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' Reply Brief in Support of Motion for Appointment of an Independent Reviewer and for Other Sanctions Against Defendants**

ARGUMENT

Last minute attempts by DHS to ignore the clear record of unprecedented injustice done to vulnerable citizens should not be tolerated.

Plaintiffs specifically referenced DHS lead counsel Rick Figueroa as the person making the statements to the court consultants, confirmed in emails and by declaration from DHS counsel. The record provides:

> **From:** Shamus O'Meara [mailto:SPOMeara@olwklaw.com]
> **Sent:** Wednesday, March 4, 2020 8:29 AM
> **To:** Ikeda, Scott; Mark Azman
> **Cc:** Winter, Aaron; Leonard, Michael; Noss, Anthony
> **Subject:** DHS violation of Rule 7.1; Plaintiffs' motion for contempt order; Disparaging statements reportedly made by DHS counsel Rick Figueroa and similar statements attributed to lawyers at Minnesota Attorney Generals Office; Your emails about the monitor
>
> Scott:
>
> We address four issues: DHS failure to comply with Rule 7.1; Plaintiffs' motion to hold DHS in contempt; your emails about the monitor; and disparaging statements reportedly made by DHS counsel Rick Figueroa and similar statements he attributed to the Minnesota Attorney General's Office.
>
> * * *

> Disparaging Statements by Rick Figureoa and similar statements he attributed to lawyers at the Minnesota Attorney General's Office
>
> We remain deeply concerned about reported disparaging statements made by DHS lead counsel Rick Figueroa including that Figueroa 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; that Figureoa attributed similar statements to lawyers at the Minnesota Attorney General's Office; and that no matter what the Court orders DHS will instruct Dr. LaVigna to tell DHS what the consultants say to him.

Ikeda Decl. Ex. 1 at 5 (8th Cir. Entry ID: 4896079)

> **From:** Ikeda, Scott [mailto:Scott.Ikeda@ag.state.mn.us]
> **Sent:** Thursday, March 05, 2020 1:05 PM
> **To:** Shamus O'Meara; Mark Azman
> **Cc:** Winter, Aaron; Leonard, Michael; Noss, Anthony
> **Subject:** RE: DHS violation of Rule 7.1; Plaintiffs' motion for contempt order; Disparaging statements reportedly made by DHS counsel Rick Figureoa and similar statements attributed to lawyers at Minnesota Attorney Generals Office; Your emails about the monitor
>
> *This e-mail is from an outside source and may not be secure. Please use caution to confirm its validity before responding, or opening links or attachments. OLWK-IT*
>
> Shamus:
>
> I write in response to your March 4 email to me raising four different issues. I'll address them in the order in which you raised them.
>
> * * *
>
> (4) Statements Made by DHS Counsel
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> With respect to alleged statements made by DHS Senior Counsel Rick Figueroa or statements "by DHS counsel to elected officials at the Minnesota Legislature, and to the consultants, about the Court and [y]our office," please let Defendants know how those alleged statements relate to Plaintiffs' contempt motion or the violation of a Court order.

(March 5, 2020 email from Ikeda to O'Meara).

Tellingly, DHS has not disclaimed the Figueroa statements, instead asserting free speech protections for them. Figueroa has been deeply involved in this matter for years

including many appearances before the Court and meetings with the court monitor, court consultants and parties. His vindictive statements were made to the court-appointed consultants, about their official role in the case, and telling them "DHS will challenge every order because the Court cannot tell it what to do." Ikeda Decl. Ex. 1 (8th Cir. Entry ID: 4896079-2); (Doc. 812). This Court has clear authority to sanction DHS for the conduct of its employee specifically directed toward the Court and court-appointed consultants. Such shocking conduct from DHS senior leadership cannot be explained away and should not be condoned.

Plaintiffs have asked for sanctions against the state and DHS. The lawyers for DHS and the Minnesota Attorney General's Office are employees of the state. Plaintiffs ask for sanctions against the state including its employee-lawyers.

The Court has the inherent clear authority to sanction DHS. The injustice done over the past 10 years results directly from DHS rejection of this Court's authority over the Agreement. Had DHS simply complied with the Court' orders rather than constantly complaining, objecting and litigating its settlement promises justice would long ago have been served. Unlike the DHS false narrative that it has been in compliance for years the Court has articulated ongoing years of noncompliance. *See* Order (Doc. 879) at 15-16 ("Despite the Court's portentous warnings, Defendants repeatedly delayed, objected to, or fought their responsibilities pursuant to the Agreement."); (Doc. 737); (Doc. 756); 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. 820) (continued DHS noncompliance supports DHS payment for expansion of monitor's role and to fulfill DHS obligations under the Agreement); Order (Doc. 823) at 10 ("areas of noncompliance have repeatedly been discovered only upon external review); Order (Doc. 779) at 12-14 (external review necessary to properly determine whether MNDHS follows best practices when using mechanical restraints at St. Peter and Anoka, and to consider statewide Olmstead Plan revision); 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.") ("the Court is also mindful of Defendants' repeated delays in compliance throughout this litigation's lengthy history that led the Court to require additional reporting and to extend its jurisdiction on multiple occasions."); (Doc. 707) at 6 ("the Court must evaluate Defendants' compliance to assess the impact of the Jensen lawsuit on the well-being of its class members and to determine whether the Court's jurisdiction may equitably end"); (Doc. 634) at 23-24 ("it is unlikely that the DHS will remedy the community noncompliance and also achieve substantial compliance with the Comprehensive Plan of Action, the Olmstead Plan, and the Rule 40 Modernization"); (Doc. No. 612 (reserving the right to re-engage the monitor to investigate or verify other issues that may arise).

Plaintiffs have also submitted many briefs and letters over the years identifying several areas of ongoing noncompliance. *See* Order (Doc. 794) at 8 ("During an April 2019 Status Conference, Plaintiffs raised concerns over multiple violations of abusive conduct and asked the Court to re-engage the Court Monitor. The Court found that an

external review of several locations was necessary to determine whether Defendants have complied with the obligations set forth in the Agreement."); (Doc. 812) ("DHS conduct has included secret waivers to allow mechanical restraint, and intentionally violating the settlement by sending a juvenile with a developmental disability to St. Peter and then claiming it had the right to abuse him with a restraint chair.") (citing to Tr. (Doc. 740) at 27 (DHS identifying mechanical restraint annual number not met); *id*. at 93 (DHS referencing 617 mechanical restraint reports and acknowledging 2018 total not met); (Doc. 586) at 6 (quoting May 20, 2015, letter from DHS assistant commissioner to Court) ("I write to notify the Court that on May 18, 2015, the Department placed W.O., a person committed solely as a person with a developmental disability, to the Minnesota Security Hospital (MSH). This impacts our compliance with Evaluation Criteria No. 82 of the Comprehensive Plan of Action (Doc. No. 283) and Amended Order (Doc. No. 284)."); (Doc. 586); (Doc. 253); (Doc. 250-1) at 25.); see gen (Doc. 728) (referencing numerous areas of noncompliance) ("The State and DHS continue to violate the Settlement, the CPA and their promises and statements to people with developmental disabilities. Indeed, repeated noncompliance and delay in the implementation of the class action settlement following this documented abuse have been hallmarks of defendants' post settlement conduct, forcing a motion for sanctions and Court action to appoint an Independent Court Monitor and order compliance on repeated occasions.")[1]

[1] *See also* (Doc. 158); June 19, 2012 *Advocate Concerns Regarding Implementation of Jensen Settlement* (Doc. 158-1); July 5, 2012, e-mail to DHS counsel (Doc. 158-2), Objection to Defendants' September 17, 2012 Status Report to the Court (Doc. 171)

DHS cannot use the Court's latest Order (879) issued 10 years after settlement approval to undo its years of bad faith conduct. It has only been through relentless efforts of the Court, the court monitor, external review, consultants and Plaintiffs' counsel pushing for settlement implementation, holding DHS to its promises and refusing to back down to DHS delay and obstruction tactics that we are this far along. DHS compliance

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("Based upon available information, including the September 26, 2012, Report of the Ombudsman, which followed the Ombudsman's Just Plain Wrong report identifying the widespread abuse of residents through the use of programmatic restraint and seclusion at the METO facility, which was the subject of the Jensen class action lawsuit upon which the Settlement Agreement is predicated, we have notified DHS that we believe the MSHS-Cambridge facility is engaging in the use of Chemical Restraint in violation of the Settlement Agreement and that the Cambridge staff have not been properly trained as required by the Settlement Agreement."); (Doc. 171-1; 171-2); (Doc. 250-1, Ex. 26) ("The issues relating to DHS non-compliance with the Settlement Agreement have existed for months. They are ongoing, requiring extensive monitoring and comprehensive responses, meetings and interaction between the parties and with the Court Monitor) (citing Doc. 158, 158-1, 158-2, 171, 171-1, 171-2, 179, 180, emails to chambers, October 4, 2012 letter to DHS counsel notifying DHS of the Settlement Class's position regarding DHS non-compliance with the Settlement Agreement and a possible Motion to Enforce the Agreement); (Doc 233) and 233-4 (exhibits 1-21, including November 14, 2013, Class Counsel Letter to Court Monitor (exhibit 19), and Proposed Order ¶2 (requesting defendants pay $150,000.00 to the cy pres fund established by the Court in this matter for the benefit of people with developmental disabilities and their families); (Doc. 353); (Doc. 362); (Doc. 412) (objecting to revised Olmstead Plan as insufficient and in violation of the settlement, and requesting evidentiary hearing be held in which DHS must answer to the Court and families for its non-compliance over the past three years and be held accountable for its actions); (Doc. 493) (listing years of delay and non-compliance by the State and DHS to develop and submit to the Court an Olmstead Plan required by the settlement); (Doc. 591) ("At this point, in the sixth year after the Settlement was signed, the issues are not litigation-based or protected. Rather, there is a vital need for sustained, professional efforts to meet the comprehensive Court-approved plans, goals and deadlines set after years of hard work by all involved. The implementation process should not be about highlighting lawyers or protecting litigation information. It should be about taking actions to improve the lives of people with disabilities and their families. These issues and focus are well known to DHS, and its actions should be directed in this manner.")

reporting obligations, the comprehensive plan of action, evaluation criteria, work plans, subcabinet reports, quarterly reports, and the many other court-ordered requirements have existed and been enforced by the Court for many years due to DHS' unprecedented non-compliance. Thousands of hours spent by the Court, consultants and Plaintiffs were incurred from court documented DHS non-compliance. Predictable empty positions from DHS refusing to acknowledge the clear record and the injustice it has done to vulnerable citizens is further evidence supporting sanctions.

The Court held a conference on Plaintiffs' initial motion to enforce the agreement, appointing the court monitor due to ongoing DHS noncompliance, and later granted Plaintiffs' second motion to enforce, extending jurisdiction in lieu of other sanctions, expressly reserving its jurisdiction to award attorney's fees, ordering the CPA, work plans, ongoing reporting and other requirements for compliance. The Court is well within its authority to sanction DHS for its conduct. *See* (Doc. 211) at 5 (court conference to discuss "resolution of Plaintiffs' Motion to Enforce Settlement" and court's agreement "to issue an order addressing the role of the Monitor and to set up a process to promote substantial compliance with the Settlement Agreement"); Order (Doc. 340) (reserving Court's right to award attorneys' fees for DHS non-compliance); Order (Doc. 587) ("The Court reserves the right to exercise its continuing jurisdiction to ensure that compliance with the Settlement Agreement is verified going forward. The Court will continue to carry out its oversight responsibility as the Workplans are updated to oversee the State's efforts in following through on the commitments it has made."); *Kokkonen v.*

Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994) (purpose of ancillary jurisdiction is to "enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.").[2]

All of the DHS positions in its two recent appeals were summarily dismissed by the 8th Circuit (Doc. 832) including its insistence that Plaintiffs must show substantial noncompliance to enforce the Agreement. *See* DHS Motion to Stay at 15 (8th Cir. Entry ID: 4879552) ("The December 18 Order Erroneously Places On State Appellants The Burden To Demonstrate Compliance"). This made-up position, like the DHS false narrative claiming no one objected to its attempts to change the Positive Supports Rule,[3] directly contradicts the Court's many orders requiring that DHS must show substantial compliance. *See* Order (Doc. 737) at 7 (Along with the Court's orders, the settlement and CPA are the "Agreement" to which DHS must show substantial compliance to be released from the Court's jurisdiction.); Order (Doc. 757) at 10 ("It appears to the Court that Defendants' Motion is an attempt to reargue their position that they are in full compliance with the Agreement and that anything else they could do is beyond the scope

[2] DHS wrongly claims the Court's Order (Doc. 737) precludes a request for sanctions. Plaintiffs are not moving for an enforcement proceeding on other items not found by the Court but rather seek sanctions under the Court's inherent powers for non-compliance found by the Court over many years, requiring extended jurisdiction, comprehensive action and work plans, years of reporting and thousands of hours to address all of these requirements by the Court, monitor, consultants and Plaintiffs.

[3] 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.")

of the Agreement. The Court has already considered these arguments and rejected them. As clearly set forth in its June 2019 Order, the Court requires additional information to properly conclude that its jurisdiction may come to a just and equitable end.") The law of this case is that DHS has been required all along to show substantial compliance with the Agreement, but never did so for ten years, needlessly causing further orders and thousands of hours for everyone involved to address its unprecedented non-compliance.

The ten year implementation record shows ongoing independent review is the only way to ensure DHS compliance with its ongoing obligations and promises to vulnerable citizens. *See* Order (Doc. 823) at 10 ("areas of noncompliance have repeatedly been discovered only upon external review); Order (Doc. 794) at 13-14 ("The Court is also mindful of Defendants' repeated delays in compliance throughout this litigation's lengthy history that led the Court to require additional reporting and to extend its jurisdiction on multiple occasions. As this Court noted in its 2017 Denial '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. Here, if Defendants had a history of properly verified reporting on issues that relate to their management of settings that serve some of our most vulnerable and challenging populations in Minnesota, external review may not be necessary.") (citing *Karsjens v. Jesson*, Civ. No. 11-3659, 2015 WL 7432333, at *6 (D. Minn. Nov. 23, 2015); *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.")

While the Court's jurisdiction is ending the extensive ten year record of DHS noncompliance clearly shows justice can only be truly served in this matter through regular independent review. This can be done through a court appointed reviewer chosen prior to the expiration of jurisdiction to provide ongoing quarterly reports paid for by DHS with copies provided to the Ombudsman and the Minnesota Disability Law Center for action under their independent authority.[4] If necessary, the Court can also exercise its discretion to extend its jurisdiction as it deems just and equitable. *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.'"); Tr. (Doc 740) at 133 ("MR. IKEDA: And the Court agreed with your reading of the -- of what is a contract, which is to say that you could keep the case as long

[4] The Court's extensive experience with court monitoring and external reviewer in this matter can help inform its decision about the function and process to be followed for an independent reviewer. *See e.g.*, Order (Doc. 212) ("The Monitor will independently investigate, 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 Defendants are in substantial compliance with the Settlement Agreement and the policies set forth therein. The Court expects the reports to set forth the factual basis for any recommendations and conclusions.")

as you -- as long as it was just -- in your mind, just and equitable.*"); Alexander v. Jensen-Carter*, 711 F.3d 905, 909 (8th Cir. 2013) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.")

CONCLUSION

Based on the foregoing, including but not limited to the Court's inherent power to sanction and ten years of unprecedented non-compliance and delay by DHS, Plaintiffs respectfully request the Court order sanctions against DHS as follows:

1. Appointing an independent reviewer to provide ongoing quarterly reports on the status of DHS compliance with the Agreement to DHS, the Ombudsman for Mental Health and Developmental Disabilities and the Minnesota Disability Law Center, paid by the money previously deposited into the Court by DHS, and to be replenished by DHS on an annual basis, to ensure compliance with DHS ongoing obligations under the Agreement.

2. Ordering DHS to pay $500,000 within thirty (30) days from the date of the Court's Order to the following:

   - 100,000 to the Court's *Cy Pres* fund to be used to facilitate access to justice and improve the lives of people with developmental disabilities and their families;

   - $100,000 to third party organizations selected by the Court and unaffiliated with DHS to promote the state-wide changes in the Agreement including the Minnesota Olmstead Plan, Positive Supports Rule and Best Practices regarding the use of restraint and seclusion;
   - $100,000 to the Minnesota Governor's Council on Developmental Disabilities for its executive director's work in this matter over 10 years as a court consultant dealing with unprecedented ongoing non-compliance and delay caused by DHS, and for DHS lead counsel's vindictive statements about the Court and Court consultants;

   - $100,000 to the Office of the Ombudsman for Mental health and Developmental Disabilities for the Ombudsman's work over 10 years as

a court consultant dealing with unprecedented ongoing non-compliance and delay caused by DHS, and for DHS lead counsel's vindictive statements about the Court and Court consultants;

- $100,000 to Plaintiffs' counsel for thousands of hours spent addressing unprecedented ongoing DHS non-compliance and delay over 10 years.

3. An extension of the Court's jurisdiction until December 31, 2020, or as otherwise necessary, to ensure DHS compliance with all requirements of the Court's Order.

4. Any further relief the Court deems just and equitable.

Respectfully submitted,

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

Dated: September 30, 2020

s/ *Shamus P. O'Meara*

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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' Reply Brief in Support of Motion for Appointment of an Independent Reviewer and for Other Sanctions Against Defendants*, 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 3393 words.

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

Dated: September 30, 2020

s/ *Shamus P. O'Meara*

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