately administered cardio-pulmonary and mouth-to-mouth resuscitation by staff members as well as members of the Seekonk Police Department. *Id.* at 3. Vincent was rushed to Rhode Island Hospital in Providence, Rhode Island, where he was pronounced dead approximately one and a half hours after the "seizure." *Id.*

46. "White Noise" therapy consists of placing a helmet over the patient's head while static-like noise is emitted to screen out other noises. *Id.* at 10-11. In addition to being helmeted, Vincent's hands were cuffed behind him and his legs cuffed together because he was thrashing about, acting aggressively and had to be restrained to keep him from striking his head against the floor. *Id.* at 11. Vincent's guardians had signed waivers allowing BRI to use aversive therapy as a part of his treatment program. *Id.* at 16.

47. Judge Paul Ryan stated in his Report that no criminal charges should be brought against any of the staff at BRI as there was no evidence "that any intentional or unintentional criminal activity" had been involved in Vincent's death. *Id.* at 20. However, Judge Ryan did indicate that Dr. Matthew Israel, founder and director of BRI, and two other staff doctors at the facility "owed a duty to care and protect Vincent from harm" and that they might have breached that duty through the failure to adequately test the modifications BRI had made to the standard hockey helmets used during the "white noise" treatment plan. *Id.* at 18.

48. N.Y. Times, *supra* note 40 (OFC acts against BRI after death of autistic student). The source of information for OFC's investigation was the records maintained by BRI which details the use of aversives on individual students. Memorandum of Appellant Office for Children [hereinafter OFC Memorandum] at 7, *In re Abby G.*, No. 86-0196 (Mass. App. Ct., Bristol County filed Mar. 2, 1986).

49. OFC Memorandum, *supra* note 48, at 11.

50. Memorandum of Respondents, *supra* note 33, at 6.

51. The procedure for appeal of an administrative order by OFC is as follows: If a license is suspended temporarily without notice (as in this case) which the agency has the power to do in what it believes to be an emergency situation, the aggrieved party (BRI) has a right to a hearing before an administrative magistrate as soon after the suspension as "reasonably possible." MASS. GEN. LAWS ANN. ch.

parents of one of the students filed a petition in the Probate and Family Court seeking guardianship and substituted judgment orders.⁵³ The parents sought to return their daughter to the treatment program that had been in effect prior to the OFC order⁵⁴ as her behavior had again become self-mutilating.⁵⁵ The court, with the agreement of all parties (including OFC who had intervened in the case)⁵⁶ issued a temporary guardianship and substituted judgment determination returning the student to her previous treatment program which included physical aversives.⁵⁷ Upon resumption of this treatment program devised for the student, she made progress in eliminating her self-destructive, anti-social behavior and the quality of her life improved.⁵⁸

As other students were experiencing severe regression due to the discontinuance of their aversive therapy treatment plans,⁵⁹ more petitions for guardianship and substituted judgment determinations were filed resulting in orders restoring aversive therapy to these students as well.⁶⁰ A petition by OFC for a stay of these orders was denied.⁶¹ OFC

28A, § 13 (West Supp. 1986). Under the rules of the Division of Administrative Law Appeals, the forum designated to hear the appeal of the OFC order, parents do not have a right to participate in the proceedings as it is a matter between the state agency and the facility licensed by that agency. Memorandum of Respondents, *supra* note 33, at 6. However, in this instance, OFC permitted the intervention of the parents. *Id.* If the aggrieved party is not satisfied with the results of their administrative hearing, he may then appeal that decision to the Superior Court. MASS. GEN. LAWS ANN. ch. 30A, § 14 (West Supp. 1986).

52. Memorandum of Respondents, *supra* note 33, at 7.

53. *Id.* at 7-8 (student in grave physical danger as result of headbanging).

54. *Id.* at 8 (prohibiting use of physical aversives).

55. *Id.* at 7. The aversives were to be administered if Janine resumed pinching, hair pulling, biting, and hitting herself as well as picking her fingers. In addition, if she engaged in other aggressive behavior resulting in injury to herself or others aversives would be employed. Agreement, *supra* note 39, at 4.

56. Memorandum of Respondents, *supra* note 33, at 8.

57. See Findings, *supra* note 35, at 14.

58. Judge Ernest Rotenberg, commenting on Janine's improvement in behavior, stated:

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

Id.

59. Memorandum of Respondents, *supra* note 33, at 10 (student regressed to an anguished, incoherent, violent and dangerous condition).

60. *Id.* at 9. The parents and guardians of five more students sought relief from discontinuance of physical aversives by the OFC. *Id.* Prior to settlement in *BRI v. Leonard*, forty substituted judgment petitions were filed and heard concerning BRI students with each student having independent counsel and court appointed guardian ad litem. Findings of Fact and Conclusions of Law in Support of

appealed this denial⁶² to the Massachusetts Appellate Court who upheld the lower court's order⁶³ and directed in effect that all parties should work to resolve "this matter in the best interests of the students."⁶⁴

A "team"⁶⁵ was organized under the direction of Judge Ernest Rotenberg, first justice of the Bristol County Probate and Family Court (Family Court). This "team"⁶⁶ was charged with the specific obligation to evaluate and recommend treatment plans suitable for the most severely handicapped students.⁶⁷ It was the "team's" duty "to negotiate in good faith and to act in the best interests of the children at BRI."⁶⁸

While the "team" was still in the process of devising suitable programs that would provide BRI students with the best possible treatment, OFC issued a directive restricting the choice of treatments available for use at BRI facilities.⁶⁹ This directive was contrary⁷⁰ to the agreement "to negotiate in good faith"⁷¹ and seriously hampered the efforts of the "team."⁷² As a result, the Family Court conducted four

Approval of Settlement Agreement [hereinafter Findings and Conclusions], at 4, *BRI v. Leonard* 86E-0018-G1 (Bristol County Sup. Ct. & Bristol County P. & Fam. Ct. entered Jan. 7, 1987).

61. Memorandum of Respondents, *supra* note 33, at 10. Physical aversives were returned to all five original petitioning students. *Id.* Since the agreement was reached in this case, approximately sixty petitions for guardianship and substituted judgments have been filed requesting permission to administer aversive therapy. Interview with Donna Vaughn, First Assistant Register, Bristol County Probate and Family Court in Taunton, Massachusetts (Mar. 30, 1987).

62. Findings, *supra* note 35, at 4.

63. The Stay was denied as it would have defeated the purpose of the preliminary injunction which was to preserve the status quo of the students until their cases could be heard on the merits. Interview with Donna Vaughn, *supra* note 60.

64. Findings, *supra* note 35, at 5.

65. *Id.* at 6.

66. The "team" established by Judge Rotenberg to devise individualized treatment plans for 18 of the BRI students in need of emergency care was an inter-agency group which included: Dr. Myrna Libby, a clinical psychologist from the Massachusetts Department of Mental Health; Mary Driscoll, from the Department of Social Services; Bette McClure, an OFC supervisory employee; Leo Soucy, a representative of the parents; and James A. Casey, Chief Probation Officer of the Bristol County Probate and Family Court, and chairman of the "team." Third Amended Complaint at 24, *BRI v. Leonard*, No. 86E-0018-G1 (Bristol County Sup. Ct. & Bristol County P. & Fam. Ct. filed June 4, 1986).

67. Findings, *supra* note 35, at 5.

68. *Id.* at 5-6.

69. *Id.* at 7. The OFC directive prohibited the "team" from developing any treatment program which included physical aversives, taste aversives, contingent food programs, helmets, water vapor aversives or use of the automatic vapor spray station.

70. *Id.* at 8.

71. *Id.*

72. *Id.*

days of hearings⁷³ which culminated in the issuance of a preliminary injunction against OFC to prohibit any action by it to suspend the license of BRI, limit intake of students or ban the use of physical aversives until a hearing on the merits of all petitions for guardianship and substitute judgment determinations had occurred.⁷⁴ Also to be heard was a class action suit which had been instituted by BRI, all parents and students against OFC requesting injunctive relief, money damages and an award of attorney's fees.⁷⁵

C. Significant Issues of the Case

1. Is the Family Court the proper forum to hear the dispute?

OFC raised this standard procedural issue and argued that BRI should have exhausted the administrative procedures provided by the regulations promulgated by OFC, the licensing agency.⁷⁶ While OFC

73. *Id.* at 8.

74. Interlocutory Decree on Preliminary Injunction, *BRI v. Leonard*, No. 86E-0018-G1 (Bristol County P. & Fam. Ct. (filed June 4, 1986)). As a result of a letter from OFC improperly directed to the First Assistant Register of the Bristol County Probate and Family Court, Judge Rotenberg found it necessary to explain the meaning of the preliminary injunction so that OFC could not violate the injunction under the guise of misunderstanding its terms. Decision of Motion to Clarify Preliminary Injunction, *BRI v. Leonard*, No. 86E-0018-G1 (Bristol County P. & Fam. Ct. (filed June 19, 1986)). In this decision, Judge Rotenberg stated:

An examination of the Preliminary Injunction entered by this Court on June 4, 1986, clearly indicates that the purpose of said Preliminary Injunction is to preserve the status quo as between each of the parties to this action. Specifically, this Court provided for the maintenance of the treatment programs either authorized by this Court, or approved by the "team" established by this Court on March 7, 1986, or otherwise in effect on April 22, 1986, and further provided for the maintenance of the status of BRI as of April 22, 1986.

Id. at 3.

75. Third Amended Complaint, *supra* note 66.

76. MASS. GEN. LAWS ANN. ch. 28A, § 10 (West 1986) states:

(a) The office [OFC] shall issue and may renew a license to any person . . . who meets applicable standards and requirements to establish and maintain . . . [a] group care facility. . . .

(c) The office [OFC] shall . . . promulgate rules and regulations to carry out the purposes and functions [of this chapter]. Such regulations, as they relate to standards and requirements for licensure and approval of . . . group care facilities . . . shall be appropriate for the protection of the health, well-being and development of children and shall include, but need not be limited to provisions regarding (1) admission policies and procedures; (2) safe transport of children; (3) physical plant and equipment; (4) the number and qualifications of staff; (5) the nature or programs of care or treatment; (6) health care and nutrition; (7) rights and responsibilities of parents, children and staff; (8) record keeping and other procedures relevant to evaluation; and (9) organization, financing and administration.

maintained that a probate court's jurisdiction did not encompass the authority to rescind orders of an administrative agency, BRI, the parents and wards countered that the probate courts are given the general equity power to act in emergency situations.⁷⁷ The Massachusetts Appellate Court supported the position that judicial intervention was necessary to maintain "the status quo until there has been a full hearing on the many difficult issues of first impression."⁷⁸

2. Is aversive therapy a suitable type of treatment?

Aversive therapy⁷⁹ is a behavior modification program used to control undesirable conduct. Those institutions who use this technique generally do so in lieu of anti-psychotic drugs,⁸⁰ electro-shock,⁸¹ restraint⁸² and seclusion,⁸³ all of which are accepted forms of treatment for severely disoriented, self-abusive, violent persons.⁸⁴

Id.

77. BRI Memorandum, *supra* note 36, at 9-12 (citing *Feinberg v. Diamant*, 378 Mass. 131, 132, 389 N.E.2d 998, 999 (1979)). This power is accorded to the probate court under the General Laws of Massachusetts. MASS. GEN. LAWS ANN. ch. 201, § 6 (West 1986) (probate courts to act in all matters concerning guardianship); MASS. GEN. LAWS ANN. ch. 201, § 14 (West Supp. 1986) (probate court to immediately issue temporary guardianship when evidence describes urgent situation).

78. *Director of the Office of Children v. Behavior Research Inst.*, No. 86-0138, slip op. at 5-7 (Mass. App. Ct. July 30, 1986). On July 30, 1985, Justice Greaney for the Massachusetts Appeals Court stated:

Although there is considerable discussion about the need for exhaustion of the administrative process, there is also no question in my mind that the existence of irreparable harm (as found by . . . [Judge Rotenberg] with support in the record) permitted immediate judicial intervention despite the existence of some ongoing administrative proceedings. . . . The injunction does not enjoin the administrative process per se, but only enjoins . . . [OFC] from doing anything, including use of the administrative process, to either close BRI or to prohibit the use of aversives I am sensitive to the concern . . . that courts should not ordinarily interfere in the affairs of a State agency, until the agency had completed its work, and any appropriate administrative process has been exhausted. However . . . I believe that the interference brought about by the preliminary injunction in this case is justified on this record in order to preserve the status quo until there has been a full hearing on the many difficult issues of first impression.

Id. (footnote and citations omitted).

79. *See supra* note 40.

80. *See supra* note 42.

81. *See supra* note 43.

82. Findings, *supra* note 35, at 11. Most common type of restraint used is tying the students to their beds or wearing a helmet to prevent them from biting themselves or others. *See generally* BRI Memorandum, *supra* note 36, at 4.

83. Findings, *supra* note 35, at 11 (treatment included being left in empty rooms for days at a time).

84. *Id.*

There is no question that those afflicted with self-destructive, life-threatening behavior and extreme levels of violence are in need of treatment⁸⁵ even to survive in an institutionalized setting.⁸⁶ The controversy arises over what is the best treatment in the short run with prospects for long-term benefits for the patient,⁸⁷ his family⁸⁸ and the community.⁸⁹ The debate is whether or not aversive therapy is a form of treatment⁹⁰ or is it "punishment"⁹¹ and within the powers of a state agency to prohibit.⁹²

3. Do parents have the primary obligation and right to choose the most effective treatment programs for their children?

Families have traditionally been entrusted with the duty to maintain

85. BRI Memorandum, *supra* note 36, at 3-5.

86. *Id.*

87. *Youngberg v. Romeo*, 457 U.S. 307 (1982) (Blackmun, J., concurring) (held that mentally retarded had right to habilitation or to not regress). In his concurring opinion, Justice Blackmun stated:

If a person could demonstrate that he entered a state institution with minimal self-care skills, but lost those skills after commitment because of the state's unreasonable refusal to provide his training, then, it seems to me, he has alleged a loss of liberty quite distinct from — and as serious as — the loss of safety and freedom from unreasonable restraints.

Id. at 327. See *Society of Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984) (class action brought by organization for mentally retarded children confined in state-operated school with court accepting *Youngberg* right to sufficient training to prevent deterioration of basic self-care skills); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473 (D.N.D. 1982) (class action challenging confinement conditions and treatment provided to mentally retarded persons). The Federal District Court of North Dakota held that acquisition and maintenance of self-care skills is essential to the exercise of basic liberties. *Id.* at 487. See, e.g., Note, *Beyond Youngberg: Protecting Fundamental Rights of the Mentally Retarded*, 51 FORDHAM L. REV. 1064, 1080-89 (1983); Note, *The Constitutional Right to Treatment in Light of Youngberg v. Romeo*, 72 GEO. L.J. 1785, 1828 (1983-84); Note, *Parental Rights and the Habilitation Decision for Mentally Retarded Children*, 94 YALE L.J. 1715, 1723 (1985).

88. Dietz, *Parents Sue Over Closing of Facility for the Autistic*, Boston Globe, Oct. 4, 1985, at 20, col. 1; *Autistic Children's Needs*, Boston Globe, Oct. 24, 1985, at 22, col. 1.

89. See I. AMARY, *THE RIGHTS OF THE MENTALLY RETARDED-DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION* 3-10 (1980). Amary discusses the history of care for the mentally retarded-developmentally disabled and indicated the then status of care and community objectives. *Id.* These objectives included: (1) providing a "homelike" environment; (2) fostering behaviors that "would maximize the human qualities of clients;" (3) enhancing the ability of the clients to cope with their environment; and (4) furnishing more comprehensive training, education and services "that will ultimately enable them to leave the institution or other limited environment and become full partners in society." *Id.* at 9-10.

90. N.Y. Times, *supra* note 40.

91. *Id.*

92. *Id.*

and provide health care and education for members of the household.⁹³ This obligation is recognized as belonging to the parents.⁹⁴ While some courts have designated this as a "parental right,"⁹⁵ it might be analogized as a trust — the parent is the trustee for the minor or incompetent (res) for the benefit of the emancipated child (beneficiary).⁹⁶ Under this theory, the trustee/parent's decisions are to be made with an eye to the future when the beneficiary will have full control over and responsibility for himself and his actions.⁹⁷

Under this quasi-trust theory, the state (seeking enforcement of the rights of the beneficiary) intervenes in the family relationship when it has perceived that the trustee/parent has failed in the duty to care for and protect the child (waste to the corpus).⁹⁸ The state steps in to apply the principles of "best interest of the child."⁹⁹ However, in Massa-

93. See *supra* notes 6 & 9 and accompanying text.

94. *Custody of a Minor* (No. 3), 378 Mass. 732, 743, 393 N.E.2d 836, 843 (1979). The court reiterated that "parents are the 'natural guardians of their children . . . [with] the legal as well as moral obligation to support . . . educate' and care for their children's development and well-being." *Id.* (citing *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932)).

95. *Meyer v. Nebraska*, 262 U.S. 390 (1923) ("the right of parents . . . to instruct their children"). See *Parham v. J.R.*, 442 U.S. 584 (1979) ("parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations'"). *People ex rel Portnoy v. Strasser*, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952) (parental rights were a "natural law"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1926); *Lacher v. Venus*, 177 Wis. 558, 569-70, 188 N.W. 613, 617 (1922) (parental rights are "inherent, natural rights").

96. *Custody of a Minor* (No. 3), 378 Mass. 732, 393 N.E.2d 836 (1979) (parental rights not absolute property right enforceable to detriment of child, but similar to a trust). See also Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLIAMETTE L. REV. 563, 583-86 (1982) (trust model balances interests of parent, child and state).

97. J. WHITEHEAD, *supra* note 5, at 54-55 (trustee parent concerned with religious, public and social responsibilities to all members of family rather than individual desires). For a discussion on the trustee family as it developed under Judeo-Christian principles, see Rushdoony, *Symposium on the Family: The Family as Trustee*, in J. OF CHRISTIAN RECONSTRUCTION 8-11 (1977-78).

98. *Custody of a Minor* (No. 3), 378 Mass. at 744, 393 N.E.2d at 844 (interests of state and child mandate intervention when child's well-being threatened by parental conduct). Massachusetts General Laws provide that any person, on behalf of a child, may seek intervention by the court if a child is without:

- (a) necessary and proper physical or educational care and discipline or;
- (b) is growing up under conditions or circumstances damaging to the child's sound character development or;
- (c) who lacks proper attention of parent, guardian with care and custody, or custodian or;
- (d) whose parents, guardian or custodian are unwilling, incompetent or unavailable to provide any such care, discipline or attention.

MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1986).

99. *Custody of a Minor* (No. 3), 378 Mass. at 744, 393 N.E.2d at 843 (1979). Referring to Massachusetts General Laws ch. 19, sec. 24, the court noted that a "child may be taken from custody of his parents on a showing that the child is

chusetts this trustee/parent obligation cannot be displaced by state intervention unless there is a showing by "clear and convincing evidence" that the trustee/parent has forsaken the fiduciary duties owed to the child.¹⁰⁰

4. To what extent may a court implement a substituted judgment order?

The courts have attempted to set the limits of state interference with family decisions on medical care¹⁰¹ while protecting the rights of the patient through determinations of "substituted judgment" — what the child, ward or incompetent would have done if making the decision alone.¹⁰² It is an effort by the courts to think as the individual would have if that person knew and understood all the circumstances pertaining to his condition.¹⁰³ This doctrine has imposed compulsory medical treatment on competent adults¹⁰⁴ as well even though it is an invasion of personal liberties guaranteed by the Constitution.¹⁰⁵

without necessary and proper physical care and the parents are unwilling to provide such care."

100. *Custody of a Minor* (No. 2), 392 Mass. at 719, 467 N.E.2d at 1286 (1984) (finding of parental unfitness must be based on clear and convincing evidence). See *Care and Protection of Three Minors*, 392 Mass. 704, 467 N.E.2d 851 (1984) (removal of child from custody of parents may be ordered only on showing that parent presently unfit to care for that child). The United States Supreme Court in *Parham* required that the state show "bad faith" on the part of parents before the state could transfer power from the parents to an agency or officer of the state regarding medical care or treatment. *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

101. *Custody of a Minor* (No. 3), 378 Mass. 732, 393 N.E.2d 836 (1979) (parents without right to assert parent's choice of "controversial treatments" for their children). See *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1962) (parents refusal of treatment could not threaten life of another).

102. *Gurardianship of Roe*, 383 Mass. 415, 444-45, 421 N.E.2d 40, 57 (1981) (probate judge to identify choice incompetent person would have made if competent). In *In re Moe*, 385 Mass. 555, 432 N.E.2d 712 (1982), the court stated:

In utilizing the doctrine of substituted judgment, [the] court seeks to maintain the integrity of the incompetent person by giving the individual a forum in which his or her rights may be exercised. The court dons "the mental mantle of the incompetent" and substitutes itself as nearly as possible for the individual in the decision-making process.

Id. at 565, 432 N.E.2d at 720, (quoting *In re Carson*, 39 Misc. 2d 544, 545, 241 N.Y.S.2d 288, 289 (N.Y. Sup. Ct. 1962)).

103. See *supra* note 102 and accompanying text.

104. *Commissioner of Corrections v. Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979). This case involved a prisoner at a state correctional facility who was made to submit to life-prolonging dialysis treatment. *Id.* The court affirmed the traditional concept that medical treatment may not be imposed on a nonconsenting competent adult without a court order authorizing such treatment. *Id.*

105. Forced treatments violate a person's constitutional guarantee of privacy found in the "penumbra" of rights guaranteed in the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The leading Massachusetts case enunciating the individual's right to bodily integrity as it relates to medical

The requests for substituted judgment have run the gamut from life-sustaining treatments¹⁰⁶ to discontinuance of life-support systems.¹⁰⁷ Each case is treated as one of first impression when the court considers what type of treatment will or will not be allowed.¹⁰⁸ Because a particular course of treatment was ordered for a person with a specific disease in one instance, is no guarantee that the next person with the same disease will receive a similar order,¹⁰⁹ though there is a consistency in the factors weighed¹¹⁰ in reaching a decision. Thus, judicial proceedings requesting substituted judgment orders are based on considerations unique to the patient, and determinations are not made without substantial deliberation.¹¹¹

The courts, as an arm of the state, impose judgment orders under the doctrines of *parens patriae*¹¹² often quoting the adage that "equity

treatment is Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). The *Saikewicz* court stated that the general rule is "[t]he constitutional right to privacy . . . is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." *Id.* at 742, 370 N.E.2d at 426. See *In re Spring*, 8 Mass. App. Ct. 831, 842-47, 399 N.E.2d 493, 500-03 for further discussion of constitutional rights of a patient. See generally Classen, *State Intervention in Medical Decision-Making*, CASE & COM., July-Aug., 1986, at 45.

106. *Custody of a Minor* (No. 3), 378 Mass. 732, 393 N.E.2d 836 (1979) (ordering chemotherapy treatment for leukemia stricken child); *Commissioner of Correction v. Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979) (ordering life-sustaining dialysis treatment); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied*, 371 U.S. 890 (1962) (ordering blood transfusion to save infant's life).

107. *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 441-42, 497 N.E.2d 626, 639-40 (1986) (allowed discontinuance of artificial life support system); *In re Hier*, 18 Mass. App. Ct. 200, 464 N.E.2d 959 (1984) (refused to order surgical procedures necessary to provide adequate nutritional support of mentally ill 92 year old woman); *In re Spring*, 8 Mass. App. Ct. 831, 849, 399 N.E.2d 493, 503 (1979) (discontinuance of life-prolonging dialysis treatment allowed); *Saikewicz*, 373 Mass. at 730-31, 370 N.E.2d at 419-20 (refused to order chemotherapy for aged severely retarded person because of low chance of remission and immediate suffering caused by treatment).

108. See *Gurardianship of Roe*, 383 Mass. 415, 444, N.E.2d 40, 56 (1981). "The determination must 'give the fullest possible expression to the character and circumstances of [the] individual' . . . [using] a subjective rather than an objective determination." *Id.* (citing *Saikewicz*, 373 Mass. at 747, 370 N.E.2d at 428).

109. Compare *Custody of a Minor* (No. 3), 378 Mass. 732, 393 N.E.2d 836 (1979) (court ordered chemotherapy treatment for leukemia victim); with *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1979) (court denied chemotherapy treatment for mentally retarded leukemia patient). Compare also *Myers*, 379 Mass. 255, 399 N.E.2d 542 (1979) (court ordered dialysis treatment) with *In re Spring*, 8 Mass. App. Ct. 831, 399 N.E.2d 493 (1979) (discontinuance of life-prolonging dialysis allowed).

110. See *infra* notes 198-223 and accompanying text.

111. See *Saikewicz*, 373 Mass. 728, 736, 370 N.E.2d 417, 422 (1979) (substituted judgment determinations present "issues of fundamental importance" requiring guidance of professionals in health care, moral ethics, philosophy and other disciplines as well as legal doctrine).

112. Classen, *supra* note 105, at 45-46 (citations omitted).

will speak for the one who cannot speak for himself."¹¹³ The argument used to justify court intervention in medical decision-making is based on the "clear and present danger" standard¹¹⁴ enunciated by the Supreme Court. Therefore, a court may enter a substituted judgment order when there is a "clear and present danger" of harm to a citizen who the state has an obligation to protect.¹¹⁵

III. ANALYSIS OF THE ISSUES: THE PARENTS' PERSPECTIVE

A. *Is Aversive Therapy an Acceptable Alternative*

Parents of autistic children are faced with a set of behaviors that make home care a virtual impossibility.¹¹⁶ The treatment options offered are limited¹¹⁷ — all are intrusive¹¹⁸ and none are without controversy.¹¹⁹ But to those parents who have not relegated their children to state care completely, the right to choose physical aversives should be

113. *Strunk v. Strunk*, 445 S.W.2d 149, 147 (Ky. 1969) (Steinfeld, J. dissenting).

114. Classen, *supra* note 105, at 46. "The 'clear and present danger' doctrine provides that personal freedoms may be restricted if necessary to prevent a grave and immediate danger to those interests which the government is charged to protect." *Id.* at 46 n.22 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

115. Classen, *supra* note 105, at 47.

116. These behaviors include: hair pulling (to near baldness), biting of self and others, head banging, pinching and hitting of self and others, rectal gouging, eating of feces, putting fists through windows, putting objects in ears and eyes, throwing furniture and habitually running away. Memorandum of Respondents, *supra* note 33, at 21-22. See also *N.Y. Times*, *supra* note 40; Findings and Order, *supra* note 34, at 1; BRI Memorandum, *supra* note 36, at 4.

117. Customary treatment for autistic persons require "more restrictive facilities [than found at BRI group homes] which depend upon exceedingly high doses of antipsychotics, physical restraint, and seclusion for days at a time, an environment of empty rooms . . . [and] locked wards. . . ." Findings, *supra* note 35, at 11. Behavior modification in the form of positive and negative reinforcement to some degree is employed by all serving this type of patient. *N.Y. Times*, *supra* note 40.

118. *Guardianship of Roe*, 383 Mass. 415, 436 & n.10, 421 N.E.2d 40, 55 & n.10 (1981) (court indicated there are few medical procedures more intrusive than forcible injection of antipsychotic medication).

119. *N.Y. Times*, *supra* note 40; *Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981). The court in *Roe* stated: "Commentators and courts have found that antipsychotic drugs are high-risk treatment." *Id.* at 439, 421 N.E.2d at 54 (footnote omitted). The court elaborated on this as follows:

We admit the possibility and express the hope that future medical advances may produce antipsychotic drugs free from the severe adverse side effects we have described. . . . At the same time, it must be noted that the intended effect of the medication — to alter mental processes — by definition cannot be eliminated from those drugs we have described as "antipsychotic." Nevertheless, we do not foreclose reconsideration of these issues when and if it can be shown that the characteristics of antipsychotic drugs have changed.

Id. at 439 n.12, 421 N.E.2d at 54 n.12. See Schopler, *Editorial: Treatment Abuse and Its Reduction*, 16 J. AUTISM & DEV'L DISORDERS, 99 (1986).

their own.¹²⁰

Aversive therapy is used in a systematic manner¹²¹ at BRI in response to specific inappropriate behavior. It is used in conjunction with a system of rewards¹²² which encourages a desired response to replace the inappropriate behavior¹²³ that is being discouraged by the physical aversives. To the proponents of aversive therapy, this controlled use of rewards and aversives can only be characterized as treatment¹²⁴ and not as "punishment" or "abuse."

Opponents of aversive therapy believe that it is an oversimplification of a very complex problem to believe that "bad" behavior can be replaced by "good" behavior with the use of rewards and aversives.¹²⁵ Others seek to ban the use of physical aversives altogether regardless of any so-called benefits that may result in their use.¹²⁶ Finally, there is a middle group which holds that no one treatment plan should be used at the exclusion of others.¹²⁷

120. See *Parham v. J.R.*, 442 U.S. 584 (1979) (Court reiterated that absent a showing of abuse or neglect, parents retain plenary authority to seek care for their children).

121. Findings, *supra* note 35, at 20.

122. *Id.*

123. *Id.* See *supra* note 116 for inappropriate behaviors.

124. Findings, *supra* note 35, at 18-21 accepting testimony of Dr. John Daignault, court-appointed guardian ad litem. See also Singer, *Physiological Studies of Punishment*, 58 CALIF. L. R. 405 (1970). Singer pointed out that "aversive therapy" is a form of behavioral treatment. *Id.* at 430. Singer further observed that this technique used by experienced clinicians "has dramatically improved the behavior of psychotic children." *Id.* at 431 (citing Bucher & Lovaas, *Use of Aversive Stimulation in Modification*, MIAMI SYMPOSIUM ON THE PREDICTION OF BEHAVIOR 1967: AVERSIVE STIMULATION (M. Jones ed. 1968)).

125. Schopler, *supra* note 119, at 99.

126. TASH, Nov. 1984 at 3. TASH (The Association of Persons with Severe Handicaps a private, non-profit group organized to protect and promote the interests of severely handicapped persons) passed a resolution in 1981 supporting the cessation of aversives which stated in part:

Any treatment option which exhibits some or all of the following characteristics: (1) obvious signs of physical pain experienced by the individual; (2) potential or actual physical side effects, including tissue damage, physical illness, severe stress, and/or death, that would properly require the involvement of medical personnel; (3) de-humanization of the individual with a severe handicap . . . because the procedures are normally unacceptable for non-handicapped persons in community environments; (4) extreme ambivalence and discomfort by family, staff, and/or caregivers regarding the necessity of such extreme strategies or their own involvement in such intervention; and (5) obvious repulsion and/or stress felt by non-handicapped peers and community members who cannot reconcile extreme procedures with acceptable standard practice.

Id.

127. Schopler, *supra* note 119, at 104. At the 6-month review hearing before Judge Rotenberg, Shervert H. Frzier, psychiatrist and former director of the National Institute of Mental Health testified "that aversive therapy is a 'viable

However, it is the parents who have evaluated the behavior of their children as they received treatment,¹²⁸ and it should be the parents who should have the right to choose among the treatments available.¹²⁹ Just as parents are allowed the option to let their child undergo an operation that may still be experimental in nature,¹³⁰ parents should be allowed to submit their children to treatments which, though controversial, may change their child's behavior.¹³¹ Also, by permitting such treatments, health care professionals are provided with the opportunity to discover better methods for helping autistic children in the future.¹³²

alternative [for treatment of autism], in fact, one of the few alternatives we have.' " The Boston Globe, June 23, 1987, at 17, col. 5.

Regulations regarding use of aversive therapy went into effect in Massachusetts on July 1, 1987 with the stated purpose of insuring "that behavior modification procedures are used to enhance the dignity, health and safety of clients" and that "extraordinary procedures" like aversive therapy are used only "as a last resort, by certified programs, subject to the strictest safeguards and monitoring." MASS. ADMIN. CODE tit. 102, § 3.04(14) (1987).

128. See *infra* note 152 and accompanying text.

129. Parham v. J.R., 442 U.S. 584, 602 (1979) (obligations of parents include "high duty to recognize symptoms of illness and to seek and follow medical advice.")

130. Federal regulations promulgated by the Department of Health and Human Services have recognized four possible categories in which children may be used as research subjects. 48 Fed. Reg. 9.814-15 (1983). These acknowledged research areas include:

(1) studies with a minimum of risk; (2) studies with more than a minimum of risk but offering a direct benefit to the child; (3) studies with more than a minimum of risk, offering no direct benefit to the child, but having the prospect of generalized knowledge; and (4) studies that would otherwise not be approved but would lead to understanding, prevention or alleviation of a major problem which affects children's health or well-being.

45 C.F.R. §§ 46.404-07 (1983). Leo Soucy, a parent of a BRI student, compares aversive therapy with chemotherapy, which is also cruel and painful but justified under the circumstances. The Boston Globe, *supra* note 127.

131. Gaylin, *Competence in WHO SPEAKS FOR THE CHILD* 42 (W. Gaylin & R. Macklin eds. 1982). Dr. Gaylin stated:

A therapeutic procedure is one that is done "as therapy." It is a treatment for the individual and is presumed to serve his purposes and welfare, even if it is still "experimental" — meaning that whether it will benefit him more than it harms him is still not established. A therapeutic experiment involves the use of a procedure that is not yet proved to work but is used in this specific case to test its efficacy on the condition of the individual.

Id.

132. Brown, *Human Independence and Parental Proxy Consent*, in *WHO SPEAKS FOR THE CHILD*, *supra* note 131 at 217. Brown offers a standard based on present and future opportunities which depends on a moral appeal. *Id.* Brown believes that where there is a "course of action, even one involving risk, and where such action does not have a high probability of interfering with present independence or with the possibility of future independent acts, [there is] . . . no reason to argue that parents should not consent." *Id.*

B. *Should Parents Make Decisions Regarding Medical Treatment for Their Children?*

To withhold from a parent, who continues to fulfill the fiduciary duties owed to his or her child,¹³³ the basic right to provide and participate in the medical care of this child¹³⁴ is an invasion into a "private realm of family life which the state cannot enter."¹³⁵ The argument that parents lose their right to make decisions as to treatment and educational opportunities when the state helps to support the child in group homes, is contrary to Supreme Court decisions.¹³⁶

In *Parham v. J.R.*,¹³⁷ the Court conceded to parents the right to make medical decisions on behalf of their children,¹³⁸ including those decisions which might not be agreeable to the child,¹³⁹ such as a parent's right to consent to aversive therapy for his child at a BRI facility. The *Parham* Court concluded that the making of disagreeable or risky decisions would not automatically shift the power to make decisions

133. *Petition of Dep't of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 421 N.E.2d 28 (1981) (state must show grievous shortcomings before parental rights abridged).

134. *See supra* note 129 and accompanying text.

135. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (interest of parent in "companionship, care, custody and management of his or her children comes to the Court with a momentum of respect"); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) ("home derives its pre-eminence as the seat of family life. . . . [T]he integrity of that life is something so fundamental that it has been bound to draw to its protection the principles of more than one explicitly granted Constitutional right."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right of individual to bring up children is a privilege long recognized at common law as necessary to "orderly pursuit of happiness by free men").

136. *Parham*, 442 U.S. at 605 (state's interest in helping parents care for mentally retarded children not to be so restrictive as to deter parents from taking advantage of opportunities provided by state). Although the states have a significant interest in allocating their resources, mere financial assistance from a state does not negate the "private realm of family life" allowing the state to issue treatment and care orders contrary to what the parents believe and have observed to be in the "best interest of the child." *Id.* at 604-05 (citation omitted). The *Parham* Court did, however, qualify the parents' retention of plenary authority concerning institutionalized care for their children by stating that such care should be subject to "a physician's independent examination and medical judgment." *Id.* at 604.

137. 442 U.S. 584 (1979). This case reviewed the procedure authorized by the State of Georgia for voluntary commitment of children under 18 to state hospitals by their parents or guardians. The Court determined that there were sufficient safeguards in the commitment process to protect the constitutional rights of the children and to ensure that parents or guardians could not arbitrarily have their children confined. A significant portion of the Court's opinion elaborated on the parent-child-state relationship and their rights and responsibilities to each other.

138. *Id.* at 602.

139. *Id.* "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* at 603.

from the parents¹⁴⁰ to some agency or officer of the state¹⁴¹ absent a showing by "clear and convincing" evidence¹⁴² of "bad faith," abuse or neglect on the part of the parents.¹⁴³ In addition to recognition of the parents' "natural bonds of affection"¹⁴⁴ with the child, the parents, decisions reflect the individuality of the family's values and religious convictions.¹⁴⁵ Thus, the burden is on the state to substantiate the need to override the legal presumption that parents "generally do act in the child's best interest."¹⁴⁶ The state failed to show that any of the parents of students residing at BRI facilities acted in "bad faith" or abused or neglected their children.¹⁴⁷

It is granted that the state (through OFC) does have general police powers to promote safe, healthy and responsible child care.¹⁴⁸ Those powers, however, may only be exercised in a broad manner and are applicable to all¹⁴⁹ without any considerations for individual differences.¹⁵⁰ It is the medical profession and parents who are in the best position to recognize these differences and who can evaluate which treatment plan will be the least intrusive¹⁵¹ and achieve the most bene-

140. *Id.*

141. "The statist notion that governmental power should supercede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* (emphasis supplied). See also *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (role of parents in guiding children to adult responsibilities "in large part beyond competence of impersonal political institutions"); Note, *Parental Rights and the Habilitation Decision for Mentally Retarded Children*, note 87, 94 *YALE L.J.* 1715, 1727-28 (1985) (state's weakness as decisionmaker).

142. See *supra* note 100.

143. See *supra* note 141.

144. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

145. Note, *supra* note 141, at 1728-29 (discussing need for diversity in a free society). For an elaboration on the actuality of this diversity see R. WILLIAMS, *FREE & UNEQUAL: THE BIOLOGICAL BASIS OF INDIVIDUAL LIBERTY* (3d ed. 1979).

146. *Parham*, 442 U.S. at 602-03 (history, human experience and reality reveal love and concern parents have for their children).

147. Court appointment of the parents as guardians of the BRI students after a hearing with OFC represented by counsel is evidence of the court's belief that the parents were continuing to fulfill their statutory duty to their children. See *Findings and Order*, *supra* note 34, at 1-3. For the statutory duties of parents and/or guardians *vis-a-vis* children, see *supra* note 97 and accompanying text.

148. See *supra* note 76.

149. *Findings*, *supra* note 35, at 27-28 (OFC only a licensing agency and is acting outside scope of authority when making treatment decisions).

150. R. WILLIAMS, *supra* note 145, at 194. Williams, a biochemist stated:

Progress in the field of medicine as well as in other fields demands full and constant awareness of the facts of human variability and an abandonment of the "normality" doctrine which has blinded us in our attempts to solve many human problems. "The patient" is only the roughest approximation. To be most effective, physicians must know a great deal about individuality and must treat distinctive individuals each with his inborn differences.

Id.

151. Part of the controversy surrounding the use of aversive therapy is semantics

ficial results.¹⁵²

C. *May Parents Request a Substituted Judgment Order Contrary to Statute, Public Policy or the Constitutional Right of the Patient?*

A substituted judgment determination allows the parents an opportunity to present facts before an impartial forum¹⁵³ concerning treatment for a child. The issue would not be before the court at all unless the requested order was not contrary to statute,¹⁵⁴ public policy,¹⁵⁵ the

— a war of words and their meanings. See N.Y. Times, *supra* note 40. For example, those who advocate aversive therapy contend that it is less “intrusive” than drugs or electro-shock therapy, intrusive being defined as “entering without right or welcome.” WEBSTER’S COLLEGIATE DICTIONARY 635 (9th ed. 1983). Opponents of aversive therapy, however, claim that pinches, muscle squeezes and cold water showers constitute “physical abuse.” OFC Memorandum, *supra* note 48, at 2-3. Also, there is a dispute over whether or not the use of physical aversives is a “therapy” or “corporeal punishment.” *Kate School v. Dept. of Health*, 94 Cal. App. 3d 608, 617, 156 Cal. Rptr. 529, 535-36 (1979). See WEBSTER’S COLLEGIATE DICTIONARY 1223 (9th ed. 1983) (“therapy” defined as treatment of a disease). For a discussion of the intrusiveness of drugs see *Roe*, 383 Mass. at 436-48, 421 N.E.2d at 52-53.

152. “People who criticize BRI don’t know what Caroline was like before she got there.” N.Y. Times, *supra* note 40 (quoting Caroline Boyner’s mother). Mrs. Boyner told the N.Y. Times reporter that her daughter banged her head against walls and floors so violently that her scalp and forehead were cut and that she had previously been kept heavily sedated on anti-psychotic drugs. *Id.* Caroline had been brought to the BRI facility tied to a stretcher. *Id.* After receiving aversive therapy, Caroline was removed from drugs and now enjoys putting on make-up and combing her hair, which is her “reward” for not banging her head. *Id.*

“If you are asking me if I would rather see my son get some pinches and cold showers, or in that condition banging his head against a wall, you can guess my answer.” The Boston Globe, Oct. 4, 1985 at 20, col. 1. (statement of Leo Soucy) Soucy indicated that before his son went to BRI, doctors had treated the boy with high doses of anti-psychotic drugs which left him, “listless, with body tremors, . . . parched and cracked lips and drooling constantly.” *Id.*

153. Classen, *supra* note 105, at 47. Classen stated:

Substituted judgment also gives rise to a degree of flexibility in resolving medical treatment disputes. An impartial judge is able to consider the facts of each case and weigh all competing considerations, including the seriousness of the physical consequences in refusing medical treatment. . . .

Id. See also *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 429 N.E.2d 626 (1986) (issues presented require more than “mechanical reliance on legal doctrine”); *Guardianship of Roe*, 383 Mass. 415, 434, 421 N.E.2d 40, 51 (1981) (substituted judgment determination requires “the process of detached but passionate investigation”); *Custody of a Minor* (No. 3), 378 Mass. 732, 745-46, 393 N.E.2d 836, 844 (1979) (to warrant substituted judgment determination contrary to parents’ wishes court must support findings in “meticulous detail”); *Saikewicz*, 393 Mass. 728, 370 N.E.2d 417 (1977).

154. *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985) (conservators seeking right to sterilize incompetent contrary to statute).

155. *In re Spring*, 8 Mass. App. Ct. 831, 399 N.E.2d 493 (1979) (guardian’s request to discontinue dialysis contrary to general state interest in preservation of

constitutional rights of the patient,¹⁵⁶ or advice of the attending physician.¹⁵⁷ The purpose of the substituted judgment order is to provide protection to the provider and the parent from civil and criminal penalties.¹⁵⁸

This is not to say the parent (or party requesting) always wins,¹⁵⁹ rather the thoroughness to which the evidence is scrutinized¹⁶⁰ offers

life). See also *Brophy*, 398 Mass. at 417, 497 N.E.2d at 626 (guardian's request to discontinue nutritional support conflicting with state's duty and concern for preservation of life); *Commissioner of Correction v. Myers*, 379 Mass. 255, 299 N.E.2d 452 (1979) (ordered forced dialysis on prisoner to maintain order and discipline in state prison); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (intervention is necessary to prevent spread of communicable disease or otherwise protect the public health).

156. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (general rule is "[t]he constitutional right to privacy . . . is an expression of sanctity of individual free choice and self-determination as fundamental constituents of life"). For a discussion on the constitutional justification for substituted judgment determinations see Classen, *supra* note 104, at 46-47.

157. *Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981) (request for substituted judgment to allow refusal of anti-psychotic drugs recommended by attending physician).

158. Classen, *supra* note 105, at 49. Reviewing the duty of physicians, Classen stated:

The interests of those individuals such as physicians who are unrelated to the individual attempting to exercise his own judgment have also been considered by the judiciary. Physicians and other health professionals are bound by the Hippocratic oath to protect and preserve life. When an individual knowingly refuses life-saving treatment, the individual is asking the physician to ignore the Hippocratic oath as well as potentially subjecting the physician to liability for abandonment.

Id. (citations omitted). See generally *Commonwealth v. Edelin*, 371 Mass. 497, 524, 359 N.E.2d 4, 18 (1979) (physician accountable to criminal law in performance of professional duties).

159. *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 707 P.2d 170, 219 Cal. Rptr. 387 (1985) (court refused sterilization of incompetent requested by conservator); *In re Hier*, 18 Mass. App. Ct. 200, 464 N.E.2d 959 (probate court order prohibiting surgical procedures necessary to provide incompetent with adequate nutritional support upheld over objection of guardian ad litem); *Custody of a Minor (No. 3)*, 378 Mass. 732, 393 N.E.2d 836 (1979) (court ordered chemotherapy treatment to leukemia stricken minor over objections of parents).

160. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977). The *Saikewicz* court set the standard now applied by Massachusetts courts when there is a request for a substituted judgment order. *Id.* at 737-59, 370 N.E.2d at 420-35. See also *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 429-42, 497 N.E.2d 626, 632-39 (1986); *Guardianship of Roe*, 383 Mass. 415, 429-52, 421 N.E.2d 40, 49-61 (1981); *In re Spring*, 8 Mass. App. Ct. 831, 837-45, 399 N.E.2d 493, 497-502 (1979); *Custody of a Minor (No. 3)*, 378 Mass. 732, 734-43 & 745-50, 393 N.E.2d 836, 838-43 & 844-47 (1979). See also *infra* notes 198-215 and accompanying text.

all parties a means for presenting experts in the field¹⁶¹ as well as giving the judge the opportunity to observe the sincerity of the parents.¹⁶² If parents are unable to obtain relief from arbitrary decisions of state agencies,¹⁶³ a request for a substituted judgment determination allows the court to revise the treatment plan the parents wish their child to receive.¹⁶⁴ Once issued, this substituted judgment order becomes superior to statute, public policy, constitutional rights of the patient, and the attending physician's recommendations.¹⁶⁵ A parent's request for a substituted judgment order must be viewed in a light most favorable to the parent¹⁶⁶ when the request is made as a part of an ongoing family relationship, regardless of whether that decision is popular.¹⁶⁷

IV. THE JUDGE'S FINDINGS AND CASE LAW

A. *Aversive Therapy*

Use of aversive therapy in treatment of autistic persons, although controversial,¹⁶⁸ is successful in many cases.¹⁶⁹ While no one method is universally accepted,¹⁷⁰ physical aversives are not absolutely forbid-

161. *Custody of a Minor* (No. 3), 378 Mass. 732, 734-43, 393 N.E.2d 836-43 (1979) (summarization of medical and expert testimony).

162. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (Court noted no showing of "bad faith" by parents).

163. *Stock v. Massachusetts Hosp. School*, 392 Mass. 205, 476 N.E.2d 448 (1984) (aggrieved parties may resort to courts for relief where "irreparable harm would result if judicial action were delayed by the implementation of the administrative process"). *Id.* at 213, 476 N.E.2d at 454.

164. *Custody of a Minor* (No. 3), 378 Mass. 732, 738-39, 393 N.E.2d 836, 840-41 (1979) (testimony of experts presented by parents supporting alternate to chemotherapy to treat child with leukemia).

165. *See supra* notes 154-58 and accompanying text.

166. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (historical presumption that parents act in child's best interest). Although this is a rebuttable presumption, the evidence must be "clear and convincing" that the parental action "threatens a child's well-being." *Custody of a Minor* (No. 3), 378 Mass. 732, 744, 393 N.E.2d 836, 844 (1979). *See supra* note 145 and accompanying text.

167. *Parham*, 442 U.S. at 603 (decisions of parent not rejected merely because they are disagreeable or risky to child).

168. *See supra* note 126 and accompanying text.

169. *See supra* notes 58 & 152 and accompanying text.

170. N.Y. Times, *supra* note 40. The author of this N.Y. Times article interviewed other experts familiar with treatments for the autistic. Dr. Charles Hamad, director of the psychology department at Fernald State School, a facility for mentally retarded and autistic persons in Waltham, Massachusetts, stated that Fernald uses drugs as well as some of the "milder 'aversive' therapies, including spraying water in the face, protective helmets and deprivation of such foods as dessert and coffee for patients who misbehave at a meal." *Id.* Dr. Hamad indicated that "some scientific research shows that punishment can be effective with autistic patients who are aggressive or wilfully abuse themselves." *Id.*

Vincent Strully, director of Efficacy Research Institute in Framingham,

den.¹⁷¹ However, the mere characterization of its use as "treatment" or "therapy" rather than "punishment" does not insulate it from scrutiny.¹⁷²

BRI v. Leonard is a case of first impression in Massachusetts.¹⁷³ There was a four day hearing on whether or not a preliminary injunction should be issued against OFC.¹⁷⁴ During this hearing, Judge Rotenberg heard testimony from the parents of the students, recognized experts in the field¹⁷⁵ and observed the students in person at the group home and on video tape.¹⁷⁶ He also had access to prior treatment records of the students.¹⁷⁷ Furthermore, Judge Rotenberg requested that OFC come forward with alternate treatment plans that might reach the level of success achieved by the use of aversive therapy on this particular group of students.¹⁷⁸

Since neither the evidence nor OFC presented any reasonable alternative, Judge Rotenberg found that aversive therapy, as administered by BRI on specific students, was in essence a treatment program and not "abuse" or "punishment."¹⁷⁹ Judge Rotenberg concluded that

Massachusetts, stated that since "punishment" is not used at his facility, the result is that "we can't handle some big, older students." *Id.*

171. OFC Memorandum, *supra* note 48, at 6 (OFC approval of aversive therapy, including physical punishment). *See also* *Kate School v. Dep't. of Health*, 94 Cal. App. 3d 606, 621, 156 Cal. Rptr. 529, 538 (1979) (state does not forbid all behavior modification therapy but has interest in regulating its use).

172. *Kate School*, 94 Cal. App. 3d at 617, 156 Cal. Rptr. at 536 (1979) (label placed on act or motivation of person performing act not determinative of whether act is treatment or punishment).

173. *Director of the Office for Children v. Behavior Research Inst. & Others*, No. 86-0318, slip op. at 7 (Mass. App. Ct. July 30, 1986) (upholding preliminary injunction to preserve status quo until full hearing on difficult issues of first impression).

174. Findings, *supra* note 35, at 8-27.

175. *Id.* at 18-22.

176. *Id.* at 3-4.

177. *Id.*

178. "Not one scintilla of affirmative evidence was offered at [the] guardianship hearings by the OFC, even though the agency was requested by the Court to produce any reasonable available alternative or less intrusive treatment that might be adopted." *Id.* at 4.

179. *Id.* at 16-18. Dr. J.L. Matson, a clinical psychologist with eleven years experience in behavior modification and consultant to the U.S. Department of Justice on the issues of "Right to Care and Right to Treatment" testified as an expert witness at the hearing for the preliminary injunction in *BRI v. Leonard*. *Id.* at 9-11. Dr. Matson characterized the OFC order prohibiting the use of physical aversives on selected BRI students as treatment decisions which "play Russian Roulette" with the safety and lives of those students. *Id.* at 27. On June 22, 1987, at the review hearing before Judge Rotenberg, Dr. Matson, appointed chairman of the review committee monitoring the students at BRI, testified that "warehousing" of the autistic in state mental institutions where they are maintained in "chemical strait jackets" by use of excessive doses of psychotropic drugs, isolated or physically restrained are equally repugnant; however, at this time, aversive therapy

aversive therapy was a behavior modification program which gave those students receiving the treatment their only hope of leading less restrictive lives.¹⁸⁰

B. *Role of Parents in Medical Decision Making*

Massachusetts defers judgments concerning the well-being of children to their parents.¹⁸¹ The initial presumption is that parents will act in the "best interest of the child".¹⁸² There must be a proper showing by the state that parental decisions threaten the child before the courts will controvert the parent's choices of treatment for the child.¹⁸³

A court must balance controversial treatment that has been successful with accepted treatment that was unsuccessful for a particular child.¹⁸⁴ This balancing test contrasts a treatment that has controlled the student's self-destructive behavior with treatments known to have caused permanent disability¹⁸⁵ or to have been ineffective.¹⁸⁶ The court must weigh the burdens against the benefits.¹⁸⁷ Lacking any showing by "clear and convincing" evidence that the parents were not acting in the "best interest of the child," the Family Court deferred to the parent's choice for making medical decisions over a state mandate that prohibited such treatments.¹⁸⁸

C. *Substituted Judgment Determination and Case Law*

In issuing the preliminary injunction enjoining OFC from taking any action to suspend the license of BRI or limiting use of physical aver-

provides "the only effective treatment we have to treat some of the most chronic cases of self injury and aggression." The Boston Globe, *supra* note 127.

180. Findings, *supra* note 35, at 4 (self-abuse, violence, aggression and destructive behavior decreased while self-care and academic skills have increased). The court further noted that the BRI group homes provide a "normalized" environment "vastly superior" than might be expected given the student's severe condition and many students "graduate" to less restrictive settings. *Id.* at 12 & 17.

181. Custody of a Minor (No. 3), 378 Mass. 732, 743, 393 N.E.2d 836, 843 (1979) (primary right and obligation for well-being of children prerogative of parents).

182. See *supra* notes 146 & 166 and accompanying text.

183. See *supra* notes 146 & 166 and accompanying text.

184. See *supra* notes 53-58 & 151-52 and accompanying text.

185. Guardianship of Roe, 383 Mass. 415, 421 N.E.2d 40, 53 (1981) (drug therapy presents "well-established likelihood of severe and irreversible adverse side effects"). See *supra* note 42 and accompanying text.

186. N.Y. Times, *supra* note 40 (anti-psychotic drugs did not control self-abusive behaviors of students); BRI Memorandum, *supra* note 36, at 4-5 (electro-shock, anti-psychotic medication, restraint did not deter assaultive, life-threatening behaviors).

187. *Roe*, 383 Mass. at 447-48, 421 N.E.2d at 58-59 (1981) (court considered adverse effects of drug treatment and prognosis if treatment administered or withheld).

188. See *supra* note 60 and accompanying text.

sives on specified "desperately afflicted students,"¹⁸⁹ Judge Rotenberg has support of well established case law in Massachusetts.¹⁹⁰ In *Superintendent of Belchertown State School v. Saikewicz*,¹⁹¹ the Supreme Judicial Court stated that by virtue of its general equity power, the probate court is the proper forum in which to decide issues relative to appointment of guardians and substituted judgment orders for incompetents.¹⁹² In *Matter of Moe*,¹⁹³ the Massachusetts Appeals Court affirmed the "broad and flexible"¹⁹⁴ powers of the probate court to provide for the needs of the mentally incompetent person.¹⁹⁵ The *Moe* court indicated that the power of the probate court is plenary unless limited by legislative enactment.¹⁹⁶ No such limitation has been placed on the probate court to date.

Judicial substituted judgment orders are the appropriate means for resolving those issues which develop when medical intervention is sought for or attempted with a minor, incapacitated adult or those who suffer from developmental disabilities.¹⁹⁷ Before implementing a form of treatment on an incompetent,¹⁹⁸ the party favoring such treatment must show that certain circumstances are present.¹⁹⁹ Also, the right to accept or reject medical treatment does not depend on any prior expression by a previously competent person.²⁰⁰ An essential purpose of

189. Findings, *supra* note 35, at 1.

190. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 755-57, 370 N.E.2d 417, 432-34 (1977) (probate court appropriate forum to determine medical requirements of incompetent).

191. *Id.*

192. *Id.*

193. 385 Mass. 555, 432 N.E.2d 712 (1982).

194. *Id.* at 561, 432 N.E.2d at 718.

195. *Id.* at 561, 432 N.E.2d at 719.

196. *Id.*

197. *Classen*, *supra* note 105, at 45.

198. A request for substituted judgment order is multifaceted and in the first instance requires a determination that the person for whom the order is requested is, in fact, unable to make the decision or give informed consent. *Lane v. Candura*, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978) (person presumed competent unless otherwise shown by evidence). *Id.* at 382, 376 N.E.2d at 1235. *See also* *Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981).

199. *Saikewicz*, 373 Mass. at 747, 370 N.E.2d at 428 (substituted judgment determination to give fullest possible inquiry into character and circumstances of individual); *Roe*, 383 Mass. at 434, 421 N.E.2d at 51 (Massachusetts Supreme Judicial Court indicated its preference to resolve extraordinary medical treatment under the test established in *Saikewicz*).

200. The courts have attempted to adduce the decision an individual would have made when competent regarding treatment and give deference to that decision. *Brophy*, 398 Mass. at 431-32, 497 N.E.2d at 633-34. However, in *In re Spring*, the Appeals Court of Massachusetts stated:

An expression of opinion by the patient when competent would obviously be of great assistance, especially where the expression indicates a contemplation or understanding of the circumstances later obtaining; but the right secured by the *Saikewicz* case is not conditioned on the patient's hav-

the substituted judgment analysis is to provide an incompetent with the same treatment rights as those granted to a competent person.²⁰¹ However, substituted judgment determinations are not always required in emergency situations.²⁰²

The doctrine of substituted judgment has been deemed an appropriate method for protecting an incompetent's right to refuse painful, life-sustaining treatment,²⁰³ anti-psychotic medication,²⁰⁴ or chemotherapy treatments.²⁰⁵ Other substituted judgment orders have been issued to force submission to hemodialysis on a competent person²⁰⁶ and chemotherapy treatments for a minor over parental objections.²⁰⁷

In making any substituted judgment determination the court considers the following: the preferences of the patient,²⁰⁸ whether the patient's religious beliefs would be inconsistent with such treatment,²⁰⁹ the desires of and impact on the family,²¹⁰ any harm resulting from the

ing had the presence of mind to formulate such an expression of his wishes when competent.

8 Mass. App. Ct. 831, 838, 399 N.E.2d 493, 498 (1979) (citation omitted). *See also In re Hier*, 18 Mass. App. Ct. 200, 208-09, 464 N.E.2d 959, 964 (1984) (court does not rely on previous representations of patient when competent concerning preferred types of treatment) (citations omitted).

201. *Roe*, 383 Mass. at 444, 421 N.E.2d at 56 (court to identify choice incompetent would have made if competent); *Saikewicz*, 373 Mass. at 746, 370 N.E.2d at 428 (state must recognize dignity and worth of an incompetent to grant that person "the same panoply of rights and choices it recognizes in competent persons"). *Id.* *See also supra* note 102 and accompanying text.

202. *Roe*, 383 Mass. at 440-41, 421 N.E.2d at 54-55. The *Roe* court stated: "We are certain that every judge recognizes that in any case where there is a possibility of immediate, substantial, and irreversible deterioration of a serious mental illness, even the smallest of avoidable delays would be intolerable." *Id.* at 441, 421 N.E.2d at 55. For a further discussion of need for substituted judgment orders in emergency situations see *Spring*, 8 Mass. App. Ct. at 835-36 & n.5, 399 N.E.2d at 496-97 & n.5 (if medical emergency exists no need for informed consent).

203. *Hier*, 18 Mass. App. Ct. 200, 464 N.E.2d 959 (incompetent's right to reject surgical procedures needed to provide adequate nutritional support).

204. *Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981) (ward's right to refuse drug treatment while confined in state institution).

205. *Saikewicz*, 373 Mass. at 746, 370 N.E.2d at 428 (incompetent not required to undergo painful chemotherapy treatments).

206. *Commissioner of Correction v. Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979) (required otherwise competent prisoner in state penal institution to submit to involuntary hemodialysis).

207. *Custody of a Minor (No. 3)*, 378 Mass. 732, 393 N.E.2d 836 (1979) (minor to undergo chemotherapy treatments on advice of attending physician and against wishes of parents).

208. *Roe*, 383 Mass. at 444-45, 421 N.E.2d at 57 (ward's stated preferences entitled to serious consideration).

209. *Id.* at 445-46, 421 N.E.2d at 57-58 (court looks to how absolutely and unequivocally ward holds to religious beliefs).

210. *Id.* at 446-47, 421 N.E.2d at 58 (substituted judgment should not interfere with family relationships). *See also Matter of Spring*, 8 Mass. App. Ct. at 846-47 n.5,

treatment,²¹¹ any harm resulting from the denial of treatment,²¹² prognosis without treatment,²¹³ and prognosis with treatment.²¹⁴ The state's interest in protecting the lives of its citizens (the public policy issue) is also evaluated.²¹⁵

It is possible that some persons would prefer to endure pain inflicted on them as a part of their treatment program²¹⁶ over the pain they may inflict on themselves²¹⁷ or the pain which they suffer from their disease.²¹⁸ It is also possible that others might choose not to go on living rather than submit to pain,²¹⁹ drug therapy,²²⁰ blood transfusions,²²¹ restraint and self-abuse,²²² or remain in a vegetative state.²²³ These are all within the scope of any substituted judgment order which may be granted.

After weighing all of the above considerations, Judge Rotenberg found that a substituted judgment determination allowing use of aversive therapy on selected students was necessary to prevent irreparable harm to the parent as well as a deterioration of the health, safety and

399 N.E.2d at 497 n.5 (fact that family and attending physician recommend same treatments added weight to patient's interests).

211. *Roe*, 383 Mass. at 447, 421 N.E.2d at 58 (competent patient would consider adverse side effects, therefore, court must evaluate such adverse effects on behalf of the incompetent).

212. *Id.* (court to consider whether individual's health would permanently deteriorate if treatment refused).

213. *Id.*

214. *Id.* at 447-48, 421 N.E.2d at 58-59 (court more inclined to enter substituted judgment order where a greater likelihood of cure or improvement with proposed treatment can be shown).

215. *Id.* at 448-50, 421 N.E.2d at 59-61 (substituted judgment orders may be subordinated to state's interest in preserving life, protection of innocent third persons, prevention of suicide and upholding ethical integrity of medical profession). See generally *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (leading Massachusetts case regarding court inquiry prior to issuance of substituted judgment determination).

216. *Saikewicz*, 373 Mass. at 750, 370 N.E.2d at 432 (chemotherapy treatments involve suffering and painful side effects).

217. *In re Hier*, 18 Mass. App. Ct. 200, 464 N.E.2d 959 (1984) (elderly patient repeatedly removed gastrostomy tube required for adequate nutritional support).

218. *R. WILLIAMS*, *supra* note 145, at 178-79 (no two people have same sensitivity or reaction to pain).

219. See *supra* note 217 and accompanying text.

220. *Roe*, 383 Mass. at 426-30, 421 N.E.2d at 47-49 (ward paranoid and schizophrenic with strong potential to inflict serious injury on self and others).

221. *In re Osborne*, 294 A.2d 372 (D.C. 1972) (court upheld right of individual to refuse life-saving blood transfusion).

222. *Roe*, 383 Mass. at 420-21, 421 N.E.2d at 44 (ward's prior experiences with drugs instrumental in refusal to submit to drug therapy even though he was a danger to self and others requiring occasional restraint and commitment to mental institutions).

223. *Brophy v. New England Sinai Hosp., Inc.*, 389 Mass. 417, 428, 497 N.E.2d 626, 631-32 (court concluded ward, if competent, would decline food and water).

rehabilitative progress of the students.²²⁴

V. MODIFIED ALTERNATE DISPUTE RESOLUTION IN SETTLEMENT OF FAMILY/STATE DISPUTES

A. *Alternate Dispute Resolution in General*

Alternate dispute resolution (ADR) is most often recognized as an integral part of labor/management jurisprudence.²²⁵ With chronic docket backlog and rising costs, however, ADR is being advanced as a means of "private arbitration . . . encompassing everything but criminal cases."²²⁶ It is a process focused on solving controversies without recourse to self-help or formal adversarial procedures while promoting efficiency and preservation of relationships.²²⁷

However, there are some situations where, because of the nature of the dispute and the conflicting interests of the parties involved, a court-directed and approved mediation would permit a more harmonious and long-term settlement. This Comment proposes that court supervised ADR is the most appropriate means by which to resolve family/state disputes.

B. *Advantages of Modified ADR in Settlement of Family/State Disputes*

Family/state disputes involve conflicting rights and obligations.²²⁸ The state's position is justified under its police and *parens patriae* powers²²⁹ to make all decisions for the institutionalized child²³⁰ as well as some decisions concerning all other children within its jurisdiction.²³¹ However, the courts have held that such state power is not to be exercised unless the parents have been disqualified as unfit.²³² The interest of parents not proven unfit by "clear and convincing" evidence outweighs any claim the state may have with regard to its actions as substitute parents.²³³

224. Findings, *supra* note 35, at 27-28.

225. W. HOLLEY & K. JENNINGS, *THE LABOR RELATIONS PROCESS* 269 (A. Constant, N. Abbott & J. Perkins eds. 1980).

226. Heaney, *Courts clogged? It's rent-a-judge to the rescue*, Boston Herald, Feb. 8, 1987, at 24, col. 3.

227. For a capsule discussion on the influence and origins of alternate dispute resolution see J. Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 *MEDIATION QUARTERLY* 3 (J.A. Lemmon ed. Sept. 1983).

228. See *supra* notes 94-100 and accompanying text.

229. See *supra* notes 13-15 and accompanying text.

230. *Parham v. J.R.*, 442 U.S. 584, 604-06 (1979) (state has real interest in insuring its resources to care for institutionalized children are allocated properly). See also *supra* note 147 and accompanying text.

231. See *supra* notes 98-99 and accompanying text.

232. See *supra* notes 99-100 and accompanying text.

233. *Parham*, 442 U.S. at 602-03 (Stewart J., concurring) (Brennan, Marshall & Stevens, JJ., dissenting) (legal presumption that parents act in child's best interest).

Since the courts ultimately become involved in settlement of serious family/state disputes, bringing the matter under the jurisdiction of the appropriate court at the outset could actually be most efficient and supportive of the family relationship. Court supervised ADR would provide that a stipulation binding on the parties be entered and filed with the court, when an agreement has been reached. This permits the court to retain jurisdiction over the matter.²³⁴

Any stipulation receiving court approval may be appealed, amended, or dismissed upon request of either party as circumstances change. Some might argue that the ability to amend a stipulation using the court-supervised ADR approach is a fundamental problem with this procedure. As is the norm in family law, however, the disputes are constantly in flux. Finality is evasive and there are seldom "winners" or "losers" as traditionally perceived.²³⁵ A stipulation worked out by agreement is generally more easily enforced as it has not been imposed on the parties by a higher authority and neither side feels that it has been defeated by the other.²³⁶ Under a program such as this, the parents and state are partners working together for the "best interests of the child" rather than adversaries.²³⁷

This is even more apparent when the dispute concerns decisions

In his concurring opinion, Justice Stewart stated that: "So deeply imbedded in our tradition is this principle of law [that parents speak for their minor children] that the Constitution itself may compel a State to respect it." *Id.* at 621. Also, Justice Brennan, in his dissenting opinion in which Justices Marshall and Stevens joined, acknowledged that "[t]he rule in favor of deference to parental authority is designed to shield parental control of child rearing from state interference." *Id.* at 637. Furthermore, Justice Brennan added that the special protection and deference cannot be accorded equally to state officials when acting *in loco parentis*. *Id.* at 638.

234. Findings and Conclusions, *supra* note 59, at 1 (probate court to retain continuing jurisdiction for periodic review). *See also* Settlement Agreement, *BRI v. Leonard* at 13-14, No. 86E 0018-G1 (Bristol County Sup. Ct. & Bristol County P. & Fam. Ct. entered Dec. 12, 1986) (time periods set forth for review, termination of agreement and institution of substituted judgment procedures as condition for permitting BRI to implement aversive therapy).

235. Lecture by Dean Kenneth R. Evans, New England School of Law, Boston, Massachusetts (Jan. 14, 1987).

236. Heaney, *supra* note 226. Commenting favorably on ADR, Alice Richmond, president of the Massachusetts Bar Association stated:

We're [Massachusetts Bar Association] very much in favor of ADR, and most lawyers also seem to approve when the circumstances warrant. . . . Actually, most cases are settled before they go to trial anyway. . . . ADR is basically a win/win situation in the right circumstances, because it is an aid not only to lawyers and clients, but to an often overtaxed system.

Id.

237. "The first and paramount duty is to consult the welfare of the child." *Custody of a Minor* (No. 3), 378 Mass. 732, 744, 393 N.E.2d 836, 843 (1979) (citation omitted).

regarding medical treatment.²³⁸ The door should be left open to allow for easy review which can be accomplished under the process suggested because of an accumulation of data and persons knowledgeable of the situation.²³⁹ Upon presentation of evidence by any one of the disputants indicating a need to re-evaluate the stipulation in effect, the court could order the parties to reconvene, review the new information and either reject it or modify the stipulation.²⁴⁰ Nonetheless, the court would always be available to conduct an evidentiary hearing if an impasse is reached. In any decision making process, however, deference should be given to maintaining family integrity and parental choices barring "clear and convincing" evidence to the contrary.

Once having decided to resolve their differences through court supervised ADR,²⁴¹ it does not seem likely that any of the parties would want to become enmeshed in the adversarial process.²⁴² Past experience should have demonstrated that by working together the parties can promote the "best interests of the child," the family and the state.

1. Application of the Proposal

In upholding the Family Court's guardianship and substituted judgment orders in *BRI v. Leonard*, the Massachusetts Appellate Court admonished all parties to recognize that they shared a common responsibility²⁴³ and had a duty to go back to the lower court and work to "resolve this litigation and settle this matter in the best interests of

238. See generally *id.* (parents refusal to submit child to orthodox medical treatment).

239. *Saikewicz*, 373 Mass. at 737, 370 N.E.2d at 423 (development of new techniques raises serious questions as to what constitutes acting in best interests of patient).

240. Settlement Agreement, *supra* note 234, at 7 (monitor to report to court for modifications of treatment plan).

241. Heaney, *supra* note 226 (ADR provides parties with more control in resolution of controversy and disputants feel better about outcome).

242. With respect to the problems inherent in the adversarial system, the *Parham* Court stated:

Another problem with requiring a formalized, fact-finding hearing lies in the danger it poses for significant intrusion into the parent-child relationship. Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child. It is one thing to require a neutral physician to make a careful review of the parents' decision in order to make sure it is proper from a medical standpoint; it is a wholly different matter to employ an adversary contest to ascertain whether the parents' motivation is consistent with the child's interests. . . . A confrontation over such intimate family relationships would distress the normal adult parents and the impact on a disturbed child almost certainly would be significantly greater.

Parham v. J.R., 442 U.S. 584, 610 (1979).

243. Findings, *supra* note 35, at 27-28.

the students."²⁴⁴ The "team"²⁴⁵ approach devised by Judge Rotenberg gave the parents the opportunity to be a part of the system by acknowledging that the family had a legitimate interest in determining treatment programs for their children.²⁴⁶ It avoided the creation of animosities that develop out of the adversarial procedure²⁴⁷ and reduced the time and cost of litigation.²⁴⁸ Further, it allowed the parents to work with those state agencies on whom they depended to help in the support of their children.²⁴⁹ In addition, the "team" viewed the needs of each student individually and was able to design a program suited to that particular student's needs²⁵⁰ in light of which treatments were successful or were to no avail.²⁵¹ The "team" could objectively evaluate all forms of treatment with the primary question being: What will help this student be more in tune with his surroundings and help him achieve a higher quality of life?²⁵²

244. Findings, *supra* note 35, at 5.

245. See *supra* note 66.

246. *In re Spring*, 8 Mass. App. Ct. 831, 840 & n.5, 399 N.E.2d 493, 499 & n.5 (1979) (importance of family and physician in treatment decision sanctioned not only by tradition but also by limitations on court's ability to do so on a day-to-day basis).

247. See *supra* note 242 and accompanying text.

248. The cost to the parents and BRI for litigating this case was \$580,605.25. Settlement Agreement, *supra* note 234, at 12.

In granting a Motion for Attorney's Fees to be paid by OFC, Judge Rotenberg stated: "[T]he students whose conditions are in many cases life-threatening must have their day in court and be allowed to complete their case; and this Court cannot allow financial extinction to prevent that." Decision on Motion for Attorneys' Fees at 15, No. 86E-0018-G1, *BRI v. Leonard* (Bristol County Sup. Ct. & Bristol County P. & Fam. Ct. filed Oct. 31, 1986). Judge Rotenberg also criticized OFC for its failure to take advantage of opportunities to negotiate and "[r]ather than adopt a conciliatory attitude, the omnipotent power of the state is now being utilized to continue the fight" wearing down both the parents and the school. *Id.* at 17. The trial time for this case was estimated by the court to be up to 120 days because the "controversy was itself complex, multifaceted and of first impression in this state. . . ." Findings and Conclusions, *supra* note 60, at 6.

249. *Parham*, 442 U.S. at 605. The *parens patriae* interest of the state in assisting parents to care for their mentally disabled children cannot be fulfilled if the parents refuse such help when it is burdensome, "embarrassing or too contentious." *Id.*

250. Individual treatment plans are recognized as necessary to provide for the best interest of the institutionalized client. I. AMARY, *supra* note 89 at 38-98. The means to achieve this individualized plan is through an interdisciplinary team consisting not only of the traditional professionals in education, recreation, social work, medicine, psychology, nursing and nutrition but also including the client and his guardian. *Id.*

251. See *supra* notes 58 & 152 and accompanying text.

252. Judge Rotenberg observed that when provided with effective treatment the students at BRI showed:

improvement . . . so basic and essential to [the students] that it literally involves their opportunity to enjoy blessings of humanity that other individuals are likely to take for granted. One such student's life, for example, without treatment [physical aversives] required imposition of a four-point

Although this model did have a setback when OFC issued its directive barring certain types of treatment at BRI,²⁵³ a settlement was reached without full litigation.²⁵⁴ It was agreed that use of intrusive physical aversives would require a court-ordered substituted judgment treatment plan for any student who is a minor or not able to provide informed consent.²⁵⁵ This recognizes the extraordinary nature of physical aversives²⁵⁶ yet does not prohibit their use altogether.²⁵⁷ The agreement also acknowledged the significant role of the parents in determining health care for their children as they were included in the settlement process.²⁵⁸

Finally, the most promising aspect of this model is exemplified in Judge Rotenberg's order accepting the settlement agreement. Judge Rotenberg concluded: "The negotiations that created the good will that brought about a settlement evoked an openness that augurs well for the future of the state, the school, the parents and their children."²⁵⁹

VI. CONCLUSION

Families are still the bulwark of this nation. They perform functions that are beyond the resources of government. Families can treat their members as individuals thereby encouraging the diversity that is essential to a free society. The errors made by one family are far more easily corrected than an error which has become institutionalized by state edict.

The state should protect and encourage independent family decisions regarding the care of children regardless of whether the children are confined in state-supported institutions. The most suitable method for encouraging such family participation is to include the families as a part of the decision making process and to reach amicable settlements

restraint to prevent him from tearing and lacerating his own prolapsed intestines. With treatment, this young man enjoys the simple pleasure of going to a restaurant; the simple pleasure of meaningful communication with another human being; the simple satisfaction of completing a meaningful task; the dignity of the achievement of basic self-care skills.

Findings, *supra* note 35, at 15.

253. See *supra* note 69 and accompanying text.

254. Settlement Agreement, *supra* note 234, at 1-2.

255. *Id.* at 2-7 (strict procedure to be followed for implementing and monitoring treatment plans which include use of physical aversives).

256. *Id.*

257. *Id.*

258. *Id.* at 1-2 & 14 (parents participated in negotiations resulting in Settlement Agreement); Findings and Conclusions, *supra* note 60, at 6 ("All parties. . . approved the agreement, including the attorneys for the students, parents. . . and all other members of the class.") *Id.*

259. Findings and Conclusions, *supra* note 60, at 6.

without recourse to adversarial proceedings.²⁶⁰

*Dorothy S. Peirce**

260. Support for this proposition is found in Chief Justice Rehnquist's closing remarks delivered in the Senate Caucus Room on June 5, 1980 when he stated:

After all, dispute resolution, whether by the adversarial process or by a process of conciliation or acceptance of the finality of a decision which has been rendered by a non-governmental institution [the family], is not an abandonment of the rule of law or a government of law. It is but a recognition of the fact that the law, in many instances, simply does not speak to a particular issue and leaves standing the decision reached by one of these other processes. That is how we have long subsisted and prospered as a society, and I should regret to see us reverse this course.

Lecture, *supra* note 1, at 7923.

* Acknowledgment and thanks to Atty. Bettina Briggs of Taunton, Massachusetts, court appointed guardian ad litem for the students at BRI, who provided me with copies of the pleadings and papers of this unpublished case. Atty. Briggs continues to serve in that capacity for those students whose treatment problems are still under court supervision. Judge Rotenberg attributes much of the success of this program to Atty. Briggs' patience and the personal interest she has taken in helping the severely handicapped students at BRI.

APPENDIX "A"

261

Hierarchy of Aversives

1. Ignore.
2. Firm "no".
3. Token Fines.
4. Water spray - applied to student's cheek to avoid the eyes, and to back of neck when medical reasons preclude use of spray to cheek.
5. (a) Vapor Spray I - compressed air mixed with water vapor sprayed downward across bridge of student's nose, lasting about three seconds.
(b) Air Spray - used instead of vapor spray where medical reasons preclude use of vapor spray.
6. (a) White Noise Visual Screen - hockey helmet used in conjunction with noise that masks other frequencies.
(b) Taste Aversives - vinegar, vanilla extract, lemon juice or jalapeno pepper juice applied to student's lips with a spray bottle.
(c) Ammonia - ampoule containing ammonia is broken and cropped into a plastic bottle; the bottle is squeezed at least one inch away from the student's nose; the student receives a puff of air with the smell of ammonia.
(d) Vapor Spray II - lasting about 15 seconds.
(e) Vapor Spray III - lasting about 2 minutes.
(f) Contingent Physical Exercise - e.g., sit-ups or toe-touches; also used to improve student's circulation.
(g) Remote Vapor Spray - use of helmet with remote switch attached to operate vapor spray.
7. (a) Hand Squeeze - firm squeeze, palm to palm.
(b) Wrist Squeeze.
8. Spank - applied to buttocks or thighs.
9. Muscle Squeeze - to shoulder, triceps, or thigh (or pectoral muscle of male student).
10. Rolling Pinch - to buttocks, inner arm, inner thigh, bottom of foot or palms of hands.
11. Finger Pinch - to buttocks, inner arm, inner thigh, bottom of foot or palms of hands.
12. Water Spray III - bucket of cold water poured over head.
13. Brief Cool Shower - one minute shower at approximately 50 degrees.

261. Memorandum of Respondents, *supra* note 33, Exhibit 12, at 9-10.