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September 3, 2016

**Via ECF With Permission**

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

Re: Jensen v. Minnesota Department of Human Services (09-CV-1775 DWF/BRT)

Dear Judge Frank:

We submit this letter pursuant to the Court's Order ([Doc. 761](#)) on the Settlement Class amended position ([Doc. 756](#)) regarding items 3 and 6 of the Court's Order ([Doc. 737](#)). After filing the original position ([Doc. 753](#)) we discovered archived information that we felt provided additional context helpful to the Court's disposition of the issues. On reflection, we should have sought permission to file the amendment and apologize for not doing so.

Our amended position addresses Motions to Enforce the Agreement, including a Motion to Enforce the parties had discussed with the Court at a March 25, 2013, status conference resulting in the Court's Order (amended) ([Doc. 212](#)) providing additional detailed authorization for the Court Monitor's review of whether DHS has substantially complied with the Agreement, and DHS payments of negotiated attorneys' fees to Class Counsel for "issues of concern and non-compliance" raised in the motions. ([Doc. 756](#)) at 3; Order ([Doc. 209](#)) (\$85,000 in attorneys' fees); Order ([Doc. 526](#)) (\$50,000 in attorneys' fees); Order ([Doc. 212](#)) (rejecting parties positions on Monitor's role and reaffirming Monitor as External Reviewer with authority to determine "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."). Our amended position also includes emails between the Court Monitor and parties provided as additional context for the Monitor's process of addressing and reporting on the state-wide application of restrictions in the Agreement. ([Doc. 756](#)) at 16; *see* Monitor Compliance Report ([Doc. 347](#)) ("The Settlement Agreement in this litigation forbids the use of restraints and other aversive practices on people with developmental disabilities (with the exception of manual restraint) at the MSHS Cambridge and all its successor facilities. In

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The Honorable Donovan W. Frank  
September 3, 2019  
Page 2

addition, the settlement requires an expansion of such restrictions through modernization of Rule 40 to comport with “best practices.” DHS accepted the Rule 40 Advisory Committee report with a commitment to extend the facility based restrictions state-wide. The Comprehensive Plan of Action adopted by the Court this year establishes that the new rule will forbid mechanical, behavioral and other restraints and aversive practices, with regard to all individuals with developmental disabilities, regardless of where they are served. The Department has committed that “DHS will prohibit procedures that cause pain, whether physical, emotional or psychological, and establish a plan to prohibit use of seclusion and restraints for programs and services licensed or certified by the department.”); Settlement Class Letter to Court ([Doc. 353](#)).

DHS wants our amended position stricken despite DHS submitting unauthorized and late-filed information over the years. Most recently, DHS filed an April 12, 2019, letter ([Doc. 731](#)) without permission requesting an agenda item two business days before the Biannual conference and three weeks after the March 20 deadline for agenda submissions ([Doc. 707](#)). We opposed it ([Doc. 732](#)). The Court allowed the item stating it would be beneficial to the Court’s understanding of the parties’ views. Order ([Doc. 733](#)). *See also* ([Doc. 400](#)) (“Defendants should have sought clarification of the Court’s Order immediately, as consistent with standard practice, rather than two days before the filing deadline.”); Order ([Doc. 421](#)) (status conference agenda item on compliance with federal rules and procedures regarding formal and informal submissions to the Court); Order ([Doc. 212](#)) (“Surprisingly to this Court, and without explanation or notice to the Court as to its relationship to the Settlement Agreement, it appears that DHS has proposed a ban on all restraint and seclusion, EXCEPT for individuals with developmental disabilities.”); Class Counsel February 24, 2013 Letter to Court (objecting to DHS Assistant Commissioner’s February 19, 2013, letter and stating parties’ stipulation reflects agreement on a process for addressing issues of concern and non-compliance if approved by the Court).

We respectfully request that the Court accept the Settlement Class amended position. We believe the information provided is beneficial to the Court’s determination of the issues.

Thank you.

Respectfully submitted,

**O’MEARA, LEER, WAGNER & KOHL, P.A.**

*/s/ Shamus P. O’Meara*

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SPO:tlb