

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians, and next friends of Bradley J. Jensen; James Brinker and Darren Allen, as parents, guardians, and next friends of Thomas M. Allbrink; Elizabeth Jacobs, as parent, guardian, and next friend of Jason R. Jacobs; and others similarly situated,

Plaintiffs,

vs.

Minnesota Department of Human Services, an agency of the State of Minnesota; Director, Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Clinical Director, the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Douglas Bratvold, individually and as Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Scott TenNapel, individually and as Clinical Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; and the State of Minnesota,

Defendants.

CIVIL FILE NO. 09-CV-01775 (DWF/BRT)

**MEMORANDUM IN SUPPORT OF
STATE DEFENDANTS'
MOTION TO ALTER OR AMEND
JUNE 17, 2019 ORDER**

Although the Court has now extended its jurisdiction to September 15, 2020, nearly nine full years after settlement approval, State Defendants¹ were not told “the applicable legal standard the Court is using to determine the circumstances under which it will end its involvement in this matter, including what specific action items remain outstanding.” [Doc. 731 at 2](#). Nor did State Defendants have notice that the Court contemplated an extension of jurisdiction; in its written orders before the latest status conference on April 16, 2019, and at that hearing, it never said it would do so. State Defendants are entitled to relief under Rule 59 because the Court extended its jurisdiction without giving State Defendants notice and an opportunity to be heard before doing so and because the Court’s order is based on plainly incorrect facts and manifest errors of law.²

FACTUAL AND PROCEDURAL BACKGROUND

Since December 5, 2011, when the Court approved the Stipulated Class Action Settlement Agreement (“Agreement”), it has maintained jurisdiction over the parties’ settlement, extending its jurisdiction three times before its last extension. *See* Docs. 136, 136 1, 223 and 224 (extending jurisdiction to December 4, 2014 in order dated August 27, 2013 and amended order dated August 28, 2013), 340, p. 14 (extending jurisdiction to December 4, 2016 and expressly reserving “the authority and jurisdiction to order an additional extension . . . ,” in order dated September 2, 2014),

¹ “Defendants” used herein refers to the State Defendants.

² The Court’s June 17, 2019 order falls within Rule 59(e) because it is an appealable order. *Auto Servs. Co. v. KPMG, LLP*, [537 F.3d 853, 856](#) (8th Cir. 2008) (quoting [Fed. R. Civ. P. 54\(a\)](#)).

545, p. 6 (extending jurisdiction to December 4, 2019 in order dated February 22, 2016), 638 (overruling objection to continuing jurisdiction in order dated June 28, 2017), 737 (extending jurisdiction to September 15, 2020 in order dated June 17, 2019). The extensive post-judgment proceedings relating to compliance with the Agreement are contained in the record, and in large part set forth by State Defendants (“Defendants”) in previous briefing.³ Prior to the Court’s June 17, 2019 order, the Court’s jurisdiction expired on December 4, 2019. [Doc. 545](#).

³ See, e.g., [Doc. 631](#), pp. 3-12 (Defendant discussing the Court’s extension of jurisdiction, appointment of Court Monitor, the Court Monitor vastly exceeding any authority under the Agreement, the Court’s expansion of the Court Monitor’s authority contrary to the Agreement, and the Court Monitor’s fees and expenses), [Doc. 179](#) (order setting status conference for December 11, 2012 on numerous topics), 421 (order setting status conference for May 28, 2015 to discuss status of the case, communication barriers, and compliance with the Agreement and the Comprehensive Plan of Action (CPA)), 552 (notice setting status conference for June 6, 2016 concerning the Olmstead Plan, Agreement, and CPA), 564 (order setting status conference for June 13, 2016 concerning update on status of W.O.; rescheduled to July 6, 2016 pursuant to order at [Doc. 566](#)), 599 (order setting status conference for December 22, 2016 regarding compliance with the Agreement and CPA; rescheduled to January 5, 2017 pursuant to notice at [Doc. 601](#)), 608 (order setting forth detailed agenda for January 5, 2017 status conference), 619 (order setting agenda for March 24, 2017 status conference regarding the Olmstead Plan), 654 (notice setting status conference for December 8, 2017), 670 (order setting agenda for December 8, 2017 status conference, including compliance with the Agreement and CPA status of the Olmstead Plan, and next steps), 689 (order setting agenda for July 12, 2018 status conference, including compliance with the Agreement and CPA, status of and revisions to the Olmstead Plan, and next steps), 691 (order amending agenda at [Doc. 690](#) to also include discussion of the appropriate legal standard to govern the Court’s involvement at the July 12, 2018 status conference), 729 (order setting agenda for April 16, 2019 status conference, including compliance with the Agreement and CPS, status of and revisions to the Olmstead Plan, Plaintiffs’ request for an evidentiary hearing and involvement of the Court Monitor, and next steps), 730 (order amending agenda at [Doc. 729](#) to include discussion of the appropriate legal standard to govern the Court’s involvement); Docs. 165, 180, 193, 202, 293, 299, 314, 328, 336, 342, 350, 360, 371, 387, 389, 396, 404, 424, 440, 529, 531, 547, 553, 569, 572, 588, 589, 602, (Footnote Continued on Next Page)

Following years of regular compliance reporting by State Defendants, the Court issued an order on January 4, 2019 stating that, “[a]s the December 4, 2019 date approaches, the Court must evaluate Defendants’ compliance to assess the impact of the *Jensen* lawsuit on the well-being of its class members and to determine whether the Court’s jurisdiction may equitably end.” Doc. 707, p. 6. The Court required Defendants to submit “a Summary Report [(“Report”)] in lieu of the Semi-Annual and Annual Compliance Reports required pursuant to the Reporting Order.” *Id.* It set forth the required contents of the Report, *id.* at 7-12, and required Defendants to “meet with Consultants regarding suggested data collection and verification procedures that will be utilized to prepare the [Report],” *id.* at 13, which they did, Declar. of Daniel J. Baker, Ph.D ¶ 5. It also set forth a schedule for the Consultants and Plaintiffs to file statements responsive to the Report, and set a Biannual Reporting Conference for April 16, 2019. *Id.* The schedule did not include any opportunity for Defendants to respond to issues raised by the Consultants or Plaintiffs in their statements.⁴ As to the April 16 conference, the order stated that the Report “will be discussed at that time” and that the conference would “also address the Olmstead Amendments and the Olmstead Quarterly Reports and Annual Report submitted since the last status conference.” Doc. 707, p. 13. The Court stated that “[i]t is the Court’s intent that the Summary Report serve as a tool to facilitate

(Footnote Continued from Previous Page)

616, 617, 621, 643, 671, 673, 680, 681, 683, 688, 698, 705, 706, 708, 736 (various reports and status updates DHS filed with the Court from 2012 to 2019).

⁴ Plaintiffs’ statement was filed eight days before the conference, with an amended version filed two days later. Docs. 728, 730.

an equitable end to the Court’s jurisdiction over this matter.” *Id.* at 12. The Court also ordered Defendants “provide a draft of the Summary Report to the Consultants no fewer than ten (10) business days before filing it,” [Doc. 707 at 13](#), which Defendants did, [Doc. 727, p. 1](#).

THE REPORT.

Defendants filed the Report on March 20, 2019. *See* Docs. 709-724. The Report itself is 225 pages long, and reports compliance with each Evaluation Criteria (“EC”) in the Comprehensive Plan of Action (“CPA”). [Doc. 710](#). It is accompanied by 28 pages of affidavits verifying the accuracy of the information reported therein, *see* [Doc. 714](#), as well as supporting exhibits including 1,270 pages documenting, to the extent possible, the status of each *Jensen* class member. Docs. 720-22. Creation of the Report and its supporting documentation consumed over 2,700 hours of staff time at the Department of Human Services. Declar. of Karen Sullivan Hook ¶ 2.

The Report thoroughly analyzed Defendants’ compliance with the Agreement and CPA and concluded Defendants were in compliance with each EC. *See generally* [Doc. 710](#). Relevant to the items identified by the Court in its order extending its jurisdiction and requiring external review and supplementation, the Court focused on four areas: (1) alleged use of prohibited techniques; (2) scope of Rule 40; (3) staff training; and (4) the possibility additional treatment homes are needed.

Alleged use of prohibited techniques.

Dr. Daniel Baker has been the designated Jensen Internal Reviewer since December 1, 2015. [Doc. 710, p. 37](#). As the Jensen Internal Reviewer, Dr. Baker reviews

every instance of restraint use at Minnesota Life Bridge (“MLB”) on an ongoing and continuous basis. Declar. of Daniel J. Baker, Ph.D ¶ 2.⁵ For the purpose of verification for reporting on Evaluation Criteria (“ECs”) related to prohibited techniques, Dr. Baker uses a sampling methodology. *Id.* at ¶ 3. For example, for verification of the data on EC 39 for the March 2019 Summary Report, Dr. Baker reviewed a random sample of 10 of 50 incidents in the reporting period. *Id.* at ¶ 3. Verification via a random sampling methodology is a professionally accepted best practice in compliance, and is taught by The Society for Corporate Compliance and Ethics as a recommended strategy. *Id.* at ¶ 3. The sample drawn for the March 2019 Summary Report was sufficiently large to assure validity. *Id.* at ¶ 3.

For the purpose of verification of data on previously unreported ECs (i.e., those subject to exception reporting and ECs not included in the February 22, 2016 Order (retired) through 2017), Dr. Baker reviewed a random sample of incidents from October 1, 2015 through December 31, 2017 and all incidents from January 1, 2018 through June 30, 2018 for the August 2018 Semi-Annual Compliance Report, and all incidents from July 1, 2018 through December 31, 2018 for the March 2019 Summary Report. *Id.* at ¶ 6.

⁵ The Court is already aware of this. See [Doc. 710, pp. 178-79](#) (March 2019 Summary Report to the Court stating that, “[t]he Jensen Internal Reviewer reviews each instance of restraint use at Minnesota Life Bridge on an ongoing and continuous basis . . . ,” and he has “monitored the use of restraints at [MLB] since the schedule for compliance reporting was established ([Doc. 545](#)), and has found that [MLB] has used no prohibited restraints or techniques”).

DHS met with Dr. Colleen Wieck and Ms. Roberta Opheim (the “Consultants”) regarding suggested data collection and verification procedures that would be utilized to prepare the March 2019 Summary Report, and DHS reached agreement with the Consultants on data collection and verification procedures. *Id.* at ¶ 5. Sampling was discussed with and agreed to by the Consultants in preparation for the March 2019 Summary Report. *Id.* at ¶ 5.

Dr. Baker has monitored the use of restraints at MLB since the schedule for compliance reporting was established in early 2016. *Id.* at ¶ 4. Based on his review of every instance of restraint use at Minnesota Life Bridge (“MLB”) on an ongoing and continuous basis, and additional verification for reporting purposes, he found that MLB did not use prohibited restraints or techniques. *Id.* at ¶ 4.

Scope of Settlement Agreement related to restraints.

Concerning the definition of “Facility,” the Settlement Agreement defines “Facility” as the METO facility, its successor, “and the two new adult foster care transitional homes to which residents of METO have been or may be transferred.” [Doc. 136-1, p. 5](#) (defining “Facility”). And the Second Amended Comprehensive Plan of Action (CPA) defines “Facility” and “Facilities” as “MSHS-Cambridge, the MSOCS East Central home established under the Settlement Agreement, and the treatment homes established (or to be established) under this Comprehensive Plan of Action [CPA].” [Doc. 283, p. 2](#). MSHS-Cambridge was closed on August 29, 2014, MSOCS East Central has been and remains an adult foster care home since approximately 2014, and Minnesota

Life Bridge homes are the successor homes established under the CPA in this case. Doc. 710, p. 178 at n.190; Declar. of Margaret Fletcher-Booth, Ph.D ¶ 2.

In relation to Rule 40, the Court refers to EC 103, Doc. 737, pp. 35-36, which states as follows:

Within thirty (30) days of promulgation of the Adopted Rule, Plaintiffs' Class Counsel, the Court Monitor, the Ombudsman for Mental Health and Developmental Disabilities, or the Executive Director of the Governor's Counsel on Developmental Disabilities may suggest to the Department of Human Services and/or to the Olmstead Implementation Office that there are elements in the Rule 40 Advisory Committee Recommendations on Best Practices and Modernization of Rule 40 (Final Version – July 2013) which have not been addressed, or have not adequately or properly been addressed in the Adopted Rule. In that event, those elements shall be considered within the process for modifications of the Olmstead Plan. That State shall address these recommendations through the Olmstead Plan sub-cabinet and the Olmstead Implementation Office. Unresolved issues may be presented to the Court for resolution by any of the above, and will be resolved by the Court.

Doc. 282, p. 33. DHS created an EC 103 Work Group ("Work Group") after the Consultants submitted a letter highlighting sections of the Rule 40 Advisory Committee Report they wished to discuss with DHS. Declar. of Karen Sullivan Hook ¶ 3. The Consultants were part of the Work Group, along with several DHS employees. *Id.* at ¶ 4. The Work Group met from the summer of 2016 to November 2017. *Id.* at ¶ 5. During the Work Group process, the Consultants agreed that there were no advisory committee recommendations not adequately addressed by the Positive Supports Rule that were appropriate to consider as a modification to the Olmstead Plan; the Consultants also agreed that the Work Group would continue to work towards implementation of advisory committee recommendations not adequately addressed by the Positive Supports Rule

through other avenues, such as DHS action. *Id.* at ¶ 6. Accordingly, no suggestions were taken to the Olmstead Subcabinet or the Olmstead Implementation Office. *Id.* at ¶ 6. By agreement, the Work Group stopped meeting in November 2017, and the Consultants, Plaintiffs' Class Counsel, and the Court Monitor, have not presented any unresolved issues regarding Rule 40 advisory committee recommendations to the Court. *Id.* at ¶ 7.⁶

Staff Training.

As to EC 54, the Court states that the Report does not show that all staff actually received the training. Doc. 737 at 31. The Report's discussion of ECs 56 and 58 illustrate Defendants' substantial compliance with EC 54. *See* Doc. 710, p. 141 (listing five training areas concerning EC 54), p. 147 (stating 87% of active staff completed EASE 2.0 Assess & Plan and Skills Demonstration training, and that 91% of active staff completed MLB TI/PST/EASE Procedure training), p. 150 (stating 87% of active staff completed Person Center Thinking training, 85% of active staff completed Person Centered Training, and 70% of active staff completed Crisis Intervention/Post Crisis Intervention and Assessment training); Doc. 710, n.171 and n.174. Notably, the

⁶ On December 4, 2018, Ms. Opheim asked if it would be possible for the Work Group to meet to discuss some specific issues. Declar. of Karen Sullivan Hook ¶ 8. On December 6, 2018, Karen Sullivan Hook responded to Ms. Opheim and Dr. Wieck, indicating that she did not believe the Work Group was the right group to discuss the issues Ms. Opheim raised because they were not part of the advisory committee recommendations the Work Group was reviewing, and offering to convene a group more appropriate to the issues raised. *Id.* On January 17, 2019, Ms. Sullivan Hook followed up with Ms. Opheim and Ms. Wieck indicating that if there are issues related to the advisory committee recommendations, the Work Group can be reconvened. *Id.* Ms. Opheim and Dr. Wieck did not thereafter request for the Work Group to be reconvened. *Id.*

above-mentioned percentages are for the relevant reporting period (through December 31, 2018), and not for the training year; the Report also indicates that all new and existing staff have completed the relevant training for two of the above-referenced areas.⁷ See [Doc. 710](#), n.171 and 174 (“As of the end of the 2018/2019 training year (March 11, 2019), except for one staff who is currently on a leave of absence, all new and existing active Minnesota Life Bridge treatment home staff have completed the required hours of annual training for EASE, Minnesota Life Bridge Therapeutic Interventions and Emergency Use of Personal Safety Techniques (TI/PST)/EASE Procedure, and Medically Monitored Restraint.”). In any event, as of the end of the training year (March 11, 2019), all active Minnesota Life Bridge staff had completed the training necessary under ECs 54, 55, and 56. Declar. of Margaret Fletcher-Booth, Ph.D ¶ 3. Dr. Booth declares that DHS has source documents showing this and that QADC Services has verified the data. *Id.*

As to EC 55, the Court states the Report provides no documentation or verification that staff has actually achieved competency. [Doc. 737, p. 31](#). Defendants’ reports have been clear that all staff training includes a competency component. See [Doc. 710, p. 146](#) (stating, regarding EC 55, that “[t]he Department has provided specific data above and in previous reports documenting completion of Actions 55.1, 55.2, 55.3, 55.4, and 55.5

⁷ Dr. Booth declares it was an oversight by DHS to not state in the March 2019 Summary Report that all active Minnesota Life Bridge staff had completed all necessary training concerning EC 54 as of the end of the training year (March 11, 2019). Declar. of Margaret Fletcher-Booth, Ph.D ¶4.

(*See* Docs 328, 342, 360, 531, 553-1, 572, 589, 621, 683)”; [Doc. 683, p. 28](#) (stating that “[e]ach course in the [MLB] staff-training curriculum has a competency component,” and that in some trainings, written competencies are required as an indicated or understanding the concepts or information provided,” and “[o]ther trainings require demonstration of skills to show competency”); [Doc. 572, pp. 5-12](#) (containing detailed evaluation of training by Internal Reviewer, including discussion of whether competency-based assessment is included; stating EASE training has “[c]ompetency evaluation as opposed to simply completing the training,” that Positive Behavioral Supports training “competency is assessed via print and verbal quizzes,” that Person Centered Training “is consistent with the vision of the JSA and CPA,” that “with the addition of a competency-based assessment, [Crisis Intervention/Post Crisis Intervention and Assessment training] is consistent with the vision of the JSA and CPA,” that MMR training includes “[c]ompetency assessment used in form of a quiz”).

As to EC 56, the Court expresses apparent concern that the Report indicates that less than 100 percent of staff have completed the required hours of training. The Report shows that 85%, 91%, and 94% of active staff completed specified relevant training during the relevant reporting period, ending December 31, 2018. *See* [Doc. 710, p. 147](#). The Report also shows that all new and existing staff completed the training relevant to EC 56 as of the end of the training year (March 11, 2019):

As of the end of the 2018/2019 training year (March 11, 2019), except for one staff who is currently on a leave of absence, all new and existing active Minnesota Life Bridge treatment home staff have completed the required hours of annual training for EASE, Minnesota Life Bridge Therapeutic Interventions and Emergency Use of Personal Safety Techniques (TI/PST)/EASE Procedure, and Medically Monitored Restraint.”).

Doc. 710, nn.171, 174.

Treatment homes.

The Court held that additional verification and review is necessary regarding the number of treatment homes needed to satisfy the Agreement. Doc. 737, pp. 33-34. EC 88 states, in part, that there “will be community treatment homes dispersed geographically,” and that “[a]ny need for additional community treatment homes beyond four will be determined based on a specific assessment of need based on client needs” based on certain specified criteria. Doc. 283, p. 29. This EC thus provides how the need for additional homes is to be determined; it does not require a certain number of homes. *See id.* Defendants reported that QADC Services and the Jensen Internal Reviewer “have verified” that the “homes are dispersed geographically.” Doc. 710, p. 222; *see also id.* at p. 221 (stating there are homes in Cambridge, Isanti, and Farmington). Defendants further reported that the Department looks to multiple sources, including the Single Point of Entry, “to continually assess the need for treatment homes . . . ,” and, “[t]o date, the Department has not determined a need for more than four treatment homes.” Doc. 710, p. 221. The Court also referred to EC 93 in its discussion of treatment homes. Doc. 737, p. 33. EC 93 states, in part, that “DHS will create stronger diversion supports through appropriate staffing and comprehensive data analysis.” Doc. 283, p. 30.

While the statements filed in response by the Consultants and Plaintiffs expressed disagreement with Defendants' interpretation of the Agreement and CPA in certain respects, none of them submitted evidence disputing the factual representations in the Report. *See* Docs. 726, 726-1, 726-2, 726-3, 727, 728, 730.

THE APRIL 16, 2019 CONFERENCE.

On April 9, 2019, the Court issued an order containing the agenda for the April 16 conference. [Doc. 729](#). It allowed the parties to submit additional proposed agenda items. *Id.* at 3. In response, Defendants asked in a letter that the Court “add an agenda item to address the applicable legal standard the Court is using to determine the circumstances under which it will end its involvement in this matter, including what specific actions remain outstanding.” [Doc. 731, p. 2](#). Defendants noted that the Court had not previously provided this information, despite Defendants' request for the same information in connection with the July 12, 2018 Biannual Status Conference, and the Court's prior commitment that it would provide it. *Id.* at 1 (citing [Doc. 691, pp. 5-6](#); [Doc. 693, p. 3](#)). The Court added to the April 16 conference's agenda that “Counsel for the parties shall apprise the Court of their views on the appropriate legal standard the Court should use to determine the circumstances under which it will end its involvement in this matter, including their views on the specific actions that remain outstanding.” [Doc. 733, p. 6](#). The Court never included as an agenda item – whether on its own or by the suggestion of a party – the possibility it would extend its jurisdiction. *See generally* [Doc. 733](#). And, during the over four hour status conference, the Court never indicated it was considering

an extension. As of the date of the conference, nearly eight months remained before the then-current end of jurisdiction on December 4, 2019.

The Court issued the Order two months later, on June 17, 2019. Doc. 737. In the Order, the Court concluded that “investigation and review is required on several compliance issues before the Court can equitably end its jurisdiction over this matter.” *Id.* at 2. The Order concludes that the Report contains insufficient information substantiating that Minnesota Life Bridge has not used prohibited restraints or techniques (*id.* at 24-27), or substantiating that staff received certain training. *Id.* at 31-33. Rather than simply ask Defendants to provide additional information on these issues, however, the Order requires Defendants to engage an external Subject Matter Expert. *Id.* The Order also requires Defendants to supplement the Report on issues relating to treatment homes. *Id.* at 33-34. The Order requires briefing on certain issues related to restraint use. *Id.* at 24-31, 35-36. All of the deadlines in the Order elapse well before December 4, 2019. *Id.* at 38-40.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) allows a party to move to “alter or amend a judgment” within 28 days after the entry of the judgment. For purposes of the rule, however, “judgment” is defined broadly to “‘include[] a decree and any order from which an appeal lies.’” *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir. 2008) (quoting Fed. R. Civ. P. 54(a)). Accordingly, “judgment” “encompasses both a final judgment and an appealable interlocutory order.” *Id.*

Orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions” are appealable under federal law. 28 U.S.C. § 1292. Regardless, the Eighth Circuit recently confirmed the existence of appellate jurisdiction related to this Court’s ongoing jurisdiction under the collateral order doctrine. *Jensen v. Minn. Dep’t of Hum. Svcs.*, 897 F.3d 908, 912 (8th Cir. 2018); *see also Gorromeo v. Zachares*, 15 Fed. Appx. 555, 556, 2001 WL 884711, *1 (9th Cir. 2001) (qualified immunity subject to collateral order doctrine); *see also Springer v. Albin*, 398 Fed. Appx. 427, 432, 2010 WL 4027821, *5 (10th Cir. 2010) (holding that an order denying a summary judgment motion based on qualified immunity “may be challenged by a rule 59(e) motion before an appeal is taken”); *Roque-Rodriguez v. Lema Moya*, 926 F.2d 103, 106 (1st Cir. 1991) (deciding that because the district court’s rejection of qualified immunity and denial of summary judgment was the “functional equivalent of a judgment for purposes of appeal,” court’s order “came within the purview of” Rule 59(e)). The same analysis applies here.⁸ *Jensen*, 897 F.3d at 912.

“Rule 59(e) motions serve a limited function of correcting ‘manifest errors of law or fact or to present newly discovered evidence.’ Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have

⁸ Nevertheless, it does not appear Plaintiffs contest the appealability of the Court’s order extending jurisdiction. *Jensen v. Minn. Dep’t of Hum. Svcs.*, No. 09-CV-01775 (DWF/BRT), 2017 WL 2799153 at *6 (D. Minn. June 28, 2017) (“Plaintiffs also reference Defendants’ routine failure to appeal or challenge the Court’s orders, including those extending jurisdiction.”).

been offered or raised prior to entry of judgment.” *United States v. Metro. St. Louis Sewer Dist.*, [440 F.3d 930, 933](#) (8th Cir.2006) (internal quotations omitted).

A party against whom a decision is rendered may seek relief under Rule 59 where that party did not have notice of or an opportunity to respond to the district court’s order. *See Luig v. N. Bay Enterprises, Inc.*, [817 F.3d 901, 906-07](#) (5th Cir. 2016) (stating that the district court erred by denying Rule 59(e) motion where it essentially granted summary judgment against a party *sua sponte* without giving that party a chance to respond); *see also Day v. McDonough*, [547 U.S. 198, 210](#) (2016) (“Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.”). The district court’s failure to consider its decision based on “all the facts” is a “judicial imperative[] relating to [a 59(e)] motion.” *Luig*, [817 F.3d at 907](#) (quotation omitted) (emphasis in original). Accordingly, a district court’s failure to give the parties the opportunity to present facts and arguments is an appropriate basis for a Rule 59(e) motion. *See Banks v. Shalala*, [43 F.3d 11, 14](#) (1st Cir. 1994) (stating that district courts “should not conclude their review without an appropriate opportunity for the presentation of the parties’ contentions” and vacating the district court’s denial of a Rule 59(e) motion because of its failure to do so (quotation omitted)).

ARGUMENT

I. THE COURT’S *SUA SPONTE* EXTENSION OF JURISDICTION CONSTITUTES A MANIFEST ERROR OF LAW.

The Order rests on manifest error of law in that the Court first informed Defendants of the bases supporting an extension of jurisdiction at the same time it

extended jurisdiction. This deprived Defendants of both prior notice that the Court contemplated an extension, and an opportunity to be heard regarding the concerns underlying the extension.

It is indisputable that litigants are entitled to notice and an opportunity to be heard before a court takes action to their detriment; here, Defendants are entitled to notice of the Court's concerns, and an opportunity to address them, *before* those concerns result in an extension of jurisdiction. *Dr. Jose S. Belaval, Inc. v. Perez-Perdomo*, [465 F.3d 33, 37](#) (1st Cir. 2006) (“Even assuming that a court may on its own motion substantially modify the terms of a preliminary injunction to the substantial detriment of a party's property interest . . . both the structure of the federal rules and the constitutional guarantee of due process require that a court not do so without giving prior notice to the parties and an opportunity for them to be heard.”); *see generally Post v. Harper*, [980 F.2d 491, 493](#) (8th Cir. 1992) (stating that due process requires “adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” (quotation omitted)).

The principle applies across legal contexts. *Day v. McDonough*, [547 U.S. 198, 210](#) (2006) (in federal habeas context: “Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.”); *Taylor v. United States*, [792 F.3d 865, 869](#) (8th Cir. 2015) (citing *Day* for the proposition that a court may not act *sua sponte* without first giving the parties notice and an opportunity to be heard); *Greater St. Louis Const. Laborers Welfare Fund v. Benco Landscape Const., Inc.*, [474 Fed. Appx. 489, 490, 2012 WL 1557382](#), *1 (8th Cir. 2012) (vacating denial of motion to set aside order piercing the corporate veil because district

court failed to consider defendant's argument that it had "not had an opportunity to be heard as to whether it was appropriate to pierce the corporate veil" and "[d]ue process requires that [defendant] is entitled to notice and an opportunity to be heard before being deprived of its property by adjudication"); *Figg v. Russell*, [433 F.3d 593, 597](#) (8th Cir. 2006) ("Sua sponte orders of summary judgment will be upheld only when the party against whom judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted." (quotation omitted)); *First Fin. Ins. Co. v. Allstate Interior Demolition Corp.*, [193 F.3d 109, 119–20](#) (2d Cir. 1999) ("while there is no dispute that district courts have the inherent power to grant summary judgment sua sponte, an essential limitation on that power is that it may not be exercised unless the losing party had notice that it had to come forward with all of its evidence and arguments."); *Bingham v. Massachusetts*, Civ. No. 08-11770-GAO, [2009 WL 1886128](#), at *1 (D. Mass. July 2, 2009) ("Under the law of this circuit, it is clear that a district court cannot dismiss a complaint for lack of standing *sua sponte*, but must afford the plaintiffs an opportunity to be heard." (citing *Preterm, Inc. v. Dukakis*, [591 F.2d 121, 134](#) (1st Cir. 1979))).

Here, Defendants were not provided notice and opportunity to be heard. The Court's agenda made no mention of the possibility of an extension of jurisdiction. [Doc. 733](#). And, the Court made no mention during the April 16 status conference that it contemplated extending its jurisdiction, nor did it ever mention the bases for its subsequent *sua sponte* decision to do so. [Doc. 740](#). Moreover, although Defendants asked the Court "to address the applicable legal standard the Court is using to determine

the circumstances under which it will end its involvement in this matter, including what specific actions remain outstanding,” Doc. 731 at 2, the Court denied the request “as premature,” Doc. 737 at 41, even though nearly a year prior it “acknowledge[d] the importance of this topic as the Court continues to exercise its jurisdiction over the implementation of the *Jensen* Settlement Agreement in this matter.”⁹

In addition, in the section addressing the extension of jurisdiction, the Court did not identify noncompliance with the Settlement Agreement as the basis for the extension. Doc. 737 at 36. Rather, all the Court said was that it needed “additional information to *determine* whether issues of noncompliance remain.” *Id.* But, Plaintiffs never identified noncompliance with the Settlement Agreement or any evidence of actual noncompliance with the Settlement Agreement; rather, all Plaintiffs could muster was to ask the Court to help find that evidence for them by scheduling an evidentiary hearing.¹⁰ Doc. 730 at 16. Courts, however, do not exist to assist parties.¹¹ *Gardiner v. A.H. Robbins Co.*,

⁹ The Court continued that it “believe[d] it would be beneficial to the Court to understand the parties’ respective views on [sic] appropriate legal standard by which the Court should evaluate the propriety of its ongoing involvement in this matter.” Doc. 691 at 2.

¹⁰ All of the deadlines imposed by the Court precede the prior jurisdiction expiration date of December 4, 2019. Doc. 737 at 38-40. Even if it were proper to require Defendants to provide additional reports or retain an additional expert at taxpayer expense, justice or equity cannot require the extension of jurisdiction now. *See Spangler v. Pasadena City Bd. of Ed.*, 611 F.2d 1239-42 (9th Cir. 1979) (holding that district court erred in failing to dissolve injunction where there was no showing that school board violated desegregation decree); *see also id.* at 1247 (“Retention of jurisdiction when there is no longer a demonstrated need to monitor compliance may defeat important governmental and personal interests.”) (Kennedy, J. concurring).

¹¹ The Court’s suggestion in footnote 41 that “the equitable treatment of persons with developmental disabilities in the State of Minnesota is not confined to the *Jensen* lawsuit” and its “hope[] that State leadership may develop a comprehensive solution to (Footnote Continued on Next Page)

747 F.2d 1180, 1194 (8th Cir. 1984) (“The judicial branch of the government is not and should never become an advocate for private causes.”).

II. UNDER RULE 59(E), THE ORDER SHOULD BE VACATED AND DEFENDANTS PROVIDED WITH AN OPPORTUNITY TO SUPPLEMENT THE RECORD AND FULLY BRIEF DISPUTED ISSUES.

To the extent the Court relied upon the four areas it identified as “issues in need of further investigation and review,” Doc. 737 at 24, that reliance is based on manifestly incorrect facts. *Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (motions under Rule 59(e) are appropriate to correct “manifest errors of law or fact”); *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996) (holding that district court properly granted motion to amend order that was based on erroneous view of the evidence). At the very least, the Court should vacate the Order and provide Defendants with a meaningful opportunity to respond, including by supplementing the record.

(Footnote Continued from Previous Page)

the global issues that exist” is especially problematic. This Court’s authority is limited to the case in front of it. *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004) (Federal courts are not empowered “to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it”) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). And, nevertheless, it is well outside the bounds of this Court’s authority to require – by a “leadership conference” that includes the Governor and Attorney General or otherwise – “develop[ment of] a comprehensive solution to the global issues that exist.” Federal courts are not super legislatures. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.”).

A. Manifest Errors Of Fact.

1. Alleged use of prohibited techniques.

The Court manifestly erred when it held it needed “more comprehensive verification” related to the use of restraints at Minnesota Life Bridge. [Doc. 737 at 24](#). As an initial matter, DHS’ summary report plainly contradicts this conclusion: “The Jensen Internal Reviewer reviews *each instance* of restraint use at Minnesota Life Bridge [(MLB)] on an ongoing and continuous basis . . . ,” and has “monitored the use of restraints at [MLB] since the schedule for compliance reporting was established ([Doc. 545](#)), and has found that [MLB] has *used no prohibited restraints or techniques*.” [Doc. 710, pp. 178-79](#) (emphasis added). But the Court’s conclusion also ignores that DHS “me[et] with Consultants regarding suggested data collection and verification procedures that will be utilized to prepare the Summary Report,” [Doc. 707 at 13](#), and reached agreement with them on data collection and verification procedures, Declar. of Daniel J. Baker, Ph.D ¶ 5. It is manifest error for the Court to now take issue with DHS’s method when that very method was agreed to by the Consultants pursuant to Court order. *In re Trans Union Corp. Privacy Litig.*, [741 F.3d 811, 816](#) (7th Cir. 2014) (“Litigants as well as third parties must be able to rely on the clear meaning of court orders setting out their substantive rights and obligations.”).

2. Scope of Settlement Agreement related to restraints.

It is manifest error to suggest that there exists a dispute related to prohibited restraint over seven years since the Court approved the Settlement Agreement language at issue. The Settlement and the Comprehensive Plan of Action prohibit certain relevant

restraints at the “Facility,” a term defined in the Settlement and the Comprehensive Plan of Action. *See* [Doc. 136-1, p. 5](#) (Settlement defining “Facility” as METO, its successor in Cambridge, “and the two new adult foster care transitional homes to which residents of METO have been or may be transferred”); [Doc. 283, p. 2](#) (defining “Facility” and “Facilities” as “MSHS-Cambridge, the MSOCS East Central home established under the Settlement Agreement, and the treatment homes established (or to be established) under this Comprehensive Plan of Action”); *see generally* Docs. 136-1, 283. It is error for the Court to suggest that there is something that needs clarification when the words of the Settlement Agreement and Comprehensive Plan of Action are clear.¹² *See In re Heine Feedlot Co.*, [107 F.3d 622, 625](#) (8th Cir. 1997) (holding that bankruptcy court erred in determining that agreement was ambiguous and in permitting debtor to present evidence of its interpretation of agreement); *Michalski v. Bank of Am. Arizona*, [66 F.3d 993, 996](#) (8th Cir. 1995) (question whether an agreement is ambiguous is an issue of law, with evidence of parties’ intent admissible only where written agreement is ambiguous).

Moreover, the Court manifestly erred when it required the parties “meet and confer to determine whether there are disputes relating to the ECs regarding the Positive

¹² It would also be absurd for the Court to conclude that the prohibition on restraint extended beyond the “Facility,” as that term is defined by the parties in the Settlement Agreement. If Plaintiffs were ultimately correct, there would be no reason to include language about Rule 40, nor would the Court have approved the Olmstead Plan, which allows for the use of restraint. *Minneapolis v. Minneapolis Police Relief Ass’n, et al.*, [800 N.W.2d 165, 174](#) (Minn. Ct. App. 2011) (declining to interpret statutes or settlement agreement to effect an absurd result). *See also* [Doc. 725-1](#) (March 2019 Revision of Olmstead Plan), p. 80 (stating, under Goal Three, that, “By June 20, 2019, reduce mechanical restraints to no more than 93 reports of mechanical restraint”).

Supports Rule for the Court to decide.” [Doc. 737 at 30](#). DHS created an EC 103 Work Group (“Work Group”) after the Consultants submitted a letter highlighting sections of the Rule 40 Advisory Committee Report they wished to discuss with DHS. Declar. of Karen Sullivan Hook ¶ 3. The Consultants were part of the Work Group, along with several DHS employees. *Id.* at ¶ 4. The Work Group met from the summer of 2016 to November 2017. *Id.* at ¶ 5. During the Work Group process, the Consultants agreed that there were no advisory committee recommendations not adequately addressed by the Positive Supports Rule that were appropriate to consider as a modification to the Olmstead Plan; the Consultants also agreed that the Work Group would continue to work towards implementation of advisory committee recommendations not adequately addressed by the Positive Supports Rule through other avenues, such as DHS action. *Id.* at ¶ 6. Accordingly, no suggestions were taken to the Olmstead Subcabinet or the Olmstead Implementation Office. *Id.* at ¶ 6. By agreement, the Work Group stopped meeting in November 2017, and the Consultants, Plaintiffs’ Class Counsel, and the Court Monitor, have not presented any unresolved issues regarding Rule 40 advisory committee recommendations to the Court. *Id.* at ¶ 7. As such, it is error for the Court to now require the parties to meet and confer on this issue. *See* [Doc. 283, p. 33](#) (EC 103).

3. Staff training.

The Court also manifestly erred when it concluded that DHS did not provide sufficient documentation of compliance with ECs 54, 55, and 56. [Doc. 737 at 31-33](#). Since 2017, DHS has provided information in the format it used in the summary report. *See* [Doc. 621, pp. 27-39](#); [Doc. 683, pp. 25-35](#); [Doc. 710, pp. 140-51](#). Neither the Court

nor Plaintiffs ever complained that the report was somehow insufficient. Regardless, as of the end of the training year (March 11, 2019), all active Minnesota Life Bridge staff had completed the training necessary under ECs 54, 55, and 56. Declar. of Margaret Fletcher-Booth, Ph.D ¶ 3,¹³ and the Court should not use any purported lack of documentation as a reason to retain jurisdiction through the next fourteen months. *See Luig*, [817 F.3d at 906-07](#).

Moreover, Defendants' reports have been clear that all staff training includes a competency component. *See* [Doc. 710, p. 146](#) (stating, regarding EC 55, that "[t]he Department has provided specific data above and in previous reports documenting completion of Actions 55.1, 55.2, 55.3, 55.4, and 55.5 (*see* Docs. 328, 342, 360, 531, 553-1, 572, 589, 621, 683)"); [Doc. 683, p. 28](#) (stating that "[e]ach course in the [MLB] staff-training curriculum has a competency component," and that in some trainings, written competencies are required as an indicated or understanding the concepts or information provided," and "[o]ther trainings require demonstration of skills to show competency"); [Doc. 572, pp. 5-12](#) (containing detailed evaluation of training by Internal Reviewer, including discussion of whether competency-based assessment is included; stating EASE training has "[c]ompetency evaluation as opposed to simply completing the training," that Positive Behavioral Supports training "competency is assessed via print and verbal quizzes," that Person Centered Training "is consistent with the vision of the JSA and CPA," that "with the addition of a competency-based assessment, [Crisis

¹³ Dr. Booth declares that DHS has source documents showing this and that QADC Services has verified the data. Declar. of Margaret Fletcher-Booth, Ph.D ¶ 3.

Intervention/Post Crisis Intervention and Assessment training] is consistent with the vision of the JSA and CPA,” that MMR training includes “[c]ompetency assessment used in form of a quiz”). It is manifest error for the Court to ignore this uncontroverted evidence and order DHS hire an outside expert.

4. Treatment homes.

The Court manifestly erred when it required DHS “supplement [its] Summary Report to present [its] assessment and analysis on the treatment homes no later than October 15, 2019,” which appears to be based on a claim by the Consultants “that the current number of homes *may* be insufficient.” [Doc. 737 at 33](#) (emphasis added). EC 88, however, does not require the addition of treatment homes; rather the EC requires only assessment of need. [Doc. 283 at 29](#). And, EC 93 plainly does not deal with treatment homes at all; indeed, the Court’s citation to the EC omits the preceding sentence that makes clear its applicability to diversion supports, which include “augmentative service supports, consultation, mobile teams, and training to those supporting the person.” [Doc. 283 at 30](#). Nothing in EC 93 refers or relates to treatment homes, and it was manifest error for the Court to conclude otherwise.

B. DHS Could Have Responded To The Court’s Concern Had It Received Prior Notice And An Opportunity To Be Heard.

Had the Court provided notice of these “issues in need of further investigation and review” and an opportunity to respond before extending its jurisdiction, [Doc. 737 at 24](#), Defendants would have been able to address the Court’s concern. Rule 59 is an

appropriate vehicle to address these issues since Defendants had no notice of the Court's concern. *See Luig*, [817 F.3d at 906-07](#).

First, as of the end of the training year (March 1, 2019), all active Minnesota Life Bridge staff had completed the training necessary under ECs 54, 55, and 56. Declar. of Margaret Fletcher-Booth, Ph.D ¶ 3. Dr. Booth declares that DHS has source documents showing this and that QADC Services has verified the data. Declar. of Margaret Fletcher-Booth, Ph.D ¶ 3.

Second, as discussed above, DHS created an EC 103 Work Group ("Work Group") after the Consultants submitted a letter highlighting sections of the Rule 40 Advisory Committee Report they wished to discuss with DHS. Declar. of Karen Sullivan Hook ¶ 3. The Consultants were part of the Work Group, along with several DHS employees. *Id.* at ¶ 4. By agreement, the Work Group stopped meeting in November 2017, and the Consultants, Plaintiffs' Class Counsel, and the Court Monitor, have not presented any unresolved issues regarding Rule 40 advisory committee recommendations to the Court. *Id.* at ¶ 7. It was, therefore, error for the Court to require the parties meet and confer to determine whether any such disputed elements exist. *See Doc. 737 at 39*.

Third, Dr. Baker reviews each instance of restraint use at the Facility (as that term is defined in the Settlement Agreement and the CPA) on an ongoing and continuous basis.¹⁴ This review was also explained in the Summary Report. [Doc. 710, pp. 178-79](#).

¹⁴ *See Doc. 136-1, p. 5* (defining "Facility" as the METO facility, its successor, "and the two new adult foster care transitional homes to which residents of METO have been or may be transferred"); [Doc. 283, p. 2](#) (defining "Facility" and "Facilities" as (Footnote Continued on Next Page)

Given the above, there is no basis for the Court's order seeking more information, appointment of an outside expert, or an additional meet and confer by counsel. Doc. 737 at 38-40. The Court should vacate its order in its entirety and enter an order ending its jurisdiction. *Spangler*, 611 F.2d at 1242 ("It follows from these principles that when a court ordered remedy has accomplished its purpose, jurisdiction should terminate.") (Kennedy, J., concurring).

CONCLUSION

In light of the foregoing, the Court should vacate the Order and terminate its jurisdiction in this case.

Dated: July 15, 2019.

Respectfully submitted,

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(Footnote Continued from Previous Page)

"MSHS-Cambridge, the MSOCS East Central home established under the Settlement Agreement, and the treatment homes established (or to be established) under this Comprehensive Plan of Action"); Doc. 710, p. 178 at n.190 and Declar. of Margaret Fletcher-Booth, Ph.D ¶ 2 (indicating MSHS-Cambridge was closed on August 29, 2014, MSOCS East Central has been and remains an adult foster care home since approximately 2014, and MLB homes are the successor homes established under the CPA); Declar. of Daniel J. Baker, Ph.D ¶ 2 (stating he reviews every instance of restraint use at MLB on an ongoing and continuous basis).

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