

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

James and Lorie Jensen, as) Case No. CV 09-1775 (DWF/FLN)
parents, guardians and next)
friends of Bradley J. Jensen,)
et al.,)
Plaintiffs,)
vs.) St. Paul, Minnesota
Minnesota Department of Human) November 25, 2013
Services, an Agency of the) 2:10 p.m.
State of Minnesota, et al.,)
Defendants.)

BEFORE **THE HONORABLE DONOVAN W. FRANK**
UNITED STATES DISTRICT COURT JUDGE
PLAINTIFFS' MOTION FOR SANCTIONS

APPEARANCES:

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: You may all be seated. Thank you.

Why don't we begin with introductions? We can start with Mr. O'Meara, first.

MR. O'MEARA: Good afternoon, Your Honor, Shamus O'Meara with O'Meara, Leer, Wagner & Kohl, on behalf of the Settlement Class.

MR. IKEDA: Good afternoon, Your Honor, Scott Ikeda, Assistant Attorney General for the State Defendants. With me to my right is Deputy Commissioner Anne Barry of the Department of Human Services, and Assistant Attorney General Steve Alpert.

THE COURT: Good afternoon to everyone. I will represent to you I have had a chance to read all submissions. I must indicate that apart from the rather narrow issue in front of me -- and you should all be relieved to know I won't read into the record all of the former orders or reports, but it would -- I mean, I will be just right up front. It would appear to me that -- and this is nothing I didn't say as recently as August in the Order.

We have had, kind of a, to use a phrase I used in the August 2013 Order, a sluggish pace of compliance, and maybe a long list of noncompliance with the Settlement Agreement.

1 And I suspect it is just a matter of time, as I
2 have noted in other orders, apart from whatever happens
3 today, that whether people are saying: Well, the truth is
4 we were just way off on -- it is not that we didn't mean
5 what we said back in December of 2011, it is just that I
6 guess we were not realistic.

7 I would think what most people on the street are
8 saying, that the people with disabilities, it's just a very,
9 very low priority to the people in the State of Minnesota.
10 I was just giving a speech on disability discrimination at
11 the U.S. Attorney's Office in Minneapolis, and said that
12 Minnesota is one of the states that has, despite the
13 Executive Order and Affirmative Action, apart from this
14 case, had the lowest hiring rate last year of almost any
15 state in the country for people with disabilities, gone from
16 over 10 percent in 1999, to 3.2 percent this year in the
17 Executive Branch of the State Government.

18 So, this doesn't relate directly to Jensen, but my
19 concern is with all of the assertions, and mostly agreements
20 of the noncompliance with the goals and deadlines, and I
21 guess now I will soon be getting some transition planning
22 and implementation draft, I am told, in the next few days or
23 couple of weeks. I think that will probably really tell the
24 story. But, I think we have all probably got our
25 reputations on the line, apart from how this comes out

1 today.

2 And so, we will see what Mr. O'Meara has to say
3 about the issues and what the Attorney General's Office has
4 to say. And we will see where we end up.

5 What I thought I would do is I will hear arguments
6 and I may indicate at the end -- I may rule on part of it,
7 take it under advisement. I will let you know when we are
8 done.

9 And then if we need to -- if someone is going to
10 put something on the screen, if people can't see it, even
11 though lawyers have monitors, I can dial down the lights in
12 here -- not to create mood lighting, but so everybody can
13 see.

14 So, Mr. O'Meara, whenever you are ready?

15 MR. O'MEARA: Thank you, Your Honor. Counsel?
16 Your Honor, we are here this afternoon to resolve an issue
17 that originates from the decisions of the State of Minnesota
18 and the Department of Human Services' decisions to abuse and
19 marginalize people with developmental disabilities, with
20 handcuffs, leg irons, locked rooms, isolation and seclusion,
21 because our state decided these cruel things were necessary
22 to treat people with developmental disabilities.

23 The unheralded important work of the Ombudsman of
24 Mental Health and Developmental Disabilities Roberta Opheim,
25 the Minnesota Governor's Council on Developmental

1 Disabilities and its Executive Director Colleen Wieck, the
2 Disability Law Center, and most importantly the families and
3 loved ones with developmental disabilities who stood out to
4 the State and DHS, put a stop to the State's program of
5 abuse at the Minnesota Extended Treatment Options Program,
6 known as METO.

7 Just plain wrong is the Ombudsman's 2008 Report
8 about the DHS abuse at METO. It speaks volumes, and it
9 speaks the truth.

10 Some persons were being restrained for what was
11 termed aggressive behavior, such as touching staff
12 shoulders, touching a pizza box that was being held by
13 staff, talking about running away, and other behaviors that
14 do not appear to meet any definition of aggressive or
15 dangerous behavior. Documents and individual records
16 revealed that people were being routinely restrained in a
17 prone, face-down position, and placed in metal handcuffs and
18 leg hobbles.

19 Some individuals were restrained with a wrist belt
20 restraint that cuffed their hands to their waist. An
21 individual with an unsteady gait was routinely placed in
22 this type of restraint, putting that person at risk of
23 injury if they should fall, as they would not be able to use
24 their arms or hands to break that fall. Others were being
25 restrained on a restraint board with straps across their

1 limbs and trunk.

2 Documentation revealed that in most cases where
3 restraints were used, the person was calm and cooperative
4 about going into the restraint, but began to struggle, cry
5 and yell once they were in the restraints. In some cases,
6 clients appeared to be conditioned to "assume the position"
7 for the application of restraints where they would lie on
8 the floor and put their hands behind their back without
9 resistance.

10 And Your Honor, this is a comprehensive report
11 issued in 2008, and it is the predicate for our office in
12 2009 on behalf of loved ones with developmental disabilities
13 who were abused at METO, initiating a lawsuit against the
14 State and DHS seeking class action status on behalf of the
15 hundreds of individuals abused at METO by the State and DHS.

16 The background is important, Your Honor, because
17 extensive negotiations for a settlement began shortly after
18 we initiated the lawsuit and continued for nearly two years.
19 It culminated in a landmark Class Action Settlement in June
20 of 2011.

21 THE COURT: Well, using the word landmark loosely,
22 because almost nothing everybody promised in the courtroom
23 has happened -- in other words, we used the word passion,
24 and I will for the limited purpose of my response say that
25 maybe people meant and had good intentions. But, if we look

1 at what was promised and when it was promised, and you are
2 right, everybody in this room calls it -- oh, it is going to
3 be landmark. We are going to improve the lives of not just
4 Class Members now, but forever.

5 I will be curious to find out just on the time
6 frame we have had, just what are all of these landmark
7 things that have happened, timely or untimely, since then.
8 If you can see my voice go up a bit, I haven't had a case
9 like this in 29 years as a Judge. I don't know if it is
10 just no priority to people, or low priority.

11 And Mr. Ferleger may take some offense at this,
12 but I said, I can't continue to spend over a half a million
13 dollars for you to do DHS' job and everybody else's job,
14 because this is taxpayer's money.

15 And what do I say to the families? We're not
16 delivering on what we promised. And there doesn't seem to
17 be coordination of agencies, because even though -- then I
18 will stop and get down off my soapbox -- even though it
19 seems like there are people like the DHS Commissioner and
20 Deputy Commissioner Anne Barry, who seem to be held in such
21 high regard, it doesn't appear that the middle bureaucracy,
22 or whomever, anybody is sufficiently informing them.

23 And it is almost like people are saying: How dare
24 the Court system or how dare somebody want to make these
25 changes. And we will find out later when we get to the

1 point about -- in fact, we don't even think we have to tell
2 anybody if we -- we will just not only get the license, but
3 we will make darn sure nobody knows we don't have it. And
4 so, that is not the way it worked in the seventies when I
5 represented agencies, because that knowledge would be
6 imputed to me as a lawyer. And I would be in harm's way for
7 how dare my clients not tell me something for 10 months.

8 But, no, I am just saying -- why do I say these
9 things? You say the background is important. Well, how
10 many reports do we have to have from a court monitor about
11 the laundry list of noncompliance and the timelines blown?
12 I would almost feel better if people say, you know what? We
13 thought it was going to be landmark, we had the best of
14 intentions, but really -- because it isn't resources. I
15 think it is the wrong priorities, lack of coordination. And
16 I am sure you will all have more than plenty to say about
17 this.

18 But, if I react this way, it is because I think my
19 reputation is on the line as much as Plaintiffs and
20 Defendants, because nothing has happened, really, in a
21 substantial way that we all promised would be landmark
22 decision for the quality of Class Members and all future
23 class members to come.

24 So, we will see what you have to say. I won't
25 apologize for what I said. I will apologize for

1 interrupting your argument and taking us off track. But,
2 maybe I say these things because I went back and reread all
3 of the orders. And probably in a scale of 1 to 10, if we
4 had a list of all of the conceded noncompliance issues, that
5 screen wouldn't be big enough, even if people assert they
6 are proceeding in good faith. Maybe they are. But, we
7 shall see.

8 MR. O'MEARA: Interrupt anytime, Your Honor.

9 THE COURT: Well, not so -- not when I get off
10 track like that.

11 MR. O'MEARA: I used a, small case, "l" in my
12 notes. I agree with you. I still hold out hope for the
13 landmark nature of the settlement.

14 THE COURT: I will just say this, and I will let
15 you begin your argument.

16 One of my questions I have here to ask all sides
17 is, well, if nobody is responsible -- and I will just take
18 relatively minor issues in the scheme of noncompliance since
19 December of 2011, especially with all of the passion and the
20 word "landmark" used by everybody in this courtroom in
21 December of 2011. And they set up the guidelines,
22 implementation. Olmstead, here is all the -- here is every
23 place, the training that was taking place. And then to get
24 back things where most of this bureaucracy didn't even know
25 about the *Jensen* Order, let alone what it required -- the

1 reason I respond like this is I think that we are all -- we
2 all are appropriately -- because really, the end result of
3 today's hearing is: Well, we can't really dispute all of
4 the things that have happened since December of '11. But, I
5 am curious, who is responsible if not everybody in this
6 room? Anyway, I will sit tight and listen to you and the
7 Attorney General's office.

8 MR. O'MEARA: Thank you, Your Honor. Mindful of
9 the Court's comments, I will flip forward.

10 THE COURT: You don't have to change where you are
11 headed, I will sit here and hear everybody out. So --

12 MR. O'MEARA: Let me do this. It is important.
13 You talked about who knew, and we believe that we have an
14 understanding of who did. From the records that we provided
15 that is in the Court file, we believe at least 35 state
16 officials knew about the lack of supervised living
17 facilities license. These disciplines include medical
18 doctors, lawyers, department commissioners, supervisors,
19 program directors, directors, controllers, program managers,
20 engineers and the list goes on.

21 The Administrator for Cambridge knew. The
22 Minnesota Department of Health Supervisor for Licensing and
23 Certification. The Supervisor and Program Manager at
24 Cambridge. The Program Manager at the Minnesota Department
25 of Health, Engineering Services. The Treatment Director at

1 Cambridge. The Supervisor of Minnesota Department of Health
2 Licensing. The Minnesota Department of Health Deputy
3 Commissioner. The Minnesota Department of Human Services
4 Deputy Commissioner. The Director of the Minnesota
5 Department of Health Office of Health Facility Complaints.
6 The Minnesota Department of Health Program Assurance
7 Supervisor Compliance Monitoring Director. The Program
8 Director for Minnesota MSHS-Cambridge. I have dozens of
9 names here without a title to them, but are attached to
10 e-mails during the time of the non-licensure where they are
11 vetting issues about the supervised living facilities
12 license, the controller, the License Certification and
13 Program Representative, the Public Health Engineer, the
14 State Fire Marshal.

15 And I believe, Your Honor, you are accurate in
16 referencing that with these types of positions and this type
17 of -- these numbers of people that were involved in the
18 licensing issue at times material to the 10-month
19 non-licensure, including times before and afterwards, that
20 knowledge is imputed, it is imputed to the parties that
21 signed the Settlement Agreement, the State of Minnesota and
22 the Department of Human Services.

23 Ultimately, this Court approved the Class Action
24 Settlement by September 5th, 2011 Final Approval Order for a
25 Stipulated Class Action Settlement Agreement. This Court,

1 and specifically Your Honor, has been comprehensively
2 involved in assisting the parties in a Class Action
3 resolution, and the numerous issues, some of them very
4 comprehensive, that have arisen after approval.

5 The settlement -- and I will not use the word
6 landmark here, involved --

7 THE COURT: Go right ahead.

8 MR. O'MEARA: The settlement involved significant
9 monetary payments to victims of abuse, and comprehensive
10 statewide changes to improve the lives of thousands of
11 people with developmental disabilities and their families.
12 Including use of best practices for positive behavioral
13 intervention, prohibition against restraint and seclusion,
14 and mandating that the state shall develop an Olmstead Plan
15 consistent and in accord with the U.S. Supreme Court's 1999
16 decision in *Olmstead versus L.C.*.

17 Importantly, Your Honor, from the time of the
18 Court's approval of the Class Action Settlement to date, our
19 office together with Dr. Wieck, Ms. Opheim, this Court, and
20 later the Court Monitor David Ferleger have spent hundreds
21 and hundreds of hours in comprehensive efforts to assist the
22 state in DHS's implementation of the settlement.

23 As we have noted in many communications to DHS,
24 the Court and the Court Monitor we have faced active
25 resistance, delay, and obstruction on the part of DHS and

1 the implementation of the Settlement Agreement. And it
2 comes from some of that middle management.

3 It comes from the Mental Health Division of DHS
4 and other areas. It is articulated in communications that
5 we had contemporaneous with the Olmstead Committee. The
6 Court Monitor has received numerous communications from our
7 office expressing our deep frustration with the process of
8 settlement implementation, the resistance that we are
9 seeing, the behind-the-scenes efforts to enact legislation
10 without going through the process and notification of the
11 Court that's contemplated by the spirit and intent of the
12 Settlement Agreement.

13 The Court, moreover, has repeatedly expressed its
14 frustration with DHS regarding the implementation of the
15 settlement. And ultimately appointing Mr. Ferleger as an
16 independent court monitor in July of 2012 due to ongoing
17 issues of DHS non-compliance with the Settlement Agreement.

18 And I reference Docket 159 and Your Honor's Order
19 of July 2012, as well, just by example, our November 27,
20 2012 letter to the Court that is Exhibit 26 in our
21 Supplemental Declaration, which covers some of the history
22 from our perspective of the noncompliance issues we faced
23 and examples of our many communications about ongoing
24 concerns with the settlement implementation.

25 The Settlement Agreement is the product of two

1 years of negotiation between the parties with counsel for
2 all sides deeply involved and the Court actively assisting
3 the resolution. It was also predicated, Your Honor, on
4 substantial trust. Trust that restraint and seclusion would
5 stop. Trust that committees required by the settlement
6 would be properly convened and best practices and
7 protections seriously vetted and implemented.

8 Trusted experts required and agreed upon would be
9 timely put in place. And trust that the MSHS-Cambridge
10 successor to METO would be properly licensed. Without
11 trust, Your Honor, without the parties being candid to one
12 another and the Court, a settlement of this magnitude will
13 see significant problems.

14 Actually, let me start with this. In early 2010,
15 Your Honor, before the settlement agreement was signed, DHS
16 intended to close METO. And the parties exchanged numerous
17 draft settlement agreements referencing its closure. We,
18 the Settlement Class, the families of people who were abused
19 wanted METO shut down.

20 Beginning in April of 2010 in a legally-operated
21 Governing Board for the State Operated Services, which is
22 part of DHS began discussing redesign of METO into another
23 facility.

24 These are documents that we received through a
25 request to the Department of Human Services, Your Honor, and

1 they are not in the record. I have a copy for the Court if
2 it wishes. But, you will see that there are discussions
3 about a second phase of redesign for the Minnesota Extended
4 Treatment Options Program, in transitions from long-term
5 residential site for individuals with developmental
6 disabilities to something else.

7 This carries on into July of 2010. And on page 7,
8 some additional discussions -- and just by way of
9 background, these appear to be meeting minutes with regard
10 to this Governing Board, State Operated Services
11 representatives discussing a Brainerd location, as well as
12 the METO location. And these issues are being vetted with
13 respect to transitioning the program to something else. And
14 these meeting minutes, Your Honor, continue on into
15 subsequent months.

16 And this is information we believe that supports
17 the fact that the State Department of Human Services is
18 looking to do something else with the METO Program. And we
19 believe it highlights that as they begin to take a look at
20 other alternatives for METO in transitioning into something
21 else, licensing and the state requirements under statute and
22 under the Administrative Rules is something that the
23 Department of Human Services, the Minnesota Department of
24 Health all should have been recognizing.

25 And we believe that the record points at the fact

1 that they did in fact consider licensing prior to the
2 signing of the Settlement Agreement, and prior to giving
3 notice to the families about transitioning to the new
4 Cambridge Facility.

5 So, on May 26th, 2011, this is before the
6 Settlement Agreement is signed, the Administrator for
7 Cambridge and two other DHS supervisors exchanged e-mails on
8 licensing for the new successor facility.

9 Mary Henderson is not in the office until next
10 week. I would like to ask her how she would like us to
11 proceed with the name change and licensed bed reduction to
12 16 before I answer your question. It may be as simple as
13 filling in the license application form and sending it to
14 her. Since our remodelling, it may require resurvey by the
15 engineers, fire marshal and nursing.

16 And then the previous e-mail from about 10 minutes
17 before that says: Will you be handling the contact with the
18 Minnesota Department of Health regarding the name and
19 occupancy change?

20 This is the change between METO and Cambridge,
21 Your Honor. We believe that this documentation trumps the
22 DH position that the licensure -- the absence or the lapse
23 in licensure for the supervised living facility license was
24 inadvertent. They knew about it. They knew about it before
25 they signed the Settlement Agreement.

1 METO closed on June 30th, 2011, and Cambridge
2 opened the next day on July 1, 2011. One week prior,
3 approximately one week prior to the Cambridge opening, a
4 letter goes out to guardians of loved ones at METO and
5 county case managers.

6 And it says: As you were previously notified,
7 effective 7/1/11, the program now known as Minnesota
8 Extended Treatment Options will have the name Minnesota
9 Specialty Health MSHS-Cambridge.

10 There is nothing about license or applying for a
11 license, the implication here is all is in good order and
12 let's move forward. Seven days later they opened the place
13 without a license.

14 There are several internal e-mails between DHS and
15 the Minnesota Department of Health regarding Cambridge
16 licensing. And the guardian -- the notice to guardians that
17 I just had up on the monitor, Your Honor, comes a month
18 after DHS in May, May 26th of 2011, is discussing license
19 and the involvement of the State Fire Marshal.

20 It is not until February 27th that several months
21 later the DHS submits its license application. It says
22 here, as a result of litigation settlement, METO is
23 completely terminated as a business on 6/30/2011. A new
24 program was established under the name, Minnesota Specialty
25 Health Systems - Cambridge.

1 This is a 2012 document, but I wanted to
2 reference, Your Honor, that this individual, Doug Seiler, is
3 stating the obvious. In the spring of 2011 State Operated
4 Services decided it needed to make some changes to the
5 program operations at the Cambridge Facility which at the
6 time was called METO. This is admission of the knowledge
7 that goes back to the spring of 2011, and we believe it goes
8 back to 2010 if you look at the Governing Board Minutes.

9 The State's decisions, we believe intentional,
10 DHS's intentional decisions not to pursue the supervised
11 living facilities license has implications. We are not
12 bringing any admissions in until we get a license from
13 supervised living facility, SLF.

14 This is from the, I believe, the Director of
15 Cambridge telling another DHS employee, with a copy to Doug
16 Seiler, that this is happening. That means you can't bring
17 in others who might need this program from Anoka or St.
18 Peter, or really anywhere else. It is a hard stop placed on
19 people coming in that affects transitioning. That is an
20 Olmstead issue. And this is a recognition and we believe an
21 admission, Your Honor, that their decisions have adversely
22 affected people with developmental disabilities.

23 I am going to be referencing the next page. This
24 is an April 12th, 2012 e-mail from Alan Radke to Paula
25 Halverson at DHS. And this speaks to, you know, the

1 specifics of loved ones in these other facilities, you know,
2 not having the ability to have appropriate care in a
3 facility such as METO -- excuse me, such as Cambridge.

4 THE COURT: Cambridge.

5 MR. O'MEARA: Without sending someone who no
6 longer requires hospital level of care to MSHS-Cambridge.
7 We will not have a D-bed for over a week. Waiting that long
8 is not good for, and that is a redacted name, or Annandale.

9 What we are seeing is DHS struggling with not
10 having a license. And these are times material to, you
11 know, the post-settlement implementation, nobody is coming
12 to us, nobody is going to the families. Nobody is going to
13 anywhere, other than each other, between DHS and the
14 Department of Health. And it affects the lives of loved
15 ones who are in these facilities.

16 And in April of 2012 when they finally got around
17 to submitting their licensing application in late February
18 they got hit with citations for rule violations with regard
19 to their application and the supervised living facility
20 rules. They ended up getting a bunch of waivers.

21 THE COURT: Five, I think, to be exact.

22 MR. O'MEARA: Nobody told us about that. We would
23 have liked to have had a conversation about waivers for
24 things like no windows in rooms.

25 This one is interesting to me. So, these are May

1 2nd e-mails. They don't have a license, but now they are
2 saying that we are going to be getting one backdated to
3 April 24th, 2012. To be fair, I just used the word
4 backdated, but that is what I interpret.

5 The bottom e-mail says: The reason Paula is so
6 anxious is because they have been holding off with
7 admissions pending a license approval. That is May 2nd,
8 2012, 11:52 p.m..

9 There is a response back: Hello, Paula, our
10 license will be effective April 24, 2012. The license will
11 be issued soon, hopefully within the next couple of days.
12 We would have liked to have known what was going on with
13 this so that we could have a conversation about why the
14 Department of Health is backdating a license for this
15 facility and why they are issuing waivers. We have no idea
16 what is going on at this point in time.

17 No one from DHS or the State told the families or
18 the loved ones with developmental disabilities who would be
19 transferred to Cambridge, that Cambridge did not have a
20 license. DHS and the State, Your Honor, through the
21 documents that we have shown, and we believe otherwise,
22 quite obviously knew that Cambridge did not have a
23 supervised living facility license when it opened.

24 The DHS Deputy Commissioner had just signed the
25 Settlement Agreement two weeks prior to the Cambridge

1 Facility opening. The Settlement Agreement absolutely
2 required the State and DHS to tell us that Cambridge was not
3 licensed.

4 The State and DHS obligations of candor absolutely
5 required that they notify the Court of its unlicensed
6 status. The statute requiring a supervised living
7 facilities license states that, the Commissioner through the
8 Attorney General's Office can seek injunction against the
9 continued operation of the unlicensed facility. That didn't
10 happen, here.

11 Neither the DHS or the Minnesota Department of
12 Health Commissioners, nor the Attorney General's Office
13 which represents the State and DHS in this matter did
14 anything. There was no disclosure to the families, or to
15 the loved ones with developmental disabilities at those
16 facilities, or to the Court, or to the Ombudsman, or to the
17 consultants, or to our office.

18 We sat shoulder-to-shoulder, Your Honor, with DHS
19 leadership, many of whom were involved, we believe, in the
20 discussions about licensing, at times, material. No one
21 told us anything. Seven chambers conferences with counsel,
22 with the Chief Compliance Officer, with the Deputy
23 Commissioner and others, right here in this courthouse and
24 no one said a word. They had every opportunity to come
25 clean and step up and say: Hey, we weren't licensed. We

1 did not have a supervised living facilities license. They
2 didn't do that, and they had an obligation to tell us. When
3 they have an obligation to tell us and to tell this Court,
4 and they don't, it is a misrepresentation and it is bad
5 faith conduct. And it is a predicate for sanctions.

6 Instead of telling us, the truth remained hidden
7 throughout those seven chambers conferences, throughout our
8 many inquiries regarding licensing at Cambridge. Your
9 Honor, we believe in this situation, in this context, where
10 there is a Class Action Settlement that is brought to the
11 Court, where the Court is actively involved for, you know,
12 certainly over a year and perhaps as much as two years prior
13 to the Settlement Agreement being approved, where there is
14 admitted abuse of people who are vulnerable at a
15 state-operated facility, that it is the responsibility, the
16 moral responsibility and the legal responsibility of the
17 state of Minnesota and Department of Human Services to make
18 every effort to inform the residents of those facilities and
19 their families that the new facility does not have a
20 safety-related license. So that these individuals and their
21 families can choose for themselves whether they want to
22 reside in an illegally-operated facility. They weren't
23 given that choice, and that is wrong. And that is a
24 predicate for sanctions.

25 We spent a lot of time working on implementation

1 issues. We had a fairly good relationship with counsel. We
2 don't anymore. We started asking about the implementation
3 issues in January of 2012, and the Court in February asked
4 us for an update on the implementation. I believe Your
5 Honor's office called our office and we coordinated with Mr.
6 Alpert and we sent this e-mail and subsequent e-mails as the
7 contemporaneous information about the implementation of a
8 Settlement Agreement.

9 January 9th of 2012, 35 people plus -- God knows
10 how many more -- knew about the unlicensed status at
11 Cambridge and didn't tell us. The implication I derive from
12 the opposition briefing is because I didn't specifically
13 state on January 9th, 2012: Are you licensed? That they
14 had no obligation to disclose it. That is wrong. That is
15 not the law.

16 Their silence, their silence, Your Honor, in the
17 wake of all of this knowledge, is a misrepresentation of the
18 actual non-licensure going on at Cambridge.

19 These are in the record, Your Honor. I am trying
20 to get through this. In July of 2012, we had questions
21 about the current license for the Cambridge facility. We
22 quoted the Settlement Agreement. And we heard about this
23 variance. And I had no idea what was going on with it, so
24 we sent them this e-mail. And we didn't get a response for
25 a long time. And then when we got a response, it was

1 insufficient and asked again and again including requests of
2 the Court Monitor. We asked specifically how it relates,
3 how does the variance compare with METO's prior license and
4 supervised living facility?

5 All they had to do was write back and say: Look,
6 we were unlicensed for a period of time. They didn't. They
7 did not do -- they did not say anything to us. And we were
8 led by their misrepresentation to rely on this variance
9 discussion. We sat in party meetings where Pat Carlson, I
10 think, who was in charge of supervising the State Operated
11 Services was talking about variance. Nobody brought up the
12 fact that they didn't have a supervised living license. We
13 had no idea what was going on with this variance. We kept
14 asking.

15 And it was important. It was important to us
16 because the license derives, you know, the protections of
17 people who are vulnerable.

18 Prior to July and June we had some vetting of a
19 report, I think, by the Department of Health. And we said
20 the report does not delineate the type of specific licenses
21 that Cambridge has received for a facility serving people
22 with developmental disabilities. We believe a generic
23 reference to licensure is vague and insufficient,
24 particularly considering the issues involving licensure of
25 the facility in the past and current questions raised about

1 how the facility is to be licensed. We wanted to know. Our
2 consultants wanted to know. Dr. Wieck wanted to know. Ms.
3 Opheim, the Ombudsman, wanted to know what was going on.
4 And they weren't telling us.

5 The Court Monitor becomes involved, and to his
6 credit he sets agendas and we move forward on discussions
7 with issues. I think he is facilitating the party meetings
8 at this point in time. And we say to Mr. Ferleger: We
9 would like to receive a response to the licensing concerns
10 involving Cambridge as expressed in our July 5th, 2012
11 e-mail to counsel. It is an important issue. It drives the
12 description of rights, protections of rights, and the type
13 of programming.

14 We wanted to know. We were asking questions. It
15 was important to us and we weren't getting answers. I am
16 making the assumption the whole time now that they have got
17 this variance from all of these other licenses that are
18 required, and they are not telling us otherwise.

19 This one is October. We want to know about the
20 licensure, again. We reference our July 5th e-mail. We
21 haven't received any response to these questions in
22 discussions. We reiterate our request for this information
23 and the questions and concerns about the Cambridge license
24 referenced in our September 20th e-mail to the Monitor.
25 Without receiving this information preferably a few days

1 before the next meeting --

2 THE COURT: You have got to slow it down just a
3 little for my Court Reporter.

4 MR. O'MEARA: I apologize, Your Honor.

5 It would be difficult to have a meaningful
6 dialogue on the subject. And that is what happened. They
7 didn't respond. They -- you know, when they did, it was one
8 or two sentences and it said they have a supervised living
9 facilities license. Never anything about the 10 months of
10 non-licensure.

11 And we were really agasp by this. It was one of
12 many issues that the DHS just simply would not come to us
13 with any meaningful information. And we kept going back to
14 the Monitor who kept putting it on his agendas. And we
15 never got a meaningful response from DHS.

16 As I mentioned, Mr. Ferleger put the license and
17 many other issues on the agenda, this is an October 24th
18 agenda. We raised specific concerns. He is referencing the
19 prior documentation, just like I am now. You know, as late
20 as November we are doing this. The Defendants' response
21 was, you know, we are licensed we have a supervised living
22 license. And the variance we were telling you about, we
23 decided to go in another direction. There was really
24 nothing said beyond that. And we continued to ask for a
25 response to the several important questions we and the

1 consultants, Dr. Wieck and the Ombudsman had about the
2 license. It was critical to us.

3 There was an agenda for a two-day meeting, I
4 believe it was here, in your large conference room. If it
5 wasn't, I apologize, but that is my recollection. Mr.
6 Ferleger's agenda.

7 I apologize. Item 31, license variance. The
8 Monitor wants to know about it. We want to know about it.
9 Now we are into, you know, this year. There's
10 communications back and forth with the monitoring issues,
11 and we on May 9th write an e-mail.

12 And we state: We learned this past week that the
13 Cambridge facility did not receive its supervised living
14 facility license from the Department of Health until 10
15 months after it opened. DHS did not notify Settlement Class
16 Counsel or the Court of this obvious violation of the
17 Settlement Agreement. It was illegal for the facility to
18 have operated without this basic license.

19 Our information about the absence of this license
20 doesn't come from DHS; it never did. It comes from
21 information from the Ombudsman regarding the licensing
22 issue. And it also comes from Dr. Wieck in the May 1 e-mail
23 to me. And you can see it highlighted here, but "The
24 successor program did not secure a new supervised living
25 facility license from the Department of Health for over 10

1 months as required under Minnesota law."

2 Yes, the Office of Legislative Auditor Report came
3 out in February. It wasn't until early May that the
4 consultants and our office began to realize what was up with
5 the supervised living facilities license issue and the
6 variance issue. And we got no help from DHS or the State of
7 Minnesota on this.

8 I have other documents, Your Honor, but I think I
9 have made my point.

10 THE COURT: And you know, of course, I will
11 address the issue you have put in front of me, even though I
12 think in the scheme of things it's, apart from today's
13 hearing, it's one small issue of many. But, obviously, in
14 the opposition brief, one of the questions is going to be:
15 Well, since there was this settlement to \$85,000 in attorney
16 fees in April of 2013, the Legislative Auditor Report
17 revealing the lack of license, no matter what the findings
18 of this Court, was issued in February of 2013. What's --
19 what does the Court make of that? I mean, that is an issue
20 raised directly or indirectly in the opposition brief on
21 just kind of looking at this, the sanction issue, itself,
22 you know, apart from the history of the Settlement Agreement
23 and the compliance and noncompliance issues. They are
24 really, sadly, in some ways aren't a lot of issues or
25 denials. But, what is most important for me to know about

1 that?

2 MR. O'MEARA: Well, if they would have told us
3 about it during the negotiations of the disposition, the
4 amicable disposition of the issues of concern in
5 noncompliance, I never would have entered into that
6 agreement with them.

7 I assumed that counsel knew about it and didn't
8 tell me. I don't know that for a fact. They will have to
9 answer that question.

10 I assume that leadership for DHS knew about it and
11 didn't tell us and didn't tell the consultants. I don't
12 know that. This is not an evidentiary hearing. I can only
13 go on the records that I have been provided that took us a
14 long time to get them. And the information that, you know,
15 that we have within the universe of knowledge, including my
16 interaction with the consultants who have acted on behalf of
17 both sides and done a pretty good job in moving issues
18 forward. I don't know if I am answering your question, Your
19 Honor, but we didn't expressly know about this.

20 And when they for months are silent and they are
21 not answering the questions about this variance, we can
22 reasonably rely on their silence and the fact that they say
23 they have a variance, you know, and not dig any further.

24 They should have come clean and told us,
25 contemporaneous with the non-licensure. Before they even

1 opened the facility, we could have addressed it. We could
2 have addressed. They didn't. They chose instead to hide
3 it, we believe intentionally.

4 The level of knowledge with the people that are in
5 these documents, as well as the numerous, numerous occasions
6 that these parties had to step up and tell this Court about
7 their non-licensure, which is a fundamental aspect of the
8 Settlement Agreement. The facility that replaces the
9 facility that abuses people doesn't have a license and they
10 don't tell you. But yet they are going into these chambers
11 conferences where we are talking about things like the
12 license variance, or we are going into a party meeting
13 facilitated by the independent Court Monitor where on
14 numerous occasions he is putting on the agenda the license
15 variance. And they are looking at me square in the eye
16 talking to me about license variances, but they are not
17 telling me the underlying truth that there is no supervised
18 living facilities license.

19 It is not just a license that, you know, where you
20 check to see if the light switches are working, these are
21 safety issues. Wouldn't they have liked to have known if
22 there were things like, I don't know, restraint chairs used
23 there? Or leg irons? Or handcuffs? I believe -- we
24 believe that the scope of that type of license review would
25 include that type of review, in addition to the programmatic

1 license having, you know, appropriate programs for people
2 that they serve.

3 So, you know, on the Administrative Rules, you
4 know, when you reflect on them, they talk about safety. You
5 know, I would never move into a facility if I didn't know
6 that -- if I knew that it didn't have a license, if the
7 State Fire Marshal hadn't been through it, if the safety
8 checks weren't in place. These are fundamental issues that
9 simply weren't dealt with. And we believe, Your Honor, they
10 were hidden for months. And we believe a lot of people were
11 involved in it. And that is why we are here asking for
12 sanctions.

13 THE COURT: And your specific request today is?

14 MR. O'MEARA: \$150,000 in monetary sanctions
15 representing \$15,000 for the 10 months, per month for the 10
16 months of non-licensure and \$50,000 in attorneys fees for
17 our office on behalf of the families having to deal with
18 this issue, this motion and having to investigate these
19 issues, and for further future work that our office is now
20 going to have to do because of the complete loss of trust in
21 the process, to birdog the implementation of the Settlement
22 Agreement. The Settlement Agreement paid us a contingent
23 fee of \$1 million. That contingent fee included, and I was
24 very clear with the Court, included work that our offices
25 would need to put in for appropriate implementation of the

1 Settlement Agreement. This kind of stuff about
2 non-licensure and hiding the ball and forcing us to engage
3 in, you know, an investigation, you know, the game is now,
4 as far as we are concerned, try to find the stuff that they
5 are not telling us about, so that we can try to protect the
6 300 families that we represent. And I am not kidding, Your
7 Honor, that is what it feels like now, with restraint
8 chairs, with legislative efforts behind the scenes to create
9 a transition time period where they get to continue to
10 restrain and exclude people. And they have no idea, and no
11 data -- they never give us anything when we ask about the
12 types of restraints and seclusion being used out there.

13 And they do that without your knowledge, outside
14 of the Settlement Agreement process, and I have to scramble
15 with e-mails with the DHS Deputy Commissioner over a weekend
16 because they are going to a Conference Committee on this
17 stuff. I think it is deplorable. And that is the stuff I
18 am talking about that we have to do. And it is hundreds and
19 hundreds and hundreds of hours expended to date and that we
20 expect to have to expend into the future.

21 THE COURT: All right.

22 MR. O'MEARA: Thank you, Your Honor.

23 THE COURT: There will be time for rebuttal. If
24 you need to dial the light down, we will, later, but --

25 Whenever you are ready, Counsel?

1 MR. IKEDA: May it please the Court? Scott Ikeda,
2 Assistant Attorney General, for the State Defendants.

3 Your Honor, we are here today on, as the Court
4 observed, the narrow issue of what to do about the fact that
5 the Department of Human Services operated the Cambridge
6 facility for 10 months without a license. DHS has said
7 before, and it said in its brief, that what it did was
8 regrettable and inexcusable. The Deputy Commissioner said
9 there is no excuse for the 10-month licensure lapse. While
10 there is some confusion around the date, it appears that the
11 problem was identified in January of 2012. I know that the
12 Department of Health says they were approached in the fall
13 of 2011.

14 The issue first came to light in February of 2013
15 in the Legislative Auditor's Report. What the documents
16 that were produced to the Plaintiffs pursuant to a Data
17 Practices request make very clear, and the Department does
18 not contest this, is that the Plaintiffs are right. There
19 were higher level people at the Department of Human Services
20 who obviously knew about the lack of licensure and didn't
21 tell anyone about it, and frankly didn't continue to operate
22 the facility albeit with the Department of Health and
23 Department of Human Services Licensing Division being aware
24 of it, but the CEO of the State Operated Services, the State
25 Medical Director, the Administrator, they absolutely knew

1 about this.

2 But, let me be clear, the Deputy Commissioner has
3 told me that she didn't know while the facility was not
4 licensed that it lacked a license, and in fact first became
5 aware when the Legislative Auditor circulated a draft
6 report. I understand that the Deputy Commissioner testified
7 before the Legislature following the Legislative Auditor's
8 Report and was asked about the lack of licensure.

9 And given the comments made by Plaintiff, Your
10 Honor, I want to be clear. Neither Steve Alpert nor I knew
11 about the lack of licensure while it was going on, and
12 frankly didn't know about it while the \$85,000 attorney fees
13 settlement was being negotiated.

14 THE COURT: I would think there would be some
15 people -- maybe they are not working anymore for the state.
16 I mean, they put you and Mr. Alpert in harm's way. I mean,
17 this information is imputed to counsel. I remember in the
18 good old days in the seventies, I would tell the St. Louis
19 County Department of Social Services, if it was a civil
20 matter -- because I did both civil and criminal -- saying I
21 need to know everything you know on these cases because I am
22 going to be held responsible. My reputation is on the line
23 and silence doesn't cut it when you are a lawyer.

24 And, of course, you heard me how I opened up. It
25 seems like some of these departments are indifferent, or it

1 is just no priority to them, either not just to you, but to
2 the Deputy Commissioner. And that is the part that no
3 matter how this comes out today, I can see somebody saying:
4 Why should anybody believe anything that anybody is saying?
5 Because now someone who I hold in quite high regard, the
6 Deputy Commissioner, is saying: Nobody told me, either. I
7 mean, somebody should be accountable for this.

8 I will be ultimately held accountable because
9 there is an order I have approved. And maybe the public has
10 a right to, but I mean that is the question I have is: Who
11 is responsible for this? I mean, I have no idea what the
12 families of some of these people think, and I think that is
13 a separate issue from how important this license is.
14 Because I didn't ask Mr. O'Meara, but I think he answered it
15 without me specifically asking the question. Is the
16 sanction he is asking for relating to the lack of a license,
17 itself, for 10 months, or the concealment or hiding it, to
18 use his words, and I suspect he is going to say before we
19 are done: Well, it is for both.

20 I interrupted you, but I am thinking back -- I
21 would think that it is just very disappointing to me there
22 are so many people that feel so comfortable telling nobody.
23 The consequence of it, I guess, is what is in front of me.
24 But, I am all ears, counsel, to try to understand this.

25 MR. IKEDA: Your Honor, absolute fair point. What

1 I have been told by the Deputy Commissioner is that there
2 have been reporting changes within State Operated Services,
3 where people who would -- there is no CEO of State Operated
4 Services anymore. That position doesn't exist. The
5 department realigned, and it is my understanding, the Deputy
6 Commissioner is here and can give you more information, but
7 it is my understanding that people are reporting directly to
8 the Deputy Commissioner.

9 In addition to that, the Department has put
10 together a Jensen Implementation Team, and sitting in the
11 back of the courtroom is Christina Baltes, who is the
12 Department's Jensen Compliance Officer. So, I think what
13 the Department would say to what you have said, Your Honor,
14 is that -- and to what Mr. Ferleger has said about -- I
15 think in one of his reports he said, not having enough
16 shoulder -- putting their shoulders into compliance, or
17 something to that effect.

18 I think recently what has been going on at the
19 Department is that it has put together this Implementation
20 Team, there are monthly party meetings. And the Department
21 fully appreciates the fact that, as counsel noted, that
22 there were meetings with individuals who knew about the lack
23 of licensure and just didn't tell anybody about it until --
24 didn't tell -- the Deputy Commissioner didn't tell the
25 lawyers involved. And that is unfortunate and regrettable.

1 THE COURT: And something -- ordinarily I wouldn't
2 bring it up because it really isn't, circumstantially or
3 otherwise, relevant to this; but, it is in prior orders of
4 mine.

5 For example, sitting down and having meetings,
6 that I have my notes here with the dates, and then having to
7 read about in the paper an Executive Order signed by
8 Governor Dayton on January 29th of 2013, when we had met
9 just four days earlier, which means this thing had been
10 worked on for some time, and it wasn't done the night
11 before.

12 And so then I read about it, and it seems almost
13 that people are trying to distance themselves from -- well,
14 we are doing our own thing and yes -- because, I mean, I
15 think in some of Mr. Ferleger's reports, and whether I
16 recall this accurately or not, it won't play a role in what
17 I am doing directly on the specific motion that is in front
18 of me today. But, meeting people who have no idea about --
19 in these facilities. Well, what do you mean Jensen and
20 training? And it is in some of the -- it is in, actually,
21 my Order from August of this year where I went through
22 examples of noncompliance, everybody is conceding. But, it
23 is just -- that's -- I think the public has a right to say:
24 Well, we know for sure the Judge is responsible, but isn't
25 anybody else responsible for this? That is my concern. It

1 seems like there is an indifference to, at times, apart from
2 the lawyers involved and apart from the Court, to the
3 Commissioner to the Deputy Commissioner; that is the
4 appearance of it. And you are saying, well, there maybe
5 have been some of that, maybe it is lack of coordination,
6 maybe it is this, maybe it is that; but, the point is I
7 think you are suggesting, and it was suggested in the
8 briefing, we acknowledge some of this and we are dealing
9 with it. I don't want to oversimplify the issues on either
10 of your -- from either points of view.

11 MR. IKEDA: No, I don't think the department would
12 context that that would even be an oversimplification. I
13 mean, the Department has written in response to the
14 Monitor's reports that there were issues -- they conceded
15 issues of noncompliance with the Settlement Agreement.

16 But, I think to put this in context --

17 THE COURT: All right?

18 MR. IKEDA: -- and to address, I guess, what the
19 Plaintiffs said in their opening brief about there has been
20 little substantive improvement following the Settlement
21 Agreement. You know, Your Honor, as you may know, I wasn't
22 involved in this case at the time of the settlement, so I
23 come in post-settlement. But, what I am told is that the
24 amount -- the instances of restraint at the facility, and
25 the Deputy Commissioner told me while we were sitting here

1 this afternoon, systemwide, have gone considerably down.

2 THE COURT: Or so people say. I mean, I think in
3 some of the reports of Mr. Ferleger, and the court
4 consultants, they would say: Be careful, because just like
5 when somebody goes AWOL, they call it transition to the
6 community. And I haven't brought that October 12, 2012
7 incident up. That is a transition to the community, and
8 even though that is not quite the way we told the Police
9 Department. I mean, I think that the reports of Mr.
10 Ferleger and others are saying: Well, I am not so sure any
11 of these reports are accurate, because there are a lot of
12 people who still believe in the restraint system. I hope
13 you are right. But, I think that the people involved in the
14 case, maybe even the consultants are saying: How can we
15 believe anything that anybody is saying?

16 And the truth of the matter is we wouldn't have a
17 Department and a Court and Mr. Ferleger agreeing to a
18 \$477,000 budget that is precipitated in substantial part by
19 noncompliance. If we all weren't -- hopefully we are in it
20 together, everybody has their own responsibilities. But, I
21 think I even said this to Deputy Commissioner Barry at a
22 time, unrelated to this motion, that takes us back a couple
23 of months in chambers when I think other people were there,
24 there is the appearance that there is the middle bureaucracy
25 who has been here from the beginning at a number of these

1 facilities, at Cambridge and Moose Lake and other places,
2 who is indifferent. And they don't really feel accountable
3 to the Commissioner, the Deputy Commissioner or anyone else.
4 And they have a comfort level, I guess, in not telling them
5 or the lawyers about things going on, either.

6 I mean, that is being suggested. And I am not
7 going to speculate about it. I hope things are the way you
8 say they are. In fact, I will be commenting before we are
9 done here today on -- if I understand we are going to be
10 having a transitional planning report and Implementation
11 Committee Report coming out, I will probably have a comment
12 about that on where we go from here, just to see what that
13 is and where we are headed.

14 But no, obviously, like I said before, and maybe
15 the Plaintiffs' counsel may not necessarily agree, but there
16 is really a very narrow issue in front of me today. In some
17 ways, that is perhaps unfortunate. But the -- no, I hope
18 things are the way you say they are. In the end, I guess,
19 we will find out sooner than later.

20 MR. IKEDA: Your Honor, like the licensing issue
21 that we are in front of you today for, the attorneys and the
22 Deputy Commissioner and the Commissioner, frankly, can only
23 address the things that they know about and the things that
24 people tell them about. And so for -- I guess when I say
25 that, you know, it has been reported at least to me to

1 report to the Court about restraints going down, the Court
2 is absolutely right. I have got no firsthand knowledge of
3 that, neither does Mr. Alpert. But, that is what our client
4 is telling us. And at least the -- there are incident
5 reports that are triggered when there are manual restraints
6 that happen that go to Plaintiffs' counsel, they go to the
7 Court Monitor. I believe that the Deputy Commissioner sees
8 all of them, as well.

9 So, I say this with the understanding -- with the
10 belief that there is a lot of notice that goes around. And
11 if there was disagreement with that point, hopefully we
12 would hear about it.

13 One other thing, I think, to put this in context,
14 Your Honor --

15 THE COURT: All right.

16 MR. IKEDA: Is that the Settlement Agreement as it
17 was drafted allowed for the use of mechanical restraints.
18 And early on, around the time I became more involved in the
19 case, you know, I understand that the Department voluntarily
20 agreed to discontinue the use of mechanical restraint at the
21 Cambridge Facility, with the goal of eliminating to the
22 extent possible, systemwide.

23 The other thing to put this into context I think
24 the Department would want to note, is that they have just
25 gone through an Olmstead planning process, as Your Honor

1 discussed, you know, the Executive Order that the parties
2 knew about and we all, as we mentioned in chambers
3 apologized for not alerting you to the Executive Order when
4 it came out.

5 But, the Olmstead planning process is complete.
6 There is an Olmstead Plan in place. And from what is being
7 reported to me and to report to you, the Department has
8 gotten positive feedback on the Olmstead Plan.

9 So, I think, you know, putting that in context, I
10 think it is a little bit unfair to say that there has been
11 little substantive relief provided. Now, that is not to
12 excuse any of the conduct that is the basis of this motion.
13 The Department doesn't quibble with these facts.

14 There were people, clearly, as I said before, that
15 knew about the lack of license and didn't tell anybody about
16 it. Sat in meetings and didn't tell anybody about it.
17 Talked about variances and didn't say: Well, by the way,
18 there was no license for 10 months.

19 But, I think what is important, to also have some
20 context for is that the dates, I think, that Mr. O'Meara was
21 putting up, at that time the facility -- for much of that
22 time the facility had already been licensed. So, when they
23 were talking -- when they were being asked about variances,
24 the Department was responding to those issues of
25 variances -- I can't get in anybody's head, but I don't know

1 why, perhaps, it wasn't affirmatively disclosed. But, at
2 the time, at least, I think, the facility had already been
3 licensed at that point.

4 You know, so the question before the Court today
5 is, given these facts, and given what the Department has
6 admitted, you know, is inexcusable; what does the Court do
7 about it? And the Department submits, how do you fix a
8 problem or how do you address a problem that was fixed a
9 year and a half ago? And what the Department did in
10 following the Court's August Order was, as the Court noted,
11 agreed to a budget of around a half a million dollars for
12 nine months of monitoring. The Court said that it wasn't
13 inclined to sanction or hold DHS in contempt then, as well.
14 And the Department believes that the more -- the robust
15 monitoring that has been taking place and that will take
16 place in the future by the monitor is the more appropriate
17 way to address what has happened in the past with the
18 license issue.

19 Frankly, you know, I think the question -- the
20 issue of remedy really is one of -- if the Court were to
21 order payment of \$150,000 to the Court and \$50,000 to the
22 Plaintiffs, would that -- how would that improve the
23 services that the department provides at the Cambridge
24 facility and elsewhere?

25 THE COURT: Well, and so, obviously, that is a

1 question I have asked myself, because some would suggest
2 that there is no treatment going on at Cambridge, and some
3 would suggest -- and hasn't been for a long time. Some
4 would suggest that people have forgotten about Judges Larson
5 and Frank Johnson what they said about basics. Some would
6 suggest that: Well, Judge, why don't you ask for restraints
7 here? Incidents of arm limiters, seatbelt locks, helmets,
8 handcuffs, plastic cuffs, and the list goes on. And just
9 what exactly is it, really, to use the SLF license purpose,
10 primary purpose to provide a residential home-like setting
11 for persons who are developmentally disabled so they can
12 live in safety through programs and treatment licensed by
13 DHS.

14 So, yes, the question I ask of myself is: Well,
15 is that going on? Some people would probably suggest that,
16 no, most of it is not. And two, whether it is or it isn't,
17 do those sanctions further that? And I am sure Mr. O'Meara
18 will have something to say about the question about the
19 sanctions. But no, the issue you raised, I explained it a
20 little bit differently; but yeah, I asked myself those
21 questions and I have gone back and reread everything a lot
22 the last few days. So, I think I interrupted your argument.

23 MR. IKEDA: So, that really -- you know, the
24 Plaintiffs in their briefing, and less so today during oral
25 argument, but in their briefing brought up several issues,

1 you know, training hours, failing to respond to requests,
2 things that predated -- that were frankly before 2000 -- in
3 the 2012, early 2013 time frame --

4 THE COURT: Well, I will interrupt again, but
5 obviously, I think part of what you are saying, and it was
6 in your brief, too, frankly. Well, whether under the
7 auspices of background or context, that is there
8 appropriately, or otherwise, that your suggestion is that,
9 well, that is not the quote -- I guess I used the phrase --
10 narrow focus of the motion that brings us into the courtroom
11 today.

12 MR. IKEDA: That is right, Your Honor. Your
13 Honor, I don't have much more to say except that the
14 Department acknowledges that there was an issue with the
15 lack of license. It takes that issue seriously. It is in
16 no way trying to minimize what its people did by allowing
17 the license to lapse and then not telling anyone. But
18 again, it asks the Court to reaffirm its August decision and
19 not hold the Department in contempt or sanction them. As I
20 mentioned before, the Deputy Commissioner has informed me
21 that the reporting structure with direct care and treatment
22 has been revamped.

23 I understand that in fact within the last few
24 months, I think, there are now two Deputy Commissioners and
25 Deputy Commissioner Barry is responsible for direct care and

1 treatment and has a different reporting structure --

2 THE COURT: You mean, Deputy Commissioner Barry
3 gets tired of working 80, 90, or 100 hours a week? She
4 would never complain, but the thought crossed my mind,
5 because she has a few other things on her plate these days,
6 too.

7 MR. IKEDA: So, Your Honor, I guess the bottom
8 line that DHS wants to make is what it has said a couple of
9 times here today. It has taken steps, recently, to address
10 structural issues. And that is what it wants to convey.
11 The Department also put together an Implementation Team,
12 Christina Baltes, who sits in the Commissioner's Suite area
13 at the Department of Human Services, you know, they believe
14 that this is the way to ensure compliance going forward, and
15 ask that a punitive sanction of \$150,000 and \$50,000 to the
16 Plaintiff not be awarded so that they can use their money to
17 address issues of future compliance. Thank you, Your Honor.

18 THE COURT: All right, I will likely give you the
19 last word, if you want it, but I will hear rebuttal if Mr.
20 O'Meara would like?

21 Most lawyers are very hesitant to turn down the
22 opportunity, so --

23 MR. O'MEARA: Thank you, Your Honor. The reason
24 why, from our view, the reason why DHS was -- let me just
25 rephrase. Let me just say it. Dr. Amato in a party meeting

1 told us he never received the Settlement Agreement exception
2 for Velcro straps. So, they implemented a complete "no
3 mechanical restraint" program at the facility. And so, it's
4 fairly easy to negotiate away, you know, the single
5 exception for the use of Velcro restraints. That is what I
6 recollect. I believe that the consultants were at that
7 party meeting. And it just exemplifies to me, as I reflect
8 on the various party meetings and the dialogue, that a lot
9 of the stuff about the settlement didn't get translated to
10 even leadership at that facility, or the staff at the
11 facility, or a lot of other people. And that is a very
12 dangerous -- you are not going to get buy-in from people if
13 you don't tell them about the settlement, if you don't go
14 out and sit down with them.

15 Ultimately, Commissioner Barry and I believe the
16 Chief Compliance Officer Greg Gray went out to Cambridge,
17 you know, and had a sit-down with the staff. But, that was
18 much later in time after we understood that people who were
19 at those facilities at that Cambridge Facility were going to
20 know about the settlement and know about how to address the
21 prohibition against restraint and seclusion.

22 The request for monetary sanctions, we believe, is
23 reasonable. We looked at a lot of different sanctions from
24 Federal Courts and State Courts. We cited in our responsive
25 brief the, you know, the *Burlington Northern* sanctions,

1 which was \$4 million plus attorneys fees of over seven
2 figures. That included misrepresentations to the Court, but
3 it also included a component which is not here, which is the
4 destruction of evidence.

5 So, we spent a lot of time looking at numbers.
6 And I could tell you that we were looking and asking for a
7 lot more in terms of the *cy pres* fund, but we felt after
8 looking at the way this jurisdiction, in particular, the
9 Eighth Circuit has looked at and handled sanctions, that
10 15,000 per month is reasonable. 50,000 in attorneys fees is
11 not based upon the hourly fee that was agreed upon by
12 clients or that was referenced to the Court in the original
13 submission of the Class Action Settlement for the Court's
14 consideration and ultimate approval. The amount of time
15 that we have in here exceeds the \$50,000 we are asking for.

16 And Your Honor, I think it is important, at least
17 from the Settlement Class view, that without the involvement
18 of Settlement Class Counsel on a number of these issues, the
19 families are losing an advocate. And we need to be vigilant
20 and shed light on these issues going forward.

21 There is an absence of trust. I would like to
22 think that the monetary sanctions are, at least in part, for
23 the re-establishment of trust, so that we can get to the
24 place where this Court can ultimately recognize that this is
25 a landmark settlement and that this is an important

1 collaboration between the state and families who are abused
2 and families of people, loved ones with developmental
3 disability, and the state, that are going to benefit
4 dramatically by things like an appropriate Olmstead Plan,
5 and best practices that are imbued into how we treat people.
6 And that we don't programmatically restrain and seclude, but
7 we use positive behavioral resources. And that is how we
8 support loved ones.

9 I would like to think, and I hope that the Court
10 would agree, at least the sanctions are in part to re-engage
11 the parties, and also to deter future conduct by what I
12 would describe, and I think the Court has described, as
13 middle management at the state agency involved in playing
14 hide the ball and not coming to their supervisors and not
15 telling them about fundamental things like an absence of
16 license. The case law speaks to that deterrent factor, and
17 I believe it is needed here.

18 We didn't bring up the AWOL situation in our
19 briefing. It was brought up in the opposition briefing. We
20 responded by providing the Court Monitor's final report. I
21 intentionally did not comment on it today. I understand the
22 narrow nature of things, but the context for other troubling
23 issues involving the case in terms of information that is
24 not being conveyed, or being conveyed improperly, is a
25 backdrop, partial backdrop for why we are here. Thank you,

1 Your Honor.

2 THE COURT: All right. I will give you the final
3 word if you would like it, Counsel.

4 MR. IKEDA: No, Your Honor. Thank you.

5 THE COURT: What I am going to do is I am going to
6 make a couple of rulings, here. Perhaps -- well, let me ask
7 a question first, and the answer -- my ruling doesn't depend
8 upon what the answer is. And I assume one or more people --
9 do I have a general understanding that at some time in the
10 near future there is a -- whether we call it an
11 implementation plan or a transition planning, or both,
12 whether it is a draft report or a report that is coming out
13 sometime in the near future?

14 And I saw Mr. Ferleger raise his hand. I don't
15 know if anybody else did. Does anybody object to him
16 saying --

17 MR. FERLEGER: Your Honor?

18 THE COURT: Why don't you come to the podium so
19 everybody can hear. Very briefly.

20 MR. FERLEGER: Under the Order of August 28th, the
21 State provided a draft, and then a final proposed plan
22 around the Rule 40 monitorization and around the valuation
23 criteria and Cambridge closure plans.

24 The plans were not acceptable, and by agreement
25 with Deputy Commissioner Anne Barry, and to her great

1 credit, the State consented to the finalization of those
2 plans by me. And I have done so in connection with some
3 consultation with regard to both.

4 On the Rule 40 plan, the expert who looked at
5 Cambridge back last spring came and spent a couple of days,
6 for example, with the Department of Human Services and
7 recently submitted a report. So, I have been putting
8 together the final plans to put in a report to you, Your
9 Honor and I hope to finalize them in the next couple of days
10 so that Plaintiffs and Ms. Opheim and Dr. Wieck can have a
11 look, and the State a final look. I will do that in the
12 form of a report with the parties having their usual 10 days
13 to comment before I file the final report.

14 THE COURT: So, when do I get -- and I will
15 explain in a minute why I am asking this, but when do I get
16 access to it?

17 MR. FERLEGER: I am planning to have it in your
18 hands by the end of this week.

19 THE COURT: But, that would mean, when you say in
20 my hands, that would be -- that is before the --

21 MR. FERLEGER: Before the comments by other folks.

22 THE COURT: By the parties. So, yeah, I suppose
23 in fairness to everyone, like other reports, once I get that
24 there may be responses from both sides of the runway, here.

25 MR. FERLEGER: That is right, Your Honor. And I

1 can, of course, if you like, provide you with the draft
2 report at the same time as I provide it to everyone else.

3 THE COURT: No, that is fine.

4 MR. FERLEGER: Thank you.

5 THE COURT: Anybody else care to comment? I mean,
6 I wasn't sure who might respond, so anybody, whether they
7 are sitting at counsel table or elsewhere, I will leave that
8 up to respective counsel. All right.

9 And I will explain why in a moment here why I
10 asked that question, and then, I mean, I may make a couple
11 of rulings here that maybe both parties will disagree with.

12 Well, first of all, the odd phrase, I suppose, for
13 a Federal Judge to say, but perhaps not given some of the
14 humanity involved in trying to restore equal status to
15 individuals with disabilities, but I am saddened about the
16 comfort level that -- and I am not necessarily saying that
17 anybody in the room, here -- I guess that is to be decided
18 at some point. But, the comfort level different agencies
19 have, and people within certain departments, whether it is
20 the DHS or Department of Health or others, with what appears
21 to be either a very low priority or indifference to -- well,
22 we really got to make sure everybody knows about the
23 licensure, because even if under the SLF license the issue
24 is, well, somebody is blowing it out of proportion. Yes, we
25 didn't have the license. And I won't repeat kind of what I

1 read about the purpose of that license, but I really think
2 in many ways and would so find that the concealment of it --
3 and I am not going to make any finding that anybody in this
4 room concealed anything, I will get to that in just a
5 minute. But, the reality is, is whether it is a low
6 priority to people who were indifferent, either out of lack
7 of respect for the residents at Cambridge or people that
8 they are trying to admit to Cambridge, or the fact that it
9 has appeared long before today to me for some reason people
10 really immediately below, and more than immediately below
11 Deputy Commissioner Barry seem to have little, if any,
12 knowledge, apart from whether they care or not, of the
13 specific Settlement Agreement and the so-called landmark
14 nature of it. I mean, that seems to come up over and over
15 again. And this almost kind of indifference -- I must be
16 just getting old or old fashioned, because I think back to
17 my days -- admittedly it was in the County Attorney's
18 Office, but most agencies wouldn't have dared not tell me
19 something, because they would know my reputation was on the
20 line.

21 And they would say: Look it, we are going to look
22 like we are hiding something, and it is not as serious as it
23 it looks. Because let's explain why we don't have a license
24 and we have got a variance, and it is not as big a deal as
25 it looks like, because we don't want people to think either

1 we don't care, or that we are indifferent, or how dare you
2 tell us how to run our facility. It is just quite startling
3 to me, and then some of the more cynical people not involved
4 in our case, and I wouldn't be one of those, to say, well,
5 what do you expect from middle management in the
6 bureaucracies, because they have been really not accountable
7 to hardly anyone most of their careers. That is the part
8 that saddens me, that people have this comfort level. And
9 where does that leave me today? Because I do respectfully
10 reject the notion, and it doesn't involve -- and perhaps Mr.
11 O'Meara won't agree, but I don't have sufficient -- well, I
12 do have sufficient information. And on the record before
13 me, we have a separate issue that I won't need to reach
14 today to make what I think is a fair decision in terms of,
15 well, under what circumstances is knowledge imputed to
16 lawyers and imputed to department heads and so forth?
17 Because for lawyers, unlike department heads, there's
18 ethical and other considerations if someone is held
19 responsible for the knowledge.

20 I don't have to reach that issue today. I am
21 going to take counsel and Deputy Commissioner at their word
22 today. I don't think it changes, sadly, what happened,
23 because I respectfully reject the notion that this was
24 inadvertent by these departments.

25 I think that they quite consciously concealed and

1 misled, whether it was because it's of no priority, or how
2 dare they, or just general indifference. Or hey, it is not
3 a big deal, so why tell anybody? In the private sector, all
4 of those people would probably be out of a job today, and it
5 is almost worse in the public sector when our reputations,
6 the public interest, and most importantly, the interests of
7 the Class Members, and in the words of all of the lawyers at
8 the Settlement Hearing, and all future people with
9 disabilities and Class Members, no matter what institutions
10 they are in, it saddens me that there is so much silence.

11 And here is my ruling. And then you will soon
12 find out why I asked the question about, is there some
13 reports coming out now? Because I read and reread some of
14 the prior -- tried to see where we were at with some of
15 these things. Since I reject the notion that I believe
16 there was some active concealment, and I decline to find it
17 was done by the lawyers in the room, or Deputy Commissioner
18 Barry, or her boss, I decline to find that. But, the
19 result, you see, is the same in the eyes of the plaintiff
20 and the public. And that is, well, we have to go through
21 all of this work, anyway, so even if it was done by
22 indifference or no priority -- or low priority, or lack of
23 coordination, because of ignorance or a cavalier attitude,
24 the conduct of other individuals, not the plaintiff, caused
25 a number of these things to happen. And some of the

1 licensing -- I would say the concealment and the cavalier
2 attitude by certain people in these departments, not knowing
3 enough to go up the chain, is quite disturbing and it caused
4 these things to happen. But, I decline to find that, as I
5 said, Deputy Commissioner Barry, or the counsel in the room:
6 Oh, yes, they knew. Obviously, if everybody did know, there
7 is ethical implications. But I am more concerned about
8 trying to carry out the Settlement Agreement.

9 Here is the ruling, given the fact that I have
10 already said, whether it was the concealment that never went
11 up through, and the indifference of not disclosing it, and
12 then -- I don't need to learn, well, did they deliberately
13 mislead with five waivers and a variance, because the result
14 is the same. Mr. O'Meara would be here either way and had
15 to do all this work.

16 I am not prepared today, but that doesn't mean I
17 won't be doing it very soon, to make a decision on, well,
18 should there be a financial sanction, whether it is \$15,000
19 a month in a *cy pres* fund, or if not that, the attorney fees
20 whether it is 50,000 or something more or less than that.
21 Until I have seen these -- I want to see the current status
22 of the case and implementation reports, because you are
23 going to see some big bold print in the Order I am going to
24 do about getting the word out, that this settlement
25 agreement if we are in -- it is not landmark. Let's hope it

1 can become landmark.

2 I am not going to question what Mr. Alpert, Mr.
3 O'Meara and many, many others said back in December of 2011.
4 I think people had the best of intentions, there was lots of
5 passion in the room that day. It's just that most of it
6 hasn't happened. And some of the things that have happened
7 have been on a completely different time schedule and an
8 entirely different context.

9 So, I have some responsibility to carry out that
10 settlement agreement. Having made the findings I have made,
11 I am going to reserve the right to impose some financial
12 sanctions or other sanctions, pending receipt of these
13 reports. And I am going to -- I will wait and see the
14 ten-day response period, as well.

15 And so, I will do an order setting out -- you will
16 see everything from priority to a list of examples of
17 noncompliance that go beyond the scope of this hearing. And
18 it won't read a lot different than my August Order where I
19 expressed some frustration, and I don't want to
20 overdramatize today, but I also was rereading what I
21 included in the Order about Ken Kohnstamm. And I am
22 thinking, you know, we are not honoring his memory, either.
23 We are not really doing what I know he would want us to do,
24 either. And reasonable people may differ on whose fault
25 that is, but it would be difficult for people to say: Well,

1 this really hasn't worked out the way everybody had hoped it
2 would. So, I hope we can, not only for me to carry out my
3 oath, but maybe to honor his memory and some of you may be
4 thinking, well, the Judge is really -- and I wouldn't
5 ordinarily have said that, but I reread some of that earlier
6 today and over the weekend.

7 So, I am going to reserve the right to impose
8 sanctions that are requested by Mr. O'Meara. I want to see
9 the -- I will do an Order now, and you will see things like
10 priority, and I will give some examples of things that I
11 would expect to see that would benefit everyone if we truly
12 are going to make this a landmark decision.

13 And then I have to say yes or no to the sanctions,
14 because I have made some findings about concealment and who
15 wasn't directly involved in that; but that really doesn't
16 dictate the decision on the financial piece, because the
17 result has been the same. We would be here anyway, in my
18 judgment.

19 So, I want to see the transitional planning, the
20 implementation report, and then because all of this motion
21 has been ruled up or down on me that, well, what should be
22 the consequence of my findings? I will follow that without
23 further hearing or conference. I will wait, because in
24 light of the timeline Mr. Ferleger has given out, I will let
25 that 10 days go, then I will make a ruling.

1 So, to the extent I have been asked to make those
2 rulings today and award specific financial sanctions, I note
3 the objection of Mr. O'Meara, because I don't claim there is
4 any stipulation here procedurally or substantively. And to
5 the extent DHS has asked me to deny it straight up today on
6 a remedy on the sanction, I note their objection.

7 So, I will repeat what I said here in small part
8 in the Order. And to my way of thinking, I am obligated to
9 rule on what is in front of me. But I am going to, much
10 like a couple of prior orders, just dictate some things
11 about what I would expect to see.

12 And then once the Order, this report comes out and
13 the 10 days have come and gone, I will then, without
14 further, it is highly, highly unlikely you will get a call
15 from my chambers saying, in light of this I would like a
16 brief of five page or less from one or both parties, or
17 something like that.

18 I will go ahead and issue an order with immediate
19 turnaround time on the remedy piece of this, because what is
20 left for me to decide is: Well, okay, the Judge made some
21 findings. Now, what is going to be the sanction to follow,
22 financial or otherwise? I will do that once those time
23 frames -- so that would be this Order coming out
24 immediately, and then a -- it just won't be a transcript of
25 this hearing. I will dictate an Order. And then I will

1 wait to see that exchange, that report. And I will respond
2 to that and make a ruling on the remedy piece that, well,
3 the Judge made the findings. What should be the financial
4 sanction, if any, whether it is *cy pres* funds, attorney
5 fees, or none of the above, or something else? So, in that
6 context, Mr. O'Meara, any request for clarification or other
7 requests of the Court?

8 MR. O'MEARA: No, Your Honor. Thank you.

9 MR. IKEDA: No, Your Honor, thank you.

10 THE COURT: I wish everybody a Happy Thanksgiving.
11 I suppose it will seem odd coming from me, but I hope one or
12 more of you will probably overeat because I am going to, as
13 inappropriate as that may sound.

14 And then I don't want to sound -- I probably used
15 this phrase before, I don't want to sound like Pollyanna in
16 that Disney movie and play the Glad Game with everyone, but
17 even though I have made some -- even before the arguments
18 and presentations, and now made some negative observations
19 about the compliance issues or noncompliance issues and the
20 case not being landmark, I still -- and the ideal is,
21 hopeless or otherwise, that until somebody gives me a reason
22 not to, I still believe that what people meant to say in
23 that day in December in this courtroom when lots of people
24 spoke, and at that time I believed what everybody was
25 saying.

1 I am still hopeful that we can do this. And I
2 want to say one other thing that has nothing to do with this
3 motion. By nothing I have said should detract from the
4 privilege that I had with the Lieutenant Governor visiting
5 my chambers and hand delivering the report that she did,
6 because other than not discussing the merits is why -- I
7 said it is up to you, Lieutenant Governor, so if you want
8 certain people here, that is fine. But, as far as I'm
9 concerned, since I have known you as long as I have and you
10 are coming as a professional courtesy -- she could have had
11 anybody do this. I am told she has been going to meetings.
12 And I said, it is fine with me if it is just you and I. We
13 won't discuss the merits; but, I welcome you here.

14 I just want to thank her for coming. And nothing
15 I have said should detract from that, because we had a very
16 genuine and sincere conversation. And I think she believes
17 in the cause, so to speak. And it would give me nothing but
18 reason to be hopeful and optimistic for the future. Because
19 if some people are wondering, well, was somebody -- it isn't
20 in the record today -- object to certain people? Because we
21 had a few inquiries. Nobody objected. I just said to the
22 Lieutenant Governor, I think it would be just fine if you
23 would come over with or without an escort, that is fine,
24 with the state patrol, and we will just have a nice private
25 chat and we won't discuss -- anyway, it was everything I

1 hoped it would be. I hoped she felt the same way, because
2 it was all positive. There was nothing negative,
3 whatsoever, about that exchange we had that day about where
4 everybody hopes to go in this case.

5 So, more than enough said, perhaps, by me. But,
6 absent something further from plaintiff or defendant, we
7 will stand adjourned at this time. Mr. O'Meara?

8 MR. O'MEARA: Nothing further, Your Honor.

9 MR. IKEDA: Nothing further, Your Honor, thank
10 you.

11 THE COURT: Now, I just said that, and I am going
12 to contradict myself. I will spare you -- and I don't know
13 if my judicial assistant has sent it to one or both parties.
14 I did as I promised I would do, even though it was a couple
15 months, or more than a couple months late.

16 If some of you recall, I had sent individual
17 letters to each Class Member about how the money would be
18 spent and I said I would be back. Because I was frankly
19 concerned about some of the guardians and other people. And
20 thanks to Greg Brooker and others, we made sure there was no
21 ineligibility for Social Security and some other issues,
22 because we had to deal with that back then.

23 But then I said I would be getting back to
24 everybody because of concerns I had, sending individual
25 letters to everybody a couple of years out. Well, we sent

1 whatever they were, 200 plus letters. Each got their own
2 letter.

3 And we have written a summary of the responses
4 that we have. And I guess the good news is I would rate 80
5 percent plus as, really, this money went where I think
6 Plaintiffs' counsel and others hoped it would go to improve
7 the quality of their lives and do some things, or in my
8 Order I said have some fun and do some things. And 20
9 percent may be too high. There was a couple of unfortunate
10 situations, and I will deal with those in terms of how the
11 money was spent by certain individuals -- or misspent may be
12 a better word.

13 But overall, I think, and so then I guess that is
14 to the credit of everyone, not the Court, that it really --
15 it seems to have gone as it was intended. Have any of you
16 received a summary sheet from me yet? I can't remember.

17 I will send one out. Frankly speaking, I did it
18 so I could use it as part of some -- I just used some of
19 these examples over at the U.S. Attorney's Office on why
20 they should help get more involved, even though Greg Brooker
21 has been a big help, get more involved in disability
22 discrimination cases. But, without using anybody's names, I
23 went through -- but I will send out that summary.

24 And frankly speaking, I guess it would be -- I
25 don't know if there would even be an issue if all of the

1 parties want to see all of the letters, but I have asked
2 Becky to put a summary together, and she has. And it is
3 mostly really neat stuff that probably contradicts my
4 statement: This isn't a landmark. Because they did what I
5 think we would all want them to do with some of the cash,
6 including, by the way, going to a NASCAR race and meeting
7 all of these famous stock car drivers. But, the iPads, a
8 lot of programming -- anyway, it was -- I will send that
9 summary out to each of you, not to detract from the issues
10 here, but it was mostly positive, not negative. So, I will
11 send that out to you. And believe it or not, we are
12 adjourned. And everybody enjoy the week and the weekend.
13 So, thank you.

14 (Adjournment.)

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16 * * *

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18
19 I, Jeanne M. Anderson, certify that the foregoing
20 is a correct transcript from the record of proceedings in
21 the above-entitled matter.

22
23
24 Certified by: s/ Jeanne M. Anderson
25 Jeanne M. Anderson, RMR-RPR
Official Court Reporter