

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents,  
Guardians and next friends of Bradley J.  
Jensen, *et al.*,

Civil No. 09-1775 (DWF/FLN)

Plaintiffs

v.

Minnesota Department of Human Services,  
an agency of the State of Minnesota, *et al.*,

Defendants

Independent Consultant and Monitor  
FIRST QUARTERLY REPORT TO THE COURT

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Independent Consultant and Monitor

October 22, 2012

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## I. INTRODUCTION

This Quarterly Report to the Court describes the initial work of the Court's Independent Consultant and Monitor and highlights several issues which have emerged. A draft of this report was provided to the parties for review and comment, so that any errors could be corrected, and any objections considered. Plaintiffs' response is attached to this final report. Defendants did not respond.<sup>1</sup>

The monitor was appointed July 17, 2012, about seven months after the Court approved the Settlement Agreement and more than a year after its filing with the Court.

The monitor's role is to "assist and inform the Court on the implementation of the Settlement Agreement's requirements" and, in doing so, to "make recommendations to the Court."<sup>2</sup> In addition, the monitor "will certainly provide advice, consultation, and recommendations to the parties, consistent with his role."<sup>3</sup> The hope is that "the reporting and monitoring under this order will facilitate a non-adversarial implementation process."<sup>4</sup>

The parties' cooperation has been exceptional. Assistant Commissioner Anne Barry, Chief Executive Officer of State Operated Services Patricia Carlson, and Chief Compliance Officer Gregory Gray have each attended the meetings with the monitor, and have been fully responsive. Michael Tessneer has timely and thoroughly replied to all requests. Defendants' counsel, Steven Alpert, Scott Ikeda and DHS Counsel Amy Akbay, and Plaintiffs' counsel, Shamus O'Meara, have been cooperative as well.

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<sup>1</sup> On September 28, 2012, the monitor sent the parties, and settlement consultants, a draft of this Quarterly Report. Plaintiffs wrote October 5, 2012 letter responding to the draft of this report; that letter and its attachments are an Appendix to this Report.

The monitor does not respond here to Plaintiffs' "frustration" and "significant concerns" on the Olmstead Committee recommendations, Rule 40 Committee, which are not covered in this Report.

On October 5, 2012 (the date by which comments were requested), Defendants sought an extension until October 8, which the monitor granted. No response was received from Defendants. The monitor therefore deems that Defendants have no objections to the matters in this report.

<sup>2</sup> Order of July 17, 2012 at 10, 12.

<sup>3</sup> *Id.* at 12.

<sup>4</sup> *Id.*

The “settlement consultants,” Colleen Wieck and Robert Opheim, continue to provide expert and independent input to the process.<sup>5</sup>

This report discusses information in Defendants’ September 17, 2012 Status Report (“Status Report”), and considers other verifying and explanatory information received from Defendants. Although the monitor had an informative visit to MSHS-Cambridge in September, no conclusion in this report is based on that visit.

**General Status.** There has been progress in implementation and, importantly, it appears that the combination of the Court’s appointment of a monitor and the establishment of a 100-point status reporting system has focused Defendants’ attention on the tasks before them. While at this early stage the monitor does not recommend any action by the Court related to non-compliance, it must also be said that there is evidence that in some respects Defendants have not fulfilled their obligations at this time, based on their own reporting, and the monitor’s analysis of the underlying data. The monitor anticipates that Defendants will continue to attend to these matters diligently.<sup>6</sup>

**Training.** The major focus of this report is on the mandated staff training. That the Settlement Agreement includes specifics on training is a recognition that quality client care depends on adequately trained staff. Here, the use of restrictive interventions such as restraints is an issue, together with an emphasis on person-centered planning and community integration under the *Olmstead* decision. That being the case, the new training under the Settlement Agreement has amplified significance.

**Recommendations.** This report also includes an agreed process for confirming compliance and incremental release from active judicial oversight. The monitor’s first recommendations for release are set forth. Additional information is sought from Defendants on the “zero tolerance for abuse and neglect” requirement, and as well as the visitor policy and admissions/discharge policy. Recently, the monitor discovered information which indicates non-compliance with the settlement’s prohibition on chemical restraint;

*A Note on Requests & Recommendations*

For emphasis and the reader’s convenience, the monitor’s “requests to the parties” and “formal recommendations to the Court” are set off in borders in the text. For tracking purposes, their numbering continues from prior requests and recommendations.

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<sup>5</sup> Dr. Wieck is Executive Director of the Minnesota Governor’s Council on Developmental Disabilities. Roberta Opheim is the Ombudsman, Minnesota Office of the Ombudsman for Mental Health and Developmental Disabilities.

<sup>6</sup> Within the last week, the Plaintiffs have issued to Defendants a “meet and confer” demand under the Settlement Agreement alleging current violations of the settlement.

Defendants are reviewing this matter and the monitor will await their action before commenting on this in detail.

**Requirements Not Reviewed.** This report does not review requirements in several categories (with some examples of each): a) those which are under discussion in parties' meetings, where it is hoped that agreements will be reached on either procedure or substance (third party experts, the Internal Reviewer functions; the External Reviewer, chemical restraint, licensing of Cambridge); b) those where the monitor awaits requested information (new staff hires for expansion of community services); c) those where results of Defendants' efforts are not yet fully in place (*Olmstead* Committee, Rule 40 Committee, changes in statutory and departmental terminology); or d) where further analysis is required whether on-site with experts or otherwise (transition planning, restraint use, community services, other mentioned hospitals).

## II. MEETINGS AND REQUESTS FOR INFORMATION

The monitor, DHS parties and counsel, with the settlement consultants, plan meet in person at least monthly to discuss progress and challenges, and to do so in a formal setting, but with encouragement of free exchange of views and suggestions. Between meetings, the monitor will work with the parties and counsel on identified issues, seeking to move the case forward expeditiously.

The monitor's initial visit to Minnesota after his appointment took place August 21, 2012 and included separate meetings with Defendants and their counsel, Plaintiffs' counsel, the settlement consultants (along with the Disability Law Center and The Arc Minnesota), and the Court. The monitor also visited MSHS-Cambridge and spoke informally with some staff and clients. These initial discussions were introductory and an opportunity to share perspectives on the tasks ahead.

The first parties' meeting took place on September 20, 2012. It covered procedural questions for this effort and a number of substantive issues including some on which there was agreement and some on which the parties disagreed. Among the topics discussed were:<sup>7</sup>

- External Reviewer
- Timing of Notice of Restraint Use
- Third Party Experts
- Behavior Analyst
- MSHS Cambridge Admission Standard

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<sup>7</sup> Plaintiffs' counsel sent a letter the morning of the meeting addressing some of these issues, and others as well. Those issues will be addressed going forward.

During the September visit, the monitor also met with DHS officials, agency counsel, and the settlement consultants. Due to scheduling conflicts the monitor spoke by in advance of the meeting with Plaintiffs' counsel by telephone.

Both for background orientation and also to inform the monitor of the parties' positions, a series of formal numbered "Requests to the Parties" was initiated in August and September. This process facilitates the parties' and monitor's tracking of responses. These requests consisted of:

Request No. 1 (July 30)

- Statutes Cited in Settlement Agreement.
- Positive Behavior Supports.
- Rule 40
- Time for Submission of Form 31032
- Scope of DHS Obligations Regarding "Residents"
- Scope of DHS Obligations – Olmstead Plan
- Scope of DHS Obligations: Rule 40 Modernization
- Class Member List

Request No. 2 (July 30)

- Olmstead Plan Committee material
- Rule 40 Committee material

Request No. 3 (July 30)

- Defendants' Status Report

Request No. 4 (August 9)

- Facility Resident Information

Request No. 5 (August 23)

- Cambridge Diversion and Admissions

Request No. 6 (September 21)

- Certification Process
- Mechanical Restraints
- Draft Admissions Policy
- "Behavior Analyst" Definition
- Visitor Policy

### III. RELEASE FROM ACTIVE JUDICIAL OVERSIGHT

The monitor strongly believes that Defendants' compliance should be recognized. Compliance should be rewarded incrementally by an end to the necessity for continual review by the monitor, and an end to active judicial oversight.<sup>8</sup>

*The "ECs" & the Certification Process*

The Evaluation Criteria consist of assertions drawn from the text of the Settlement Agreement.

Affirmation (a "yes") that an EC is factually in place indicates compliance. Negation (a "no") of an EC indicates non-compliance.

The Certification Process permits an organized approach to compliance review, with an identification of the duration required to achieve release from oversight.

There is no need to await a date significantly in the future for a global declaration of completion when step-by-step, Defendants achieve an acceptable level of compliance with specific obligations in the Settlement Agreement. Substantial compliance should be recognized as it is achieved.

The monitor proposed to the parties a set of 100 "Evaluation Criteria" extracted from the Settlement Agreement, and included these ECs as the core of the Status Report format which Court on July 17, 2012 ordered the monitor to establish. The parties accepted the report format and the Evaluation Criteria.

Following the EC development, the monitor proposed to the parties a *Certification Process for Release from Active Judicial Oversight*, to establish a system for recognition, on Defendants' request, of substantial compliance with the ECs. When this process is adopted, Defendants will be in control of when they are ready to be reviewed for a final compliance recommendation. The plaintiffs will have the opportunity to respond. The monitor will examine and verify the level of compliance. Items which require outside consultation will be identified in advance, where possible. Whether the parties agree or disagree with the monitor's recommendation, the matter would be submitted by the monitor for the Court's consideration.

The Certification Process is ready for adoption. Defendants wrote to the monitor, "We have no suggested edits to the draft document [*Certification Process*]."

The Plaintiffs have agreed with the proposed process, except that they state that release from active judicial oversight "should only be permitted upon all parties agreeing to such release" and that, once released, there should be a process for re-

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<sup>8</sup> Of course, if there is slippage during the period of the court's active oversight, and compliance thought to be in place turns to non-compliance, the court may require that Defendants be obligated to report the circumstances.

imposition of oversight should Defendants slip into non-compliance.”<sup>9</sup> The monitor agrees in part:

- Release from active judicial oversight should occur when there has been sufficient compliance, in quality and duration, that one would reasonably believe that there is sufficient momentum and commitment (and internal DHS attentiveness) to sustain compliance. Should compliance be alleged to have deteriorated, there should be a procedure to reinstate active judicial oversight. The draft Process has therefore been revised to add: “Should Plaintiffs believe Defendants are in non-compliance with a previously released Evaluation Criterion, Plaintiffs may present information supporting that belief to the monitor, who will review the facts presented, provide Defendants with an opportunity to respond, and will make a recommendation to the Court for appropriate action. Should the monitor ”
- It does not seem workable, nor contemplated by the Settlement Agreement that Defendants’ compliance is subject to unreviewable affirmation by Plaintiffs. Once a settlement agreement is incorporated into a judicial order, the question of compliance is for the court, unless the parties have agreed otherwise. The monitor’s recommendations regarding compliance are submitted to the Court for decision. However, for clarity, the draft *Process* has been revised to add: “The question of release from oversight will be submitted to the Court.” This change addresses Plaintiffs’ concern and confirms (what is already the case) that the final word on compliance is the Court’s.

**Formal Recommendation No. 2.**<sup>10</sup>

The monitor respectfully recommends that the Court adopt the revised proposed *Certification Process for Release from Active Judicial Oversight* which is forth on the following page.

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<sup>9</sup> In a September 17, 2012 email from Shamus O’Meara to the monitor (October 8, 2012 email: same), Plaintiffs state:

Certification Process. In the event Defendants become out of compliance on a provision(s) of the Settlement Agreement previously released from active judicial oversight, the Settlement Class supports reinstatement of active judicial oversight of the requirements in the Agreement pertaining to that provision(s). We also believe that release from active judicial oversight should only be permitted upon all parties agreeing to such release.

<sup>10</sup> Formal Recommendation No. 1 was in the monitor’s *First Report to the Court*.



October 22, 2012

**Jensen v. DHS**  
**Certification Process for Release from Active Judicial Oversight (DRAFT)**

**A. Goal.** The goal is establishment of a process for an incremental, orderly and effective review of Defendants' compliance with the Settlement Agreement. The process will permit the Independent Consultant and Monitor to consider and verify Defendants' compliance with established "evaluation criteria," ("EC") to report findings and recommendations to the Court, and to permit the Court to order that specific ECs are released from continued active judicial oversight. Defendants in the first instance should control when ECs are requested to be released.

**B. Standard of Review.** The standard of review for compliance is "substantial compliance." It is important that substantial compliance be maintained a sufficient time for the Court to have confidence that there is sufficient momentum and established support in Defendants' agency that compliance will be maintained going forward.

**C. Evaluation Criteria.** The Defendants' Status Report format established by the Monitor includes 100 numbered Evaluation Criteria. Those criteria are adopted.

**D. Categorization for Substantial Compliance.** The ECs will be categorized as follows: a) Treatment, b) Administrative, c) Systems, and d) One-Time.

- "Treatment" will refer to ECs related to individual client care, services and treatment.
- "Administrative" will refer to procedural, reporting, and administrative ECs.
- "Systems" will refer to staff hiring, training and qualifications, the *Olmstead* and Rule 40 matters, and state organizational issues.
- "One-Time" will refer to ECs for which compliance is established upon completion of a one-time task.
- ECs requiring consultant review will also be identified. After adoption of this Certification Process, the categorization will be discussed by the monitor with the parties and adopted in a later document.

**E. Time Period for Sustained Compliance.**

- Treatment and Systems ECs will require one year of sustained compliance to demonstrate substantial compliance.
- Administrative ECs will require six months of sustained compliance to demonstrate substantial compliance.
- One-Time ECs will not require a time period for substantial compliance.

**F. Orderly Procedure for Incremental Release from Oversight**

- At any time, Defendants may request the monitor to recommend release of specific ECs from active judicial oversight. The request will be accompanied by an explanation and documentation.
- Plaintiffs may respond within 10 days.
- The monitor will review the request, investigate the situation, verify compliance as appropriate, and provide a written recommendation to the Court (and/or recommendations to the parties in advance of a report to the Court). The parties will receive a draft report.
- The question of release from oversight will be submitted to the Court.
- Should Plaintiffs believe Defendants are in non-compliance with a previously released Evaluation Criterion, Plaintiffs may present information supporting that belief to the monitor, who will review the facts presented, provide Defendants with an opportunity to respond, and will make a recommendation to the Court for appropriate action. The monitor may also raise a 'slippage' issue *sua sponte*.

**IV. RELEASE RECOMMENDATION ON COMPLETED TASKS**

In their *Status Report*, Defendants identify seven Evaluation Criteria as “completed.” Documentation is provided or referenced in the Report’s exhibits. With one exception, each of these is a one-time event which need not be reviewed further, in the monitor’s judgment.<sup>11</sup>

Although the *Compliance Certification Process* has not yet been adopted, the monitor deems the *Status Report’s* designation to be a request for a recommendation of release from active judicial oversight, and that there is no reason to delay action.<sup>12</sup>

EC 1 requires additional comment. On EC 1, the Settlement Agreement section is titled METO Closure. The settlement text encompasses the closure of the program, licensure of any successor program, and states a mission or function of any successor -- the latter of which requires attention to admissions policies and criteria. METO is closed and has been replaced by MSHS-Cambridge. That important step was accomplished by Defendants and the effort involved deserves respect and commendation. The parties do not agree at the moment on the licensure question or on the mission/function reflected in admissions policies and criteria. The monitor is overseeing additional discussion on these points.

TOPIC	EVALUATION CRITERION	Compliance
<b>METO Closure</b>	1. METO closed by June 30, 2011. [RELEASE on element of “closure of the facility,” not on the licensure or mission/function elements].	Yes. See discussion.
<b>External Reviewer Funding</b>	47. DHS funds the costs of the external reviewer.	Yes
<b>Olmstead Committee Establishment</b>	85. An Olmstead Planning Committee was established by February 5, 2012	Yes
<b>Olmstead Committee Membership</b>	88. The Olmstead Planning Committee is comprised of no less than fifteen (15) members with demonstrated understanding of the spirit and intent of the Olmstead decision, best practices in the field of disabilities, and a longstanding commitment to systemic change	Yes

<sup>11</sup> DHS funding of the External Reviewer, EC 47, is guaranteed by an Interagency Agreement with the Minnesota Department of Health. While one might speculate that DHS might default on this agreement, that unlikely prospect can be addressed if it should occur.

<sup>12</sup> Plaintiffs object to “deeming” the designation as a request for release. In light of Plaintiffs’ agreement to the release from oversight, and that such deeming will not occur in the future under the *Certification Process*, there is no need for further comment.

	that respects the human and civil rights of people with disabilities, and with the required stakeholder representation.	
<b>Rule 40 Committee Establishment</b>	89. By February 5, 2012, the Department convened a Rule 40 Advisory Committee with the designated membership approved by the parties.	Yes
<b>Rule 40 Committee Review of Arizona Policy</b>	91. The Committee's review of best practices included the Arizona Department of Economic Security, Division of Developmental Disabilities, Policy and Procedures Manual, Policy 1600 Managing Inappropriate Behaviors.	Yes
<b>Rule 40 Committee Public Notice Re Rule Intent</b>	92. The Committee issued a public notice of intent to undertake administrative rule making by February 5, 2012.	Yes

Plaintiffs “preliminarily” agree to the release of these items from active judicial oversight,<sup>13</sup> with the exception of EC 91, that the Rule 40 Committee’s review included an Arizona policy on Managing Inappropriate Behaviors. Plaintiffs do not explain their contention that the Committee’s review did not include the Arizona policy.

The Arizona policy is listed as a resource on the “home page” of the DHS Rule 40 Committee website. The April 2, 2012 Committee meeting included a presentation by commissioned outside experts who reviewed the rules of the 50 states, including Arizona, and especially referenced, Arizona as a “good example,” described Arizona’s policies, and included as the first of 29 abbreviated recommendations:

1. Engage in a careful review of the Arizona DES, Division of Developmental Disabilities, Policies and Procedures Manual, Policy 1600, Managing Inappropriate Behavior for application in Minnesota.<sup>14</sup>

The monitor therefore concludes that the Rule 40 Committee’s review did include the Arizona policy. Defendants complied with EC 91.

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<sup>13</sup> The monitor acknowledges Plaintiffs’ disagreement with this one-time ‘deeming’ based on the status report. Because there is no disagreement regarding the substance of the compliance (except on Rule 40), and no deeming will occur again, given acceptance of the release process, the disagreement is noted, and a change in the report is not necessary.

<sup>14</sup> April 12, 2012 Rule 40 Committee meeting materials.

**Formal Recommendation No. 3**

The monitor respectfully recommends that the Court *release* from active judicial oversight the following Evaluation Criteria: EC 1 (limited as stated above), 47, 85, 88, 89, 91 and 92, described in detail below.

**V. ZERO TOLERANCE FOR ABUSE AND NEGLECT**

With regard to ECs 26-28,<sup>15</sup> Defendants issued a *Policy on Zero Tolerance for Abuse and Neglect of Adults and Minors*.<sup>16</sup> The policy states it is effective July 13, 2012. It provides: “The goal of State Operated Services is to achieve ‘zero tolerance’ for the maltreatment of any client.” The policy provides extensive discussion on reporting and action regarding such maltreatment.

The policy does not define “maltreatment.” The Settlement Agreement states: “The State’s goal is to achieve ‘zero tolerance’ for abuse (including verbal, mental, sexual, or physical abuse) and neglect, whether from other residents or from staff.”<sup>17</sup> It may be that Defendants reasonably chose the term “maltreatment” rather than the terminology in the Settlement Agreement.

The policy does not refer to staff discipline or potential referral to the county attorney for criminal prosecution. These elements are in the Settlement Agreement.

The monitor expects that the definitions of abuse and neglect, as well as staff discipline procedures, and referral for prosecution, are covered elsewhere in state law, regulations or policy. If so, it may be that this policy can be augmented by appropriate cross-references.

It would be helpful to the monitor for Defendants to clarify the above matters.

**Request to the Parties No. 9<sup>18</sup>**

The monitor respectfully requests Defendants to provide – as may be relevant here - - the definitions of abuse and neglect, staff discipline procedures, and standards for

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<sup>15</sup> Settlement Agreement, Sec. V.G.

<sup>16</sup> *Status Report*, Ex. 26A (Policy 6310).

<sup>17</sup> Settlement Agreement, Sec. V.G.

<sup>18</sup> Titled “No. 7” in error in quarterly report draft.

referral for prosecution, which are covered elsewhere in state law, regulations or policy. Also, Defendants are requested to consider whether for clarity, restatement or cross-referencing is appropriate in the July 13, 2012 policy. Defendants are also requested to explain their views on how the policy comports with the Settlement Agreement. Plaintiffs may also wish to provide their comments.

As of the submission of this Report, Defendants had not responded to this Request No. 9. The monitor awaits that response, and notes here that a response is necessary before consideration of compliance with EC 26-28.<sup>19</sup>

## VI. STAFF TRAINING

The Settlement Agreement requires staff training, consistent with applicable best practices, in:<sup>20</sup>

*First Wave: Initial Training*

- Therapeutic interventions
- Personal safety techniques
- Medically monitored restraint

*Second wave: Person-centered/ PBS*

- Positive behavioral supports
- Person centered approaches
- Post crisis evaluation

This section of this report reviews reported compliance with three elements of staff training at MSHS-Cambridge:

1. The initial wave of training for “the specified number of hours” in therapeutic interventions, personal safety techniques and medically monitored restraint. This was to have been completed between September 1, 2010 and December 31, 2011. (EC 63).

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<sup>19</sup> Plaintiffs’ October 5, 2012 letter’s comment on this section refers the monitor to July 2012 exchange with Defendants in which Plaintiffs asked whether Defendants’ data included resident-to-resident alleged neglect, and requested a “further response” from Defendants. The monitor expects Defendants will respond to Plaintiffs, copying the monitor, on this issue.

<sup>20</sup> Sec. IX.A., EC 61 and 62. Curricula at Defendants’ *Status Report*, Ex. 61A. The Settlement Agreement was filed with the Court June 23, 2011. Attachment B to the Settlement, “Staff Training,” describes the required training. All staff, without exception, are required to receive the training.

2. The second wave of training for “the specified number of hours” of 40 hours in “person centered planning and positive behavior supports,” with 16 of those 40 hours on “person centered thinking/planning), and 4 hours in “Post Crisis Evaluation and Assessment. (EC 65).
3. Whether, “[f]or each instance of restraint, all staff involved in imposing restraint received all the above training” under EC 63. (EC 64).

The sources of data are the “staff training transcripts” at Defendants’ Status Report, Ex. 63A and the identification of staff involved in imposing restraint in the seven restraints covered in the Status Report, Ex. 9A through 9G.

Plaintiffs’ vigorous comments on the training issue are noted after presentation of the monitor’s evaluation.

**A. EC 63-64: INITIAL TRAINING**

TOPIC	EVALUATION CRITERION	Compliance
<b>INITIAL TRAINING</b>	63. Facility staff receive the specified number of hours of training subsequent to September 1, 2010 and prior to December 31, 2011: Therapeutic interventions (8 hours); Personal safety techniques (8 hours); Medically monitoring restraint(1 hour).	Partial
<b>NO RESTRAINT WITHOUT TRAINING</b>	64. For each instance of restraint, all staff involved in imposing restraint received all the above training.	No

This “first wave” of training of “all employees” was required to have been completed by December 31, 2011. EC 63. These are the “specified hours” in each course:

Therapeutic interventions	8 hours
Personal safety techniques	8 hours
Medically monitoring restraint	1 hour

The Settlement Agreement forbids staff to be involved in restraint without the above training:

Staff at the Facility shall not be eligible to impose restraint until the above specified training has been completed and then only [to impose emergency restraint per Attachment A].<sup>21</sup>

The rule is a necessary one for the safety of clients and staff. “Therapeutic interventions” focus on “safety, connecting with the client, understanding of the

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<sup>21</sup> Settlement Agreement IX.B.1. EC 64.

client, and awareness of client behavior as well as the client environment.”<sup>22</sup> “Personal safety techniques” covers crisis intervention training on “balance, disengagement (blocks and releases) and physical engagement (escorts and restraint.”<sup>23</sup> When restraint is used it is necessary to monitor the client for any medical issues which might arise.

The “no” compliance ratings below are compelled because Defendants have rightly required 100% in this important safety domain: “All current staff will be trained” by June 30, 2011, and “[n]ew staff must demonstrate competence in Therapeutic Interventions and Personal Safety Techniques prior to working with clients.”<sup>24</sup>

## 1. All Employees

All staff are to receive the three trainings. For then current staff the deadline was December 31, 2011. The monitor reviewed this requirement based on the current status of compliance.

With regard to four MSHS Cambridge staff, Defendants are not in compliance:

Staff	Therapeutic Intervention	Personal Safety Techniques	Medically Monitored Restraint	Position & Hire Date
NMM	NO (4 OF 8)	NO (4 OF 8)	YES	Behavioral Med Practitioner 1/20/09
AJH	YES	YES	NO	RN 3/31/10
RJU	YES	YES	NO	LPN 1 3/5/12
KLB	YES	YES	NO	Maintenance, hired 3/1/07

Three of the four (NMM, AJH, and KLB) were hired long before the Settlement Agreement but have not yet received all the trainings. One of the four (RJU) was hired March, 5, 2012, six months ago, but has not yet received one of the trainings.

Two of the four employees (AJH and RJU) are also deficient in all three of the other trainings required (*see* chart in sub-section 3 below)

## 2. Training of Staff Involved in Restraints

EC 64 forbids staff to be involved in administering restraint without having completed the training.

<sup>22</sup> Settlement Agreement, Attachment B.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

The monitor identified the staff who were involved in the 7 restraints from the names listed at the top of each restraint form as having been involved.<sup>25</sup> This settlement requirement included training dates prior to the court approval of the settlement; therefore, we included 3 restraints which had been reported to Plaintiffs in the period between the filing and approval of the settlement. Next, we matched the staff names against the participation in the specified training courses for each Cambridge staff in these three areas.<sup>26</sup>

The results are shown in the two charts on the next pages. The first chart is “by restraint incident,” and the second is “by employee.”

By incident:

- In 6 out of 10 cases, there was compliance; all staff involved had received all the required training.
- In 2 cases, none of the 8 staff had received all the required training.
- In 3 cases, none of the total 9 staff had been trained for medically monitored restraint.

By employee:

- Most employees (13 out of 22; 59%) had received all the required training at the time they restrained a client.
- 4 staff were involved in repeated incidents without having received the missing training between the incidents.
- All but 1 of the involved staff had completed the three trainings by the time they were involved in a 2012 incident.

One of the staff who restrained client BB on January 29, 2012, KC, had not had the required crisis evaluation and assessment training before the restraint. All the others had received it.

**B. PERSON-CENTERED AND POSITIVE BEHAVIOR SUPPORTS;  
CRISIS EVALUATION – EC 65**

TOPIC	EVALUATION CRITERION	Compliance
<b>Person-centered, Positive Supports, Crisis Evaluation</b>	65. Facility staff receive the specified number of hours of training subsequent to September 1, 2010 and prior to March 31,2012: Person centered planning and positive behavior supports (with at least sixteen (16) hours on person centered thinking/planning): a total 40 hours; Post Crisis Evaluation and Assessment,	Partial

<sup>25</sup> Ex. 9A through 9G to *Status Report*.

<sup>26</sup> Ex. 63A (“Staff training transcripts”).



## By Restraint Incident: Was Employee Trained Before Date of Restraint?

Employee Name	Resident Restrained	Date of Restraint	MEDICALLY MONITORED RESTRAINT?	THERAPEUTIC INTERVENTION?	PERSONAL SAFETY?
Janie Mell		1/29/12	Yes	Yes	Yes
Kendra Cline	BB	1/29/12	Yes	Yes	Yes
Stephanie Kuznia		1/29/12	Yes	No (had 4 of 8)	No (had 4 of 8)
David Hicks		5/10/12	Yes	Yes	Yes
Elizabeth Klute	BB	5/10/12	Yes	Yes	Yes
Kevin Morgan		5/10/12	Yes	Yes	Yes
Stacey Sjostedt		5/10/12	Yes	Yes	Yes
Eben Gillespie		5/4/12	Yes	Yes	Yes
Richard Bell	JR	5/4/12	Yes	Yes	Yes
Stuart W. Hazard		5/4/12	Yes	Yes	Yes
Dawn Thomas		6/10/12	Yes	Yes	Yes
Debbie Glassing	JR	6/10/12	Yes	Yes	Yes
Matt Johnson		6/10/12	Yes	Yes	Yes
Robin Noren		6/10/12	Yes	Yes	Yes
David Hicks		7/5/12	Yes	Yes	Yes
Doni Lamoreaux		7/5/12	Yes	Yes	Yes
Elizabeth Klute	JR	7/5/12	Yes	Yes	Yes
Janet Marciniak		7/5/12	Yes	Yes	Yes
Stacey Sjostedt		7/5/12	Yes	Yes	Yes
Stephanie Kuznia		7/5/12	Yes	Yes	Yes
David Hicks		8/13/11	No	No (had 4 of 8)	No (had 4 of 8)
Jim Kunshier	JDR	8/13/11	No	No (had 4 of 8)	No (had 4 of 8)
Matt Johnson		8/13/11	No	Yes	Yes
David Hicks		8/10/12	Yes	Yes	Yes
Judy Roehl	JS	8/10/12	Yes	Yes	Yes
Stephanie Jensen		8/10/12	Yes	Yes	Yes
David Hicks		9/19/11	No	No	No
Matt Johnson		9/19/11	No	Yes	Yes
Robin Noren	NK	9/19/11	No	Yes	Yes
Stephanie Kuznia		9/19/11	No	No (had 4 of 8)	No (had 4 of 8)
Steve Hiebert		9/19/11	No	No	No
Dawn Thomas		9/29/11	No	No (had 4 of 8)	No (had 4 of 8)
Doni Lamoreaux	NK	9/29/11	No	Yes	Yes
Heather Hauri		9/29/11	No	Yes	Yes
Robin Noren		9/29/11	No	Yes	Yes
David Blom		5/19/12	Yes	Yes	Yes
Heather Hauri	NK	5/19/12	Yes	Yes	Yes
Jim Kunshier		5/19/12	Yes	Yes	Yes
Stephanie Jensen		5/19/12	Yes	Yes	Yes

## By Employee: Was Employee Trained Before Date of Restraint?

Employee	Resident	Date of Restraint	MEDICALLY MONITORED RESTRAINT?	THERAPEUTIC INTERVENTION?	PERSONAL SAFETY?
Elizabeth Klute	JR	7/5/12	Yes	Yes	Yes
	BB	5/10/12	Yes	Yes	Yes
David Blom	NK	5/19/12	Yes	Yes	Yes
David Hicks	JR	7/5/12	Yes	Yes	Yes
	BB	5/10/12	Yes	Yes	Yes
	NK	9/19/11	No	No (had 4 of 8)	No (had 4 of 8)
	JDR	8/13/11	No	No (had 4 of 8)	No (had 4 of 8)
	JS	8/10/12	Yes	Yes	Yes
Dawn Thomas	JR	6/10/12	Yes	Yes	Yes
	NK	9/29/11	No	No (had 4 of 8)	No (had 4 of 8)
Debbie Glassing	JR	6/10/12	Yes	Yes	Yes
Doni Lamoreaux	JR	7/5/12	Yes	Yes	Yes
	NK	9/29/11	No	Yes	Yes
Eben Gillespie	JR	5/4/12	Yes	Yes	Yes
Heather Hauri	NK	5/19/12	Yes	Yes	Yes
	NK	9/29/11	No	Yes	Yes
Janet Marciniak	JR	7/5/12	Yes	Yes	Yes
Janie Mell	BB	1/29/12	Yes	Yes	Yes
Jim Kunshier	NK	5/19/12	Yes	Yes	Yes
	JDR	8/13/11	No	No (had 4 of 8)	No (had 4 of 8)
Judy Roehl	JS	8/10/12	Yes	Yes	Yes
Kendra Cline	BB	1/29/12	Yes	Yes	Yes
Kevin Morgan	BB	5/10/12	Yes	Yes	Yes
Matt Johnson	JR	6/10/12	Yes	Yes	Yes
	NK	9/19/11	No	Yes	Yes
	JDR	8/13/11	No	Yes	Yes
Richard Bell	JR	5/4/12	Yes	Yes	Yes
Robin Noren	JR	6/10/12	Yes	Yes	Yes
	NK	9/29/11	No	Yes	Yes
	NK	9/19/11	No	Yes	Yes
Stacey Sjostedt	JR	7/5/12	Yes	Yes	Yes
	BB	5/10/12	Yes	Yes	Yes
Stephanie Jensen	JS	8/10/12	Yes	Yes	Yes
	NK	5/19/12	Yes	Yes	Yes
Stephanie Kuznia	JR	7/5/12	Yes	Yes	Yes
	BB	1/29/12	Yes	No (had 4 of 8)	No (had 4 of 8)
	NK	9/19/11	No	No (had 4 of 8)	No (had 4 of 8)
Steve Hiebert	NK	9/19/11	No	No	No
Stuart W. Hazard	JR	5/4/12	Yes	Yes	Yes

	(4 hours).	
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The Settlement Agreement requires 40 hours of training in person-centered planning (16 hours of which are on “person-centered thinking/planning) with 24 hours of the 40 on positive behavior supports. “This training is delivered to “all employees.”<sup>27</sup>

- The 16 hours are in a 16 hour course which is titled "Person Centered Thinking 2 day Workshop"
- The 24 hour course is titled, "Introduction to Positive Behavior Supports."

Little discussion is needed at this point on the centrality of this training to the services planned and delivered under the Settlement Agreement. The concepts and practice of “person-centered” and “positive behavior support” appears repeatedly throughout the document.

A third course is also required: “Post Crisis Evaluation and Assessment.” Its purpose is to evaluate the circumstances which resulted in the use of restraints” and thus to improve response to difficult situations, and to consider changes in a person’s support plan.<sup>28</sup>

**a. Were the three courses taken?**

All staff are required to take all three courses. Of the 73 active Cambridge employees as of September 17, 2012, all had timely taken all three courses with the following exceptions:<sup>29</sup>

Staff	16 Hour Course	24 Hour Course	Four Hour Course	Position & Hire Date
KC	See next section	YES	NO	HSSH <sup>30</sup> 1/26/00
CAJ	See next section	NO	YES	HSSS 1/7/98
DAG	15	YES	YES	LPN 1 11/28/11
AJH	NO	NO	NO	RN 3/31/10
RJU	2	NO	NO	LPN 1 3/5/12
SWB	See next section	NO	NO	HSSS, hired 2/17/99
TCI	15	YES	YES	LPN 1
KLB	NO	NO	NO	Maintenance, hired 3/1/07

<sup>27</sup> Settlement Agreement at Attachment B.

<sup>28</sup> Settlement Agreement at Attachment B.

<sup>29</sup> Ex. 63A, *Status Report*.

<sup>30</sup> HSSS designates a “Human Services Supports Specialist.” This staff has direct care responsibilities.

At this time, “partial compliance” is an appropriate designation, although, with reference to the requirement that “all staff” receive the training, it is a concern that staff who have been employed as many as 14 years are still not up to date with all required training.

One of the staff who restrained client BB on January 29, 2012, KC, had not had the required crisis evaluation and assessment training before the restraint.

**b. Were the required hours of training received?**

The Settlement Agreement requires that staff “shall receive the specified number of hours of training” in the three areas set forth.<sup>31</sup>

With the exceptions noted in the section above, the 24 hour course on positive behavior supports was received by 68 of the 73 (93%) employees (see exceptions in discussion immediately above). This is a very positive achievement.

With regard to the 16 hour course on person centered thinking, **no employee met that requirement of 16 hours of training.** All employees, according to Defendants’ *Status Report*, are listed as having had “13” contact hours in that training.<sup>32</sup> The course’s “specified number of hours” is “16,” and the Training Curriculum<sup>33</sup> also states: “Length: 16.00 hours.”

When the monitor inquired of Defendants for an explanation of the discrepancy, he was informed by Dr. Richard Amado:

They [Staff Development] literally count the number of hours they are in the classroom. So everybody has a different number of hours. \*  
\* \* 13 is the actual number of hours in the classroom. If the transcript says 13, that is the number of hours in the classroom.<sup>34</sup>

Dr. Amado states that the 13 hours is the same “learning opportunity” as 16 hours for this course.

Dr. Amado explained that “we first became aware of the problem” before December, 2011. He did not know whether Plaintiffs had been informed.

In a September 24, 2012 email, Dr. Amado further explained that, as it turned out,

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<sup>31</sup> Settlement Agreement, Sec. IX.B.1. EC 65.

<sup>32</sup> *Status Report* at Ex. 63A.

<sup>33</sup> *Status Report* at Ex. 61A.

<sup>34</sup> Telephone, 9/25/12.

the class took less than 8 hours for “[m]ost of the classes in which Cambridge staff participated:”

The course description says the program is two 8-hour days, as Michael [Smull] designed it. Once we started delivering the program, however, we discovered the amount of time people spent in the course was in large part related to the number of people in the program. That is because much of the program is spent in activities and exercises. When there are more people in the class, it takes longer to conduct the exercises and activities. If there is an activity that requires reporting out to the rest of the room, or walking around the room writing on other participant’s worksheets, it can be done in 10 minutes when there is a class of 25-30; the same exercise can take much longer when there are 50 people in the class. Most of the classes in which Cambridge staff participated had 30 or fewer participants, so they went quickly.

Because our Staff Development staff record the number of hours actually spent in the classroom, rather than the amount of time for which the class is scheduled, staff will have credit for varying amounts of time for the Person Centered Thinking 2-Day program.<sup>35</sup>

Doug Seiler, for DHS, explained that the class time became 13 hours in this way:

In theory, at the time the lawsuit settlement was written, it was believed that the class time for Person Centered Thinking would be two eight hour sessions. In reality, upon the classes being established and instructed they turned out to be approximately 6 and a half hours each day for a total of 13. This was not known until the actual classes were arranged and taught and hours in training logs reflect actual time in the class.<sup>36</sup>

The question at this point is: *Does the 13 hours of course time satisfy the 16 hours required by the Settlement Agreement?* The 16 hours appears in the Settlement Agreement itself, and in the Training Curriculum provided by Defendants with their *Status Report*. A DHS official’s presentation on training to the Rule 40 Committee in July 2012 included the 16 hour curriculum. However, 13 hours is uniformly reported for every employee who took the training except the three listed in the table above (15 hours, 15 hours and 2 hours).

Also, it is noted that, for every one of the *other* training courses, the hours listed in

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<sup>35</sup> Dr. Amado also stated that there is additional “on the fly” learning in these areas during the working day.

<sup>36</sup> Email by Doug Seiler, September 24, 2012.

the Employee Training Transcripts precisely match the course hours listed in the Training Curricula sheets.

### C. Monitor's Judgment

Plaintiffs discuss staff training compliance at length. They disagree with the monitor's characterization of "partial compliance" in some of the tables above. Rather, Plaintiffs explain, they do "not agree that DHS has complied with the Settlement Agreement training provisions." Plaintiffs cite repeated representations by Defendants (both by counsel to the Court and during Rule 40 Committee meetings) that the training had been fully completed.<sup>37</sup> They also state:

Our office was not made aware that only 13 hours of training was used by DHS in an attempt to satisfy the 16-hour requirement agreed upon by the parties under the Settlement Agreement, or that staff was not trained as required by the Settlement Agreement prior to using restraints on residents, which evinces a lack of candor and disregard of a fundamentally important aspect of the Settlement Agreement.<sup>38</sup>

Defendants' documentation itself shows that important training was not delivered to staff Defendants identify as involved in restraint administration, to staff required to receive various training (including professional hand-on staff), and – separately -- that a 16 hour course was delivered in 13 hours.

The monitor's Request to the Parties No. 10 states that the monitor "will not make a judgment pending Defendants' response to the draft of this report."<sup>39</sup> Defendants

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<sup>37</sup> Plaintiffs' October 5, 2012 letter at 2-3.

<sup>38</sup> *Id.*

<sup>39</sup> The Request to the Parties was misnumbered in the draft Quarterly Report. It provided Defendants an opportunity to comment on and rebut the presentation in that Report.

*The monitor will not make a judgment until several questions are answered in Defendants' response to the draft of this report: (emphasis added)*

1. Defendants knew before the Settlement Agreement was approved that the 16 hours was not being received. Were the Plaintiffs informed? It being known that the 16 hour course was being delivered in 13 hours, why was the Settlement Agreement not amended to reflect 13 hours?

did not respond to the draft of this report. Therefore, the facts set forth above, based solely on Defendants' documentation and representations filed with the Court, are the basis for the conclusion below.

**The monitor concludes that Defendants are not in compliance with the training requirements at EC 63, 64 and 65 to the extent detailed above.**

## **VII. ADMISSIONS AND VISITORS POLICIES**

Two policies included in Defendants' *Status Report* prompt the monitor to note that, in these respects, the Settlement Agreement was either not sufficiently communicated internally or was not being attended to.

- The Departmental Bulletin on MSHS Cambridge admissions and discharge criteria in the *Status Report* is an unadopted draft (which had not previously been shared with Plaintiffs or the monitor)<sup>40</sup> and it was to replace a several-year old (pre-Settlement) bulletin on the same subjects. This means that MSHS Cambridge was continuing to operate under a policy which had not been reviewed or modified in light of the Settlement Agreement.
- Similarly, a 2009 Visitor Policy<sup>41</sup> which is significantly inconsistent with the Settlement Agreement, has been in effect at Cambridge. This visitor policy is in non-compliance with the Settlement Agreement. Defendants recently informed the monitor: "On the date the Defendants' Status Report was issued the 2009 policy was in effect at the MSHS-Cambridge program."<sup>42</sup> For the past nine months, then, Cambridge clients have had visits restricted under a policy which should not have been in place (as Defendants readily acknowledged at the September 20, 2012 parties' meeting). Defendants have

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2. Defendants' *Status Report* at Ex. 61A (Training Curriculum) states that the course is "16.00 hours." Why does this not reflect the 13 hours delivered?

3. Plaintiffs are requested to inform the monitor of their position on this question regarding hours of training.

<sup>40</sup> *Status Report*, Ex. 2A. At the September 20, 2012 parties' meeting, Assistant Commissioner Barry quickly acknowledged that this document was not the Department's official position, and that any draft should, and would, be shared with Plaintiffs and the monitor in advance of adoption.

<sup>41</sup> *Status Report*, Ex. 66A.

<sup>42</sup> Email from Steven Alpert to David Ferleger, September 27, 2012.

a new draft policy, into which the Settlement Agreement provisions will be incorporated.<sup>43</sup>

### **VIII. CHEMICAL RESTRAINT**

By happenstance, during the monitor's review of the procedural requirements regarding restraint,<sup>44</sup> he found references in client medical Progress Notes to psychotropic medication being used PRN (a standing order) apparently for behavior control. A subsequent review of a small sample of Defendants' computerized medication records confirmed that there are PRN orders for psychotropic medication at Cambridge, written specifically to control behavior.

The Settlement Agreement forbids any use of medication for behavior control.<sup>45</sup>

Due to the importance of these observations to the health and welfare of the Cambridge clients, the monitor raised his findings to the Assistant Commissioner and director of State Operated Facilities by email on Sunday evening, August 23, 2012 and during the ensuing week.

Defendants' leadership immediately responded and began to investigate the matter.

In the interest of permitting Defendants time to examine and, if necessary, rectify the situation, the monitor does not comment here further.

It is stressed to Defendants, however, that there appears to be a need to broadly consider the use of psychotropic medication at Cambridge, and how that use is impacted by the treatment modalities in place, by the level of community and facility-based activity of the clients, by the clients' specific individual needs, and the like. It is hoped that Defendants' review will not focus solely on the individual situations which happened to appear in the restraint review sample.

Plaintiffs' October 5 comments on the quarterly report stated its belief that

DHS is in substantial non-compliance with the Settlement Agreement and is engaging in the use of Chemical Restraint at the MSHS-Cambridge facility in violation of the Settlement Agreement as identified by the Ombudsman for Mental Health and Developmental Disabilities in its September 27, 1012 report on the MSHS Cambridge facility.

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<sup>43</sup> Plaintiffs' October 4, 2012 letter to the Court, attached to the October 5 letter to the monitor, also protests that the 2009 Visitor Policy is non-compliant with the Settlement Agreement.

<sup>44</sup> *Report to the Court No. 1.*

<sup>45</sup> Settlement Agreement, Sec. V.D. EC 14 and 15.



The Ombudsman's report arrived the day before this Quarterly Report was issued in draft and is therefore not addressed here. However, as explained above, the monitor had independently identified compliance concerns regarding chemical restraint which he had raised to Defendants. This topic will continue to be of high profile attention by the monitor.

#### **IX. AMENDMENTS TO THE SETTLEMENT AGREEMENT**

The parties have agreed to several amendments to the Settlement Agreement, some of which are in the nature of "tweaking" and one of which is a major change.

The Defendants' clinical and administrative judgment is that there is no need for any mechanical restraint to be permitted under the Settlement Agreement. To their great credit, Plaintiffs and Defendants have agreed – for the benefit of clients and of staff – that there is no need for the two types of mechanical restraint which were the "exception" to the Settlement Agreement's prohibition of mechanical restraint.

The monitor will submit the amendments to the Court in a separate recommendation.

\* \* \*

With appreciation to the parties, their counsel, and the settlement consultants, this report is submitted to the Court.

Respectfully submitted,

/s/ David Ferleger  
David Ferleger  
Archways Professional Building  
413 Johnson Street  
Jenkintown, PA 19046  
Phone: (215) 887-0123  
Fax: (610) 672-9680  
david@ferleger.com

Independent Consultant  
and Monitor

October 22, 2012

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents,  
Guardians and next friends of Bradley J.  
Jensen, *et al.*,

Civil No. 09-1775 (DWF/FLN)

Plaintiffs

v.

Minnesota Department of Human Services,  
an agency of the State of Minnesota, *et al.*,

Defendants

APPENDIX  
Independent Consultant and Monitor  
FIRST QUARTERLY REPORT TO THE COURT

Plaintiff Class Counsel  
Letter of October 5, 2012

October 22, 2012

David Ferleger <david@ferleger.com>   
To: Office <office@ferleger.com>

October 6, 2012 8:26 AM

Print 2 of email and attachments. ---1 for me and 1 to file on topic first quarterly RPT. Also file all in computer section on same topic

10 Attachments, 2.3 MB

David Ferleger

Sent from my iPad  
Apologies for brevity or errors

Begin forwarded message:

**From:** "Shamus O'Meara" <SPO@johnson-condon.com>  
**Date:** October 5, 2012, 8:34:39 PM EDT  
**To:** "'David Ferleger' (david@ferleger.com)" <david@ferleger.com>  
**Cc:** "Steve Alpert@ag.state.mn.us" <Steve.Alpert@ag.state.mn.us>, Annie Santos <masantos@johnson-condon.com>  
**Subject:** Jensen et al v. Deeparment of Human Services et al

Mr. Ferleger:

We enclose our October 5, 2012, letter with enclosures responding and commenting on the Independent Monitor's Draft First Quarterly Report to the Court.

Thank you.

Respectfully,

**Shamus P. O'Meara**  
[spo@johnson-condon.com](mailto:spo@johnson-condon.com)  
**direct:** 952.806.0438



7401 Metro Blvd | Suite 600 | Minneapolis, MN 55439-3034 | [Johnson-Condon.com](http://Johnson-Condon.com)

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[0171 Amen...pdf \(594 KB\)](#)



[October 4, 2012.pdf \(226 KB\)](#)

**JENSEN SETTLEMENT AGREEMENT STATUS REPORT BY  
MINNESOTA DEPARTMENT OF HUMAN SERVICES  
May 14, 2012**

**Section IV. (Page 6): Closure of the METO program.**

The METO program was closed June 30 2011. The sixteen (16) bed Minnesota Specialty Health System Cambridge opened July 1st. Additionally one of the two transition foster homes is open with three (3) individuals in residence. The second transition home is awaiting the fire marshal inspection. The MSHS Cambridge has a current census of six (6) and has been running at an average daily census of eight (8). The first transition home has a vacant bed. As of this time there is not a demonstrated need for the second transition home.

**Section V. A. (Page 6): Prohibited techniques.**

The policy on Therapeutic Interventions and Emergency use of Personal Safety Techniques is implemented. There have been only three (3) uses of emergency restraint since December 2011. In the first episode, notification of several of the external parties was delayed by two days. However, DHS Licensing visited the program and cited the program for the delay. The Medical Officer review was timely completed for this episode and the review by the Internal Expert, Dr. Rick Amado was timely completed. A copy of Dr. Amado's review was provided to Mr. O'Meara after his request.

In the second episode (May 4, 2012), all notifications were timely. The Medical Officer review was also timely completed for this episode.

However, the Department has received a phone call contact from Licensing with regard to concern over the level of detail in the May 4 Report. More specifically, the concerns were around the "rationale for not using a side lying hold", in the document and related concerns over a prone restraint. The Department provided an oral explanation but Licensing has requested that a written addendum be produced with this detailed information. The Department will complete the addendum and send it out to all recipients of the original form.

Licensing also raised concern over whether the consultation with the Third Party/SOS Medical Director occurred within 30 minutes. The Department noted that it was an error on the Facility's part in the documentation because Dr. Radke was acting in the capacity of both SOS Medical Director and Third Party Expert and was first contacted at 3:48 p.m. The correct timeframe will be placed in both areas in the addendum the Department will be sending to Licensing.

Dr. Amado has visited the Facility and is expected to have his review completed by the end of the week.

There was a third episode of the use of emergency restraint that occurred on May 10, 2012. The restraint was reported to last 1 minute. The individual was transported to the local emergency room and then admitted to Anoka Metro Regional treatment Center for psychiatric evaluation

and stabilization. All notifications were done timely. Consultation by Dr. Radke was completed timely. Dr. Amado has also initiated his review of this matter and is expected to complete his review by the end of the week.

**Section V. E. (Page 8): Third Party Expert.**

The Department was required to establish a protocol to contact, on a rotating basis, a qualified Third Party Expert from a list of at least five (5) qualified Third Party Experts pre-approved by Plaintiffs and Defendants. The Department posted an RFP in the State Register on November 21, 2011. The posting ran for thirty (30) days. No responses were received. Following the Settlement Agreement, however, the Department utilized the Medical Officer Review protocol under Section V. F.

Despite being in full compliance with this provision, when the Department was advised that there was interest in reopening the position, another RFP was issued in April to a list of known experts. One individual has verbally expressed an interest and the Department is awaiting his written response.

**Section VII. A. (Page 10): The Department shall establish one employee (Internal Reviewer) with responsibility for monitoring the Facility's use of restraint.**

The Department has employed Dr. Rick Amado in this capacity. While Dr. Amado had been on medical leave during some of this time, as set forth above, he was still able to complete his review.

**Section VII. B. (Page 11): The Department will provide funding for the External Reviewer in the Office of Health Facility Complaints, Minnesota Department of Health. The External Reviewer will have full enforcement authority, proper credentials, and be approved jointly by the Plaintiffs and Defendants.**

Admittedly, the Department is not in compliance with this requirement. In November, 2012, Deputy Commissioner Barry provided MDH the provision from the settlement regarding the position and the start of an inter-agency agreement. MDH did express concern as to whether a full time position was required and if it were part time on this and part time on something else, MDH would run into issues over the experience required to complete other responsibilities as most of their investigators are nurse evaluators.

On February 8, 2012, the Department sent a status update to Mr. O'Meara and this provision was highlighted as a concern:

**Page 12. The External Reviewer shall provide the Plaintiffs and the Department with a draft report. The External Reviewer shall issue quarterly reports to the court for the duration of the agreement.**

The first quarterly report to the court is due in early March with a draft due to the plaintiff and Department 15 days before submission to the court. The External Reviewer will not be in place in time to produce this report within these timelines.

The Department is interested in discussing an alternative strategy pending the position being filled.

On February 10, 2012, Mr. O'Meara notified the Department that the Court had contacted him and requested an update of the non-monetary items in the Settlement Agreement and it was the Department's understanding that Mr. O'Meara had forwarded the February 8 update to the Court.

On March 8, 2012, the Department provided Mr. O'Meara additional information regarding efforts to comply with this provision, including a copy of a memorandum between the Department and MDH dated March 6, 2012 detailing the concern over filling the position. In part, MDH explained that it would prefer to engage a person "who better fits the profile of other OHFC employees" and that their preference would be to use an Registered Nurse and "add requirements to the RN position such as background in psychology, knowledge of best practices in treatment of persons with developmental disabilities, or whatever other special knowledge would best fit the desires of the court."

Discussions between the agencies continued and the Department contacted Dr. Wieck requesting her input on this position. In the interim, MDH has also advised the Department that they would utilize current staff to fulfill the requirements of the settlement.

On April 3, 2012, the Department hosted a meeting with the Department of Health ("MDH"), Roberta Opheim, Ombudsman, Ombudsman Office for Mental Health and Developmental Disabilities, Dr. Colleen Wieck, Executive Director of the Minnesota Governor's Council on Developmental Disabilities, and Mr. O'Meara. The group discussed alternative ways to get qualified staff on board to complete the third party reviews of the Facility and issuance of the quarterly report to the Court. The group agreed that MDH would hire an Advanced Practice Rn (APRn) with certification in mental health and experience in services for individuals with developmental disabilities. Additionally they would contract with a clinical expert with the credentials specified in the Settlement Agreement to serve as clinical consultant to the APRn. The interagency agreement is being modified to include this change and MDH has begun the process to fill the position. The Department has allocated the necessary funds for this provision.

Bottom line, however, is that the External Reviewer position remains unfilled and MDH did not complete the first quarterly report and update as required (see next item).

**Section VII. B. 4. and 5. (Page 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. The external reviewer shall issue quarterly reports to the Court for the duration of this Agreement. The reports shall describe whether the Facility is operating consistent with best practices, and with this Agreement.**

Because of the issues regarding the hiring of the External Reviewer, the first quarterly report was not filed with the Department and, more importantly, with the Court.

The first quarterly report to the Court was due in early March with a draft due to the plaintiff and Department fifteen (15) days before submission to the Court. The External Reviewer with the Department of Health was not yet in place (see above) so the first report was not completed. The next report is due in early June. The Department is hopeful that this report will be completed within the required time lines. However, in the event there is another delay, the Department will file an updated status report.

**Section IX. B.1. (Page 14): Staff at the Facility shall receive specified hours of training by December 31, 2011 (therapeutic interventions, personal safety tech., medically monitored restraint)**

The Department completed the training for facility staff prior to December 31, 2011.

**Section IX. B.2. (Page 15): Staff at the facilities shall receive the specified training by March 31, 2012 (person centered planning/positive behavioral supports, post crisis evaluation)**

The Department has completed the specified training.

**Section IX. D. (Page 15): The Department will discontinue any marketing or publicity inconsistent with the mission of the facilities.**

The Department has removed road signage, references to the METO program on the Department web site, and ended the use of the program brochures. A new brochure, and two bulletins are being drafted. One bulletin describes the new reporting process in the event of the use of emergency restraint. The other bulletin announces the admission and discharge criteria for the new program.

**Section X. A.1.a. (Page 16): Community Support Services (“CSS”) will provide long term monitoring of person with clinical and situational complexities.**

CSS has established the monitoring process and currently has twenty-seven (27) individuals in long term monitoring.

**Section X. A.1.b. (Page 16): CSS services will be statewide and respond within three (3) hours from authorization.**

CSS has initiated the (3) hour response time state-wide. CSS has provided augmented support to forty-two (42) individuals since in the first three (3) months of 2012.

**Section X. A.2. ( Page 17): Expansion of CSS will include fourteen (14) full-time equivalents (FTEs).**

Expansion of CSS staff was completed in October 2011.



**Section X. B. (Page 18): 1. Within sixty (60) days of the Court's approval of this Agreement, the Department will establish an *Olmstead* Planning Committee which will issue its public recommendations within ten (10) months of the Court's Order approving this Agreement. Within eighteen (18) months of the Court's approval of this Agreement, the State and the Department shall develop and implement a comprehensive *Olmstead* plan.**

The Department convened the first meeting of the *Olmstead* Planning Committee on March 7, 2012. The Committee is meeting for a half day every two weeks. They have begun review of the array of institutional and community based services, development of their work plan and the drafting of a vision and principles statement. Bi-Monthly meetings are projected to continue through October 2012.

The Department has determined that involvement of an outside expert could prove helpful in moving the work of this Committee forward, particularly in fleshing out the various components of the plan into a final document. In fact, the Department was in contact with Mr. Ferleger for this very purpose. However, Mr. Ferleger has told the Department that he does not wish to pursue work on the *Olmstead* Plan until the Court clarifies whether it wants Mr. Ferleger involved in another capacity.

**Section X. C. (Page 19): Within sixty (60) days from the date of the Order approving this Agreement, the Department shall organize and convene a Rule 40 advisory committee.**

The Department initiated a solicitation of interest published in the State Register January 3rd, 2012. Selection of committee members was completed in collaboration with plaintiff's counsel and named committee members. The first meeting was held January 30, 2012. The Committee has adopted the basic provisions of the Settlement Agreement related to positive behavioral supports, person centered planning, prohibitions of certain techniques, training, monitoring and the emergency use of seclusion and restraint. The Committee is beginning the process of determining what barriers to implementation exist in the broader system licensed by the Department.

**Section X. D.1. (Page 20): The Department shall undertake its best efforts to ensure that there are no transfers to or placements at the Minnesota Security Hospital ("MSH") of any person committed solely as a person with a developmental disability. As of July 1, 2011 there shall be no transfers or placements of persons committed solely as a person with developmental disabilities to the MSH.**

The Department has established processes to review all referrals for admission to the MSH to ensure persons committed solely as a person with developmental disability are not admitted. One person was admitted in October 2011 and initially did meet the criteria because the order for commitment was for mental illness and developmental disability with a requirement to treat to competency based on a criminal matter. After admission, the court ended the commitment for mental illness. The individual completed the treatment to competency and was discharged from the program.

Above and beyond the requirements of the Settlement Agreement, the Department and the Ombudsman's office have initiated an early intervention protocol for persons with a developmental disability who are at risk of commitment under the mentally ill and dangerous ("MI & D") provision. This effort is intended to bring the necessary clinical and program expertise, funding resources, and advocacy support to achieve better outcomes for the individual and effectively manage the public safety risk thereby avoiding the M I& D commitment status.

**Section X. D.3. (Page 20): No later than December 1st, 2011 persons confined at the MSH who are solely committed as a person with a developmental disability shall be transferred to the most integrated setting.**

There are three (3) men who are committed solely as DD still residing at the MSH. All three have active plans for discharge that include family, representatives from the Ombudsman for MHDD, county social services, and the future provider. Funding for the services has been agreed upon.

In planning for these men's discharge to the community the principles of "most integrated setting" in accordance with the Olmstead decision and person centered planning are being applied. The clinical complexity of each of these men and the risk of harm to self and/or others makes the planning difficult. In spite of these difficulties the planning is moving forward and placements are expected by mid-summer.

These plans also will carry a considerable investment of financial resources. For example, one placement that is being finalized has a cost of \$500,000 for the building of a residence in the community. In addition, for the three men leaving the MSH, the projected cost to the Home and Community Based Waiver for two of the men is \$1,500 per day (each) and for the other man it is \$3,000 per day. These initial costs should moderate as the individuals adjust to their new living situations.

**Section X. E. (Page 21): Any person committed solely as a person with a developmental disability at the Anoka Metro Regional Treatment Center ("AMRTC") who does not have an acute psychiatric condition will be transferred from AMRTC to the most integrated setting.**

The Department has established a process to assess the medical necessity for individuals with a developmental disability before admission to AMRTC for psychiatric care and treatment; that individuals must have an acute psychiatric condition and meet a hospital level of care. Patients are assessed regularly during the episode of care to determine the need for continued stay. Once they no longer meet these criteria, discharge planning is made to transfer the patient.

Two patients committed solely as a person with a developmental disability received services at AMRTC since January 1, 2012. The first was a Rule 20.01 transferred from the Competency Restoration at MSH on February 1, 2012 after Ramsey County dropped the MI Commitment and replaced it with a DD commitment. The Competency Restoration Program could not keep him with the DD only commitment and the patient was discharged from AMRTC to a foster care home on March 8, 2012 after the Rule 20.01 issue was resolved.

The second admission was after the most recent use of emergency restraint on May 10, 2012 (*see* above). The individual was transported to the local emergency room and then admitted to AMRTC for psychiatric evaluation and stabilization.

**Section X. F. (Page 21): The Department shall substitute the term “developmental disabilities” for the term “mental retardation” where it appears in any Department policy, bulletin, web site, brochure, or other publication. The Department also agreed to draft a bill for the Minnesota Legislature that will require the replacement of terms such as “insane,” “mentally incompetent,” “mental deficiency,” and other similar inappropriate terms that appear in Minnesota statutes and rules.**

The Department has made efforts in its policy, bulletin, website, and other publications to replace the old terminology with “developmental disability”. When an oversight was brought to its attention, the Department promptly followed up and addressed the concern.

Legislation was drafted and adopted that directs the Department to convene a work group to identify other insensitive or outdated language.

255.6 Sec. 10. TERMINOLOGY AUDIT.

255.7 The commissioner of human services shall collaborate with individuals with

255.8 disabilities, families, advocates, and other governmental agencies to solicit feedback and

255.9 identify inappropriate and insensitive terminology relating to individuals with disabilities,

255.10 conduct a comprehensive audit of the placement of this terminology in Minnesota  
Statutes

255.11 and Minnesota Rules, and make recommendations for changes to the 2013 legislature

255.12 on the repeal and replacement of this terminology with more appropriate and sensitive

255.13 terminology

The Department recognizes that further work is necessary prior to and during the next legislative session to further this goal.

**Section XIV. C. and D. (Page 30): This Agreement is not intended to affect the rights of Plaintiffs or Class Members for any disability benefits or related benefits or funding they are receiving or for which they may qualify. The parties agree that the Court’s order approving this Agreement will include a provision that to the extent of this Court’s authority, the Settlement Amount paid to Plaintiffs and Class Members shall not jeopardize any disability benefits or related benefits or funding they are receiving or for which they may qualify; The parties agree that the Court’s order approving this Agreement shall preclude the State and the Department from seeking to recover any of the Settlement Amount from Plaintiffs and the Class Members for cost of care charges for residing at METO or participation in any other State program involving people with developmental disabilities, or any other attempt by the State or the Department to recover any of the Settlement Amount from Plaintiffs or Class Members, and that the State and the Department shall be relieved of any obligations to initiate any proceedings to recover any of Settlement Amount from Plaintiffs and Class Members.**

The Department has instructed its staff and initiated contact with county social services staff, county attorneys, providers, and placed a general notice on the Department web site to acknowledge the issuance of the settlement checks and that these funds were not to be considered income or assets for the purpose of benefit eligibility. A summary of the Department's proposed action plan was provided to the Court and counsel by email on February 23, 2012. The Department has initiated additional contacts as appropriate following the further orders from the Court.

The Department has been contacted by Social Security and requested the names of all claimants and their social security numbers. Social Security has contacted the Department and requested the names of all claimants and their social security numbers. The Department alerted the Court of this development on May 2, 2012 and on May 3, 2012 the Department submitted a draft amendment to the Protective Order to Mr. O'Meara in order to address this request. This is still an open issue.

Additionally the Department submitted a request to Centers for Medicare & Medicaid Services ("CMS") to amend the Minnesota State Plan to exempt these funds from consideration of eligibility. An answer from CMS is expected in late May. Given recent developments with the Court's interaction with the federal government, however, we do not anticipate problems with this.

AG: #3011352-v1

**J O H N S O N  C O N D O N**  
*Attorneys at Law P.A.*

October 5, 2012

**Via E-Mail Only**

Mr. David Ferleger  
Ferleger Wealth Management, LLC  
Archways Professional Building  
413 Johnson Street, Suite 203  
Jenkintown, PA 19046

Re: Jensen et al v. Minnesota Department of Human Services et al  
Court File No: 09-CV-1775 DWF/FLN  
Our File No.: 7400-001

Dear Mr. Ferleger:

On behalf of the Settlement Class, we provide the following comments to the draft Independent Monitor's First Quarterly Report to the Court. We respectfully request that the monitor include this communication with its finalized report along with our October 4, 2012, letter to Judge Frank objecting to the recent DHS report to the Court (enclosed), and October 4, 2012, letter to DHS counsel (enclosed).

The Settlement Class believes DHS is in substantial non-compliance with the Settlement Agreement and is engaging in the use of Chemical Restraint at the MSHS-Cambridge facility in violation of the Settlement Agreement as identified by the Ombudsman for Mental Health and Developmental Disabilities in its September 27, 2012, report on the MSHS Cambridge facility. We have demanded a Meet and Confer with DHS under the Agreement and have provided notice that the Settlement Class may move to enforce the State/DHS to comply with the Settlement Agreement

We reiterate our position that all parties should agree to any release of DHS from judicial oversight, and that there must be a process allowing for reinstatement of judicial oversight in the event that State/DHS reverts to non-compliance. The Settlement Class objects to the report's exclusion of these important provisions and we respectfully request that the report include references to the Settlement Class position in this regard.

The Settlement Class preliminarily agrees with the monitor's position regarding release of judicial oversight on provisions in the Settlement Agreement referenced on pages 9 and 10 of the draft report, except the Rule 40 - Arizona provision.

We do not agree with the following statement on page 8 of the draft report:

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Mr. David Ferleger, Ferleger Wealth Management, LLC

October 5, 2012

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“Although the *Compliance Certification Process* has not yet been adopted, the monitor deems the *Status Report’s* designation to be a request for a recommendation of Release from active judicial oversight, and that there is no reason to delay action.”

Rather than inferring a State/DHS request for release from active oversight, we prefer that the State/DHS affirmatively request such a release, if any, citing the specific sections of the Settlement Agreement requested for release, including the factual basis for the request, and any relevant documentation, and that Settlement Class counsel be provided a reasonable time period within which to respond to the request. We also refer the monitor to our October 4, 2012, letter objection to Judge Frank relating to the Defendants’ status report.

Based upon available information, including information provided by the monitor, *see, e.g.*, draft report at pp. 11-17, the Settlement Class does not agree that DHS has complied with the Settlement Agreement training provisions. Our office was not made aware that only 13 hours of training was used by DHS in an attempt to satisfy the 16-hour requirement agreed upon by the parties under the Settlement Agreement, or that staff was not trained as required by the Settlement Agreement prior to using restraints on residents, which evinces a lack of candor and disregard of a fundamentally important aspect of the Settlement Agreement. This is further evidenced by DHS reports to the Court and communications stating the all training requirements under the Settlement Agreement have been met. *See, e.g.*, May 14, 2012, Jensen Status Report submitted by DHS to the Court at p. 4 (enclosed).<sup>1</sup>

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<sup>1</sup> In its Report, at page 4, DHS stated to the Court:

**Section IX. B.1. (Page 14): Staff at the Facility shall receive specified hours of training by December 31, 2011 (therapeutic interventions, personal safety tech., medically monitored restraint)**

The Department completed the training for facility staff prior to December 31, 2011.

**Section IX. B.2. (Page 15): Staff at the facilities shall receive the specified training by March 31, 2012 (person centered planning/positive behavioral supports, post crisis evaluation)**

The Department has completed the specified training.

*See also* February 8, 2012, e-mail from Steve Alpert (enclosed), advising:

**Page 14 Staff at the facilities shall receive specified hours of training by Dec 31, 2011 (therapeutic interventions, personal safety tech., medically monitored restraint)**

DHS completed the training for facility staff prior to December 31, 2011.

**Page 15 Staff at the facilities shall receive the specified training by March 31, 2012 (person centered planning/positive behavioral supports, post crisis evaluation)**

DHS has scheduled and initiated the specified training. The schedule projects completion of the training by March 31st, 2012

Mr. David Ferleger, Ferleger Wealth Management, LLC

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Additionally, in a PowerPoint presentation given by Natalie Marr, DHS, to the Rule 40 Committee on July 6, 2012, (enclosed), Ms. Marr represents to the Rule 40 Committee that all training under the Settlement Agreement is complete. *See* PowerPoint at p. 6. Notably, the monitor's draft report also reference that Dr. Amado stated less than 8 hours of training was provided, while Doug Seiler, DHS, claims 13-hours was provided. Draft report at pp. 15-16. Our office, Dr. Wieck, and Kay Hendrickson from the Ombudsman's Office also asked specific questions of DHS about training hours, topics, and the curricula at Rule 40 meetings and received inconsistent and evasive responses. Ms. Hendrickson asked for training curricula at the Rule 40 meeting as well and was told it would not be provided. We understand Ms. Hendrickson and later Dr. Wieck received links to the training, but never received clear answers about how the training that was provided at MSHS-Cambridge compared to the Settlement Agreement requirements. We had to follow up with repeated requests for training information and it was weeks before it was provided. There has been a noted resistance from DHS to providing basic training information. Based on this resistant background and DHS's statements to our office and the Court that it has complied with the training requirements of the Settlement Agreement, when it had not, the Settlement Class strongly disagrees with the monitor's reference that DHS has "partially" complied with the initial training requirements of the Settlement Agreement.

Regarding the Visitor Policy and Chemical Restraint at MSHS Cambridge, we direct the monitor to our enclosed October 4, 2012, letters to Judge Frank and Steve Alpert.

Regarding abuse and neglect, Section V of the draft report, we refer the monitor to the July 2012, e-mail exchange with DHS counsel, enclosed. We await further response from DHS on this issue.

We do not agree with the monitor's commendation of Defendants for being in compliance with certain provisions of the Settlement Agreement when the State/DHS is in substantial non-compliance with the Agreement. The monitor also seeks to give DHS "respect" for closing METO. While the closure is notable, we believe it was necessitated by the widespread abuse of residents as articulated in in the Ombudsman's *Just Plain Wrong* report, and its closure brought about by residents, their families, and people and organizations advocating on their behalf. We also understand the METO facility was selected by the State to close months before the conclusion of settlement negotiations as part of a pre-settlement State/DHS restructuring of its operations.

Today is the deadline for the Olmstead Committee to issue its much anticipated public recommendations. *See* Settlement Agreement, Section X.B1 ("Within sixty (60) days of the Court's approval of this Agreement, the Department will establish an Olmstead Planning Committee which will issue its public recommendations within ten (10) months of the Court's Order approving this Agreement."). Following the October 4, 2012, Olmstead Committee meeting, it became apparent to Settlement Class Counsel that the Olmstead Committee would not be meeting the Settlement Agreement deadline for issuing its public recommendations for an Olmstead Plan. The Olmstead Committee co-chairs informed the Olmstead Committee at the October 4, 2012, committee meeting that the Olmstead Committee's recommendations would

Mr. David Ferleger, Ferleger Wealth Management, LLC

October 5, 2012

Page 4

not even be compiled into a single document until the beginning of next week, and further advised that at least two additional committee meetings would be needed to finalize the recommendations. DHS has not complied with this important Settlement Agreement deadline nor sought leave to amend it or notify the Court that it would not be met. In its status report to the Court, DHS merely states the next steps for this deadline are to “[c]ontinue monitoring.” The Settlement Class objects to the DHS decision to ignore the Olmstead Committee public recommendation deadline under the Settlement Agreement.

We continue to be frustrated and have significant concerns about the Olmstead and Rule 40 committees as expressed in the Advocate Concerns document previously provided to DHS counsel, and subsequently to the Court, and to the monitor. Despite repeated requests and notice to the Court and monitor, we still await DHS responses to these concerns.

The September 27, 2012, report by the Ombudsman involving the MSHS Cambridge facility should also be incorporated into the monitor’s report to the Court because of the important issues and concerns raised relating to chemical restraint, prone restraint, licensure, internal monitoring, training, and DHS non-compliance with the Settlement Agreement.

The Settlement Class expressly preserves, and does not waive, all of its rights and positions.

Thank you.

Respectfully,

JOHNSON & CONDON, P.A.

*/s/ Shamus P. O’Meara*

Shamus P. O’Meara

SPO:MAS:tlb

Enclosures

October 5, 2012 LT David Ferleger.doc



# Minnesota Specialty Health System - Cambridge and Settlement Successor Facilities

## 2011/2012 Settlement Required Training and other Supplementary Training

Presented by  
Natalie M. Marr, Psy. D., LP  
*Clinical Director for MSHS programs*

## Outline of Settlement Requirements

- Settlement Agreement, Page 14, Section IX. Other practices at the facility, Part A
  - A. The Facility treatment staff shall receive training in positive behavioral supports, person centered approaches, therapeutic interventions, personal safety techniques, crisis intervention, and post crisis evaluation. The training is explained more fully in Attachment B which is incorporated into this Agreement by reference. All training will be 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)

## Outline of Settlement Requirements

*continued*

- Settlement Agreement, Page 14 & 15, Section IX. Other practices at the facility, Part B.1.

B.1. Staff at the Facility shall receive the specified number of hours of training subsequent to September 1, 2010 and prior to December 31, 2011:

Therapeutic Interventions	8
Personal Safety Techniques	8
Medically Monitoring Restraint	1*

Staff at the Facility shall not be eligible to impose restraint until the above specified training has been completed, and then only certain restraints in an emergency as set forth in Attachment A to this Agreement, *“Therapeutic Interventions And Emergency Use Of Personal Safety Techniques.”*

\* The curriculum for Medically Monitoring Restraint amounted to 2 credit hours of training time, surpassing the Settlement Requirements

## Outline of Settlement Requirements

*continued*

- Settlement Agreement, Page 15, Section IX. Other practices at the facility, Part B.2.

B.2. Staff at the Facility shall receive the specified number of hours of training subsequent to September 1, 2010 and prior to March 31, 2012:

Person Centered Planning and Positive Behavior Supports (at least 16 hours on Person Centered thinking/planning)	40
Post Crisis Evaluation and Assessment	4
<b>Grand Total</b>	<b>61*</b>

\*The actual time was 62 hours per staff person with the 2 hour actual time for Medically Monitoring Restraint. This all occurred while there were clients being served at Cambridge with a cap on the census.



## Therapeutic Interventions

- These are techniques that are used everyday to promote a therapeutic environment, including the following elements:
  - Connecting
  - Understanding
  - Awareness of Self
  - Awareness of Others
  - Awareness of the Environment
  - Safety



## Personal Safety Techniques

- A variety of techniques used in volatile and unsafe situations as a means to attain safety with the least amount of intrusiveness, including training the following areas:
  - Balance
  - Movement
  - Disengagement
  - Engagement
  - Escorts
  - Approved Restraints (see attachment on Approved Techniques for MSHS Cambridge and its Successor facilities)



## Medically Monitoring Restraint

- Observing and understanding how to physically monitor an individual while he/she is being restrained
- Minimize risk of medical impact of restraint use
- The training was developed by a Registered Nurse
- Qualified medical staff as instructors



## Post Crisis Evaluation and Assessment

- Training on Critical Action Review of Experience (or CARE reviews\*)
  - How to evaluate the circumstances that resulted in a restraint
  - It is more than a debriefing
  - Allows the program to learn more about the client and make modifications to programming to prevent future unsafe situations for that individual
  - It also provides information to the program on system, process, or training issues that may need revisions, modifications, or updates

\*CARE reviews were initiated on the METO campus in 2009. This curriculum was much more detailed than the initial format for CARE reviews and included training of all MSHS Cambridge and Successor Facility staff.

## Person Centered Thinking/Planning

(<http://sdaus.com/>)

- Two days of certified instructor led training developed by Support Development Associates, LLC
  - Day 1: exposure to PCT concepts
  - Day 2: applied learning to begin skill development.
    - Focused on changing perspectives to balanced support between what is “important to” a person and what is “important for” a person
    - Changing thinking from fixing what is wrong with a person to supporting each person’s opportunities to live an everyday life
    - Eight specific tools for creating the structure of person centered thinking are taught across the two days
- Infrastructure for ongoing training and culture change in the PCT philosophy

## Positive Behavior Supports

- 2 days of classroom work and one day of on the job training
- Training was developed by Rick Amado, Ph. D., LP and co-lead with intern Stacey Danov, Ph. D.
- Objectives of the course:
  - Understanding the difference between behavior modification and Positive Behavior Support
  - Identify potential factors influencing behavior
  - Use at least one behavior data collection method
  - Conduct a simple functional behavior assessment

## Dates of Completion\*

\*MSHS Cambridge and Successor Facility's compliance with the Settlement Agreement

- **Therapeutic Interventions**
  - December 2010/January 2011 4 hours
  - May/June 2011 4 hours
  - December 2011 4 hours
- **Personal Safety Techniques**
  - December 2010/January 2011 4 hours
  - May/June 2011 4 hours
  - December 2011 4 hours
- **Medically Monitoring Restraint**
  - November/December 2011 2 hours
- **Post Crisis Evaluation and Assessment/Critical Action Review of Experience**
  - January – March 2012 4 hours
- **Person Centered Thinking**
  - January – March 2012 16 hours
    - Two 8 hour classroom days with practice during class
    - Ongoing support by the peer coaches and leadership infrastructure
- **Positive Behavior Support**
  - November/December 2011 24 hours
    - Two 8 hour classroom days with one 8 hour On the Job Training day

## Additional Training Prior to Settlement Agreement

- “Positive Behavior Support” training through the College of Direct Support completed in the summer of 2009 by all METO staff whose jobs included direct contact with clients (<http://directcourseonline.com/directsupport/>)
  - This seven-part course was created to help direct support professionals to learn to better support people who may engage in challenging behavior. The curricula encourages learning safe, fair, and compassionate strategies that help to reduce and even prevent these behaviors. The following areas are covered as part of the training
    - Understanding Behavior
    - Functions and Causes of Behavior
    - Understanding Positive Approaches
    - Preventing Challenging Behavior
    - Responding to Challenging Behavior
    - Behavior Support Plans
    - Rules, Regulations, Policies and Rights

## Additional Training Prior to Settlement Agreement continued

- Expansion to a classroom version of College of Direct Supports “Positive Behavior Support” curricula
  - 12 or more hours
  - Presented by clinically trained staff in a classroom setting
  - The course followed the CDS computer based training
  - Occurred during the summer of 2010

## Additional Training Prior to Settlement Agreement continued

- 40 hour/week long orientation to the new MSHS Cambridge Program Model
  - This was an orientation to the proposed new practices with the inception of the MSHS Cambridge program in pace of treatment, utilization review, and active discharge planning throughout treatment
    - The MSHS Cambridge program filed a variance in January 2012 with DHS Licensing, closely following regulations of the mental health IRTS model Training on how to teach individuals with intellectual and developmental challenges
  - Training on the following evidence based practices: Illness, Management, and Recovery and Trauma Informed Care
  - Training on new milieu management to incorporate PBS principles and extinguish past practices with a consequence based model
  - Training on clients with dual diagnoses of intellectual disability and mental health conditions, including differences in presentation of symptoms (Ohio’s Coordinating Center of Excellence)
  - Training on MN Waiver System, Utilization Management, and Discharge Planning process for MSHS Cambridge

## Additional Training Subsequent to Settlement

- Training geared at building capacity in SOS and the private staff to complete functional behavioral analyses and associated program plans that incorporate positive behavior supports in a person centered planning format
  - This training is being offered to a small cohort of SOS and private sector staff at a time
- Minnesota Positive Behavior Support Initiative (<http://rtc.umn.edu/mnpbsi/main/>)
  - Approximately 15 months of intense training on Positive Behavior Supports and Person Centered Planning
    - The training time commitment is approximately:
      - 8.5 hours per week of studies and assignment work
      - One 8 hour classroom session per month
      - Ongoing access to an expert acting as a mentor

## Ongoing training for the MSHS Cambridge and Successor Programs

- Upon start of employment
 

▫ Therapeutic Interventions*	8 hours
▫ Personal Safety Techniques*	8 hours
▫ Medically Monitoring Restraint	2 hours

\*These training curricula will be completed by new employees prior to being authorized to participate in any use of emergency restraint.





## Ongoing training for the MSHS Cambridge and Successor Programs Continued

- Within the probationary period of early employment
  - Person Centered Thinking 16 hours
  - Positive Behavior Support\*\* 24 hours
  - Post Crisis Evaluation & Assessment 4 hours

\*\*This curricula includes 2 classroom days of 8 hours each and an on the job training day.



## Ongoing training for the MSHS Cambridge and Successor Programs Continued

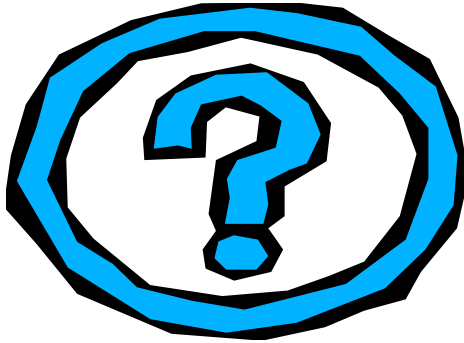
- Yearly thereafter
  - Therapeutic Interventions 8 hours
  - Personal Safety Techniques 8 hours
  - Medically Monitoring Restraint 2 hours
  - Positive Behavior Support\* 12+ hours
  - Post Crisis Evaluation & Assessment 4 hours
  - Person Centered Thinking\*\* Ongoing

\*PBS training will occur in part with computer based training portions, on the job training portions, and classroom portions. At a minimum each staff will complete 12 hours per year.

\*\*With the initiation of PCT from Support Development Associates, LLC in the original settlement requirement training, an infrastructure of peer coaches and leadership have received ongoing training in order to help the continuation of culture change at MSHS Cambridge and its successor facilities to a more PC treatment facility. This occurs mostly in on the job contexts and is also the topic of many all staff meetings.



## Questions



J O H N S O N  C O N D O N  
*Attorneys at Law P.A.*

**AMENDED**

October 4, 2012

**FILED 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 et al v. Minnesota Department of Human Services et al  
**Court File No: 09-CV-1775 DWF/FLN**  
Our File No.: 7400-001

Dear Judge Frank:

On behalf of the Settlement Class, we provide this Objection to Defendants' September 17, 2012 Status Report to the Court [Doc. No. 165] ("Report").

The Settlement Agreement sets forth the process for reporting to the Court concerning compliance with the Settlement Agreement:

**VII. INTERNAL AND EXTERNAL REVIEW OF THE USE OF RESTRAINTS**

**B. External Reviewer**

4. 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. The external reviewer shall provide Plaintiffs and the Department with a draft report. The Plaintiffs and the Department will have fifteen (15) business days to provide written comment. The external reviewer's final report shall be issued to Plaintiffs and the Department thereafter.

5. The external reviewer shall issue quarterly reports to the Court for the duration of this Agreement. The reports shall describe whether the Facility is operating consistent with best practices, and with this Agreement. The external reviewer's

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Hon. Donovan W. Frank  
October 4, 2012  
Page 2

reports shall be filed on the Court's public electronic court filing system, or any successor system, with appropriate redaction of the identities of residents or other personal data information that is statutorily protected from public disclosure.

Settlement Agreement, Section VII.B(4),(5).

As a threshold issue, under the Agreement, the *external reviewer*, not DHS, is required to issue quarterly reports to the Court.<sup>1</sup> Moreover, the external reviewer is required to provide a draft report to Plaintiffs and the DHS, allowing for comment by the parties before finalizing and submitting to Court. Sec. VII.B.4. and VII.B.5. DHS admits that an external reviewer is not in place yet. Report Sec. VII.B.43. The DHS Report was not provided to our office for review and comment.

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<sup>1</sup> The Court's July 17, 2012, Order, requires Defendants to submit a status report within 60 days, in part, as a result of Defendants' failure to engage an external reviewer who is charged with issuing quarterly status reports to the Court under the Settlement Agreement. *See* Order [Doc. No. 159].

The Court remains concerned with Defendants' continued non-compliance with the External Reviewer requirements. Sec. VII.B.4 of the Settlement Agreement requires: "The external reviewer shall issue quarterly reports to the Court for the duration of this Agreement." The Settlement Agreement was approved by the Court December 5, 2011. These reports were thus due March 5 and June 5, 2012. No reports were filed. As noted above, a status report by Defendants' counsel, dated May 14, 2012, stated with regard to the External Reviewer, "Admittedly, the Department is not in compliance with this requirement." Regarding the quarterly reporting, Defendants' counsel noted that no report was filed in March, and stated:

The next report is due in early June. The Department is hopeful that this report will be completed within the required time lines. However, in the event there is another delay the Department will file an updated status report.

Order at p. 6.

Although the status report was ordered to be submitted by Defendants (in lieu of the external reviewer due to Defendants non-compliance with the external reviewer provision of the Settlement Agreement), the Court's Order does not change the requirement under the Settlement Agreement that the report first be submitted to Plaintiffs' counsel for review and comment. *See* Order [Doc. No. 159].

Hon. Donovan W. Frank

October 4, 2012

Page 3

In its Report, DHS fails to provide any documented evidence that MSHS-Cambridge, the successor facility to METO, is in compliance with certain provisions of the Settlement Agreement. Throughout the Report, DHS merely provides copies of various policies or bulletins as evidence of purported compliance (*see* Report IV.2., IV.3-4, V.A.6., V.G.26., VII.A.40., IX.A.61.-62, IX.C.66.-68., IX.D.69.-70., IX.E.71.-72., X.A.73.-81.). Simply referring to a policy or bulletin is not evidence of compliance or verification. To the extent the policies or bulletins are consistent with the Settlement Agreement, DHS has failed to provide any evidence that it is in compliance with the policies or bulletins.

In its Report, DHS states:

“During the interval of this status report there were no reports of the use of prohibited restraints and techniques.” Report V.A.7

“During the interval of this status report there were no reports of the use of medical or psychotropic/neuroleptic medication for punishment, in lieu of habilitation, training, behavior support plans, for staff convenience, or as behavior modification.” Report V.A.8.

“During the interval of this status report there were no reports of the use of prone restraint, chemical restraint, seclusion, or time out. Report V.B.11.

As our office previously advised the Court, we have notified DHS of our ongoing concerns, and have requested information from DHS, involving the use of powerful psychotropic chemicals pursuant to PRN orders at MSHS-Cambridge. In our July 5, 2012, e-mail to DHS counsel [Doc. 158-2], enclosed with our July 10, 2012, letter to the Court [Doc. 158], we stated:

On PRNs and Chemical Restraint at the Minnesota Specialty Health System – Cambridge (“Cambridge”) facility, the Settlement Agreement provides:

D. Chemical Restraint. The Facility shall not use chemical restraint.

1. A chemical restraint is the administration of a drug or medication when it is used as a restriction to manage the resident’s behavior or restrict the resident’s freedom of movement and is not a standard treatment or dosage for the resident’s condition.

2. Orders or prescriptions for the administration of medications to be used as a restriction to manage the resident’s behavior or restrict the resident’s freedom of movement shall not be written as a standing order or on an as-needed basis (PRN).

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Please advise of the specific reasons why PRNs are being used at Cambridge. Please advise whether the policy or procedures issued to Cambridge staff for the use of PRNs and/or psychotropic drugs include any warning or reference that PRNs shall not be used to manage behavior or restrict movement. Please advise whether staff have been specifically trained on this aspect of the Settlement Agreement. We believe this is extremely important if PRNs are to continue being used at Cambridge for psychotropic drugs.

July 5, 2012, E-mail to Steve Alpert.

We did not receive a substantive response to our request for this information, nor does the DHS Report reference our request or concerns expressed involving the use of psychotropic medications and PRNs.

On September 28, 2012, the Ombudsman for Mental Health and Developmental Disabilities issued its Report, In the Review of: MSHS-Cambridge Replacement Program for the Former METO Program (“Report of the Ombudsman”), concluded:

- There is a general concern that the programing provided for the clients deviates from the original purpose of the program as outlined in the empowering legislation for METO or the subsequent Settlement Agreement that described the conditions of any successor program. This was and is to be primarily a program for individuals with a developmental disability with serious behavioral and legal issues, regardless of what other co-occurring conditions these clients may have.
- There is concern that there is a lack of vocational/habilitation programing that has clearly has always been a hallmark policy of this state for persons with developmental disabilities.
- There is a concern that chemical restraints appear to be used based on the PRN use of psychotropic medications and other medications used to deal with agitation.
- There is concern regarding the lack of medical staffing and the use of HSS staff for medication monitoring including first dose or PRN medication, given the number of complex medications that many clients are prescribed. There is concern as to whether HSS staff members are trained on monitoring for the very serious side effects that can accompany use of PRN antipsychotics.
- Also arising out of concern for the medical coverage is the issue of using the local Cambridge Medical Center when a client is out of behavioral control. While on first look this might appear to be logical, however the Cambridge Medical Center’s Director of Behavioral Health is the same person who was the Clinical Director at METO during the time of excessive restraints and the person who

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would decide what protocols the Medical Center will use when the MSHS clients are at the medical center. In addition, it was the understanding of the Ombudsman that the special unit at AMRTC was supposed to provide those services needed when the MSHS – Cambridge clients were in need of acute behavioral stabilization.

- There is a concern that the Internal Reviewer is not being utilized as intended in the Jensen Settlement Agreement. We question why the facility under federal monitoring is allowed to reject or modify recommendations.
- Charting continues to remain a significant concern.
- Our office remains concerned that despite the agreement that this program would not be developed as an IRTS, all indications point to the program operating as if they are. Just because the DHS Licensing laws, rules and variances for persons with developmental disabilities under 245B are silent on medical staffing, day habilitation by the program and other issues does not mean that this is the right approach for the population that is to be served in this program.

September 26, 2012, Report of the Ombudsman at pp. 8-9 (enclosed).

Based upon available information, including the September 26, 2012, Report of the Ombudsman, which followed the Ombudsman's *Just Plain Wrong* report identifying the widespread abuse of residents through the use of programmatic restraint and seclusion at the METO facility, which was the subject of the Jensen class action lawsuit upon which the Settlement Agreement is predicated, we have notified DHS that we believe the MSHS-Cambridge facility is engaging in the use of Chemical Restraint in violation of the Settlement Agreement and that the Cambridge staff have not been properly trained as required by the Settlement Agreement.<sup>2</sup> In addition to the findings and concerns expressed by the Ombudsman, and additional information concerning the MSHS Cambridge facility. We have also advised DHS that retaining the Third Party Expert requirements as agreed upon by the parties in the Settlement Agreement and DHS Policy, Attachment A, and reaffirmed by DHS to our office and the Court, is critical to ensuring that residents receive proper care and that their civil rights are protected while at the Cambridge facility.

Contrary to the DHS Report, moreover, we also believe the MSHS-Cambridge facility may be using Prone Restraint in violation of the Settlement Agreement. The Ombudsman's Report provides in part:

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<sup>2</sup> Our office has also demand that the immediate cessation of Chemical Restraint at MSHS-Cambridge Facility and Compliance with Settlement Agreement.

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#### RESTRAINTS:

We requested a restraint log from 12/13/2011 to 9/13/2012, and were given documentation regarding seven uses of restraints as well as copies of reviews by the Internal Reviewer.

General Comments: Though prone restraint is not to be used, it is evaluated for contraindications in the initial History & Physical and is referred to in other documents. It appears a prone hold is usually used while in transition to another position.

#### Examples:

1. JR had a May 4th restraint. We found two completed DHS 3652 Documentations for Implementation of Controlled Procedures forms describing the same incident. One contained detailed information regarding a prone hold; however, the other did not.
2. JL's record contains an initial history and physical assessment which indicated contraindications to a prone hold; however, a unit form indicated that there were no contraindications. This was brought to the attention of Amanda Bartnick, R.N. who immediately made arrangements to correct this.

Ombudsman Report at pp. 3-4.

The marked distinctions between the Ombudsman's Report and the DHS statement that is not engaging in prone restraint is alarming.

As we have advised DHS, our office recently learned that MSHS Cambridge residents cannot have visitors in their living units, and cannot use the Rec Center either for visitation. Notably, the 2009 Visitor Policy provided with the DHS Report, which DHS confirmed was in force at the time of the Report, is clearly not compliant with the Settlement Agreement. DHS has agreed to discontinue enforcement of this Policy and provide a replacement policy consistent with the Settlement Agreement. Visitation is an extremely important issue to residents and their loved ones. The Settlement Class strongly objects to any restrictions on visitation inconsistent with the Settlement Agreement, including any attempt to restrict visitation by placing a restriction in the resident's individual treatment plan, or because the visit is inconvenient to staff.

Under the Settlement Agreement, Sec. IV(5), MSHS-Cambridge is to "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." In the Report, DHS references a



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parent survey that will be issued no later than September 30, 2012. *See* Report IV.5. A “parent survey” alone is not in compliance with the Settlement Agreement as parents are to be notified that they can comment, without limitation to a survey, any time regarding the operation of MSHS-Cambridge, on any topic.

The DHS Report is not complete. For example, under the “Next Steps” column, DHS provides “Continue monitoring,” without providing any actionable plan of how DHS plans to come into compliance with the Settlement Agreement. *See, e.g.*, Report V.A.6.-8., V.C.12.-15.

There remain a number of important concerns to the Settlement Class involving the implementation and compliance with the Settlement Agreement. Our September 20, 2012, e-mail communication to the independent monitor, enclosed, reiterates many of these outstanding concerns.

Thank you.

Respectfully,

**JOHNSON & CONDON, P.A.**

*s/ Shamus P. O’Meara*

Shamus P. O’Meara

M. Annie Santos

SPO:MAS:tlb

Enclosures

# Office of the Ombudsman for Mental Health and Developmental Disabilities



## State of Minnesota

In the Review of: MSHS-Cambridge

Replacement program for the former METO program

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**Date:** September 26, 2012

**Review Team Member:** Alicia Donahue, Chris Michel, and Cheryl Turcotte

**Legal Jurisdiction for the Review:**

Under Minnesota Statutes 245.91-97, the Office of Ombudsman for Mental Health and Developmental Disabilities is created and charged with promoting the highest attainable standards of treatment, competence, efficiency and justice for persons receiving services or treatment for mental illness, mental retardation and related conditions, chemical dependency and emotional disturbance. Concerns and complaints can come from any source. They should involve the actions of an agency, facility, or program and can be client specific or a system wide concern.

**Reason for the Review:**

In 2008, the Office of Ombudsman for Mental Health and Developmental Disabilities issued a public report entitled “Just Plain Wrong”. The purpose of the unannounced visit was to follow-up on our initial report entitled “Just Plain Wrong” regarding the original METO review and to monitor the progress made. This report describes observations made during the unannounced visit by Ombudsman’s staff to the MSHS-Cambridge program on 9/13 and 9/14/2012.

**Details of the Review:**

During the visit the Ombudsman’s Office staff toured the facility, reviewed client charts and documentation. We also observed several mental health reviews with the psychiatrist and/or the advanced psychiatric nurse practitioner. We spoke with Stephanie Kuznia, Stuart Hazard, Paula Halverson and various other staff. As opposed to our 2008 review, staff this time were very welcoming and cooperative.

Our observations and key findings can be found under the following categories:

- Households
- Staffing
- Medications
- Restraints
- Records
- Programming and Treatment
- Employment
- Grievance Process

**This visit was not meant to be a complete or comprehensive review but to give an overview of our observations in key areas during a two day period.**

### **HOUSEHOLDS:**

There has been some remodeling since METO. Walls have been reinforced and plexiglass was used in doors and windows. The former seclusion rooms are now medication rooms. Door handles and locks have been replaced; handles are “suicide proof”. A narrow door which opens outward is located adjacent to the door to the bedroom. This narrow door can be opened to check on the client and to enter if the primary door is blocked. Connecting the two living units/households, is a series of “swing doors” which allow the units to be refigured from the usual four beds on each side, to two on one side, six on the other, etc., in response to the needs of the clients.

The four households visited appeared stark. The main areas typically had nothing on the walls, bare floors and some large pieces of furniture. We noticed few, if any, personal items, magazines, newspapers, etc. Clients do have individual rooms which they can lock if desired.

Near each household’s nursing station were some posted items including a packet of grievance forms. All households had “Home & Courtesy Agreements.” These are “house rules” stating how clients are to treat one another and outline rules and restrictions regarding phone privileges, TV, radio, video games, lights out, access to snacks, etc. See sample. We noted one household’s posted Home & Courtesy Agreements/Guidelines was dated 2008 and its content clearly referred to METO and not the successor program.

Household Kitchens: Each household has a kitchen area which can be accessed by clients; supervision is determined individually.

During our tour, there were five clients in the households. Of the five, three were sleeping, one was using the client phone located in a separate room, and one was engaged in negative interaction. Records indicate that some clients wake up, do their first mini-core, and then often go back to bed. Staff said they give reminders or prompts to a client who misses a group or lunch; a client overhearing this remark stated: “no they don’t, they don’t do shit here, they say

they do, but they don't.”

### **STAFFING:**

MSHS-Cambridge currently has four nurses on staff, plus the Director of Nursing. The RN's work primarily daytime hours, with an RN on-call nights and weekends. When asked what happens when there isn't an RN on call, both Paula Halverson & Stuart Hazard indicated that that has not happened and will not happen at this time. MSHS-Cambridge is, however, moving toward fewer RN's, with the eventual plan of having no nursing coverage nights and weekends. They indicate this would be most similar to community facilities “like most IRTS are” and would be in line with their current licensing. They plan to move towards increased use of community resources such as the local emergency room or transfer to AMRTC. Quote from Paula Halverson: “If there were any symptoms, we would bring them to Cambridge Emergency Room for an evaluation to determine risk of safety. If it was determined that we could not keep them safe, we would have them admitted.”

MSHS-Cambridge currently has four individuals with the position title of behavior analysts (BA). They are having a hard time hiring someone who meets the proposed criteria in the settlement agreement. Stuart Hazard said they are looking at offering MSHS-Cambridge as an internship site to the University of Minnesota program, in hopes of eventually attracting BA's with the desired credentials.

#### Staff Ratios:

- Current staff to client ratio: 1 to 2
- Night staff ratio: 3 night staff per building, each building covers 2 households (6 staff total)
- 1 MHP on the unit, per awake shift

The program uses Mental Health Practitioners (MHPs) rather than QMRPs. MHPs include LPNs, BAs, Skills Development Specialist, Licensed Psychologist, Recreation Specialist and Social Worker (?), all of whom are assigned to households. Centralized staff include: the Clinic RN, Psychologist, RNP, consulting Psychiatrist and Discharge Specialist. Their regular physician continues to be Dr. David Paulson. They also subcontract for medical services from Nurse Practitioner, Keri Anderson. The program uses Human Services Specialists (HSS staff) as line staff.

### **MEDICATIONS:**

Medications are passed by staff who have had the required training. When asked about “first-dose monitoring,” Halverson responded that medication changes of that nature are done during the week when there are medical staff available for monitoring. MSHS-Cambridge staff reported to us that “stat” medications are discouraged due to the limited availability of medical staff. Clients will be referred to the community hospital if needed. See Policy #6370 First-Dose Monitoring. For a client example see the 8/23 to 8/29 MAR (Medication Administration Record) for BR.

There appear to be a number of clients on multiple psychotropic medications. The Justification for Medication form states the physician's justification for using poly-pharmacy or the use of medication exceeding the FDA maximum dosage. In addition, we noted the frequent use of PRN's. It is unclear to us whether the medication is being used for behavioral control or to alleviate acute psychiatric symptoms. It should be noted that the current Documentation for Implementation of Controlled Procedures form does not include whether or not the client was administered a prescribed PRN or an emergency PRN ordered at the time of the controlled procedure.

One client record contained an undated physician's Script for PRN Ativan. The Ativan is documented on one MAR, but not on subsequent MARs. No documentation was found indicating whether the Script and the MAR documentation are related to the same prescription, or if they cover different time periods. The Script is identified as being from "Minnesota Specialty Health System – Cambridge."

Medications are regularly reviewed, at least twice per month, in the mental health reviews conducted by the psychiatrist or the advanced psychiatric nurse practitioner. We were able to sit in on three mental health reviews, all of which included the client as an active participant and appeared to be very thorough.

### **RESTRAINTS:**

We requested a restraint log from 12/13/2011 to 9/13/2012, and were given documentation regarding seven uses of restraints as well as copies of reviews by the Internal Reviewer.

General Comments: Though prone restraint is not to be used, it is evaluated for contraindications in the initial History & Physical and is referred to in other documents. It appears a prone hold is usually used while in transition to another position.

#### Examples:

1. JR had a May 4th restraint. We found two completed DHS 3652 Documentations for Implementation of Controlled Procedures forms describing the same incident. One contained detailed information regarding a prone hold; however, the other did not.

2. JL's record contains an initial history and physical assessment which indicated contraindications to a prone hold; however, a unit form indicated that there were no contraindications. This was brought to the attention of Amanda Bartnick, R.N. who immediately made arrangements to correct this.

Restraint usage is reviewed by Internal Reviewer, Dr. Rick Amado. His reviews appear to be thorough and give specific recommendations. Some of these recommendations were "accepted." However, the majority were "accepted with ... modifications". The MSHS-Cambridge response is done by Stuart Hazard, Treatment Director. It is unclear whether anything further happens with these recommendations, i.e. are they shared with the treatment team or acted upon in some other way. It was unclear what the follow-up process is when the Internal Reviewer says one

thing and the MSHS- Cambridge response is “modified.” The real value of an Internal Reviewer is the Reviewer’s expertise in effectively addressing the behavioral issues through treatment planning. We wonder whether this expertise is being truly utilized in a manner that has a meaningful impact on the client’s treatment.

Examples:

- The Internal Reviewer questioned whether JR’s transfer was clinically contraindicated because he appeared stable prior to his move to MSHS-Cambridge; he further questioned whether this might constitute abuse or neglect. The response indicated that this would be formally brought up at the next diversion meeting. We didn’t find documentation that this was done or that it was passed on to the CEP.
- The Internal Reviewer suggested completion of a functional behavior analysis (FBA) regarding a specific behavior for JS. We did not find evidence of follow through.

No medical orders for restraint were found in the records. When asked, Paula Halvorson said that medical orders for emergency/unplanned restraint are not required for facilities covered by their current license.

At least four uses of emergency restraint were reviewed by DHS Licensing as evidenced by Licensing Compliance Reports/Correction Orders issued on 2/15/2012, 7/5/2012, 7/5/2012 and 7/12/2012. These reports can be found on the DHS Licensing website.

### **RECORDS:**

General Comments: Records appear disorganized and confusing and because of this, the records were difficult to review. The documents are very different than those used at the time of the initial review. Many of the documents are lengthy, redundant and scattered making us question how the records can all come together to be actually used in a meaningful way. In contrast, the purple binder that follows the client was concise, well organized and contained helpful information. This binder is described under “PROGRAMMING AND TREATMENT” in more detail.

Several mistakes and filing errors were noted. Perhaps the most significant was the client record that contained two different History & Physical Forms, obviously describing different people, but both identified as being for the same client. NOTE: This was pointed out to Paula Halvorson who immediately removed the incorrect form. This was brought to her attention because of the potential danger to the client if the wrong information were to be used in an emergency situation.

The difficulty in locating items may or may not be related to the fact that each professional does his/her own filing.

## PROGRAMMING AND TREATMENT:

Mini-Core meetings: Mini-cores are held twice daily --- this is a meeting between an individual client and at least one staff person. The client is able to identify what he/she wants to work on and how. Communication issues are addressed and clarified and they talk about what is working and what is not. These working forms are included in a purple binder kept on the household. The binder also contains very simple forms, to be used by client and staff in reviewing, setting goals and making daily plans.

This purple binder is a working individual folder which provides the means by which the volumes of information contained in the actual client records is translated into a meaningful working treatment plan. As opposed to the two primary records, which are cumbersome at best, these binders contain a minimum of paper and seem to effectively translate the plan into daily life activities providing a method for data collection. A core piece is the Quick Look. This is a brief two to four page document written by an R.N., which gives a quick view of the client. It contains the necessary identifying information, diagnosis, medications, brief history, current programming, etc. It provides information in a concise manner readily accessible to unit staff.

Per Stuart Hazard, treatment is based on the **“Boys Town”** model, which was also the basic structure of the old METO. The primary treatment technique used is IM&R (Illness Management and Recovery), an approach normally used with people with serious and persistent mental illness (SPMI). Stuart Hazard indicates that it is not difficult to adjust this approach for persons with developmental disabilities (DD) --- one just needs to “repeat, repeat, repeat.”

Clients are assigned Privilege Levels including “on track”, Treatment Interfering Behavior, and Safety Interfering Behavior. We did not, due to time constraints, delve into this further.

MSHS-Cambridge openly described utilizing IM&R as their primary treatment modality. Stuart Hazard provided information pertaining to implementation.

- “Illness Management and Recovery Focus Areas” is a document located within each client chart.
- It outlines each of the ten modules within the IM&R program. Each module includes a handful of bullet points describing the topics covered in that module.
- Mr. Hazard reports the IM&R module “Drug and Alcohol Use” is not used due to “staff not having the necessary training or credentials.”
- Staff are assigned to one of each of the other nine IM&R modules. That staff person is then responsible to learn the curriculum and facilitate the group sessions for that module.
- Mr. Hazard reports that Nicole McMahon (staff person from AMRTC – unknown to us function) helped redesign IM&R to be a more appropriate fit for their clientele. We do not have specific information regarding the redesign.
- When Mr. Hazard was asked, “as the treatment director, how did you decide on this

treatment modality, which is not an evidence based practice for the population you serve?” he answered “because it was a preset curriculum.” When Mr. Hazard was asked, “how has MSHS-Cambridge overcome the IM&R requirement of client’s recognizing and challenging highly cognitive distortions and behaviors?” he responded “while it doesn’t necessarily fit with our population of DD, it does meet some of their needs.” When asked for specific examples of ways in which the programming was modified to fit with their client population, Mr. Hazard replied with “simpler language and more repetition.”

- Mr. Hazard indicated while alcohol and drug abuse is not addressed through IM&R, it is also not addressed with any other treatment method even though a number of clients have chemical dependency issues.

START (“Socialization Training and Anger/Aggression Replacement Treatment”) is another treatment modality utilized at MSHS-Cambridge. Mr. Hazard indicates this treatment is based on the program “Be Cool.” CoolAnger.com reports this treatment model “combines educational, awareness, insight cognitive and real life applications to bring the client into self-empowerment to change” ([www.CoolAnger.com](http://www.CoolAnger.com)) MSHS-Cambridge “Be Cool” programming is done in a group setting. It utilizes worksheets, handouts and videos. Based on our reading we can’t tell whether this is evidenced based practice or is suited to this population.

MSHS-Cambridge subcontracts with Riverwood Center once a week for sex offender treatment and MSHS-Cambridge provides transportation.

Cambridge Isanti School District provides educational services for individual clients at MSHS-Cambridge. Clients do not go off campus to attend public school.

Sensory Room: Though not visited at this time, several OMHDD staff recall seeing this room at the time of the original review. It continues to be overseen by the Skills Development Specialist and continues to be located in the Vocational Building. The room provides a calm peaceful environment. It contains a variety of swings, brushes and other sensory items. Clients can, and do, request to use this room.

Recreation Center: While touring, we observed several clients and staff interacting in a positive manner while engaged in a number of wellness activities.

### **VOCATIONAL:**

Assessments include identification of clients’ strengths and needs in the vocational area and may include a determination of potential benefit from work opportunity. There is also documentation that at least some clients want to work. This is a very important part of day to day living; however, it does not appear to be addressed. There are no employment or job training opportunities available to clients at MSHS- Cambridge. Example: In the former METO program, NK consistently attended work, was considered a good worker and found the job interesting. Although NK continues to state “I want a job, I need to make money,” employment is not



available under the MSHS-Cambridge redesigned program. We noted during the initial METO review that the vocational program was robust and we were disappointed to see this absence in vocational opportunities.

### **GRIEVANCE PROCESS:**

See Grievance Policy and sample form. A packet of forms is posted outside the nursing station on each living unit. The hospital review board is no longer utilized by MSHS-Cambridge.

### **OMBUDSMAN'S COMMENTS/CONCERNS:**

I have reviewed the observations made by the staff of this agency and provide the following comments.

The Ombudsman remains concerned about the following issues reviewed in this visit report. These may be in addition to other areas previously expressed by this agency in the original report and over the course of various meetings the Ombudsman has had with the leadership of DHS since the original report was issued.

- There is a general concern that the programing provided for the clients deviates from the original purpose of the program as outlined in the empowering legislation for METO or the subsequent Settlement Agreement that described the conditions of any successor program. This was and is to be primarily a program for individuals with a developmental disability with serious behavioral and legal issues, regardless of what other co-occurring conditions these clients may have.
- There is concern that there is a lack of vocational/habilitation programing that has clearly has always been a hallmark policy of this state for persons with developmental disabilities.
- There is a concern that chemical restraints appear to be used based on the PRN use of psychotropic medications and other medications used to deal with agitation.
- There is concern regarding the lack of medical staffing and the use of HSS staff for medication monitoring including first dose or PRN medication, given the number of complex medications that many clients are prescribed. There is concern as to whether HSS staff members are trained on monitoring for the very serious side effects that can accompany use of PRN antipsychotics.
- Also arising out of concern for the medical coverage is the issue of using the local Cambridge Medical Center when a client is out of behavioral control. While on first look this might appear to be logical, however the Cambridge Medical Center's Director of Behavioral Health is the same person who was the Clinical Director at METO during the time of excessive restraints and the person who would decide what protocols the Medical Center will use when the MSHS clients are at the medical center. In addition, it was the understanding of the Ombudsman that the special unit at AMRTC was supposed to

provide those services needed when the MSHS – Cambridge clients were in need of acute behavioral stabilization.

- There is a concern that the Internal Reviewer is not being utilized as intended in the Jensen Settlement Agreement. We question why the facility under federal monitoring is allowed to reject or modify recommendations.
- Charting continues to remain a significant concern.
- Our office remains concerned that despite the agreement that this program would not be developed as an IRTS, all indications point to the program operating as if they are. Just because the DHS Licensing laws, rules and variances for persons with developmental disabilities under 245B are silent on medical staffing, day habilitation by the program and other issues does not mean that this is the right approach for the population that is to be served in this program.

Issued under the authority of



**Roberta Opheim**

Minnesota Ombudsman for Mental Health and Developmental Disabilities

## Annie Santos

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**From:** Shamus O'Meara  
**Sent:** Thursday, September 20, 2012 8:27 AM  
**To:** 'David Ferleger' (david@ferleger.com)  
**Cc:** Steve.Alpert@ag.state.mn.us; Colleen.Wieck@state.mn.us; roberta.opheim@state.mn.us; Annie Santos  
**Subject:** Meeting With David Ferleger, Parties and Consultants  
**Attachments:** July 10 Letter to Judge Frank.pdf; Advocate Concerns Involving Implementation of Jensen Settlement.pdf; June 19 and July 5, 2012 e-mails.pdf; RE: Jensen Settlement Agreement; RE: Rule 40; RE: Monday's Rule 40 meeting

Mr. Ferleger:

For the meeting today, we highlight the following issues important to Settlement Class Counsel:

1. Some of the concerns expressed in the enclosed Advocate Concerns document have gone unanswered. We would like to receive responses to them.
2. We would like to receive a response to the licensing concerns involving Cambridge as expressed in our July 5, 2012, e-mail to counsel, enclosed. This is an important issue. The license for the facility drives the description of rights, protection of rights, and type of programming that people at MSHS-Cambridge receive. We understand the idea of IRTS was proposed and not accepted because it was not a license for people with developmental disabilities and the settlement required the successor program to return to its original purpose of serving people with developmental disabilities with severe behavioral issues.

In addition our the previously stated licensing inquiry, we would like to understand specifically what the residents are doing during a typical day. Does the program and services provided at MSHS-Cambridge include employment, supported employment, and community integration. How much time are they in 'group' as some residents describe. Is 'group' being discontinued. Is there any contemplated replacement for it. We understand that it is perhaps a ½ to 1 hour with the rest of the day unstructured and idle.

3. The definition of Prohibited Techniques in the Settlement Agreement was reached by consensus between the parties with active assistance from the consulting experts. Mike Tessner and I were asked by DHS to present the Settlement Agreement provisions to the Rule 40 Committee as the committee was off track and needed a solid understanding of the agreement as a predicate for its work. I believe we both Mr. Tessner and I viewed the Prohibited Techniques section, like other sections of the settlement agreement, as a best practice developed provision that should be present throughout the State/DHS facilities. Mr. Tessner's May 7, 2012, e-mail to me, enclosed, expressed this view:

Shamus,

I believe you and Colleen have spoken about the Rule 40 meeting on Monday and you are planning on attending. We are feeling it is important to revisit the Settlement conditions relative to restraint and seclusion. The thought is that I would review the specific requirements for the Cambridge programs and you would talk about the expectation of the revision of rule 40 for the broader system. Our desire is to get the committee to adopt these conditions as the frame for the revision of rule 40 and then focus on how this would fit in the array of other settings for which DHS is responsible.

My response to Mike's e-mail shared this perspective and reiterated our view about the importance of this issue:

We will not support positions that seek a rule change using restraint, seclusion or other prohibited techniques precluded by the settlement, or any use of restraint beyond the specific use allowed by the settlement (e.g., Velcro strap only in defined emergency situation with third party and expert review).

Implementing these Prohibited Techniques in all DHS managed facilities was also a goal expressed to us by Alex Bartolic at the Rule 40 Committee, and is consistent with the State's goal expressed in the agreement to widely implement the Rule 40 and Olmstead process:

"The 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."

Contrary to this view, however, rather than accepting this provision, we have received several reports, and have firsthand experience, with state and other members on the Rule 40 seeking to develop exceptions to the preclusion on using Prohibited Techniques, particularly the preclusion against restraints. We are advised that one state operated representative in a management position involving Cambridge firmly believes in the programmatic use of restraints (the primary reason why the lawsuit was commenced) and rejects the definition of emergency in the settlement agreement.

Our July 30, 2012, e-mail, enclosed, to Roberta Opheim, further expressed our view of the Rule 40 Committee's charge.

4. We recently learned that Cambridge residents cannot have visitors in their living units, and cannot use the Rec Center either for visitation. This does not appear to be consistent with the Settlement Agreement.

5. Mr. Ferleger's First Report to the Court provides information about the admission, readmission, and discharge patterns at MSHS-Cambridge. It appears that people with developmental disabilities are entering Anoka, and that people with developmental disabilities are still in St Peter. It also appears that people may be moved through several facilities for brief periods of time, and that the transition planning requirements of the Settlement Agreement may not have been implemented. We continue to have serious concerns about implementing the transition planning required by the Settlement Agreement.

6. DHS's recent report to the Court was not provided to our office for review and comment as we believe is required by the Settlement Agreement. We have some disagreement with it. We need clarification of DHS's process for the report, whether it intended to be the report of the external reviewer, and whether a draft report will be provided to our office for review and comment prior to filing the report with the Court.

7. We continue to have concerns about the use of PRN's and possible chemical restraint usage at Cambridge despite its prohibition in the Settlement Agreement. our July 6<sup>th</sup> e-mail, enclosed, discussed this issue and asked for information:

Please advise of the specific reasons why PRNs are being used at Cambridge. Please advise whether the policy or procedures issued to Cambridge staff for the use of PRNs and/or psychotropic drugs include any warning or reference that PRNs shall not be used to manage behavior or restrict movement. Please advise whether staff have been specifically trained on this aspect of the Settlement Agreement. We believe this is extremely important if PRNs are to continue being used at Cambridge for psychotropic drugs.

We understand that the Ombudsman has a similar concern and would like to hear from her on this important issue.

8. The August 28, 2012 Bulletin for admission to Cambridge does not comply with the Settlement Agreement. our office was not consulted on the bulletin prior to its issuance.

9. We would like to be updated on the progress of hiring the third party expert. We understand that DHS originally received no response to its RFP on this position, but our understanding from the chambers conference with Judge Frank where this was discussed that DHS agreed to continue working to fill this position. My July 6<sup>th</sup> e-mail to counsel also asked for the names and C.Vs of the individual(s) being considered for both the nurse specialist and the third party expert positions so we consider them with the consultants and provide feedback to DHS. We received information on the nurse specialist from Ms. French, and have since asked that she include Ms. Wieck and Ms. Opheim in the interviews for that position, but have not received any information or update on the hiring of the third party expert.

Thank you.

Shamus

**Shamus P. O'Meara**  
[spo@johnson-condon.com](mailto:spo@johnson-condon.com)  
**direct:** 952.806.0438



7401 Metro Blvd | Suite 600 | Minneapolis, MN 55439-3034 | Johnson-Condon.com

"Alpert, Steve" <Steve.Alpert@ag.state.mn.us> 

May 14, 2012 6:45 PM

To: "'Rebecca\_Baertsch@mnd.uscourts.gov'" <Rebecca\_Baertsch@mnd.uscourts.gov>

Cc: Shamus O'Meara <SPO@johnson-condon.com>, "Kohnstamm, Kenneth" <Kenneth.Kohnstamm@ag.state.mn.us>

Jensen v. Minnesota Department of Human Services

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1 Attachment, 341 KB

The Honorable Donovan W. Frank  
U.S. District Court Judge  
Warren E. Burger Federal Building and  
U.S. Courthouse  
316 North Robert Street, Suite 724  
St. Paul, MN 55101

**Re: *James and Lori Jensen, et al. v. Minnesota Department of  
Human Services, et al.***  
**File No. 09-CV-0177S DWF/FLN**

Dear Judge Frank:

Attached is the status report of May 14, 2012 regarding the various requirements of the Settlement Agreement in this matter. We thank the Court in advance for the opportunity to discuss the Court's letter of May 4, 2012.

Please let me know if the Court also wants a copy of this status report filed by ECF.

Respectfully,

Steve Alpert

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This e-mail is intended to be read only by the intended recipient. This e-mail may be legally privileged or protected from disclosure by law. If you are not the intended recipient, any dissemination of this e-mail or any attachments is strictly prohibited, and you should refrain from reading this e-mail or examining any attachments. If you received this e-mail in error, please notify the sender immediately and delete this e-mail and any attachments. Thank you.



[Jensen Statu...pdf \(341 KB\)](#)

**JENSEN SETTLEMENT AGREEMENT STATUS REPORT BY  
MINNESOTA DEPARTMENT OF HUMAN SERVICES  
May 14, 2012**

**Section IV. (Page 6): Closure of the METO program.**

The METO program was closed June 30 2011. The sixteen (16) bed Minnesota Specialty Health System Cambridge opened July 1st. Additionally one of the two transition foster homes is open with three (3) individuals in residence. The second transition home is awaiting the fire marshal inspection. The MSHS Cambridge has a current census of six (6) and has been running at an average daily census of eight (8). The first transition home has a vacant bed. As of this time there is not a demonstrated need for the second transition home.

**Section V. A. (Page 6): Prohibited techniques.**

The policy on Therapeutic Interventions and Emergency use of Personal Safety Techniques is implemented. There have been only three (3) uses of emergency restraint since December 2011. In the first episode, notification of several of the external parties was delayed by two days. However, DHS Licensing visited the program and cited the program for the delay. The Medical Officer review was timely completed for this episode and the review by the Internal Expert, Dr. Rick Amado was timely completed. A copy of Dr. Amado's review was provided to Mr. O'Meara after his request.

In the second episode (May 4, 2012), all notifications were timely. The Medical Officer review was also timely completed for this episode.

However, the Department has received a phone call contact from Licensing with regard to concern over the level of detail in the May 4 Report. More specifically, the concerns were around the "rationale for not using a side lying hold", in the document and related concerns over a prone restraint. The Department provided an oral explanation but Licensing has requested that a written addendum be produced with this detailed information. The Department will complete the addendum and send it out to all recipients of the original form.

Licensing also raised concern over whether the consultation with the Third Party/SOS Medical Director occurred within 30 minutes. The Department noted that it was an error on the Facility's part in the documentation because Dr. Radke was acting in the capacity of both SOS Medical Director and Third Party Expert and was first contacted at 3:48 p.m. The correct timeframe will be placed in both areas in the addendum the Department will be sending to Licensing.

Dr. Amado has visited the Facility and is expected to have his review completed by the end of the week.

There was a third episode of the use of emergency restraint that occurred on May 10, 2012. The restraint was reported to last 1 minute. The individual was transported to the local emergency room and then admitted to Anoka Metro Regional treatment Center for psychiatric evaluation

and stabilization. All notifications were done timely. Consultation by Dr. Radke was completed timely. Dr. Amado has also initiated his review of this matter and is expected to complete his review by the end of the week.

**Section V. E. (Page 8): Third Party Expert.**

The Department was required to establish a protocol to contact, on a rotating basis, a qualified Third Party Expert from a list of at least five (5) qualified Third Party Experts pre-approved by Plaintiffs and Defendants. The Department posted an RFP in the State Register on November 21, 2011. The posting ran for thirty (30) days. No responses were received. Following the Settlement Agreement, however, the Department utilized the Medical Officer Review protocol under Section V. F.

Despite being in full compliance with this provision, when the Department was advised that there was interest in reopening the position, another RFP was issued in April to a list of known experts. One individual has verbally expressed an interest and the Department is awaiting his written response.

**Section VII. A. (Page 10): The Department shall establish one employee (Internal Reviewer) with responsibility for monitoring the Facility's use of restraint.**

The Department has employed Dr. Rick Amado in this capacity. While Dr. Amado had been on medical leave during some of this time, as set forth above, he was still able to complete his review.

**Section VII. B. (Page 11): The Department will provide funding for the External Reviewer in the Office of Health Facility Complaints, Minnesota Department of Health. The External Reviewer will have full enforcement authority, proper credentials, and be approved jointly by the Plaintiffs and Defendants.**

Admittedly, the Department is not in compliance with this requirement. In November, 2012, Deputy Commissioner Barry provided MDH the provision from the settlement regarding the position and the start of an inter-agency agreement. MDH did express concern as to whether a full time position was required and if it were part time on this and part time on something else, MDH would run into issues over the experience required to complete other responsibilities as most of their investigators are nurse evaluators.

On February 8, 2012, the Department sent a status update to Mr. O'Meara and this provision was highlighted as a concern:

**Page 12. The External Reviewer shall provide the Plaintiffs and the Department with a draft report. The External Reviewer shall issue quarterly reports to the court for the duration of the agreement.**

The first quarterly report to the court is due in early March with a draft due to the plaintiff and Department 15 days before submission to the court. The External Reviewer will not be in place in time to produce this report within these timelines.



The Department is interested in discussing an alternative strategy pending the position being filled.

On February 10, 2012, Mr. O'Meara notified the Department that the Court had contacted him and requested an update of the non-monetary items in the Settlement Agreement and it was the Department's understanding that Mr. O'Meara had forwarded the February 8 update to the Court.

On March 8, 2012, the Department provided Mr. O'Meara additional information regarding efforts to comply with this provision, including a copy of a memorandum between the Department and MDH dated March 6, 2012 detailing the concern over filling the position. In part, MDH explained that it would prefer to engage a person "who better fits the profile of other OHFC employees" and that their preference would be to use an Registered Nurse and "add requirements to the RN position such as background in psychology, knowledge of best practices in treatment of persons with developmental disabilities, or whatever other special knowledge would best fit the desires of the court."

Discussions between the agencies continued and the Department contacted Dr. Wieck requesting her input on this position. In the interim, MDH has also advised the Department that they would utilize current staff to fulfill the requirements of the settlement.

On April 3, 2012, the Department hosted a meeting with the Department of Health ("MDH"), Roberta Opheim, Ombudsman, Ombudsman Office for Mental Health and Developmental Disabilities, Dr. Colleen Wieck, Executive Director of the Minnesota Governor's Council on Developmental Disabilities, and Mr. O'Meara. The group discussed alternative ways to get qualified staff on board to complete the third party reviews of the Facility and issuance of the quarterly report to the Court. The group agreed that MDH would hire an Advanced Practice Rn (APRn) with certification in mental health and experience in services for individuals with developmental disabilities. Additionally they would contract with a clinical expert with the credentials specified in the Settlement Agreement to serve as clinical consultant to the APRn. The interagency agreement is being modified to include this change and MDH has begun the process to fill the position. The Department has allocated the necessary funds for this provision.

Bottom line, however, is that the External Reviewer position remains unfilled and MDH did not complete the first quarterly report and update as required (see next item).

**Section VII. B. 4. and 5. (Page 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. The external reviewer shall issue quarterly reports to the Court for the duration of this Agreement. The reports shall describe whether the Facility is operating consistent with best practices, and with this Agreement.**

Because of the issues regarding the hiring of the External Reviewer, the first quarterly report was not filed with the Department and, more importantly, with the Court.

The first quarterly report to the Court was due in early March with a draft due to the plaintiff and Department fifteen (15) days before submission to the Court. The External Reviewer with the Department of Health was not yet in place (see above) so the first report was not completed. The next report is due in early June. The Department is hopeful that this report will be completed within the required time lines. However, in the event there is another delay, the Department will file an updated status report.

**Section IX. B.1. (Page 14): Staff at the Facility shall receive specified hours of training by December 31, 2011 (therapeutic interventions, personal safety tech., medically monitored restraint)**

The Department completed the training for facility staff prior to December 31, 2011.

**Section IX. B.2. (Page 15): Staff at the facilities shall receive the specified training by March 31, 2012 (person centered planning/positive behavioral supports, post crisis evaluation)**

The Department has completed the specified training.

**Section IX. D. (Page 15): The Department will discontinue any marketing or publicity inconsistent with the mission of the facilities.**

The Department has removed road signage, references to the METO program on the Department web site, and ended the use of the program brochures. A new brochure, and two bulletins are being drafted. One bulletin describes the new reporting process in the event of the use of emergency restraint. The other bulletin announces the admission and discharge criteria for the new program.

**Section X. A.1.a. (Page 16): Community Support Services (“CSS”) will provide long term monitoring of person with clinical and situational complexities.**

CSS has established the monitoring process and currently has twenty-seven (27) individuals in long term monitoring.

**Section X. A.1.b. (Page 16): CSS services will be statewide and respond within three (3) hours from authorization.**

CSS has initiated the (3) hour response time state-wide. CSS has provided augmented support to forty-two (42) individuals since in the first three (3) months of 2012.

**Section X. A.2. ( Page 17): Expansion of CSS will include fourteen (14) full-time equivalents (FTEs).**

Expansion of CSS staff was completed in October 2011.

**Section X. B. (Page 18): 1. Within sixty (60) days of the Court's approval of this Agreement, the Department will establish an *Olmstead* Planning Committee which will issue its public recommendations within ten (10) months of the Court's Order approving this Agreement. Within eighteen (18) months of the Court's approval of this Agreement, the State and the Department shall develop and implement a comprehensive *Olmstead* plan.**

The Department convened the first meeting of the *Olmstead* Planning Committee on March 7, 2012. The Committee is meeting for a half day every two weeks. They have begun review of the array of institutional and community based services, development of their work plan and the drafting of a vision and principles statement. Bi-Monthly meetings are projected to continue through October 2012.

The Department has determined that involvement of an outside expert could prove helpful in moving the work of this Committee forward, particularly in fleshing out the various components of the plan into a final document. In fact, the Department was in contact with Mr. Ferleger for this very purpose. However, Mr. Ferleger has told the Department that he does not wish to pursue work on the *Olmstead* Plan until the Court clarifies whether it wants Mr. Ferleger involved in another capacity.

**Section X. C. (Page 19): Within sixty (60) days from the date of the Order approving this Agreement, the Department shall organize and convene a Rule 40 advisory committee.**

The Department initiated a solicitation of interest published in the State Register January 3rd, 2012. Selection of committee members was completed in collaboration with plaintiff's counsel and named committee members. The first meeting was held January 30, 2012. The Committee has adopted the basic provisions of the Settlement Agreement related to positive behavioral supports, person centered planning, prohibitions of certain techniques, training, monitoring and the emergency use of seclusion and restraint. The Committee is beginning the process of determining what barriers to implementation exist in the broader system licensed by the Department.

**Section X. D.1. (Page 20): The Department shall undertake its best efforts to ensure that there are no transfers to or placements at the Minnesota Security Hospital ("MSH") of any person committed solely as a person with a developmental disability. As of July 1, 2011 there shall be no transfers or placements of persons committed solely as a person with developmental disabilities to the MSH.**

The Department has established processes to review all referrals for admission to the MSH to ensure persons committed solely as a person with developmental disability are not admitted. One person was admitted in October 2011 and initially did meet the criteria because the order for commitment was for mental illness and developmental disability with a requirement to treat to competency based on a criminal matter. After admission, the court ended the commitment for mental illness. The individual completed the treatment to competency and was discharged from the program.

Above and beyond the requirements of the Settlement Agreement, the Department and the Ombudsman's office have initiated an early intervention protocol for persons with a developmental disability who are at risk of commitment under the mentally ill and dangerous ("MI & D") provision. This effort is intended to bring the necessary clinical and program expertise, funding resources, and advocacy support to achieve better outcomes for the individual and effectively manage the public safety risk thereby avoiding the M I& D commitment status.

**Section X. D.3. (Page 20): No later than December 1st, 2011 persons confined at the MSH who are solely committed as a person with a developmental disability shall be transferred to the most integrated setting.**

There are three (3) men who are committed solely as DD still residing at the MSH. All three have active plans for discharge that include family, representatives from the Ombudsman for MHDD, county social services, and the future provider. Funding for the services has been agreed upon.

In planning for these men's discharge to the community the principles of "most integrated setting" in accordance with the Olmstead decision and person centered planning are being applied. The clinical complexity of each of these men and the risk of harm to self and/or others makes the planning difficult. In spite of these difficulties the planning is moving forward and placements are expected by mid-summer.

These plans also will carry a considerable investment of financial resources. For example, one placement that is being finalized has a cost of \$500,000 for the building of a residence in the community. In addition, for the three men leaving the MSH, the projected cost to the Home and Community Based Waiver for two of the men is \$1,500 per day (each) and for the other man it is \$3,000 per day. These initial costs should moderate as the individuals adjust to their new living situations.

**Section X. E. (Page 21): Any person committed solely as a person with a developmental disability at the Anoka Metro Regional Treatment Center ("AMRTC") who does not have an acute psychiatric condition will be transferred from AMRTC to the most integrated setting.**

The Department has established a process to assess the medical necessity for individuals with a developmental disability before admission to AMRTC for psychiatric care and treatment; that individuals must have an acute psychiatric condition and meet a hospital level of care. Patients are assessed regularly during the episode of care to determine the need for continued stay. Once they no longer meet these criteria, discharge planning is made to transfer the patient.

Two patients committed solely as a person with a developmental disability received services at AMRTC since January 1, 2012. The first was a Rule 20.01 transferred from the Competency Restoration at MSH on February 1, 2012 after Ramsey County dropped the MI Commitment and replaced it with a DD commitment. The Competency Restoration Program could not keep him with the DD only commitment and the patient was discharged from AMRTC to a foster care home on March 8, 2012 after the Rule 20.01 issue was resolved.

The second admission was after the most recent use of emergency restraint on May 10, 2012 (*see* above). The individual was transported to the local emergency room and then admitted to AMRTC for psychiatric evaluation and stabilization.

**Section X. F. (Page 21): The Department shall substitute the term “developmental disabilities” for the term “mental retardation” where it appears in any Department policy, bulletin, web site, brochure, or other publication. The Department also agreed to draft a bill for the Minnesota Legislature that will require the replacement of terms such as “insane,” “mentally incompetent,” “mental deficiency,” and other similar inappropriate terms that appear in Minnesota statutes and rules.**

The Department has made efforts in its policy, bulletin, website, and other publications to replace the old terminology with “developmental disability”. When an oversight was brought to its attention, the Department promptly followed up and addressed the concern.

Legislation was drafted and adopted that directs the Department to convene a work group to identify other insensitive or outdated language.

255.6 Sec. 10. TERMINOLOGY AUDIT.

255.7 The commissioner of human services shall collaborate with individuals with

255.8 disabilities, families, advocates, and other governmental agencies to solicit feedback and

255.9 identify inappropriate and insensitive terminology relating to individuals with disabilities,

255.10 conduct a comprehensive audit of the placement of this terminology in Minnesota  
Statutes

255.11 and Minnesota Rules, and make recommendations for changes to the 2013 legislature

255.12 on the repeal and replacement of this terminology with more appropriate and sensitive

255.13 terminology

The Department recognizes that further work is necessary prior to and during the next legislative session to further this goal.

**Section XIV. C. and D. (Page 30): This Agreement is not intended to affect the rights of Plaintiffs or Class Members for any disability benefits or related benefits or funding they are receiving or for which they may qualify. The parties agree that the Court’s order approving this Agreement will include a provision that to the extent of this Court’s authority, the Settlement Amount paid to Plaintiffs and Class Members shall not jeopardize any disability benefits or related benefits or funding they are receiving or for which they may qualify; The parties agree that the Court’s order approving this Agreement shall preclude the State and the Department from seeking to recover any of the Settlement Amount from Plaintiffs and the Class Members for cost of care charges for residing at METO or participation in any other State program involving people with developmental disabilities, or any other attempt by the State or the Department to recover any of the Settlement Amount from Plaintiffs or Class Members, and that the State and the Department shall be relieved of any obligations to initiate any proceedings to recover any of Settlement Amount from Plaintiffs and Class Members.**

The Department has instructed its staff and initiated contact with county social services staff, county attorneys, providers, and placed a general notice on the Department web site to acknowledge the issuance of the settlement checks and that these funds were not to be considered income or assets for the purpose of benefit eligibility. A summary of the Department's proposed action plan was provided to the Court and counsel by email on February 23, 2012. The Department has initiated additional contacts as appropriate following the further orders from the Court.

The Department has been contacted by Social Security and requested the names of all claimants and their social security numbers. Social Security has contacted the Department and requested the names of all claimants and their social security numbers. The Department alerted the Court of this development on May 2, 2012 and on May 3, 2012 the Department submitted a draft amendment to the Protective Order to Mr. O'Meara in order to address this request. This is still an open issue.

Additionally the Department submitted a request to Centers for Medicare & Medicaid Services ("CMS") to amend the Minnesota State Plan to exempt these funds from consideration of eligibility. An answer from CMS is expected in late May. Given recent developments with the Court's interaction with the federal government, however, we do not anticipate problems with this.

AG: #3011352-v1

"Alpert, Steve" <Steve.Alpert@ag.state.mn.us>✉

July 23, 2012 2:28 PM

To: Shamus O'Meara <SPO@johnson-condon.com>

Cc: "Kohnstamm, Kenneth" <Kenneth.Kohnstamm@ag.state.mn.us>, "Ikeda, Scott" <Scott.Ikeda@ag.state.mn.us>, "David Ferleger" (david@ferleger.com) <david@ferleger.com>

RE: Advocate Concerns Regarding implementation of the Jensen Settlement

2 Attachments, 33 KB

Shamus-

I was in mediation all day Friday, but have forwarded this on to the Department for further clarification. I will continue to provide responses from the Department regarding the Advocate Concerns as I receive and review them.

As always, should you wish to discuss any issues, do not hesitate to call.

Thanks.

Steve

---

**From:** Shamus O'Meara [mailto:SPO@johnson-condon.com]

**Sent:** Friday, July 20, 2012 8:49 AM

**To:** Alpert, Steve

**Cc:** Kohnstamm, Kenneth; Ikeda, Scott; 'David Ferleger' (david@ferleger.com)

**Subject:** RE: Advocate Concerns Regarding implementation of the Jensen Settlement

Steve,

In follow up to your e-mail, below, the reporting of abuse and neglect and referral for prosecution are issues that also relate to staff. Your e-mail appears to reference whether or not a resident (client) is referred for prosecution. Can you please confirm whether the DHS response relates to staff or to resident abuse and neglect and referral for prosecution, or whether it responds for both staff and resident incidents.

Can you please also forward the DHS response to the remainder of the Advocate Concerns.

With David Ferleger's recent court ordered involvement, I am copying him on this e-mail as he has asked to be copied on such communications.

Thanks

Shamus

**Shamus P. O'Meara**

[spo@johnson-condon.com](mailto:spo@johnson-condon.com)

**direct:** 952.806.0438





7401 Metro Blvd | Suite 600 | Minneapolis, MN 55439-3034 | Johnson-Condon.com

---

**From:** Alpert, Steve [mailto:Steve.Alpert@ag.state.mn.us]  
**Sent:** Tuesday, July 17, 2012 10:50 AM  
**To:** Shamus O'Meara  
**Cc:** Kohnstamm, Kenneth; Ikeda, Scott  
**Subject:** Re: Advocate Concerns Regarding implementation of the Jensen Settlement

Shamus-

The Department provides this response to the following section of your email of June 21, 2012:

**The settlement agreement provides, "The State of Minnesota further declares, as a top concern, the safety and quality of life of the Residents of the Facility. The State agrees that its goal is to provide these residents with a safe and humane living environment free from abuse and neglect."**

**Advocates believe it would be helpful to learn what specific actions the State has taken and implemented to date to meet this goal.**

**Zero Tolerance**

**The Settlement Agreement reaffirms the State's zero tolerance for abuse and neglect and its reporting commitment relating to the abuse of vulnerable persons, and referral where appropriate of suspected abuse or neglect for criminal prosecution. We have received no information concerning how this is being implemented by DHS...**

Please see attachments regarding zero tolerance.

**...and whether referral for prosecution has occurred for any suspected incidents of abuse.**

Since December 5, 2011 there have been no reports of suspected abuse/neglect at CSHS Cambridge. Since this date the adult foster care transition site has reported two incidents of suspected abuse/neglect to the common entry point. The first report occurred 4-4-12 and resulted from staff observing one of the residents entering a peer's bedroom. Staff asked him what he was doing entering the bedroom and he responded that he was bisexual. The VA report was made based on this response. Further review found no evidence of abuse/neglect. No referral was made to law enforcement.

The second incident occurred 4-20-12. A Resident of the house reported that 2 years earlier he had visited his family home and "fooled around" with a foster sister. Based on this self report the program made a report of suspected abuse/neglect to the common entry point. County reported they found no validity to the claim. No referral was made to law enforcement.

Please let me know if you have any questions

Thanks

Steve

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"Alpert, Steve" <Steve.Alpert@ag.state.mn.us>  
To: Shamus P. O'Meara  
Re: update on Settlement Agreement implementation

February 8, 2012 5:22 PM

Shamus:

Here is the status of the items you identified. I highlighted the provision related to the External Reviewer as there has been a delay in getting that position filled. Please let me know if you have any other questions.

Steve

I plan to be out of the office next week and will have little or no access to e-mail, so please leave me a voice mail if any concerns arise.

**Page 8 The Department shall contract with at least (5) qualified Third Party Experts....**

The Department posted an RFP in the State Register on November 21, 2011. The posting ran for 30 days. No responses were received. The department has adopted the alternative strategy of utilizing the Medical Officer Review protocol.

**Page 10 The Department shall establish one employee (Internal Reviewer) with responsibility for monitoring the facility's use of restraint**

The Department has employed Dr. Rick Amado in this capacity. Dr. Amado has been on medical leave however he is still able to complete his reviews.

**Page 11 DHS will provide funding for the External Reviewer in the OHFC/MDH. The External Reviewer will have full enforcement authority, proper credentials, and be approved jointly by the Plaintiffs and Defendants.**

The Department has allocated the necessary funding and is finalizing the interagency agreement with the MDH.

**Page 12 The External Reviewer shall provide the Plaintiffs and the Department with a draft report. The External Reviewer shall issue quarterly reports to the court for the duration of the agreement.**

The first quarterly report to the court is due in early March with a draft due to the plaintiff and Department 15 days before submission to the court. The External Reviewer will not be in place in time to produce this report within these timelines. The Department is interested in discussing an alternative strategy pending the position being filled.

**Page 14 Staff at the facilities shall receive specified hours of training by Dec 31, 2011 (therapeutic interventions, personal safety tech., medically monitored restraint)**

DHS completed the training for facility staff prior to December 31, 2011.

**Page 15 Staff at the facilities shall receive the specified training by March 31, 2012 (person centered planning/positive behavioral supports, post crisis evaluation)**

DHS has scheduled and initiated the specified training. The schedule projects completion of the training by March 31<sup>st</sup>, 2012

**Page 15 State will discontinue any marketing or publicity inconsistent with the mission of the facilities.**

DHS has removed road signage, references to the METO program on the DHS web site, and ended the use of the program

brochures. A new brochure, and two bulletins are being drafted. One bulletin describes the new reporting process in the event of the use of emergency restraint. The other bulletin announces the admission and discharge criteria for the new program.

**Page 16 CSS will provide long term monitoring of person with clinical and situational complexities...**

CSS has established the monitoring process and currently has 20 individuals in long term monitoring

**Page 16 CSS services will be statewide and respond within (3) hours from authorization**

CSS has initiated the (3) hour response time state wide

**Page 17 Expansion of CSS will include 14 FTE's**

Expansion of CSS staff was completed in October 2011

**Page 18 Establish an Olmstead Committee**

The Department initiated a solicitation of interest process in the State Register beginning on January 30<sup>th</sup> running until February 13<sup>th</sup>. Selection of committee members and co-chair will be completed in conjunction with Plaintiff's counsel and named committee members. The first committee meeting is set for March 7<sup>th</sup>, 2012. Monthly meetings are projected through October 2012

**Page 19 The Department shall organize and convene a rule 40 advisory committee.**

The Department initiated a solicitation of interest published in the State Register January 3<sup>rd</sup>, 2012. Selection of committee members was completed in collaboration with plaintiff's counsel and named committee members. The first meeting was held January 30, 2012.

**Page 20 The Department shall undertake its best efforts to ensure that there are no transfers to or placements at the MSH of person committed solely as a person with a developmental disability. As of July 1<sup>st</sup> there shall be no transfers or placements of persons committed solely as a person with developmental disabilities to the MSH**

The department has established processes to review all referrals for admission to the MSH to ensure persons committed solely as a person with developmental disability are not admitted. One person was admitted in October 2011 and initially did not meet the criteria because the order for commitment was for mental illness and developmental disability with a requirement for treat to competency base on a criminal matter. After admission the court ended the commitment for mental illness.

Additionally, the Department and the Ombudsman's office have initiated an early intervention protocol for persons with a developmental disability who are at risk of commitment under the mentally ill and dangerous provision. This effort is intended to bring the necessary clinical and program expertise, funding resources, and advocacy support to achieve better outcomes for the individual and effectively manage the public safety risk thereby avoiding the MI+D commitment status.

**Page 20 No later than December 1<sup>st</sup>, 2011 persons confined at the MSH who are solely committed as a person with a developmental disability shall be transferred to the most integrated setting**

There are four individuals meeting this criteria still residing at the MSH. Three individuals were admitted before the July 1<sup>st</sup> date. One individual is mentioned above and was admitted after July 1st. All four have active placement planning underway. Placement planning is being done under a person centered process and includes the individual, guardian, Ombudsman's staff, Community Support Services, community provider, and county

**Page 21 Any person committed solely as a person with a developmental disability at the AMRTC who does not have an**

**acute psychiatric condition will be transferred from AMRTC to the most integrated setting.**

There is one person at the AMRTC who does not have an acute psychiatric condition. This individual is committed as a person with a developmental disability with a treat to competency order from the criminal court. The individual has 2 felony criminal charges pending. The competency hearing before the criminal court took place on February 6<sup>th</sup>, and was continued until February 26<sup>th</sup>. DHS is awaiting further order from the court before proceeding with placement planning to the most integrated setting.

**Page 21 DHS shall substitute the term “developmental disability” for the term “mental retardation” where it appears in any DHS policy, bulletin, web site, brochure, or other publication**

The Department has been working with the Office of the Revisor and state agency staff to identify and make changes from old terminology to “developmental disability” within state statute and rule. The Department has made efforts in its policy, bulletin, website, and other publications to replace the old terminology with “developmental disability”.

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