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May 15, 2020

Via CM/ECF Only

The Honorable Donovan W. Frank
Senior U.S. District Judge, District of Minnesota
United States District Court
724 Warren E. Burger Federal Building
and U.S. Courthouse
316 North Robert Street, Suite 724
St. Paul, MN 55101

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

Dear Judge Frank:

State Defendants submit this letter, as well as the enclosed Addendum to the *Olmstead* Plan March 2020 Revision, in response to the Court's order of April 6, 2020 in the above-captioned matter ("Order") ([Doc. 831](#)). The Order requires State Defendants to "submit an addendum to the *Olmstead* Plan March 2020 Revision" that includes answers to questions posed by the Court in 10 subject matter areas related to the COVID-19 pandemic, as well as "[a] brief explanation for each goal summarizing how the goal may be impacted by the COVID-19 pandemic and whether further revision is necessary." [Doc. 831, p. 3](#). By submitting this response, State Defendants do not agree that the Order is proper, or waive any objection to or argument regarding the Order. In addition, nothing in State Defendants' response constitutes a commitment or enforceable requirement that the State take any particular course of action in response to the COVID-19 pandemic or otherwise.

As a final matter, State Defendants object to the Order. First, the Court issued the Order in the absence of any request from Plaintiffs, or assertion by Plaintiffs that the Settlement Agreement ("SA") or Comprehensive Plan of Action ("CPA") grants the Court some role in the State's response to this peacetime emergency. It is improper for the Court to *sua sponte* take action apparently asserting some such role. *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."). Second, and relatedly, the Court did not give the parties any notice that it contemplated issuing the Order before doing so, improperly depriving State Defendants of the ability to be heard about the Order's propriety. *Mathews v. Eldridge*, [424 U.S. 319, 333](#) (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, [380 U.S. 545, 552](#) (1965)). Third, the SA and CPA contain no provisions authorizing the Court

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to explore the necessity of, or direct, *Olmstead* plan amendment, and State Defendants' long ago complied with their *Olmstead* Plan-related obligations in the SA and CPA. See [Doc. 510](#) (approving the *Olmstead* Plan), 531, 589, 614-1, 643, 676, 700, 711 (reporting compliance with *Olmstead*-related ECs).

Sincerely,

s/ Scott H. Ikeda

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ADDENDUM

The U.S. District Court for the District of Minnesota ordered that an addendum to the Olmstead Plan March 2020 Revision be provided to the Court by May 15, 2020, including responses to specific questions and information regarding potential further revision to existing goals in light of the COVID-19 pandemic.

The Olmstead Subcabinet approved the addendum on May 11, 2020.

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Addendum to the *Olmstead* Plan March 2020 Revision

The U.S. District Court for the District of Minnesota ordered that an addendum to the Olmstead Plan March 2020 Revision be provided to the Court by May 15, 2020, including responses to specific questions and information regarding potential further revision to existing goals in light of the COVID-19 pandemic.

Minnesota law vests “general direction and control of emergency management” in the Governor, Minn. Stat. 12.21, subd. 1, who may both declare peacetime emergencies and take such actions and issue such orders as he deems necessary to respond to the peacetime emergency within that authority. Governor Walz declared a state of peacetime emergency due to the COVID-19 pandemic on March 13, 2020.

The responses below were compiled in response to the Court’s order and are based on information reasonably available to the agencies at the time this addendum was approved by the Olmstead Subcabinet. The COVID-19 pandemic, however, is a rapidly evolving situation and responses to the pandemic, including the issues below and guidance issued in response, will continue to evolve and change over time as directed by the Governor.

QUESTION 1: To what extent are school districts providing special education services?

(a) If school districts are not providing special education services, what is being done to remedy this issue?

MDE has issued and updated guidance for school districts related to special education services throughout the COVID-19 pandemic. The MDE [School Closure Guidance for Public Schools Districts and Charter Schools](#) made clear to school districts that students with disabilities should continue to receive specialized instruction and services to meet their needs through a distance learning model. In addition, MDE is providing ongoing technical assistance and supports to school districts for the delivery of special education services including:

- [online guidance for implementation of special education](#) in distance learning;
- online guidance for [due process](#) and school district accountability for special education;
- availability of MDE staff to school districts for technical assistance;
- clarification of telemedicine options and data privacy policies for delivery of special education services; and
- coordination of resources for families through the state’s interagency online clearinghouse of disability information Disability Hub, as well as the state-supported information center for students with disabilities – PACER.

Special education services are diverse and vary by student based on each student’s individual needs and Individualized Education Program (IEP) or Individualized Family Service Plan (IFSP) team planning. MDE guidance directed school districts to continue providing all special education services that can be delivered as part of school district distance learning plans, including teledelivery. MDE does not have a state data system that can identify which specific special education services are being provided to students with disabilities across the state.

The special education services that are most difficult to provide are those that cannot be provided outside of fully-staffed school buildings, i.e. through distance learning or teledelivery via phone or an online platform. In response, MDE is ensuring school districts are receiving resources and supports for:

design and implementation of distance learning plans that integrate a plan for special education services; adoption of teledelivery for special education services, including telehealth, telemedicine, telepractice, and telesupervision; and funding teledelivery of special education services with state and federal special education funds, as well as Medicaid. These resources and supports to school districts are available for students with disabilities of all ages under the Individuals with Disabilities Education Act ([34 C.F.R. §300.8](#)).

QUESTION 2: To what extent are group homes properly staffed?

(a) If group homes are not properly staffed, what is being done to ensure proper staffing?

The term “group home” is used to describe many different types of settings. The Minnesota Department of Human Services (DHS) supports multiple types of residential settings in the community where people with disabilities may reside. These include corporate adult foster care (commonly considered a “group home”), as well as settings such as board and lodge, board and care, and assisted living.

DHS operates some residential settings, such as Minnesota State Operated Community Services (MSOCS). The majority of licensed community residential settings in Minnesota are privately owned and operated.

Licensing regulations for residential settings, which are still being enforced, include regulations regarding staffing levels. Staffing levels vary based on size and type of setting. While DHS enforces licensing regulations, DHS does not have real-time data regarding staffing levels of private settings.

MDH issued “COVID-19 Recommendations for Employees and Residents of Group Homes” on April 8, 2020. The Disability Protection Advisory Group, consisting of DHS staff from disability services, NAMI, the Ombudsman’s Office, ARC, and many others, are currently reviewing and revising this guidance.

The guidance acknowledges the need to balance workforce challenges with the need to prevent further spread of the virus that causes COVID-19 in health care settings. MDH has recommended that if insufficient staffing is an issue for the group home, administrators should contact the local emergency preparedness coordinator to arrange for emergency replacement staff. DHS Licensing is allowing for expedited background checks to get staff into homes more quickly than normal.

During this peacetime emergency, a report to Minnesota Adult Abuse Reporting Center (MAARC) still triggers emergency protective services from the county if an issue of staffing rises to the level of neglect.

QUESTION 3: Are group home staff receiving extra pay?
(a) If not, to what extent may extra pay be provided?

The majority of the licensed community residential settings in Minnesota are privately owned and operated. DHS does not set wages for employees of privately owned and operated residential settings. DHS does not have information as to whether staff at privately-run residential settings are receiving extra pay.

DHS sets Medicaid rates for services, based on methodologies particular to the services and through federal approval by the Center for Medicaid/Medicare Services. Rates for residential settings are being adjusted based upon increased hours of staffing required due to the COVID-19 pandemic. Exception rates may be utilized in some cases with extraordinary needs.

DHS operates some residential settings, such as Minnesota State Operated Community Services (MSOCS). At DHS residential settings, state policy is allowing for paid sick leave if a staff becomes sick from COVID-19, without the use of their own sick time accruals.

QUESTION 4: To what extent are the staff at group homes using personal protective equipment?
(a) If staff are not using personal protective equipment, what is the plan to ensure that they will in the future?

MDH and the federal Centers for Disease Control and Prevention (CDC) provide guidance about the use of personal protective equipment (PPE) and availability.

<https://www.health.state.mn.us/facilities/patientsafety/infectioncontrol/ppe/index.html>

It is recommended that providers advise staff on guidelines and health and safety expectations, and refer them to the MDH website for necessary protocols. The CDC has conducted supportive site visits among a limited number of group homes.

Health care crises are managed locally through local emergency management and local public health. Providers are advised to contact their local emergency management agency to request PPE support and coordinate optimization strategies. PPE is not widely available nationwide.

As of May 1, 2020, and based on current CDC guidance, DHS residential settings have access to surgical/procedure masks for approximately 25-50 weeks given 1-2 masks per week per employee. Eye protection, gloves and gowns are also available for employees.

The question of how to obtain and distribute additional PPE to various settings throughout the state is ongoing at the highest levels of state government and will continue to evolve based on then-current circumstances and applicable state and federal guidance.

QUESTION 5: If a resident leaves a group home, is the resident discharged or allowed to return?

Governor Walz issued Executive Order 20-14 on March 23, 2020 to prohibit evictions during this peacetime emergency. Individual situations are based on the legal relationship an individual has with their housing provider, including whether there is a lease or residency agreement.

Service terminations are governed by Minnesota Statute 245D.10. Depending on the type of services provided, a 30 or 60 day notice for termination of services is required, and the right to appeal is provided by applicable law.

DHS has convened an advisory group that includes representatives from the two Ombudsman's offices and other advocacy groups to advise on issues that may arise affecting the rights of individuals who receive DHS-paid services during the pandemic.

QUESTION 6: In light of day programs being closed, have day program staff been redeployed to group homes? (a) If not, is there a plan to do so in the future?

The majority of licensed day programs in Minnesota are privately owned and operated. DHS has approved day service providers using remote technology to provide services.

DHS operates some vocational/day training and habilitation services as Minnesota State Operated Community Services (MSOCS). MSOCS has begun the process of redeployment of its staff to priority areas.

QUESTION 7: What is being done to remedy job losses for people with disabilities?

The primary immediate activity to remedy job losses resulting from the COVID-19 pandemic is a large and rapid expansion of the Unemployment Insurance (UI) program, administered by the Minnesota Department of Employment and Economic Development (DEED). Payment of UI benefits are being processed immediately upon application, rather than enforcing the usual one-week wait. Additional funding has been approved at both the state and federal level to increase the amount of UI payments individuals may receive, and the time allowed for collecting UI benefits has been extended by an additional 13 weeks.

Longer term, Minnesotans with disabilities who are eligible and who want to seek competitive integrated employment continue to receive services through the Vocational Rehabilitation program. Those services have not been interrupted by the pandemic but continue to be offered remotely through mechanisms such as teleconferencing and online meeting platforms.

There are several activities that are not specific to people with disabilities but do include them. Minnesota's CareerForce/Employment Services has begun transitioning to a virtual services model to serve all career seekers remotely. DEED is closely monitoring the economic situation statewide and identifying and publicizing businesses that are currently hiring people. In addition, DEED is administering a small business emergency loan program to help businesses stay open during the pandemic.

The Disability HUB (<https://disabilityhubmn.org/>) provides resources on work and benefits planning for people with disabilities and can provide individual assistance for each person's unique situation.

QUESTION 8: To what extent are the parents of adults with disabilities allowed access to visit them if they are hospitalized? (a) If access is currently prohibited, is there a plan to remedy this issue in the future?

Per MDH consultations with the Minnesota Hospital Association (MHA) in April 2020, there does not appear to be a standard practice or policy among the 130 acute care hospitals in MN regarding visitation guidelines for parents of adults with disabilities when they are hospitalized. Data does not exist to respond accurately to this question.

QUESTION 9: What is being done to ensure that people with disabilities have access to computers or cellphones so that they may remain connected to the community virtually?

There are a number of programs to help individuals with limited incomes to access cellphones or computers. For example, the Federal Communications Commission (FCC) provides the LifeLine program which provides reduced-cost phone or internet service to eligible households living in the community. DHS leads a technology task force, and there are available services to purchase adaptive equipment under waived services. DHS funds the Tech4Home program which offers at home, in person assistive technology (AT) consultation and technical assistance to help people with disabilities.

DHS facilities allow use of approved video platforms to communicate with friends and families. Many individuals have personal devices to do this as well. DHS has directions on how to share links to outside entities for services like Vidyo, a video-teleconferencing platform which is available for telehealth.

Regarding access to computers for distance learning, in response to Executive Order 20-02, the Minnesota Department of Education provided school districts with the Distance Learning Plan Template. This template directed school districts to ensure students, including students with disabilities, have internet access as needed, including consideration of working with local internet providers to obtain internet access for students and families, and additional options that could be used to provide students and families the materials, resources and support that they need. The template also directed schools to develop plans ensuring students have access to appropriate educational materials, including technology. School districts using online learning systems were specifically directed to consider and integrate into their plan how the school district ensures it can effectively support students' unique learning and teaching needs, including differentiated instruction as well as one-on-one support for students who need it. These school districts were also directed to identify additional options made for students and families who will not have access to the school district's online learning system, including how the schools district will ensure that the options are of the same, if not better, quality than the system the students and families cannot access. Specifically for special education services, the template directed school districts to consider the availability and provision of both online and non-internet resources to support students with disabilities.

The State of Minnesota is supporting school district provision of technology, including for students with disabilities, through the Minnesota Telecommunications/Internet Access Equity Aid program. This program provides school districts and charter schools with financial assistance to help with the costs of maintaining internet access, video connectivity and related telecommunications services. The Minnesota Department of Education is also actively reviewing current federal opportunities for supporting school district technology provision in response to the COVID-19 national emergency.

QUESTION 10: How is information being provided to individuals with low or no reading skills?

MDH has created COVID -19 Response materials available through videos with audio in English and in American Sign Language. In addition, infographic type materials are also available that convey key messages around hand washing and social distancing. Materials can be found here:

<https://www.health.state.mn.us/diseases/coronavirus/materials/index.html>.

MDH has a public hotline available from 7 am – 7 pm to answer COVID-19 related questions. Interpreters are available.

MDE coordinates accessible online information via the Disability Hub, with live chat, phone and e-mail supports for persons with disabilities and their families, as well as ensuring staff are available by e-mail. The Disability Hub is an online free statewide resource network that helps persons with disabilities, including students with disabilities and their families, solve problems, navigate state systems and plan for the future. COVID-19 information is available on the Disability Hub.

All state agencies are required to adhere to the following state and federal requirements related to accessibility. This information is available on the MNIT website at

<https://mn.gov/mnit/government/policies/accessibility/stat-basis.jsp>.

A brief explanation of Olmstead Plan goals summarizing how the goals may be impacted by the COVID-19 pandemic and whether further revision is necessary.

At this time it is not possible to provide a meaningful analysis of how the existing goals under the Olmstead Plan may be impacted by the COVID-19 pandemic, as the state is in the midst of responding to the pandemic. The state does not yet have reportable data that would demonstrate the potential impact of the COVID-19 pandemic on existing measurable goals. In order to ensure that actions taken related to the Olmstead Plan are based in credible data, progress under existing goals is reported only when data is available that is valid and reliable and can be analyzed to meaningfully track progress. The impact of the COVID-19 pandemic, which has occurred only recently and is a rapidly evolving situation, cannot yet be determined based on available data. It would be premature to predict what that data may ultimately show regarding the existing Olmstead Plan goals.

The Olmstead Subcabinet continues to oversee, evaluate and monitor progress under the state's Olmstead Plan, as it is charged to do by executive order. The COVID-19 pandemic will result in a number of challenges throughout the state, including for individuals with disabilities, and the long-term impacts of the current situation are currently unknown. If the data reflects that the COVID-19 pandemic is having a measurable impact on existing goals, or if it is determined that additional responses are necessary in light of the COVID-19 pandemic, any proposed changes to measurable goals would occur through the Olmstead Subcabinet with an opportunity for community input and engagement.