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)

STATE DEFENDANTS' BRIEF REGARDING POSITIVE SUPPORTS RULE AND SCOPE OF SETTLEMENT AGREEMENT AND CPA ON RESTRAINTS

INTRODUCTION

Defendants have complied with all of the Settlement Agreement and Comprehensive Plan of Action's ("CPA") requirements relating to restraints. Neither document applies its provisions regarding mechanical restraint outside the "Facility," as defined, nor do any of the system-wide terms of either document require promulgation of a Positive Supports Rule ("PSR") completely prohibiting mechanical restraint in other facilities and settings. There are also no unaddressed issues relating to the Rule 40 Advisory Committee's recommendations and the *Olmstead* Plan ("Plan"), and certainly no restraint-related issues; Plaintiffs did not follow the procedure set forth in the CPA's Evaluation Criterion ("EC") 103, Defendants complied with that procedure years ago, and in any event the parties already extensively litigated whether the Plan had to completely prohibit mechanical restraint, and the Court concluded it did not. Finally, consistent with the Settlement Agreement and CPA, the Court should resolve this dispute by evaluating whether Plaintiffs have shown a pattern and practice of substantial non compliance.[1]

[1] Plaintiffs filed their brief on these issues on August 15, 2019. Doc. 753. For reasons unknown to Defendants, yesterday afternoon Plaintiffs an "amended" brief adding a net of approximately 10 pages of material, to which Defendants have only a day to respond. Doc. 756. Plaintiffs do not appear to have asked the Court for permission to file this untimely brief or made any showing its untimeliness should be excused, and it should be stricken. Fed. R. Civ. P. 6(b)(1)(B) (court may extend the time to act after the time has expired "on motion . . . if the party failed to act because of excusable neglect."). To the extent Defendants can address the "amendments" to Plaintiffs' brief given the lack of any redlines or strikethroughs and the limited time available, Defendants do so below.

FACTS

I. THE RULE 40 ADVISORY COMMITTEE AND THE EC 103 WORKGROUP.

As required by Section X.C of the Settlement Agreement, Defendants engaged the Rule 40 Advisory Committee ("Advisory Committee") "to study, review, and advise the Department on how to modernize Rule 40 to reflect current best practices" as also eventually required in EC 9. Doc. 136-1, p. 19. The Advisory Committee issued its Recommendations on Best Practices and Modernization of Rule 40 ("Advisory Committee Recommendations") on July 2, 2013.[2]

Regarding restraints, while "some committee members believe[d] the use of any mechanical restraints does not represent best practices and should be prohibited," Advisory Committee Recommendations, p. 21, the recommendations do not establish this as current best practice. Instead, "[s]ome committee members acknowledge[d] that sometimes, albeit rarely, situations arise where temporary use of mechanical restraints for self-injurious behavior should be permitted." *Id*. at 20. Similarly, some members "recommend[ed] that a provider may temporarily continue the use of mechanical restraints" under certain circumstances. *Id*. at 20-21. As another example, "[s]ome committee members recommend[ed] specifically allowing the use of arm limiters when such use is under the care of a highly qualified mental health professional and used to prevent serious self-injurious behavior." *Id*. at 21.

[2] Available at https://mn.gov/mnddc/meto_settlement/documents/Rule-40-Final-7-2-13.pdf.

As previously discussed in Defendants' memorandum in support of their Motion to Alter or Amend June 17, 2019 Order (Doc. 743, pp. 8-9), and consistent with EC 103, 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. Doc. 745, ¶ 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.

II. THE APPROVAL AND CONTENT OF THE *OLMSTEAD* PLAN, AS IT RELATES TO USE OF MECHANICAL RESTRAINT.

As the Court knows, it rejected multiple versions of the State's *Olmstead* Plan before eventual approval. During this process, Plaintiffs were heard repeatedly about their view that the Plan should completely prohibit mechanical restraint. In response to

the version of the Plan filed July 10, 2014 (Doc. 326-1), Plaintiffs "reiterate[d] 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." Doc. 332, p. 13.[3] The Court declined to approve that version of the Plan. Doc. 344. In response to the version of the Plan eventually approved (Doc. 486-1), Plaintiffs again objected that the Plan did not "[e]xpressly prohibit the use of restraint and seclusion for all people with disabilities to which the Olmstead Plan applies with a single emergency exception for the use of limited manual restraint consistent with the Jensen Settlement Agreement." Doc. 493, p. 5.

The Court specifically noted its consideration of Plaintiffs' position before approving this Plan. Doc. 510, p. 6 ("[T]he Plaintiff Class objects to the revised *Olmstead* Plan to the extent that it fails to expressly prohibit the use of restraint and seclusion for individuals with disabilities with a single emergency exception."). Having considered the parties' respective positions on this subject, the Court "approve[d] the [Plan] over the objections of the Plaintiff Class," holding that:

[3] In response to an earlier Plan version, Plaintiffs said: "As we have also repeatedly stated, 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." Doc. 276, pp. 3-4.

> The *Olmstead* Plan contains sufficient and reasonable measurable goals intended to eliminate the use of restraint and seclusion in compliance with the parties' Settlement Agreement. These goals include specific numeric goals for reducing the use of restrictive procedures by disability service providers, reducing the number of Behavior Intervention Reporting Form reports of restrictive procedures, completely prohibiting the use of mechanical restraint by disability service providers *with limited exceptions to prevent serious injury* . . . . these goals reflect the State's desire to reasonably reduce the use of restraint and seclusion while avoiding "serious unintended consequences" that may result from an immediate and complete prohibition. The Court finds this approach reasonable under the circumstances.

Id. at 9-10 (emphasis added) (internal citations omitted). Overall, the Court concluded the Plan "substantially complies with the comprehensive standards and requirements set forth in . . . *Olmstead* [], and in prior orders of this Court." *Id*. at 7.

The approved Plan contained three goals specifying that mechanical restraint would still be used in some circumstances "in services licensed under Minn. Statute 245D, or within the scope of Minn. Rule, Part 9544." Doc. 486-1, pp. 29-30, 75-82 (Positive Supports Goals One, Two, and Three). Defendants have reported on these goals numerous times in the nearly four intervening years. *See infra* at 10-11 None of the subsequent Plan amendments altered the content of these measurable goals, with the exception of an edit to Positive Supports Goal Three in the amendment filed on March 29, 2019. *See* Doc. 616-1, pp. 85-86 (February 28, 2017 amendment); Doc. 681-1, pp. 81-82 (March 29, 2018 amendment); Doc. 725-2, pp. 83-84 (March 29, 2019 amendment).

III. DEFENDANTS' USE OF RESTRAINT AT THE FORENSIC MENTAL HEALTH PROGRAM ("FMHP")[4] AND ANOKA METRO REGIONAL TREATMENT CENTER ("AMRTC").

DHS' Direct Care and Treatment division ("DCT") operates facilities providing direct care and treatment to individuals with mental illness, developmental disabilities, and substance use disorders. Stevens Decl., ¶ 2. Included in DCT's operations are FMHP and AMRTC. *Id*. at ¶¶ 2-3.

FMHP is licensed by DHS as a supervised living facility to provide care and treatment for individuals civilly committed for an indeterminate time as mentally ill and dangerous, as well as other individuals who require higher security or who have been civilly committed after being found incompetent in a criminal case. *Id*. at ¶ 3. AMRTC is licensed by the Minnesota Department of Health as a psychiatric hospital and serves civilly committed individuals from across the state, and is not licensed by DHS. *Id*. at ¶ 4. Patients admitted to AMRTC and FMHP often exhibit more severe and dangerous behaviors, increased frequency of dangerous behavior or increased duration of dangerous behaviors than patients in community hospitals and other community settings. *Id*. at ¶ 12.

Use of restraint and seclusion at both facilities is regulated by rules promulgated by the state licensing agencies referenced above. *Id*. at ¶ 4-6; Stevens Decl. Ex. C, D. In addition, use of restraint and seclusion is regulated by the Centers for Medicare and Medicaid Services ("CMS") in the case of AMRTC, and the Joint Commission in the case of FMHP. Both of these bodies also have standards governing how mechanical

[4] Formerly the Minnesota Security Hospital, or MSH. Declaration of KyleeAnn Stevens ("Stevens Decl."), ¶ 3.

restraint and seclusion may be used. Stevens Decl., ¶ 6; Stevens Decl. Ex. A, B. These bodies engage in oversight and monitoring of implementation of these standards, and AMRTC and FMHP are in compliance with these standards. Stevens Decl., ¶ 6.

These regulatory structures prohibit restraint of any kind within AMRTC or FMHP, including manual, mechanical restraint or seclusion, except when necessary to protect the immediate physical safety of the patient, staff or others. *Id*. at ¶ 7. In addition, internal DCT policies specify measures for employing restraints in ways that minimize the risk of injury to the patient and others when it does become necessary to use restraint, and also permit use of restraint only in the presence of behavior that is likely to cause harm to self or others in the immediate future. *Id*. at ¶ 8; Stevens Decl. Ex. E, F. For example, if a patient begins punching a staff or another patient in the head or face, DCT policies permit employment of manual or mechanical means to immobilize or reduce the patient's ability to move his or her arms, legs, body, or head freely.[5] Stevens Decl., ¶ 8.

DCT staff, to the extent possible, work to reduce or ideally eliminate the need for the use of restraint or seclusion by attempting to address the individual issues that may cause behaviors posing an imminent risk of physical injury to self, staff, or others. *Id*. at ¶ 13. DCT policies require all staff providing direct care to be trained on restraint interventions. *Id*. at ¶ 9. In addition, staff are trained on interventions and methods to de-escalate behavioral situations before the behavior poses an imminent risk of harm, and

[5] Within the past five years, for example, two staff at FMHP have received serious and debilitating head injuries as a result of patient aggression. Stevens Decl., ¶ 8.

are required to use the least restrictive means necessary to protect the patient and others for the shortest period of time necessary. *Id*. This includes protecting both the patient being restrained and the staff implementing the restraint from potential injury from the restraint itself. *Id*.

The type of restraint that is the least restrictive and safest to use is assessed on a case-by-case basis and depends on unique characteristics of the patient and behavioral incident. *Id*. at ¶ 10. After a manual restraint is used, staff evaluate whether the patient no longer poses a risk of harm, or if the manual restraint is insufficient to protect the safety of the patient or others from imminent risk of harm. *Id*. Manual restraint is sometimes not the optimal intervention. *Id*. For example, in some situations, manual restraint may pose a potential for musculoskeletal or internal injury to both the patient and staff, if the patient does not calm, if the restraint intensifies the patient's physical struggle, or if the continued use of manual restraint requires additional staff. *Id*.

In addition, use of manual restraint for extended periods of time poses significant safety threats to the patient and staff, including musculoskeletal injuries, trauma and respiratory, renal or cardiovascular injuries. *Id*. Moreover, patients with a history of physical or sexual trauma may find manual restraint re-traumatizing by triggering memories of times when another person restrained their freedom in order to cause physical harm. *Id*. Accordingly, individual-specific admissions and other treatment documents, which are continually reviewed and updated as clinically appropriate, describe specific characteristics of a patient that are relevant for determining whether

manual restraint should be continued or whether mechanical restraint or seclusion is a safer or medically indicated alternative. *Id*.

The applicable restraint policies (Stevens Decl., Ex. E, F) are intended to protect patient health and prevent overuse and abuse of restraint. In addition to other items, they require medical review and authorization of the restraint as well as continuous monitoring of the patient and regular checks on patient health during the restraint. *Id*. at ¶ 11. The policies also require review and debriefing after the event, with both staff and the patient, in order to minimize future use of restraint or seclusion, as well as notification of the patient's guardian. *Id*. Staff must end the restraint or seclusion as soon as the patient no longer poses an imminent risk of harm. *Id*. The use of restraint and seclusion described above represents best practices nationally for similar facilities. *Id*. at ¶ 6.

Typically, a patient faces the most severe behavioral challenges when they are first admitted to AMRTC or FMHP. *Id*. at ¶ 13. Depending on the patient, it takes varying amounts of time for a patient's psychiatric symptoms to stabilize, for medical practitioners to prescribe and adjust medications, for the patient to become more trusting of staff and adapt to the new environment, and for the staff to determine what the best strategies are to de-escalate the patient's dangerous behavior. *Id*. In general, over time as the patient stabilizes, or as their mental health symptoms cycle, the need for use of restraint and seclusion to protect the safety of the patient or others decreases. *Id*.

IV. THE PRECEDING THREE YEARS OF COMPLIANCE EVALUATION.

Since the Monitor's November 29, 2016 Compliance Report (Doc. 604), the Court has received numerous compliance reports related to the CPA, and numerous progress

reports and amendments related to the Plan, in addition to the more recent Summary Report. *See* Doc. 609-1, 614-1, 616-2, 617-1, 621, 636-1, 643, 649-1, 671-1, 673-1, 676, 680-1, 681-2, 683, 688-1, 698-1, 700, 705-1, 706-1, 708-1, 710, 716-23, 725-1, 736-1, 758-1. During this period of time, the Court has on a number of occasions heard from the parties about what steps remain and stated it would determine what steps remain, but has not done so. Doc. 612, p. 3 (stating, after the January 5, 2017 Status Conference, that it would "determine the extent to which any follow-up monitoring or DHS verification is needed.") Doc. 638, pp. 23-24 (directing the parties, on June 28, 2017, to "meet and confer to discuss the essential steps that remain in Defendants' implementation of the Agreement before the Court can equitably terminate its jurisdiction over this matter."). Doc. 652, pp. 2-3 (on September 13, 2017, directing the parties to meet and confer about "the essential steps that remain in Defendants' implementation of the agreement," and to file letters setting forth their positions, to "help facilitate 'the essential steps that remain'"); Doc. 691, pp. 2, 5-6 (on July 10, 2018, "acknowledg[ing] the importance" of "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," and ordering the parties to address those subjects); Doc. 693, p. 3 (stating on July 19, 2018, that "[f]ollowing the Court's receipt of the reports identified above, the Court will issue an order establishing next steps. This order will also establish how the Court intends to address the applicable legal standard to determine the circumstances under which it will end its involvement in this matter."); Doc. 707 (on January 4, 2019, stating the Court wanted the Summary Report in order to "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," and not addressing the applicable legal standard or which specific actions remain outstanding); Doc. 733 (on April 15, 2019, again "acknowledg[ing] the importance" of "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," and again ordering the parties to submit their positions on those issues); Doc. 737, pp. 38-41 (requiring additional information and positions statements, including the instant brief), 37 ("Defendants' request that the Court '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' . . . is denied" as "premature.").

ARGUMENT

"A settlement agreement is essentially a contract, subject to contractual rules of interpretation and enforcement." *Goddard, Inc. v. Henry's Foods, Inc.*, 291 F. Supp. 2d 1021, 1028 (D. Minn. 2003) (citing *Ridgecliffe Second Association v. Boutelle*, 2001 WL 1182404, at *2 (Minn. Ct. App., Oct. 9, 2001)); *see also Sheng v. Starkey Labs., Inc.*, 53 F.3d 192, 194 (8th Cir. 1995) ("Settlement agreements are governed by basic principles of contract law."). Because "[c]ontract interpretation . . . is ordinarily a matter of state law," *Great Lakes Commc'n Corp. v. AT&T Corp.*, 124 F. Supp. 3d 824, 838 (N.D. Iowa 2015) (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989), a federal settlement agreement is governed by

the contract law of the forum state. *American Prairie Constr. Co. v. Hoich*, 594 F.3d 1015, 1023 (8th Cir.2010).

"[W]here the language of the contract is clear and unambiguous, there is no opportunity for interpretation or construction." *Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1436 (8th Cir. 1995); *see also Storms, Inc. v. Mathy Const. Co.*, 883 N.W.2d 772, 776 (Minn. 2016) ("When a contractual provision is unambiguous, we do not 'rewrite, modify, or limit its effect by a strained construction.'") (quoting *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010)). Minnesota courts "construe a contract as a whole and attempt to harmonize all clauses of the contract." *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990). "Phrases and sentences cannot be dissected and read separately and 'out of context with the entire agreement.'" *River Valley Truck Ctr., Inc. v. Interstate Companies, Inc.*, 704 N.W.2d 154, 163 (Minn. 2005) (quoting *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2d 121, 124 (Minn. 1973)). "Because of the presumption that the parties intended the language used to have effect, [Minnesota courts] attempt to avoid an interpretation of the contract that would render a provision meaningless." *Chergosky*, 463 N.W.2d at 526.

I. THE SETTLEMENT AGREEMENT AND CPA DO NOT REQUIRE DEFENDANTS TO PROHIBIT MECHANICAL RESTRAINT BEYOND THE "FACILITY," AS DEFINED IN THOSE DOCUMENTS.

A. The Plain Language Of Part V Of The Settlement Agreement, And The CPA's Corresponding ECs, Unambiguously Restrict Restraint Use Only At The "Facility."

As a threshold matter, the plain language of the Settlement Agreement and CPA apply their restraint provisions only to the "Facility," not any facility or program licensed by Defendants.

First, the Settlement Agreement defines "Facility" as "the Minnesota Extended Treatment Options ('METO') program, its Cambridge, Minnesota 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. It also defines "Resident" as "a person residing at the Facility." *Id*. Finally, the Settlement Agreement also defines its scope, stating that "[t]he scope of DHS obligations regarding people with developmental disabilities in this Agreement pertain only to the residents of the Facility, with the exception of the provisions of Recitals, Paragraph 7, and Section X, 'Systemwide Improvements.'" *Id*. at 5-6.

Section V – entitled "Prohibited Techniques," and which is not one of the exceptions to the Facility-specific scope established above – states (in Subpart V.A) that:

> Except as provided in subpart V.B., below, the State and DHS shall immediately and permanently discontinue the use of mechanical restraint (including metal law enforcement-type handcuffs and leg hobbles, cable tie cuffs, PlastiCuffs, FlexiCuffs, soft cuffs, posey cuffs, and any other mechanical means to restrain), manual restraint, prone restraint, chemical restraint, seclusion, and the use of painful techniques to induce changes in behavior through punishment of *residents* with developmental disabilities.

> Medical restraint, and psychotropic and/or neuroleptic medications shall not be administered to *residents* for punishment, in lieu of adequate and appropriate habilitation, skills training and behavior supports plans, for the convenience of staff and/or as a form of behavior modification.

Id. at 6 (emphasis added). Subpart V.B then states that, [n]otwithstanding subpart V.A above, the Facility's policy . . . provides that certain specified manual and mechanical restraints shall only be used in the event of an emergency." Doc. 136-1, p. 7. Accordingly, Section V of the Settlement Agreement applies restraint prohibition only to the Facility.

Similarly, in the CPA, "'Facility' and 'Facilities' means MSHS-Cambridge, the MSOCS East Central Home established under the Settlement Agreement, and the treatment homes established (or to be established) under this [CPA]." Doc. 283, p. 2. The ECs restricting restraint use then explicitly set forth requirements applicable to the "Facility" only. *Id*. at 5-7. Accordingly, the scope of the Settlement Agreement and CPA's provisions relating to prohibited restraints unambiguously apply only to the Facility, not to other locations like FMHP.[6]

[6] The parties appear to agree about this. Plaintiffs acknowledge that Subpart V.A of the Settlement Agreement "governed the 'facility' defined in the settlement," and go on to rely on the separate "System Wide Improvements" subparts of the Settlement Agreement and CPA. Doc. 753, pp. 4. Defendants address their compliance with these subparts' requirements below.

B. The Terms Of The Settlement Agreement And CPA Relating To "System Wide Improvements" Do Not Require The Positive Supports Rule To Apply Section V's "Prohibited Techniques" Terms Outside The "Facility."

Further, and contrary to Plaintiffs' sole argument about the scope of restraint prohibition (*see* Doc. 753, pp. 4-15), the "System Wide Improvements" sections of the Settlement Agreement and CPA do not require the Positive Supports Rule to apply the provisions of Section V outside the "Facility."

i. The Settlement Agreement.

The pertinent portion of the Settlement Agreement is Subpart X.C, entitled "Rule 40." It states in its entirety:

> 1. Within sixty (60) days from the date of the Order approving this Agreement, the Department shall organize and convene a Rule 40 (Minn. R. 9525.2700-.2810) Advisory Committee ("Committee") comprised of stakeholders, including parents, independent experts, DHS representatives, the Ombudsman for Mental Health and Developmental Disabilities, the Minnesota Governor's Council on Developmental Disabilities, Minnesota Disability Law Center, Plaintiffs' counsel and others as agreed upon by the parties, to study, review, and advise the Department on how to modernize Rule 40 to reflect current best practices, including, but not limited to the use of positive and social behavioral supports, and the development of placement plans consistent with the principle of the "most integrated setting" and "person centered planning, and development of an 'Olmstead Plan'" consistent with the U.S. Supreme Court's decision in Olmstead v. L.C., 527 U.S. 582 (1999). The Committee's review of best practices shall include the Arizona Department of Economic Security, Division of Developmental Disabilities, Policy and Procedures Manual, Policy 1600 Managing Inappropriate Behaviors.
>
> 2. Within sixty (60) days from the date of the Court's approval of this Agreement, a public notice of intent to undertake administrative rule making will be issued.
>
> 3. DHS will not seek a waiver of Rule 40 for the Facility.

As to the first two paragraphs above, the Rule 40 Advisory Committee process and promulgation of the PSR are set forth in detail above. *See supra* at 3-4. As to the third paragraph above, Defendants have not sought a waiver of Rule 40 for the Facility. *See* Doc. 710, p. 161. Plaintiffs set forth no evidence or argument that Defendants have violated any of these terms.

ii. The CPA.

As to the CPA, Section X.C of that documents sets forth six ECs (99-104) extrapolated from the Settlement Agreement's Subpart X.C (discussed above). *See* Doc. 283, pp. 27 (referring the reader to "Part [II] of this [CPA]"), 31-33 (Part II of the CPA, entitled "Modernization of Rule 40.").

First, it is unclear which of these ECs, if any, Plaintiffs actually believe Defendants have failed to comply with; aside from an oblique reference to EC 103, they do not cite any of them or include any argument that an EC's terms have been violated. Plaintiffs instead primarily note as a general matter that ECs in the CPA are enforceable, Doc. 753, p. 5, and then spend more than five pages quoting a variety of prior orders regarding the role of the Monitor as the Settlement Agreement's External Reviewer. *Id*. at 7-12. Given Plaintiffs' view that the Monitor is to determine "substantial compliance," they apparently agree that Defendants have complied with ECs 100, 101, and 102, with

which the Monitor found compliance on November 29, 2016. Doc. 604, pp. 12, 125-29.[7] Notably, Defendants' compliance with EC 102 means the proposed rule was "consistent with and incorporate[d], to the extent possible in rule, the Rule 40 Advisory Committee's consensus recommendations," that during the rule-making process, Defendants "advocate[d] that the final rule be fully consistent with the Rule 40 Advisory Committee's recommendations," and that Defendants timely shared a draft of the proposed rule with Plaintiffs, the Monitor, the Consultants with an opportunity to discuss it in conference prior to public notice, as well as timely providing those entities with the intended final content. Doc. 283, p. 33.

Accordingly, a dispute potentially remains only as to ECs 99, 103 and 104. Defendants have complied with each of these ECs.[8]

a. EC 99.

EC 99 states:

> The scope of the Rule 40 modernization shall include all individuals with developmental disabilities served in programs, settings and services licensed by the Department, regardless of the setting in which they live or the services which they receive. As stated in the Settlement Agreement, the modernization of Rule 40 which will be adopted under this [CPA] shall reflect current best practices, including, but not limited to the use of positive and social behavioral supports, and the development of placement plans consistent with the principle of the "most integrated setting" and the

[7] In any event, Defendants have complied with these ECs as explained in the Summary Report, Doc. 710, pp. 175-77, 224, and Plaintiffs present no evidence or argument to the contrary. Doc. 710.

[8] Because EC 103 relates primarily to the Court's request for briefing on "whether the Agreement provisions related to Olmstead require incorporation of additional or modified goals relating to prohibited restraints," Doc. 737, p. 35, Defendants discuss compliance with that EC in a separate section below. *See infra* at 24-28.

> "person centered planning, and development of an 'Olmstead Plan'" consistent with the U.S. Supreme Court's decision in Olmstead v. L.C., 527 U.S. 582 (1999).

As to EC 99's first requirement, "[t]he scope of Rule 40 modernization" – that is, the PSR – applies to "all individuals with developmental disabilities served in programs, settings and services licensed by the Department, regardless of the setting in which they live or the services which they receive." Minn. R. 9544.0010, Subps. 1, 2 (the PSR applies to "providers of home and community-based services to persons with a disability or persons age 65 and older governed by Minnesota Statutes, chapter 245D," and to "other licensed providers and in other settings licensed by the commissioner under Minnesota Statutes, chapter 245A, for services to persons with a developmental disability or related condition.").[9]

Second, EC 99 requires the PSR to "reflect current best practices," but sets forth no required content other than that current best practices include "the use of positive and social behavioral supports" and the development of *Olmstead*-consistent placement plans. The PSR contains both. *E.g.*, Minn. R. 9544.0030 (requiring individualized development and implementation of "positive support strategies," including person-centered planning and integrated, inclusive service delivery). EC 99 does not require the PSR to contain any other specific content, including prohibition of mechanical restraint outside of the Facility, unless reflective of best practices.

[9] Notably, while there has been some discussion of restraint use at AMRTC, Defendants do not license that facility. Stevens Decl., ¶ 4.

As discussed above, *see supra* at 3-4, the Advisory Committee Recommendations did not establish complete prohibition of mechanical restraint as a best practice. Plaintiffs present no argument or evidence to the contrary, or that any other source established complete prohibition of mechanical restraint as a "current best practice" that the PSR was required to "reflect." *See* Doc. 753, pp. 1-15.[10]

Nor would complete prohibition of mechanical restraint constitute a best practice. Instead – using FMHP and AMRTC as examples – restraint, sometimes including mechanical restraint, is consistent with best practices when used to prevent risk of physical injury to self, staff, or others. *See supra* at 10. Reliance solely on emergency use of manual restraint would sometimes, depending on the individual and situation, create a greater risk of harm to the individual, staff, or others relative to mechanical restraint. *Id*. at 9. As noted above, use of manual restraint for extended periods of time poses significant safety threats to the patient and staff, including musculoskeletal injuries, trauma and respiratory, renal or cardiovascular injuries. *Id*. It may otherwise be therapeutically contraindicated in some situations, for example with patients with a history of physical or sexual trauma may find manual restraint re-traumatizing by triggering memories of times when another person restrained their freedom in order to cause physical harm. *Id*. at 9.

Overall, Plaintiffs simply make no argument Defendant failed to comply with the plain language of EC 99. Defendants have complied with the unambiguous language of

[10] At best, it appears Plaintiffs simply quote their counsel's earlier expression of an opinion to this effect. Doc. 753, p. 14 n.3.

that EC, and the Court should so hold, regardless of whether Defendants must show substantial compliance or Plaintiffs must show substantial non-compliance. *Wessels,* 65 F.3d at 1436 ("[W]here the language of the contract is clear and unambiguous, there is no opportunity for interpretation or construction.").

Even if Plaintiffs had demonstrated some ambiguity in EC 99's requirements, they have no evidence that the parties intended Rule 40 modernization to completely prohibit mechanical restraint outside the Facility, as would be required. *Winthrop Res. Corp. v. Eaton Hydraulics, Inc.*, 361 F.3d 465, 470 (8th Cir. 2004) (citing *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 17 (Minn.1982) ("However, if a contract term is ambiguous, extrinsic evidence can be considered by the trier of fact to help it determine the parties' intent."). Indeed, Plaintiffs take exactly the opposite view: that it was perfectly clear the PSR recommended by the Advisory Committee and promulgated by Defendants *would not* completely prohibit mechanical restraint, and that Plaintiffs vociferously objected. *See, e.g.*, Advisory Committee Recommendations, p. 13 (recounting Plaintiffs' objections to the Advisory Committee's conclusions, based on Plaintiffs' contrary opinion that the restraint prohibition applicable *to the Facility* should be adopted as best practice); Doc. 511, pp. 1-3 (detailing Plaintiffs' awareness that the Advisory Committee process resulted in a PSR not completely prohibiting mechanical restraint).[11] Plaintiffs

[11] Plaintiffs' "amended" brief provides about five additional pages of communications further demonstrating that, far from exhibiting an intent to completely prohibit mechanical restraints on which they later reneged, a DHS employee communicated to Plaintiffs and the Monitor on (as one example) January 7, 2014 that Attachment A to the Settlement Agreement was limited in scope. Doc. 756, pp. 18-21. Other additions in that (Footnote Continued on Next Page)

accordingly concede that Defendants' subsequent conduct shows they did not intend the Settlement Agreement or CPA to result in the complete prohibition of mechanical restraint, which is dispositive even if either were ambiguous. *Fredrich v. Indep. Sch. Dist. No. 720*, 465 N.W.2d 692, 695 (Minn. Ct. App. 1991) ("To determine intent of the parties, the court looks at surrounding circumstances and the parties' own subsequent conduct.").

At best, Plaintiffs rely – again, without first addressing the actual words of the Settlement Agreement or CPA – on a few extra-contractual statements. Plaintiffs quote a document entitled "DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions" ("SONAR"),[12] which states that "the Department also agreed more broadly in the [CPA] to prohibit restraint and seclusion in all licensed facilities and settings, consistent with the above-noted legislative directive in Minnesota Statutes, section 245.8251." SONAR, p. 40. The final clause qualifying this sentence is important, as demonstrated by the discussion immediately preceding this quote:

> *This subpart fulfills the statutory directive in Minnesota Statutes, section 245.8251*, to ensure that the prohibitions on restrictive interventions contained in Minnesota Statutes, chapter 245D, apply to all Department-licensed services and facilities. The Department therefore incorporates Minnesota Statutes, section 245D.06, subdivision 5 . . . . a key section that

(Footnote Continued from Previous Page)
brief further demonstrate that Plaintiffs have known for years that Defendants did not intend for the PSR to completely ban mechanical restraint following the completion of the Rule 40 modernization process in the CPA, and that Plaintiffs repeatedly objected and were heard on the subject. *Id*. at 16-17, 22-24.

[12] Available at https://www.leg.state.mn.us/archive/sonar/SONAR-04213.pdf

> establishes the prohibited procedures . . . . *[Minn. Stat. § 245D.06, subd. 5] also qualifies the list by stating that these techniques are prohibited "when used as a substitute for adequate staffing, for a behavioral or therapeutic program to reduce or eliminate behavior, as punishment, or for staff convenience."* The qualification allows for the possibility of the rare, unforeseeable circumstance in which a practice that is ordinarily unacceptable may have a momentary, acceptable purpose. *Therefore, it is when the practices are used for the prohibited reasons that the practice is prohibited.* The inclusion of the phrase "for a behavioral or therapeutic program to reduce or eliminate behavior" demonstrates that planned, programmatic use of the prohibited practices is not permitted.

SONAR, pp. 39-40. Even if the SONAR could somehow have amended the Settlement Agreement or CPA, it obviously does not express any intent to completely prohibit mechanical restraint. Nor do the other documents Plaintiffs cite state that Defendants either believed the Settlement Agreement or CPA required the complete prohibition of mechanical restraint, or that Defendants otherwise intended the PSR or Plan to mandate such a complete prohibition. Doc. 503, pp. 1-2 (then-Commissioner Jesson's August 27, 2015 letter, explicitly discussing that the Plan's measurable goals continue to allow mechanical restraint under limited circumstances); DHS Respect and Dignity Practices Statement, pp. 1-2[13] (stating it is a "goal" to "prohibit use of seclusion and restraints for all programs and services licensed or certified by the department," but noting that "legal and regulatory requirements *limit*[] the use of seclusion and restraint," that Rule 40

[13] Available at https://mn.gov/mnddc/meto_settlement/documents/DHS-Respect-Dignity-Practices-7-2013.pdf.

modernization would "prohibit *programmatic* use of seclusion and restraints," and outlining emergency restraint procedures) (emphasis added).[14]

In sum, Defendants have complied with the unambiguous language of the EC 99, which does not require complete prohibition of mechanical restraints. Even if this EC were ambiguous, however, Defendant's subsequent conduct on the subject clearly demonstrated no intent to agree to complete prohibition.

b. EC 104.

EC 104 states that "[t]he Department of Human Services shall implement the Adopted Rule and take other steps to implement the recommendations of the Rule 40 Advisory Committee." Doc. 283, p. 33. Plaintiffs do not make any argument about this EC. Defendants have complied with this EC as explained in the Summary Report (*see* Doc. 710, pp. 224-25). *E.g.*, Doc. 710, pp. 224-25. Further, as already discussed above, the Advisory Committee did not recommend complete prohibition of mechanical restraint, meaning there can be no such recommendation to implement.

[14] Plaintiffs also appear to rely on the statement in the "Recitals" section of the Settlement Agreement that "[t]he State also agrees that its goal is to utilize the Rule 40 Committee and Olmstead Committee process described in this Agreement to extend the application of the provisions in this Agreement to all state operated locations serving people with developmental disabilities with severe behavioral problems or other conditions that would qualify for admission to METO, its Cambridge, Minnesota successor, or the two new adult foster care transitional homes," but do not mention that the plain language of this provision states a goal, rather than binding Defendants to accomplish that goal as to any particular term of the Settlement Agreement. *Compare* Doc. 136-1, p. 3 *with* Doc. 753, pp. 4-5. Plaintiffs also claim this provision appears in the "System Wide Improvements" section of the Settlement Agreement, when in fact it appears in the "Recitals." This provision does not appear in the CPA.

II. THERE ARE NO ISSUES TO BE RESOLVED BEFORE THE COURT CONSIDERS THE MARCH 2019 PLAN REVISION.

The Court's June 17, 2019 Order states that "the Court must determine whether the Agreement provisions related to *Olmstead* require incorporation of additional or modified goals relating to prohibited restraints," and notes EC 103's statement that elements in the Advisory Committee Recommendations that stakeholders believe "have not been properly addressed, or have not adequately or properly been addressed in the [PSR] . . . shall be considered within the process for modifications of the [Plan]," with unresolved issues to be presented to the Court and resolved by the Court. Doc. 737, p. 35. The Court then states it "must determine whether there are issues to be resolved by the Court with respect to unaddressed elements in the [PSR]," and directs the parties to "determine whether there are issues to be resolved before the Court considers the [Plan] March 2019 Revision." *Id*. at 36. There are no such issues, for the reasons discussed below.

A. Defendants Complied With The Plain Language Of EC 103.

First, Defendants complied with EC 103, which sets forth a time-limited procedure by which unresolved issues relating to the PSR could be routed through the *Olmstead* amendment process, and potentially to the Court. That EC states:

> Within thirty (30) days of the 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 Council 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. The State shall address these suggestions through 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. 283, p. 33. EC 103 therefore sets forth the following procedure:

1. The listed stakeholders had 30 days from the promulgation date of the PSR to suggest to Defendants or the *Olmstead* Implementation Office that some element(s) of the Advisory Committee Recommendations had not been addressed adequately, properly, or at all in the PSR.[15]

2. In the event of such a suggestion, the elements identified would be considered by the *Olmstead* Subcabinet and the *Olmstead* Implementation Office within the process for modifications of the Plan.

3. The listed stakeholders could then present remaining unresolved issues to the Court for resolution.

As to the first step above, and as described previously, Defendants met with the Consultants about this subject matter, and after working together Defendants and the Consultants agreed there were no elements of the Advisory Committee Recommendations not adequately addressed by the PSR that would be appropriate for consideration in the Plan amendment process. *See supra* at 3-4. Accordingly, this dialogue did not proceed to the second step outlined above. Plaintiffs, for their part, present no evidence that they suggested to Defendants, between August 31 and September 30, 2015, that some element of the Advisory Committee Recommendations had not been sufficiently addressed by the PSR and submitted any such issue to the

[15] The PSR took effect on August 31, 2015, *see* Minn. Rule. 9544.0005, and 30 days later was September 30, 2015.

Olmstead Subcabinet and Olmstead Implementation Office for consideration in the Plan amendment process. Accordingly, there are no unresolved issues for the Court to review.

B. Plaintiffs Do Not Identify "Elements In The [Advisory Committee Recommendations] Which Have Not Been Addressed, Or Have Not Adequately Or Properly Been Addressed In The [PSR]."

Second, even if EC 103 allowed Plaintiffs to raise PSR-related issues directly to the Court years after the fact, Plaintiffs' brief does not ask the Court to resolve any unaddressed elements of the Advisory Committee Recommendations as required by EC 103, and in fact does not address the Court's request relating to EC 103 at all. Doc. 753, pp. 1-15. This makes sense, given that Plaintiffs vehemently disagreed with the Advisory Committee's decision not to recommend the complete prohibition of mechanical restraint.

Even ignoring the time-limited nature of EC 103's process, Plaintiffs also do not ask for any additional or modified Plan goals relating to prohibited restraints, or comment on any elements of the Plan's March 2019 Revision. *Id*. Indeed, it is clear from their brief (and as discussed above, *see supra* at 18-23) that Plaintiffs simply believe – incorrectly – the Settlement Agreement and CPA required promulgation of a PSR completely prohibiting mechanical restraint, not that such a prohibition was to be alternatively accomplished through the Plan. For these additional reasons, there are no unresolved issues for the Court to review.

C. In Any Event, Plaintiffs Cannot Relitigate Whether The Plan Should Completely Prohibit Mechanical Restraints.

Even if Plaintiffs had complied with EC 103 and included argument responsive to the Court's request in the June 17, 2019 Order, they would be barred from re-arguing that the Plan should completely prohibit mechanical restraints. As discussed above, Plaintiffs repeatedly and extensively argued during the Plan approval process that the Court should not approve any Plan that did not completely prohibit mechanical restraints. *See supra* at 20-23. The Court considered these arguments and rejected them in favor of the Plan's allowance of limited use of mechanical restraint. *Id.*; Doc. 510, pp. 6, 9-10.

This is the law of the case, and Plaintiff cannot relitigate it. "The law of the case is a doctrine that provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Morris v. Am. Nat. Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)). "The doctrine prevents the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Little Earth of the United Tribes, Inc. v. United States Dep't of Housing & Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir.1986). Plaintiffs concerns about the approved Plan were considered by the Court and rejected, and Plaintiffs chose not to appeal the Court's Plan approval. Consequently, this issue has been decided for four years, during which Defendants have worked to meet the Plan's Positive Supports Goals, submitted numerous reports on those goals, and submitted three Plan amendments. For this reason and the reasons above, there are no outstanding

"issues related to the [PSR] that must be resolved before the Court considers the [Plan] March 2019 Revision." Doc. 737, p. 40.

III. CONSISTENT WITH THE SETTLEMENT AGREEMENT, THE COURT SHOULD RESOLVE THESE DISPUTES BY DETERMINING WHETHER PLAINTIFFS HAVE SHOWN A PATTERN AND PRACTICE OF SUBSTANTIAL NON-COMPLIANCE.

The Settlement Agreement's "Dismissal and Retention of Jurisdiction" places on Plaintiffs the burden to demonstrate "a pattern and practice of substantial non-compliance with Attachment A" in order to trigger an additional year of jurisdiction as of right. Doc. 136-1, p. 39. This section otherwise specifies that it is Plaintiffs' responsibility to bring enforcement proceedings, requiring them to provide notice "of any enforcement proceeding," including "the section of the [Settlement Agreement] subject to the enforcement action." *Id*. Accordingly, Plaintiffs have the burden to show "a pattern and practice of substantial non-compliance" in order for the Court to conclude that Defendants have violated the Settlement Agreement or CPA. There is nothing at all surprising about a plaintiff having the burden to prove breach of contract. *Brown v. Farnham*, 58 Minn. 499, 501, 60 N.W. 344, 345 (1894) ("In an action for breach of contract the burden is on the plaintiff to prove the breach, unless the same is admitted by the pleadings."); *Border Foods, Inc. v. Advantage Int'l*, No. C0-01-2166, 2002 WL 1425371, at *2 (Minn. Ct. App. July 2, 2002) (citing D.*H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, New Jersey*, 535 N.W.2d 671, 675 (Minn. Ct. App.1995), *review denied* (Minn. Oct. 18, 1995) ("In a breach of contract action, the plaintiff has the burden to prove breach and that damages arose from the breach.").

In arguing to the contrary, Plaintiffs quote the Settlement Agreement's provision requiring the External Reviewer to periodically "issue a written report informing the Department whether the Facility is in substantial compliance with this Agreement and the policies incorporated herein." Doc. 136-1, p. 12. This is the only occurrence of the term "substantial compliance" in the Settlement Agreement. *See also* Doc. 283, p. 14 (CPA EC 43). Nothing about this provision places any burden on Defendants or relates to enforcement actions or length of jurisdiction in any way. It simply functions to provide the parties with the External Reviewer's current assessment of compliance.

Plaintiffs otherwise simply quote a number of subsequent statements by the Court or the Monitor. Doc. 753, pp. 2-4, 8-10. Some of these unremarkably note that the Monitor, in performing the External Reviewer function, was evaluating substantial compliance. While the Monitor and the Court, in the other statements Plaintiffs cite, have stated that Defendants must show substantial compliance, Plaintiffs cite no authority that the Court or the Monitor may somehow unilaterally amend the Settlement Agreement by making such statements, and there is none in Minnesota law, in the CPA, or in the Settlement Agreement, which addresses enforcement and "constitutes a single, integrated, written contract expressing the entire agreement of the parties relative to the subject matter hereof." Doc. 136-1, p. 42.

The Court should hold that Plaintiffs have the burden to demonstrate Defendants have engaged in a pattern and practice of substantial non-compliance related to the issues in this brief, and any other compliance issues in this case.

CONCLUSION

In light of the foregoing, the Court should hold that Plaintiffs have the burden to show a pattern and practice of substantial non-compliance with the Settlement Agreement and CPA, that the Settlement Agreement and CPA do not require the complete prohibition of mechanical restraint at all Department-licensed facilities and settings, and that there are no unresolved issues related to the PSR.

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