UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians, and next friends of Bradley J. Jensen; James Brinker and Darren Allen, as parents, guardians, and next friends of Thomas M. Allbrink; Elizabeth Jacobs, as parent, guardian, and next friend of Jason R. Jacobs; and others similarly situated,

Plaintiffs,

v.

Minnesota Department of Human Services, an agency of the State of Minnesota; Director, Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Clinical Director, the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Douglas Bratvold, individually and as Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Scott TenNapel, individually and as Clinical Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; and the State of Minnesota,

Defendants.

Civil No. 09-1775 (DWF/BRT)

ORDER

Shamus P. O'Meara, Esq., and Mark R. Azman, Esq., O'Meara Leer Wagner & Kohl, PA, counsel for Plaintiffs.

Scott H. Ikeda, Aaron Winter, Anthony R. Noss, and Michael N. Leonard Assistant Attorneys General, Minnesota Attorney General's Office, counsel for State Defendants.

INTRODUCTION

This matter is before the Court on the parties' positions regarding the scope of their Stipulated Class Action Settlement Agreement (Doc. No. 136-1 ("Settlement Agreement")) with respect to prohibited restraints and compliance with the Positive Supports Rule.[1]

BACKGROUND

The factual background for the above-entitled matter is clearly and precisely set forth in the Court's June 2019 Order and is incorporated by reference here. (*See* Doc. No. 737 ("June 2019 Order").) The Court notes particular facts relevant to this Order below.[2]

Jurisdiction over this matter was most recently scheduled to end on December 4, 2019. (Doc. No. 545 at 6.) On June 17, 2019, the Court extended its jurisdiction until September 15, 2020 because it found that it needed additional information to properly determine whether its jurisdiction may come to a just and equitable end. (June 2019 Order at 36, 38.) At that time, the Court directed the parties to meet and confer to discuss their positions on: (1) whether provisions of the Agreement on prohibited techniques include the Forensic Mental Health Program ("FMHP") (formerly the Minnesota Security

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[1] On March 12, 2014, the Court formally adopted and approved a Comprehensive Plan of Action ("CPA") consisting of 104 evaluation criteria and accompanying actions designed to help direct and measure compliance. (Doc. Nos. 283, 284 ("CPA").) The combination of the Settlement Agreement and CPA is hereinafter referred to as the "Agreement."

[2] The Court also supplements the facts as needed.

Hospital), and Anoka Metro Regional Treatment Center ("AMRTC"); and (2) whether there are issues related to the Positive Supports Rule that must be resolved before the Court considers the *Olmstead* Plan March 2019 revision. (June 2019 Order at 30.) The Court further directed that if the parties were unable to enter into a Stipulation on either issue, they must file a Joint Statement to inform the Court of their respective positions no later than August 15, 2019. (*Id.*) The parties did not enter into a Stipulation on either issue.[3] The Court now considers each party's position.[4]

DISCUSSION

I. Legal Standard

The Settlement Agreement provides that it "shall be construed and enforced in accordance with applicable federal and Minnesota laws." (Settlement Agreement at 42.)

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[3] The parties did not file a Joint Statement as directed. Plaintiffs notified the Court of the parties' inability to enter into a Stipulation in a brief supporting their position on August 15, 2019. (Doc. No. 753 ("Pl. Memo.") at 1.) On the same day, Defendants filed a letter explaining why they had not submitted a Joint Statement and asked the Court for leave to file a response to Plaintiffs' brief by August 29, 2019. (Doc. No. 754.) The Court granted Defendant's request. (Doc. No. 755.) Defendants timely submitted their response. (Doc. No. 759 ("Def. Memo.").) On August 28, 2019, Plaintiffs filed an amended brief without seeking prior permission from the Court. (Doc. No. 758 ("Amended Brief").) On August 30, 2019, the Court directed Plaintiffs to file a letter to show why their Amended Brief should be excused. (Doc. No. 761.) The Court also granted Defendants the opportunity to respond Plaintiffs' explanation. (*Id.*) Defendants objected to the Amended Brief. (Doc. No. 771.) Having reviewed and considered each party's position, the Court observes that whether or not it relies on the Amended Brief has no impact on its analysis or ultimate conclusion.

[4] While the June 2019 Order did not request the parties to address the legal standard under which the Court should resolve the issues, each party argued its position anyway. As discussed below, the Court requires additional information before it can properly resolve the issues.

"Settlement agreements are governed by basic principles of contract law." *Sheng v. Starkey Labs., Inc.*, 53 F.3d 192, 194 (8th Cir. 1995); *see also Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581-82 (Minn. 2010). Federal courts evaluating settlement agreements apply the forum state's law. *See Am. Prairie Const. Co. v. Hoich*, 594 F.3d 1015, 1023 (8th Cir. 2010).

"Under Minnesota law, 'the primary goal of contract interpretation is to determine and enforce the intent of the parties.'" *Loftness Specialized Farm Equip., Inc. v. Twiestmeyer*, 818 F.3d 356, 361 (8th Cir. 2016) (citation omitted). "Where the parties express their intent in unambiguous words, those words are to be given their plain and ordinary meaning." *Id.* (citation omitted). Therefore, a court "must first make a legal determination whether the contract is ambiguous—i.e., 'whether the language used is reasonably susceptible of more than one meaning.'" *Swift & Co. v. Elias Farms, Inc.*, 539 F.3d 849, 851 (8th Cir. 2008) (quoting *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982)). A court should "construe a contract as a whole and attempt to harmonize all of its clauses." *Storms, Inc. v. Mathy Const. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). In addition, unambiguous provisions should not be given "a strained construction." *Id.* (quoting *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364-65 (Minn. 2009)). The presence or absence of ambiguity in a contract "depends, not upon words or phrases read in isolation, but rather upon the meaning assigned to the words or phrases in accordance with the apparent purpose of the contract as a whole." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997).

II. The Agreement

The Settlement Agreement addresses prohibited techniques in Section V. (Settlement Agreement at 6-7 ("Prohibited Techniques").) Section V.A. provides:

> [Defendants] shall immediately and permanently discontinue the use of mechanical restraint (including metal law enforcement-type handcuffs and leg hobbles, cable tie cuffs, PlastiCuffs, FlexiCuffs, soft cuffs, posey cuffs, and any other mechanical means to restrain), manual restraint, prone restraint, chemical restraint, seclusion, and the use of painful techniques to induce changes in behavior through punishment of residents with developmental disabilities. Medical restraint, and psychotropic and/or neuroleptic medications shall not be administered to residents for punishment, in lieu of adequate and appropriate habilitation, skills training and behavior supports plans, for the convenience of staff and/or as a form of behavior modification.

(*Id.*) Section V.B. further provides that:

> Notwithstanding subpart V.A. above, the Facility's policy . . . defines manual restraint, mechanical restraint, and emergency, and provides that certain specified manual and mechanical restraints shall only be used in the event of an emergency. This policy also prohibits the use of prone restraint, chemical restraint, seclusion and time out.

(*Id.* at 7.)

The Settlement Agreement states that "[t]he scope of [Defendants'] obligations regarding people with developmental disabilities in the [Settlement] Agreement pertain only to the residents of the Facility, with the exception of the provisions of Recitals, Paragraph, and Section X, 'System Wide Improvements.'" (Settlement Agreement at 5-6.) The Settlement Agreement defines "Facility" as "the Minnesota Extended Treatment Options ("METO") program, its Cambridge successor, and two new adult foster care transitional homes to which residents of METO have been or may be transferred," and

"Resident" as "a person residing at the Facility."[5] (*Id.* at 5.)

The seventh provision of the Settlement Agreement's Recitals provides:

> The State of Minnesota further declares, as a top concern, the safety and quality of life of the Residents of the Facility. The State agrees that its goal is to provide these residents with a safe and humane living environment free from abuse and neglect. The State also agrees that its goal is to utilize the Rule 40 Committee and Olmstead Committee process described in this Agreement to extend the application of the provisions in this Agreement to all state operated locations serving people with developmental disabilities with severe behavioral problems or other conditions that would qualify for admission to METO, its Cambridge, Minnesota successor, or the two new adult foster care transitional homes.

(*Id.* at 3 ¶ 7 ("Recital 7").)

Section X, another exception to the Settlement Agreement's Facility-specific scope, addresses System Wide Improvements. (Settlement Agreement at 16-21 ("System Wide Improvements").) Section X includes the modernization of state administrative rules relating to positive behavior supports ("Rule 40" or "Positive Supports Rule") (*Id.* at 19.) Specifically, Section X.C. provides:

> 1. Within sixty (60) days from the date of the Order approving this Agreement, the Department shall organize and convene a Rule 40 (Minn. R. 9525.2700-.2810) Advisory Committee ("Committee") comprised of stakeholders, including parents, independent experts, DHS representatives, the Ombudsman for Mental Health and Developmental Disabilities, the Minnesota Governor's Council on Developmental Disabilities, Minnesota Disability Law Center, Plaintiffs' counsel and others as agreed upon by the parties, to study, review, and advise the Department on how to modernize Rule 40 to reflect current best practices, including, but not limited to the use of positive and social behavioral supports, and the development of placement plans consistent with the principle of the "most integrated setting" and "person centered planning, and development of an 'Olmstead

[5] The CPA similarly provides that "'Facility' and 'Facilities' means MSHS-Cambridge, the MSOCS East Central Home established under the Settlement Agreement, and the treatment homes established (or to be established under this [CPA]." (CPA at 2.)

> Plan'" consistent with the U.S. Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 582 (1999). The Committee's review of best practices shall include the Arizona Department of Economic Security, Division of Developmental Disabilities, Policy and Procedures Manual, Policy 1600 Managing Inappropriate Behaviors.
>
> 2. Within sixty (60) days from the date of the Court's approval of this Agreement, a public notice of intent to undertake administrative rule making will be issued.
>
> 3. DHS will not seek a waiver of Rule 40 for the Facility.

(Settlement Agreement at 19.) The CPA includes six evaluation criteria, numbers 99 thru 104, that correspond to Section X.C. (CPA at 31-33.) The Court focuses now on numbers 99, 103, and 104.

> Evaluation Criterion 99 addresses the scope of the rule modernization:
>
> The scope of the Rule 40 modernization shall include all individuals with developmental disabilities served in programs, settings and services licensed by the Department, regardless of the setting in which they live or the services which they receive. As stated in the Settlement Agreement, the modernization of Rule 40 which will be adopted under this [CPA] shall reflect current best practices, including, but not limited to the use of positive and social behavioral supports, and the development of placement plans consistent with the principle of the "most integrated setting" and the "person centered planning, and development of an 'Olmstead Plan'" consistent with the U.S. Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 582 (1999).

(CPA at 32.)

Evaluation Criterion 103 sets forth a procedure by which unresolved issues relating to the modernization of the rule may be routed through the *Olmstead* amendment process, or through the Court, if necessary:

> Within thirty (30) days of the promulgation of the Adopted Rule, Plaintiffs' Class Counsel, the Court Monitor, the Ombudsman for Mental Health and Developmental Disabilities, or the Executive Director of the Governor's

> Council on Developmental Disabilities may suggest to the Department of Human Services and/or to the Olmstead Implementation Office that there are elements in the Rule 40 Advisory Committee Recommendations on Best Practices and Modernization of Rule 40 (Final Version July 2013) which have not been addressed, or have not adequately or properly been addressed in the Adopted Rule. In that event, those elements shall be considered within the process for modifications of the Olmstead Plan. The State shall address these suggestions through Olmstead Plan sub-cabinet and the Olmstead Implementation Office. Unresolved issues may be presented to the Court for resolution by any of the above, and will be resolved by the Court.

(*Id.* at 33.)

Evaluation Criterion 104 states that "[t]he Department of Human Services shall implement the Adopted Rule and take other steps to implement the recommendations of the Rule 40 Advisory Committee." (*Id.* at 33.)

II. Prohibited Techniques

Plaintiffs argue that Prohibited Techniques are not limited to any particular state operated location. (Pl. Memo. at 4-5.) Plaintiffs contend that the Settlement Agreement's System Wide Improvements provision and corresponding CPA Evaluation Criteria, and Recital 7 extend application of the provisions of the Settlement Agreement, including Prohibited Techniques, to all state operated locations, including FMHP and AMRTC. (*Id.* at 4-6.)

Plaintiffs also cite a document entitled "DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions on Restrictive Interventions" ("SONAR")[6] to support their position. (*Id.* at

[6] The SONAR document may be found at https://www.leg.state.mn.us/archive/sonar/SONAR-04213.pdf.

6.) The SONAR provides, "the Department also agreed more broadly in the Comprehensive Plan of Action to prohibit restraint and seclusion in all licensed facilities and settings, consistent with the above-noted legislative directive in Minnesota Statutes section 245.8251." SONAR at 40. Finally, Plaintiffs cite a 2015 letter to the Court from the DHS Commissioner that states:

> 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 DRS-licensed settings when serving a person with a developmental disability and 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.

(Pl. Memo. at 6-7 (citing Doc. No. 503 at 1-2 ("Letter")).) Plaintiffs contend that Defendants' own statements affirm and admit that the Prohibited Techniques apply to individuals with developmental disabilities at all state operated locations. (*Id*. at 6.)

Defendants argue that the plain language of Settlement Agreement, including its scope and definitions of "Facility" and "Resident", unambiguously restricts the Prohibited Techniques provision to Facilities. (Def. Memo. at 14.) Defendants similarly contend that the plain language of Recital 7 reflects only a goal to extend the application of the provisions in the Agreement to all state operated locations, and that they are not bound to accomplish that goal as to any particular term of the Settlement Agreement. Accordingly, Defendants contend that Prohibited Techniques do not apply to FMHP and AMRTC. (*Id.*)

Defendants argue further that the System Wide Improvements do not require that the rule modernization provision apply Prohibited Techniques outside of the Facility. (*Id.* at 16.) With respect to Evaluation Criterion 99, Defendants assert that they engaged the Rule 40 Advisory Committee "to study, review, and advise the Department on how to modernize Rule 40 to reflect current best practices" and that the Advisory Committee issued its "Recommendations on Best Practices and Modernization of Rule 40" on July 2, 2013. (*Id.* at 18 (citing Settlement Agreement at 19; CPA at 31); *see also* Doc. No. 219-1 ("Advisory Committee Recommendations").) Defendants contend because the Advisory Committee Recommendations did not establish a complete prohibition of mechanical restraint as a best practice that the rule modernization was required to reflect, settings outside of the Facility are not subject to the strict provisions of Prohibited Techniques. (*Id.* at 3-4 (citing Advisory Committee Recommendations at 20-21).)

Defendants further contend that some use of mechanical restraint is consistent with best practices when used to prevent risk of physical injury to self, staff, or others. (*Id.* at 7-10, 20.) Defendants assert that "reliance solely on emergency use of manual restraint would sometimes, depending on the individual and situation, create a greater risk of harm to the individual, staff, or others relative to mechanical restraint." (*Id.* at 10, 20.)

In short, Defendants argue that while mechanical restraints are sometimes used at settings outside of the Facility, limited use of mechanical restraint actually reflects "best practice." Contrary to Plaintiffs' assertion, Defendants also contend that the SONAR does not express any intent to completely prohibit mechanical restraint. Defendants cite a

separate section of the SONAR which qualifies that there are exceptions to the procedures subject to Minn. Stat. § 245D.06 prohibition:

> The statutory subdivision also qualifies the list by stating that these techniques are prohibited when used as a substitute for adequate staffing, for a behavioral or therapeutic program to reduce or eliminate behavior, as punishment, or for staff convenience. The qualification allows for the possibility of the rare, unforeseeable circumstance in which a practice that is ordinarily unacceptable may have a momentary, acceptable purpose. Therefore, it is when the practices are used for the prohibited reasons that the practice is prohibited. The inclusion of the phrase for a behavioral or therapeutic program to reduce or eliminate behavior demonstrates that planned, programmatic use of the prohibited practices is not permitted.

SONAR at 40 (internal quotation marks and citations omitted.) Defendants similarly contend that when read in its entirety, the Letter actually describes DHS' intent to continue to allow mechanical restraint under limited circumstances. (*Id.* at 23 (citing Letter at 1-2).) Consequently, Defendants argue that they have complied with the unambiguous language of Evaluation Criterion 99 which does not require complete prohibition of mechanical restraints, and that even if the language was ambiguous, any of their subsequent conduct on the subject does not demonstrate any intent to agree to complete prohibition. (*Id.* at 24.)

The Court finds that the language of the Agreement unambiguously limits Prohibited Techniques to Facilities. The Settlement Agreement specifically states that "[t]he scope of [Defendants'] obligations regarding people with developmental disabilities in the [Settlement] Agreement pertain only to the residents of the Facility, with the exception of the provisions of Recitals, Paragraph, and Section X, 'System Wide Improvements.'" (Settlement Agreement at 5-6.) Prohibited Techniques is not listed as

one of the exceptions to the Facility-specific scope. The Settlement Agreement defines "Facility" as "the Minnesota Extended Treatment Options ("METO") program, its Cambridge successor, and two new adult foster care transitional homes to which residents of METO have been or may be transferred," and "Resident" as "a person residing at the Facility." (*Id.* at 5.) The CPA similarly provides that "Facility" and "Facilities" means MSHS-Cambridge, the MSOCS East Central Home established under the Settlement Agreement, and the treatment homes established (or to be established under this [CPA]." (CPA at 2.) The Court finds that because FMHP and AMRTC are not listed as Facilities, they are not subject to the strict provisions of Prohibited Techniques.

Notwithstanding, the Court finds that the System Wide Improvements provision related to Rule 40 also unambiguously requires Defendants to "modernize Rule 40 to reflect current best practices." (Settlement Agreement at 19.) While Defendants argue that they have complied with Evaluation Criterion 99 because their use of mechanical restraint at FMHP and AMRTC reflects current best practices and that the Positive Supports Rule appropriately applies the Advisory Committee Recommendations, the Court requires additional information before it makes such a determination.[7]

The Court Advisory Committee Recommendations on the use of mechanical restraint for self-injurious behavior specifically state:

> Some committee members acknowledge that sometimes, albeit rarely, situations arise where temporary use of mechanical restraints for self-

[7] The Court observes that not all members of the Advisory Committee agreed that some use of mechanical restraint represents best practices. (Advisory Committee Recommendation at 21.)

injurious behavior should be permitted. Some advisory committee members recommended that a provider may temporarily continue the use of mechanical restraints when:

- The person exhibits serious self-injurious behavior;
- The person comes into a DHS regulated setting from a setting where mechanical restraints are permitted;
- Immediate removal of the mechanical restraint has been initiated and was routinely used in other settings; and
- Positive behavioral support strategies have been tried.

Some committee members acknowledge that although the use of mechanical restraints needs to be eliminated, when an individual coming from other settings and has become dependent on the use of mechanical restraints, immediate cessation may present an unwarranted risk to the person.

Some committee members believe the use of any mechanical restraints does not represent best practices and should be prohibited.

Advisory committee members were not able to come to consensus on the use of mechanical restraints such as the use of seat belt restraints, guided escort, arm limiters, or other mechanical restraints intended to protect the individual from serious self-injurious behavior. Some committee members recommend seat belt restraints be permitted with a plan in place to move away from the dependency; they consider seat belt adapters to be different from mechanical restraints. Other committee members consider seat belt restraints like any other mechanical restraint that will be strictly prohibited with the exception of use during an implementation period.

Some committee members recommend specifically allowing the use of arm limiters when such use is under the care of a highly qualified mental health professional and used to prevent serious self-injurious behavior. The highly qualified mental health professional would develop and oversee the positive strategies used to wean the person's use of the arm limiters. The use of arm limiters would not be subject to an arbitrary time limit. Permitted use would be based on the person's progress. If progress plateaus, then additional mental health professionals should be consulted. The minimum professional level required to use arm limiters with a person would be a staff person subject to the third tier of the recommended staff training. The advisory committee recommends all of the same notifications, reporting requirements and monitoring as the Emergency Use of Manual Restraint section. Some committee members recommend that data be collected, analyzed and shared publicly while in compliance with HIPAA privacy.

(Advisory Committee Recommendations at 20-21.)

To properly determine whether Defendants' use of mechanical restraint at FMHP and AMRTC reflects current best practices, the Court finds that an external review is required. An external review will allow Defendants the opportunity to demonstrate that they appropriately limit the use of mechanical restraint to prevent self-injurious behavior, that it is applied in accordance with the Advisory Committee's Recommendations, and that it reflects progress towards their "goal" to apply the provisions of the Agreement to all state operated locations.

II. Positive Supports Rule

Plaintiffs contend that the Agreement's requirement to revise and modernize Rule 40 and replace it with the Positive Supports Rule "highlight[s] the Agreement's protection from restraint and seclusion for people with developmental disabilities in state operated locations." (Pl. Memo. at 12-13.) Plaintiffs contend that "over the years, the Settlement Class and Consultants have called out DHS' attempts to avoid its requirements in the Agreement through misguided variances, exemptions, amendment, and incorrect positions on the Positive Supports Rule." (*Id.* at 14.) Plaintiffs contend that continued use of mechanical restraint and seclusion at FMHP and AMRTC creates a "very real danger facing vulnerable citizens." (*Id.*)

Defendants argue that there are no unresolved issues related to the Positive Supports Rule. (Def. Memo. at 25.) Defendants assert that pursuant to Evaluation Criterion 103, they established a Work Group that met from the summer of 2016 to

November 2017 to address concerns with the Advisory Committee Recommendations. (*Id.* at 4.) Defendants also assert that the Work Group ultimately concluded that "there were no advisory committee recommendations not adequately addressed by the Positive Supports Rule through other avenues, such as DHS action." (*Id.* (citing Doc. No. 745 ¶ 6.) Defendants argue that since the Work Group's decision to stop meeting in November 2017, no unresolved issues regarding the Advisory Committee Recommendations have been reported. (*Id.*)

Defendants argue further that Plaintiffs do not specifically identify a modification to the Olmstead Plan goals relating to prohibited restraints, or comment on any elements of the March 2019 Revision, and that any unaddressed element pursuant to Evaluation Criteria 103 is time barred. (Def. Memo. at 27.) Defendants contend that Plaintiffs "simply believe incorrectly" that the Agreement prohibits any use of mechanical restraint at all state operated facilities.

As stated above, the Court finds that the Agreement unambiguously limits the strict provisions of Prohibited Techniques to Facilities. Therefore, some use of mechanical restraint at FMHP and AMRTC may be appropriate, provided its limited use reflects current best practices. The Court agrees with Plaintiffs to the extent that inappropriate use of mechanical restraint may pose a very real danger to vulnerable citizens, and that the Olmstead Plan may require modification to address inappropriate use. Because the Court needs additional information to properly determine whether

Defendants' use of mechanical restraint at FMHP and AMRTC reflects current best practices, the Court cannot yet consider the *Olmstead* Plan March 2019 revision.[8]

While Defendants contend that any unaddressed elements of the Advisory Committee Recommendations are time barred, the Court notes that Evaluation Criterion 104 unambiguously states that Defendants "shall implement the Adopted Rule and take other steps to implement the recommendations of the Rule 40 Advisory Committee." (CPA at 33.) The Court finds that an External Review to properly ensure that Defendants' use of mechanical restraint reflects best practices, and application of the Advisory Committee's Recommendations is an appropriate "step to implement the recommendations of the Rule 40 Advisory Committee."

ORDER

Based upon the presentations and submissions before the Court, and the Court being otherwise duly advised in the premises, **IT IS HEREBY ORDERED** that:

1. **External Reviewer**: The parties must meet and confer no later than December 30, 2019 to select an External Reviewer. If the parties agree, they must notify the Court via email by January 3, 2020. If the parties are unable to agree upon an External Reviewer, each party must nominate two individuals they would like to perform the external review to the Court via email by January 3, 2020. The Court will then select an External Reviewer and notify the parties.

[8] The Court recognizes that the 2020 revision is forthcoming and advises that its consideration of that revision is similarly constrained pending the External Reviewer's findings.

2. **External Review**: The External Reviewer must address the extent to which Defendants' use of mechanical restraint at the Forensic Mental Health Program and Anoka Metro Regional Treatment Center reflects current best practices, specifically quantifying the type, frequency, and duration of mechanical restraint at each location, and identifying whether Positive Supports were attempted prior to use.

3. **Report**: The External Reviewer must complete an initial report prior to March 13, 2020, unless a different date is adopted by the Court. Defendants will have ten days to respond to the initial External Reviewer report. The External Reviewer will submit a final report within ten days after receipt of Defendants' response, or within ten days of submission of the initial report, if Defendants do not make a response. Defendants will share the final reports with Plaintiffs' Class Counsel, the Consultants, and the Court.

4. **Response**: After the final report has been submitted, Consultants will have ten (10) business days to file statements with the Court. After the Consultants have filed their statements, Plaintiffs will have seven (7) business days to file a statement with the Court.

Dated: December 17, 2019

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge