



Minnesota Department of **Human Services**

**RECEIVED**

AUG 27 2015

CLERK, U.S. DISTRICT COURT  
ST. PAUL, MINNESOTA

August 27, 2015

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

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

Dear Judge Frank:

The Minnesota Department of Human Services (DHS) submitted the State's revised Olmstead Plan (Plan) to the Court on August 10, 2015, for the Court's review and approval. On August 19, 2015, Shamus O'Meara, Plaintiffs' class counsel, submitted a letter containing his response and objections. Please accept this as DHS' response to Mr. O'Meara's letter, as invited by the Court's order of August 20, 2015.

With regard to the substance of the Plan, Mr. O'Meara states he remains concerned about several aspects of the Plan and he includes text from an August 7, 2015, email which lists his concerns. First, Mr. O'Meara notes "that the Olmstead Plan should [a]pply to all people in Minnesota with a disability as defined by the Americans with Disabilities Act." This Plan applies to all people in Minnesota with a disability as defined by the Americans with Disabilities Act. On page 106 of the Plan, the term "persons/people with disabilities" is defined as used in the Plan. This definition mirrors the definition of "disability" in the Americans with Disabilities Act (42 U.S.C. § 12102). As stated in the Plan, it is the vision of the Olmstead Subcabinet that people with disabilities are living, learning, working, and enjoying life in the most integrated setting.

Second, Mr. O'Meara states "that the Olmstead Plan should...[e]xpressly prohibit the use of restraint and seclusion for all people with disabilities to which the Olmstead Plan applies with a single emergency exception for the use of limited manual restraint consistent with the Jensen Settlement Agreement." Great strides have been made in the area of restraint and seclusion since the Jensen Settlement Agreement was adopted by the Court. Since that time, by the efforts of many throughout the community and including the parties, Minnesota Rules, part 9544 was promulgated and now prohibits restraint and seclusion, except for emergency use of manual restraint, in DHS-licensed settings when serving a person with a developmental disability and

SCANNED  
AUG 28 2015

U.S. DISTRICT COURT ST. PAUL

also in Home and Community-Based Services settings when serving a person with a disability. Minnesota Statutes, Chapter 245D was enacted and similarly prohibits restraint and seclusion in Home and Community-Based Services settings. Prone restraint is no longer permitted in any setting. There have been accompanying reductions in the use of restraint and seclusion as well. For example, as noted in the Positive Supports section of the Plan, in SFY 2014, there were 2,038 reports of mechanical restraints involving 85 individuals, but by June 30, 2015, only 31 individuals were approved for emergency use of mechanical restraint, and the Plan includes a goal to reduce this number to seven or fewer by June 30, 2019. Considerable training and planning is underway to continue the forward progress in the reduction of restraint and seclusion.

As detailed in the Plan, in a DHS-licensed setting when serving a person with a developmental disability and in a Home and Community-Based Services setting when serving a person with a disability:

“The statute and the rule prohibit restrictive intervention, except for:

- Emergency use of manual restraint, which may be used only when a person poses an imminent risk of physical harm to self or others and is the least restrictive intervention that would achieve safety. Property damage, verbal aggression, or a person’s refusal to receive or participate in treatment or programming on their own do not constitute an emergency. This definition applies to DHS-licensed services and facilities. See Minn. Stat. § 245D.02, subd. 8a.
- Transitions when providers begin working with an individual for whom the use of a restrictive procedure was used before admission and the team agrees that the procedure must be faded rather than immediately stopped to prevent injury to the person or others; and/or
- Limited exceptions for use of mechanical restraints when a person is at imminent risk of serious injury due to self-injurious behavior and less restrictive strategies would not achieve safety.

Reporting, clinical consultation, and oversight are required in those circumstances as specified by statute and rule.” (Pages 74-75)

Similarly, in a Department of Education (MDE) setting:

“...restrictive procedures are prohibited except when used in an emergency situation....A restrictive procedure is defined in [Minn. Stat. § 125A.0941] as a physical hold or seclusion. In an educational setting, “seclusion” means confining a child alone in a room from which egress is barred.” (Page 75)

The Plan continues to press forward on this topic, with goals that aim to further reduce the use of restraint and seclusion even in these limited emergency circumstances. For instance, with respect to the use of seclusion in educational settings, an immediate, comprehensive prohibition could result in serious unintended consequences, such as increased school district reliance on law enforcement, more restrictive student placements such as home-bound placement, and less

access for students to integrated and effective educational settings. The approach in the Plan, instead, is a commitment to move toward elimination of seclusion in schools in a responsible way that has been effective in the past. The support of the Restrictive Procedures Work Group was essential to MDE's successful advocacy at the state Legislature to prohibit the use of prone restraint in schools. Therefore, the Plan notes that MDE intends to:

“engage the Restrictive Procedures Work Group to make recommendations to MDE and the 2016 legislature on how to eliminate the use of seclusion in schools on students receiving special education services and modify the Statewide Plan to reflect those recommendations. The recommendations shall include the funding, resources, and time needed to safely and effectively transition to a complete elimination of the use of seclusion on students receiving special education services.” (Page 81)

A significant amount of time was spent with Magistrate Judge Becky Thorson on the topic of restraint and seclusion. DHS is aware that Mr. O'Meara is not in full agreement with this portion of the Plan, and noted so in its August 10, 2015, submission. It is the position of DHS that, by the accomplishments already achieved and the continued advancements described in the Plan, DHS is meeting its obligations with respect to restraint and seclusion under the Jensen Settlement Agreement and the Comprehensive Plan of Action. Furthermore, DHS remains willing to continue to engage on the topic of restraint and seclusion with the goal of ensuring that persons with disabilities are treated with respect and dignity in all circumstances.

Third, Mr. O'Meara states “that the Olmstead Plan should...[i]nclude sufficient funding necessary to meet and implement the goals set forth in the plan.” For the most part, there is sufficient funding to implement the goals set forth in the Plan, and this is noted under the rationale portion of each topic area. Some new funding has been obtained, such as the \$50 million from the state Legislature for the expansion of mental health services, as detailed in the Crisis Services section of the Plan. With respect to areas where there is not presently sufficient funding, the Plan states:

“Each of these activities is subject to funding and policy directives that are the result of State or Federal appropriations and legislative and regulatory actions. In order for certain changes in activity to occur, it may be necessary for State agencies to propose and pursue statutory changes or regulatory waivers. It may also be necessary for State agencies to request authorization to redirect funding or to request additional funding in order to accomplish certain outcomes...The subcabinet will work to ensure the needs for statutory, regulatory, or funding changes that arise as a result of implementing the Olmstead Plan are fully considered as part of the biennial budget and legislative planning process.” (Page 99)

Fourth, Mr. O'Meara states “that the Olmstead Plan should...[u]se measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the most integrated setting.” The Plan contains detailed measurable goals that focus on

increasing opportunities for people with disabilities and improving service delivery. Each goal uses the metric that most effectively measures change in that area. For some goals, that is an increase in the number of people served, for others, it is another measurement that will show movement in quality or substance. Each measurable goal in the Plan aims to increase the number of people with disabilities receiving services that best meet their individual needs and in the most integrated setting.

Lastly, Mr. O'Meara states "that the Olmstead Plan should...[b]e consistent and in accord with the Olmstead decision...[and c]omply with all applicable Court Orders." It is the position of DHS that the Plan is not only consistent with the Olmstead decision and the Court's orders, but in several respects, goes above and beyond what is required. By establishing goals for transportation, healthcare, and community engagement, the Plan does more than merely strive to increase the number of people with disabilities receiving services that best meet their individual needs in the most integrated setting. Eight state agencies were actively involved in the development of the Plan and, as a result, Minnesota's Olmstead Plan strives to improve state services in ways beyond increased opportunities for integrated living, education and employment.

Mr. O'Meara raises the issue of waiver waiting lists, and submits suggested revisions to the Waiting Lists section of the Plan. Specifically, Mr. O'Meara seeks to: shorten the timelines on the goals; remove any acknowledgement of funding limitations; include a commitment to request additional funds from the Legislature; and elicit an admission regarding an allegation of underspending monies in the past. The suggested revisions go beyond the requirements of the Olmstead decision. This was another area on which Magistrate Judge Thorson spent time with the parties. Those discussions resulted in significant movement and the setting of challenging targets on the part of DHS. Specifically, DHS has redesigned the waiting list process to prioritize individuals based on urgency of need and on who has been waiting the longest. DHS has also committed to ending the waiting list at the brisk pace possible within available resources. We believe that the Plan as submitted provides a clear and attainable path to meet our responsibilities under the Jensen Settlement Agreement, the Comprehensive Plan of Action, the Court's orders, and the law, including the reasonable pace standard as set forth in the Olmstead decision.

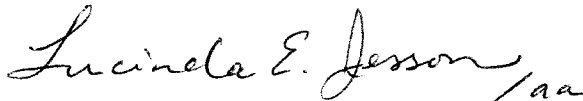
Mr. O'Meara takes issue with the statement in our August 10, 2015, submission that he is in agreement with the Plan with the exception of the Positive Supports and Waiting List sections. As we stated, it was our understanding that on the mediated issues, there was consensus except for those two provisions. While Mr. O'Meara raises concerns about future implementation, funding, and interpretation of the Plan, these concerns do not specifically relate to the detailed plan goals.

With respect to ongoing judicial oversight, the Court's jurisdiction in the Jensen matter currently extends through December 2016, which allows the Court time to gauge effective implementation of the Olmstead Plan. Additionally, the Plan was built to be a robust plan that will eventually stand on its own, progress in its goals over time, and live on into the future, providing a strong

statement and well-defined roadmap to inclusion and integration for people with disabilities in the State of Minnesota.

Thank you for the opportunity to respond to Mr. O'Meara's letter. Please contact me if you have questions or need additional information.

Sincerely,

A handwritten signature in cursive script that reads "Lucinda E. Jesson". To the right of the signature, there are two small, handwritten lowercase letters "aa".

Lucinda E. Jesson  
Commissioner

Cc: Shamus O'Meara, Attorney for Plaintiffs  
Roberta Opheim, Ombudsman for Mental Health and Developmental Disabilities  
Colleen Wieck, Executive Director for the Governor's Council on Developmental Disabilities  
Mary Tingerthal, Chair, Olmstead Subcabinet