

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

Civil No. 09-1775 (DWF/FLN)

Plaintiffs,

v.

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

Defendants.

**REPORT TO THE COURT:
ACTIONS ON OLMSTEAD PLAN UPDATE**

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The Olmstead Subcabinet filed a status report on February 20, 2015 for the November-December 2014 period (“Subcabinet Report”).¹ The report also includes 2015 events such as a renewed Governor’s Executive Order supporting this effort.

This Report to the Court comments on both reported successes and on some deficiencies. The deficiencies require remedial action; such action is highlighted below.²

The “new” Subcabinet under new leadership and a renewed mandate from the Governor is moving to comply with missed deadlines and to organize its work with increased sufficiency. Concerns continue regarding the sufficiency of Olmstead Implementation Office staffing, especially considering that we remain at the “planning” stage for the plan’s deliverables, and we are not yet in the thick of the OIO monitoring and assuring the agencies’ implementation of numerous action steps.

I. HIGH PRIORITY NEED FOR ASSURING IMPLEMENTATION COMPLIANCE

The Court Monitor strongly advises the Subcabinet to immediately examine and decide how it will monitor and assure agencies’ compliance with the manifold implementation requirements of the various plans, which the Subcabinet is adopting under the Olmstead Plan. The results of this examination should be shared in writing with the Court Monitor in draft and final form.

At this point, the Olmstead Plan Updates essentially report on the Subcabinet’s approval/review processes and generally on Olmstead Implementation Office activities. The Updates do not report on what is being done under the various approved plans.

The Court Monitor has not been informed of any effort by the Subcabinet to establish templates or mechanisms for the detailed

¹ The Minnesota Olmstead Subcabinet Report to the Court, *Status Update, November 1, 2014 – December 31, 2014, Report Number 6* [Dkt. 389, filed Feb. 20, 2015]

² See Order of September 3, 2014 at 12-13 [Dkt. 340] (“The Court Monitor shall: a. Oversee the timely implementation of all procedures and activities related to all outstanding obligations under the Court’s Orders.” “f. Supervise compliance activities by the Defendants with respect to the Court’s orders.”).

“implementation phase” for the elements of the Olmstead Plan. This effort deserves the highest priority. See Order of August 28, 2013 at 6 (“Updates to the *Olmstead* Implementation Plan shall include activities undertaken pursuant to the Plan, documentation of such activities”).

II. INVIGORATED SUBCABINET UNDER NEW EXECUTIVE ORDER

The Court Monitor urged an “immediate fix” to the lack of a “system, which operates effectively to track and ensure timeliness, or to explain lateness, with regard to deliverables.”³

The Court Monitor is pleased to report to the Court that the State has undertaken to improve the situation. Governor Dayton’s Executive Order 15-03 was issued on January 28, 2015, amplifying the role and authority of the Subcabinet and the Olmstead Implementation Office. A clear decision making process is being established, along with establishment of an Executive Committee. Mary Tingerthal, Commissioner of the Minnesota Housing Finance Agency is the new chair.

III. ABSENCE OF DESCRIPTION OF COURT’S ORDER OF JANUARY 9, 2015

Missing from the Subcabinet Report is any description of the content of the Court’s 14 page January 9, 2015 Order finding that specific items are “deficient” in that they “do not meet the requirements set forth in *Olmstead v. L.C.* and in the numerous prior orders of this Court.”⁴ The Court provided examples from seven topic areas:

³ Court Monitor, *Report to the Court: Olmstead Plan: Completion of Deliverables* at 3 [Dkt. 376].

⁴ Order of January 9, 2015 at 3 [Dkt. 378]. The Subcabinet Report’s entire discussion of the order is:

On January 9, 2015, the Court provisionally approved the proposed revision from November 10, 2014 subject to the review of the State’s modifications and any submissions by Plaintiff’s Counsel. The court directed a revised Olmstead Plan to be filed by March 20, 2015.

Subcabinet Report at 3.

- Employment
- Housing
- Transportation
- Support Services
- Lifelong Learning and Education
- Healthcare and Healthy Living
- Community Engagement

The absence of a summary of the January 9 order contrasts with the Subcabinet's inclusion of a description of the content of the Court's August 20, 2014 Order requiring modification of the Olmstead Plan to include measurable goals, address accurate reporting, and quality of life measures.

IV. OLMSTEAD IMPLEMENTATION OFFICE OPERATIONS

The staffing reported to the Court is insufficient to achieve effective oversight of the Plan. The Court Monitor previously expressed concern about staffing. "It is imperative that the OIO have sufficient resources."⁵

Implementation of the Olmstead Plan requires a full-bodied staffing. Coordination of activities, and corroboration of reports from more than a half dozen agencies is just one aspect of what needs to be done. As agencies begin to implement the plans now being produced, there will need to be systems to monitor implementation actions and their results, and to follow up where there is slippage. All this is in addition to work with the Subcabinet and its Executive Committee

⁵ Court Monitor, Report to the Court: Approval of Revised Olmstead Plan at 4 [Dkt. 333]. After listing some functions of the Olmstead Implementation Office, the monitor cautioned against "short-cuts:

Fulfillment of these functions require a fully staffed office with both professionals and support staff, as well as funding for consultants, outside contracts, and out of pocket costs, including accommodations for people with disabilities (for example, interpreters and other aids for the deaf, and aids for the blind). In-house legal counsel, or some other accessible source of legal counsel, would be appropriate as well. There should be no short cuts in staffing the office. A number of activities, including surveys and dispute resolution, for example, may also need separate budget lines.

The Annual Report now provided includes only two staff in addition to the full-time Executive Director. One is a full-time Assistant Director and one is a half-time Communications Manager.⁶ The Assistant Director “focuses on plan compliance, interagency coordination, quality assurance and community relations.”⁷

V. ACKNOWLEDGEMENT OF FAILURE TO MEET DEADLINES

The Court Monitor urged an “immediate fix” to the lack of a “system, which operates effectively to track and ensure timeliness, or to explain lateness, with regard to deliverables.”⁸

The Subcabinet Report agrees with the Court Monitor’s December 31, 2014 report to the Court that 19 of 26 (73%) required deliverables were not timely completed.⁹ The Subcabinet Report provides a schedule for action to ensure completion of all overdue deliverables at its February and March meetings.

VI. MOVEMENT FROM SEGREGATED TO INTEGRATED SETTINGS

The narrative in the Subcabinet Update on movement from segregated to integrated settings includes much important data and graphs of some data. However it does not graph census information for ICF/DD, Anoka of Minnesota Security Hospital. The census information status over time is an important window into movement from one to another setting. Graphs for census should be provided along with the other information, which is graphed.

⁶ Exhibit 6-4: *QA 3C1 – Olmstead Plan Annual Report* at 150 (of the Subcabinet Report). An “Executive Assistant/Interpreter” position (full-time) is also planned. Exhibit 6-5: *QA 3E – Olmstead Implementation Office Report*, at Subcabinet Report 159.

⁷ *Id.* The Assistant Director also does “office operational tasks” which “will be reassigned when additional staff members are added to the OIO.” *Id.*

⁸ Court Monitor, *Report to the Court: Olmstead Plan: Completion of Deliverables* at 3 [Dkt. 376].

⁹ The Minnesota Olmstead Subcabinet Report to the Court, *Status Update, November 1, 2014 – December 31, 2014, Report Number 6* [Dkt. 389, filed Feb. 20, 2015]

ACTION 1. The narrative in future Status Reports will graph the census over time (retroactive to January 2014) of ICF/DD institutions, nursing homes, and the DHS Anoka and Minnesota Security Hospital facilities.

VII. ABSENCE OF A “CONCRETE PLAN FOR CHANGE” TO ADDRESS BARRIERS AND DISINCENTIVES

One key requirement was not met. The Subcabinet approved a report, which on its face is non-compliant, and the Subcabinet Report does not explain the deficiency.

The Olmstead Plan earliest substantive section (“Overarching strategic actions”) requires a “concrete plan for change, through administrative alignment and collaboration, legislative action, policy and rule changes, and funding changes and prioritization.” This concrete plan “includes other agencies and departments in Minnesota (not only subcabinet agencies.”¹⁰

With a December 31, 2014 deadline, the State was required to “identify options to address” “barriers to integration that are linked to federal legislation, regulation, or administrative procedures.”¹¹

Instead of meeting this deadline for this fundamental report, the State produced on February 2, 2015 what is “similar, in a sense, to an opinion

¹⁰ Olmstead Plan at 31-32 (Nov. 6, 2014). The requirement, cited in the Report’s Exhibit 6-2, is for action to:

Review all policies, procedures, laws, and funding through the perspective of the Olmstead decision (including related case law and guidance), identifying where and how current systems unintentionally create barriers to integration or create disincentives to development and use of integrated settings.

Wherever such a barrier or disincentive exists, develop a concrete plan for change, through administrative alignment and collaboration, legislative action, policy and rule change, and funding changes and prioritization. This action includes other agencies and departments in Minnesota (not only subcabinet agencies).

¹¹ *Id.*

survey” which “do [es] not represent the formal positions of any organizations or agencies.”¹² The report is an UNEDITED wholesale recitation of unidentified individuals survey comments.

The document concedes that it does not satisfy the Olmstead Plan requirements. The “initial timeframe. . . was not sufficient given the magnitude of the action required in the plan.”¹³

ACTION 2. With regard to the requirement undergirding Ex. 6-2. *Olmstead Barriers & Disincentives Identification Survey Results*, the State and DHS will address the matters in the Olmstead Plan by means in addition to opinion surveys (but may include opinion surveys) and will comply with the requirement to identify options to address barriers to integration that are linked to federal legislation, regulation, or administrative procedures. This will be completed by June 1, 2015. A plan for timely completion will be provided to the Court Monitor by April 1, 2015.

VIII. ACTIONS TAKEN SATISFY REQUIREMENTS

There are Update exhibits, which demonstrate attention to, and general compliance with, the expectations of the Olmstead Plan.¹⁴ For example,

Exhibit 6-7: EM 3J – IPS and SRC Reports (page 190)
 Exhibit 6-9: HS 4B – HousingLink Improvements WorkPlan (page 220)
 Exhibit 6-10: TR 1A – Minnesota Transit Funding Primer (page 224)
 Exhibit 6-11: TR 3A– MNDOT ADA Transition Plan (page 236)

The Subcabinet’s approval of these documents is warranted and the Court Monitor credits the achievements represented in these reports. Implementation should proceed apace.

¹² Subcabinet Report, Exhibit 6-2. *Olmstead Barriers & Disincentives Identification Survey Results* at 4 (submitted to Subcabinet Feb. 2, 2015; approved by Subcabinet Feb. 15, 2015).

¹³ *Id.* at 28.

¹⁴ The Court Monitor does not address in this report the deficiencies raised by the Court on measureable goals, and meaningfulness requirements in the Court’s orders on proposed plans.

IX. ACTIONS TAKEN DO NOT SATISFY REQUIREMENTS

In some instances, the action taken fails to satisfy the requirement ordered in the Olmstead Plan. The table below shows the requirement, the sufficiency of compliance and, in the highlighted cells, the action to be taken.

Requirement	Sufficiency of Compliance
QOL SURVEY QA 1C . “Conduct a pilot of the [Quality of Life] survey.” <i>Ex. 6-3: QA 1C – Quality of Life Survey Pilot Study Report. (page 64).</i>	This lengthy and well organized; clearly written report is solely on the survey instrument development and administration process. <i>Ex. 6-3: QA 1C – Quality of Life Survey Pilot Study Report.</i>
ACTION 3. With regard to the Quality of Life Survey (QA 1C), the next Subcabinet Update will include analysis of the results of the Pilot, and future updates will include qualitative and quantitative analysis of the survey results, and any recommendations arising therefrom.	
EXITING CORRECTIONS “HS 1E: Develop a process to track the number of individuals with disabilities exiting state correctional facilities and their access to appropriate services and supports. (p. 50 [Olmstead Plan].” <i>Exhibit 6-8: HS 1E – Process to Track Individuals Exiting Corrections (page 216)</i>	This consists entirely of a one page “Process Flow Chart” with six boxes, three of which are Olmstead-related. (page 218) This does not address “access to appropriate services and supports.” It solely asks DHS and DEED to match inmate names against “services provided.” All action stops there.
ACTION 4. With regard to access to services and supports for people with disabilities leaving the corrections system (HS 1E), the next and subsequent updates will provide qualitative and quantitative reports on both the process and results of access to services and supports.	

OTHER SEGREGATED SETTINGS Exhibit 6-13: SS 2G/SS 2G.1 – Report on Other Segregated Settings (page 314) By September 30, 2014 DHS will review this data and other states plans for developing most integrated settings where people work and live. Based on this review DHS will establish measureable goals related to demonstrating benefits to the individuals intended to be served and timelines for moving those individuals to the most integrated settings.	On the first element of this requirement (data review), this report provides a welcome wealth of demographic data, identification of numbers of individuals residing in various settings, and receiving day services in various contexts. The second element requires “measurable goals related to demonstrating benefits to the individuals. . . .” Here, the State provides apparently arbitrary (no explanation is provided) targets and timelines through FY 2019, which are proposed to take place “without additional resources.” The numbers are all even multiples of 25 or 50 (50, 125, 150, 200, 300, 350, etc.). (page 338). There is no discussion of the adequacy of these numbers, the incremental cost (if any) of providing integrated settings and services, or any rationale for these numbers.
ACTION 5. With regard to SS 2G/SS 2G.1, the next and subsequent Update will set forth a revision of the “goals” section which will include measurable goals related to demonstrating benefits to the individuals, and which will fulfill the anticipated need over the current report’s timeline (through FY 2019), and with deadlines for accomplishing those efforts. There shall be no arbitrary or unexplained goals related to demonstrating benefits to the individuals.	
POSITIVE PRACTICES Exhibit 6-14: SS3C, 3D, 3E – <i>Statewide Plan for Positive Practices and Supports</i> (page 360)	This is a very thoughtful and well-developed plan, which focuses on systemic improvement.

	It falls short with regard to including commitments that funding, staff and other supports will be provided for the Plan's implementation.
ACTION 6. With regard to the <i>Statewide Plan for Positive Practices and Supports</i> (submitted under SS 3C, 3D, 3E), the Plan shall be supplemented in the next Update to include commitments that funding, staff and other supports will be provided for all the steps in the Plan's implementation.	

X. CONCLUSION

The “new” Subcabinet under new leadership and a renewed mandate from the Governor is moving to comply with missed deadlines and to organize its work with increased sufficiency. Concerns continue regarding the sufficiency of Olmstead Implementation Office staffing, especially considering that we remain at the “planning” stage for the plan’s deliverables, and we are not yet in the thick of the OIO monitoring and assuring the agencies’ implementation of numerous action steps.

The most recent Update on Olmstead Plan compliance has both strengths and weaknesses. This report to the Court specifies actions to be taken to address those weaknesses.

Respectfully submitted,

/s/ David Ferleger