O'MEARA LEER WAGNER KOHL
Attorneys at Law P.A.

April 8, 2019

(Amended April 10, 2019)

FILED VIA ECF

The Honorable Donovan W. Frank
United States District Court - District of Minnesota
Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: Jensen, et al v. Minnesota Department of Human Services, et al.
Court File No. 09-CV-1775 (DWF/BRT)

Dear Judge Frank:

This letter is submitted by the undersigned class counsel pursuant to the Court's January 4, 2019, Order (Doc. 707).

We reiterate our positions over many years supporting the enforcement of the Court's Orders in this matter including its Final Approval Order for Stipulated Class Action Settlement (Doc. 136), Comprehensive Plan of Action (CPA) (Doc. 283, 284), and all related orders of the Court, including Orders directing compliance, as well as its most recent Order. *See* Order (Doc. 707) at 4 ("The Agreement incorporates a Comprehensive Plan of Action ("CPA"). The CPA, sets forth Evaluation Criteria ("EC") and accompanying Actions: The ECs set forth the outcomes to be achieved and are enforceable."); Doc. 551 at 3 ("The 113-page Gap Report restates the agreed compliance Evaluation Criteria ("ECs") with DHS's report on the "state of compliance" for each."); *Id*. n.2 ("The ECs were developed by the Court Monitor and the parties and approved by the Court as part of the Comprehensive Plan of Action ("CPA"). The CPA "serve[s] as both a roadmap to compliance and as a measuring stick for compliance.")[1] The Court has

[1] *See also* Doc. 233 at 1-3; at 7 ("In lieu of contempt and other sanctions at this time, the Court requires Defendants to fulfill their obligations in a timely manner for the Court's review and approval; attend any status conferences that may be scheduled by the undersigned or Magistrate

dd: 952.806.0438
fax: 952.893.8338
SHAMUS P. O'MEARA
Attorney at Law
e: SPOMeara@olwklaw.com
m: 952.831.6544 7401 Metro Boulevard, Suite 600, Minneapolis, MN 55439-3034 f: 952.831.1869
www.olwklaw.com

extended its jurisdiction on multiple occasions due to State and DHS ongoing non-compliance, affirmed by the Eighth Circuit Court of Appeals (Doc. 650, 653, 696), and ordered the State and DHS to comply, directing action in relation to the Evaluation Criteria, appointing and directing a court monitor, and requiring other information from the defendants to ensure their compliance, in lieu of additional sanctions.

We support the views of the Consultants in their recent letters to the Court (Doc 726, 727). In this setting, the State and DHS have the affirmative obligation to establish that they are have complied with the court-ordered Settlement, CPA and related Court orders, as determined by the Court in its sole discretion. For example, in the absence of DHS complying with its External Reviewer requirements of establishing "substantial compliance with this Agreement and the policies incorporated herein" (Doc. 136-1 at 12) the Court assigned the External Reviewer role to the Court Monitor. *See* Order (Doc. 578) at 3 ("The External Reviewer function will continue to be governed by the provisions of the Jensen Settlement Agreement, the CPA, and prior orders of the Court. (See Doc. No. 136-1, Stipulated Class Action Settlement Agreement at 11-13; Doc. No. 212, April 25, 2013 Order at 6; Doc. No. 283, Second Amended Comprehensive Plan of Action at 13-14.) Thus, the Court Monitor will continue to fill the External Reviewer role for the purposes previously established by agreement of the parties."); Order (Doc. 551) ("The Court has since extended its jurisdiction on three occasions, most recently extending its jurisdiction to December 4, 2019. The Court is hopeful that substantial compliance with the Jensen Settlement Agreement will be achieved by this date."); December 31, 2013, Court Monitor Report to the Court at 7 ("The Plan does not provide any suggestions for the State's demonstration of sufficient substantial compliance to enable the Court to relinquish active jurisdiction."); Order (Doc. 327) ("The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance."); Order (Doc. 634) at 23-24 ("At this juncture, it is unlikely that the DHS will remedy the community noncompliance and also achieve substantial compliance with the Comprehensive Plan of Action, the Olmstead Plan, and the Rule 40 Modernization by December 4, 2014.")[2]

Judge Becky R. Thorson regarding the Olmstead Plan; and actively seek input from the consultants to the parties, Dr. Colleen Wieck and Roberta Opheim, in this process."); ("The Court encourages Defendants to timely fulfill their obligations under the Settlement Agreement."); Order dated May 5, 2015 at 7 (Doc. 435) ("The Court has repeatedly expressed its concerns regarding Defendants' pattern of noncompliance with the terms of the Settlement Agreement that were announced at the Final Approval Hearing before this Court on December 1, 2011, and reaffirmed in this Court's numerous subsequent orders. (See, e.g., Doc. No. 188; Doc. No. 205, Doc. No. 212, Doc. No. 223, Doc. No. 259, Doc. No. 368, Doc. No. 400.)

[2] *See also* Order (Doc. 545) at 5 ("Plaintiffs' Class Counsel and the Consultants are permitted, but not required, to submit written comments to the Court following DHS's submission of an

Due to the fundamental importance of safety to the settlement class and people with developmental disabilities and their families, and its direct connection to the class action lawsuit, the *Just Plain Wrong* report, the Settlement, CPA and years of efforts following all of them, we address the ongoing abuse of people with developmental disabilities by the State and DHS, including the ongoing use of mechanical restraints on people with developmental disabilities at the Minnesota Security Hospital, including use of restraint chairs on vulnerable citizens with disabilities.

We respectfully ask that the Court order an evidentiary hearing on the use of mechanical restraints on people with developmental disabilities by the State and DHS in violation of the Court's Orders and the State's promises to eliminate using mechanical restraints on people with developmental disabilities. With this abusive conduct firmly in mind, we continue to remain extremely concerned about DHS indifference, and at times outright objection, to advocate concerns regarding ongoing abuse in state operated and licensed facilities. We continue to receive concerns about the State and DHS avoiding discussion about such abuse, minimizing it, denying it is occurring, or advocating for its continued use based on nebulous and misguided "security" concerns. These wrongly held positions point up the critical need for ongoing court involvement and independent monitoring to facilitate the proper implementation of the Court's orders approving the Settlement and CPA and related orders for the protection of people with developmental disabilities. [3]

---

exception, semi-annual, or annual report.") The settlement class expressly reserves all rights and positions including its rights to seek enforcement of the Court-approved Settlement, CPA and related Court Orders should the State and DHS continue to abuse people with developmental disabilities or otherwise violate the Settlement, CPA or related Orders.

[3] "[O]f all mechanical restraints, the restraint chair represents some of the most traumatizing experiences of mechanical restraints. It is the concern of the OMHDD that if we use the strict interpretation of the DHS regarding MN Rules 9455.0060 Subd. 2, any facility or program, whether operated by DHS or licensed or certified by DHS, could argue similar reasons why they could use any of the prohibited practices as long as they articulate a reason not contained in that section of the rule." March 25, 2016, State Ombudsman for Mental Health and Developmental Disabilities letter to Court at 3. *See* August 29, 2013, e-mail from Settlement Class Counsel to Court Monitor (Doc. 250-1 at 21) ("We have asked but have not received a listing of the type of restraint and seclusion and other aversives used on people with developmental disabilities at DHS facilities. We were told at a prior party meeting that DHS did not know what kind of aversives each facility was using or the frequency of use but that DHS would get us that information. It has not been provided and no one has bothered to give us any update on efforts to procure this information. We are learning, independent of DHS, about the use of 'restraint chairs' and other aversives and DHS trainings on the use of restraints and aversives."); June 10, 2013, e-mail from Settlement Class Counsel to Court Monitor [Doc. 250-1 at 18-19] ("It has

We respectfully ask that the Court actively involve the Independent Court Monitor on this fundamentally important issue of safety to provide his views and input and answer questions on this aspect of the settlement and CPA. *See* Order (Doc. 551) at 24 ("If, at any time, a party or consultant wishes to request that further duties be assigned to the Court Monitor, the party or consultant may submit a request directly to the Court.") As all are well aware, the Independent Court Monitor, appointed by the Court after ongoing noncompliance by the defendants,[4] has identified many areas of noncompliance by the State and DHS. *See gen.* Order (Doc. 159); (Doc. 551) at 18 ("The Court Monitor was appointed by the Court on July 7, 2012. Over the years, the Court has assigned various duties to the Court Monitor in order to promote compliance with the Jensen Settlement Agreement. Many of these duties evolved through the agreement and cooperation of the parties."); Order (Doc. 578) at 3 ("the Court Monitor will continue to fill the External Reviewer role for the purposes previously established by agreement of the parties.")

---

come to our attention that DHS may have trainings and/or an online training catalogue involving the use of handcuffs, restraints, and a restraint chair. . . . We urge that the Monitor conduct and immediate and complete investigation of this issue. We request copies of all documents obtained relative to this issue."); November 14, 2012, letter Settlement Class Counsel to Court Monitor at 5 (Doc. 233-4).

[4] Order (Doc. 159) at 14 n.22 ("Defendants have requested Mr. Ferleger's consultation to advise the Olmstead Committee under the Settlement Agreement."); at p. 11 ("Appointment of an independent advisor, consultant, or monitor is appropriate in light of the nature and complexity of the Defendants' obligations under the court-approved Settlement Agreement, the fact that Defendants admit they are already in non-compliance with an important element of their obligations (appointment of the "external reviewer"), the gaps and deficiencies in the Defendants' May 14 and July 9, 2012 compliance reports, the failure to file required reports by the External Reviewer, the compliance deficiencies raised by Plaintiffs' Class Counsel, and the special expertise required for effective review of the systemic elements of the Settlement Agreement."); Order (Doc. 156) at 10; Order (Doc. 160) at 1; Order (Doc. 205) at 5-7 ("In the context of the issue of noncompliance with the original Settlement Agreement the Court respectfully declines; absent further order of the Court, to modify the role of David Ferleger or to otherwise approve the stipulation of the parties at this time." "[T]he focus of David Ferleger will be to evaluate compliance and noncompliance vis a vis a mediation approach."); Order (Doc. 551) ("The Court Monitor was appointed by the Court on July 17, 2012. (Doc. No. 159.) Over the years, the Court has assigned various duties to the Court Monitor in order to promote compliance with the Jensen Settlement Agreement. Many of these duties evolved through the agreement and cooperation of the parties. The Court will consider modifying aspects of the Court Monitor's role if DHS's new internal and external verification mechanisms are demonstrated to appropriately (internally and externally, through independent review) audit compliance with the Jensen Settlement Agreement and the CPA.")

In her landmark 2008 report, *Just Plain Wrong* (Doc. 3-1), Ms. Roberta Opheim, the State of Minnesota's Ombudsman for Mental Health and Developmental Disabilities stated:

> Documents in individual records revealed that people were being routinely restrained in a prone face down position and placed in metal handcuffs and leg hobbles. In at least one case, a client that the metal handcuffs and leg hobbles were secured together behind the person, further immobilizing the arms and legs, reported it to the Ombudsman staff. Some individuals were restrained with a waist belt restraint that cuffed their hands to their waist. An individual with an unsteady gait was routinely placed in this type of restraint, putting that person at risk of injury if they should fall. Others were being restrained on a restraint board with straps across their limbs and trunk.

Just Plain Wrong at 17 (Doc. 3-1). *See also* Amended Class Action Complaint (Doc. 3); Answer (Doc. 24) ¶ 39 (admitting use of restraints).

A federal class action lawsuit was commenced due to this horrific abuse by our State on people who are vulnerable. *See gen.* Amended Complaint (Doc. 3). The parties entered into a Stipulated Class Action Settlement Agreement (Doc.104) resulting from this lawsuit, which was approved by the Court (Doc. 136), including the elimination of mechanical restraint, seclusion, and numerous statewide changes for the benefit of people with developmental disabilities, including the State's promise to develop and implement an Olmstead Plan, and its commitment to positive behavioral treatment of vulnerable citizens with disabilities.

The Consultants' April 1 and April 3, 2019, letters to the Court (Doc. 726 and Doc. 727), point up a continuing danger with DHS positions on the use of restraint, and inadequate lack of reporting on this important issue.

The State and DHS continue to violate the Settlement, the CPA and their promises and statements to people with developmental disabilities. Indeed, repeated noncompliance and delay in the implementation of the class action settlement following this documented abuse have been hallmarks of defendants' post settlement conduct, forcing a motion for sanctions and Court action to appoint an Independent Court Monitor and order compliance on repeated occasions:

> From the outset, based on the Settlement Agreement's mandates, the Court has emphasized the dual nature of Defendants' obligations: (1) protection of individuals while they live in an institution; and (2) assurance of

> transition to quality care in the community. Nonetheless, the DHS has repeatedly failed to comply with these obligations. (See, e.g., Doc. No. 223 at 10; Doc. No. 159 at 12-13.) Whether this failure is due to the breadth of the necessary system changes, including training, coordinating, and holding accountable the State's eighty-seven counties, or the DHS' lack of a full-fledged Jensen oversight office until mandated in the Comprehensive Plan of Action (Doc. No. 283), or the DHS' indifference to or intentional non-compliance with the Settlement Agreement and related Orders of the Court (Doc. No. 259 at 5; Doc. No. 251 at 3), the Court respectfully directs the DHS to comply with the terms of the Court's Orders.
>
> * * *
>
> The Court can no longer tolerate continued delay in implementation of the Settlement Agreement. Adherence to the Court's Orders by the DHS officials and staff at all levels is essential, not discretionary. The interests of justice and fairness to each Class member and similarly situated individuals requires no less.

Order (Doc. 340) at 3-6.

As we have previously noted in filings with the court, *see* August 24, 2016 class counsel letter to court (Doc. 586), DHS used a mechanical restraint chair on a person with developmental disability at MSH in direct violation of the Settlement and civil rights, more than once.[5] DHS then tried to justify this abuse by stating the Positive Support Rule does not preclude it. *See gen*. DHS April 7, 2015. letter to Court. In another example of its disregard for the Court-ordered process, DHS secretly issued a variance for MSH to allow for the use of mechanical restraint, without any notice to the Court, Consultants or Class Counsel. DHS communications on this issue sought to amplify its misguided position that DHS is not required to inform the Court, Court Monitor or Consultants about its variance to use of mechanical restraint on people with developmental disabilities in this setting. DHS disregard of a fundamental protection in the Court's Orders approving and involving the Settlement and CPA supports continued active monitoring of DHS conduct. *See* Order (Doc. 327) ("The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance.")

[5] ("[A]fter seeking the Court's involvement and agreeing to collaborate on W.O.'s situation, it was discovered that DHS was using a mechanical restraint chair on a person with developmental disability at MSH in direct violation of the Settlement and civil rights, more than once.")

DHS continues its abusive conduct, unabashedly using mechanical restraint, including restraint chairs, on people with developmental disabilities, including at least one class member as documented in an October 17, 2018, public Maltreatment Investigation Memorandum concerning restraint chair abuse on July 2, 2018 at MSH, https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=LLO_445865

In direct contrast to this ongoing abuse by DHS, the class action lawsuit, Settlement and CPA are fundamentally predicated on stopping the State and DHS from restraining and secluding people with developmental disabilities. Now, over eight years after the settlement was approved, intentional decisions by the State and DHS to continue abusing people with developmental disabilities with mechanical restraint, including restraint chairs, is indefensible and should be stopped.

As we have noted before, *see* Doc. 586 at 8-14, the Settlement Agreement is clear on its intent:

> **V. PROHIBITED TECHNIQUES**
>
> A. Except as provided in subpart V. B., below, the State and DHS shall immediately and permanently discontinue the use of mechanical restraint (including metal law enforcement-type handcuffs and leg hobbles, cable tie cuffs, PlastiCuffs, FlexiCuffs, soft cuffs, posey cuffs, and any other mechanical means to restrain), manual restraint, prone restraint, chemical restraint, seclusion, and the use of painful techniques to induce changes in behavior through punishment of residents with developmental disabilities. Medical restraint, and psychotropic and/or neuroleptic medications shall not be administered to residents for punishment, in lieu of adequate and appropriate habilitation, skills training and behavior supports plans, for the convenience of staffand/or as a form of behavior modification.
>
> B. Policy. Notwithstanding subpart V. A. above, the Facility's policy, "Therapeutic Interventions and Emergency Use of Personal Safety Techniques," Attachment A to this Agreement, defines manual restraint, mechanical restraint, and emergency, and provides that certain specified manual and mechanical restraints shall only be used in the event of an emergency. This policy also prohibits the use of prone restraint, chemical restraint, seclusion and time out. Attachment A is incorporated into this Agreement by reference.

> * * *
>
> 1. Within sixty (60) days upon Court approval of this Agreement, the State shall undertake best efforts to ensure that there are no transfers to or placements at the Minnesota Security Hospital of persons committed solely as a person with a developmental disability. No later than July 1, 2011, there shall be no transfers or placements of persons committed solely as a person with a developmental disability to the Minnesota Security Hospital. This prohibition does not apply to persons with other forms of commitment, such as mentally ill and dangerous, mentally ill, chemically dependent, psychopathic personality, sexual psychopathic personality and sexually dangerous persons. Nor does this prohibition pertain to persons who have been required to register as a predatory offender under Minn. Stat. § 243.166 or 243.167 or to persons who have been assigned a risk level as a predatory offender under Minn. Stat. § 244.052.
>
> 2. There shall be no change in commitment status of any person originally committed solely as a person with a developmental disability without proper notice to that person's parent and/or guardian and a full hearing before the appropriate adjudicative body.
>
> 3. No later than December 1, 2011, persons presently confined at Minnesota Security Hospital who were committed solely as a person with a developmental disability and who were not admitted with other forms of commitment or predatory offender status set forth in paragraph 1, above, shall

Final Approval Order for Stipulated Class Action Settlement Agreement at 6, 20 (Doc. 136).

This clear intent was not lost on the Independent Court Monitor:

> This settlement provision is clearly intended to prevent individuals with developmental disabilities from institutionalization at the Minnesota Security Hospital, a secure facility for individuals committed as mentally ill and dangerous.

Independent Court Monitor STATUS REPORT ON COMPLIANCE at 140 (June 11, 2013)

In addition, the Court Monitor comprehensively reviewed the Settlement Agreement, Rule 40 Advisory Committee reports, DHS adoption of the report and findings, and DHS statements and policies, including the DHS Respect and Dignity Practices Statement, in relation to the Minnesota Security Hospital, stating:

> The initial impetus for this litigation was the excessive use of mechanical restraints at the Minnesota Extended Treatment Option (METO) at Cambridge, MN. In addition to closing METO, the 2011 court-approved settlement in this case prohibited all but emergency restraints; mechanical restraints and seclusion became things of the past.
>
> The Settlement Agreement did more than forbid non-emergency restraints and seclusion at Cambridge. Referencing the 1987 rule which permitted aversive treatment such as restraints and seclusion, the State of Minnesota declared that "its goal is to utilize the Rule 40 Committee" process "to extend the application of the provisions in this Agreement to all state operated locations serving people with developmental disabilities with severe behavioral problems or other conditions that would qualify for admission to METO, its Cambridge, Minnesota successor, or the two new adult foster care transitional homes." Settlement Agreement, ¶7, Recitals.
>
> Under the settlement, the State is to:
>
> > modernize Rule 40 to reflect current best practices, including, but not limited to the use of positive and social behavioral supports, and the development of placement plans consistent with the principle of the "most integrated setting" and "person centered planning, and development of an 'Olmstead Plan'" consistent with the U.S. Supreme Court's decision in Olmstead v. L.C, 527 U.S. 582 (1999).
>
> In response to the *Rule 40 Advisory Committee Recommendations on Best Practices and modernization of Rule 40* (July 2, 2013) (Dkt. 219), the Department of Human Services committed to establishment of a plan to eliminate seclusion and restraints:
>
> > To that end, DHS will prohibit procedures that cause pain, whether physical, emotional or psychological, and establish a plan to prohibit use of seclusion and restraints for programs and services licensed or certified by the department. It is our expectation that service providers, including state operated

> services, will seek out and implement therapeutic interventions and positive approaches that reflect best practices.

The settlement also requires the State to develop and implement a plan to comply with the requirements of the Americans with Disabilities Act as enunciated in the Supreme Court's 1999 decision in Olmstead v. L.C. The Rule 40 Advisory Committee cites Olmstead as among current "best practices" incorporated into the settlement.

Accepting the Advisory Committee report, the Department adopted the principle for services which are licensed or certified by the Department that "[p]rohibit[s] techniques that include any programmatic use of restraint, punishment, chemical restraint, seclusion, time out, deprivation practices or other techniques that induce physical, emotional pain or discomfort." The principle is to be implemented by December 31, 2014.

In June 2013, the Department adopted a DHS Respect and Dignity Practices Statement (attached to this report) which similarly endorses the prohibition of techniques including restraint and seclusion and "other techniques that induce physical, emotional pain or discomfort." The Statement commits DHS to "seek the inclusion of these concepts in the State Olmstead Plan and its implementation."

As indicated in the settlement agreement, and detailed in the Advisory Committee's report, the ban on seclusion and restraints is not established in a vacuum. Careful and compassionate treatment planning, addressing behavioral and other needs through best practice supports and person centered planning are among the conditions which sustain the Department's move away from once common aversive measures.

Anoka Regional Treatment Center and Minnesota Security Hospital are within the scope of the changes in restraint and seclusion policy and practice described above.

* * *

The Court has recognized that "[t]he Rule 40 modernization and the Olmstead Plan, and other elements of the settlement agreement, will affect all persons served at state operated locations other than MSHS-Cambridge, including Anoka Regional Treatment Center and Minnesota Security

> Hospital among others." Direction Letter to the Court Monitor (Aug. 5, 2013) at 1 (Dkt. 220). The Monitor is to review compliance with regard to MSH and Anoka, and the Court expects Defendants to "provide full access" to the records of the residents of those institutions. Id.

Restraint Chair and Seclusion Use at AMRTC and MSH: Phase I Review (October 17, 2013) at 4-7 (Doc. 236); *id.* at 8 ("The examination of the aggregate data indicates that there is significant use of the Restraint Chair and of Seclusion at Anoka and MSH.")

In addition, the CPA (Doc. 284), agreed upon by DHS, and approved by the Court, contains enforceable Evaluation Criteria. CPA Evaluation Criteria 99 to 104 correspond to the Systemwide improvements section of the Settlement, including DHS obligations to modernize Rule 40, the administrative rule governing the use of aversive and deprivation procedures on people with developmental disabilities. The CPA further states that "unresolved issues may be presented to the Court for resolution by any of the above, and will be resolved by the Court." CPA at EC 103.

DHS has definitively agreed with its obligations under the CPA, confirming that it "also agreed more broadly in the Comprehensive Plan of Action to prohibit restraint and seclusion in all licensed facilities and settings to the CPA," and to "[a]bide by the Rule 40 Advisory Committee Recommendations." *See* Minnesota Department of Human Services Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions (SONAR) (December 23, 2014) at 40, https://www.leg.state.mn.us/archive/SONAR/SONAR-04213.pdf.

As part of the implementation of the Settlement, the Positive Support Strategies and Restrictive Interventions (PSR) was publically adopted. Importantly, the PSR expressly prohibits mechanical restraint. *See* Ch. 9544.0060. DHS, in its public positions supporting the Positive Supports Rule, clearly committed to prohibiting mechanical restraint at state operated facilities:

> Along with advances in behavior support strategies, states are also moving away in large numbers from outdated and no longer acceptable interventions for managing the most serious and challenging behaviors – those that are self-injurious or threaten the safety of others. Interventions used in the past, including physical restraints or seclusion, could be dangerous, punitive, or inappropriate in a community setting. The Minnesota Legislature is now joining other states in requiring that use of restrictive interventions be phased out, and replaced with person-centered planning and a positive support model of care.

This rulemaking is largely driven by the above-noted settlement of a class-action lawsuit commonly known as the Jensen case. The lawsuit alleged the unlawful restraint of persons with developmental disabilities in a Department-run residence for persons with disabilities. As part of the settlement, the Department agreed to pursue a number of broad initiatives. This rulemaking is the execution of that obligation. One of those initiatives was to "modernize" the rules that previously governed restraint and seclusion, which is commonly known as "Rule 40.

* * *

[T]he Minnesota Legislature, in connection with the terms of the Jensen Settlement Agreement, directed the Department to adopt rules that would govern positive support strategies and would ensure the applicability of the prohibitions and limits in chapter 245D to all of its licensed services and settings when serving a person with a developmental disability or related condition. To fulfill the settlement agreement obligation and legislative directives, the Department is now proposing a rule that governs positive support strategies for all licensed settings and services and, for providers not already governed by chapter 245D, applies the prohibitions and limits of that chapter to those non-245D licensed services. The rule accomplishes the latter by incorporating the pertinent requirements of chapter 245D by reference. As a result of the proposed rule, no Department-licensed service or facility will be permitted to use outdated and unacceptable practices for persons governed by the statute and rule.

* * *

One key statutory requirement is that existing use of restrictive interventions must be ended. Specifically, chapter 245D and the rule, via incorporation of the statutory requirements, require providers to phase out the use of any restrictive interventions over the course of 11months. So, if a provider had been programmatically using restraint to guide the behavior of a person with aggressive or self-injurious behavior, the provider would have 11 months to diminish the use of that intervention to the point of discontinuing it entirely.

* * *

Applicability to providers licensed under Minnesota Statutes, chapter 245D. The rule applies to all services and facilities licensed by the Department under Minnesota Statutes, chapter 245D.

Applicability to other licensed services and settings. The rule also applies to all Department-licensed services and facilities when providing services to persons with a developmental disability or related condition.

* * *

It is reasonable to adopt policy that the Legislature has vetted and adopted. Further, incorporating the statutory prohibitions on use of restrictive interventions is also consistent with the Department's agreement to preclude use of restraints and seclusion both in the Jensen Settlement Agreement and in the Comprehensive Plan of Action. The terms of the Jensen Settlement Agreement require the Department to "immediately and permanently discontinue" the use of mechanical restraints, medical restraints, and medications as a method of punishment, or in lieu of adequate staff training or behavior support plans, convenience, or as a form of behavior modification in the program that was the subject of the lawsuit. As noted, the Department also agreed more broadly in the Comprehensive Plan of Action to prohibit restraint and seclusion in all licensed facilities and settings, consistent with the above-noted legislative directive in Minnesota Statutes, section 245.8251. As detailed in the "DHS Respect and Dignity Practices Statement" signed by the commissioner, "it is our goal to prohibit procedures that cause pain, whether physical, emotional or psychological, and prohibit use of seclusion and restraints for all programs and services licensed or certified by the department.

* * *

The Department agreed in the Comprehensive Plan of Action to abide by the Rule 40 Advisory Committee Recommendations. When the Department is legally bound to abide by the Recommendations, it is necessary to adhere closely to these recommendations.

* * *

The list is not intended to diminish the all-encompassing nature of the prohibition against use of procedures that fall within the broad categories set out in Minnesota Statutes, section 245D.06, subdivision 5. In other words, even without itemizing the specific techniques, these procedures would still be prohibited by virtue of the incorporation into rule of the broader statutory prohibition.

* * *

Item H reflects the principle that any use of an aversive or deprivation procedure diminishes the quality of life of a person. This is consistent with fulfilling a major focus of the Jensen Settlement Agreement. Consistent

> with current best practices, aversive or deprivation procedures are now generally considered to be a form of abuse. It is necessary and reasonable that the rule recognize the broad objective of eliminating aversive and deprivation procedures in Minnesota licensed social services.

DHS SONAR at 1, 2, 16, 39, 40.

Since August 31, 2015, all facilities licensed under Minn. State 245D, including MSH under 245A, have been required to comply with the PSR and its prohibition against mechanical restraints. *See* Minn. R. 9544.0010, subp. 2; 9544.0060, subp. 2(V).

In a letter to DHS licensing on the DHS use of mechanical restraints at MSH, the Minnesota Disability law Center stated:

> Deputy Commissioner Johnson's letter raises significant concerns regarding the implementation of the PSR at both MSH and other DHS licensed facilities. MSH or any other facility could justify the use of an otherwise prohibited procedure by stating that the purpose for the procedure's use was different than one of the four purposes laid out in the PSR. In the incidents involving [ ], MSH cited "security" as its purpose. MSH or other licensed providers could create other "purposes" to justify the use of any of the procedures listed in Minn. R. 9544.0060, subp. 2 to subvert the intention of the PSR. This type of "purpose-based" exception has the potential to render the entire "Prohibited Procedures" portion of the PSR null and void.

May 18, 2016, letter to DHS Licensing Division.

The Licensing Division responded on June 10, 2016, stating, "The Positive Supports Rule applies to more than 20,000 DRS-licensed programs, across 12 distinct service classes when serving a person with a developmental disability or related condition, as defined in Minnesota Rules, part 9544 0020, subpart. 11." However, it did not provide the requested criteria and guidance that DHS is required to provide under the law, *see Swenson v. State, Dep'I of Pub. Welfare*, 329 N. W.2d 320, 324 (Minn. 1983) (DHS "must either follow its own regulations or amend them in accordance with statutory rulemaking procedures"); *Troyer v. Vertlu Mgmt. Co./Kok & Lundberg Funeral Homes*, 806 N. W.2d 17, 24 (Minn. 2011). DHS failure to clarify and provide guidance by its internal enforcement division points up a critical danger to people with developmental disabilities in this state, leaving facilities, and families, without clear, direct guidance needed to avoid misinterpretation about the PSR, increasing the risk the using of prohibitive abusive procedures on vulnerable citizens. *See* Doc 586 (referencing use of variances to the Positive Supports Rule to allow for mechanical restraint and other abuses on people with developmental

disabilities), at p. 12 ("DHS failure to clarify and provide guidance by its internal enforcement division points up a critical danger to people with developmental disabilities in this state, leaving facilities, and families, without clear, direct guidance needed to avoid misinterpretation about the PSR, increasing the risk the using of prohibitive abusive procedures on vulnerable citizens. This DHS inaction further supports Court involvement and active monitoring to ensure that the CPA is properly implemented, and the PSR properly enforced by DHS.")

In 2019, just like 2016, just as in 2008 when the Ombudsman issued the *Just Plain Wrong* report, there can be no excuse, delay, waiver, variance or anything else preventing the immediate protection of our vulnerable loved ones. As we have repeatedly stated to DHS, the State, the Court, Court Monitor, and Consultants, we do not support or condone any conduct, proposed plan provision, interpretation of any provision, process or protocol that allows for the use of restraint or seclusion on people with developmental disabilities, whether as part of a "transition," "waiver," "exemption," "exception," "conditional use," "variance," "temporary use," "study period," or any other excuse. The continued use of restraint and seclusion directly violates the civil rights of people with developmental disabilities. We object to any such conduct, proposed provision, interpretation or ignorance that seeks to allow for the continued use of restraint and seclusion. This has been the repeated, reiterated position of the Settlement Class throughout the pendency of this matter. Such provisions are not best practice, do not protect anyone, have no positive or redeeming qualities, and would directly contradict the Settlement, CPA and PSR's elimination of restraint and seclusion. The effort should be on best practices that focus on Positive Behavioral Supports of individuals with developmental disabilities rather than restraining and secluding them in violation of their rights. *See also* Settlement Class Counsel July 14, 2014, letter to Court (Doc. 332) at 13; *Gas Aggregation Servs. v. Howard Avista Energy, LLC*, 458 F.3d 733, 739 (8th Cir. Minn. 2006) (finding party acted in bad faith when it concealed and misrepresented terms of settlement).

The protection and proper treatment of people with disabilities are at the heart of the issues before the Court. DHS has great responsibility to act to ensure the safety of people with disabilities and help them "to be loved, appreciated, respected and productive." *See MN DHS Guidelines to the Investigation of Vulnerable Adult Maltreatment,* Appendix V Common Courtesies when Interacting with People with Disabilities at p. 196 (Dec. 2010); see gen. Settlement Agreement; November 17, 2014 class counsel letter to court (Doc. 362); *Olmstead v. L.C.*, 527 U.S. 582 (1999). Minnesota's new Governor also supports this view. *See* Minnesota Governor Tim Walz Executive Order 19-13, *Supporting Freedom of Choice and Opportunity to Live, Work, and Participate in the Most Inclusive Setting for Individuals with Disabilities through the Implementation of Minnesota's Olmstead Plan* at 1 (March 29, 2019), https://mn.gov/governor/assets/2019_03_29_EO_19-13_tcm1055-377973.pdf ("The

unnecessary and unjustified segregation of individuals with disabilities through institutionalization is a form of disability-based discrimination prohibited by Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq., which requires that states and localities administer their programs, services, and activities, in the most integrated setting appropriate to meet the needs of individuals with disabilities.")

We respectfully request that the Court continue its active monitoring of the State and DHS to ensure the proper implementation of the Court's Orders approving the Settlement and Comprehensive Plan of Action for the protection of people with developmental disabilities, including further extending jurisdiction over defendants should their non-compliance continue.

We respectfully ask that the Court order an evidentiary hearing on the State and DHS use of mechanical restraints on people with developmental disabilities in violation of the Court's Orders and the State's promises to eliminate the use of mechanical restraint on people with developmental disabilities, and involve the Court Monitor on these issues.

Thank you.

Respectfully submitted,

O'MEARA, LEER, WAGNER & KOHL, P.A.

/s/ Shamus P. O'Meara

Shamus P. O'Meara
SPO:tls