UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

	Court File No.: 09-CV-1775 DWF/BRT
James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen, et. al, Plaintiffs, vs. Minnesota Department of Human Services, an agency of the State of Minnesota, et. al., Defendants.	**SETTLEMENT CLASS SETTLEMENT CLASS POSITION ON ITEMS 3 AND 6 OF THE COURT'S ORDER (DOC. 737)**

Introduction

Pursuant to the Court's Order (Doc. 737), Settlement Class counsel conferred with counsel for the State and DHS (collectively, "DHS") on items 3 and 6 of the Order. The parties are not in agreement on them. The Settlement Class therefore provides its position on these items. *See* Order (Doc. 737) (parties to inform the Court of their respective positions no later than August 15).[1] The "Agreement" herein is "the combination of the Settlement Agreement and Comprehensive Plan of Action." *Id*. at 7.

[1] On July 24, Settlement Class counsel asked DHS counsel for the DHS section of the draft joint letter to the Court required to be filed by August 15 but has not received the DHS section.

Proposed Briefing Deadline

The Settlement Class proposes a September 25 deadline for the submission of the parties' additional briefing, if any, on issues 3 and 6 of the Court's June 17, 2019, Order, with no reply allowed. This process is supported by the Court's Orders, past practice in this matter and the Agreement.[2]

DHS Must Establish "Substantial Compliance" with the Agreement

The Agreement and related Court Orders require the State and DHS (collectively, "DHS") must establish "substantial compliance" with the Agreement. *See e.g*. Order (Doc. 136) Ex. A (Doc. 136-1) (settlement agreement) at 12 ("Every three (3) months, the external reviewer shall issue a written report informing the Department whether the Facility is in *substantial compliance* with this Agreement and the policies incorporated herein. The report shall enumerate the factual basis for its conclusion and may make recommendations and offer technical assistance."); Order (Doc. 211) at 5 ("The Court

[2] *See e.g*. Order (Doc. 168) at 2 ("The parties shall file objections, if any, to future reports and recommendations by the Independent Consultant and Monitor within twenty-one days of their filing. Objections not timely filed shall be deemed waived. *Cf*., Fed. R. Civ. P. 53(f)(2) (21 days to object to special master's report). In addition to the twenty-one days, the parties will have had the additional time afforded by the monitor's providing them with an advance draft of his report. In an urgent situation, the monitor need not provide a draft, and the Court may set a shorter time for response."); Order (Doc. 652) at 2-3 ("No later than three business days prior to the conference, counsel should file a letter setting forth the parties' positions on what essential steps remain in Defendants' implementation of the Agreement"); Order (568) at 3 ("The parties shall submit their proposals regarding the External Review role as outlined in the *Jensen* Settlement Agreement within three days of this Order; Order (Doc. 349) at 3 ("The parties shall file responses to the October 17, 2014 report, and the recommendations contained therein, on or before October 30, 2014."); Agreement (CPA) (Doc. 284) EC 103 ("unresolved issues may be presented to the Court for resolution by any of the above, and will be resolved by the Court."),

received a request on March 4, 2013, from Plaintiffs' counsel to schedule a conference with the Court to discuss resolution of Plaintiffs' Motion to Enforce Settlement, as well as the status of the case. At that time, the Court was informed that counsel for Defendants also agreed to scheduling a conference to discuss the status of Plaintiffs' Motion to Enforce Settlement. At the March 25, 2013 status conference, the Court agreed to issue an order addressing the role of the Monitor and *to set up a process to promote substantial compliance* with the Settlement Agreement entered in this case on December 1, 2011."); Order (Doc. 634) at 23-24; 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."); 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."); Order of Sept. 3, 2014 (Doc. 340) ("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." "The Court Monitor shall serve for as long as necessary for Defendants to achieve *substantial compliance*. However, it is expected that Defendants will *substantially comply* with the Court's Orders by December 4, 2014."); Order (Doc. 327) ("The Court Monitor shall serve for as long as necessary for Defendants to achieve *substantial compliance*."); Order (Doc. 212) at 6 ("The external reviewer function, as set forth in the Stipulated Class Action Settlement Agreement at paragraph VII.B (External Reviewer) will be subsumed within

the Monitor's role as originally set forth in the Court's July 17, 2012 Order, at which time the Court appointed David Ferleger as the Court's independent consultant and monitor. The Monitor will independently investigate, verify, and report on compliance with the Settlement Agreement and the policies set forth therein on a quarterly basis. Those quarterly reports shall inform the Court and the parties whether the Monitor believes, based upon his investigation, without relying on the conclusion of the DHS, that Defendants are in *substantial compliance* with the Settlement Agreement and the policies set forth therein. The Court expects the reports to set forth the factual basis for any recommendations and conclusions."); 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.")

"Prohibitive Technigues" (Restraint and Seclusion) and the Positive Supports Rule

In the Jensen settlement, DHS agreed to:

> 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 staff and/or as a form of behavior modification.

(Doc 136-1) (settlement) at 5-6. The only exception is for a defined emergency situation, and then only through temporary manual restraint applied consistent with an agreed upon protocol. *Id*. While this governed the "facility" defined in the settlement (*Id*. at 5) DHS

also agreed to "System Wide Improvements" not limited to any particular facility, including modernizing Rule 40 and developing an Olmstead Plan, and its declaration to "utilize the Rule 40 Committee and Olmstead 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…." *Id.* at 3.

The Court has been clear that the Comprehensive Plan of Action is an enforceable part of the Agreement. *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."); *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."). CPA Evaluation Criteria 99 to 104 correspond to the System Wide Improvements section of the Agreement, including DHS obligations to modernize Rule 40, and the administrative rule governing the use of aversive and deprivation procedures on people with developmental disabilities. Developed "by the Court Monitor and the parties" (*Id.* at n.2) and adopted by the Court as a result of DHS ongoing non-compliance, the CPA reiterates DHS requirements and expands upon them. *See* (Doc. 604) at p. 5 ("Adopted by the Court amid continued compliance concerns, and without objection from any party (Doc. No. 284), the court-ordered Comprehensive Plan of Action (CPA) is the roadmap to compliance. It includes verbatim, modified, restated and, in some cases,

expanded Settlement Agreement requirements, and additional relief. These are embodied in more than 100 Evaluation Criteria (EC). The Evaluation Criteria are enforceable and set forth 'outcomes to be achieved.'"). *See also* DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions, at 2, 16, 40:

> 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.
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> 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.
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> 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.

See also DHS Commissioner August 27, 2015, letter to Court ("Great strides have been made in the area of restraint and seclusion since the Jensen Settlement Agreement was

adopted by the Court. Since that time, by the efforts of many throughout the community and including the parties, Minnesota Rules, part 9544 was promulgated and now prohibits restraint and seclusion, except for emergency use of manual restraint, in DRS-licensed settings when serving a person with a developmental disability and also in Home and Community-Based Services settings when serving a person with a disability. Minnesota Statutes, Chapter 245D was enacted and similarly prohibits restraint and seclusion in Home and Community-Based Services settings. Prone restraint is no longer permitted in any setting.")

These DHS statements affirm and admit the Agreement's restraint and seclusion prohibition applies to individuals with developmental disabilities at state operated locations.

The Agreement required DHS to appoint an External Reviewer to determine and report on whether there is "substantial compliance." The Court appointed an Independent Court Monitor to fulfill the role of the External Reviewer, without objection from DHS, after DHS failed to appoint the External Reviewer, and after substantial efforts by the Court to encourage compliance. *See* Order (737) at 5 ("Importantly, Defendants' own report, dated February 2, 2016, notes that 'the Court appointed the Court Monitor as the External Reviewer, with the consent of Plaintiffs and Defendants.'"); Order (Doc. 179) at 2 ("The Court deems this an opportune and appropriate time to consider the pace of Defendants' implementation of the obligations they undertook both as to the facility and system-wide, including but not limited to community integration under *Olmstead v. L.C.*, and to consider any circumstances which may hinder Defendants' implementation with

all deliberate speed."); Order (Doc. 340) at 10 ("The Court Monitor has continued to serve the Court, pursuant to the Court's July 17, 2012 Order, in substantial part because of the noncompliance of the DHS. With few exceptions, his findings and recommendations have generally been received by the parties with little or no objection.")

The Court Monitor was provided with broad investigative authority to evaluate DHS compliance. *See* Order (737) at 5 ("Pursuant to its April 25, 2013 Order, the Court asked the Court Monitor to 'independently investigate, verify, and report on compliance with the Settlement Agreement and the policies set forth therein on a quarterly basis.'"). The Court Monitor was authorized, without objection from DHS, to investigate the status of the settlement implementation in his role as the External Review, as well as additional authority conferred by the Court over the years, in order to determine whether DHS has "substantially complied" with the Agreement. *See e.g.* Order (Doc. 340) at 11:

> 2. The Court Monitor shall make findings of compliance concerning the Defendants' activities under the Settlement Agreement, the Comprehensive Plan of Action, which includes, among other things, the Olmstead Plan, the rules proposed or adopted under the Rule 40 Modernization requirement, and other Orders of the Court. In addition, the Court Monitor shall make recommendations that will facilitate the goals and objectives of the Court's Orders, including recommendations for contempt, sanctions, fines or additional relief. The Court Monitor may continue to issue reports on compliance and other issues in this case in his discretion; in light of the requirements in this Order, quarterly compliance reports by the Court Monitor are no longer required. The Internal Reviewer, Dr. Richard Amado, shall continue to issue his reports to the Court Monitor. The Court Monitor shall also continue to issue reports on compliance and other issues in this case at his discretion.
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> 3. The Court Monitor has the authority necessary to facilitate and assist Defendants to achieve substantial compliance with Defendants' obligations under the Court's Orders.

4. The Court Monitor shall:

a. Oversee the timely implementation of all procedures and activities related to all outstanding obligations under the Court's Orders.

b. Oversee the activities of the Defendants in order to ensure and affirm that the service system provides services and support that comply with the Court's Orders.

c. Oversee the activities of the Defendants, including their oversight and monitoring, in order to ensure that their supervision and regulation of counties, contractors, providers, and agents results in substantial compliance with the Court's Orders.

d. Oversee the activities of the Defendants related to their communications with other state agencies necessary to achieve substantial compliance with the existing Court's Orders.

e. Review existing data collection mechanisms, information management, performance standards, provider review, and quality improvement systems, and, if necessary, identify specific improvements to achieve substantial compliance with the Court's Orders.

f. Supervise compliance activities by the Defendants with respect to the Court's Orders.

g. Facilitate efforts of the Defendants to achieve substantial compliance with the Court's Orders at the earliest feasible time.

h. Evaluate the adequacy of current activities and the implementation of remedial strategies to facilitate substantial compliance with the existing Court's Orders.

i. Propose to the Court actions that could be taken to more rapidly achieve substantial compliance, including the need for any additional Court Orders. In developing these actions, to the extent the Court Monitor deems appropriate, he may:

(1) Develop specific outcome measures or standards of compliance for those areas in which such outcome measures or standards would assist in the determination of substantial compliance;

(2) Encourage and allow the Defendants in the first instance to propose timelines, outcome measures, or standards of compliance, should they desire to do so; and

> (3) Include, when he deems appropriate, timetables for implementation, descriptions of measures necessary to bring the Defendants into substantial compliance or to overcome obstacles to substantial compliance.

> 5. The Court Monitor may make formal, written recommendations if the Court Monitor: (a) determines that any action necessary to achieve substantial compliance with an outstanding obligation under the Court's Orders is not being implemented or is inadequately implemented; (b) finds that Defendants are violating any provision of the Court's Orders; or (c) acts on a party's submission or a sua sponte consideration of a dispute. Such recommendations shall include consideration of the appropriateness of contempt, sanctions, fines, or additional relief. Such recommendations may also include timetables for implementation and descriptions of measures necessary to bring the Defendants into substantial compliance or to overcome obstacles to substantial compliance.

> 6. The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance. However, it is expected that Defendants will substantially comply with the Court's Orders by December 4, 2016. Pursuant to the Settlement Agreement § XVIII.B and § XVIII.E, and the Court's August 28, 2013 Order, the Court's jurisdiction is extended to December 4, 2016, and the Court expressly reserves the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of the Defendants' compliance and absent stipulation of the parties.

See also Doc. 220 (Court's August 5, 2013, letter to Court Monitor):

> Pursuant to the Order of April 25, 2013 (Doc. 212), you filed the *Status Report on Compliance* (June 11, 2013), (Doc. No. 212). In lieu of issuing a show cause order against Defendants for sanctions and contempt, I am respectfully making the following requests of you with regard to your responsibilities as the Court's independent consultant and monitor.

> Due to be implemented by Defendants are the Rule 40 modernization and the *Olmstead* Plan requirements of the Settlement Agreement. The State intends to extend these provisions widely.

> The 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.

> To preliminarily prepare for and to facilitate further compliance reviews, the Court requests you to conduct visits to Anoka Regional Treatment Center and Minnesota Security Hospital. You will also visit a number of class members and former MSHS-Cambridge residents who have left the facilities. The Court assumes and expects that the Defendants will cooperate and provide full access for these visits and to records of such persons. Consultants may be retained to assist in this effort.

See also Order (Doc. 239) (The Court's 'independent consultant and monitor' audits and evaluates compliance by DHS and programs which it licenses and funds under the Joint Settlement Agreement and the several plans being developed under the settlement. *See* Orders of July 17, 2012 (Doc. No. 159) and August 28, 2013 (Doc. No. 224) (appointing monitor). *E.g., Monitor's Rationale for Document Request – Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1 Review* (Oct. 17, 2013) (Doc. No. 236); the *Implementation Plan for the Settlement Agreement Evaluation Criteria and Cambridge Closure,* the *Implementation Plan for the Rule 40 Advisory Committee Recommendations;* and the *Olmstead Plan and its Implementation Plan.* On the latter three plans, *see* Order of August 2, 2013 (Doc. No. 219). DHS and Plaintiffs chose Mr. Ferleger as the "External Reviewer" to evaluate compliance. Order of April 23, 2013 (Doc. No. 211)"); Order (Doc. 551) at 18 ("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.")

The Court authorized the Court Monitor's investigation of the Minnesota Security Hospital and Anoka Regional Treatment Center as part of determining whether DHS has established "substantial compliance" with the Agreement. The Court Monitor's reports, received and approved by the Court without objection from DHS, state the prohibitive techniques provision of the Agreement applies to MSH and Anoka. *See* (Doc. 236) at 4-7:

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

See also Doc. 217 Independent Court Monitor June 11, 2013, Status Report on Compliance at 140 ("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.")

The Agreement's requirement to revise and modernize Rule 40, DHS replacing it with the Positive Supports Rule, and mandating development of an Olmstead Plan,

highlight the Agreement's protection from restraint and seclusion for people with developmental disabilities served in state-operated locations. As noted above, DHS leadership, in documents submitted to the Court and through statements during the rulemaking process to the Administrative Law Judge, among other communications, have repeatedly confirmed and admitted the Agreement broadly applies protection against restraint and seclusion to people with developmental disabilities in state-operated locations, including MSH, Anoka and other state operated locations. *See* DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions, at 2, 16, 40; DHS Commissioner August 27, 2015, letter to Court; DHS Respect and Dignity Practices Statement http://www.mn.gov/mnddc/meto_settlement/documents/DHS-Respect-and-Dignity-Practices-Statement.pdf; Ensuring MN DHS Guidelines to the Investigation of Vulnerable Adult Maltreatment, Appendix V Common Courtesies when Interacting with People with Disabilities at p. 196 (DHS has great responsibility to act to ensure the safety of people with disabilities and help them "to be loved, appreciated, respected and productive"); Gov. 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) ("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.")

Over the years, the Settlement Class and Consultants have called out DHS attempts to avoid its requirements in the Agreement through misguided variances, exemptions, amendment, and incorrect positions on the Positive Supports Rule.[3] These disturbing positions, ongoing 10 years after the settlement, point up the very real danger facing vulnerable citizens at MSH, Anoka and other state operated locations where abusive mechanical restraint and seclusion continue to be used on vulnerable citizens.

[3] *See* (Doc. 511) ("In addition, we note the Positive Supports Rule allows for ongoing use of restraint on people with disabilities. As a result, we reiterate our strong concerns and objections, expressed to the Rule 40 Committee, *Olmstead* Committee, *Olmstead* Subcabinet, the State, DHS, counsel, the Independent Court Monitor and the Court over many years, involving the ongoing use of restraint and seclusion."); (Doc. 276) at 3-4 ("Following recent DHS rulemaking communications and continued attempts to expose people with developmental disabilities to restraint and seclusion, we also must reiterate that the Settlement Class does not support or condone any proposed Plan provision, or interpretation of any Plan provision, 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," or "study period," for any provider, or anyone else. The use of transition periods, waivers, exemptions, exceptions, etc. that provide for the continued use of restraint and seclusion directly violates the civil rights of people with developmental disabilities. The Settlement Class objects to any proposed Plan provision 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 Agreement's elimination of restraint and seclusion, and the spirit and intent of the Settlement Agreement. Insistence on these provisions would only facilitate the ongoing dangerous use of aversive, abusive procedures that have been eliminated by the Class Action Settlement as well as best practices that focus on Positive Behavioral Interventions and Support of individuals with developmental disabilities rather than restraining and secluding them in violation of their rights."). Doc. 493 (Settlement Class August 15, 2015 letter to Court).

The Settlement Class respectfully requests that the Court address DHS continuing non-compliance in these areas in determining whether DHS has established substantial compliance with the Agreement.

Respectfully submitted,

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

Dated: August 15, 2019

/s/ Shamus P. O'Meara

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