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February 25, 2014

ECF Filed

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

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

Dear Judge Frank:

On behalf of the Settlement Class, in response to the Court's January 22, 2014 Order, we respond to the current proposed Olmstead Plan submitted by DHS.

As we have repeatedly conveyed, the Jensen Settlement Agreement is the agreed upon, Court ordered baseline upon which DHS conduct must be measured, including the best practices promised in the Settlement Agreement to which it expressly agreed, including the development and implementation of an Olmstead Plan.

As background, we provide a copy of our October 22, 2013, letter to the Court Monitor expressing several concerns and commenting on a previous DHS proposed Olmstead Plan. Although the current proposed Olmstead Plan differs in several respects, benefitting from the active involvement and guidance of the Court Monitor and consultants, our focus and some of our concerns remain. Perhaps the most notable concern is the near complete lack of trust of DHS actions after three years of comprehensive involvement and meetings between the parties since the Court approval of the Class Action Settlement. We expressed this important concern to the DHS Commissioner and Solicitor General at a recent meeting with the parties and Court Monitor, which to the credit of all was a meeting where good work was done to resolve differences and build consensus on a number of important items involving the Comprehensive Plan of Action now before the Court. However, our concerns remain regarding whether DHS will take all necessary actions to timely and appropriately

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implement an Olmstead Plan that properly addresses, supports and protects people with disabilities and their families.

Mindful of our ongoing concerns regarding DHS actions, we reiterate the recommendations conveyed in our October 22, 2013, letter to the Court Monitor, which originate from our October 31, 2012, e-mail to the *Olmstead* Committee, and our June 4, 2013 letter to the Court Monitor:

The Olmstead Recommendations should specifically highlight and include reference to the Jensen Class Action Settlement Agreement requirement that an appropriate Olmstead plan must have measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the “Most Integrated Setting,” and that is consistent and in accord with the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 582 (1999).” The Recommendations should also specifically recommend criteria necessary for creating an effective and proper Olmstead Plan, including:

1. Primary stakeholders should be fully involved in the development, implementation and evaluation of the state’s Olmstead Plan.
2. The process for developing the state’s Olmstead Plan should be a public process open to public review and monitoring.
3. The Olmstead Plan must be comprehensive enough to assure that people with disabilities receive services in the Most Integrated Setting and take into account all areas that affect their lives, including housing, attendant services, transportation, employment, education, and assistive technology.
4. The Olmstead Plan should include measurable goals with target dates.
5. The Olmstead Plan should address funding issues and make funding recommendations.
6. The Olmstead Plan should restructure and increase community-based services for people with disabilities.
7. The Olmstead Plan should include a comprehensive system for the identification and assessment of individuals for community living, including a process for identifying institutionalized individuals who want to live in the Most Integrated Setting as well as those now living in the community who are at risk of institutionalization.

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8. The Olmstead Plan should create the necessary services and supports so that placement in the Most Integrated Setting becomes the norm.
9. The Olmstead Plan should include a tracking system to assess the effectiveness of the Olmstead Plan and Olmstead related activities and a data collection system to assess and identify gaps/problems and issues preventing people from living in the Most Integrated Setting.
10. The Olmstead Plain should include quality assurance activities by creating a mechanism to evaluate the quality of services provided and monitor providers and vendors.
11. The Olmstead Plan should identify and address issues in the state's current system *See e.g.*, <http://www.coalitionforaging.org/CTIONYOlmstead1.pdf> (New York)

With a June 2013 due date for the Olmstead Plan, it is imperative that the recommendations include next steps such as:

1. Who will be responsible for the work that will be completed between now and June 5th?
2. We believe that the Olmstead Plan cuts across the entire department and responsibility for the development of the Plan consistent with the Jensen Settlement Agreement and the Olmstead decision must undertaken by the Commissioner.
3. There are interagency issues for the Olmstead Plan that require active involvement of the DHS Commissioner's Office as well as the Governor's Office throughout the development of the Plan.
4. The development of the Olmstead Plan must be a public process with comments allowed and facilitated. The recommendations should describe this process.
5. The recommendation should insist that the Olmstead Plan be strategic, measurable, and clearly state who is responsible, with a listing of specific timelines, and how the Plan will be implemented, and specific resources needed

As we have also repeatedly stated, the Settlement Class does not support or condone any proposed Plan provision, or interpretation of any Plan provision, that allows for the use of

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restraint or seclusion on people with developmental disabilities, whether as part of a “transition,” “waiver,” “exemption,” “exception,” “conditional use,” “variance,” “temporary use,” or “study period,” for any provider, or anyone else. The use of transition periods, waivers, exemptions, exceptions, etc. that provide for the continued use of restraint and seclusion directly violates the civil rights of people with developmental disabilities. The Settlement Class objects to any proposed Plan provision that seeks to allow for the continued use of restraint and seclusion. This has been the repeated, reiterated position of the Settlement Class throughout the pendency of this matter. Such provisions are not best practice, do not protect anyone, have no positive or redeeming qualities, and would directly contradict the Settlement Agreement’s elimination of restraint and seclusion, and the spirit and intent of the Settlement Agreement. Insistence of these provisions would only facilitate the ongoing dangerous use of aversive, abusive procedures that have been eliminated by the Class Action Settlement as well as best practices that focus on Positive Behavioral Interventions and Support of individuals with developmental disabilities rather than restraining and secluding them in violation of their rights.

We are hopeful that DHS and the State of Minnesota will take all necessary actions to timely, effectively and appropriately develop and implement a meaningful Olmstead Plan that supports, protects and serves people with disabilities and their families consistent with all applicable laws and the promises they have made under the Settlement Agreement.

Thank you.

Respectfully submitted,

O’MEARA, LEER, WAGNER & KOHL, P.A.

/s/ Shamus P. O’Meara

Shamus P. O’Meara

SPO:tlb

Enclosure

O'MEARA LEER  WAGNER KOHL

Attorneys at Law P.A.

October 22, 2013

Via E-Mail Only

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

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

Dear Mr. Ferleger:

On behalf of the Settlement Class, we provide the following comments regarding the proposed DHS *Olmstead* Plan which DHS provided to our office on October 18.¹ In doing so, the Settlement Class expressly preserves, and does not waive, all of its rights and positions.

As we have repeatedly stated to the Court, Court Monitor, and to DHS, the Settlement Agreement is the agreed upon, Court ordered baseline upon which DHS conduct must be measured, including the best practices promised in the Settlement Agreement to which it expressly agreed, and the development and implementation of an *Olmstead* Plan:

The State of Minnesota further declares, as a top concern, the safety and quality of life of the Residents of the Facility. The State agrees that its goal is to provide these residents with a safe and humane living environment free from abuse and neglect. The State also agrees that its goal is to utilize the Rule 40 Committee and *Olmstead* Committee process described in this Agreement to extend the application of the provisions in this Agreement to all state operated locations serving people with developmental disabilities with severe behavioral problems or other conditions that would qualify for admission to METO, its Cambridge, Minnesota successor, or the two new adult foster care transitional homes.

¹ Settlement Class Counsel was provided a link to a public website where information about the planning was periodically provided.

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* * *

Olmstead Plan

1. Within sixty (60) days of the Court's approval of this Agreement, the Department will establish an Olmstead Planning Committee which will issue its public recommendations within ten (10) months of the Court's Order approving this Agreement. Within eighteen (18) months of the Court's approval of this Agreement, the State and the Department shall develop and implement a comprehensive Olmstead plan that uses measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the "Most Integrated Setting," and is consistent and in accord with the U.S. Supreme Court's decision in *Olmstead v. L.C.*, [527 U.S. 582](#) (1999).

Final Approval Order for Stipulated Class Action Settlement Agreement, Exhibit A, Stipulated Class Action Settlement Agreement at 3, 18.

For many months, despite Orders from the Court, specific directives from and involvement of the Court Monitor, and numerous concerns expressed by Settlement Class Counsel and the Consultants, the *Olmstead* process, negotiated and agreed upon by DHS and expressly made part of the Class Action Settlement Agreement signed by DHS on June 16, 2011, and approved by the Court on December 5, 2011, has not been taken seriously by DHS. Instead, DHS has chosen a cavalier approach to the development of the Court ordered *Olmstead* Plan resulting in a near complete failure to engage the comprehensive *Olmstead* process contemplated by the Court's Orders. These failures have prompted the Consultants to step in to assist the DHS planning with Dr. Colleen Wieck and Roberta Opheim expending hundreds of hours attempting to work with DHS staff to develop a comprehensive *Olmstead* Plan. Settlement Class Counsel has spent countless hours requesting and demanding information from DHS and interacting with the Court Monitor and Court regarding ongoing issues of concern and non-compliance with, and implementation of, the Settlement Agreement, including the *Olmstead* Committee and *Olmstead* Plan. *See, e.g.*, Settlement Class Counsel June 4, 2011, Letter to Court Monitor (enclosed) (*e.g.*, November 27, 2012, letter to the Court providing a comprehensive update of ongoing efforts over many months to understand the status of the State Defendants' compliance with the Settlement Agreement).

As we have noted previously, on many occasions, DHS has promised to act or provide information and failed to act or disclose its actions or information. This lack of candor and response to concerns raised reflects widespread failure to properly address the settlement provisions to which DHS expressly agreed and a dangerous, cavalier approach to the issues of concern raised. This has led to a near complete breakdown of trust

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involving DHS stated positions, later found to be untrue, or partially false, or never conveyed, or subsequently, and secretly, contradicted by others within DHS or other State agencies.

The *Olmstead* process is no exception. Our many communications to DHS, the Court Monitor and the Court highlight the importance of taking the *Olmstead* process seriously and devoting the necessary resources to implement the requirements of the Settlement Agreement on this vital and fundamental plan. Our October 31, 2012, e-mail to the *Olmstead* Committee, and our June 4, 2013 letter to the Court Monitor (enclosed) are highlighted as two examples:

The [Olmstead] Recommendations should specifically highlight and include reference to the Jensen Class Action Settlement Agreement requirement that an appropriate Olmstead plan must have measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the “Most Integrated Setting,” and that is consistent and in accord with the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, [527 U.S. 582](#) (1999).”

The Recommendations should also specifically recommended criteria necessary for an creating an effective and proper Olmstead Plan, including:

1. Primary stakeholders should be fully involved in the development, implementation and evaluation of the state’s Olmstead Plan.
2. The process for developing the state’s Olmstead Plan should be a public process open to public review and monitoring.
3. The Olmstead Plan must be comprehensive enough to assure that people with disabilities receive services in the Most Integrated Setting and take into account all areas that affect their lives, including housing, attendant services, transportation, employment, education, and assistive technology.
4. The Olmstead Plan should include measurable goals with target dates.
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to live in the Most Integrated Setting as well as those now living in the community who are at risk of institutionalization.

8. The Olmstead Plan should create the necessary services and supports so that placement in the Most Integrated Setting becomes the norm.
9. The Olmstead Plan should include a tracking system to assess the effectiveness of the Olmstead Plan and Olmstead related activities and a data collection system to assess and identify gaps/problems and issues preventing people from living in the Most Integrated Setting.
10. The Olmstead Plain should include quality assurance activities by creating a mechanism to evaluate the quality of services provided and monitor providers and vendors.
11. The Olmstead Plan should identify and address issues in the state's current system

See e.g., <http://www.coalitionforaging.org/CTIONYOlmstead1.pdf> (New York)

With a June 2013 due date for the Olmstead Plan, it is imperative that the recommendations include next steps such as:

1. Who will be responsible for the work that will be completed between now and June 5th?
2. We believe that the Olmstead Plan cuts across the entire department and responsibility for the development of the Plan consistent with the Jensen Settlement Agreement and the Olmstead decision must undertaken by the Commissioner.
3. There are interagency issues for the Olmstead Plan that require active involvement of the DHS Commissioner's Office as well as the Governor's Office throughout the development of the Plan.
4. The development of the Olmstead Plan must be a public process with comments allowed and facilitated. The recommendations should describe this process.
5. The recommendation should insist that the Olmstead Plan be strategic, measurable, and clearly state who is responsible, with a listing of specific timelines, and how the Plan will be implemented, and specific resources needed

October 31, 2012, E-mail to Olmstead Committee (enclosed).

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Olmstead Committee Process

“Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”

Olmstead v. L.C., [527 U.S. 581, 600](#) (1999)

Settlement Class Counsel repeatedly objected to the DHS Olmstead Planning Committee process and its failure to develop a proposed plan or any consensus recommendations. DHS ignored the Settlement Class concerns, and those of the consultants, focusing instead on its own internal agenda. Ultimately, a set of recommendations were issued by DHS, held out as the work of the committee, when the committee was never provided with a proposed final document to review and consider. DHS again ignored objections and placed the recommendations on its website and cited to them as the work of the committee. DHS finally agreed to remove the document from its website but until recently did not issue any disclaimer to the document and has refused to remove any of the pages to it, including the offensive and incorrect preface and other objectionable pages.

* * *

The Court’s April 25, 2013, Amended Order [Doc. 212] referenced the January 28, 2013, Governor’s Executive Order creating a subcabinet. The Monitor’s December 13, 2013 Formal Recommendation to the Parties, copied to the Court, reported that during the December 11, 2012, Status Conference, Anne Barry stated the DHS Commissioner intended to recommend to the Governor a subcabinet to formulate an Olmstead Plan. The Monitor’s Formal Recommendation included items the Monitor believed should be included in the Governor’s Executive Order. On December 14, 2012, Settlement Class advised the Monitor that the Settlement Class was in agreement with the proposed subcabinet approach to the Olmstead issues with certain revisions: (1) Settlement Class Counsel be allowed to attend and participate in the sub-cabinet consulting group meetings; (2) All meetings pertaining to the sub-cabinet group, consulting group or any other related meetings are open to the public and that the sub-cabinet expressly complies with the Open Meeting Law; (3) The subcabinet begin its work no later than January 15, 2013, retain the expert assistance no later than February 1, 2013, and present the Olmstead Plan to the Governor no later than October 1, 2013; and (4) Settlement Class retain all rights to relief under the Jensen Settlement Agreement and applicable law including but not limited to all rights to bring a Motion to Enforce the Settlement

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Agreement before the Federal Court.

* * *

DHS has set up a subcabinet through executive action but never bothered to provide Settlement Class Counsel with the committee agendas, meeting minutes, meeting dates or anything relating to the subcabinet, nor has DHS asked Settlement Class Counsel for any input or suggestions for the subcabinet. DHS provided some of this information to our office on May 6 after we advised DHS in the April 30 party meeting that none of these items had been provided. From our view, the creation of an Olmstead plan is again delayed by DHS and State of Minnesota failures to act promptly, leaving the heavy lifting for the consultants on short notice to correct incomplete and unprofessional efforts, and finding excuses for the State Defendants' ongoing failure to engage on an absolutely critical provision of the Settlement Agreement that, if implemented properly, will provide positive, life changing opportunities and protections for thousands of people with disabilities and their families. Given the passage of time from the December 2011 Court approval of the Settlement, ongoing delayed action by DHS, and ongoing failures to communicate and take the issues seriously, we anticipate that the State Defendants will not complete an Olmstead Plan on time, or will rush to create one without appropriate expert input in its drafting and will label it a consensus plan similar to what DHS did regarding the Olmstead Committee recommendations

June 4, 2013, Letter to Court Monitor (enclosed).

These are just a few of the many examples cited since the Settlement Agreement was approved highlighting our deep and ongoing concern that immediate, sustained efforts be employed by DHS to properly and timely develop an *Olmstead* Plan to safeguard these important protections for people with disabilities and their families. We do not believe DHS has shared these concerns, resulting in a rushed, incomplete and deficient *Olmstead* Plan despite the best efforts of the Consultants, Settlement Class Counsel, Court Monitor and the Federal Court to assist DHS in recognizing the importance of these concerns to the people and families DHS serves.

One notable *Olmstead* failing by DHS directly impacting people with developmental disabilities and their families stands out today, as it did before the Settlement, after Court approval of the Settlement, and despite subsequent Orders from the Court and specific directives from the Court Monitor and repeated concerns expressed by the Consultants and Settlement Class Counsel: the absence of appropriate transition planning required by the *Olmstead* decision, Settlement Agreement and Court Orders. Transition plans have been expressly required and must be focused on the person with a disability, to listen and learn of their own goals and aspirations and comprehensively involve them on such

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fundamental life issues as where they will live, and with whom they will live, and where and how they are to receive their care. Instead, the absence of appropriate transition plans have kept loved ones in institutional settings away from their family, friends and support, where they remain at significant risk of restraint and seclusion, or referral to law enforcement without sufficient basis, and ongoing violations of their civil rights, or transferred to other restrictive settings because proper planning to discharge and transition them has not been considered, or has been ignored. MSHS Cambridge, the successor to METO, where seclusion and restraint of loved ones with developmental disabilities with metal handcuffs and leg irons was regularly practiced without care for their basic rights, does not even have proper transition plans in place today, nearly two years after the Settlement Agreement was approved, in direct violation of the *Olmstead* decision and the Court Order approving the Settlement Agreement.

Mindful of this important background, we do not believe the DHS proposed *Olmstead* Plan sufficiently requires the use of “measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the ‘Most Integrated Setting,’ and is consistent and in accord with the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, [527 U.S. 582](#) (1999). Accordingly, the Court Monitor, or the Monitor’s consultant(s) at the direction and supervision of the Court Monitor, should specifically assess whether the proposed *Olmstead* Plan “uses measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the ‘Most Integrated Setting,’ and is consistent and in accord with the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, [527 U.S. 582](#) (1999). Statements by DHS about the *Olmstead* Plan or empty promises about compliance should not be accepted. Rather, active review should take place with written protections specifically integrated into the final *Olmstead* Plan itself to include strict enforcement provisions and Court authority to sanction DHS for failure to follow the provisions of the Plan.

The *Olmstead* Plan will forever affect the lives of people with disabilities and their families. Proper, forceful steps must be taken *now* to ensure that important protections are in place to ensure ongoing compliance with and enforcement of *Olmstead* and the Settlement Agreement. Based on our experience with the Settlement Agreement and the many difficulties with DHS non-compliance and its failure to properly implement the Settlement Agreement and Court Orders, we believe the Court should be actively involved to enforce its Orders relating to the Settlement Agreement and *Olmstead* Plan to include the imposition of sanctions against DHS for failure to properly develop and implement an *Olmstead* Plan that “uses measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the ‘Most Integrated Setting,’ and is consistent and in accord with the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, [527 U.S. 582](#) (1999).

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

Thank you.

Respectfully,

O'MEARA LEER WAGNER & KOHL, P.A.

/s/ Shamus P. O'Meara

Shamus P. O'Meara
SPO:me

Enclosures

cc:
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