

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

James and Lorie Jensen, as parents, guardians,  
and next friends of Bradley J. Jensen; James  
Brinker and Darren Allen, as parents,  
guardians, and next friends of Thomas M.  
Allbrink; Elizabeth Jacobs, as parent, guardian,  
and next friend of Jason R. Jacobs; and others  
similarly situated,

Civil No. 09-1775 (DWF/BRT)

Plaintiffs,

v.

**ORDER**

Minnesota Department of Human Services,  
an agency of the State of Minnesota; Director,  
Minnesota Extended Treatment Options, a  
program of the Minnesota Department of  
Human Services, an agency of the State of  
Minnesota; Clinical Director, the Minnesota  
Extended Treatment Options, a program of  
the Minnesota Department of Human Services,  
an agency of the State of Minnesota; Douglas  
Bratvold, individually and as Director of the  
Minnesota Extended Treatment Options, a  
program of the Minnesota Department of Human  
Services, an agency of the State of Minnesota;  
Scott TenNapel, individually and as Clinical  
Director of the Minnesota Extended Treatment  
Options, a program of the Minnesota Department  
of Human Services, an agency of the State of  
Minnesota; and the State of Minnesota,

Defendants.

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Shamus P. O'Meara, Esq., and Mark R. Azman, Esq., O'Meara Leer Wagner & Kohl,  
PA, counsel for Plaintiffs.

Scott H. Ikeda, Aaron Winter, and Anthony R. Noss, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for State Defendants.

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On June 6, 2016, the Court held a Biannual Status Conference in this matter to receive updates on the status of the *Jensen* Settlement Agreement, the Comprehensive Plan of Action ("CPA"), and the *Olmstead* Plan. (Doc. No. 576.)<sup>1</sup> As the Court explained at the Biannual Status Conference, June and December Status Conferences are an opportunity for all parties or the Consultants to provide input or updates to the Court on all reports submitted since the preceding status conference.

During the June 6, 2016 Biannual Status Conference, representatives from the Department of Human Services ("DHS") and the *Olmstead* Subcabinet presented to the Court on several reports previously submitted to the Court. Plaintiffs' Class Counsel also provided comments in addition to the Ombudsman for Mental Health and Developmental Disabilities, the Executive Director of the Minnesota Governor's Council on Developmental Disabilities (together, "Consultants"), and a representative from the Minnesota Disability Law Center.

The Court took the presentations under advisement and has reviewed all submissions addressed at the June 6, 2016 Biannual Status Conference. The Court now issues the following order.

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<sup>1</sup> The Court's agenda for this status conference was provided to the parties and invited attendees in advance and may be reviewed at Docket Number 568.

## ORDER

Based upon the presentations and submissions before the Court, and the Court being otherwise duly advised in the premises, **IT IS HEREBY ORDERED** that:

**1. *Jensen* Settlement Agreement & Comprehensive Plan of Action**

**a. External Reviewer Function**

i. The Court has received and reviewed the parties' submissions and proposed orders regarding the External Reviewer function. Each party and the Consultants also had an opportunity to comment on these proposals during the June 6, 2016 Biannual Status Conference. The Court declines to adopt either proposed order. Absent agreement of the parties regarding whether or how to amend the External Reviewer function as set forth in the *Jensen* Settlement Agreement and the CPA, the Court concludes it is most appropriate to maintain the status quo. 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. (*See* Doc. No. 136-1, Stipulated Class Action Settlement Agreement at 11-13; Doc. No. 212, April 25, 2013 Order at 6; Doc. No. 283, Second Amended Comprehensive Plan of Action at 13-14.) Thus, the Court Monitor will continue to fill the External Reviewer role for the purposes previously established by agreement of the parties. (*See id.*)

ii. As directed under the Court's March 18, 2016 Order, the Court Monitor's duties in this regard, including reporting requirements, are

currently stayed. (*See* Doc. No. 551 at 24.) The Court reserves the right to order that these duties resume or make further modifications to the Court Monitor’s duties at any time consistent with the Court’s exercise of its discretion. (*See id.*)

iii. Nothing in this Order precludes the parties from further meeting and conferring or from submitting additional proposals or stipulations on the External Reviewer function. If the parties do so, the Court urges the parties to collaborate with the Consultants.

**b. Court Monitor’s Report & Defendants’ Verification Report**

i. On February 2, 2016, Defendants submitted a *Jensen Settlement Agreement Comprehensive Plan of Action (CPA) – Ninth Compliance Update Report, Reporting Period: May 1 – September 30, 2015*. (Doc. No. 531 (“Gap Report”).) In the Court’s March 18, 2016 Order in response to the Gap Report, the Court ordered the Court Monitor and Defendants to conduct various verification activities relating to Defendants’ compliance with certain CPA Evaluation Criteria (“ECs”). (*See generally* Doc. No. 551.) On May 11, 2016, and May 31, 2016, the Court Monitor and Defendants submitted separate reports to the court documenting their verification activities. (*See* Doc. No. 565, *Independent Consultant and Monitor – Report to the Court: Comprehensive Plan of Action Evaluation Criteria 93 and 98* (“Court Monitor’s Report”); Doc. Nos. 572 & 573, *Jensen Settlement Agreement Comprehensive Plan of*

*Action (CPA) – Report to Court In Response to March 18, 2016 Order (Doc. No 551)* (“Defendants’ Verification Report”).) The Court has received and reviewed these reports, and the parties and the Consultants had an opportunity to comment on these reports at the June 6, 2016 Biannual Status Conference.

ii. Although it is apparent that continued improvements are needed in Defendants’ verification procedures and verification reporting efforts, the Court will not require supplemental reporting on the Gap Report or in response to the Court Monitor’s Report. Instead, the Court will require DHS to focus its efforts on compliance with the *Jensen Settlement Agreement* and the CPA, verification of those efforts, and preparation of the next Compliance Update Report due to the Court on August 31, 2016. (See Doc. No. 545 at 3.) In this report, in addition to the compliance update on relevant ECs as required by the established reporting schedule, DHS must report on the issues and concerns recently raised by the Court and the Court Monitor, including the issues addressed in Defendants’ Verification Report. For example, Defendants must report on their efforts and state of compliance with respect to EC 93’s mobile teams provision<sup>2</sup> and EC 98’s provisions relating to therapeutic follow-up of Class Members through the

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<sup>2</sup> The Court seeks clarification of the following with respect to EC 93: (1) What is the definition of Mobile Teams under EC 93? (2) When and how have Mobile Teams been deployed under this definition in the reporting period? (3) What were the outcomes of these deployments? (4) Were the Mobile Teams’ efforts timely and effective?

Successful Life Project.<sup>3</sup> In light of the Court Monitor's Report, Defendants' Verification Report, and the presentations at the June 6, 2016 Biannual Status Conference, the Court also seeks an update in the August 31, 2016 report on the outcomes for individuals with disabilities resulting from Defendants' efforts with respect to Community Support Services and crisis interventions throughout the state (*see* ECs 67-72; Doc. No. 551 at 12-14), and the prevalence and justification for 911 calls at the facilities, including a statement of whether the calls resulted in the use of handcuffs or chemical restraint (*see* ECs 28-30; Doc. No. 551 at 8-10).<sup>4</sup> These are examples only, and DHS must present complete reports on the state of compliance under all reportable ECs along with proper verification. These examples are provided to demonstrate the depth of information the Court seeks in its next compliance update report on all relevant ECs.

iii. The Court recommends that DHS establish a protocol to govern DHS's compliance evaluation and verification efforts, including efforts involving Independent Subject Matter Experts or the *Jensen* Internal Reviewer. The Court further recommends that DHS implement this

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<sup>3</sup> The Court seeks clarification of the following with respect to EC 98: (1) How many individuals have been followed up with in the reporting period? (2) In what settings were these individuals residing? (3) Have these individuals' lives been improved? (4) Were these individuals prevented from re-institutionalization or transfers to more restrictive settings?

<sup>4</sup> The Court also seeks information on whether any training is provided at the facilities to educate staff on the impropriety of using 911 calls in lieu of positive behavioral supports for the purpose of implementing prohibited restraints.

protocol as soon as possible so that it may be used between now and the August 31, 2016 Compliance Update Report deadline, and the Court urges DHS to consult with the Consultants to facilitate this process. The Court expects to evaluate the status of Defendants' verification protocols at the December 2016 Biannual Status Conference and may request to see a sample of a verification report generated using these protocols.

**2. *Olmstead* Plan**

**a. *Olmstead* Subcabinet Quarterly Reports**

i. As the Court indicated at the June 6, 2016 Biannual Status Conference, the Court will not be routinely issuing orders in response to each *Olmstead* Subcabinet Quarterly Report on Measurable Goals. Rather, the Court will notify Defendants if the Court has questions or requires follow-up reporting in response to such reports.

**b. Administrative Issues: Reporting & Adoption of Future Goals**

i. At the June 6, 2016 Biannual Status Conference, Commissioner Mary Tingerthal, the Chair of the *Olmstead* Subcabinet, presented proposals to adjust *Olmstead* reporting deadlines and to confirm the process for adopting future *Olmstead* goals. (*See* Doc. Nos. 577 & 577-1.) The Court **APPROVES** these proposals. To the extent prior Orders of the Court are inconsistent with these proposals, they are hereby superseded.

ii. In particular, the Court approves of the proposal to amend certain reporting deadlines for annual goals. (*See* Doc. No. 577-1 at 1-2.) Notwithstanding anything to the contrary in paragraph 4 of the Court's February 22, 2016 Order for Reporting on *Olmstead* Plan (Doc. No. 544), DHS shall include in quarterly reports the status of Annual Goals included in the *Olmstead* Plan. This information shall be reported in the next quarterly report following both the Annual Goal measurement date and a determination that the data is reliable and valid. All other provisions of the Court's February 22, 2016 Order remain in effect.

iii. In addition, the Court approves of the proposal regarding adoption of future goals. (*See* Doc. No. 577-1 at 2-3.) New annual goals shall be adopted by the Subcabinet on a provisional basis at a meeting subsequent to any applicable due date for the new annual goals. Once adopted provisionally by the Subcabinet, the agencies will begin to report progress in subsequent quarterly reports as specified in the reporting schedule. These provisional goals will then be considered for incorporation into the *Olmstead* Plan as part of the annual cycle for updating and extending the *Olmstead* Plan. (*See* Doc. No. 540 at 3.)

iv. The Court supports the amended time line for *Olmstead* reporting because it will allow the *Olmstead* Subcabinet to fully verify its data before such data is reported to the Court. As the Court has emphasized in previous orders, verification of reported data is critically important to

ensure that the Court can fully evaluate Defendants' activities and the resulting outcomes for persons with disabilities. The Court appreciates the *Olmstead* Subcabinet's attentiveness to this issue and its diligence in developing a proposed approach to ensure proper verification going forward. The Court suggests that the *Olmstead* Subcabinet share its verification approach and strategies with the *Jensen/Olmstead* Quality Assurance and Compliance Office and relevant DHS officials to aid Defendants in consistently verifying all reports submitted to the Court. Going forward, the Court may request to see a sample of a verification report generated through the *Olmstead* Subcabinet's verification process.

v. In a letter submission to the Court following the June 6, 2016 Biannual Status Conference, Defendants seek clarification regarding the effect of the Court's February 22, 2016 Order for Reporting on *Olmstead* Plan on reporting requirements contained in the Court's January 22, 2014 Order. (*See* Doc. No. 577-1 at 3.) The reporting requirements imposed in the January 22, 2014 Order requiring the *Olmstead* Subcabinet to report "on a 60-day report system" (Doc. No. 265 at 4) are superseded by the reporting requirements imposed in the Court's February 22, 2016 Order (*see* Doc. No. 544 at 7-8).

**c. Updated *Olmstead* Plan**

i. On May 31, 2016, Defendants submitted an updated *Olmstead* Plan incorporating new goals on Assistive Technology and

Prevention of Abuse and Neglect. (See Doc. No. 571, May 31, 2016 Letter to the Court; Doc. No. 571-1, Updated *Olmstead* Plan With Revisions Indicated; Doc. No. 571-2, Updated *Olmstead* Plan – June 1, 2016 Update.) All parties and the Consultants had an opportunity to comment on the updated *Olmstead* Plan during the June 6, 2016 Biannual Status Conference. The Court **APPROVES** the State’s *Olmstead* Plan – June 1, 2016 Update (Doc. No. [571-2]).

ii. Magistrate Judge Becky R. Thorson facilitated the development of the updated *Olmstead* Plan with the collaboration and consultation of the parties, the Consultants, *Olmstead* Subcabinet members, DHS staff, and staff from other state agencies. The Court is grateful to all those involved for diligently working to craft the Plan and the initial goals that address the critical topics of Assistive Technology and Prevention of Abuse and Neglect. Assistive Technology is an essential resource for ensuring that individuals with disabilities can live fully integrated lives within their communities, and successful integration of individuals with disabilities requires above all that such individuals be protected from all forms of abuse and neglect. These topics are essential for the State to responsibly ensure that the *Olmstead* Plan achieves its laudable purpose. With its new goals and strategies on these topics, the Subcabinet and DHS’s commitment to continued improvement in verification, and the continued amendment process built into the Plan, the Court is hopeful that

the updated *Olmstead* Plan will result in measurable improvements in the lives of individuals with disabilities throughout the state.

**3. Public Education and Outreach**

i. At the June 6, 2016 Biannual Status Conference, the Court sought information from Defendants about “DHS’s efforts to correct public misconceptions about the goals of the *Jensen* Settlement Agreement or Minnesota’s *Olmstead* Plan.” (Doc. No. 568 at 5.) Defendants provided the Court with a status update on this topic, and the parties and the Consultants also had an opportunity to comment. The Court emphasizes the importance of ensuring that the public has accurate, consistent, and complete information about the *Jensen* Settlement Agreement and the *Olmstead* Plan. Toward this end, the Court urges Defendants to develop a concrete plan to facilitate their public education efforts and to respond to public misconceptions that arise. The Court expects to further inquire about such efforts at the December 2016 Biannual Status Conference.

Date: June 21, 2016

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge