UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen, et. al, Plaintiffs, vs. Minnesota Department of Human Services, an agency of the State of Minnesota, et. al., Defendants.	Court File No.: 09-CV-1775 DWF/BRT **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY (DOC. 784)**

INTRODUCTION AND BACKGROUND

Plaintiffs oppose the Minnesota Department of Human Services and State of Minnesota (DHS) Motion for Stay (Doc. 784). Its obstinate approach challenging this Court's jurisdiction and authority is a broken record, rejected many times over by this Court, and by the Eighth Circuit. *Jensen v. Minnesota Department of Human Services,* 897 F.3d 908, 916 (8th Cir. 2018) (affirming this Court's authority to extend its jurisdiction to enforce the Agreement "as it deems just and equitable.") DHS again pushes a baseless position predicated on ignoring its own non-compliant conduct which singularly led to this Court's post-settlement involvement and the expenditure of substantial taxpayer money to force DHS compliance.

Its retreaded motion rejects DHS promises to vulnerable adults and the process of compliance in favor of reckless policies that restrain, seclude, marginalize and endanger people with developmental disabilities. DHS ignores the significant record militating

against its position, including the Court's prior investigation of restraint use at the St. Peter and Anoka locations[1] with extremely troubling findings that prompted separate investigations by the Minnesota Disability Law Center for suspected abuse of vulnerable adults. Plaintiffs respectfully requests the Court deny the DHS motion and continue to exercise its jurisdiction to over the Agreement "as it deems just and equitable." The Court has jurisdiction and authority to appoint an external reviewer to evaluate mechanical restraint at St. Peter and Anoka. These are fundamental issues of safety for vulnerable citizens protected under the Agreement and related Orders necessitated by DHS conduct.

Long ago, DHS sought and agreed to a post-settlement implementation process to determine whether DHS has established substantial compliance with the Agreement. *See gen.* Order (Doc. 753) and (Doc 756) (amended) (citing record and numerous Orders requiring that DHS must show substantial compliance with the Agreement); (Doc. 667) Plaintiffs' Brief. Opp. to DHS Motion for Stay. Ongoing compliance concerns along with numerous emails, status conferences and communications between the parties and the Court on how to address DHS non-compliance, including Plaintiffs' Motion to Enforce compliance, led the Court to appoint an Independent Court Monitor, originally suggested by DHS, with Court-ordered authority to determine whether DHS has established substantial compliance with the Agreement. *See* Order (Doc. 340) at 11:

[1] "St. Peter" refers to the Forensic Mental Health Program (formerly the Minnesota Security Hospital), and "Anoka" refers to the Anoka Metro Regional Treatment Center.

> The Court Monitor shall make findings of compliance concerning the Defendants' activities under the Settlement Agreement, the Comprehensive Plan of Action, which includes, among other things, the Olmstead Plan, the rules proposed or adopted under the Rule 40 Modernization requirement, and other Orders of the Court. In addition, the Court Monitor shall make recommendations that will facilitate the goals and objectives of the Court's Orders, including recommendations for contempt, sanctions, fines or additional relief. The Court Monitor may continue to issue reports on compliance and other issues in this case in his discretion; in light of the requirements in this Order, quarterly compliance reports by the Court Monitor are no longer required. The Internal Reviewer, Dr. Richard Amado, shall continue to issue his reports to the Court Monitor. The Court Monitor shall also continue to issue reports on compliance and other issues in this case at his discretion.
>
> The Court Monitor has the authority necessary to facilitate and assist Defendants to achieve substantial compliance with Defendants' obligations under the Court's Orders.

See also Order (737) at 5 ("Pursuant to its April 25, 2013 Order, the Court asked the Court Monitor to 'independently investigate, verify, and report on compliance with the Settlement Agreement and the policies set forth therein on a quarterly basis.'")[2]

[2] Order (Doc. 737) at 5; Order (Doc. 212) at 6; Order (Doc. 211) at 5 ("The Court received a request on March 4, 2013, from Plaintiffs' counsel to schedule a conference with the Court to discuss resolution of Plaintiffs' Motion to Enforce Settlement, as well as the status of the case. At that time, the Court was informed that counsel for Defendants also agreed to scheduling a conference to discuss the status of Plaintiffs' Motion to Enforce Settlement. At the March 25, 2013 status conference, the Court agreed to issue an order addressing the role of the Monitor and to set up a process to promote substantial compliance with the Settlement Agreement entered in this case on December 1, 2011."); Order (Doc. 205) ("the Court intends to inform the parties at the status conference that given the status of the case, including the issues of noncompliance, the focus of David Ferleger will be to evaluate compliance and noncompliance issues vis-à-vis a mediation approach. Consequently, with or without agreement of the parties, the Court will establish the role and function of David Ferleger, as well as establish the budget for his services, if the parties are unable to reach an agreement.") ("The external reviewer function … will be subsumed within the Monitor's role as originally set forth in the Court's July 17, 2012 Order, at which time the Court appointed David Ferleger as the Court's independent consultant and monitor. The Monitor will independently investigate,

This process ultimately led to the mutually developed Comprehensive Plan of Action (CPA) approved by the Court as a roadmap to determine whether DHS established compliance, including system-wide terms not limited to any particular facility and utilizing the Rule 40 and Olmstead committee process to extend provisions to all state operated locations. Along with the Court's Orders, the Jensen settlement and CPA are the "Agreement" to which DHS must show substantial compliance to be released from the Court's jurisdiction. (Doc. 737) at 7 ("Agreement" is "the combination of the Settlement Agreement and Comprehensive Plan of Action.")[3]

The DHS motion rejects the reality of the CPA, including its modified, restated and expanded requirements ordered as a direct result of DHS non-compliance. *See* (Doc. 604) at p. 5 ("Adopted by the Court amid continued compliance concerns, and without objection from any party (Doc. No. 284), the court-ordered Comprehensive Plan of Action (CPA) is the roadmap to compliance. It includes verbatim, modified, restated and, in some cases, expanded Settlement Agreement requirements, system-wide

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verify, and report on compliance with the Settlement Agreement and the policies set forth therein on a quarterly basis. Those quarterly reports shall inform the Court and the parties whether the Monitor believes, based upon his investigation, without relying on the conclusion of the DHS, that DHSs are in substantial compliance with the Settlement Agreement and the policies set forth therein."); (Doc. 239) (The Court's 'independent consultant and monitor' audits and evaluates compliance by DHS and programs which it licenses and funds under the Joint Settlement Agreement and the several plans being developed under the settlement.")

[3] *See also* Order (Doc. 578) at 3 ("The External Reviewer function will continue to be governed by the provisions of the Jensen Settlement Agreement, the CPA, and prior orders of the Court."); Order (Doc. 340) ("The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance. However, it is expected that Defendants will substantially comply with the Court's Orders.")

obligation, and additional relief. These are embodied in more than 100 Evaluation Criteria (EC). The Evaluation Criteria are enforceable and set forth 'outcomes to be achieved.'"); Order (Doc. No. 224) at 10 ("The Court deems this an opportune and appropriate time to consider the pace of Defendants' implementation of the obligations they undertook both as to the facility and system-wide, including but not limited to community integration under Olmstead v. L.C.")[4]

Prior Court-Ordered Review of Restraint and Seclusion at St. Peter and Anoka

Despite the many Orders directing DHS compliance, and an undisputed record showing the Court Monitor investigated restraint use at St. Peter and Anoka under his court-ordered authority, with DHS knowledge, agreement and participation, DHS claims the Court has no authority to review the use of mechanical restraint at St. Peter and Anoka. The record, however, clearly shows the Court directed the Court Monitor to review restraint at these locations "in lieu of issuing a show cause order against DHSs for sanctions and contempt." The Court's August 5, 2013, letter to the Court Monitor (Doc. 220) states:

> Pursuant to the Order of April 25, 2013 (Doc. 212), you filed the *Status Report on Compliance* (June 11, 2013), (Doc. No. 212). In lieu of issuing a show cause order against DHSs for sanctions and contempt, I am respectfully making the following requests of you with regard to your responsibilities as the Court's independent consultant and monitor.

[4] Order (Doc. 707) at 4 ("The Agreement incorporates a Comprehensive Plan of Action ("CPA"). The CPA sets forth Evaluation Criteria ("EC") and accompanying Actions: The ECs set forth the outcomes to be achieved and are enforceable."); *Id*. n.2 ("The ECs were developed by the Court Monitor and the parties and approved by the Court as part of the Comprehensive Plan of Action ("CPA"). The CPA "serve[s] as both a roadmap to compliance and as a measuring stick for compliance.").

> Due to be implemented by DHSs are the Rule 40 modernization and the *Olmstead* Plan requirements of the Settlement Agreement. The State intends to extend these provisions widely.
>
> The Rule 40 modernization and the Olmstead Plan, and other elements of the settlement agreement, will affect all persons served at state operated locations other than MSHS-Cambridge, including Anoka Regional Treatment Center and Minnesota Security Hospital among others.
>
> To preliminarily prepare for and to facilitate further compliance reviews, the Court requests you to conduct visits to Anoka Regional Treatment Center and Minnesota Security Hospital. You will also visit a number of class members and former MSHSCambridge residents who have left the facilities. The Court assumes and expects that the DHSs will cooperate and provide full access for these visits and to records of such persons. Consultants may be retained to assist in this effort.

Id. DHS was aware of the Court Monitor's investigation of St. Peter and Anoka, agreed with it, and provided the requested information to the Court Monitor:

Minnesota Department of Human Services

October 30, 2013

By Overnight Mail and E-mail as requested

David Ferleger, Esq.
Independent Consultant and *Jensen*
Court Monitor Archways
Professional Building
413 Johnson Street, Suite 203
Jenkintown, PA 19046

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

Dear Mr. Ferleger:

This is with regard to your request titled, "Request No. 2013-10: AMRTC and MSH Records on Restraint Chair and Seclusion Use" dated October 18, 2013 (attached). The request also pertains to "Rationale for Document Request: Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1 Review" which was filed with the Court on October 17, 2013. The due date for the requested materials is 15 days from the date of the October 18, 2013 request which is Saturday November 2, 2013.

Enclosed, please find two copies of the documentation requested relating to items one to six as listed in your request for the four sampled individuals.

Thank-you for the extension to November 18, 2013 for the following item which will be sent to you directly digitally/electronically as requested on or before November 18, 2013:

> *7. Within 15 days of this request. DHS will digitally provide the Court Monitor any analyses, DHS internal or public reports, consultant reports, or the like, regarding Restraint Chair, Seclusion or restraint use within State Operated Services, which analyze or discuss the magnitude or reasons for restraint/seclusion use and/or means or proposals for changes in policy or practice. The time period for this Par. 7request is January 1, 2008 to the present.*

As requested, I will also be sending the following electronically by email to you on or before November 2,2013:

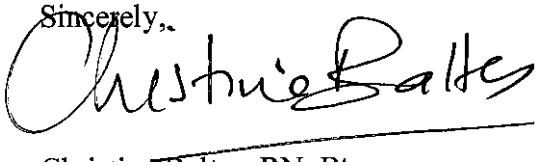
> *8. Within 15 days of this request. DHS will digitally provide the Court Monitor with all AMRTC and MSRpolicies and forms regarding use of restraints or seclusion which are in effect as of October 18, 2013 or were in effect since January 1, 2008 (indicating as to each the effective dates).*

Please note that some of the historical materials requested in items 7 and 8 back to 2008, may not be available due to record retention requirements.

Please let me know if there is anything you need further.

Christina'"Baltes, RN, BSN, PHN, MA,
QDDP/QIDP Jensen Compliance Officer

Sincerely,



Mailed Cc w/o enclosures: E-mail CC w/o enclosures:

The Honorable Donovan W. Frank Shamus O'Meara, Attorney
for Plaintiffs
Colleen Wieck, Executive Director for the Governor's Council on Developmental
Disabilities
Roberta Opheim, Ombudsman for Mental Health and Developmental
Disabilities
Steven Alpert, Assistant Attorney General Scott Ikeda, Assistant Attorney
General Gregory Gray, DHS Chief Compliance Officer
Amy Kaldor Akbay, DHS Chief General Counsel

Decl. O'Meara, Ex. D.

DHS communicated and provided information to the Court Monitor, Consultants and Class Counsel, including, for example, DHS emails dated October 31, 2013 (providing information responding to Court Monitor's Request No. 2013-10: AMRTC and MSH Records); November 27, 2013 and December 02, 2013 (providing Anoka incident reports Court Monitor requested); January 3, 2014 (providing information in response to Court Monitor's Request No. 2013-14: Anoka and MSH Incident Reports); and January 16, 2014 (5 emails providing information responding to Court monitor's Request No. 2013-15: Anoka and MSH Restraint and Seclusion Reports). O'Meara Decl. ¶ 6. *See also* December 13, 2013, Court Monitor Letter to DHS Commissioner Anne Barry re. Court Monitor Request No. 2013-15 - Anoka and MSH Restraint and Seclusion Reports;

The Court Monitor's report, (Doc. No. 236) *Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1 Review* was received and approved by the Court without objection from DHS. *Id.* at 8 ("The examination of the aggregate data indicates that there is significant use of the Restraint Chair and of Seclusion at Anoka and MSH.") ("The

Monitor is to review compliance with regard to MSH and Anoka, and the Court expects Defendants to 'provide full access' to the records of the residents of those institutions."); (Doc. 347) ("The Settlement Agreement in this litigation forbids the use of restraints and other aversive practices on people with developmental disabilities (with the exception of manual restraint) at the MSHS Cambridge and all its successor facilities. In addition, the settlement requires an expansion of such restrictions through modernization of Rule 40 to comport with "best practices."); (Doc. 756) at 16 (emails between the Court Monitor and parties regarding the Court Monitor's process of addressing and reporting on the state-wide application of restrictions in the Agreement); (Doc 730) (Class Counsel Letter to Court).

Alarmed by the Court Monitor's restraint report which provided probable cause to suspect the abuse of vulnerable adults with disabilities, the Minnesota Disability Law Center initiated its investigation of St. Peter and Anoka under federal law, writing to Anoka's executive director on February 14, 2014:

> Our office has received and reviewed the October 17, 2013 report from Federal Court Monitor David Ferleger entitled *Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1Review*. This report details the extensive use of restraint and seclusion at the Anoka Metro Regional Treatment Center (AMRTC). This report provides probable cause to suspect that abuse and neglect has occurred at the AMRTC. As a result, our office will be conducting an abuse and neglect investigation of the AMR TC pursuant to our authority and responsibility under federal law.
>
> ****
>
> **Reports of Abuse and Neglect - October 17, 2013 Court Monitor's Report**
>
> On October 17, 2013, Federal Court Monitor David Ferleger issued a report entitled *Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1*

> *Review* ("Ferleger Report"). Mr. Ferleger wrote this report as part of his ongoing role as Court Monitor for the *Jensen v. Minnesota Department of Human Services* settlement agreement. In his report, Mr. Ferleger outlines the use of restraint and seclusion at the Anoka Metro Regional Treatment Center (AMRTC). Mr. Ferleger reviewed data obtained from DHS on the use of restraints and seclusion at AMR TC. Based on his review, Mr. Ferleger calculated that the average use of the restraint chair at AMRTC was 566 minutes per month from January 2012 to August 2013. *See* Ferleger Report, chart following p. 8. Mr. Ferleger calculated that the average use of seclusion at AMR TC during that time period was 148 minutes per month. *Id* Mr. Ferleger also examined the use of restraint and seclusion on individual patients. Mr. Ferleger noted that one patient at AMRTC was held in a restraint chair for 85 hours over 35 times during February of 2012. *Id* at p. 8. Mr. Ferleger determined that "there is significant use of the restraint chair and of seclusion" at AMRTC. *Id* at p. 8. Mr. Ferleger concluded that despite the terms of the *Jensen* settlement and DHS' commitment to eliminate restraint and seclusion, AMRTC continues to use these aversive practices. *Id* at p. 10.
>
> The MDLC has concluded that the October 17, 2013 Court Monitor's Report is a report of abuse and neglect received by the P & A system. Moreover, the information provided in Mr. Ferleger's report provides probable cause that incidents of abuse and neglect have occurred at AMRTC. As a result, our office will be conducting an abuse and neglect investigation at the AMRTC pursuant to our authority and responsibility under federal law.

O'Meara Decl. Ex. A. The Disability Law Center subsequently issued its reports on restraint and seclusion at St. Peter and Anoka. O'Meara Decl. Ex B (Restraint and Seclusion Investigation of the Anoka Metro Regional Treatment Center: Findings and Recommendations of Mid-Minnesota Legal Aid's Minnesota Disability Law Center), and Ex C (Restraint and Seclusion at the Minnesota Security Hospital). These reports contain substantial findings and recommendations concerning these important issues:

Anoka

- Current Restraint and Seclusion Policy Lacks Clear Guidance to Staff and Patients.

- The policy states that restraint and seclusion "may only be used as a last resort for the management of aggressive, violent, or self-destructive behavior." But the policy does not define what constitutes a "last resort;" it does not define "aggressive, violent or self-destructive behavior," and it does not identify de-escalation techniques or supportive interventions to be used prior to initiating restraint or seclusion.

- The policy is confusing with respect to the length of time that an individual may be in seclusion or restraint. Because of the harmful nature of restraint and seclusion, these procedures should be minimized and "discontinued at the earliest possible time”

- Policy does not conform with current best practices set forth in Minnesota Statutes Section 245D or Minnesota's new Positive Support Rules. While AMRTC does not fall within the scope of245D or the Positive Support Rules because it is not a licensed facility under Minnesota Statutes Section 245A, DHS has acknowledged that these rules represent best practices for individual with disabilities and promote a safe and healthy treatment environment

- AMRTC should update its restraint and seclusion policy so that it parallels the requirements of Minnesota Statutes Section 245D and the Positive Support Rules. AMRTC's new policy should contain clear definitions of when restraint and seclusion may be used, and should specifically define what constitutes an "imminent risk of harm. " The policy should also clearly set forth when restraint and seclusion must cease. Adopting these standards would not only ensure that AMRTC uses best practices for the treatment of people with disabilities, but would acclimate patients to the standard of care that they can expect to encounter when they are discharged to the community.

- The use of restraint and seclusion is a traumatic process that can negatively impact the physical and mental well-being of patients and staff. In order to maintain a safe and healthy treatment environment and minimize the damage done to both patient and staff, a restraint and seclusion protocol should include a "debriefing process" that discusses the incidents and works on reestablishing the therapeutic bond between the patient and staff.

- Findings from the CMS recertification surveys are consistent with information discovered during MDLC's investigation that suggests patient treatment at AMRTC needs to be improved.

- AMRTC should continue and increase its efforts to improve treatment options and discharge planning, including increasing efforts to build connections between AMRTC staff, county social services agencies, and private providers

St. Peter

- The Implementation of the Current MSH Seclusion and Restraint Policy Continues to Fall Short of Acceptable Outcomes Established by DHS
- In practice, the use of restraint and seclusion does not uniformly conform to MSH's written policies and procedures and, in some cases, represents substantial violations of these policies and procedures. These violations include difficulty identifying antecedent behaviors; belated attempts to use less restrictive measures; use where there was not a risk of imminent harm; and a release process that did not consistently follow the policy.
- MSH Fails to Provide Proper Debriefing and Adjustment of Behavior Plans in Response to the Use of Restraint and Seclusion
- The frequency of training on topics related to the use of restraint and seclusion training is insufficient, particularly compared to training in other areas
- Despite the implementation of person-centered policies, patients are not involved with staff training

- The Patients Most Frequently Restrained and Secluded Receive Inadequate Mental Health Treatment
- Successful Implementation of the MSH Restraint and Seclusion Policy Requires a Greater Effort by MSH Staff to Identify and Correct Problems With Its Usage
- The current policy does not comply with DHS's new positive support strategies rule for persons with developmental disabilities
- Because patients who have been committed to MSH as Mentally Ill and Dangerous may also be diagnosed with a developmental disability, all staff will need to know what requirements apply to which patients
- MSH needs to create a respectful and effective patient debriefing process
- Behavior management and clinical review committees should be accountable to the patients, particularly those who have been restrained or secluded

- Additional Training on the Correct Implementation of All Aspects of the Seclusion and Restraint Policy Is Needed at MSH
- To Significantly Reduce Restraint and Seclusion, and to Create a Successful Environment for Patients and Staff, MSH Should Increase, Improve, and Individualize Its Mental Health Treatment

O'Meara Decl. Ex B, C

Today, critical issues remain concerning the use of restraint and seclusion at these locations. *See e.g.* DHS License Details, Minnesota Security Hospital dba Forensic Mental Health Program (investigative memoranda and correction orders): https://licensinglookup.dhs.state.mn.us/Details.aspx?l=801558; *Id*. September 24, 2019, Correction Order ("Two incidents involving the use of restraint and seclusion did not meet requirements." "On July 5, 2019, an individual was manually and mechanically restrained." "On July 6, 2019, an individual was manually restrained and placed in seclusion.")

The record also shows the Court's Order (Doc. 239) confirming the Court Monitor's authority to access and obtain copies of records of individuals served by DHS and the programs and services it operates, regulates, licenses or funds in order to audit and evaluate DHS compliance under the Agreement and related programs and plans:

> The Court's "independent consultant and monitor" audits and evaluates compliance by DHS and programs which it licenses and funds under the Joint Settlement Agreement and the several plans being developed under the settlement. *See* Orders of July 17, 2012 (Doc. No. 159) and August 28, 2013 (Doc. No. 224) (appointing monitor). *E.g., Monitor's Rationale for Document Request – Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1 Review* (Oct. 17, 2013) (Doc. No. 236); the *Implementation Plan for the Settlement Agreement Evaluation Criteria and Cambridge Closure,* the *Implementation Plan for the Rule 40 Advisory Committee Recommendations;* and the *Olmstead Plan and its Implementation Plan.* On

> the latter three plans, *see* Order of August 2, 2013 (Doc. No. 219). DHS and Plaintiffs chose Mr. Ferleger as the "External Reviewer" to evaluate compliance. Order of April 23, 2013 (Doc. No. 211).

Id. at 2.

On this substantial record, DHS has been a knowing and willing participant in the Court's investigation of restraint and seclusion at St. Peter and Anoka over many years. As the Court reviews compliance issues for the Agreement and related Orders, programs and plans it is logical and cost effective for the Court Monitor (or Gary LaVigna who served as a court-appointed reviewer on compliance issues) update and complete the restraint review of the St. Peter and Anoka locations as part of the Court's external reviewer appointment referenced in its recent Order (Doc. 779.[5] *See also* Order (Doc. 551) at 24 ("If, at any time, a party or consultant wishes to request that further duties be assigned to the Court Monitor, the party or consultant may submit a request directly to the Court."); (Doc. 551) at 18 ("The Court Monitor was appointed by the Court on July 7, 2012. Over the years, the Court has assigned various duties to the Court Monitor in order to promote compliance with the Jensen Settlement Agreement. Many of these duties evolved through the agreement and cooperation of the parties.").

In contrast to its present position objecting to external review, DHS previously retained outside experts, at the suggestion of Plaintiffs' counsel, to assist its

[5] DHS insists the Court appoint its nominees for the reviewer position, strangers to this process with little knowledge of the Agreement or its significant implementation history. DHS is noticeably silent on Plaintiffs position conveyed to DHS that in addition to extensive litigation, compliance problems and disturbing issues involving their hospitals nothing Plaintiffs have reviewed suggests the DHS proposed reviewers have any familiarity with the Jensen class members, the Positive Support Rule or Olmstead Plan.

implementation of the Agreement. The October 31, 2013, Letter from DHS to Court and Court Monitor (Doc. 246) states:

> **Review by Outside Experts.**
>
> Early in the process, Plaintiffs' Counsel in the *Jensen* case suggested that the Department of Human Services contract with an outside party to fashion the Minnesota *Olmstead* Plan. While we disagreed with Plaintiffs' counsel on the value of putting an outside party in charge of developing our plan, we acknowledged that outside experts would be valuable in helping us create a plan that would meet the needs of Minnesotans with disabilities in accordance with the principles set forth in the *Olmstead* decision. As a result, the *Olmstead* Subcabinet contracted with individuals who had specific expertise on at least one aspect of our plan (i.e. - housing or education). Each of these subject matter experts reviewed the plan and then video conferenced with a state workgroup focusing on that particular portion of the plan. The subject matter experts provided feedback on areas where they felt the plan could be improved and, in most cases, that feedback was incorporated into the plan. In addition, the Subcabinet contracted with an additional expert who provided feedback on the structure of the plan. His feedback was also largely accepted and incorporated into the plan.

(Doc. 246) at 2.

The Record Shows Plaintiffs' Ongoing Objections to Restraint and Seclusion, including Exceptions for Restraint Under the Positive Supports Rule.

The CPA establishes that the Positive Supports Rule forbids mechanical, behavioral and other restraints and aversive practices with regard to all individuals with developmental disabilities, regardless of where they are served. The current DHS litigation position belies its own statements that "DHS will prohibit procedures that cause pain, whether physical, emotional or psychological, and establish a plan to prohibit use of seclusion and restraints for programs and services licensed or certified by the department." (Doc. 346) at 6.

Throughout the years, Plaintiffs have continuously objected to the use of restraint and seclusion, including objecting to exceptions for restraint sought for the Positive Supports Rule. The undisputed record is that Plaintiffs have repeatedly called out DHS attempts to use misguided variances, exemptions, amendment, and incorrect positions on the Positive Supports Rule as a means to restrain and seclude people with developmental disabilities. *See e.g.* (Doc. 511) ("In addition, we note the Positive Supports Rule allows for ongoing use of restraint on people with disabilities. As a result, we reiterate our strong concerns and objections, expressed to the Rule 40 Committee, Olmstead Committee, Olmstead Subcabinet, the State, DHS, counsel, the Independent Court Monitor and the Court over many years, involving the ongoing use of restraint and seclusion.")[6]

[6] *See also* (Doc. 511) ("In addition, we note the Positive Supports Rule allows for ongoing use of restraint on people with disabilities. As a result, we reiterate our strong concerns and objections, expressed to the Rule 40 Committee, Olmstead Committee, Olmstead Subcabinet, the State, DHS, counsel, the Independent Court Monitor and the Court over many years, involving the ongoing use of restraint and seclusion."); (Doc. 276) at 3-4 ("Following recent DHS rulemaking communications and continued attempts to expose people with developmental disabilities to restraint and seclusion, we also must reiterate that the Settlement Class does not support or condone any proposed Plan provision, or interpretation of any Plan provision, that allows for the use of restraint or seclusion on people with developmental disabilities, whether as part of a "transition," "waiver," "exemption," "exception," "conditional use," "variance," "temporary use," or "study period," for any provider, or anyone else. The use of transition periods, waivers, exemptions, exceptions, etc. that provide for the continued use of restraint and seclusion directly violates the civil rights of people with developmental disabilities. The Settlement Class objects to any proposed Plan provision that seeks to allow for the continued use of restraint and seclusion. This has been the repeated, reiterated position of the Settlement Class throughout the pendency of this matter. Such provisions are not best practice, do not protect anyone, have no positive or redeeming qualities, and would directly contradict the Settlement Agreement's elimination of restraint and seclusion, and the spirit and intent of the Settlement Agreement. Insistence on these provisions would only facilitate

The DHS Motion to Stay is yet another attempt to delay and distract from the Court-ordered process for compliance to which DHS agreed and is legally bound. A stay "is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). "It is instead an exercise of judicial discretion and the propriety of its issue is dependent on the circumstances of the particular case." *Id.* As the moving party, DHS "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. DHS cannot sustain this burden, and the Court should deny the motion in its entirety.

ARGUMENT

A. Standard of Analysis

DHS seeks a stay pursuant to Federal Rule of Civil Procedure 62(c), which states in pertinent part:

> While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies 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.

Fed.R.Civ.P. 63(c). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433, 129 S. Ct. 1749, 1760, 173 L. Ed. 2d 550 (2009). "It is instead an exercise of judicial discretion, and the propriety of its

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the ongoing dangerous use of aversive, abusive procedures that have been eliminated by the Class Action Settlement as well as best practices that focus on Positive Behavioral Interventions and Support of individuals with developmental disabilities rather than restraining and secluding them in violation of their rights."); Doc. 493 (Settlement Class August 15, 2015 letter to Court); Doc (756) ("The Settlement Class objects to and will never support any provision in this draft rule or otherwise that allows for mechanical restraint and seclusion." "Your draft rule violates the Jensen class action settlement agreement and the civil rights of those it purports to serve."); (Doc. 353) Class Counsel Letter to Court.

issue is dependent upon the circumstances of the particular case." *Id.* (internal quotations, citations and brackets omitted). The moving party "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 434. "[B]ecause the burden of meeting the standard is a heavy one, more commonly stay requests will be found not to meet this standard and will be denied." 11 Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2904 (3d ed.) (cases cited therein).

The determination of whether to grant a stay is determined by an evaluation of four factors:

> (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;
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
> (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987). "The first two factors of the traditional standard are the most critical." *Nken*, at 434; *see also Karsjens v. Jesson*, 2015 WL 7432333 (D.Minn. Nov. 23, 2015) ("As the moving party, Defendants bear the heavy burden to prove all four factors, and the first two factors are the most critical."). "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) (internal quotations and citations omitted).[7]

[7] Rule 62(c) applies only to cases involving an injunction. *Liberty Mutual v. Clemens Coal*, 2017 WL 4758948, *2 (D.Kan. Oct. 20, 2017) ("The plain language of Rule 62(c) indicates that a court may issue a stay under this rule only while an appeal is pending and only if the order or judgment appealed from is an injunction."). "The determination of whether an order is an injunction depends upon the substantial effect of the order rather

As a threshold matter, the stay request should also be summarily denied based on DHS' own argument that the "purpose of a stay is to preserve the status quo." *Asarco LLC v. NL Indus.*, 2013 WL 943614, at *3 (E.D. Mo. Mar. 11, 2013). Status quo means the "situation that currently exists." Black's Law Dictionary (10th ed. 2014). The current situation is the ongoing compliance with the Agreement, including DHS reporting obligations and ongoing work to implement the terms of the Agreement as directed by the Court. The status quo is not to abandon the work of the last ten years.

B. DHS Fails to Satisfy the Heavy Burden for a Stay.

1. DHS fails to show a strong likelihood of success on the merits.

The mere possibility of success is insufficient. *Nken*, at 434. The movant must present "a strong showing" that it is likely to succeed on the merits. *Hilton*, at 776. The Eighth Circuit considers this first factor to be "the most important factor." *Brady*, at 789. Just like its prior failed jurisdictional argument, DHS ignores the Agreement and law of this case. For years, it has been undisputed, and affirmed on appeal, that the Court may exercise jurisdiction over the settlement to the extent it "deems just and equitable."

After 10 years of non-compliance, much of it admitted, DHS again resorts to the tactic of objecting to the Court's power to sanction and review whether DHS has

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than its terminology." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir. 1982). Many orders direct a party to take or not take action, but "not all such orders qualify as injunctions . . ." *Auer v. Trans Union, LLC*, 834 F.3d 933, 936 (8th Cir. 2016). Here, the applicable court action involved approval of a voluntary settlement agreement. *See* Order Approving Settlement [136]. DHSs cannot invoke Rule 62(c) because they have failed to demonstrate that it applies.

complied rather than concentrating on correcting its conduct. The record over the years is replete with Court orders, Court Monitor reports, DHS admissions and other evidence showing a continued pattern of non-compliance by DHS that directly led to the Court's actions to enforce the Agreement and its related Orders. The Court is authorized to sanction DHS for its conduct. *Chambers*, 501 U.S. at 42–47, and order the review of St. Peter and Anoka to ensure DHS compliance with its Orders. The passage of time cannot be used as an excuse for non-compliance.

The Court has sought to encourage DHS compliance, monitor it, mediate implementation issues, receive and act on DHS requests, meet with the parties and consultants, exercise patience, and ultimately sanction DHS for its continued defiance of the Agreement and related Court Orders. Authorized to address DHS conduct, the Court has taken action, providing specific guidance, directives and Orders to correct the noncompliant conduct and implement the Agreement. The appointment of an external reviewer to evaluate mechanical restraint use at St. Peter and Anoka, as was previously done in 2013 by the Court Monitor, is consistent with the Court's authority to sanction and enforce its Orders and ensure DHS compliance. The Court's jurisdiction and authority is present and authorized by the Agreement, which expressly incorporated its continued jurisdiction into the Court's final order "for the purposes of receiving reports and information required by this Agreement, or resolving disputes between the parties to this Agreement, or as the Court deems just and equitable. Final Approval Order (Doc. 104) Ex. A, XVIII.B; *Jensen v. Minnesota Department of Human Services*, 897 F.3d 908,

916 (8th Cir. 2018) ("We conclude . . . this provision permits the district court to extend its jurisdiction as it 'deems just and equitable.'").

Based on the foregoing, DHS has failed to demonstrate a strong showing of success on the merits. Based on this factor alone, the Court should deny the motion.[8]

2. DHS has failed to demonstrate irreparable harm.

"Simply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, at 434 ("the 'possibility' standard is too lenient" (quoting *Winder v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). DHS' untenable argument centers upon a claimed deprivation of the right to an appeal should the stay not be granted. A pending appeal with the Eighth Circuit belies that argument. Even if the appeal fails, DHS remains liable under state law for breach of contract, meaning its obligations under the agreement remain regardless of the presiding court. *See also* Order (Doc. 674) at 9-10 (denying DHS motion for stay of appeal) ("The only circumstance under which Defendants' pending appeal would be rendered moot is if the Court terminates its jurisdiction over the Agreement's implementation. Defendants have not established, and the Court does not perceive, that this outcome is either certain or imminent during the time period while Defendants' appeal is pending. Thus, this possibility does not establish irreparable harm." "The Court also notes that even if there were a significant risk that Defendants' appeal would be mooted in the absence of a stay,

[8] *See also In re Wholesale Grocery Prods. Antitrust Litig.*, Civ. No. 09-MD-2090, 2016 WL 6246758, at *2 (D. Minn. Oct. 25, 2016) ("As with any appeal, the Eighth Circuit may choose to disagree with this Court's conclusions . . . , but this possibility does not make it likely that Defendants will succeed on the merits of their appeal.")

courts do not consistently find that such a result constitutes irreparable harm." (citing *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC,* Civ. No. 5:13-278-F, 2013 WL 3288092, at *6 (E.D.N.C. June 28, 2013)).

DHS further contends it may be forced to expend funds that may prove superfluous should it prevail on appeal, yet must admit it will continue to reporting obligations regardless of the outcome. DHS voluntarily agreed to settle this matter, which originated from the admitted use of restraints including metal handcuffs and leg shackles and seclusion, and its own non-compliance has unnecessarily caused this matter to drag on for years. A stay is not warranted where the applicant's unclean hands has warranted sanctions they now seek to escape. *See* Order (Doc.674) at 11 ("The Court is also mindful of Defendants' repeated delays in compliance throughout this litigation's lengthy history that led the Court to extend its jurisdiction on multiple occasions. As this Court has previously noted, "[a] court may decline to grant a motion to stay based on claims of administrative and monetary harm where 'the principal irreparable injury which Defendants claim that they will suffer . . . is injury of their own making.'") citing *Karsjens v. Jesson*, Civ. No. 11-3659, 2015 WL 7432333, at *6 (D. Minn. Nov. 23, 2015) (quoting *Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970)). *See also Precision Instrument Mfg Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 815 (1945) (doctrine of unclean hands is a maxim "far more than mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . .").

DHS fails to demonstrate it will suffer irreparable harm.

3. Issuance of a stay will substantially injure interested parties.

The third factor is whether the issuance of a stay will substantially injure parties interested in these proceedings.[9] *Nken*, at 434. It will.

There exists a very real danger that if granted a stay and left on its own DHS will continue its delay and noncompliance and may no longer honor Agreement requirements, even perhaps continuing to roll back agreed upon protections. *See, e.g.*, Doc 586 (referencing use of variances to the Positive Supports Rule to allow for mechanical restraint and other abuses on people with developmental disabilities), at p. 12 ("DHS failure to clarify and provide guidance by its internal enforcement division points up a critical danger to people with developmental disabilities in this state, leaving facilities, and families, without clear, direct guidance needed to avoid misinterpretation about the PSR, increasing the risk the using of prohibitive abusive procedures on vulnerable citizens. This DHS inaction further supports Court involvement and active monitoring to ensure that the CPA is properly implemented, and the PSR properly enforced by DHS.")

There is a significant backdrop of noncompliance and delay caused by DHS clearly demonstrated in the many years since the approval of the settlement agreement. Mindful of this record, the Court should exercise its sound discretion and continue enforcing its orders to implement the settlement agreement "as the Court deems just and

[9] DHS focuses only on the injury to "Plaintiffs," but the standard applies to "other parties interested in the proceeding." *Nken*, at pl 434. There can be no doubt that the vulnerable citizens of Minnesota protected by the *Olmstead Plan* and the terms of the *Jensen* settlement are interested in these proceedings and are at grave risk of substantial injury should a stay issue. *See also* 11 Wright & Miller, *Fed. Pract. & Proc.* § 2904 and n. 23 (stays commonly denied in actions involving public benefits).

equitable" and avoid additional delay in the delivery of justice pursuant to the parties' agreement. *See, e.g.*, Order (Doc. 674) at 14 ("The Court has an obligation to ensure that the Agreement, entered into with an aim to improve the lives of individuals with disabilities throughout the state, is implemented fully and without delay Order." (Doc. 340) ("The Court can no longer tolerate continued delay in implementation of the Settlement Agreement. Adherence to the Court's Orders by the DHS officials and staff at all levels is essential, not discretionary. The interests of justice and fairness to each Class member and similarly situated individuals requires no less."); *Robinson Rubber Prods. Co., Inc. v. Hennepin Cty.*, Minn., 927 F. Supp. 343, 348 (D. Minn. 1996) (the public interest favors the enforcement of the United States Constitution); *Ecolab, Inc. v. FMC Corp.*, No. 05-CV-831, 2007 WL 1582677 (D. Minn. 2007) ("Courts have denied motions to stay when 'there is an inexplicable or unjustified delay in seeking re-examination' or when it appears that a stay 'will serve simply to delay proceedings.")

The State's Ombudsman remains involved in protecting our vulnerable citizens, along with the executive director of the Minnesota Governor's Council on Developmental Disabilities, serving as Consultants in this matter, have a much different view of DHSs' remaining settlement obligations. The Independent Court Monitor, moreover, appointed by the Court after ongoing noncompliance by DHS, has identified many areas of noncompliance. *See* Class Counsel Letter to Court (Doc. 661) at 4.

4. The public interest weighs heavily against issuance of a stay.

The final issue requires examination of "where the public interest lies." *Nken*, at 434. The public interest, in this case, lies in allowing this Court to continue its work in

correcting DHS noncompliance and implementing the Agreement for the benefit of the vulnerable citizens of our state. *See, e.g.*, *Cruz v. Dudek*, 2010 WL 4284955, at *16 (S.D. Fla. Oct. 12, 2010) (stating there is strong public interest under *Olmstead* to eliminate discrimination from segregation of persons with disabilities).

DHS argues that principles of federalism favor issuance of a stay. Those concerns are baseless because DHS voluntarily entered into the Agreement, did not object to the Court's approval of the Agreement, the Court Monitor's court-ordered investigation of restraint and seclusions at St. Peter and Anoka, willingly participating in that investigation, and accepted it, and cannot reasonably suggest it did not recognize its obligations under the Agreement. Principles of federalism are not implicated in this proceeding.

In a stunning display of self-interest and ignorance of the record, moreover, DHS requests a stay because it says it will prevent more costs. There can be no doubt that protecting Minnesota's vulnerable citizens strongly favors the public interest. *See Olmstead v. L.C.* 527 U.S. 581 (1999); *Cruz*, at *16. In fact, it is also the DHS' stated duty to protect vulnerable adults:

> Ensuring the Minnesotans we care for are treated with respect and dignity is a key element of our agency's mission. Practices around seclusion and restraint have not always been consistent with these principles. The Minnesota Department of Human Services, as an agency with responsibilities in the administration and oversight of services, and as a provider of services, is committed, in words and in actions, to achieving these goals. To that end, it is our goal to prohibit procedures that cause pain, whether physical, emotional or psychological, and prohibit use of seclusion and restraints for all programs and services licensed or certified by the department. It is our expectation that service providers will seek out and implement therapeutic interventions that reflect best practices. We

> commit not only to following legal and regulatory requirements limiting the use of seclusion and restraint as a provider of service, but also to creating a broader culture that honors the trust placed in us both as a provider and as a department responsible for the administration and oversight of many of the services that support citizens. Such a culture will help the agency and providers regulated by the agency adapt to best practices that continue to evolve over time.

DHS Commissioner, *DHS Respect and Dignity Practices Statement* (June 20, 2013), http://mn.gov/dhs/media/news/news-detail.jsp?id=252-73196. *See also* Minnesota DHS, Adult Protective Services Unit ("It is the policy of the state of Minnesota to provide safe environments and services for vulnerable adults and to provide protective services for vulnerable adults who have been maltreated."), http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_005710; (Doc. 136) at 3 ("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."); at 18 ("The State and the Department shall develop and implement a comprehensive Olmstead plan that uses measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the "Most Integrated Setting," and is consistent and in accord with the U.S. Supreme Court's decision in Olmstead v. L.C., 527 U.S. 582 (1999).")

The protection and proper treatment of people with disabilities is at the heart of the issues before the Court. DHS has great responsibility to act to ensure the safety of people with disabilities and help them "to be loved, appreciated, respected and productive." *See*

MN DHS Guidelines to the Investigation of Vulnerable Adult Maltreatment, Appendix V Common Courtesies when Interacting with People with Disabilities at 196 (Dec. 2010); DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions at 2, 16.. ("any use of an aversive or deprivation procedure diminishes the quality of life of a person. This is consistent with fulfilling a major focus of the Jensen Settlement Agreement. Consistent with current best practices, aversive or deprivation procedures are now generally considered to be a form of abuse. It is necessary and reasonable that the rule recognize the broad objective of eliminating aversive and deprivation procedures in Minnesota licensed social services.")

DHS is silent on how the vulnerable adults currently protected by the Agreement and Court Orders will continue to be protected under a stay. DHS should be articulating precisely how they will protect our vulnerable citizens rather than seeking to continue abusive policies of restraint and seclusion. In addition, when it comes to added costs, hundreds of thousands of dollars in time and resources have been expended by the Consultants, Court, Court Monitor, Class Counsel and multiple agencies solely from DHS admitted, court-documented and ongoing failures to comply with the Agreement. *See* Order (Doc. 526) (awarding Class Counsel $50,000 in attorneys' fees from DHS for settlement implementation period including fees for Motion for Sanctions); Order (Doc. 209) (awarding Class Counsel $85,000 in attorneys' fees from DHS in connection with efforts to monitor, enforce and otherwise ensure that Class Members receive the non-monetary benefits obtained by the Settlement Agreement).

This matter long ago could have been concluded had DHS simply chosen to competently and meaningfully live up to its promises. As the Court appropriately observed, "[m]ultiple admonitions to the DHS have been insufficient to secure effective action by the DHS to close the significant gaps between its stated intentions and actions" Order (Doc. 340) at 7. "Continued implementation delays can no longer be tolerated. More importantly, the dignity, quality of life, and best interests of every Class Member and similarly situated individuals with disabilities hinge on fulfillment of the promises made by DHSs at the fairness hearing in this matter." *Id*. at 7-8.

Further, as noted by the *Nken* Court, the propriety of issuance of a stay "is dependent on the circumstances of the particular case." 556 U.S. at 433. Here, as explained above in detail, the basis for the Court's continued exercise of jurisdiction is based on DHS' own continued and ongoing noncompliance with the Agreement. DHS wants to be released from its obligations as a reward for failing to comply with the Agreement. This Court should invoke the doctrine of judicial estoppel to bar DHS from pursuing a stay. "Judicial estoppel is an equitable doctrine, invoked by a district court at its discretion." *Capella University v. Executive Risk Specialty Ins. Co.*, 617 F.3d 1040, 1051 (8th Cir. 2010). Courts review three factors under this doctrine:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would

> derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id.

As the Court identified in its Order (638), the parties have consistently sought the Court's involvement since approval of the Agreement, and by its actions "intended the Court to retain authority to exercise jurisdiction as it deems just and equitable." *Id*., at p. 21. The Court should not allow DHS to suddenly reverse its position to seek an unfounded rejection of its settlement obligations. *See Precision Instrument Mfg Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 815 (1945) (doctrine of unclean hands is a maxim "far more than mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . ."); *Ecolab, Inc. v. FMC Corp*., No. 05-CV-831, 2007 WL 1582677 (D. Minn. 2007) ("Courts have denied motions to stay when 'there is an inexplicable or unjustified delay in seeking re-examination' or when it appears that a stay 'will serve simply to delay proceedings.'")

The public interest weighs heavily against issuance of a stay.

5. If a stay is issued, it must be upon a bond or other terms securing the Plaintiffs rights.

If a stay is issued, it must be "on terms for bond or other terms that secure" the rights of the Plaintiffs and those protected under the Agreement. Fed. R.Civ.Proc. 62(c);[10] *see also* 11 Wright & Miller, *Fed.Pract. & Proc.* § 2904. In the event of a stay,

[10] DHS cites inapposite case law in opposition to the need for appropriate security, including a case that addresses Rule 62(d). *See* DHS Brief at p. 23 n. 15 (citing

the Court should conduct further proceedings for the determination of appropriate security for the protection of persons at risk by DHS non-compliant conduct. Appropriate security may include alternative reporting, informal conferences with the Court during the pendency of the appeal, or development of further action plans. Overall, however, the equities do not favor a stay, and the protections of the Agreement and this Court's Orders would be unnecessarily jeopardized if a stay were issued.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully requests the Court deny Defendants' Motion for Stay.

Respectfully submitted,

O'MEARA, LEER, WAGNER & KOHL, P.A.

Dated: January 17, 2020

s/ *Shamus P. O'Meara*

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Omnioffices v. Kaidanow, 201 F.Supp.2d 41, 43-44 (D.D.C. 2002). Further, despite DHS' representation, the *Omnioffices* Court's comments as to the usefulness of a bond was in relation to Rule 62(d), *not* Rule 62(c). In connection with Rule 62(c), the Court in *Omnioffices* also acknowledged the D.C. Circuit's criticism of stays "granted in cases involving appeals from non-monetary judgments." *Id*., at 43. The Court reviewed the difference between Rules 62(c) and 62(d), and upon analysis of the Rule 62(c) factors in that non-monetary case, denied the request for a stay. *Omnioffices*, thus, supports denial of stay, not issuance.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen, et. al, Plaintiffs, vs. Minnesota Department of Human Services, an agency of the State of Minnesota, et. al., Defendants.	Court File No.: 09-CV-1775 DWF/BRT **LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE**

I, Shamus P. O'Meara, certify that Plaintiffs' Brief in Opposition to Defendants' Motion for Stay (Doc. 784), complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Office Word 2016, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 9,020 words.

O'MEARA, LEER, WAGNER & KOHL, P.A.

Dated: January 17, 2020

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