



Minnesota Department of **Human Services**

August 22, 2014

By Hand Delivery

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

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

Dear Judge Frank:

I write in response to the letter from Class Counsel filed with the Court, dated July 24, 2014, responding to the Court Monitor's June 20, 2014, *Community Compliance Review* (Doc. Nos. 313 and 327) (hereinafter "Compliance Review") and the recent DHS *Olmstead Plan*. The Department respectfully takes this opportunity to demonstrate the progress the Department has made towards compliance with the *Jensen Settlement Agreement* ("JSA") and Comprehensive Plan of Action ("CPA") and to correct factual inaccuracies contained in Class Counsel's letter.

Class Counsel cites the Court Monitor's prior reports and orders issued by the Court in 2013 to support his contention that the Department has demonstrated "fundamental non-compliance" with the JSA for the last three years. The Department disagrees with Class Counsel's assessment of its compliance efforts. To date, the Department has made huge strides in its compliance with the JSA and CPA. The Court's adoption and approval of the Second Amended CPA (Doc. No. 284) on March 12, 2014 was in itself a significant and positive event. Since its approval, the Department has reported completion of numerous Evaluation Criteria ("EC") contained in the CPA within the specified deadlines (Doc. Nos. 289, 299, and 328). The Department believes that the last individual currently residing at MSHS-Cambridge will be moved into an integrated setting in the community and we continue our efforts to try to close the Cambridge facility by the end of August. The Department continues to diligently complete those ECs that have an upcoming due date. While there is always room for improvement, the Department's bimonthly updates demonstrate that the Department has made numerous positive

changes that meet compliance objectives. Consequently, these positive changes are not indicative of “fundamental non-compliance” as Class Counsel suggests.

In response to Class Counsel’s assertions of non-compliance concerning the transition elements of the JSA as raised in the Court Monitor’s Compliance Review, the Department reiterates and incorporates herein its position as stated in its July 3, 2014, letter to the Court responding to the *Community/Compliance* Review. As stated in that letter, the Department acknowledges that its initial focus was on training and transition planning within its own structure before expanding efforts on training and transition planning to county case managers and licensed providers. But as also stated in that letter, these efforts have not gone unattended. As explained in recent parties’ meetings, the Department is now focusing its efforts on rolling out person centered training and transition planning to counties and providers.

Of course, undertaking such a challenging task statewide is a huge endeavor that cannot practically be accomplished within a short timeframe. This is why we agree with Class Counsel that including long-term training and person centered transition planning into the *Olmstead* Plan will be of great benefit. Nevertheless, and contrary to Class Counsel’s assertions, recent actions taken by the Department, as reported in its updates on the CPA and *Olmstead* Plan, demonstrate significant progress and compliance with efforts to improve monitoring and oversight of transition planning and training statewide, including transition planning for Cambridge clients. In fact, the Court Monitor in his Compliance Review acknowledges the Department’s positive steps in its statewide implementation efforts in this regard:

“[t]he State, through the Department of Human Services, has recognized that it must do more to ensure that the counties comply with the court’s mandates, and DHS Commissioner Lucinda Jesson has personally conveyed that message to county officials. MSHS-Cambridge over the past year has developed a person centered plan process template, which can serve as a foundation for state-wide efforts in this regard. For the several hundred individuals who left METO/Cambridge under this lawsuit, a special intensive monitoring will be in place to safeguard them in the community. Training in the Community is in process, albeit slowly and disjointly (sic).”

Compliance Review, pp. 36-37.

With respect to the *Olmstead* Plan, Class Counsel cites to the Court Monitor’s Status Report dated June 11, 2013, in which the Court Monitor expressed the opinion that the Plan would not meet the November 1, 2013, deadline and that the Plan would need to be reviewed for adequacy and compliance with the JSA’s comprehensive standards. The Plan was timely filed

by the November 1, 2013, deadline, and an amended Plan was timely filed prior to July 15, 2014. Moreover, the Department disagrees with Class Counsel's characterization of its efforts as "inaction" and "misdirection." The Department is actively pursuing the use of measurable goals in order to fully implement person centered transition services statewide. The Department has also begun work on forming a team to maintain therapeutic follow-up of Class Members in accordance with EC 98. (Doc. No. 328, pp. 293-94) Furthermore, the Department is in the process of finalizing a statewide training action plan that will set forth objectives for implementing statewide person centered training along with training on the *Jensen Settlement Agreement*. These and other measures taken by the Department shows positive and substantial action on its obligations under the CPA and the *Olmstead Plan*. In any event, the Department agrees with Class Counsel that the consultants and Court Monitor have been beneficial in being actively involved with DHS in its efforts to address concerns regarding implementation of the *Olmstead Plan*. The *Olmstead Plan* is a living document and it is anticipated that it will be continually improved upon as the State continues its efforts to implement the Plan statewide.

In his letter, Class Counsel makes reference to one class member who was moved into a modified "pole barn" as an example of a setting that was not based on the class member's "choice" and not the "most integrated setting." There are numerous inaccuracies with Class Counsel's assertions. The building is not a "pole barn." The site is in an area zoned for residential/commercial use that is across from a city park and licensed as a corporate adult foster care home. While the outside may be industrial-looking, the inside is far from it. The site has a large back yard, two bedrooms, two bathrooms, and a large modern kitchen. (See Exhibit #1 attached hereto.) This client's parents and case manager were involved in choosing this site, and the client indicated his choices for furniture and other items prior to moving in. The client chose not to travel from MSH to view the home prior to the move. This particular site was the best option available as the client's social worker had little success in garnering interest from service providers. The site is near a day work program that will allow the client to work during the day when he chooses to do so. At this time, however, this client believes he is not yet ready to work outside of the home. When the site was developed, his parents lived about 20 miles from the site but have since moved to northern Minnesota with plans to eventually move to Colorado.

Person centeredness is at the core of the services provided to the client to this day. There is certainly progress to be made, but the services currently being provided, encourages the client

to make choices that positively impact his living situation and goals for the future. Class Counsel's interpretation of this client's community placement is simply incorrect.

Class Counsel reiterates his opposition to a rule that provides for the use of restraint and seclusion on persons with developmental disabilities. The Department is committed to using evolving best practices with respect to restraint and seclusion while abiding by the terms of the JSA and CPA. To that end, the Department has accepted the Rule 40 Advisory Committee recommendations relating to restraint and seclusion as stated in the CPA (Doc. No. 283), and on July 29, 2013, Commissioner Jesson issued a "DHS Respect and Dignity Practices Statement" aimed at prohibiting the programmatic use of restraint and seclusion within all programs and services licensed or certified by the Department (Doc. No. 236, p. 15). The Department is currently working with the consultants and Court Monitor to draft a proposed Rule using its rulemaking authority that addresses the prohibited use of restraint and seclusion in accord with the JSA/CPA and the principles set forth in the "DHS Respect and Dignity Practices Statement."

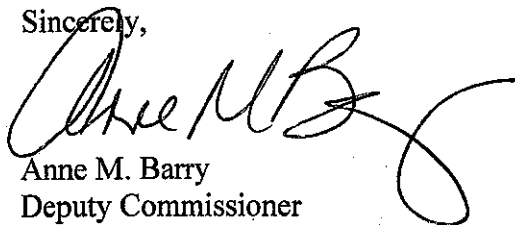
Class Counsel suggests that the Court extend its jurisdiction over the JSA to ensure compliance. The Department has come a long way in meeting its compliance objectives under the JSA and CPA and continues to work closely with consultants and the Court Monitor on meeting the remaining Evaluation Criteria in the CPA. Given the Department's substantial compliance efforts on the JSA/CPA and the impending closure of the Cambridge facility, the Department respectfully suggests that further discussion takes place before any decisions are made to extend the Court's jurisdiction in this matter.

Class Counsel also requests that sanctions be issued and suggests that the Court Monitor be converted to a Special Master for purposes of supervising the transition planning and person centered compliance. As previously noted in reports submitted to the Court by the Department to date, the Department has made significant progress in many of the areas of concern addressed in those reports. Consequently, any remedial action by the Court need not go beyond what has already been ordered by the Court. Indeed, the Court Monitor expressed that "[w]hile the scope of the remedial action should be broad; the Court Monitor believes that the Court's enforcement authority may reasonably . . . be limited at this time to the provisions of the Court's orders" (Compliance Review, Doc. No. 313, p. 4). To reiterate, the Department has taken the Court Monitor's concerns seriously and has re-doubled efforts to address the issues outlined in the Compliance Review.

Moreover, the Court Monitor in his current role has been effective in evaluating compliance and in providing guidance to the Department when addressing preferred approaches and when the Department takes additional steps beyond the CPA in spirit of our commitment. The current model as established by the Court has and continues to work well, and there would be no additional benefit gained by converting the Court Monitor's current role into that of a Special Master for purposes of evaluating compliance on statewide person centered training and transition planning.

As always, the Department is available to discuss this or any other issues with the Court and Court Monitor, and I hope this information will be helpful to the Court.

Sincerely,



Anne M. Barry
Deputy Commissioner

Cc: David Ferleger, Independent Consultant and *Jensen* Court Monitor
Shamus O'Meara, Attorney for Plaintiffs
Colleen Wieck, Executive Director for the Governor's Council on Developmental Disabilities
Roberta Opheim, Ombudsman for Mental Health and Developmental Disabilities
Scott Ikeda, Assistant Attorney General
Aaron Winter, Assistant Attorney General
Gregory Gray, DHS Chief Compliance Officer
Amy Akbay, DHS Chief General Counsel

Exhibit # 1 (One)

