UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen, et al., Plaintiffs, vs. Minnesota Department of Human Services, an Agency of the State of Minnesota, et al., Defendants.	Case No. CV 09-1775(DWF/BRT) St. Paul, Minnesota June 23, 2015 2:04 p.m.

BEFORE **THE HONORABLE DONOVAN W. FRANK**
UNITED STATES DISTRICT COURT JUDGE
MOTION FOR RELIEF FROM JUDGMENT

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 have counsel for each respective party note their presence for the record and in what capacity they appear?

MR. IKEDA: Good afternoon, Your Honor. Scott Ikeda, Assistant Attorney General for the State Defendants. And I understand the Court is asking -- would like a report today. And so, if it is okay, I would like to have the four DHS witnesses introduced at this time?

THE COURT: That is fine.

MR. IKEDA: So, if you guys don't mind, if you want to come up and sit in that -- so, first is -- Your Honor, as you know, Deputy Commissioner Anne Barry is here. Dr. Krystal Dinwiddie is seated at your far left there. She is a clinical psychologist at MSH. Deputy Commissioner Barry. Jerry Nord is the Community Supports Supervisor. And seated next to Mr. Nord is Dr. Peter Miller, who is a psychiatrist and DHS Medical Director.

And they will be able to, I think among the four of them, be able to answer whatever questions the Court might have. I'm sorry, and with me is Assistant Attorney General Tony Noss.

MR. O'MEARA: Good afternoon, Your Honor. Shamus

O'Meara for the Settlement Class in opposition to the motion today.

THE COURT: What I contemplated in the Order is we could get reports from people on W.O. I know the Ombudsperson is here and she has submitted a report. In fact, I noticed it came in at 3:00 a.m., I believe, in the morning, electronically, if I see it correctly.

And I know I have been gone from the State Court for a long time, 17 years, but I did many commitment hearings. I was in St. Peter, as a lawyer, and as a Judge, State Judge. And I am coming into this hearing not quite understanding, apart from *Jensen*, frankly, why -- and I will be asking how many people in the room have talked to the County Attorney, Dakota County Attorney Jim Backstrom and his assistant who handled the case, the two social workers who have been managing W.O.

In the old days, everybody sat down together and didn't need judges. And when we had provisional discharge issues, and especially for mentally ill and dangerous, which isn't the issue today, but that is what took me to St. Peter, both as a lawyer, assistant county attorney in the old days, and as a State Judge for many years.

And so, I actually think irrespective of how the motion comes out today, it doesn't really solve anything, because I am still going to have to evaluate, now that DHS

has promised to make every effort to move W.O., and we have the consultant from California who has made some recommendations that -- folks brought in. So, I am curious to see that issue.

I must -- and so, I know one of the positions of the Plaintiff will likely be the lack of transparency in the system with respect to giving variances to yourself, and just sitting down and saying: Well, where do we go from here? And then I am not sure what the position is -- I have read the complicated issues and used to do that work, too, with respect to the parents of W.O. and the co-guardians, and it's maybe further complicated by the fact that, for better, for worse, one co-guardian without going into too much detail, apparently of what I have read, has chosen to involve the biological father in the recent past, all of these very complicated psychological issues.

So, really, frankly, apart from *Jensen*, I think, hopefully, everybody's efforts can be concentrated on what do we do for this young man who will be 17 before too long?

But, in that context, whenever you are ready, Mr. Ikeda? Now, what I contemplated -- unless either counsel says, well, wait a minute -- is maybe having each -- if you want to have an oral report, have the individual just come to the podium.

Now, if Mr. -- and then if we get to a point where

either counsel says, regardless of who was called up to the podium by whom, and you say, well, we think they should be sworn in and we should have formal direct and cross. Do you have a view, Mr. O'Meara? Or do you want to just wait and --

MR. O'MEARA: Your Honor, I think I would like to defer to the Court's interest in making an informed decision. So, in whatever manner you would like to receive information from counsel or the parties, I am all for it.

THE COURT: What do you prefer?

MR. IKEDA: Your Honor, I guess I anticipated allowing the DHS folks to give you the update that the Court requested. And if the Court has questions, they are prepared to answer.

THE COURT: All right. So we can proceed with your motion, whenever you are ready. And then Mr. O'Meara, my view is if we get to the point where you are saying: Well, I think maybe they should be put under oath and put on the stand and so we could ask some questions, it has gotten too informal for an update, I assume you will say so.

MR. O'MEARA: I will, Your Honor, thank you.

THE COURT: All right.

MR. IKEDA: Well, Your Honor, we are here today on the Defendant's Rule 60 Motion, which the Court and the parties know is a limited one, it is limited to the

circumstances, the unique circumstance that were presented by an individual who we have all agreed in court to refer to as W.O.

Let me just be clear that the Rule 60 Motion is certainly a recognition by the Defendants that the language of the Settlement Agreement prohibits the placing or transfer of an individual who is committed solely as a person with a developmental disability to the Minnesota Security Hospital.

As was indicated in the motion and the supporting affidavits, the circumstances under which W.O. presented to DHS, one was a very quick turnaround. I think the department didn't -- the county said that the original placement wouldn't take him back on May 19th. And also, unique circumstances in terms of how he presented.

And Dr. Miller can speak to that. With respect to the legal arguments -- so, I will keep this real brief. I mean, with respect to the legal argument, I think the parties looking at the briefs agree that this is an issue where the Court has a lot of discretion about whether to grant relief from the judgment in this particular circumstance under these -- in this particular circumstance, under these specific facts. And the Defendants ask that the Court do so under these very unique and specific circumstances.

As I mentioned at the outset, Your Honor, the Department is here today. There are four individuals who are prepared to answer the Court's questions. Dr. Peter Miller is a psychiatrist at DHS. He is the Medical Director of Community Services and Technology.

Dr. Miller was involved with, essentially, the valuation of other criteria or other placements in the decision to place W.O. at MSH.

Mr. Jerry Nord is Community Support Supervisor. He was the individual who, as you saw in the affidavits, looked for other community placements that might be appropriate and that would take W.O., and was unsuccessful in that regard.

Deputy Commissioner Barry is here to really talk about big picture issues. And I think Ms. Opheim raised some of the questions about what facilities are available under circumstances like this, and when individuals like W.O. present themselves to DHS. And Deputy Commissioner Barry is certainly prepared to address those issues and answer the Court's questions in that regard.

And finally, Dr. Krystal Dinwiddie is a clinical psychologist at MSH on the unit where W.O. is residing, and is prepared to answer a lot of the questions that the Court has about the housing option -- or housing circumstances, treatment, sort of day -- the normal day that I think the

Court was interested in their order -- or in the Court's Order.

So, I think with that understanding, and as the motion is presented to the Court, and with the report that DHS provides, the Department certainly asks that the Court exercise its discretion and allow relief from the judgment.

So, I think maybe the first person who would be best to come up would be Dr. Miller. And he can sort of introduce himself. I understand Dr. Miller came to DHS about five years ago after working up near Duluth in community psychiatry, and can talk about what made W.O. unique, and why MSH was the appropriate place in that --

THE COURT: Before we do that, perhaps just a couple of questions. One is, obviously we have the observation by the Ombudsperson, Ms. Opheim, and then implying that Dr. LaVigna would join with that. On page 3 of her report we got today saying: W.O.'s transition team has questions that the DHS Commissioner was aware of the predatory dangerous culture W.O. was being exposed to at the Security Hospital. And that basically, people have conceded that his needs cannot be met there. And so, I won't go on and continue, that well, it's a transition team, and so hence we should be very deliberative in looking at a different placement for him.

I won't go over the whole report, but -- and then,

of course, you end your motion by saying that we are making best efforts to look at moving him out of the Security Hospital.

What is the position today with respect to -- especially when I read reports saying, W.O., quote, "had a better week or good week this past week." And actually, reading his diagnoses, I -- that seemed -- sounded very similar to me, sadly, from seeing other people who have been in foster homes since they had been ten with these variety of diagnoses. And a lot of these things sounded very familiar to me.

But, what is the -- what will kind of be the bottom line today, if you know, not to oversimplify this complicated young man, but what will be the bottom line today, do you think?

MR. IKEDA: So, I understand, Your Honor, from speaking with my clients, that in terms of -- and Dr. Dinwiddie can, I think, speak to this a lot more clearly than I can since she has remained in contact with W.O. But, my understanding is that he is on a one-to-one staff to patient ratio, which means he is observed and escorted, is my understanding, 24 hours a day.

And, you know, with respect to what the Department has been doing, I know that Mr. Nord is prepared to talk about that. And I know as the Plaintiffs -- or as was

attached, I believe, to Ms. Opheim's submission to the Court, there are weekly reports that are done of team meetings. And my understanding is that the County is involved in those meetings, as well.

This might be a good time for you to hear from Dr. Dinwiddie, if that is okay with you.

THE COURT: All right. Now, some people don't like standing at the podium. That goes up and down, too. So, if it is comfortable where it is, otherwise Doctor, you can move it.

Could you just please state your name for the record and spell your last name?

DR. DINWIDDIE: Good afternoon. Dr. Krystal Dinwiddie, D as in David, -i-n-w-i-d-d-i-e.

THE COURT: So maybe you could just briefly indicate, even though counsel has said, kind of, your position with DHS, why don't you indicate your position and background and then you can maybe just go ahead and tell me what you think is most important for me to know about this young man.

DR. DINWIDDIE: Sure. I received my Doctoral Degree from the Chicago School of Professional Psychology in Clinical Forensic Psychology, which is a specialty working with individuals involved in the legal system.

I am currently the clinical psychologist for Unit

800, which is the acute care and Evaluation Unit. I first met W.O. on October 21st, having started my position at DHS in October.

THE COURT: Now, in that Unit -- sorry for the interruption. In that Unit, if my memory serves me correct, is that primarily people that are there, either committed as mentally ill and dangerous, or they are pending commitment for mentally ill and dangerous, as opposed to mentally ill without the dangerousness, because that is two entirely -- two separate populations in my view.

DR. DINWIDDIE: Unit 800 can receive an individual under a variety of commitments.

THE COURT: Okay.

DR. DINWIDDIE: Initial MI&D, finalized MI&D, which includes transfers from other units if that person enters into a crisis. We also will receive individuals with MI only, MI/CD, MI/DD and Rule 20 Evaluations. So, there's a variety of ways that a person might come to Unit 800.

THE COURT: So, if you understand my -- I will repeat what I said earlier. If you need more focus, you let me know. What is more important for me -- that is a question sometimes I will ask -- a judge will ask a lawyer: Tell me what is most important for me to know? And then I may have a couple of questions for you.

DR. DINWIDDIE: Sure. W.O. presents with a very

well-documented history of neurocognitive disturbance and deficit. He has behavioral concerns that has come across as very troublesome to manage.

He initially was on a Life Skills Unit when he returned to MSH, which is a unit designed for individuals with TBI or other cognitive deficits. Due to aggressiveness and sexualized behaviors, he was transferred back to Unit 800.

I think that one of the important things that we have tried to do is instill safety from his vulnerabilities on Unit 800 at MSH, because he is on the one-to-one staffing ratio, which means during his waking hours a dedicated staff person remains with him at all times. When he goes into his bedroom, he is observed via camera to ensure safety.

He is also -- every person on the Unit is provided fifteen-minute wellness checks just so that we can maintain a staff presence on the unit and to try to divert any escalations as they might occur.

I think that in addition to the clinical therapies that he receives, he also has consistent and continuous access to clinical staff from about 7 a.m. until 6 p.m. to assist him in his coping deficits and just manage it and make strategies.

Right now his daily schedule kind of looks like breakfast at 7:00 a.m., medications. He is offered a number

of treatment groups. Each week he receives no less than 2 to 3 individual sessions with myself. Even with that level of clinical service offered, we still see crisis incidents where he escalates to aggression.

I think that his transfer to Unit 800 was really precipitated by just more -- I don't want to say more aggressiveness, like it was on a continuum, but the significance of harm that was occurring towards peers on Unit 200 really was the deciding factor to send him back over to 800.

THE COURT: And you say his peers, obviously it has perhaps been suggested in -- well, I am not going to restrict it just to Roberta Opheim's report, or I am probably mispronouncing the name, Dr. LaVigna. But the idea of, well, one, he is a less sophisticated minor with more sophisticated people that might subject him to either exploitation, or apart from the predatory behavior allegations, and then the isolation, itself, just like -- not to oversimplify the socialization issue, but oftentimes people say lack of socialization in the end is the doomsday for like people that are home schooled or in solitary confinement if they are at a prison or a hospital. In the end, it is doomsday, because it is the socialization aspect that somehow has to be balanced in. That is the part that I'm just kind of curious about, what do you want me to know

about that?

DR. DINWIDDIE: Yes. When I say peers, I am really intending to mean his available peer group, which is mostly adults on the treatment unit. I do think that we have seen and identified several vulnerabilities that those individuals pose towards W.O., in that he is on money plans for the possibility of potential financial exploitation, where maybe someone is not coming to take his money but they might ask to play a basketball for money and staff needs to intervene to kind of help him process and understand why that might not be in his best option.

I think that because it is an acute psychiatric facility and unit, when others enter into a crisis by virtue of their own unique needs, W.O. is not well equipped to maybe manage or handle that, based on his just overall poor social skills and lack of boundaries. Sometimes his approach is more intrusive towards others. And then, if they are having their own unique needs or concerns. It just kind of ups the ante, ups the ante.

So, we see times where he remained in a level of crisis and we have seen the aggressive behaviors, not necessarily because of his own attributes or needs, but just by virtue of the environment.

THE COURT: I think I read somewhere, and this would have been back in April of this year when he was

discharged for a time. I want to say my memory tells me April 6th, but I could be --

DR. DINWIDDIE: You are correct.

THE COURT: -- off on that. There was a reference somewhere that, well, he was maybe averaging at least 4 PRNs or medication a day. And then when he went into the community, it went immediately down to one. And I would think that, all by itself, might have resulted in a behavior modification of somebody like that. Not that that -- I happened to read that and I was just kind of curious about it in terms of a transition plan, if I read that correctly. And I would think that that might affect one's behavior, depending on the effect of those four PRNs, or whatever he was receiving before he was provisionally discharged.

DR. DINWIDDIE: I would agree with you, Your Honor. I'm not sure of the circumstances and why that change occurred, necessarily. But, I do know at MSH W.O. has gained education around the use of as needed or PRN medications. And it has proven on a number of occasions to help divert or, if you will, ground him in a way to not escalate to aggressive behavior.

THE COURT: Now, maybe this is, you will say, either it is not a fair question or you are the wrong person to ask, but I am sure you will tell me.

So, what is the next step here in terms of --

obviously, you know, lawyers and judges talk one way, health care and medical people use different language. But, in terms of looking for -- I always don't like using the word less restrictive alternative, because that has got a lot of legal implications, and that is not what I am asking.

What is the next step when people are saying: Well, we are going to do our very best to look for some transitional planning and move him -- you know, and I think I read where Dr. LaVigna is saying, well, if we can't find a place in the next month or so that is semipermanent, then we should look for something other than an institutional setting.

What is most important for me to know about what options are being looked at or what -- realistic or unrealistic, frankly speaking?

DR. DINWIDDIE: I think I can answer that question just from a clinical standpoint.

THE COURT: Certainly, and I wasn't trying in a roundabout way -- yeah, I assume it is strictly from a clinical standpoint.

DR. DINWIDDIE: I think for W.O., having established an early engagement when he transitions with psychological staff, psychiatric staff, even there was discussion of possibly nursing staff being -- kind of like a crisis team, but also people that can engage with him,

because he is a high need, high demand type of individual. So, having that well established so the engagement can begin as early as possible would be in his best interest, I believe.

Also, when I said earlier that his aggressiveness maybe hasn't arisen on that spectrum or continuum, I think that in the community the difference between MSH and in the community is our staffing ratio is obviously higher. So, maybe a higher staff density for him would be better received in a one-to-one or two-to-one in a more-relaxed community setting.

THE COURT: On an unrelated question -- and thank you for that. I have read in more than one place, and I may have the time period wrong. It may go back further than October of 2014. But, he has lost, I think I saw, 60 pounds. Is there some -- if I am trying to understand how is it that someone -- and maybe I have missed something in the reports and it may be right there, but is that something that we should be concerned about? Or --

DR. DINWIDDIE: It has been identified by his current treatment team as a concern. It is one of the items on his current treatment plan related to self care. In working with W.O. very early I identified that he was kind of very preoccupied with losing weight and he wanted to lose weight, lose weight.

Upon further exploration one of his peers at MSH was also verbalizing that same information or content. And W.O., I think, based on his level, embraced that and just kind of went with it to an unhealthy level of not wanting to eat or refusing his meals. What we have done to address that is provide education on self care. We provide supplemental drinks.

So, if he misses a meal or refuses one, by choice, then he is offered two Ensure shakes as a supplement. It has come up in a variety of different ways, where he would attend the groups related to it. I know that personally in several individual sessions we've had the session around mealtime to just bolster him eating and having the relatedness or interpersonal connection with myself to eat, which has worked in some regards.

Right now he is currently verbalizing a desire to gain more weight, or to be at a healthy weight. So, I think that our efforts has become more internalized where he is not just trying to be like this other person who actually does have obesity-related issues.

THE COURT: Just one other question, and you may or may not have been the individual who had said it or recommended it. And I don't want to sound like Pollyanna in that great Disney movie, because it seemed like something so simple, but so important.

Someone in one of these reports that was supplied to me said: Well, one of our suggestions to staff is that when he says something -- and I will use my words because I don't remember the exact quote -- outlandish, or comes up with an unreasonable demand, instead of saying "no," because apparently if he hears that word, he, apart from its tone, he reacts sometimes very aggressively, there may be other -- they will say, "That is a good idea, but" -- I read that somewhere.

Again, I don't want to kind of oversimplify it, but is that just one of many things that maybe with a diagnosis like this, does it get down to something that simple that is that important?

DR. DINWIDDIE: I think that it is tremendously important in W.O.'s case. I believe that that quote came from a part of Dr. LaVigna's recommendations.

THE COURT: Oh, did it? Okay.

DR. DINWIDDIE: That information was shared by his treatment team because I think Dr. LaVigna described it as inter-relational style or interactional style -- I'm sorry.

And what that really means is that someone with his deficits and concerns, he can have a very fluid presentation. So, in moment one, he is euphoric and engaged and happy in the tone of voice, or a perceived body language slide or something that he might misinterpret via nonverbal

communication can become the deciding factor.

And the way that you would want to convey messages to him and check for knowledge is extremely important. Not only the staff density, but even staff training in that area, I think, would be important for him.

THE COURT: I have no other questions. Mr. Ikeda? Mr. O'Meara?

MR. IKEDA: Your Honor, I think a couple of things that I think Dr. Dinwiddie might want to talk about in more detail --

THE COURT: All right.

MR. IKEDA: I understand that she is familiar with Dr. LaVigna's report and may have some more thoughts to share with you.

THE COURT: All right.

MR. IKEDA: And then number two, I don't really have a preference about the order that she addresses this. But, I think she was also in the middle of telling you about sort of his daily life --

THE COURT: Oh, and I interrupted her, all right.

MR. IKEDA: I know that, you know, she is familiar with sort of the other vocational, recreational things you mentioned in your Order.

DR. DINWIDDIE: I began with kind of outlining his schedule, beginning about at 7:00 a.m.. He is offered

during the morning at least two clinical therapy groups, ran by either myself or other clinical staff members. He has daily opportunity to attend the library, which has books, magazines, other forms of media available to patients.

At 11 a.m., he has the opportunity for recreational therapy, going to the gym. Lunch is usually around 12:00. At that point there is usually another therapeutic group that he is offered. He had been referred and was receiving during his first admission educational classes in pursuit of his diploma for high school.

THE COURT: Was that the reference to one hour per day, or was there something in addition to that? I thought I read somewhere one hour per day; but anyway, go ahead.

DR. DINWIDDIE: I believe the educational classes are one hour per day. They are not going now because of the summer break. But, if he should remain in September, those would resume.

So, at 5:00, dinner is served. And he then for the afternoon is provided about two to three hours of recreational sports or card games and socialization with his peers.

Some of the groups that are offered include: Coping strategies, anger management, everyday strategies for distress tolerance and coping. Other self-care groups, ran by nursing staff, like I said earlier, provide individual

therapy which I think really takes on a fluid approach with him. But, it is designed to increase his coping and frustration tolerance with external factors.

He has the opportunity to work. At this time he has reported he does not want to. In the community he was able to do more physical, hands-on, I think, yard-work type things, and the opportunities that he has right now I don't think is as attractive.

He can attend religious services, and he does at times. And I think I spoke to vocational recreational -- we have the weekly discharge plan meeting for him with a lot of members involved. In addition, as a team, we meet weekly to discuss any vulnerabilities or any concerns that emerge for W.O., specifically, in relation to his peer group.

THE COURT: Anything else you think I should --

DR. DINWIDDIE: Now, I would ask for counsel to give me the second question --

THE COURT: All right.

DR. DINWIDDIE: -- because I only -- was it Dr. LaVigna's report?

MR. IKEDA: It was, thank you.

DR. DINWIDDIE: Dr. LaVigna provided a summary of his report, and he did clarify that the full report would likely be completed in about a month's time. What he did provide the treatment team was a DRO or differential

reinforcement of other behavior plan. And this plan includes -- well, let me back-up. It is from the premise that W.O. did not receive unconditional positive regard early on based on his trauma history and the abuses in it, like that he received. And because of that he doesn't have a well-established sense of self and he is not sure how to -- he is not necessarily capable of relating to others in prosocial ways, i.e., the violence or the aggression.

Each day W.O. is to receive a gift. Each night he is to receive a gift, just because he exists as a human which will bolster his own sense of validity as a person. He also will engage in the program, which would be one stamp or token per day for just existing, whether or not he has an aggressive behavior or not.

And then on the first day that he does not engage in aggression, he would receive two stamps, and then they would continually increase until day 10 where he would receive 10 for that day, reaching 150 stamps over a two-week period, hopefully.

At the end of that 150, he would also receive another reward or incentive to reinforce that we would like to see no aggression from him. Dr. LaVigna also provided me with a school-based intervention that I am currently in the process of reviewing and becoming familiar with that he believed would help as another form of teaching strategies

in frustration tolerance.

THE COURT: Okay, thank you. Mr. O'Meara?

MR. O'MEARA: Thank you, Your Honor. I just would like the Doctor, if she could, to answer a couple of questions. Should I address the witness directly, Your Honor, or through the Court?

THE COURT: Well, why don't you -- yeah, if that is acceptable to Mr. Ikeda, you can just ask, as long as -- yeah, from there where you are at, that is fine.

MR. O'MEARA: Doctor, are you aware of how many times W.O. has been held by a four or five-point restraint?

DR. DINWIDDIE: During this time to admission he has not received four or five-point restraints.

MR. O'MEARA: How about his prior?

DR. DINWIDDIE: Prior -- I believe there are one -- one or -- forgive me if I am misspeaking, but I believe there was one or two instances when he was committed as MI and DD.

MR. O'MEARA: Are these incidents documented in any way?

DR. DINWIDDIE: Yes.

MR. O'MEARA: By what means?

DR. DINWIDDIE: We complete a restraint and seclusion packet or form highlighting our efforts to avoid the restraint, as well as efforts to help de-escalate, and

then our efforts to help that individual reach safety to be released.

MR. O'MEARA: Thank you. With regard to PRN, are those standing orders?

DR. DINWIDDIE: He does have two standing orders for PRN.

MR. O'MEARA: Okay, all right.

DR. DINWIDDIE: I'm sorry, they have expiration dates, but they are renewed by the psychiatric provider that stays on that unit.

MR. O'MEARA: Is that to be used as a form of behavior modification?

DR. DINWIDDIE: No.

MR. O'MEARA: What is it used for?

DR. DINWIDDIE: It has been identified by W.O. as a coping strategy that he can -- has learned to identify for himself when he begins in the escalation process.

MR. O'MEARA: So, when he testified earlier that he, in response to Judge Frank's question, he is using PRN as needed four times a day, is he requesting that four times a day or is someone suggesting that to him?

DR. DINWIDDIE: I believe his current order -- and I can't speak too much to the medication, but I believe he can take Ativan up to two times a day and Vistaril up to three times a day.

MR. O'MEARA: And does he sign any request form for the medication?

DR. DINWIDDIE: No, not to my knowledge.

MR. O'MEARA: Were you involved at all in any of the applications for a variance?

DR. DINWIDDIE: No.

MR. O'MEARA: When did you first become aware that DHS had requested a variance for W.O.?

DR. DINWIDDIE: I did document my -- the phone call that I received. I believe it was May 12th or 13th.

MR. O'MEARA: Are you familiar with other facilities in Minnesota that handle crisis intervention, crisis management of the type that are you describing today with regard to W.O.?

DR. DINWIDDIE: Can you please rephrase? I'm not sure I understand your question.

MR. O'MEARA: I am just asking if you are aware of any other facilities other than St. Peter that can handle the type of behavior that you are expressing with regard to W.O.

DR. DINWIDDIE: No, not personally.

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

THE COURT: Thank you, Doctor.

DR. DINWIDDIE: Thank you.

MR. IKEDA: Well, I don't know what the Court

wants to go to next, but I know that Deputy Commissioner Barry is prepared to address the Court about sort of the bigger picture items. I know we started specifically with W.O., but I know that the Department wants to respond to the concerns about the lack of a facility and things like that.

THE COURT: That is fine. If you want to have Deputy Commissioner Barry come up? How are you today?

DEPUTY COMMISSIONER BARRY: Fine, Your Honor. I am Anne Barry, Deputy Commissioner with the Minnesota Department of Human Services, with responsibility for direct care and treatment.

THE COURT: Well, I could -- maybe we could -- one of the -- go ahead.

MR. IKEDA: Thank you, Your Honor. I think -- I don't know how you want to do this, but the Deputy Commissioner, I know, is prepared to sort of talk about the efforts that were made in initial placement, sort of the longer term --

DEPUTY COMMISSIONER BARRY: Sure.

MR. IKEDA: -- what is the plan.

THE COURT: And maybe kind of some context, there, knowing that is where you are going to begin.

Obviously, and I think this was probably something in the air or in the record by some way of inference or allegation before we got the Ombudsperson's report. But,

the notion is, well, here is what is available, but there is really much less available today than a couple of years back. And for this unique population -- I will use a characterization -- I'm not suggesting it is Ms. Opheim's in the report that, well, not sufficient efforts have been made to really appropriately staff and have appropriate facilities available, and that is one of the reasons why there is this crisis and there are probably others just like W.O. out there. And so this may just be the beginning.

And again, that may not be a fair characterization, I may have oversimplified a couple of things mentioned, but it's that -- well, I think it was in response to, well, yes, there's no facility available, but many people saw it coming months and months and months ago and everybody was silent. And that is why we are in this predicament now.

DEPUTY COMMISSIONER BARRY: Your Honor, I will start by saying that with all of the changes that are taking place in the system, in the continuum of care, or system of care for people with disabilities, we are trying do a number of things at once. We are trying to create greater community capacities so that people have more choices about where they live, to be more *Olmstead*-friendly.

I think we made some choices early on in the process of the *Jensen* settlement, made a decision to close

the Cambridge Facility. One of the issues that we have with W.O. is at the point he had to come back to the care and commitment of the Commissioner, we are limited in the number of secure facilities we have.

And the judgment was made that because of the level of violence and aggression, and that doesn't define all of W.O., but at the time we were looking at how serious the aggression was, that it was determined that we needed a secure facility. And we only have a couple of secure facilities, which include St. Peter Security Hospital and Anoka; and that we are equipped to manage some of the most, you know, some of the most dangerous of W.O.'s behavior.

So, early on when it became clear that this placement wasn't going to work, Dr. Pratt, Dr. Miller and others and Jerry Nord, two of whom are here today started raising the issue about, well, where can we place? And we knew how limited we were. Again, because we made some choices early on and made choices that were all very community-based, none of which are secure.

So, to the larger issue, we know we have a number of young, mostly males at this point, between the ages of 16 and 21 who are presenting with very, very serious, aggressive behavior, and we are very limited in what we can do. So, we are going to seek community-based variances to create more secure environments in the community.

Now, specifically, again, back to W.O. and the report of Dr. LaVigna. He is suggesting, at least as I understand it, suggesting something a little different, a community-based home with parents, with a mother and a father, two parents, and a three-on-one staffing ratio, which far out exceeds any of our programs, any program anywhere in the community.

We have a couple of programs like that in our institutional environments, for example, at Security Hospital and at Anoka where we can do one-on-ones, two-on-ones and three-on-ones. So, we are trying to be as creative and innovative and flexible with financing as we can be to figure out how we could possibly do that in a community-based environment.

I would be remiss if I didn't say that we still have some concerns about the level of aggression and want to do everything we can to make sure that W.O. is successful in the community. But, one of the reasons his community provider wouldn't take him back was just sheerly the level of aggression and violence and that the neighborhood in which he was living became concerned and threatened by his behavior. We are trying to balance out his needs with the needs of -- well, with neighbors. And we all care. We all care about W.O.'s ability to live successfully in the community. And he can only do so if we are really able to

help him transition and do some of the things that Dr. Dinwiddie has talked about.

So, specifically, with W.O. we are doing everything we can to find a more secure home than some of our community-based facilities, adopting as many of Dr. LaVigna's recommendations as we can, and develop a staffing model and go to our policy division to seek an exception for the rate payment -- because this will be extraordinary, comparatively -- so that we can move as quickly as we can so W.O. can be successful in the community. In the broader picture, I think we need to work closely with the Ombudsman.

You know that as a part of the *Jensen* settlement discussions taking place, that crisis homes are one of the number one topics that still need to be addressed. And we agree that the state has to have more capacity. I think there is some question about how much of that capacity has to be state run and state developed. More prepared, we want to be more prepared than we were with W.O. But, we also think there needs to be more provider capacity.

THE COURT: And then there is always and maybe that is irrelevant here, but then I noted that: Well, the first thing Pine County did is dismiss all the juvenile charges.

I think the average, whether it applies to this case or not, whether it is relevant today or not, and they

probably group the county, state and the court all together, we only know one thing. I think the public looks at this and says: You all are spending taxpayers' money, so why don't you all get together and figure this out? Rather than say -- well, the county should do this.

So, yeah, and obviously, I am not implying that, well, I know of some juvenile detention facilities or treatment centers, whether it is AGC up in Duluth, or some other facilities that are appropriate. I am not suggesting that, because I don't have that in front of me.

But yeah, that is an interesting issue, too, as well as something that will probably come up before we are done this afternoon. And that is, I am not saying that this isn't some subtle way to ask you a question, you can respond depending on you and counsel, because it may come up.

Obviously, we had a commitment order, we had a Jarvis Hearing Order, you know, the initial, then the MI got dropped off, and we have a commitment order that was stipulated to by guardians, defense lawyers, the whole works, and no objections. In fact, they waived all of the appearances at the last commitment hearing.

And so, obviously, there is a group of players. But yeah, that whole thing of county, state and where do we go from here.

DEPUTY COMMISSIONER BARRY: Your Honor, I think

one more issue that I would like to raise has to do with whether we could have foreseen this or not is questionable. But, what we are beginning to see is a number of Rule 20 commitments for people with cognitive limitations. And I think it is simply because the Court doesn't know and the counties don't know what to do.

And so they are coming to us for an assessment. And I know they are, both the Ombudsman and Colleen Wieck, Dr. Wieck in her role as the Executive Director of the Governor's Council for Developmental Disabilities might be willing to share an opinion about, well, what should we as a state do around competency, determinations of competency restoration for people with, you know, limited cognitive ability recognizing, of course, that they certainly have their rights, as well.

But, we are using the space that we developed to serve people like W.O. under the Settlement Agreement. We are using that space to serve people that probably can be served somewhere else. So, maybe we could have foreseen that, but we remain frustrated that then those clients committed to the Commissioner under Rule 20 get stuck with us because the criminal court either doesn't do anything with the charges or we have to work harder with the county to find a placement, and I see it as our responsibility.

So, I just want to raise it as another issue. I'm

not sure how much we could have seen that, but we are certainly feeling the impact of that right now and it has limited our choices.

THE COURT: Mr. O'Meara?

MR. O'MEARA: Your Honor, I will just defer some of my comments.

THE COURT: All right. Thank you Deputy Commissioner.

DEPUTY COMMISSIONER BARRY: So, Your Honor, counsel has reminded me that one of the other things that I had -- since I have been following W.O. since his time at our Child and Adolescent Behavioral House Services Program, which was quite some time ago, he was there -- it's a program for adolescents. It's the one place in the state where we do have a secure environment for children and adolescents.

W.O. was moved from that program. Well, he was in the criminal justice system for a while and then was adjudicated to the Commissioner -- committed to the Commissioner at MSH. While at the Child and Adolescent Behavioral House Services Program, he injured about 13 of our staff, I mean, just to understand the level of his aggression and violence, and took apart an entire unit at MSH. He has also injured a number of our staff.

It doesn't take long for staff in our system, as

well, to know about the escalating behaviors of clients. And so, I think we also want to recognize in all fairness to W.O. that this next step in the transition is really, really important for him and for everybody that works with him and around him to understand that he is growing and developing and beginning to understand a number of things.

I also want to point out that his next transition into the community not be -- may not be with state-operated services. We hope there is a community-based provider that will step up, like the community-based provider that stepped up in the past.

But, even the concerns that you raised, Your Honor, about the differences in his medication between our facility and the community are the things that we should be able to communicate better about. And we learned something very important in that transition. Along with Dr. LaVigna's report, I think that we can make another transition to the community. The question is will we need to step down before we go directly to the community? Or can we go directly to the community?

THE COURT: Okay, thank you.

MR. IKEDA: Your Honor, I think the next person that would be appropriate for the Court to hear from is Dr. Miller. Dr. Miller is a psychiatrist. As I mentioned, he joined DHS five years ago, and was involved -- he is the

Medical Director, was involved in the discussions when W.O.'s community placement option decided that they wouldn't take him back and sort of can explain to you the circumstances from a clinical perspective, the psychiatric perspective.

And also, I think, talk about, you know, his -- I understand from Dr. Miller that he worked in community-based psychiatry up in Duluth and can speak to sort of the community resources and things that they considered. I think, you know, he and Jerry Nord might overlap a little bit, but from a psychiatric perspective, I think it is important for the Court to hear from Dr. Miller.

THE COURT: If you would, please, you could just state your full name and just a little bit of your background, although counsel has covered that and then tell me what you --

DR. MILLER: Right. Peter Miller, M-i-l-l-e-r, M.D., psychiatrist with the State of Minnesota. And prior to that for 25 years in community psychiatry in the Duluth area, medical school at the University of Washington. I trained at several places in the U.S. and Canada. And, as well as psychiatry, I am subspecialty Board-certified in neuropsychiatry.

So, my practice, as well as being in the community over the years, has been working primarily with people with

structural or biological brain injury, like traumatic brain injury, intellectual disability, dementia, epilepsy, and so on.

So, that was really why I was asked to join the state about five years ago, as we were forming a unit for people with intellectual disability at Anoka, and worked there forming that unit until then directions changed. So, I have now moved towards a much more substantial involvement in our community-based services operation.

And it was in -- and I serve as one of the five medical directors. And I more or less happened to be on day call when the final decision had to be made for W.O. I protested a couple of times that I may not be the best person to be here, because I just had -- it was the luck of the draw that day --

THE COURT: Timing is everything.

DR. MILLER: But I have been involved, though, with Jerry Nord prior, and actually before that with Dr. Realmuto, who is our Medical Director at the Child Adolescent Behavioral Hospital.

In an earlier phase, I had some oversight responsibilities there. So, I had heard some things about the events when W.O. had the problems at CABS and the injuries there. And as I understand it I think there may be two staff who still have not been able to return to work at

CABS.

So, I have talked with Dr. Realmuto. And then as issues came along, and W.O. was in the community placement prior to this most recent admission, Jerry Nord called myself and Dr. Realmuto and we actually had some conversations with the nurse practitioner who was monitoring medication in the community.

Both Dr. Realmuto and I had some significant questions and concerns about that, as Anne Barry has mentioned. The approaches that we sometimes do use in state service or in caring for people with more severe illness aren't always the ones that people in the community are as comfortable with. We try to offer some guidance, but there is really very little response to that offer. And I understand that people kind of want to run their own show and so on. But, at least I want to be clear, we were making an effort at that point to say, maybe there are some things we can do differently about medications.

I also reviewed, then, with Jerry Nord, a number of the options. Besides DHS Services, I also do some consulting through the State with Metro Crisis Coordination Program. So, I am somewhat familiar with their services. And they really didn't feel based on that history that they could have taken him after the events when he had eloped at CLO.

We also ran through multiple different options within the state. In my community-based role, I consult with the Crisis Homes, MSOCS and our Community Support Services, as well as the Minnesota Life Bridge, successor to the METO Program. And I was familiar enough to know when they looked at it and said, we don't think we could manage him in this setting, I supported that. I agreed with that.

So, we were finally, in my opinion, kind of forced to make a decision. I would agree that the choices came down to the Minnesota Security Hospital and Anoka in terms of a place that seemed to offer the security.

And at least when I came to Anoka, I was told there that even Anoka is safe, but not secure. We don't have kind of the whole dual entry process. It is not even as secure for someone who is at risk of elopement.

But, more than that, kind of approaching this clinically, I realize that W.O. had more recently been released from MSH. And if there is any hope of this being a short turnaround in getting him out to the community, it probably is going to work better with staff that already knew him and could move to the next phase more quickly, rather than starting from ground zero.

So, I think the other points are simply to emphasize what counsel has said, is that I sort of approach this from, you know -- my heart is in the community, that is

what I have done for, now, close to 30 years, I guess, working with people with intellectual disability, trying to keep them out of the hospital keep them in the community, keep them integrated to the best extent possible.

So, it was certainly -- I was not, as I have indicated, not excited about being cast in that role, but given all of the factors we have heard about, I felt like we needed to utilize St. Peter with the idea of being as short a turnaround as possible.

We have had some discussions, I know I have been party to a very few of them about his future transition planning. But, having observed over my career a number of placement settings, it is much more common for people with an intellectual disability in the community in settings of no more than four residents in a home. It has kind of become an industry standard, if you will.

And there is something about the level of -- socialization is very important, but the level of overstimulation can be especially important. And I think for this person who we have touched on his diagnosis a little bit, but certainly a long list of assaults that have happened to his brain, physical trauma that has led him to have to have a shunt to pull spinal fluid out of his brain so it doesn't expand, exposure to alcohol, methamphetamine, cocaine during pregnancy --

THE COURT: Well, we -- and again, it is always, apart from this case and W.O., I remember back in the day when I was up in St. Louis County when we thought we were doing the right thing and said, maybe we ought to be screening some of these juveniles for the presence of fetal alcohol syndrome. And that was very controversial to kind of say, well, wait a minute you are going to be looking at -- that seems to be towards the Native American population. But, that concern has been raised here that, well, that could have a presence for W.O. here, as well.

DR. MILLER: Right. And it is unfortunately one of many factors. And the other one I was just going to add is his experience of being abused subsequent to all of this.

So, it is clear to me, from various testing and scans and so on, he has very limited frontal lobe functioning which means, you know, the ability to make socially appropriate judgments. If he has an impulse to do something, there is not all of the normal brain functions that would stop him from doing that.

It doesn't mean that he can't learn or won't learn, and I -- ultimately, I am optimistic about what I know about him. And I haven't emphasized -- as I have done this all at arm's length, I have never actually treated him. But, I certainly have treated a number of others with somewhat similar pattern. Not a -- Jerry Nord and I were

talking about this -- not too many in even a relatively long career that have had this level of aggression and violence; but, a few.

And I can remain optimistic that with the right mix of the correct medication to address anxiety systems and impulsiveness and the right behavioral programming, I would share that broad view that the consultant brought in, that I think that he can certainly get to a much better and more integrated site, but it will take time and effort, is my sense.

THE COURT: All right. Anything, Mr. O'Meara?

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

Were you involved in providing information for purposes of the variance request?

DR. MILLER: No.

MR. O'MEARA: When did you first become aware that there was a variance request.

DR. MILLER: I don't recall, exactly. I know that what -- what I will say, I do recall that the discussion at the time of trying to arrange admission was that that would need to be dealt with. But, that is as far as I was involved.

MR. O'MEARA: Are you a DHS employee?

DR. MILLER: Yes.

MR. O'MEARA: Have you been trained on the *Jensen* Settlement Agreement?

DR. MILLER: Yes.

MR. O'MEARA: Have you reviewed the preclusion against standing orders and PRN use for behavior modification?

DR. MILLER: Certainly, yes.

MR. IKEDA: Your Honor, I know this isn't the examination of a witness, but I would object to the extent he mischaracterizes the -- he states a legal conclusion that he shouldn't have to answer.

MR. O'MEARA: I will withdraw it, Your Honor.

THE COURT: All right.

MR. O'MEARA: What I am trying to get at is, do you believe that the use of the medication with regard to W.O. is consistent with the preclusion regarding chemical restraint in the *Jensen* Settlement Agreement?

MR. IKEDA: And I make the same objection. It is a legal conclusion and really not for the Doctor to answer.

THE COURT: Now, if you have an opinion, I don't want you giving a legal conclusion. If you have a view on this, you may give it, Doctor. If you don't, you should say so.

DR. MILLER: I think I can answer partially; and that is, number one, I haven't been involved with his

treatment at MSH. I really can't comment on that, specifically. I do know from my career, that very often the appropriate selected PRN medication with the appropriate safeguards is a very useful tool.

MR. O'MEARA: May I continue, Your Honor?

THE COURT: Yes.

MR. O'MEARA: Are you aware of the incidents of assaults against W.O. at St. Peter?

DR. MILLER: Again, I haven't -- I have heard the reports occasionally, but I have not been fully briefed.

MR. O'MEARA: Were you aware before you read the Ombudsman's report that W.O. was being groomed by sexual predators.

DR. MILLER: I had heard some comments to that effect.

MR. O'MEARA: By whom and when?

DR. MILLER: I don't recall. As I said, a couple of times I did connect in by video with a weekly meeting that has occurred to do some treatment planning. I haven't been able to do that very often, but it was brought up on at least one of those occasions.

MR. O'MEARA: Do you know if he has been removed from an environment that would provide an opportunity for a sexual predator to do grooming of W.O.?

DR. MILLER: I am really not aware of his -- the

specifics of his environment at all.

MR. O'MEARA: That is all I have, Your Honor.

MR. IKEDA: Nothing, Your Honor.

THE COURT: I suspect if you were, unrelated to the case, if you were in Luther that long, we probably know some of the same folks. It's likely.

DR. MILLER: I think so, yeah.

THE COURT: Thank you.

DR. MILLER: Thank you.

MR. IKEDA: Well, Your Honor, the last person that DHS had come prepared to address the Court is Jerry Nord.

THE COURT: All right.

MR. IKEDA: But I think given what the Court heard earlier in the reports from Deputy Commissioner Barry, Dr. Miller and Dr. Dinwiddie, you know, I know Dr. Nord -- or Mr. Nord signed an affidavit that talked about the placement attempts they made, and Dr. Dinwiddie talked about the ongoing attempts to try to move him out of MSH as quickly as possible. So, I sort of -- I think unless the Court has specific questions, I think the Department's report is complete.

THE COURT: I do not at this time.

MR. IKEDA: Okay. Thank you, Your Honor.

Well, I think this -- as I mentioned before the Court heard from the DHS witnesses, obviously, I think what

the Court heard was that as we pointed out in the motion, these were unique circumstances, these were difficult circumstances, as you heard from Dr. Miller. I don't think he used the word bias.

His orientation was he wanted to do what he could to keep -- his preference was for community placement, just couldn't be done under the circumstances. And so, for that reason, the Department respectfully requests that the Court grant its motion. Thank you.

THE COURT: Mr. O'Meara?

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

THE COURT: And I will indicate to both counsel that when the Ombudsperson was under the original orders -- or both Roberta Opheim and Dr. Colleen Wieck are noted consultants, but when Roberta Opheim called in to chambers, she was told, not directly by me, but by someone else in chambers that, well, yes, appreciate a report. And then if you are going to be here, the Court or one of the lawyers may ask you to come to the podium and give any update with or without the report. So, that is kind of where that stands right now, so without knowing what you may intend to do, Mr. O'Meara.

MR. O'MEARA: Thank you, Your Honor. I think it would be important for the Court to hear from the Ombudsmen. The issues before the Court are neither unique nor

extraordinary, as suggested by DHS counsel. They exist with other people with developmental disabilities in this state, in this country. And they exist in at least one other juvenile at the St. Peter facility. And the types of behaviors and situation that is being described by the various witnesses today has been known by DHS for several months.

So, a bit of background I think is important. On June 16th, 2001 (SIC) the State and DHS signed the stipulated Class Action Settlement Agreement, that is Docket 136.

THE COURT: 2011 or 2001?

MR. O'MEARA: 2011. It feels like 2001.

THE COURT: I am old, but not that old. So --

MR. O'MEARA: On December 5th, 2011, the Court issued its Final Approval Order for the Stipulated Class Action Settlement Agreement, that is Docket 136.

And that Order states, the certification of the Settlement Class is hereby ratified in the Settlement Agreement attached as Final Approval Order Exhibit A. This is actually from the judgment, Your Honor.

And expressly incorporated herein is approved in its terms and adjudged to be fair, reasonable, adequate, and in the best interests of the Settlement Class Members. And it is hereby ordered that the parties are directed to

consummate the agreement in accordance with its terms.

As I mentioned, a judgment was issued two days later on December 7th, 2011, entering judgment consistent with this Court's Order.

Two years prior to this, our office and the Attorney General's Office on behalf of the State and DHS began negotiating the Class Action Settlement Agreement, which is really the subject of this motion, as far as I am concerned, including the disposition of people with developmental disability, commitment status, confined at the Minnesota Security Hospital in St. Peter.

The Settlement Agreement -- and there is no ambiguity, states that, quote, "No later than July 1, 2011, there shall be no transfers or placements of persons committed solely as a person with a developmental disability to the Minnesota Security Hospital." End quote.

The State agreed not to do it. They agreed not to do that as of July 1, 2011, nearly four years ago. In fact, in the Settlement Agreement, they said they would use their best efforts to transfer everyone out with that sole DD commitment status within 60 days of the Court's December 5th, 2011 Order.

And I think it also goes without saying that the reason for including the Minnesota Security Hospital in the settlement is to avoid the situation that we now find

ourselves in today. We didn't want DHS to use the Minnesota Security Hospital as a replacement for METO.

METO existed to -- as a facility for individuals with developmental disabilities who were self-injurious to themselves or others. And now what we are finding and what we are hearing is six years after we began negotiating the Settlement Agreement and four years after the DHS and State commitment not to do it, they have got to transfer these types of people to the Minnesota Security Hospital because that is the only facility around that can properly handle them.

They are basically saying, we want METO again. We got rid of METO, and the Settlement Agreement says any successor facility must comply with the *Olmstead* decision, must use positive behavioral supports, must be licensed solely to treat people with developmental disabilities and so on and so on.

There was also a prohibition under the Settlement Agreement as expressed on numerous occasions in the Comprehensive Plan of Action, and in the DHS dignity and policy statement, that there shouldn't be restraint or seclusion involving people with developmental disabilities.

Well, what is St. Peter in the view of an advocate? As a parent of a child with a developmental disability? As a Settlement Class Counsel for 300 people

who were restrained and secluded at a state facility where they were handcuffed and shackled, the Minnesota Security Hospital is a dangerous place. You go there, you might not get out.

This Court last week ruled about the deprivation of liberty at that facility and has expressed concerns in its written Order with regard to juveniles and how juveniles are treated at that facility. Restraint and seclusion has been identified by the Court Monitor as existing at the Minnesota Security Hospital.

And now we have a 16-year-old with a sole developmental disability commitment down there in this dangerous place. And I submit, Your Honor, that there is no one that can testify that the Minnesota Security Hospital is set up to take a juvenile that is solely diagnosed with a developmental disability, sort of committed under a DD status for treatment of that individual at that forensic facility. That is not why it is there. It is there for security. It is a criminal, forensic, prison-like facility, and it no place for people with sole DD.

Take a look at the Ombudsman's report that comes out early this morning. This juvenile is hit in the head. He is being groomed by sexual predators. He is threatened with assault. He is being assaulted. How can his situation improve when he is down there? So, on behalf of the

Settlement Class, we have a completely different opinion about what is happening here, and we believe it is completely avoidable -- should have been.

So, the juvenile's MI portion of his commitment is removed by State Court Order on January 8th, 2015. However, DHS on its own, and intentionally, asks itself for a variance, to allow this individual to remain at the Minnesota Security Hospital in direct violation of the Settlement Agreement. And this Court's Orders and the promises by the State and DHS to not do that.

That variance, according to the variance document in my Exhibit A to this motion, expired on April 29th. But, I think early in April this individual came out. Why did he come out?

So, Your Honor, on January 30th, 2015 the Court Monitor sends a notice of noncompliance regarding the Comprehensive Plan of Action to Peg Booth, Anne Barry, Scott Ikeda, Amy Akbay and Richard Figueroa, three lawyers, the Deputy Commissioner, and the *Jensen* Implementation Office stating, "The Comprehensive Plan of Action forbids confinement at the Minnesota Security Hospital of persons committed solely as individuals..." --

THE COURT: Can you slow it down just a little bit?

MR. O'MEARA: Sure.

THE COURT: Thank you.

MR. O'MEARA: I apologize. "The Comprehensive Plan of Action forbids confinement at the Minnesota Security Hospital of persons committed solely as individuals with a developmental disability."

And the Court Monitor references the Comprehensive Plan of Action and some sections.

Next paragraph. "DHS is to notify the committing court that such confinement would violate the Orders in this case, again citing to the CPA."

Next paragraph, "An individual is currently confined at MSH in violation of these requirements. The committing court changed the commitment from MI/DD to solely DD."

I am copied on it, the consultants and Jennifer DeCubellis is copied on this. So now, as at least of January 30th, 2015 the Court Monitor has weighed in and said this is violating the Court Order. So, W.O. comes out, but doesn't stay out.

On May 15th DHS again asks itself for another variance to put him back in. Another direct intentional violation of this Court's Order, without the involvement of this Court, without doing what they should have done, which is come to the Court for relief under Rule 60 to begin with.

The Court Monitor warned them about it in an

email. It doesn't have the authority to sanction what they are doing. Reminded them of the importance of the provision about not transferring people to the Minnesota Security Hospital; and they still did it.

Not only is it frustrating, it is simply not collaboration. It is not working with the Ombudsman for Mental Health and Developmental Disabilities, Your Honor, who for years from 2009 during the settlement negotiation, all the way through, has forewarned of this very issue.

As we close METO, let's all be cognizant of the fact that there will be people in crisis. And we need to have facilities that will address this. We need to be prepared for this. We can't simply use jails to warehouse people who are in crisis. This is part of the fabric of their disability condition in some cases.

And now, we are sitting here six years later, after having been warned time and time again by a very good and astute professional who is serving people every day that if we don't have these facilities in place, then we are going to have a problem.

The Settlement Agreement also required an *Olmstead* Plan. And the Court is well aware of the various noncompliance benchmarks that have been missed by DHS in getting that plan going.

That plan, Your Honor, if properly developed and

implemented would imbue dramatic, positive, life-changing approaches to how we address people with disabilities, including people with developmental disabilities in crisis, like W.O., including crisis response, crisis stabilization, and the development of facilities to address these very situations.

Rather than try to shoehorn in a forensic criminal facility down in St. Peter with sexual predators who are grooming this juvenile and trying to hold it up as the only facility in the state that can handle this type of behavior, I think that is shortsighted. I think it is wrong.

I think if they simply would have worked with Roberta Opheim, they would have maybe heard about some of the ideas that she has articulated to the Court today in her report, and maybe this whole situation could have been avoided.

DHS hasn't complied with the *Olmstead* Plan, they haven't done very much in the way of crisis stabilization and providing facilities. This is all self-made, Your Honor. They find themselves in a situation that they made for themselves.

They were warned. They were, I believe, mandated under the Settlement Agreement and under the spirit and intent of that agreement to do the right thing and to have facilities in place to properly manage someone in crisis.

And they haven't done that. And they intentionally violated the Court's Order twice, without notice.

And now they want to come here after the fact under Rule 60 and ask you to really sanction their violations under the guise that, you know, these issues have been extraordinary and unique. They are not. And I don't believe the Court, respectfully, Your Honor, should condone the type of behavior that is now before this Court.

So, on behalf of the Settlement Class, Your Honor, we respectfully request that the Court deny the requests articulated in the State and DHS's Motion. I do urge the Court to hear from the Ombudsman's Office, because I do believe Ms. Opheim has some very relevant things to say.

THE COURT: What is the relevance -- in other words, even assuming the lack of transparency, even DHS isn't claiming they contacted anybody and said, look it, we are going to go in for a variance. We have got this young man and we are going to give ourselves a variance and here is the way it is going to work. So, I don't think there is any dispute about kind of who knew what when.

But, that aside for the moment, what is the relevance, if any, of the fact that a guardian, and a defense lawyer for W.O. stipulated to the commitment and actually waived his presence at the one in 2015, and we haven't heard a word from any of them since?

In other words, regardless of what the State Judge did or did not know, or let's take the Dakota County Attorney's Office, that there is a very reputable County Attorney down there, Jim Backstrom, who is quite knowledgeable in the disability justice area. I mean we all, including me, make our share of mistakes for sure. But, the relevance that we have a Dakota County Attorney's Office and his assistant, defense lawyer for them, and then separate from whether or not anybody ever told the State Judge or the County Attorney, are you aware of this -- or the defense lawyer, for that matter, that this went all pretty much by stipulation. In other words, there wasn't an objection raised by anyone.

And in fact, it looks like at the second commitment hearing when they continued it, it was DHS's recommendation that the MI get dropped off that, which actually would have been almost easier to leave it there. But they came forward and said: We don't have a basis for this, so it will be dropped off. So, developmental -- what's -- it seems like there is a disconnect here somewhere.

MR. O'MEARA: There certainly is. I can't speak for the family. I don't represent the family.

THE COURT: I am not criticizing them by saying that. But I maybe am by the silence of the defense counsel.

And maybe -- well, we have got a -- like I said, a reputable County Attorney and their office. What should I make of all of this?

MR. O'MEARA: Well, I don't do civil commitments. So, I am not speaking as a professional that handles those areas. But, as an advocate, I have been advised for many years that a lot of these -- in a lot of these situations, and maybe it is not this one, they reach consensus without a lot of the salient facts.

I mean, if they knew that they would be -- this individual would have been placed in a population that had sexual predators that would be grooming him, would they have agreed to it? If they knew that down at St. Peter this individual could be placed in a restraint chair, would they have agreed to it?

If they knew that the State and DHS had agreed not to send people like W.O. to St. Peter, would that hearing ever have happened in the manner that it did? Those are very relevant considerations.

And it is also important to reflect on the Court Monitor's very direct finding of noncompliance and essentially directing the parties to tell the State Court what was going on with respect to the *Jensen* Settlement Agreement. They simply can't do what they did, Your Honor.

And I don't want to be caustic about this but, you

know, their stipulation be damned. They agreed not to do it. They never should have brought that issue before the State Court, ever. They should have come here first.

THE COURT: Well, they didn't bring it before the State Court, the Dakota County Attorney did, but --

MR. O'MEARA: Right, with the knowledge of DHS. DHS applied to itself for the variance. I have a big problem with that internal variance request, and granting, without any knowledge of anybody else.

This is a Federal Court lawsuit that has been going on for a long time. And we were adamant that St. Peter not be involved with the individuals that we were representing. We simply do not like St. Peter. We don't like it as a facility for people with developmental disabilities. Never did, never will. I don't think it is a treatment program. I think it is a prison-like, forensic criminal system. And we did not -- we told the lead lawyer that, we told Anne Barry that, we told everybody we could. We don't want those people there. We want them out.

It took them a long time, a couple of three years to get the three or four individuals with sole DD diagnoses out, even after they promised to get them out earlier. And I have a big problem with an individual, a 16-year-old, 17-year-old individual being down there now that I am not sure he will ever get out.

THE COURT: All right.

MR. O'MEARA: Thank you.

(Discussion off the record.)

THE COURT: Let's do this, we will take 10, 15 minutes, here, and then we will go to the Ombudsperson and then have any closing remarks by both counsel. If that works? I want to give her an afternoon break, here, and then we will be back and finish up with Roberta Opheim. Ms. Opheim, I assume you will agree to come to the podium after the break?

MS. OPHEIM: Of course.

THE COURT: Then I will hear from both of you. Let's take 15, here, see you all at 3:45. All right.

(Recess.)

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

I think we left off with the Ombudsperson coming to the stand, if you would, please? I'll try turning on my microphone. That might help.

And that podium goes down. There is a button right on the front center there, if you would like. And if you want to state your full name for the record?

MS. OPHEIM: Yes, Your Honor. My name is Roberta Opheim. I am the State of Minnesota Ombudsman for Mental Health and Developmental Disabilities, and I have been there for 22 years.

I have asked Chris Michel, who is the regional Ombudsman in our agency, that actually has her office at the St. Peter Regional Treatment Center, and she participated greatly in many of the meetings regarding W.O.

THE COURT: All right.

MS. OPHEIM: As well as analysis of information and items within the report. So, in case there is a question, I might need to defer to her.

Your Honor, and this should be of no surprise to anyone. I am frustrated. I am frustrated because this problem has existed for many years.

The problem of crises and placements preexisted the report we did in 2008 on the Minnesota Extended Treatment Options. We have been asking for years why we have a system where you have to make an appointment to have a crisis, because every crisis bed is full, or they close some of them because nobody wanted to pay to, you know, have something available, similar to the Fire Department where it is on call when you need it, but you don't it need all of the time.

I see this as a situation where everyone agrees that we have a problem. When I speak to many people within the system they say: Yeah, we really do, and yes we have to do something about that. But, there appears to be absolutely no concentrated urgency. So, when the time

comes, we then are forced into a position to react to the immediate situation because of a failure to do the long-range planning.

Many of these things are common sense. Yes, there are bureaucratic barriers. You know, I thought, wouldn't it be better if DHS could purchase a home and get it up to speed more quickly than all of the leasing? But then I was reminded that that requires bonding money. And you know, every time you turn around there is a different bureaucratic barrier that makes it -- but, we had a system, albeit not a perfect system, but wherein the Ombudsman's caseload, we could find something, we could leverage a bed, we could assist a case manager or someone else, or a family member even finding the right location.

Our caseloads now are fraught with people who -- well, one of the most recent ones is a young woman sitting in the hospital in Duluth. She has been there 130 days past her medical necessity to be in the hospital, because there is no place to go, not a pertinent home, not a crisis home, not an empty bed, not in any empty bed, which I would not support, I want people to go to the right place when they should.

Normally, I would say to the Court, best practices would dictate that W.O. should only have to move one time. And it should be to the right location. That is in a

perfect world. Right now, the length of time to find, develop, or even secure the type of family foster care setting -- and I spoke directly with Dr. LaVigna yesterday. And he said, you know, if we can't find that anytime soon, then perhaps we can create surrogate families, you know, staff who are routine, get to know the people that are there day in and day out. There is consistency. They have community outings and community options.

But, in the meantime, the environment he is in makes it difficult for him to even begin to engage in the treatment process in the kind of powerful way that is recommended by someone like Dr. LaVigna. I think many of the staff that are there do the best they can. They are not in a position to create the environments that he needs to go to, but he will get worse.

I mean, he may calm down and stabilize, but whether he will really get absorbed and receive the treatment he needs to grow and develop -- every day he remains there is a day lost in his developmental cycle that we will never get back.

I understand why they felt that they were pushed into the corner when the time arose that he was going to come back. But, that does not negate the fact that we have for years asked for a comprehensive plan of how people flow through the system.

One of the things that is terribly missing in this, while we talk about W.O., but on the picture as a whole, no one has given to me in the last 10 years of requesting it the number of people in the state that we know meet this high level, unique level of need, of criteria.

What is the unique number of people -- is it 160? Is it 200 people? How many homes would we need for those? Should they be Life Bridge Treatment homes? Which in a sense is a stopover stabilization move on? Or do they need just regular housing with ordinary day-to-day staffing?

Many of the staff on 800 have made comments to myself and the staff that they all recognize that this is the wrong environment for him. So, but -- you know, to say that safety overrides everything means that our failure as a state to develop the needed resources which we have been told have been coming since at least December of 2008 through the *Olmstead* Plan, right now we don't have any run of the mill cases in the Ombudsman's Office. Almost every one of those is a crisis case, somebody with no place to go. I call it no room at the inn.

And I feel an urgency. But, I fail to create that sense of urgency in others. You know, part of the problem is that we have children i an adolescent community behavioral health hospital that he was in and was reported to have torn apart. Well part of the reason they can't

serve him is that they have been cut down to only be able to staff a census of four people. And of course it would be difficult for them.

But, is that W.O.'s fault? Is it the staff at St. Peter's fault? Anybody's fault? We constantly look at the barriers without saying: Okay, if we can't get what we need with what we have got, how do we get what we need in a different way?

So, with that, I guess, I would answer questions. Again, Chris has worked more closely, day-to-day, involved with staff and the Ombudsman in the unit observing and advocating on this individual's behalf.

But, I know DHS has homes that are sitting fallow. Yes, they will take -- as the Deputy Commissioner said to me -- 40 to 60 days. But, I really recommend that there be geographically several of these homes created with high-security windows, doors, that can still be a home-like environment, but for which someone who really can't be over-stimulated by a group environment can go during their crisis to be stabilized before they can be returned home.

But those homes sit empty, completely empty. They have no staff. We don't have resources to get them up and make the architectural modifications that need to be made.

I'm not sure I understand what is a safe setting, a secure setting, high-security setting. But, you don't

have to have a lock on the door to create a secure and safe setting where someone can't cut themselves, break a window, or completely tear things apart.

I really can't comment on whether the Judge should sort of give a pass on sort of the legal implications of --

THE COURT: I wasn't going to ask you about -- I was not going to ask you about that. But, I will just tell you my impression from what you have said, which is consistent with the report you submitted to all of us, until you tell me otherwise, that you have kind of given the -- where we are at, and some of the reasons why, and that doesn't mean everyone agrees on -- you probably agree on more where we are at, apart from W.O., than why we are there.

But, I think in terms of today, you are saying, well, apart from the *Jensen* Agreement, however you decide that, we have to get a place ready and prepared now. People don't agree on why there isn't one now for W.O. But, it seems to be that you don't know of any place that I could move him today, either; do you?

MS. OPHEIM: Not today.

THE COURT: Right.

MS. OPHEIM: But, I do think that if the right due diligence and financial availability -- for example, talk about a bureaucratic barrier, there was the intent of the

staff of St. Peter when he was moved to a community-based facility to follow him up there and ease with the transition, to provide guidance, care, and assistance to the new provider.

Well, so they started to do that and then found out that the pot of money or the grant or the money that was made available to move out of St. Peter wouldn't pay for that particular situation or any things like staff overnights, you know, travel expenses and some of those types of expenses. So, they just quit doing it, even though it was a needed item without necessarily looking at, are there funds we can transfer elsewhere? How do we make it happen? We have to move from: We can't, because, to how can we?

And I think he needs to move as soon as humanly possible, but I think there has to be some absolute urgency. And I certainly wouldn't languish past the end of the variance deadline, which is in August of this year, because I think he is losing precious time.

THE COURT: Now, you implied that you would like your Regional Ombudsperson -- if you want to -- did you have something that you wanted to state?

MS. MICHEL: It would just be more based on questions, Your Honor.

THE COURT: You will have to get a little closer

to the microphone, there. They are not fancy entertainment mikes, so they won't pick you up unless you are quite close. If you would please state your name and spell your last name, please?

MS. MICHEL: Chris Michel, M-i-c-h-e-l.

THE COURT: What, if anything, do you think I should know? Have you had contact, I assume, with W.O.?

MS. MICHEL: Yes, I have been observing him and monitoring the weekly meetings for transition planning. And based on your Order, I have also been doing further gathering of information, inquiring, asking questions so that we could fulfill our obligations.

THE COURT: So, how do you think that transition planning is going?

MS. MICHEL: It has been difficult. I think it has been difficult when O.W. (SIC) first came to the program, he was re-admitted to the Life Skills Program that was designed for individuals with cognitive deficits. Again, as consistent with the report, shortly thereafter, he needed to take on a more bravado type of image.

And within a couple of days he started demonstrating behaviors that, well, this isn't where I want to be, maybe, and so how do I do something so I can get elsewhere? A couple of the examples was is he wanted to go to the hospital. And he thought, you know, in maybe

previous situations, if he did something, he was able to be placed at a hospital. This time he was also asking to go to Lino Lakes.

So, shortly thereafter, and after repeated requests to leave that unit, there was a decision for him to go to the Crisis Admissions Unit on 800. And so there was a changeover in teen supervision. I think some of the clinical doctors had followed him, but you know, again, we were working with a different team. And then he took on a different persona with the individuals that were also residents of 800.

And it quickly, very quickly became obvious that he was interjecting himself into some dangerous situations. Again, perhaps based on some learned experience: If I did this, maybe something else will happen. So again, I think I pretty much spelled most of that out in the report.

THE COURT: So, it seems that the last week, unless something has changed, has been a better week?

MS. MICHEL: It is interesting, yes. And I am very happy to hear that it went well. We had the national, well, world-renowned expert come to visit him and --

THE COURT: Went out to eat at a restaurant?

MS. MICHEL: Yep. They went out to a Chinese restaurant in the community and it went very, very well. What I have also noticed was that there were individuals

that had been perceived as aggressors transferred from that unit, and they are now currently in other units. So, to try to minimize some of those risks and vulnerabilities, there has been a change in the therapeutic milieu in individuals on 800.

That is not to say that there still are individuals that are very ill. And it is not to say that at any given time or any given date that another individual would be ordered, and the program would be required to accept an individual that could potentially put a risk in O.W.'s (SIC) case.

THE COURT: All right. Mr. O'Meara, any questions of Ms. Michel?

MR. O'MEARA: Just briefly, Your Honor. Ms. Michel, can you describe the types of dangerous situations that W.O. has found himself in down there?

MS. MICHEL: In one situation, and I read in an incident report where -- again, he is a young man and wants to be very social. He wants to be very engaged in the activities that everybody else is doing.

And there is an activity at the gym. And so, some of his peers from that unit, I can't say maybe there was some peers from other units that were playing basketball. He has demonstrated some hypersexuality in his dress and provocative dancing. And in that situation, he asked to

play basketball. The peers declined. But, through some negotiation, he was allowed to engage in that game of basketball.

After several minutes, it seemed to excite him in a way that he started to rub his bottom on other players. And again, maybe that is --

THE COURT: I think that is referenced in the report.

MS. OPHEIM: In the report.

MS. MICHEL: Okay. And so, again, that is really something that is difficult, if not irritating for other peers that again are also struggling with their own challenges, as well.

MR. O'MEARA: Ms. Michel, do you believe that the unit that he is currently on is a safe environment for him?

MS. MICHEL: It is very difficult. I think that the hospital is trying to do everything that they possibly can do at this point to meet his needs. And as I said, I believe that there are individuals that have been transferred off those units to try to accommodate that. But, I also think that given the nature of the hospital and when there are individuals that are potentially ordered, you know, depending on their situation to be admitted, that that would present a significant risk, as well as, again, this is a crisis unit.

So, individuals that are currently at the hospital when there is a situation and their mental health decompensates, I think it becomes very unpredictable.

MR. O'MEARA: Ms. Michel, do you have any information about other individuals with sole developmental disability commitments at the Minnesota Security Hospital?

MS. MICHEL: Yes. When the *Jensen* Agreement was signed, it was to base individuals that were solely committed as developmentally disabled as needing to be discharged.

What the settlement also said was, is that it would exclude individuals with the predatory offender registration requirement. And at this point there continues to remain none of the individuals that continue to be solely committed as DD, with that predatory offender requirement, has been discharged from the facility.

MR. O'MEARA: Do you have any opinion with respect to the MI commitment status with regard to individuals with developmental disabilities?

MS. MICHEL: As Ms. Barry had related to the referenced individuals being ordered on a Rule 20, there has also been individuals that are in jeopardy of becoming committed as MI&D. As those individuals, in cases, have -- in one particular case actually did have a sole DD commitment, as well. But, after a number of reports to the

Court, the Security Hospital had tried to do, I think, what they could in their discretion.

If people are still coming into the system, they are putting, placing the MI piece on the developmental commitment status, as well. I am not a clinician, so I can't really, you know, again -- and challenge that, you know, their primary diagnosis is developmental disabilities and that is one of the primary factors of them having some of their challenges. But, I do think that there is reason to believe that there are individuals that are coming in that really, again, would be more appropriately served in the community.

MR. O'MEARA: So, just to follow-up on that, are you stating that you are aware of situations where an individual with a developmental disability commitment is having his or her commitment changed to a dual commitment to MI/DD?

MS. MICHEL: In one case I am familiar with an individual that had a sole DD commitment and the county had requested his placement under a Rule 20. The security hospital said that would be in violation of *Jensen*, vis-a-vis again based on he was not competent to stand for his charges. They initiated the MI&D. They stipulated to the initial MI&D hearing.

And he had been, at the hospital, evaluated, they

report to the Court. Again, asked the Court to reconsider the MI&D status, and the Judge declined. Although he was empathetic with, you know, again, the understanding of his disability, there was no place for him to go.

MR. O'MEARA: That is all. Thank you, Your Honor.

THE COURT: Thank you.

Unless Mr. Ikeda has any questions of either one of you?

MR. IKEDA: I can just pick one.

THE COURT: All right.

MR. IKEDA: I understand from my client that -- you were talking about that he was doing well over the past week. I understand there was an incident on Saturday. Are you familiar with that incident?

MS. MICHEL: Just this Saturday?

MR. IKEDA: Yes.

MS. MICHEL: No.

THE COURT: All right, thank you.

Absent any further updates, I will hear any closing remarks by each counsel, if you wish.

MR. IKEDA: Well, Your Honor, I think what you heard today confirms that -- and I think my client agrees with this, that this is a really unfortunate circumstance. And the Department doesn't contest that the Settlement Agreement speaks for itself about what its obligations are

with respect to those committed solely as DD and admission or placement into the Security Hospital.

I think what the Court had an opportunity to hear from the Deputy Commissioner about the decision to close Cambridge and how that decision may not have been the right decision, given the circumstances that the Department finds itself in now; but, you know, at least an awareness, I think, that there is that issue out there.

I thought about addressing, I think, some of the legal issues that Mr. O'Meara raised, and that Ms. Opheim discussed, that with respect to -- and I don't know how significant this is to the Court, but with respect to the issue of someone being committed DD, who then becomes committed MI/DD, or MI&D, that actually is not prohibited by the Settlement Agreement.

And, you know, as the Court knows, and the Court mentioned being a State Court Judge years ago --

THE COURT: A long time ago.

MR. IKEDA: You know, those decisions to commit are made by counties, how people are committed, whether they are committed. And with respect to Minnesota law, the question of where someone is placed is one that really is left to the Commissioner if they are committed as MI/CD or DD.

So, the idea that the Commissioner, or the idea

that a Court would commit someone as only DD to the Security Hospital, actually under the statute the Commissioner has the authority about where to place, has more authority about provisional discharges. You know, if you are committed MI&D or as an SDP, SPP, you go through the SCAP process.

I don't think that there is any contention, and I have not asked my client this, but I don't think that there is any dispute that it took a while to move the last person out of MSH who was committed solely as DD following the Settlement Agreement. And my understanding from court reports, as well, is that that person -- there was a house either built or retrofitted and that the person continues to reside there.

You know, I think one of the things the Department pointed out in its brief that is worth noting, Your Honor, is that since that happened, the Department has regularly reported that it has not transferred or placed someone committed solely as DD into the security hospital.

As you heard from Dr. Miller, the individual that is the subject of this motion presented -- I think his affidavit said something like 1 percent of -- in terms of risk of violence.

You heard Ms. Opheim say that as of today there is really no other place besides the Security Hospital. And I think you heard Dr. Miller say the same thing. So, I think

they are both saying the same thing. And you heard Dr. Miller say that, you know, he would have preferred -- he comes from the orientation of wanting to keep working with the intellectually disabled and wanting to keep them in the community.

So, it sounded like it wasn't what Dr. Miller wanted to do, but it was the facility that was most appropriate for W.O. at the time. You've heard that there's ongoing meetings to move or to transition W.O. as best as -- DHS says, as best as they can.

And with respect to the timing, I think it is worth noting that this was a circumstance, as the Court noted, where W.O. was in the juvenile facility up in Pine County pending criminal charges. And my understanding in speaking with the client is that the jail was going to release W.O. And sometime around May 15th, his community placement said that they had major issues. I think that was in Jerry Nord's Affidavit, that they couldn't take him back.

And so, you saw the licensing variance. You saw, I think, on May 18th, that he was actually admitted to MSH. I think what my client wants to sort of point out in what they did today was make clear that this was something that happened over a series of days.

I think Mr. Nord's Affidavit suggests that the decision, at least the major issues came up on May 15th with

respect to the community placement, and the jail was wanting -- or the juvenile facility was wanting to release W.O.

You know, as the State has pointed out in its briefing, this was -- these were exceptional circumstances. It was an unusual circumstance. Dr. Miller called it -- I think referred to it as one percent, and he said statistically -- actually, I don't remember the exact words, but he mentioned how unique this was, the situation and the circumstances are. And so, for that reason, the State respectfully requests that you grant the Rule 60 Motion. Thank you.

THE COURT: Any concluding remarks? Most lawyers don't turn it down, Mr. O'Meara, so I doubt that you will.

MR. O'MEARA: Thank you, Your Honor. I was reading the variance request, and it is attached as Exhibit A to my Affidavit.

And it says, pursuant to Minnesota Statutes, and it cites the statute, the Commissioner may grant variances to rules that do not affect the health or safety of persons in a licensed program if the following conditions are met, and it goes through three conditions.

And I submit to the Court, that the decision to grant variances to W.O. does affect his health and safety. All we have to do is simply read the Ombudsman's report

about what is happening to him and to others at the Minnesota Security Hospital to know that it affects the health and safety.

And I would urge the Court to include a review of the variance request, mindful that DHS under the record before the Court has not testified that they asked anybody else for input with regard to that request. Not this Court, not the Court Monitor, not my office, not Ms. Wieck, and not the -- not Roberta Opheim, the Obmudsman for Mental Health and Developmental Disabilities. They should have.

The Commissioner has great powers under that statute to change lives for better or worse. And I submit that in this circumstance, DHS in twice granting variances through internal requests without outside information has made this situation worse for this young individual.

And so, we again urge that the Court deny the motion. And that in denying the motion, the Court exercise its discretion to order that the Department of Human Services work with the Ombudsman's Office on an expedited basis to find a safe and secure placement, other than the Minnesota Security Hospital for W.O., consistent with the *Jensen* Settlement Agreement, the Final Approval Order, the Comprehensive Plan of Action and the civil rights of this individual. Thank you, Your Honor.

MR. IKEDA: No thank you, Your Honor.

THE COURT: All right. What I will do is, and I will do a relatively -- well, I will do a short written Order. I will rule now, but I will do a short written Order.

In some courts, and I have no quarrel with that -- reproduce the parts of the transcript and say, there is the order. But usually, we will draft a short order. And there may be aspects of it -- it won't be -- I don't think it is a complicated -- it may be a complicated issue, factually, for this -- to kind of do the right thing for this young 16-year-old or soon to be 17 in July, but I don't think it is a complicated legal issue.

And something I will say that perhaps both counsel would disagree with. I frankly think that whether I grant or deny the motion, it, for many reasons, just like we could have easily been here on a motion to enforce the Settlement Agreement, and in effect, an order to show cause for contempt, we would be pretty much in the same position, legally. Because, for example, I could find, well, yes, it violates the Order, but no ability to comply, or this wasn't contemplated by the agreements under these circumstances.

I think I know what is -- well, I know what I am going to do. I can't assure everybody this is going to solve the issue for W.O., but we will go forward.

First of all, actually, the thing that --

obviously, the thing that should concern us all is trying to do the right thing, without compromising staff and other public safety issues, but still try to act in the best interest of W.O.

What concerns me more, but I think I can do my part to fix this, until I am shown otherwise, is kind of the lack of transparency and consultation and notice to one another.

In other words, someone approaching, from DHS approaching -- whether it is the Ombudsperson, Plaintiffs' counsel, Class counsel, or Dr. Wieck, or one, or all three -- and I suppose we could add a fourth, the Court, and say: Look it, we are applying, we are going in for a variance. Here is the way it is going to work. This is the one back in 2014. And there is a commitment hearing. Here is where it is now the county's bailiwick. It is theirs. And here is our position.

I am just kind of -- well, I guess Plaintiffs' counsel has called it, accurately, unilateral action of DHS with -- kind of, let's all work together. We each have different responsibilities for sure, but let's kind of work together as a team.

We will each carry out our own responsibilities. It doesn't mean we will always agree on everything. But, we don't want to look like we are covering something up or look

like we are doing something we are not supposed to by not telling you right up front, here is the situation, here is where we are going.

And that is actually of concern, because there are lots of talented people on both sides. And it seems like I suspect the public would expect that we should all be working together, or the folks should, too. And part of my order is going to address that.

What the Court is going to do, and I would end up with the same remedy or issue whether I granted or denied the motion.

I don't find extraordinary circumstances under this situation or it would be a proper exercise of my discretion or serve the interest of what was intended by either party to grant the motion, so -- but, I don't want to even focus on it. I will -- respectfully, noting the objection of DHS denying the motion without prejudice to bring it again, or I have the right to bring it on my own motion or to clarify it, we would end up at the same place.

Whether I continued this, which I think would be -- I am going to respectfully direct that -- and counsel can consult with your respective clients. And in fact, maybe nobody will have to be here, they're all -- think positively -- or have a hearing. Write down on your calendars, either setting aside an hour or two on Monday,

July 27th, or Tuesday, August 4th. You can talk to your folks, get back to Brenda Schaffer in the next day or so if one of those dates in the morning or afternoon would work, or consult with one another.

And then, most importantly, here is what will happen between now and then. I am hoping I get a call or a message saying, we have all been working together, and here is the provisional discharge plan for the -- here is the provisional discharge plan for W.O.

However, what I will do is request that DHS consult with the Ombudsperson. And then who she involves is up to her. And let Plaintiffs' counsel know what is going on. And I am just reading -- I am going to take, today, counsel and DHS at their word. The Defendants are committed to meeting as often as needed to expeditiously move W.O. from MSH.

And then Doctor -- the consultant you brought in said he would have finished up in the next 30 days. And then what I expect is, direct that DHS in consultation with the Ombudsperson and other involved staff that you each rely on everyday, and I will put this in an Order. Exercise best efforts to have a plan to -- and you don't have to wait until one of these dates to move W.O. out, but a plan on, well, how are we going to move him? And how is that going to work?

I also will agree to meet, and you can invite -- I have no jurisdiction over the following folks, but I would agree if DHS is concerned or somebody else is concerned, well the Court ought to give notice of this, and I will to defense counsel in the commitment and send a copy to the Dakota County Attorney Jim Backstrom and his staff saying -- and the two social workers -- I had their names written down here, Kelly Ruiz and Sandra Freese -- I may have mispronounced their names -- involving the group and saying, let's do the best we can to come up with a plan.

So, I called July 27th or August 4th and then if none of those dates work and if you find a different date you want to suggest, it is just a status report. And if the report is: Everything -- he is being moved and here is where it is, we all agree; or no, it is worse now than it has ever been, I will set that for a review/status conference.

And whether we do it in the courtroom, depending on who is here or in chambers, we can have it on the record. The point is, I would like the -- and I want to see the plan and what it looks like, because everybody says they are making best efforts in their difficult circumstances.

I don't have to decide today whether this was entirely avoidable and should have been foreseeable weeks and months ago. I remember the days when they closed Moose

Lake State Hospital, and there were all sorts of people being moved down into the Chicago and Lake Avenue, Lake Street and Chicago area.

And all things were happening on, well, where is the plan in place to transition people into the community? I would like to see the implementation plan. If there is an issue of disrespect that someone is thinking, well, the State Court ought to be aware of it. I will be glad to talk with any individual there who will pass this on.

And so, I am hoping that between now and then with full transparency and consultation, that under very difficult circumstances a plan will -- something will be -- come up with that, well, you all won't agree on how we got to this situation and that somebody should be held accountable. This is the plan that will work for W.O., and I will keep my fingers crossed -- that is not a legal term -- that nothing happens to him in between.

Because I will say this, I think a concern by the Ombudsperson, but really it has been implied by many people in the room today, every day a young person like this even with this complicated diagnosis and his unfortunate history is in kind of semi-isolation, if not total isolation in these very unusual conditions, even assuming no endangerment with any serious socialization, assuming that over-stimulation is not an issue probably puts them -- not

to overuse the word institutionalization, but puts them another day away from a transition into the community, but that is why we have got all of the folks here that I think can make this happen. And I venture to say that there's probably other individuals, if not quite with this complicated diagnosis out there in the same situation.

And if there is something more, whether it is a funding issue or something else where they say: Well, if the Judge would just enter this order, or if the state and feds could get together and do this, because there is something one judge can do and the other can't, if we know that -- I think that one of the issues is there is some accountability for defense counsel, whether it is privately retained or public defender in these situations, county attorneys, who are supposed to act in the interest of justice and the public interest, as well. And I will repeat it for the third time, I think the particular county attorney has a reputation for doing that.

So, I may be naive, but I am hoping that I will put this order together. And that on before one of these two dates, if one of those works, that that doesn't mean that everybody is going to kind of clap hands or anything. Because obviously, Mr. O'Meara, you've raised a number of other issues of noncompliance that go beyond the scope of W.O. today. But, I am going to deal with what I have here.

And I am going to try to remain optimistic until we are forced to go into a hearing that I don't think would serve anyone's best interest; but, if we have to, we have to. And well, we are claiming ability to comply, and whether it is a funding issue, a lack of or poor planning, a lack of -- not resources, but the wrong priorities. If we have to go there, we go there. But, I would like to think that this is the first step in getting everybody together and seeing if somehow we can find a solution for W.O.

So, in that context, other than any objections to the extent it doesn't ask for the relief you requested, Mr. O'Meara, any other requests for clarification? I will draft the order and have it out tomorrow.

MR. O'MEARA: No, Your Honor. Just a point of clarification.

THE COURT: Yes?

MR. O'MEARA: I addressed the, sort of, unilateral nature of these things.

THE COURT: Yes.

MR. O'MEARA: With respect to our position that this is not an extraordinary issue, it is a known issue for DHS. It has been known for months. So, I am completely fine with your Order.

THE COURT: All right. Other than the objection to the dismissal without -- denial without prejudice, the

motion, anything further, requests for clarification, Mr. Ikeda?

MR. IKEDA: No, other than do you want us to communicate with Brenda about the date --

THE COURT: Well, if you two could -- it doesn't have to be today, come up with, well, one of these dates, as long as the Judge can do it on the 27th or August 4th, and then I'll -- so you don't have to have everyone come back, because I am sure your clients have important things they will want to be doing. But, to make sure if we even have to consult one another, as long as everybody knows who is talking to whom, to say: Yes we need to get together, or no we don't and here is the situation.

And I suppose some people would suggest that we should be holding this hearing at St. Peter or going somewhere other than a courthouse to let everybody be involved, but we will approach that bridge if and whenever it comes up.

But, yes, try to see if one of those two dates, and the time on it -- I would think we wouldn't need more than an hour or two, and maybe no time at all. If we say, well, can we have a nonappearance, because here is the plan. He is going to be moved, or he has been moved; or no, we object to this. I will do whatever to try to help also minimize delay and cost to everybody, too, coming in here.

And, of course, I will reserve the issue of any costs and fees depending on the outcome of this.

Mr. O'Meara anything further.

MR. O'MEARA: Other than to suggest that my office doesn't need to be involved in the interaction between DHS and the Ombudsman's Office to develop that plan, I just need to know that there has been an agreement on it.

THE COURT: Right, and I am assuming if there is some issue, that they are consulting with one another. And if, obviously, if someone wants to give you a call and say, here is what we are doing or here is the question, they will do that.

And I would say the same if there is some disagreement or you are saying, well, can we involve the Judge? As long as the other party knows somebody is contacting me, that is fine. All right?

MR. O'MEARA: Yes.

THE COURT: I will thank everybody for coming today. And I suppose no matter what anybody thinks of what I have done or the positions people have taken, people might be surprised, either pleasantly or unpleasantly, that all the focus on a young man with the initials W.O., hopefully we can do the right thing here. We are adjourned. And thank you all.

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

THE COURT: All right, thank you.

(Adjournment.)

* * *

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

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