

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

REPORT TO THE COURT

Client RW:

AWOL v. Transitioned to the Community

David Ferleger, Esq.
Archways Professional Building
413 Johnson Street, Suite 203
Jenkintown, PA 19046
david@ferleger.com
215 887 0123

November 7, 2013

TABLE OF CONTENTS

I.	MSHS-Cambridge Client RW Went AWOL from Cambridge October 5, 2012	4
II.	Untrue Information Was Filed with the Court	5
III.	DHS Was Aware that RW Was Violent, Was an Elopement Risk, and He Was at Risk in the Community for Drug/Alcohol Abuse and Violence	8
IV.	The October 5, 2012 Incident and Its Administrative Review	9
V.	Conclusion	11

Attachments:

DHS Response to Draft Report, letter of Nov. 5, 2013
Plaintiffs Class Counsel Response to Draft Report, Nov. 5, 2013

Thirteen months ago, RW, a young male client at MSHS-Cambridge, ran from the facility and entered a waiting car which drove off with him. It is a crime for someone to carry away a person from a facility.¹ The Department of Human Services listed him as AWOL. RW's commitment expired the day he ran away, but he had not been discharged when he was carried off.

The Court Monitor issues this report because

- DHS' report to the Court that RW was transitioned to the community in accordance with the Settlement Agreement was not true, and
- The incident raises questions regarding oversight of clients in a facility and responses to a risky situation in which a client, known to have significant needs for full-time supervision, gets away from a facility to which he has been committed.

About a month after RW's disappearance, DHS filed a formal compliance status report with this Court stating that RW had been "transitioned to the community." In this litigation and in DHS' lexicon, "transitioned to the community" means a planned move overseen by a case manager to a known location, pursuant to a written transition plan and specifying post-move protections, supports and services. RW was not "transitioned to the community."

DHS undertook no investigation of the incident, no inquiry was made into whether staff were neglectful, and DHS apparently did not share client-specific information with the police authorities with a "missing persons" report. All that was done was a brief routine incident report by the Cambridge director.

DHS Central Office was not specially notified of RW's disappearance from Cambridge, and neither the Court Monitor or Plaintiffs Class Counsel were notified.

Conflictingly, DHS maintains that it was acceptable for RW to suddenly leave since he was (as of just that day) a "voluntary" patient. But DHS notified law enforcement and filed a "missing persons" report with the police. Regardless, DHS' suggestion is incorrect. RW had no right to leave that day.²

¹ Minn. St. 252.05 (crime to carry away a person with developmental disabilities).

² Minn. St. 253.04 subd. 2 (written request to leave required; 12 hour notice).

The Court Monitor issues this report because a) DHS' report to the Court that RW was transitioned to the community in accordance with the Settlement Agreement was not true, and b) the incident raises questions regarding oversight of clients in a facility and responses to a risky situation in which a client, known to have significant needs for full-time supervision, gets away from a facility to which he has been committed.

A draft of this report was provided to the parties on October 22, 2013 for their review and comment. On November 5, DHS and Plaintiffs Class Counsel sent responses which are attached to this report.³

I. MSHS-Cambridge Client RW Went AWOL from Cambridge October 5, 2012

□

EXHIBIT A: DHS RW DATA PROVIDED TO MONITOR 10/10/13

MSHS-Cambridge Discharges (7/1/2011 to 10/08/2013)

**** [CONFIDENTIAL BANNER DELETED] ****

NAME	ADMIT	DISCHARGE	MREC	FINANCIAL COUNTY	DISCHARGED TO	DISCHARGE ADDRESS	DISCHARGE PHONE
------	-------	-----------	------	---------------------	------------------	-------------------	-----------------

**** [OTHER NAMES DELETED] ****

W [REDACTED] R [REDACTED]	5/9/2012	10/5/12	[REDACTED]	Hennepin	AWOL	Unknown	
---------------------------	----------	---------	------------	----------	------	---------	--

**** [OTHER NAMES DELETED] ****

On October 10, 2013, the Department of Human Services provided the Court Monitor a “discharge tracking form” which the Monitor requested during an October 9 meeting with his implementation plan consultants. RW is listed as having been “discharged” to “AWOL” and the “discharge address” is “Unknown.” Exhibit A above is from the DHS tracking form.

Responding to the draft of this report, DHS distanced itself from its own documentation. DHS states that the “term AWOL should not have appeared” on its report to him, that use of AWOL was a “mistake,” and: “Frankly, we should have delayed giving the document to Mr. Ferleger” so the language could have been “removed.”⁴

³ Plaintiffs' Class Counsel's one sentence email stated that counsel agreed with the draft report.

⁴ DHS Letter, Nov. 5, 2013, at 1.

In the Monitor's view, it would be entirely improper for DHS to "remove" the truthful statement from a document requested by the Court's judicial adjunct.

II. Untrue Information Was Filed with the Court

A. The Report to the Court

Six weeks after RW's "AWOL" to "Unknown," DHS reported to the Court that RW was "transitioned to the community during this review period." Defendants' Status Report, filed November 19, 2012 (Dkt. 180). The phrase appears in DHS' report to the Court under Settlement Agreement EC 54's "Transition Planning" mandate which requires that clients are served "in the most integrated setting appropriate to meet such person's individualized needs, including home or community settings."⁵ The image to the right is from DHS' report to the Court.

The report to the Court was not true. RW was not "transitioned to the community" when he went AWOL on October 5, 2012.⁶

11-17-12 update

Two individuals were transitioned to the community during this review period. RW was discharged on 10-5-12 with a length of stay of 149 days. NK was discharged on 10-26-12 with a length of stay of 1064 days.

⁵ EC 54 states, "The State has undertaken best efforts to ensure that each resident is served in the most integrated setting appropriate to meet such person's individualized needs, including home or community settings."

⁶ Was the untrue statement to the Court made knowingly by DHS Central Office?

- DHS's response to the draft report states that the staff writing the report to the Court knew that RW had left Cambridge without authorization:

When the Defendants' Status Report was written, *staff writing the report* and MSHS-Cambridge understood that RW was not committed and had left on his own volition.⁶ (emphasis added)

- However, the Court Monitor understood that (although the information provided to the Court was not true), the staff writing the report did not know that RW had left AWOL and that he was not "transitioned to the community" under the Settlement Agreement.

DHS did not inform the Court Monitor or Plaintiffs Class Counsel of the AWOL at the October 24, 2013 parties' meeting.⁷

B. RW Was Not Entitled to Leave Cambridge on October 5, 2012

DHS' statements that RW was entitled to walk away from MSHS-Cambridge because he was a "voluntary" patient do not reflect his status, and are inconsistent with Cambridge's records and with the law.

RW's situation was the following:

- RW was committed by the Hennepin County District Court on April 9, 2012 as a person with developmental disabilities, on a stayed commitment. *In the Matter of RW*, File 27-MH-PR-12-188 & 27-CR-10-20804 *Amended Stayed Order for Commitment as Developmentally Disabled*, at 2-3.
- Based on the stay, the Hennepin County Attorney agreed to dismiss criminal charges. The criminal charges arose from an incident "when [RW] punched a juvenile male and made threats to kill the victim's mother."
- The stay of commitment was conditional. The stay was:

On condition that Respondent:

enter and complete inpatient residential treatment at the Minnesota Specialty health System – Cambridge, and follow all directions of the staff of the program:

* * *

cooperate with aftercare planning and follow the aftercare plan;

The Court Monitor urges Deputy Commissioner Anne Barry to consider whether the quoted statement is or is not correct.

⁷ The Settlement Agreement does not require notice to the parties of elopements. One would have expected, however, that the disappearance of a client to "unknown" location would have been reported to Plaintiffs Class Counsel and the Court Monitor.

* * *

April 9, 2012 Order(emphasis added)

- The stay was to terminate October 5, 2012.
- RW did not have the right to leave Cambridge without notice; he did not have the right to decide to leave on his own. Cambridge's records explain regarding his "right to refuse or terminate services" that:

R has a state appointed guardian to assist him in determining his need to remain in treatment. *His guardian has signed him in to MSHS-CA facility for treatment.*⁸

- RW, even if a "voluntary" patient, had no right to leave that day. First, his guardian signed him in for treatment. Second, whether RW or his guardian, one may not simply walk away from the facility.⁹ Third, since RW violated the terms of the stay of commitment, the court should have been involved.

C. DHS Now Agrees that the "Transition" for RW Was Not Acceptable

To its credit, DHS now agrees that the "transition" for RW is not what is acceptable under the Settlement Agreement, and also that elopements from Cambridge will now be reported to the Court Monitor and Plaintiffs Class Counsel.

III. DHS Was Aware that RW Was Violent, Was an Elopement Risk, and He Was at Risk in the Community for Drug/Alcohol Abuse and Violence

RW was 21 at the time he left Cambridge. He was born [REDACTED]. He had been admitted to MSHS-Cambridge on May 9, 2012.

⁸ Cambridge, RW *Individual Neglect and Abuse Prevention Plan*, at 16 (Sept. 20, 2012) (emphasis added). The Hennepin County District Court' Letters of General Guardianship, give the guardian "custody of the Ward and the power to establish a place of abode within or without the State." *In Re Guardianship of RW*, File 27-GC-PR-10-352 [illegible], Nov. 1, 2010.

⁹ Minn. St. 253.04 subd. 2 (written request to leave required; 12 hour notice).

The psychiatric assessment in RW's Cambridge files describes a history involving prior elopements, violence and a risk to himself if he should run away. Cambridge records also show that the facility was to have been on the lookout for his running away.¹⁰ RW "has eloped several times from group homes that 'usually' resulted in drug and/or alcohol abuse."¹¹

RW "had been arrested twice in Hennepin County due to a charge of unlawful possession of a firearm" He was incarcerated two other times. He "has a recent history of elopement, physical aggression and drug and alcohol abuse." He had punched his mother's boyfriend in the face. "He also had an incident in 2010 where he punched a juvenile male and made threats to kill this juvenile's mother."¹²

RW was at Cambridge under a criminal court order of stayed commitment as a person with developmental disabilities. "Felony-level criminal charges" had been filed but were dismissed contingent on his court commitment.

"Elopement" was one of RW's "Treatment Plan Objectives."¹³ Staff were concerned "with RW's state of mind if the information he hears from the court is not what he expected." On "Health and Safety," the team was also concerned that "RW may not make healthy choices once discharged from MSHS."¹⁴

This backdrop is germane to how Cambridge and DHS responded to RW's disappearance.

IV. The October 5, 2012 Incident and Its Administrative Review

The incident occurred on October 5, 2012 at 3:40 PM. Less than 2 hours later, the then-director, Stuart Hazard, signed off on Administrative Review. MSHS Cambridge completed the standard Incident Report which classifies

¹⁰ Dr. Jack Kasl, 5/11/12 "Diagnostic Assessment."

¹¹ *Id.*

¹² Dr. Jack Kasl, 5/11/12 "Diagnostic Assessment."

¹³ 8/21/12, "Summary of Progress on Treatment Plan Objectives."

¹⁴ 8/21/12, "Assessment and Plan." DHS responds to this section of the draft report on the risk of RW in the community that a September 20, 2012 "Assessment of Current Functioning" at Cambridge, discontinued treatment goals "Self-awareness, self-control and respecting others." DHS Nov. 5, 2013 letter. These discontinued goals do not negate the Cambridge staff concern for the dangers which would attend his leaving the facility.

the elopement as a “Major Incident: Elopement with serious risk factors.” So far as the Monitor is informed, no Investigation, DHS Licensing or other review took place.¹⁵

The Incident Report describes the event as follows:

Client was in administration building, walking to canteen accompanied by 2 staff and client #93349. Client left canteen saying he needed to use the bathroom. Client was seen exiting building running and entered a silver Impala which was parked nearby. Unable to read number plate as car left area. Law enforcement were called immediately and given a description of the client and car. Client received a phone call from his lawyer today saying his Stay of Commitment expired today. Client is under Guardianship and has been signed in to MSHS Cambridge on a Voluntary admission. Client eloped after hearing above news from his lawyer. It appears he had prearranged a car to pick him up.

Cambridge notified the police and made a missing persons report.

The Administrative Review by Mr. Hazard does not show that there was any effort to:

- Examine the court commitment order or the Guardian admission document
- Notify DHS Central Office of the disappearance of RW¹⁶
- Ensure that DHS and community hospitals/facilities were notified
- Ensure that community mental health and intellectual disabilities providers were notified
- Ensure notification/protection of the alleged targets of prior action by RW

In addition, the Administrative Review – without any indication of any interviews with staff or investigation – clears staff of any error; the Review expresses no concern with possible staff neglect or lack of supervision.

Aside from the Administrative Review within Cambridge, there was no investigation by anyone of this incident.¹⁷

¹⁵ The *SOS Incident Report Form – All Data View, and its Administrative Review Supplemental Documentation*, dated October 5, 2012.

¹⁶ DHS confirms that Central Office staff were not notified. DHS Nov. 5, 2013 Letter at 2.

To its credit, DHS now agrees that a “more in-depth review could have been done” and that “no one pursued additional reviews.”¹⁸

¹⁷ Email to Court Monitor from Christina Baltes, Jensen Compliance Officer, October 11, 2013.

¹⁸ DHS Nov. 5, 2013 Letter at 3.

V. Conclusion

Over a signed affirmation, DHS reported to the Court that RW was “transitioned to the community” by DHS under the community placement provision in the Settlement Agreement (EC 54). That report to the Court was not true. DHS failed in its obligation to be candid with the Court.

Cambridge staff were very aware that elopement would pose serious risks to RW and to others. The circumstances here should have prompted investigation of Cambridge staff for neglect and lack of appropriate supervision of RW. *See* Settlement Agreement, EC 26-28. No such investigation took place.

The Court Monitor appreciates and commends DHS Deputy Commissioner Anne Barr’s response to the draft of this report in her forthright acknowledgement of responsibility for the errors which occurred, and with a commitment to “better assess, respond and report” on such occurrences.”¹⁹

Respectfully submitted,

/s David Ferleger

November 7, 2013

¹⁹ The Deputy Commissioner states:

Since the Court Monitor’s draft report, DHS has provided the Court Monitor with additional information which hopefully provides further context to this matter. It was never our intent to mislead or provide inaccurate information to the Court with the filing of Defendant’s Status Report, dated November 19, 2012 (Dkt. 180). The Department realizes the gravity of the matter and recognizes that it could have been handled better. Since this occurrence, DHS has recognized its administrative structure, has new leadership in place, and has instituted a protocol whereby DHS Senior Management is immediately informed of such occurrences. While there is always room for improvement, we believe these changes will allow us to better assess, respond, and report on the same.



Minnesota Department of Human Services

November 5, 2013

The Honorable Donovan W. Frank
United States District Court
724 Federal Building
316 North Robert Street
St. Paul, MN 55101

By Hand-Delivery

David Ferleger, Esq.
Independent Consultant and Jensen Court Monitor
Archways Professional Building
413 Johnson Street, Suite 203
Jenkintown, PA 19046

By E-Mail

Re: *James and Lori Jensen, et al. v. Minnesota Department of Human Services, et al.*
Court File No.: 09-CV-01775 DWF/FLN

Dear Judge Frank and Mr. Ferleger:

I write in response to the October 22, 2013, draft "Independent Consultant and Monitor REPORT TO THE COURT Client RW: AWOL v. Transitioned to the Community" in order to address the following topics identified therein.

I. MSHS-Cambridge Client RW Went AWOL from Cambridge October 5, 2012

The term AWOL should not have appeared on the spreadsheet given to Mr. Ferleger. AWOL is not a term used on any official DHS discharge document. In this instance, the spreadsheet given to Mr. Ferleger was manually created by a DHS staff member in a limited amount of time. The goal was to get the spreadsheet to Mr. Ferleger as soon as possible. In this case, our haste to prepare the document resulted in the use of the term AWOL even though it is not accurate. Frankly, we should have delayed giving the document to Mr. Ferleger and taken more time to ensure loose language such as AWOL was properly reviewed and removed. We apologize for any confusion this mistake may have caused.

II. Untrue Information Was Filed with the Court

Although I cannot speak with certainty to the motivations of every DHS employee, it is certainly my belief that there has been no conscious effort by DHS employees to mislead or provide inaccurate information to the Court relating to the *Defendant's Status Report*, filed November 19, 2012 (Dkt. 180). When the *Defendant's Status Report* was written, staff writing the report and MSHS-Cambridge staff understood that RW was not committed and had left on his own volition. A Diagnostic Assessment, dated 5/11/2012, indicates RW's individual recovery vision was to live with immediate family. DHS represented in its November 2012 status report that RW was transitioned to the community. The fact that the stay of commitment order terminated and RW left of his own volition is the reason he was

identified as being transitioned. However, we clearly agree that the “transition” which took place in this instance is not the kind of transition for which we strive. DHS is committed to ensuring that clients have appropriate transition plans affording a full opportunity for integration consistent with the principles of *Olmstead*.

The Court Monitor is correct in that the Settlement Agreement does not require notice to the parties when an elopement at MSHS-Cambridge occurs and as such no notice was provided. However, moving forward, DHS will notify the Court Monitor, Class Counsel, and consultants of client separation from MSHS-Cambridge in accordance with the Court’s Amended Order, dated August 28, 2013.

III. DHS Was Aware that RW Was Violent, Was an Elopement Risk, and He Was at Risk in the Community for Drug/Alcohol Abuse and Violence.

RW was admitted to MSHS-Cambridge on May 9, 2012. RW has a history of difficulty controlling his behavior, has in the past eloped from the homes he was placed in and has engaged in use of drugs and/or alcohol.

However, the 9/20/12 Assessment of Current Functioning and Individual Treatment Plan - Monthly Progress Report indicates that RW was meeting his objectives such that “The team discontinued Self-awareness, self-control, and respecting others, objectives.” RW was showing progress, and DHS followed-up as outlined below.

IV. The October 5, 2012 Incident and Its Administrative Review

When an incident occurs, DHS staff fills out a State Operated Services Incident Report Form on-line. This form has a feature that provides “Auto-notification sent to Administrative Reviewer and CC Individuals.”

This form was submitted by the RN Consultant at about 4:09 p.m., and the submission auto-generated notifications to the Administrative Reviewer and certain key individuals including, in this instance: law enforcement, RW’s attorney, and County Social Services. Attempts to initially notify his guardian were futile as the voice mail was full, but contact was eventually made with the guardian.

Although a system generated date and time on the form states that the “Administrative Reviewer Sign Off” was done by Stuart Hazard at 5:13 pm on 10/5/2013, the progress notes indicate that staff, at that time, was still waiting for updates from law enforcement and that law enforcement had contacted RW’s guardian. Documentation is lacking to show whether Mr. Hazard examined RW’s court records or the guardian admission document or whether he notified DHS Central Office. DHS Senior Management has since confirmed that they were not made aware of this matter during the relevant occurrence or reporting timeframe. It was not until recently that DHS Senior Management was added to the list of auto-generated recipients for elopements. Also, it is normally anticipated that when law enforcement is involved, that the incident will be tied into their database and some tracking is done in relation to missing persons with local hospitals as prudent. Staff at MSHS-Cambridge would also not have any details of RW’s “alleged targets of prior action.” Law enforcement would be the primary responsible party to notify such “targets” as they deem necessary.

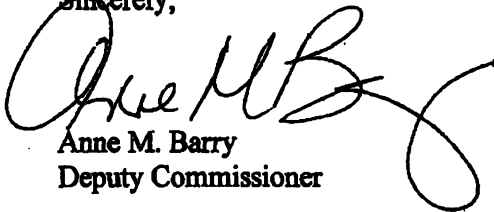
A more in-depth review could have been done at that time; however, given that staff was understanding that RW's stay of commitment had terminated, no one pursued additional reviews.

V. DHS Response Regarding the AWOL Report

Since the Court Monitor's draft report, DHS has provided the Court Monitor with additional information which hopefully provides further context to this matter. It was never our intent to mislead or to provide inaccurate information to the Court with the filing of Defendant's Status Report, dated November 19, 2012 (Dkt. 180). The Department realizes the gravity of the matter and recognizes that it could have been handled better. Since this occurrence, DHS has reorganized its administrative structure, has new leadership in place, and has instituted a protocol whereby DHS Senior Management is immediately informed of such occurrences. While there is always room for improvement, we believe these changes will allow us to better assess, respond, and report on the same.

I hope the information is helpful and provides some insights into what transpired with this individual.

Sincerely,



Anne M. Barry
Deputy Commissioner

Cc: Shamus O'Meara, Attorney for Plaintiffs
Colleen Wieck, Executive Director for the Governor's Council on Developmental Disabilities
Roberta Opheim, Ombudsman for Mental Health and Developmental Disabilities
Steven Alpert, Assistant Attorney General
Scott Ikeda, Assistant Attorney General
Gregory Gray, DHS Chief Compliance Officer
Amy Kaldor Akbay, DHS Chief General Counsel

Shamus O'Meara <SPOMeara@olwklaw.com>

October 22, 2013 2:38 PM

To: "Office of David Ferleger, Esq." <office@ferleger.com>

RE: Draft Report to the Court- Client RW: AWOL v. Transitioned to the Community



6 Attachments, 16 KB

Dear Mr. Ferleger:

Settlement Class Counsel agrees with the Court Monitor's proposed report to the Court.

Thank you.

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

Shamus P. O'Meara

direct: 952.806.0438

Relationships Reliability Results

[email](#)

[website](#)

[bio](#)

[v-card](#)

7401 Metro Blvd | Suite 600 | Minneapolis, MN 55439-3034



From: Office of David Ferleger, Esq. [mailto:office@ferleger.com]

Sent: Tuesday, October 22, 2013 9:39 AM

To: Roberta Opheim; Colleen Wieck, Ph.D.; Steven H. Alpert, Esq.; Scott Ikeda; Shamus O'Meara; Amy Akbay, Esq.; Mike Tessneer; Annie Santos; Anne Barry; christina.baltes@state.mn.us

Cc: Elizabeth (Betsy) McElroy; David Ferleger, Esq.

Subject: Draft Report to the Court- Client RW: AWOL v. Transitioned to the Community

Dear Colleagues,

Attached you will please find my Draft Report to the Court on Client RW: AWOL v. Transitioned to the Community.

The parties' responses are due no later than November 4, 2013.

Thank you.

Regards,

Ashley Arntz
Office of David Ferleger, Esq.
Archways Professional Building
413 Johnson Street, Suite 203
Jenkintown, PA 19046
office@ferleger.com
(215) 887-0123 Phone