



# STATE OF MINNESOTA

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October 25, 2017

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## VIA ELECTRONIC FILING

The Honorable Becky R. Thorson  
Magistrate Judge, District of Minnesota  
United States District Court  
Warren E. Burger Federal Building  
and U.S. Courthouse  
316 North Robert Street, Suite 646  
St. Paul, MN 55101

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

Dear Judge Thorson:

I represent the State Defendants in the above-entitled matter. State Defendants submit this letter pursuant to the Court's September 13, 2017 Order, which requires the parties to file a letter: stating their positions on what essential steps remain in this case; stating when those steps should occur; reciting the current reporting schedule; and proposing any adjustments to the current reporting schedule. (Doc. No. 652, pp. 2-3).

As an initial matter, consistent with State Defendants' position in their appeal pending before the Eighth Circuit and in prior briefing before the Court (*see* Doc. Nos. 631, 637) State Defendants believe that no essential steps remain and no related deadlines are necessary because the Court lacks jurisdiction over this matter and the Settlement Agreement ("JSA") has expired.

Even if the Court had jurisdiction over a non-expired settlement, State Defendants' position is still that no essential steps remain and no related deadlines are necessary because Plaintiffs are unable to establish substantial noncompliance with the JSA. (*See* JSA Comprehensive Plan of Action ("CPA") Aug. 2017 Semi-Annual Compliance Report, Reporting Period: Jan. 1, 2017 – June 30, 2017, Doc. No. 643 (sealed version), 644 (redacted, public version); JSA CPA March 2017 Annual Compliance Report, Reporting Period: Jan. 1, 2016 – Dec. 31, 2016, Doc. No. 621 (sealed version), 622 (redacted, public version); JSA CPA Response to Court Monitor's Compliance Assessment filed Dec. 12, 2016, Doc. No. 606-2, p. 38 (stating, in part, that "the Department has satisfied the requirements of the JSA and CPA and has implemented a robust system of internal oversight relating to the JSA, CPA, and provision of services to persons with disabilities," and "[g]iven all of the progress made, the Department is confident that an objective reviewer would conclude that the Department is in substantial compliance with the JSA and CPA"); JSA CPA Ninth Compliance Update Report, Reporting Period: May 1 – Sept. 30, 2015, Doc. No. 531); ([Doc. 136-1, p. 39](#) (requiring Plaintiffs to demonstrate State Defendants' "substantial noncompliance with Attachment A.")).

The Honorable Becky R. Thorson

October 25, 2017

Page 2

Second, a recitation of the current<sup>1</sup> reporting schedule is, in summary, as follows:

- Jensen Settlement Agreement (“JSA”) Reporting:
  - JSA CPA Evaluation Criteria (“EC”) 1, 4, 38, 45, 46, 54-62, 65-66, 80-81, 83-84, 89-92, 94, 96, 100, and 101, are to be reported on annually, (JSA CPA Reporting Schedule, Doc. No. 545-1), and such reports are due on or before March 31, (Order for Reporting on Settlement Agreement, Doc. No. 545, pp. 3-4);
  - JSA CPA ECs 2-3, 39, 41, 47-53, 64, 67-79, 93, 98, and 103, are to be reported on semi-annually (Doc. No. 545-1), and such reports are due on or before August 31 and February 28 (or in the case of a leap year, February 29), (Doc. No. 545, pp. 3-4);
  - JSA CPA ECs 5-14, 22-25, 28-30, 32-33, 35-36, 40, 82, and 85, are subject to exception reporting, which “has the meaning that the reporting will occur more frequently than semi-annually, if concerns are noted,” (Doc. No. 545-1), “with the exclusion of reports for Emergency Use of Manual Restraint (“EUMR”) which are governed by the terms of the Stipulated Class Action Settlement Agreement (Doc. No. 136-1),” (Doc. No. 545, p. 4); and
  - As of January 17, 2017, “[i]n all future reports, DHS shall incorporate the improvements and clarifications it identified in its Response to the Court Monitor’s Compliance Assessment with respect to ECs 1, 51, 65, 66, 69, 93, and 96.” (Order dated Jan. 17, 2017, Doc. No. 612, p. 3.)
- Olmstead Plan Reporting:
  - “First Quarter (data acquired by the Olmstead Implementation Office through the last day of April) quarterly status report[s] [are due on] . . . May 31,” (Order for Reporting on Olmstead Plan (Doc. No. 544, p. 5));
  - “Second Quarter (data acquired by the Olmstead Implementation Office through the last day of July) quarterly status report[s] [are due on] . . . August 31,” (*id.*);

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<sup>1</sup> Again, State Defendants’ position is that no further reporting is necessary or proper given the Court’s lack of jurisdiction. In addition, State Defendants filed a motion to stay pending appeal, so State Defendants’ position is that no reporting should be required pending appeal. (Doc. No. 655.)

The Honorable Becky R. Thorson

October 25, 2017

Page 3

- “Third Quarter (data acquired by the Olmstead Implementation Office through the last day of October) quarterly status report[s] [are due on] . . . November 30,” (*id.*);
- “Fourth Quarter (data acquired by the Olmstead Implementation Office through the last day of January) quarterly status report[s] [are due on] . . . February 28, or, in the case of a leap year, February 29,” (*id.*);
- Exhibit A (Doc. No. 544-1) attached to the Order for Reporting on Olmstead Plan “lists measureable goals for each topic area and corresponding deadlines for each goal” (Doc. No. 544, p. 5);
- “DHS shall . . . include in its quarterly reports the status of each Annual Goal in the approved *Olmstead* Plan (Doc. No. 481-1),” and this information “shall be reported in the next quarterly report following the Annual Goal identified in the *Olmstead* Plan,” (Doc. No. 544, pp. 5-6);
- “Annual reports shall cover data acquired by the Olmstead Implementation Office during the period of October 1 through September 30 and shall be due on or before the following December 31,” (Doc. No. 544, p. 6); and
- “DHS shall report to the Court on the implementation of the annual *Olmstead* Plan amendment process. Potential Plan amendments shall be identified and included in each annual report due on or before December 31. Plan amendments adopted by the Subcabinet shall be reported to the Court on or before February 28, or, in the case of a leap year, February 29.” (*Id.*)

Finally, consistent with their view that the Court lacks jurisdiction over this matter and that the Settlement Agreement has expired, (*see* Doc. Nos. 631 and 637), State Defendants propose that all current reporting deadlines be stricken. If the Court will not dismiss the case, however – and without waiving their position on the Court’s lack of jurisdiction over the Settlement Agreement – State Defendants alternatively propose that the Court change the JSA reporting schedule to require a single annual report covering all active ECs, due on March 31 of each year or the first business day thereafter.<sup>2</sup>

Plaintiffs’ corresponding letter ([Doc. 661](#)), for its part, does not meaningfully respond to the Court’s September 13, 2017 Order. While asserting a variety of purported compliance concerns, it fails to set forth any “essential steps” that Plaintiffs believe should be taken in order to address these alleged concerns sufficient to end the Court’s oversight, or when those steps

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<sup>2</sup> Again, this suggestion is made without waiver of State Defendants’ position the Court lacked jurisdiction, (Doc. Nos. 631, 637), and even if the Court had jurisdiction, the case and associated tasks under the Settlement Agreement should be stayed (Doc. No. 655).

The Honorable Becky R. Thorson

October 25, 2017

Page 4

should occur.<sup>3</sup> Moreover, in identifying a list of alleged areas of noncompliance, Plaintiffs' letter fails to acknowledge it is their burden under the JSA to affirmatively demonstrate "substantial noncompliance," ([Doc. 136-1, p. 39](#)), and does not contain any explanation of why Plaintiffs believe any instance of alleged noncompliance constitutes "substantial noncompliance" with the JSA. ([Doc. 661, pp. 4-13](#)).<sup>4</sup> It is unclear how productive the October 30, 2017 case management conference can be in light of Plaintiffs' apparent unwillingness to acknowledge their burden to demonstrate substantial noncompliance, as the JSA requires, and propose essential steps, as the Court ordered.<sup>5</sup>

Sincerely,

**s/ Scott H. Ikeda**

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<sup>3</sup> Plaintiffs' letter also fails to set forth the current reporting schedule, or Plaintiffs views on whether any adjustment to the reporting schedule is appropriate.

<sup>4</sup> As noted above, State Defendants believe Plaintiffs cannot establish substantial noncompliance with the JSA. In addition, Plaintiffs' October 22, 2017 letter is the first time State Defendants have heard about many of Plaintiffs' purported compliance concerns, suggesting that Plaintiffs either did not know about them before asking the consultants for their views, or have for years inexplicably failed to bring a motion to enforce the JSA on these topics, as that agreement required them to do. [Doc. 136-1, p. 39](#).

<sup>5</sup> Assistant Attorney General Aaron Winter intends to appear on behalf of State Defendants at the October 30, 2017 case management conference, in addition to Assistant Attorney General Scott Ikeda.