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.	**AMENDED 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.

DHS Must Establish "Substantial Compliance" with the Agreement

The Agreement and related Court Orders require that 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 ("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; Order (Doc. 551); Order (Doc. 340) ("The Court Monitor shall serve for as long as necessary for Defendants to achieve *substantial compliance*."); Order (Doc. 212) at 6 ("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."); December 31, 2013, Court Monitor Report to the Court at 7.

Settlement Class Motions to Enforce the Agreement

After continuing DHS non-compliance, and a prior Motion to Enforce (Doc. 250-2) the Settlement Class filed a Motion for Sanctions (Doc 230) "to hold the State Defendants accountable for their bad-faith conduct and lack of candor to the Court, Court Monitor, consultants and Settlement Class," and stating "DHS willfully and intentionally acted in substantial noncompliance with the Settlement Agreement." *Id*.; (Doc. 232) at 27-28. DHS responded to the motion (Doc. 241) and appeared at the hearing. *See* November 25, 2013, Hearing Transcript, Motion for Sanctions at 28 (Mr. Ikeda: "[T]he Department has written in response to the Monitor's reports there were issues — they conceded issues of noncompliance with the Settlement Agreement.") The Court granted the motion:

> The Court finds and concludes that Plaintiffs' Motion for Sanctions (Doc. No. [230]) is **GRANTED**. However, for the reasons stated off the bench at the time of the hearing and in this Memorandum and Order, the Court reserves ruling on what sanctions are appropriate, pending receipt of the status of compliance by Defendants and the status of the implementation plan required by this Court, noted in the Court's Memorandum and Order.

Order (Doc. 259). The Court continued to addressed sanctions for DHS non-compliance with the Agreement and related Orders. *See gen.* Order (Doc. 340). The Court comprehensively reviewed DHS non-compliance and extended jurisdiction for the continued enforcement of it orders requiring that DHS substantially comply with the Agreement:

- The Court's December 17, 2013 Order reserved the issue of additional sanctions pending review and scrutiny of Defendants' compliance with the existing Orders of the Court, including the implementation plan required pursuant to the Court's August 28, 2013 Order as well as the Stipulated Class Action Settlement Agreement,

- DHS does not contest the Court Monitor's findings of non-compliance

- 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. 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, or the DHS' indifference to or intentional non-compliance with the Settlement Agreement and related Orders of the Court, the Court respectfully directs the DHS to comply with the terms of the Court's Orders.

- The Court has expressed its concern with non-compliance on prior occasions.

- 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.

- In refraining from issuing contempt and other punitive sanctions for the most recently established non-compliance, at least at this time … the Court is obligated to take some action with the objective of increasing the Court Monitor's responsibilities to: (1) oversee Defendants and ensure their accountability; and (2) expedite prompt and meaningful compliance. Consequently, the Court will extend its jurisdiction for a period of at least two additional years.

- Extending the term of the Court's jurisdiction is clearly necessary based on the significant delays in implementation as well as the non-compliance with the Settlement Agreement. The Court concludes that at least a two-year extension is necessary in order for the Court to oversee and direct the DHS

to accelerate its efforts to comply with the Settlement Agreement and to fulfill the promises and proclamations made by the DHS at the time of the fairness hearing when the Settlement Agreement was approved by the Court.

- The Court Monitor's role has been to "assist and inform the Court on the implementation of the Settlement Agreement's requirements" and to report, monitor, and make recommendations to the Court and the parties. (Doc. No. 159 at 12.) Given the record since that appointment, and the circumstances described in the Court Monitor's *Community Compliance Review*, the Court finds that a more substantial role is necessary.

- While the extension of jurisdiction may be considered a sanction related to the circumstances described in this Order, the Court also reserves the right to entertain a motion by the Plaintiff Class to recover attorney fees that have been incurred directly related to the non-compliance of the DHS

- The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance.

Order (Doc. 340). DHS subsequently agreed to pay Settlement Class counsel $50,000 in "attorneys' fees, costs and disbursements related to issues of concern and non-compliance" raised by Plaintiffs, on behalf of the Settlement Class" including but not limited to the attorneys' fees sought in the Motion for Sanctions. November 20, 2015 Order (Doc. 526).

Prior to its Order on attorneys' fees (Doc. 526), the Court held a March 25, 2013, status conference on a prior motion to enforce DHS compliance with the Agreement. *See* October 4, 2012, Settlement Class Counsel notice letter to DHS Counsel (Doc. 250-2) at 28 (SETTLEMENT CLASS POSITION REGARDING THIRD PARTY EXPERT REQUIREMENTS OF THE SETTLEMENT AGREEMENT; DEMAND FOR IMMEDIATE CESSATION OF CHEMICAL RESTRAINT AT THE MSHS CAMBRIDGE FACILITY AND FOR COMPLIANCE WITH SETTLEMENT

AGREEMENT; DEMAND TO MEET AND CONFER PURSUANT TO SECTION XVIII.B OF THE SETTLEMENT AGREEMENT; AND 21 DAY NOTICE OF POSSIBLE MOTION TO ENFORCE PURSUANT TO SECTION XVIII.D OF THE SETTLEMENT AGREEMENT.) The Court's Order following the status conference on this earlier Motion to Enforce stated:

> 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. 211) at 5. *See also* Order (Doc. 205) (providing background on efforts to encourage parties to agree on court monitor role and stating "the Court intends to inform the parties at the status conference that given the status of the case, including the issues of noncompliance, the focus of David Ferleger will be to evaluate compliance and noncompliance issues vis-à-vis a mediation approach. Consequently, with or without agreement of the parties, the Court will establish the role and function of David Ferleger, as well as establish the budget for his services, if the parties are unable to reach an agreement.")

DHS ultimately agreed to pay Settlement Class counsel $85,000 in "attorneys' fees, costs and disbursements related to issues of concern and non-compliance raised by

Plaintiffs, on behalf of the Settlement Class" to resolve this prior motion to enforce. April 8, 2013 Order (Doc. 209).

The Court's Orders approving and enforcing the Agreement, addressing ongoing DHS non-compliance over many years, meeting with the parties and addressing Settlement Class Motions to Enforce, orders setting up the process to promote DHS substantial compliance, and extending the Court's jurisdiction to enforce compliance, reaffirm the Court's authority to evaluate and determine whether DHS has substantially complied with the Agreement.

"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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> ***
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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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> ***
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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.

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:
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> (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;
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> (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.
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> 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.
>
> 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 Settlement Class has also responded to the Court Monitor's requests to provide positions on the Agreement to clarify its application. For instance, in our December 14, 2013, letter to the Court Monitor we wrote:

> On behalf of the Settlement Class, we respond to the Court Monitor's *Request No. 2013-13: Application of Attachment A to MSHS-Cambridge Successors.*
>
> The Settlement Agreement, Section IV, CLOSURE OF THE METO PROGRAM, states:
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> > The METO program will be closed by June 30, 2011. Any successor to METO shall: (1) comply with the U.S. Supreme Court decision in Olmstead v. L.C., 527 U.S. 582 (1999); (2) utilize person centered planning principles and positive behavioral supports consistent with applicable best practices including, but not limited to the Association of Positive Behavior Supports, Standards of Practice for Positive Behavior Supports (http://apbs.org) (February, 2007); (3) be licensed to serve people with developmental disabilities; (4) only serve "Minnesotans who have developmental disabilities and exhibit severe behaviors which present a risk to public safety" pursuant to METO's original statutory charge under Minn. Stat. § 252.025, subd. 7; and (5) notify parents and guardians of residents, at least annually, of their opportunity to comment in writing, by e-mail, and in person, on the operation of the Facility.
>
> This section requires compliance with U.S. Supreme Court caselaw authority, best practices to protect and plan with people with developmental disabilities, requiring focus on their dreams and goals, compliance with licensure requirements, and admission/service under METO's original statutory charge. We believe the Settlement Agreement appropriately focused any METO successor on these authorities and positive, accepted best practices rather than allowing for programmatic restraint and seclusion and other civil rights violations that were the predicate for the class action lawsuit.

> In our November 14, 2013, e-mail (enclosed), we reiterated our previously stated position objecting to any process that is inconsistent with the Settlement Agreement and Court Orders, including the closure of Cambridge without first ensuring that residents and those whom the facility serves are protected through appropriate discharge and transition plans consistent with the *Olmstead* decision using person centered planning allowing the individual to make decisions about their own future, and taking all necessary steps to ensure that loved ones transitioned from Cambridge into other facilities are not subjected to restraint or seclusion.
>
> Attachment A to the Settlement Agreement applies to specific locations existing at the time of the Settlement Agreement. *See* Section III(A). The State of Minnesota, in the Settlement Agreement, *see* Recitals (7), and through the DHS Commissioner's communications, *see* July 29, 2013, DHS Respect and Dignity Practices Statement (enclosed), have stated they want to extend the provisions of the Settlement Agreement to all state operated locations serving people with developmental disabilities with severe behavioral problems or other conditions that would qualify them for admission to METO, Cambridge or two adult foster care transitional homes referenced in the Settlement Agreement. To comply with these statements and provisions, the Settlement Agreement's prohibition against restraint and seclusion must apply to the new locations referenced in the Court Monitor's Request. The State/DHS could use Attachment A for these new locations, or develop site specific policies and procedures for them that comply with the Settlement Agreement, *Olmstead*, best practices, State/DHS stated goals and communications and other items as noted above.
>
> As we have previously stated, the Settlement Class again objects to any process that is inconsistent with the Settlement Agreement and Court Orders, including the closure of Cambridge without first ensuring that residents and those whom the facility serves are protected through appropriate discharge and transition plans consistent with the *Olmstead* decision using person centered planning allowing the individual to make decisions about their own future. This includes, without limitation, taking all necessary steps to ensure that loved ones transitioned from Cambridge into other facilities are not subjected to restraint or seclusion. As we also stated in our December 7, 2013, letter to the Court Monitor (enclosed), the Settlement Class does not support or condone any process, plan, policy, provision or interpretation 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. providing for the continued use of restraint and seclusion directly violates the civil rights of people with developmental disabilities. The prohibition against restraint and seclusion is a fundamentally important provision of the Settlement Agreement for the protection of the civil rights and dignity of people with developmental disabilities. It must not be compromised or excepted.

We also responded to emails from the monitor on these subjects:

From: Shamus O'Meara
Sent: Sunday, January 12, 2014 1:09 PM
To: Office of David Ferleger, Esq.; Mike Tessneer; christina.baltes@state.mn.us; Steven H. Alpert Esq.; Scott Ikeda; Anne Barry
Cc: Colleen Wieck, Ph.D.; Roberta Opheim; David Ferleger, Esq.; Elizabeth (Betsy) McElroy
Subject: RE: Follow-up to Request No. 2013-13: Application to Attachment A to MSHS-Cambridge Successors

Dear Mr. Ferleger:

I will try to clarify further. Attachment A is specific to the three entities defined under the Agreement as those were the entities DHS identified during negotiations and in the agreement. As DHS identifies new facilities to which residents will be transferred DHS must properly address the protection of residents at those facilities and other state operated, controlled or administered facilities to which the residents will be transferred. The settlement states the scope of DHS obligations under the settlement pertain to residents of the Facility (Cambridge and the two identified group homes) with the exception of the provisions in Recitals (7) and Section X, "Systemwide Improvements, but also requires compliance with *Olmstead* and best practices. Our point is that while Attachment A applies to the three entities defined in the agreement, DHS, to be compliant with its *Olmstead*, best practices and other legal obligations, must use Attachment A or another policy that has at least the same protections to ensure the ongoing protection of residents as contemplated by *Olmstead*, best practices and other legal obligations, which exist and are enforceable against DHS without any settlement agreement. Attachment A can be viewed as a vetted, best practices document, or through ongoing collaboration with the Court Monitor and other professionals, DHS can develop a better policy that protects residents and complies with *Olmstead* and best practices. The *Olmstead* and Rule 40 plans and their implementation should also address such policies for the protection of people with developmental disabilities, and the appropriate engagement and collaboration with the individuals and their families, so they may live in the most integrated setting supported by best practices from the state/DHS when involved with certain aspects of their lives.

Thank you.

Respectfully,

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

Shamus P. O'Meara

direct: 952.806.0438

From: Shamus O'Meara
Sent: Wednesday, January 08, 2014 6:30 PM
To: David Ferleger
Cc: Wieck, Ph.D. Colleen; Opheim Roberta; Akbay Amy Esq.; Sullivan, Beth G (DHS); Gray Gregory; Barry Anne; DHS Baltes (DHS); Friend, Maggie A (DHS); Alpert Steve H. Esq.; Ikeda Scott; Tessneer Mike; McElroy Elizabeth(Betsy); Office
Subject: RE: Request No. 2013-13: Application of Attachment A to MSHS-Cambridge Successors

Dear Mr. Ferleger:

The Settlement Class reiterates its response set forth in our December 14, 2013, letter previously provided (enclosed). As we have conveyed in our prior communications, the Settlement Agreement requires compliance with U.S. Supreme Court caselaw authority, best practices to protect and plan with people with developmental disabilities, requiring focus on their dreams and goals, compliance with licensure requirements, and admission/service under METO's original statutory charge. Compliance does not mean one facility or group home but should follow and protect the individual.

Thank you.

Respectfully,

Shamus

Shamus P. O'Meara

direct: 952.806.0438

From: David Ferleger [mailto:david@ferleger.com]
Sent: Wednesday, January 08, 2014 5:00 PM
To: Shamus O'Meara
Cc: Wieck, Ph.D. Colleen; Opheim Roberta; Akbay Amy Esq.; Sullivan, Beth G (DHS); Gray Gregory; Barry Anne; DHS Baltes (DHS); Friend, Maggie A (DHS); Alpert Steve H. Esq.; Ikeda Scott; Tessneer Mike; McElroy Elizabeth(Betsy); Office
Subject: Re: Request No. 2013-13: Application of Attachment A to MSHS-Cambridge Successors

Dear Shamus,

Would you please let me know at your earliest convenience whether Plaintiffs agree with Defendants' response regarding application of Att. A to MSHS-Cambridge successors, copied below. If not, please specifically state any additional or different language you suggest.

Thank you.

David

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On Jan 7, 2014, at 4:12 PM, Tessneer, Michael L (DHS) <mike.tessneer@state.mn.us> wrote:
David,

In response to your request of 12-11-13 below, the Department provides the following response.

The Department believes the provisions in Attachment A apply to the MSHS-Cambridge program until the people now served there are transitioned to the community at which time the site will be closed. Attachment A will continue to apply to the East Central MSOCS transitional foster home located in Cambridge. Once they are open, Attachment A will apply to the two new homes Broberg's Lake located at 675 366th Ave NE, Cambridge, Mn. and Stratton Lake located at 25024 Lincoln Drive, Isanti, Mn.

The Department believes the current language of the Settlement Agreement is adequate and does not need modification.

Please let me know if you have any questions.

Mike

Without commenting on the intersection of these settlement provisions on the Cambridge closure/replacement plan, I request the parties to report to me by January 8, 201" with any recommendation regarding the scope of Attachment A outside the

> institutional facility, whether the existing transitional facility or to the new homes being developed under the closure plan (which are not going to be used for clients directly leaving Cambridge), or elsewhere. Also, please advise me whether, in your view, any modification of the Settlement Agreement may, or may not, be required in this regard.

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:

> **From:** Shamus O'Meara
> **Sent:** Saturday, June 28, 2014 8:05 AM
> **To:** 'Scheffer, Elizabeth R (DHS)'; Wieck, Colleen (ADM); Opheim, Roberta (OMHDD)
> **Cc:** Gray, Gregory N (DHS); Akbay, Amy K (DHS); Booth, Peg (DHS); Bartolic, Alex E (DHS); Young, Charles W (DHS); Klukas, Robert J (DHS); Sullivan Hook, Karen E (DHS); Finlayson, Katherine (DHS); Office of David Ferleger, Esq. (office@ferleger.com); 'David Ferleger'
> **Subject:** RE: Draft Rule
>
> The Settlement Class objects to and will never support any provision in this draft rule or otherwise that allows for mechanical restraint and seclusion. *See, e.g.*, page 8 ("Use of mechanical restraint") and page 10 ("Use of seclusion").
>
> Your draft rule violates the Jensen class action settlement agreement and the civil rights of those it purports to serve.
>
> O'MEARA LEER WAGNER KOHL
> *Attorneys at Law P.A.*
>
> **Shamus P. O'Meara**

O'MEARA, LEER, WAGNER & KOHL, P.A. | 7401 Metro Blvd, Suite 600 | Minneapolis, MN 55439-3034 direct: 952.806.0438 | fax: 952.893.8338 | SPOMeara@olwklaw.com | v-card | olwklaw.com

From: Scheffer, Elizabeth R (DHS) [mailto:Beth.Scheffer@state.mn.us]
Sent: Wednesday, June 25, 2014 2:05 PM
To: Shamus O'Meara; Wieck, Colleen (ADM); Opheim, Roberta (OMHDD)
Cc: Gray, Gregory N (DHS); Akbay, Amy K (DHS); Booth, Peg (DHS); Bartolic, Alex E (DHS); Young, Charles W (DHS); Klukas, Robert J (DHS); Sullivan Hook, Karen E (DHS); Finlayson, Katherine (DHS)
Subject: Draft Rule

Attached please find the draft positive supports rule for your review and discussion. The draft rule is still a work in progress, some provisions are still actively under discussion, and all provisions are subject to further discussion. The draft rule will continue to evolve and remain under discussion through the end of October.

We can discuss on Monday how you would like to provide feedback. Again, if you have any items you feel strongly that DHS consider before even sharing the draft with any other persons, you will need to call those to our attention no later than July 14, and preferably earlier. Absent that, it is entirely up to you when and how you provide feedback to us on the draft rule.

Regards,

Beth

Beth Scheffer
Administrative Law Manager
DHS Compliance Office

(651)431-4336

See also Settlement Class August 29, 2013, email to Court Monitor (Doc. 250-1) at 21-22 ("We do not support any efforts, proposed legislation, proposed waivers, rules or measures that are inconsistent with the Jensen Settlement Agreement provisions and the spirit and intent of the Settlement Agreement. This position has been repeatedly conveyed to DHS, the Court Monitor and the Court, including the Rule 40 process and the issues involving

proposed changes and modification of Minnesota Statute 245D and other proposals by OHS impacting people with developmental disabilities and their families." "There is no application of the fundamental prohibition against restraint and seclusion and other prohibited techniques which is a hallmark of the Jensen Settlement Agreement. Instead, there are inconsistent provisions, ongoing questions and tensions between Rule 40 final recommendations and the 245 proposals and waivers, continued violation of the Settlement Agreement and the civil rights of people with developmental disabilities, rejection of due process, rejection of Rule 40 final recommendations, and the use of a process to achieve these results that is not collaborative nor consistent with the rights of people with developmental disabilities and the best practices for their care.").[2] These disturbing

[2] *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

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.

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 28, 2019

/s/ Shamus P. O'Meara

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SETTLEMENT CLASS COUNSEL

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).