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,

vs.

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 FILE NO. 09-CV-01775 (DWF/BRT)

STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STAY DECEMBER 18, 2019 ORDER PENDING APPEAL

INTRODUCTION

Over eight years ago, the Court approved a settlement agreement in connection with a lawsuit arising from the alleged "use of seclusion and mechanical restraints routinely imposed upon patients of the Minnesota Extended Treatment Options program (METO)," one of many DHS-operated facilities. (Doc. No. 3 at ¶ 1.) Now, the Court wants to appoint someone to look at the use of restraint at two different DHS-operated facilities, the Forensic Mental Health Program (formerly the Minnesota Security Hospital) (FMHP) and Anoka Metro Regional Treatment Center (AMRTC), even though the settlement agreement contains no provision authorizing such a review and no party asked the Court to undertake this review.

The Court's un-asked-for intrusion into DHS's operation of these two facilities also plainly violates the state agency's sovereignty, and principles of federalism prohibit the Court's actions. For these reasons, Defendants State of Minnesota and the Minnesota Department of Human Services ("State Defendants") are appealing the Court's December 18, 2019 Order and ask this Court stay the order pending State Defendants' appeal.

FACTUAL BACKGROUND

Over ten years ago, Plaintiffs sued State Defendants (and others) over the use of "mechanical restraints routinely imposed upon patients of the M[ETO]." (Doc. No. 3 at ¶ 3.) Two years later – and over eight years ago – the Court issued its Final Approval Order for Stipulated Class Action Agreement approving the parties' Settlement Agreement, and dismissed this case with prejudice. (Doc. Nos. 136, 136-1.) The

Settlement Agreement called for, among other things, the closure of METO (Doc. No. 136-1 at 6); prohibition of certain kinds of restraints and seclusion at METO, its "successor, and the two new adult foster care transitional homes to which residents of METO have been or may be transferred," (Doc. No. 136-1 at 5-9); development and implementation of an *Olmstead* Plan, (Doc. No. 136-1 at 18); and the organization and convening of a Rule 40 Advisory Committee "to study, review, and advise the Department on how to modernize Rule 40 to reflect current best practices…."[1] (Doc. No. 136-1 at 19.)

In 2014, the parties agreed to what became known as the "Comprehensive Plan of Action" ("CPA"). (Doc. No. 271-1.) The CPA arose out of a requirement set by the Court to "submit a proposed Implementation Plan for the Court's review and approval" that would "encompass the Settlement Agreement requirements (aside from Rule 40 and the *Olmstead* Plan)." (Doc. No. 224 at 3.) The CPA included Evaluation Criteria that "set forth outcomes to be achieved and [that] are enforceable" (Doc. 283 at 1), and required DHS hire at least six full-time professional staff to work on issues related to the CPA and *Olmstead* Plan. (Doc. No. 283 at 1.)

It is undisputed that (1) METO closed (Doc. No. 340 at 6, n.1); (2) there is no use of prohibited restraint or seclusion at METO's successor or the two adult foster care transitional homes subject to the prohibition (Doc. No. 775-1 at 3); (3) the State developed and implemented an *Olmstead* Plan that this Court approved (Doc. No. 510);

[1] Rule 40 refers to the now-repealed predecessor to the Positive Supports Rule.

and (4) DHS organized and convened a Rule 40 Advisory Committee, as required by the Settlement Agreement (Doc. Nos. 136-1 at 19, 219-1).

I. RELEVANT PORTIONS OF THE SETTLEMENT AGREEMENT AND CPA.

A. The Settlement Agreement And CPA's Definition Of "Facility" Excludes FMHP And AMRTC.

The Settlement Agreement prohibits the use of certain kinds of restraint and seclusion only at what the Settlement Agreement defined as the "Facility," "the Minnesota Extended Treatment Options ('METO') program, its Cambridge, Minnesota successor, and the two new adult foster care transitional homes to which residents of METO have been or may be transferred." (Doc. No. 136-1 at 5 (defining "Facility").) The Settlement Agreement does not prohibit the use of restraint or seclusion at other DHS-operated facilities. (Doc. No. 136-1 at 5–7, 12.) The CPA also does not prohibit the use of restraint or seclusion at FMHP or AMRTC. (Doc. No. 283 at 2 (defining "Facility" or "Facilities" subject to the prohibition)). The Court recognized that the Settlement Agreement and CPA definition of "Facility" do not include FMHP or AMRTC. (Doc. No. 779 at 11-12.)

B. The Role Of The External Reviewer.

The Settlement Agreement provides than an External Reviewer will report every three months on whether "*the Facility* is in substantial compliance with this Agreement

and the policies incorporated herein."[2] The Settlement Agreement further provides that the parties could then respond, and the External Reviewer would then issue a final report. (*Id*., p. 12 (emphasis added).) Similarly, the CPA states that "the External Reviewer issues written quarterly reports informing the Department whether the Facility is in substantial compliance with the Agreement and the incorporated policies." (Doc. No. 283, pp. 13-14.) As noted above, neither the Settlement Agreement nor the CPA definitions of "Facility" include either FMHP or AMRTC. (Doc. No. 136-1 at 5–7, 12; Doc. No. 283 at 2.) Nor do the Settlement Agreement or the CPA contain any provision authorizing the Court to appoint a different external reviewer to evaluate restraint compliance outside the "Facility."

The Court, however, ordered the appointment of an "external reviewer" in its December 18 Order to "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." (Doc. No. 779 at 17.) This new "external reviewer," thus appears to be an entirely separate role first created by the Court in its December 18 Order.

[2] The Settlement Agreement further states, in part, that the External Reviewer "shall issue quarterly reports to the Court for the duration of this Agreement" that "describe whether *the Facility* is operating consistent with best practices, and with this Agreement," and that the reports shall be filed with the Court. (*Id*. (emphasis added).)

C. The Rule 40 Modernization Process And Referral Of Unresolved PSR-Related Issues To The Olmstead Process.

The implemented Positive Supports Rule ("PSR") at Minn. R. chapter 9544, the product of the Rule 40 modernization process, "establishes methods, procedures, and standards to be used by providers governed by this chapter for the use of positive support strategies with persons receiving services. The purpose of these rules is to improve the quality of life of persons receiving home and community-based services." Minn. R. 9544.0005. The PSR applies "to providers of home and community-based services to persons with a disability or persons age 65 and older governed by Minnesota Statutes, chapter 245D" and to "other licensed providers and in other settings licensed by the commissioner under Minnesota Statutes, chapter 245A, for services to persons with a developmental disability or related condition." Minn. R. 9544.0010, subps. 1, 2. Because DHS does not license AMRTC (*see* Doc. No. 759 at 7; Doc. No. 760 at 2, ¶ 4), the PSR plainly does not apply there, which appears to be uncontested.

The section of the Settlement Agreement dealing with Rule 40 (section X.C), which resulted in the PSR, set forth a process by which Defendants "shall organize and convene a Rule 40 (Minn. R. 9525.2700-.2810) Advisory Committee . . . to study, review and advise the Department on how to modernize Rule 40 to reflect current best practices." (Doc. No. 136-1 at 19.) The CPA (EC 103) sets forth "a time-limited procedure by which unresolved issues relating to the PSR could be routed through the *Olmstead* amendment process, and potentially to the Court." (Doc. No. 759 at 25-26; *see also* Doc. No. 283 at 33 (setting forth EC 103).) No unresolved issues were routed

through the *Olmstead* process or to the Court. (Doc. No. 743 at 8-9; Doc. No. 759 at 4, 26-27.) No other provision of the Settlement Agreement or CPA allows the Court to involve itself with the PSR or restraint-related content in the *Olmstead* Plan.

II. THE BURDEN ON DEFENDANTS.

While the December 18 Order is silent about who will pay for the reviewer, it appears that Defendants may again be required to pay for a costly review.[3] Just seven months ago, the Court ordered Defendants to retain a specific Subject Matter Expert to review and report on certain ECs relating to use of prohibited techniques. (Doc. No. 737 at 38-40.) The Court also ordered DHS retain an expert to review certain ECs related to staff training. (Doc. No. 737 at 39–40.) That expert, Dr. Gary LaVigna, charged DHS $500 per hour and agreed to cap the hours spent on his review to 120 hours. (*See* Jan. 9, 2020 Declaration of Margaret Fletcher-Booth ¶ 2, Ex. 1 (invoice).) Overall, Dr. LaVigna charged DHS $60,000 for the Court-ordered review of these ECs.[4] (*See id*. ¶¶ 3-4.)

III. THE DECEMBER 18, 2019 ORDER.

On June 17, 2019, the Court ordered the parties to either stipulate to, or inform the Court of their separate positions regarding, any matters that must be resolved before the Court's consideration of revisions to the *Olmstead* plan. (Doc. No. 737 at 40.) The parties filed separate submissions, noting disagreements regarding the scope of the

[3] Resolution of this issue, however, is not dispositive of this motion, as each pertinent factor weighs in favor of granting a stay regardless of who pays for the cost of the review.
[4] This expense added to the substantial amounts of taxpayer dollars that Defendants have had to pay throughout this case, including over $1 million to pay the Court Monitor. (*See, e.g.*, Doc. No. 659 (affidavit describing the costs of JOQACO staff and reporting requirements)).

Settlement Agreement and whether Plaintiffs have demonstrated substantial noncompliance by Defendants. (Doc. Nos. 753, 754.) After briefing, the Court issued the December 18, 2019 Order. (Doc. No. 779.)

The December 18 Order concludes, in part, that, "[t]he Court finds that because FMHP and AMRTC are not listed as Facilities, they are not subject to the strict provisions of Prohibited Techniques." (Doc. No. 779 at 3-12.) The Order goes on, however, to state, "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." (Doc. No. 779 at 12.) The Order later states:

> 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.

(Doc. No. 779 at 14.) The Court then ordered the following:

> (1) The parties must meet and confer by December 30, 2019 "to select an external reviewer" and, if unable to agree, each party must nominate two individuals they would like and inform the Court by email on Jan. 3, 2020; the Court will "then select the [reviewer] . . . .";
>
> (2) The reviewer "must address the extent to which Defendants' use of mechanical restraint at [FMHP and AMRTC] 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) The reviewer "must complete an initial report prior to March 13, 2020," unless a different date is adopted by the Court. Defendants then have 10 days to respond. The reviewer "will submit a final report" within 19 days after receipt of Defendants' response, or within 10 days of submission of the final report if Defendants do not respond. "Defendants will share the final reports [sic][5] with Plaintiffs' Class Counsel, the Consultants, and the Court."

(Doc. No. 779 at 16-17.) The Order allows the Consultants and Plaintiffs to file statements with the Court regarding the external reviewer's report, but does not allow Defendants the opportunity to respond. (Doc. No. 779 at 17.)

STANDARD OF REVIEW

Fed. R. Civ. P. 62(c) provides for a stay of a district court order or judgment so that a party may meaningfully exercise its right of appeal. Rule 62(c) states that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." "The purpose of a stay is to preserve the status quo of the parties." *Asarco LLC v. NL Indus., Inc.*, No. 4:11–CV–00864–JAR, 2013 WL 943614, at *3 (E.D. Mo. Mar. 11, 2013).

The Court must consider four factors in deciding whether to issue a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;

[5] The plural "reports" appears to be a typographical error.

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

See Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (citations omitted).

"Ultimately, [the Court] must consider the relative strength of the four factors, 'balancing them all.'" *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (citation omitted). For instance, " [c]lear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury." *Id*. (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984) (citation omitted). Application of these factors requires a stay or suspension of the Court's December 18, 2019 Order pending resolution of Defendants' appeal.[6]

[6] The Court's December 18 Order is appealable under 28 U.S.C. § 1292(a)(1) as an order modifying an injunction. *See Mikel v. Gourley*, 951 F.2d 166, 168–69 (8th Cir. 1991); *Jones-El v. Berge*, 374 F.3d 541, 543–44 (7th Cir. 2004). Court orders incorporating the terms of a settlement agreement are equivalent to injunctions, *see Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1187 (8th Cir. 1984), and the December 18 order modifies the Court's order approving the Settlement Agreement, because it purports to create new obligations under that Agreement. The Order is also appealable as a final order, because further proceedings will not produce a more final order regarding the requirement to conduct an external review, and there is no danger of piecemeal litigation as the merits of the case have already been litigated. *See* 28 U.S.C. § 1291; *Miller v. Alamo*, 975 F.2d 547, 549–50 (8th Cir. 1992); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). The Order squarely falls under the collateral order doctrine, because (1) it conclusively determines that the required external review is within the scope of the Settlement Agreement; (2) this issue is distinct from the underlying merits of the case; and (3) there will be no more final judgment from which to appeal. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); *Jensen v. Minnesota Dep't of Human Servs.*, 897 F.3d 908, 912 (8th Cir. 2018).

ARGUMENT

I. DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS.

This Court's jurisdiction over this matter is governed solely by the terms of the Settlement Agreement. *See Miener v. Missouri Dept. of Mental Health*, 62 F.3d 1126, 1127 (8th Cir. 1995); *Roberts v. Ocwen Loan Servicing*, LLC, 617 F. App'x 613, 614 (8th Cir. 2015) (dismissing a federal action to enforce settlement agreement when brought outside that agreement's 60-day jurisdiction retention period); *4:20 Commc'ns, Inc. v. Paradigm Co.*, 336 F.3d 775, 778 (8th Cir. 2003) (dismissing federal action to enforce settlement agreement when brought outside that agreement's 90-day jurisdiction retention period).

That Settlement Agreement is a contract, governed by Minnesota contract law. *See American Prairie Constr. Co. v. Hoich*, 594 F.3d 1015, 1023 (8th Cir. 2010); *Sheng v. Starkey Labs., Inc.*, 53 F.3d 192, 194 (8th Cir. 1995) ("Settlement agreements are governed by basic principles of contract law."). Under Minnesota law, where contract language is clear and unambiguous, there is no room for interpretation or construction. *Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1436 (8th Cir. 1995). Contracts should be given their plain and ordinary meaning. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998); *Barry v. Barry*, 78 F.3d 375, 382 (8th Cir. 1996). Minnesota courts construe contracts as a whole, harmonizing all clauses. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990). Courts do not read portions of the contract in isolation, *River Valley Truck Ctr., Inc. v. Interstate Companies, Inc.*, 704 N.W.2d 154, 163 (Minn. 2005), and

avoid interpretations that will render a provision meaningless or lead to a harsh and absurd result. *Chergosky*, 463 N.W.2d at 526; *Brookfield Trade Ctr.*, 584 N.W.2d at 394.

A. The Settlement Agreement And CPA Only Allow For A Reviewer To Evaluate The "Facility."

First, nothing in the Settlement Agreement permits the Court to appoint an external reviewer to review the use of mechanical restraint at FMHP or AMRTC. As noted—and as the Court acknowledged—the Settlement Agreement's prohibitions relating to restraint apply only to the specific facilities identified in the Settlement Agreement. (Doc. No. 136-1 at 5–7, 12; Doc. No. 779 at 15.) The only "external reviewer" mentioned in the Settlement Agreement is an individual who will report on whether these facilities are operating consistent with the Settlement Agreement and best practices. (Doc. No. 136-1 at 11–13.) This individual is to be the counterpart of an "internal reviewer"—a DHS employee who is responsible for monitoring the facilities' use of restraints. (Doc. No. 136-1 at 10–11.)

To the extent that the Court relies on the Settlement Agreement's provision for an "External Reviewer," that reliance is misplaced, as the Court's December 18 Order expands the role of an external reviewer far beyond anything contemplated in the Settlement Agreement. Indeed, the December 18 Order apparently grants the "external reviewer" authority to review and report on all uses of mechanical restraint at both FMHP and AMRTC, neither of which is included in the Settlement Agreement as one of the "Facilities" subject to external review. (Doc. No. 779 at 16–17.)

By creating a new "external reviewer" not contemplated by the Settlement Agreement, and imposing obligations on facilities not identified in that agreement, the Court failed to interpret the language of the Settlement Agreement in a manner consistent with the intent of the parties. *See Lang v. Gen. Ins. Co. of Am.*, 127 N.W.2d 541, 545 (1964); *Olympus Ins. Co. v. AON Benfield, Inc.*, 711 F.3d 894, 899 (8th Cir. 2013). Indeed, the Court's interpretation would create an absurd result, given the parties' careful limitations on both the role of the External Reviewer and the facilities subject to monitoring and the restrictions on Prohibited Techniques. (*See* Doc. No. 136-1 at 6–9, 11–13.) If the Court may, consistent with the Settlement Agreement, appoint other reviewers to monitor and report on other facilities, then the specific and limited provisions agreed to by the parties are effectively meaningless. Because the parties cannot have intended such an absurd result, Defendants are further likely to prevail on appeal. *See Chergosky*, 463 N.W.2d at 526; *Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge of Hallock, Minn.*, 282 Minn. 477, 479-80, 165 N.W.2d 554, 556 (1969).

B. Neither The Settlement Agreement Nor The CPA Requires Restraint Use At Any Particular Location To Comport With "Current Best Practices."

The December 18 Order appears to conclude that the Settlement Agreement or CPA requires the use of restraint at FMHP and AMRTC to comport with "current best practices." (*See* Doc. No. 779 at 14 (ordering a review to "properly determine whether Defendants' use of mechanical restraint at FMHP and AMRTC reflects current best practices.").) While the unrebutted evidence in the record shows that such use comports with best practices (Doc. No. 759 at 7-10, 20), the Settlement Agreement and CPA do not

make Defendants' compliance contingent on how restraints are used at any particular location.

The unambiguous language of the Settlement Agreement and CPA contain no requirement that restraint use at any particular location comply with current best practices. The only references to restraint-related best practices in those documents require that *the content of the modernized PSR* reflect "current best practices" as of the time of modernization, not that mechanical restraint use at any particular location reflect current best practices years later. (*See* Doc. No. 79 at 6-7) (quoting Section X.C the Settlement Agreement (a Rule 40 Advisory Committee must be convened to "study, review, and advise the Department on how to *modernize Rule 40 to reflect current best practices* . . .") and EC 99 ("As stated in the Settlement Agreement, the *modernization of Rule 40 which will be adopted under this [CPA] shall reflect current best practices* . . ."). As noted, no party brought any unresolved issues related to Rule 40 to the *Olmstead* Subcabinet or this Court. (Doc. No. 743 at 8-9; Doc. No. 759 at 4, 26-27.)

Second, contrary to the Court's apparent conclusion (*see* Doc. No. 779 at 16), use of mechanical restraint in a particular setting could not possibly violate EC 104's requirement that Defendants "implement [the PSR] and take other steps to implement the recommendations of the Rule 40 Advisory Committee." (Doc. No. 283 at 33.) The PSR was indisputably put into effect over four years ago, on August 31, 2015.[7] (Doc. No. 710

[7] The verb "implement" means to "put (a decision, plan, agreement, etc.) into effect." *Implement*, Oxford New American Dictionary 873 (3d ed. 2010) ("*the regulations implement a 1954 treaty*"). By promulgating the Positive Supports Rule, DHS "put [the
(Footnote Continued on Next Page)

at 224–25.) It applies to "providers of home and community-based services to persons with a disability or persons age 65 and older governed by Minnesota Statutes, chapter 245D" and "other licensed providers and in other settings licensed by the commissioner under Minnesota Statutes, chapter 245A, for services to persons with a developmental disability or related condition," Minn. R. 9544.0010, subps. 1, 2. Even if a reviewer concluded that certain instances of mechanical restraint use in a particular setting did not comport with "current best practices," that would therefore do nothing to rebut that the PSR has been implemented. As to "other steps to implement the recommendations of the Rule 40 Advisory Committee" (Doc. 779 at 8), Defendant has already explained at least twice – with no dispute from Plaintiffs – that the stakeholders already agreed there were no other such recommendations not addressed in the PSR. (Doc. No. 743 at 8-9; Doc. No. 759 at 4.)[8]

(Footnote Continued from Previous Page)
rule] into effect." *See id.*; *see also Lebanon Farms Disposal, Inc. v. Cty. of Lebanon*, No. 1:CV-03-0682, 2004 WL 7338460, at *12 (M.D. Pa. July 9, 2004) ("[I]n common usage of the word, something is 'implemented' only at the time it is initially given practical effect or commenced, such as when a plan first goes into effect.").

[8] The December 18 Order also states that "to the extent that inappropriate use of mechanical restraint may pose a very real danger to vulnerable citizens . . . the Olmstead Plan may require modification to address inappropriate use . . . the Court cannot yet consider the *Olmstead* Plan March 2019 revision." (Doc. No. 779 at 15.) That revision does not suggest changes to the substance of the Plan related to mechanical restraint, however. (Doc. No. 725-1) The Court may not issue whatever directives it believes appropriate related to mechanical restraint in the absence of authorization in the Settlement Agreement or in law; nor have Plaintiffs asked for that remedy. *See Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1194 (8th Cir. 1984) ("The judicial branch of the government is not and should never become an advocate for private causes.").

C. The PSR Does Not Apply At AMRTC.

Aside from the foregoing, Defendants are deeply concerned about the Court's assertion of authority to review mechanical restraint use at AMRTC in particular. The relevant portion of the Settlement Agreement, and ECs 99-104, relate to "Modernization of Rule 40," and EC 99 states that the scope of Rule 40 modernization includes "programs, settings, and services licensed by the Department." (Doc. No. 283 at 32. (emphasis added).) Defendant does not license AMRTC, and the PSR accordingly does not govern restraint use at AMRTC. (*See* Doc. No. 759 at 19 & n.8); Minn. R. 9544.0010, subps. 1, 2. Even if the Court's reading of EC 99 and 104 were otherwise correct, the CPA therefore does not require the PSR to have been implemented at AMRTC and attempting to review restraint practices there plainly oversteps the Court's authority.

D. The December 18 Order Erroneously Places The Burden To Demonstrate Compliance On Defendants.

As detailed in Defendants' brief preceding the December 18 Order, Defendants have asked the Court to simply state "the applicable legal standard the Court is using to determine the circumstances under which it will end its involvement in this matter, including what specific actions remains outstanding," but the Court has refused to do so. (*See* Doc. No. 759 at 10-12.) In requesting the briefing preceding the December 18 Order, the Court specifically asked, to the extent the parties identified a dispute about restraint-related issues, for the parties to "propose a process for the Court to resolve the dispute consistent with the enforcement proceedings set forth in the Settlement

Agreement or other procedure permitted pursuant to the Agreement." (Doc. No. 737 at 39, 40.) Accordingly, Defendants set forth in their brief that Plaintiffs have the burden under the Settlement Agreement to bring an enforcement proceeding and demonstrate "a pattern and practice of substantial non-compliance." (Doc. No. 759 at 29-30.)

Despite the Court's specific request for briefing on this issue, the December 18 Order holds that the Court "did not request the parties to address the legal standard under which the Court should resolve the issues," but that "each party argued its position anyway." (Doc. No. 779 at 3 n.4.) The December 18 Order then states that "the Court requires additional information before it can properly resolve the issues" but does not explain why the Court cannot state the standard it believes is imposed by the Settlement Agreement. The Court's request for "more information," however, makes clear that it has placed on Defendant the burden to demonstrate compliance with the Settlement Agreement, characterizing the ordered review as:

> *allow[ing] Defendants the opportunity to demonstrate* that they appropriately limit the use of mechanical restraint to prevent self-injurious behavior,[9] 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.[10]

[9] As explained in prior briefing, mechanical restraint may be appropriately used for purposes other than prevention of self-injurious behavior, for instance to prevent injury to others, or to avoid use of manual restraint on individuals for whom such restraint would be re-traumatizing because of a history of physical or sexual assault. (*See* Doc. No. 759 at 8-10.) Defendants assume the Court's statement limiting the appropriate uses of mechanical restraint was an oversight, but ask the Court to clarify if not.

[10] Nothing in the Settlement Agreement or CPA requires Defendants to demonstrate progress towards the goal the Court refers to.

(Doc. No. 779 at 14 (emphasis added).) The practical effect of this is to require nothing of Plaintiffs, and to place on Defendants the financial and legal burden of proving – to whatever still-unknown level is sufficient to satisfy the Court – that they are not violating the Settlement Agreement. This is contrary to governing law and the plain language of the Settlement Agreement. *See Brown v. Farnham*, 60 N.W. 344, 345 (Minn. 1894) ("In an action for breach of contract the burden is on the [p]laintiff to prove the breach, unless the same is admitted by the pleadings."); (*see also* Doc. No. 759 at 29-30).

E. The December 18 Order Violates Defendants' Due Process Rights.

The December 18 Order is also improper in that it takes action Defendants had no notice the Court contemplated. The Court's preceding order asked the parties to brief "whether there are disputes" or "issues" for the Court to decide, not whether the court should, or could, order review of mechanical restraint use at FMHP or AMRTC. (Doc. No. 737 at 39-40.) "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 52 (1965)). Relatedly, Plaintiffs did not request review of restraint use for best practices, present any evidence supporting such a request, or identify any dispute about Defendants' compliance with ECs 103 or 104. (*See* Doc. No. 756 at 1-25.) They instead contended solely – and as the Court has confirmed, incorrectly, (*see* Doc. No. 779 at 11) – that the Settlement Agreement and CPA completely prohibit mechanical restraint anywhere. (Doc. No. 779 at 7-16.) Defendant had no opportunity to respond to anything other than this argument, and it is improper for the Court to *sua sponte* identify different issues not raised by

Plaintiffs. *See Gardiner*, 747 F.2d at 1194 ("The judicial branch of the government is not and should never become an advocate for private causes.").

II. THE COURT'S INJUNCTION WOULD SUBJECT DEFENDANTS TO IRREPARABLE HARM IF IT IS NOT STAYED OR SUSPENDED PENDING APPEAL.

Denial of this motion would irreparably harm Defendants. It is the "quintessential form of prejudice" when denial of a stay would effectively deprive a party of its right to appeal. *In re Country Squire Assoc. of Carle Place, L.P.*, 203 B.R. 182, 183 (B.A.P. 2d 12 Cir. 1996) (quoting *In re Advanced Min. Sys., Inc.*, 173 B.R. 467, 469 (S.D.N.Y. Oct. 5, 1994)). Accordingly, "de facto deprivation of the basic right to appeal" constitutes a "strong showing of irreparable harm."[11] *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003). Indeed, many courts have concluded that the effective loss of appellate rights alone constitutes *per se* irreparable harm. *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 WL 3288092, at *6-7 (E.D.N.C. June 28, 2013) (citing *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 347-49 (S.D.N.Y. 2007); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 522 (Bankr. W.D. Tex. 2000); *Country Squire*, 203 B.R. at 183). "[W]here the denial of a stay pending appeal risks mooting any appeal of significant claims of error, the irreparable harm requirement is satisfied." *Adelphia*, 361 B.R. at 348 (emphasis in original). A party can be effectively deprived of its appellate rights by being forced to spend money it would have no way to recover in the event of success on

[11] State Defendants therefore ask that the Court promptly rule on this motion given the March 13 deadline to present a report (Doc. No. 779 at 17), so that State Defendants can ask the Eighth Circuit for a stay if denied.

appeal. Accordingly, "[t]he threat of unrecoverable economic loss . . . does qualify as irreparable harm" (emphasis added). *Iowa Util. Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996); *see also Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 431 F. Supp. 2d 980, 984 (D. Minn. 2006) (being "required to invest significant time, costs and resources" that may prove to be superfluous if a party prevails on appeal constitutes irreparable harm); *Illinois Bell Tel. Co. v. Hurley*, 2005 WL 735968, at *7 (N.D. Ill. Mar. 29, 2005) (even quantifiable monetary losses constitute irreparable harm when "there is no entity against which [the stay movant] could recover money damages").

The December 18 Order will require Defendants to expend a substantial amount of taxpayer dollars before they obtain appellate review. The December 18 Order plainly requires a reviewer to spend a significant amount of time reviewing mechanical restraint use at FMHP and AMRTC.[12] In Defendants' view, the qualifications necessary to conduct such a review are extensive, resulting in significant expense. (*See* Email from Aaron Winter to Chambers, dated January 3, 2020 (discussing qualifications of proposed reviewers).) When the Court Monitor carried out the duties of the External Reviewer,[13] the External Reviewer's services cost Defendants $225 per hour, a rate established over seven years ago. (*See* Doc. Nos. 136-1, p. 11; Doc. No. 160 at 2.) Dr. LaVigna's recent

[12] (*See* Doc. No. 779 at 17 (requiring the reviewer to address the extent to which mechanical restraint use at FMHP and AMRTC reflects "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).

[13] On April 23, 2013, the Court ordered that the External Reviewer function at paragraph VII.B of the Settlement Agreement "will be subsumed within the [Court] Monitor's role . . . ." (Doc. No. 211 at 6.)

service as a Subject Matter Expert who wrote two court-ordered reports in this case is more relevant to how much the Department is likely to need to pay an expert to comply with the December 18 Order. (*See* Doc. No. 737 (court order); Doc. Nos. 775-1, 775-5 (Dr. LaVigna's reports regarding use of prohibited techniques and staff training).) Dr. LaVigna billed the Department $60,000 to write the two reports. (*See* Jan. 7, 2020 Booth Declar., Ex. 1.)

Regardless of the allocation of these costs, the December 18 Order encroaches on the management of state settings that serve some of the most vulnerable and challenging populations in Minnesota, a core area of state sovereignty. This also constitutes an irreparable harm. *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (in preliminary injunction context, "because the State of Kansas claims the NIGC's decision places its sovereign interests and public policies at stake, we deem the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits").

III. PLAINTIFFS WOULD NOT BE HARMED BY A STAY.

Nor would Plaintiffs be harmed by a stay. The obligations imposed on Defendants do not directly accrue to Plaintiffs' benefit. If Defendants are unsuccessful on appeal, the temporary cessation of the Court's December 18 Order will likely have little impact on Plaintiffs whatsoever; indeed, Plaintiffs' complaint in this case was about the alleged improper use of restraints at a single DHS facility, (*see* Doc. No. 58-2 (Second Amended

Complaint),[14] and the December 18 Order pertains to the use of restraints at two *different facilities*, (*see* Doc. No. 779). Moreover, there can be little prejudice to Plaintiffs given that they could not have anticipated the new external reviewer reporting requirements ordered by the Court would ever exist.

IV. THE PUBLIC INTEREST FAVORS A STAY OR SUSPENSION OF THE COURT'S DECEMBER 18, 2019 ORDER.

As discussed, the obligations imposed on Defendants under the December 18 Order intrude on the State's responsibility to set public policy and administer its own law. As the United States Supreme Court has recognized, remedies in institutional reform cases such as this one can "raise sensitive federalism concerns" because they "commonly involve[] areas of core state responsibility." *Horne v. Flores*, 557 U.S. 433, 448 (2009); *see also, e.g., Rizzo v.* Goode, 423 U.S. 362, 378 (1976) ("[F]ederal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"); *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006). The Court's December 18 Order interferes with the State's responsibility of caring for individuals with a disability when it monitors the minutiae of the Department's administration of matters beyond the case itself, which

[14] "Class Members" are "[a]ll individuals who were subjected to the use of any aversive or deprivation procedures, including restraints or seclusion while a resident at the Minnesota Extended Treatment Options program at any time(s) from July 1, 1997 through May 1, 2011. Settlement Class or Class Member does not include any individual who has properly and effectively requested exclusion from the Settlement Class." (Doc. No. 136-1, p. 23.)

involved the use of restraint at a single DHS-operated facility. (*See* Doc. No. 58-2 (Second Amended Complaint).)

The December 18 Order also implicates separation-of-powers concerns, imposing obligations well beyond those contemplated by the parties. *See Bacon v. City of Richmond*, 475 F.3d 633, 638 (4th Cir. 2007) ("Preserving the link between remedies and violations [furthers] an important separation of powers principle, ensuring that court edicts are grounded in the requirements of law and not in notions of judicial policy."). These concerns are heightened given the substantial expenses imposed by the December 18 Order. *See Horne,* 557 U.S. at 448 (federalism concerns are heightened where "a federal court decree has the effect of dictating state or local budget priorities"). Indeed, the federal courts have specifically recognized that the public interest is furthered where, as here, a stay prevents added cost to the public. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544-45 (8th Cir. 1982) (holding that "granting the stay serves the public interest by avoiding delay that would inevitably add to the cost of the project, requiring greater expenditures from the public treasury"); *see also Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 431 F. Supp. 2d 980, 984 (D. Minn. 2006) (holding that "[r]equiring the parties, their respective counsel and the AAA to expend time, energy and resources in proceeding with an arbitration that may ultimately prove futile if respondents are successful on appeal is not in the public interest").[15]

[15] It should also be noted that the requested stay cannot be conditioned on the issuance of a bond. *See, e.g., McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982) (holding Rule 62(c) only authorizes the imposition of (Footnote Continued on Next Page)

CONCLUSION

Based on the foregoing, the Court should stay Defendants' obligations under the December 18 Order (Doc. No. 779) during the pendency of the appeal of the Court's December 18, 2019 Order.

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Respectfully submitted,

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conditions "to preserve the status quo while the case is pending in [an] appellate court"); *Omnioffices, Inc. v. Kaidanow*, 201 F. Supp. 2d 41, 43-44 (D.D.C. 2002) ("[P]osting bond is meaningless" in cases involving non-monetary judgments because it "does not protect the rights of the non-moving party.").