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ECF-Filed

July 28, 2020

The Honorable Donovan W. Frank
United States District Court - District of Minnesota
Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: Jensen, et al v. Minnesota Department of Human Services, et al.
Court File No. 09-CV-1775 (DWF/BRT)

Dear Judge Frank:

Plaintiffs provide this letter pursuant to the Court's Order (Doc. 779) and subsequent Orders involving the court-ordered external review of DHS and the State's ("DHS") practice of mechanically restraining people with developmental disabilities at the Forensic Mental Health Program ("St. Peter") and Anoka Metro Regional Treatment Center ("Anoka"). *See also* Order (Doc. 798) at 3 (Dr. LaVigna's report must specifically quantify the type, frequency, and duration of mechanical restraint at St. Peter and Anoka, and identify whether Positive Supports were attempted prior to use.)

Plaintiffs agree with the Consultants' observations and requests in their July 20, 2020, letter to the Court. The report from Dr. LaVigna is incomplete and should be revised to provide the requested information for the appropriate determination of issues the Court identified for external review.[1]

It appears Dr. LaVigna never visited St. Peter or Anoka for his review and only conducted a paper review from information primarily provided by DHS and its lawyers. On site observation and inspection of the actual conditions at St. Peter and Anoka, including interviews with staff and residents regarding the use of mechanical restraints, should be a fundamental part of the review. Dr. LaVigna should physically inspect St. Peter and Anoka, conduct interviews of staff and residents, and amend his report with findings from the onsite inspection, observation and interviews.

[1] The Court's Order (779) directed DHS to engage Dr. LaVigna and that he meet with the Consultants.

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The report does not state that Dr. LaVigna received or read the Jensen Settlement Agreement, the Comprehensive Plan of Action, the Positive Supports Rule, the Olmstead Plan, the Court Monitor's report (Doc. 236)— *Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1 Review* (finding "significant use of the Restraint Chair and of Seclusion"), the Disability Law Center's letter and reports on the use of restraints (*e.g.*, Investigative Report; Restraint and Seclusion at the Minnesota Security Hospital; (Doc. 792 Ex. A-C), licensing reports involving the use of restraint at St. Peter and Anoka (*e.g.* DHS License Details, Minnesota Security Hospital dba Forensic Mental Health Program (licensing actions and maltreatment findings including a February 6, 2020, finding of maltreatment by abuse and neglect of a vulnerable adult with autism), or the DHS official position that "All people with developmental disabilities should be served in accordance with the Agreement with current best practices":

> **Q R4 – Can restraints be used with people who have developmental disabilities but are not *Jensen* Class Members while receiving services at Anoka Metro Regional Treatment Center?**
>
> **Answer:**
> All people with developmental disabilities should be served according to the terms of the *Jensen* Settlement. These terms use best practices for therapeutic interventions and the least restrictive intervention necessary to achieve safety.

Jensen Settlement Agreement (JSA) Frequently Asked Questions at 7 ("These terms use best practices for therapeutic interventions and the least restrictive intervention necessary to achieve safety. These terms will also keep DHS in compliance with guidelines in the Commissioner's DHS Respect and Dignity Statement the Americans with Disabilities Act and Minnesota's Olmstead Plan.") These are crucial documents that should be part of the external review of DHS practices that mechanically restrain vulnerable citizens with developmental disabilities.")

Dr. LaVigna's report and invoices reference several communications with DHS and its lawyers but copies of these communications were not provided. Dr. LaVigna also states he requested "Other documents that Quality Assurance and Disability Compliance Services felt would be helpful," and "Applicable State and Court documents," and that he received "Various State policies and procedures." However, copies of these documents were not provided.

All letters, emails, Dr. LaVigna's draft report(s), DHS and its lawyers' comments to the draft report(s), and all other communications between Dr. LaVigna and DHS and its lawyers should be provided for review by the Court, Consultants and Plaintiffs.

The report notes DHS "was not able to identify a single resident of Anoka identified as having a developmental disability with whom mechanical or physical restraint or any other restrictive procedure had been used for the entire year of 2019 or since then. This was independently confirmed by Mary Rogers from the Ombudsman's office who attributed this to the applicable State policies and procedures which the staff were invested in and committed to following." However, Dr. LaVigna does not state whether he agrees with these comments, nor does he provide opinion on why DHS continues mechanically restraining St. Peter residents with developmental disabilities while not using mechanical or physical restraint or any other restrictive procedure on Anoka residents with developmental disabilities "for the entire year of 2019 or since then."

Dr. LaVigna commends Anoka staff for not using restraints and restrictive procedures but does not state whether using abusive mechanical restraints, including mechanical restraint chairs, is an acceptable best practice. The continued use of such abusive and cruel measures directly conflicts with DHS commitments to completely eliminate mechanical restraint at locations where DHS claims people with developmental disabilities exhibit serious behaviors. *See* Order (Doc. 257) at 3 ("The revised policy, endorsed by the Court Monitor, incorporates the parties' agreement to eliminate the Velcro soft cuffs and fabric ankle straps exception, and thus establishes Cambridge as a facility entirely free from use of mechanical restraints."); (Doc. 232-2) at 11 ("Mike Tessner and I were asked by DHS to present the Settlement Agreement provisions to the Rule 40 Committee as the Committee was off track and needed a solid understanding of the Agreement as a predicate for its work, We viewed then, and now, that the Prohibited Techniques section, like other sections of the Settlement Agreement, as a best practice developed provision that should be present throughout the State/DHS facilities.")

The report should be amended to include Dr. LaVigna's review and opinion on whether using abusive mechanical restraints, including mechanical restraint chairs, on vulnerable citizens with developmental disabilities is an acceptable best practice.

Plaintiffs were cruelly abused by DHS with mechanical restraints including leg shackles and law enforcement handcuffs.[2] Plaintiffs certainly do not believe using abusive

[2] (Doc. 3-1) *Just Plain Wrong* at 17 ("Documents in individual records revealed that people were being routinely restrained in a prone face down position and placed in metal handcuffs and leg hobbles. In at least one case, a client that the metal handcuffs and leg hobbles were secured together behind the person, further immobilizing the arms and legs, reported it to the Ombudsman staff. Some individuals were restrained with a waist belt restraint that cuffed their hands to their waist. An individual with an unsteady gait was routinely placed in this type of restraint, putting that person at risk of injury if they should fall. Others were being restrained on a restraint board with straps across their limbs and trunk.")

mechanical restraints on vulnerable citizens with developmental disabilities constitutes "best practice." Far from it, strapping and immobilizing vulnerable adults in mechanical restraint chairs, handcuffing them, shackling them and inflicting other abuses on them with mechanical restraints is torture. DHS already acknowledged this in its DHS Respect and Dignity Statement, signed by the DHS commissioner on June 20, 2013, stating DHS will "Prohibit techniques that include any use of restraint, punishment, chemical restraint, seclusion, time out, deprivation practices or other techniques that induces physical, emotional pain or discomfort." *See also* (Doc. 792-1) ("DHS has recognized that the use of restraint and seclusion is an abusive practice"; "Restraint and Seclusion is Abuse and Neglect"); (Doc. 792-3) at 2 ("defining 'abuse' to include 'the use of bodily or chemical restraints which is not in compliance with federal and state laws and regulations' and 'any other practice which is likely to cause immediate physical or psychological harm or result in long-term harm if such practices continue.'"); *C.P.X. through S.P.X, et al. v. Garcia*, --- F.Supp.3d ---, Crt File No. 17-CV-417, 2020 WL 1531126 (S.D. IA March 30, 2020), Trial Order (Doc. 328) at 91 (finding school's use of mechanical restraint device consisting of a mattress on a metal bed frame and various Velcro straps "tortures its students.").

Further commenting on the Agreement DHS also stated:

> In December 2011, the Jensen Settlement Agreement set a new course toward best practices in how people with disabilities are treated. The Jensen Agreement resulted from unhealthy conditions in the Minnesota Extended Treatment Options (METO) program. One key provision of the Jensen Agreement was a requirement that the Department of Human Services (DHS or Department) empower a committee to examine the issues of seclusion and restraint as they pertain to persons with developmental disabilities. In particular, the Agreement called for a review, and possible update, of a DHS administrative rule commonly known as Rule 40. However, while abiding by the Jensen's Agreement directive on Rule 40, it is DHS's belief that there is a great opportunity to create broader policies on positive supports, prohibited practices, training, monitoring and reporting across the programs we regulate. Therefore, with recognition that there are some providers and advocacy groups whose opinions differ, DHS, along with a growing number of our clients, advocates, and providers, support a change in Department policy to prohibit procedures that cause pain, whether physical, emotional or psychological and prohibit programmatic use of seclusion and restraints for all programs and services licensed or certified by the Department.

Id. See also Order (Doc 820) (citing DHS goal in Settlement Agreement ¶ 7 to "extend the application in this Agreement to all state operated locations serving people with

developmental disabilities with severe behavioral problems or other conditions that would qualify for admission to METO" or its institutional or community successor."); *MN DHS Guidelines to the Investigation of Vulnerable Adult Maltreatment*, Appendix V *Common Courtesies when Interacting with People with Disabilities*:

> People with disabilities are people first. Their disabilities should come second. Yes, the disabilities are part of them, but are not the most important aspect. People with disabilities are like everyone else. They may look, move or act differently sometimes, but they strive toward similar goals. They do not want to be treated differently, but instead want the same things in life that everyone else does -- to be loved, appreciated, respected and productive. Recent changes in laws, policies and attitudes have opened opportunities for people with disabilities to pursue education, recreation and employment in the mainstream of community life. As we increasingly find ourselves in situations involving people with disabilities, we need to enhance understanding and communication in everyday interactions

Id. at 196.

The report should be also amended to include Dr. LaVigna's review and opinion on whether using mechanical restraints violates the Positive Supports Rule and its express prohibition against using restraints.

In its Statement of Reasonableness submitted in support of the Positive Supports Rule, DHS stated:

> To fulfill the settlement agreement obligation and legislative directives, the Department is now proposing a rule that governs positive support strategies for all licensed settings and services and, for providers not already governed by chapter 245D, applies the prohibitions and limits of that chapter to those non-245D licensed services. The rule accomplishes the latter by incorporating the pertinent requirements of chapter 245D by reference. As a result of the proposed rule, no Department-licensed service or facility will be permitted to use outdated and unacceptable practices for persons governed by the statute and rule.
>
> ***
>
> 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.

> ***
> Further, incorporating the statutory prohibitions on use of restrictive interventions is also consistent with the Department's agreement to preclude use of restraints and seclusion both in the Jensen Settlement Agreement and in the Comprehensive Plan of Action. The terms of the Jensen Settlement Agreement require the Department to immediately and permanently discontinue the use of mechanical restraints, medical restraints, and medications as a method of punishment, or in lieu of adequate staff training or behavior support plans, convenience, or as a form of behavior modification in the program that was the subject of the lawsuit. As noted, the Department also agreed more broadly in the Comprehensive Plan of Action to prohibit restraint and seclusion in all licensed facilities and settings, consistent with the above-noted legislative directive in Minnesota Statutes, section 245.8251.

DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions at 2, 16, 40 DHS is on the Court record stating mechanical restraint is not an acceptable practice. *Id.; see* (Doc 756) at 10 (citing "DHS Commissioner August 27, 2015, letter to Court ("Great strides have been made in the area of restraint and seclusion since the Jensen Settlement Agreement was adopted by the Court. Since that time, by the efforts of many throughout the community and including the parties, Minnesota Rules, part 9544 was promulgated and now prohibits restraint and seclusion, except for emergency use of manual restraint, in DRS-licensed settings when serving a person with a developmental disability and also in Home and Community-Based Services settings when serving a person with a disability. Minnesota Statutes, Chapter 245D was enacted and similarly prohibits restraint and seclusion in Home and Community-Based Services settings. Prone restraint is no longer permitted in any setting.")

As the Court is aware, despite DHS positions agreeing that mechanical restraint cannot be used on people with developmental disabilities, Plaintiffs, Consultants and the Minnesota Disability Law Center have repeatedly notified the Court of the dangerous DHS tactic of issuing variances and taking contrary positions to circumvent the Positive Supports Rule and its prohibition against the use of mechanical restraint. *See e.g.* (Doc. 756) at 22-25:

> Over the years, the Settlement Class and Consultants have called out DHS attempts to avoid its requirements in the Agreement through misguided variances, exemptions, amendment, and incorrect positions on the Positive Supports Rule:
>
> > **From:** Shamus O'Meara
> > **Sent:** Saturday, June 28, 2014 8:05 AM

To: 'Scheffer, Elizabeth R (DHS)'; Wieck, Colleen (ADM); Opheim, Roberta (OMHDD) **Cc:** Gray, Gregory N (DHS); Akbay, Amy K (DHS); Booth, Peg (DHS); Bartolic, Alex E (DHS); Young, Charles W (DHS); Klukas, Robert J (DHS); Sullivan Hook, Karen E (DHS); Finlayson, Katherine (DHS); Office of David Ferleger, Esq. (office@ferleger.com); 'David Ferleger'
Subject: RE: Draft Rule

The Settlement Class objects to and will never support any provision in this draft rule or otherwise that allows for mechanical restraint and seclusion. *See, e.g.*, page 8 ("Use of mechanical restraint") and page 10 ("Use of seclusion").

Your draft rule violates the Jensen class action settlement agreement and the civil rights of those it purports to serve.

Shamus P. O'Meara
O'MEARA, LEER, WAGNER & KOHL, P.A. | 7401 Metro Blvd, Suite 600 | Minneapolis, MN 55439-3034 direct: 952.806.0438 | fax: 952.893.8338 | SPOMeara@olwklaw.com | v-card | olwklaw.com

From: Scheffer, Elizabeth R (DHS) [mailto:Beth.Scheffer@state.mn.us]
Sent: Wednesday, June 25, 2014 2:05 PM
To: Shamus O'Meara; Wieck, Colleen (ADM); Opheim, Roberta (OMHDD)
Cc: Gray, Gregory N (DHS); Akbay, Amy K (DHS); Booth, Peg (DHS); Bartolic, Alex E (DHS); Young, Charles W (DHS); Klukas, Robert J (DHS); Sullivan Hook, Karen E (DHS); Finlayson, Katherine (DHS)
Subject: Draft Rule

Attached please find the draft positive supports rule for your review and discussion. The draft rule is still a work in progress, some provisions are still actively under discussion, and all provisions are subject to further discussion. The draft rule will continue to evolve and remain under discussion through the end of October.

We can discuss on Monday how you would like to provide feedback. Again, if you have any items you feel strongly that DHS consider before even sharing the draft with any other persons, you will need to call those to our attention no later than July 14, and preferably earlier. Absent that, it is entirely up to you when and how you provide feedback to us on the draft rule.
Rgards, Beth

Beth Scheffer
Administrative Law
Manager DHS
Compliance Office
(651)431-4336

See also (Doc. 250-1) at 27-33 (Plaintiffs' letter to the Court); *id.* 21-22 ("We do not support any efforts, proposed legislation, proposed waivers, rules or measures that are

inconsistent with the Jensen Settlement Agreement provisions and the spirit and intent of the Settlement Agreement. This position has been repeatedly conveyed to DHS, the Court Monitor and the Court, including the Rule 40 process and the issues involving proposed changes and modification of Minnesota Statute 245D and other proposals by OHS impacting people with developmental disabilities and their families." "There is no application of the fundamental prohibition against restraint and seclusion and other prohibited techniques which is a hallmark of the Jensen Settlement Agreement. Instead, there are inconsistent provisions, ongoing questions and tensions between Rule 40 final recommendations and the 245 proposals and waivers, continued violation of the Settlement Agreement and the civil rights of people with developmental disabilities, rejection of due process, rejection of Rule 40 final recommendations, and the use of a process to achieve these results that is not collaborative nor consistent with the rights of people with developmental disabilities and the best practices for their care.").[3]

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[3] *See also* (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."); Doc. 493; (Doc 586) at 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."); (Doc. 730) at 14 ("In a letter to DHS licensing on the DHS use of mechanical restraints at MSH, the Minnesota Disability law Center stated: Deputy Commissioner Johnson's letter raises significant concerns regarding the implementation of the PSR at both MSH and other DHS licensed facilities. MSH or any other facility could justify the use of an otherwise prohibited procedure by stating that the purpose for the procedure's use was different than one of the four purposes laid out in the PSR. In the incidents involving [ ], MSH cited "security" as its purpose. MSH or other licensed providers could create other "purposes" to justify the use of any of the procedures listed in Minn. R. 9544.0060, subp. 2 to subvert the intention of the PSR. This type of "purpose-based" exception has the potential to render the entire "Prohibited Procedures" portion of the PSR null and void."); *see gen*. (Doc. 362).

Notably, DHS previously asked Plaintiffs' counsel to jointly present on the Agreement with DHS after advising that the Rule 40 Committee was off track. Both DHS and Plaintiffs that the Agreement's prohibition against mechanical restraint is the best practices approach that should be utilized by the Rule 40 Committee for all state/DHS facilities. For example, our email to the court monitor, (Doc. 232-2) at 11, states:

> "[T]he Settlement Class does not support any provision of the Rule 40 narrative that is inconsistent with, or in violation of, the Settlement Agreement. The latest proposed narrative seeks exceptions for the use of certain mechanical restraint. The parties to the Jensen Settlement Agreement have agreed there will be no use of mechanical restraint for the Facility as defined in the Settlement Agreement. Nearly one year ago our office and Mr. Tessner presented to the Rule 40 Committee urging that the Committee follow the guidance of the Jensen Settlement Agreement to prohibit the use of mechanical restraint which reflects best practices. As we have repeatedly conveyed, the definition of Prohibited Techniques in the Settlement Agreement was reached by consensus between the parties with active assistance from the consulting experts. Mike Tessner and I were asked by DHS to present the Settlement Agreement provisions to the Rule 40 Committee as the Committee was off track and needed a solid understanding of the Agreement as a predicate for its work, We viewed then, and now, that the Prohibited Techniques section, like other sections of the Settlement Agreement, as a best practice developed provision that should be present throughout the State/DHS facilities.

See also Doc. 233-4) at 13:

> The definition of Prohibited Techniques in the Settlement Agreement was reached by consensus between the parties with active assistance from the consulting experts. Mike Tessner and I were asked by DHS to present the Settlement Agreement provisions to the Rule 40 Committee as the committee was off track and needed a solid understanding of the agreement as a predicate for its work. I believe we both Mr. Tessner and I viewed the Prohibited Techniques section, like other sections of the settlement agreement, as a best practice developed provision that should be present throughout the State/DHS facilities. Mr. Tessner's May 7, 2012, e-mail to me, enclosed, expressed this view:
>
> > Shamus,
> >
> > I believe you and Colleen have spoken about the Rule 40 meeting on Monday and you are planning on attending. We are feeling it is important to revisit the Settlement conditions relative to restraint and seclusion. The thought is that I would review the specific requirements for the Cambridge

> programs and you would talk about the expectation of the revision of rule 40 for the broader system. Our desire is to get the committee to adopt these conditions as the frame for the revision of rule 40 and then focus on how this would fit in the array of other settings for which DHS is responsible.

My response to Mike's e-mail shared this perspective and reiterated our view about the importance of this issue:

> We will not support positions that seek a rule change using restraint, seclusion or other prohibited techniques precluded by the settlement, or any use of restraint beyond the specific use allowed by the settlement (e.g., Velcro strap only in defined emergency situation with third party and expert review).

Implementing these Prohibited Techniques in all DHS managed facilities was also a goal expressed to us by Alex Bartolic at the Rule 40 Committee, and is consistent with the State's goal expressed in the agreement to widely implement the Rule 40 and Olmstead process:

> "The State also agrees that its goal is to utilize the Rule 40 Committee and Olmstead Committee process described in this Agreement to extend the application of the provisions in this Agreement to all state operated locations."

Contrary to this view, however, rather than accepting this provision, we have received several reports, and have firsthand experience, with state and other members on the Rule 40 seeking to develop exceptions to the preclusion on using Prohibited Techniques, particularly the preclusion against restraints. We are advised that one state operated representative in a management position involving Cambridge firmly believes in in the programmatic use of restraints (the primary reason why the lawsuit was commenced) and rejects the definition of emergency in the settlement agreement.

* * *

Plaintiffs agree with Dr. LaVigna's recommendation to use the Court and Consultants as outside monitors. Continued monitoring of DHS abusive mechanical restraint practices and its conduct seeking to circumvent its statements and policies prohibiting mechanical restraint is vital to the protection of our vulnerable citizens. As the Court has repeatedly noted, DHS noncompliance caused the appointment of and expenditures for the independent court monitor to ensure compliance with the Agreement. *See gen*. Order (737) (listing numerous findings of noncompliance); Order (Doc. 820) (continued DHS

noncompliance supports DHS payment for expansion of monitor's role and to fulfill DHS obligations under the Agreement); Order (Doc. 159) at 11, 14; Order (Doc. 435). DHS noncompliance over many years shoes it is unable to properly protect vulnerable citizens with developmental disabilities from abuse with mechanical restraints.

The record establishes DHS noncompliance and attempts to contradict and ignore its positions that mechanical restraint will not be used on people with developmental disabilities, including twice appealing this Court's Orders for mechanical restraint review at St. Peter and Anoka despite participating and advocating for restraint review at these locations ordered "in lieu of issuing a show cause order against Defendants for sanctions and contempt," *see* (Doc. 220) (2013 review ordered "[t]o preliminarily prepare for and to facilitate further compliance reviews, participating in all other external reviews"), and officially stating the Agreement's restraint provisions are applicable to serve all people with developmental disabilities under current best practices. Predictably, the 8th Circuit summarily dismissed the DHS appeals, after previously dismissing the DHS appeal of this Court's Order extending jurisdiction as it deems just and equitable. *See also* Order (Doc. 737) (detailing DHS noncompliance from "almost immediately after the Court approved and adopted the Settlement Agreement," orders for "an implementation plan with specific actions, deadlines, and reporting requirements for the Court's review," finding DHS "violated the Settlement Agreement and granted Plaintiffs' request for sanctions," extending jurisdiction "In lieu of issuing contempt or other punitive sanctions, other noncompliance findings."); Order (Doc. 340) at 3 ("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."); Order (Doc.674) at 11 (noting DHS "repeated delays in compliance throughout this litigation's lengthy history that led the Court to extend its jurisdiction on multiple occasions"); Order (Doc 586) at 12.

The substantial record shows DHS has little interest in protecting vulnerable citizens from abusive mechanical restraint, even challenging basic restraint reporting requirements that are clearly part of the Agreement. *See* Order (Doc. 794) ("[I]t is well-established that reporting is part of the Agreement; the fact that the Court seeks additional reporting is neither novel, nor outside the scope of the Agreement."); Order (Doc. 737) (ordering mechanical restraint review in recognition of "the very real danger that inappropriate use of restraint poses to some of society's most vulnerable citizens."); *see gen.* (Doc. 730); (Doc. 821); (Doc. 353); Order (Doc. 297) at 2-3 ("Recalling that this litigation was initiated after the 2009 public exposure of inappropriate and abusive force at MSHS-Cambridge's predecessor METO, the Court is extremely disappointed that, more than two years after the approval of the Settlement Agreement, for some employees, safety is equated with "a show of force, power and control" in a "legacy of the old institutional way and not the direction we [DHS] are headed." "This state of

affairs is fraught with risk to the safety of clients and staff alike."); (Doc. 586) (referencing DHS used a mechanical restraint chair on a person with developmental disability at MSH in direct violation of the Settlement and civil rights, more than once); (Doc. 250-1) at 25 (Despite Promises, Use of Seclusion and Restraint Persists for State Patients); (Doc. 812); Ikeda Decl. (8th Cir. Entry ID: 4896079-2) Ex. 1 (DHS lead counsel reportedly told the Consultants they should tell the Court to release its jurisdiction and then DHS will begin to work with and listen to them; the consultants are merely doing the bidding of the Court; DHS will challenge every order because the Court cannot tell it what to do; the Governor supports all of this; and that the same lawyer attributed similar statements to lawyers at the Minnesota Attorney General's Office.)

The public's interest in ensuring that DHS lives up to its promises and actually protects people with developmental disabilities under its care through monitoring and outside scrutiny is of paramount concern— a familiar theme involving DHS conduct. *See* Order (Doc. 820) ("While the Court stayed the Court Monitor's duties in January 2017; it has not yet determined that the Court Monitor's works has concluded. (Doc. No. 612 (reserving the right to re-engage the Court Monitor to investigate or verify other issues that may arise)."); Order (Doc. 823) at 10 ("areas of noncompliance have repeatedly been discovered only upon external review. (See, e.g., Doc. Nos. 236, 327, 347, 374, 388, 414, 604.)"); Order (Doc. 159) at 10-11 ("Defendants acknowledge that they expect to have their compliance monitored. Anne Barry, Deputy Commissioner of the Defendant Minnesota Department of Human Services, affirmed at the settlement approval hearing that Defendants expected external scrutiny in this case: "First of all, we fully expect that watchfulness and scrutiny. We are in the business of public service, so we understand we will be watched. We expect that we will be watched."); (Doc. 246) ("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"); *The Deinstitutionalization of People With Developmental Disabilities*, Minnesota Office of the Legislative Auditor (1986) (stating DHS needs "to prepare for the 'post-Welsch era and to analyze what will change when the case is ended," "the consent decree has made a difference partly because it exposed the hospitals to intense, outside scrutiny," and "consider continuing outside monitoring of the state hospitals and community facilities" … to ensure that the hospitals do not retreat from the progress they have made and to point out areas where improvements are needed."); Order (Doc. 224) ("The historic settlement in this litigation was hailed by Plaintiffs and Defendants alike as one which would fundamentally improve the lives of individuals with disabilities in Minnesota and serve as a national model. The settlement's innovations were both with regard to replacement of mechanical and other restraints with positive behavioral supports and development of a comprehensive all-disabilities plan to implement the Supreme Court's decision under the Americans with Disabilities Act in Olmstead v. L.C., 527 U.S. 581 (1999)."); *See also 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);

Thank you.

Respectfully submitted,

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

/s/ Shamus P. O'Meara

Shamus P. O'Meara
SPO/tls