

**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.

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

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

Plaintiffs filed a Complaint¹ against Defendants on July 10, 2009, asserting multiple violations of federal and state law arising out of the allegations of “abusive, inhumane, cruel and improper use of seclusion and mechanical restraints routinely imposed upon patients of the Minnesota Extended Treatment Options program (METO).”² (Doc. No. 1.) Following extensive negotiations, the parties entered into a Stipulated Class Action Settlement Agreement (“Agreement”) which was approved by the Court on December 5, 2011. (*See* Doc. Nos. 104, 136.)

The Agreement provided for the closure of the METO facility, established requirements regarding restraint and seclusion at successor facilities, and established requirements for the Department of Human Services (“DHS”) to internally and externally monitor restraint use. (*See* Doc. No. 136-1 (“Agreement”) at 6-13.) The Agreement also provided that the State shall exercise “best efforts” for appropriate discharge of residents to the most integrated setting through transition planning. (*Id.* at 13-14.) In addition, the Agreement imposed requirements relating to other practices at METO and its successor facilities such as staff training. (*Id.* at 14-16.)

¹ On July 30, 2009, Plaintiffs filed an Amended Complaint arising out of these same allegations. (*See* Doc. No. 3 at 3.)

² The Court recognizes that the term “patients” is out of date. For the sake of consistency, it leaves the term, but encourages use of the word “residents” as an alternative.

Beyond the provisions applicable to METO and its successors, the Agreement also included a section entitled “System Wide Improvements.” (*See id.* at 16-21.) This section identified goals and objectives in the areas of long-term monitoring, crisis management, and training. (*Id.* at 16-17.) In addition, this section imposed requirements related to the creation of an *Olmstead* Plan which was agreed to be developed and implemented within eighteen months of the Agreement’s approval. (*Id.* at 18.) The Agreement also established requirements relating to two other state facilities, the modernization of state administrative rules relating to positive behavioral supports (“Rule 40”), and the substitution of offensive terminology in DHS publications. (*Id.* at 19-21.)

In its December 1, 2011 Fairness Hearing regarding the Agreement, the Court stated:

I find it to be fair, reasonable and adequate and will also serve the public interest, as well as the interests of the Class Members. Of course that carries with it . . . a responsibility on the parties and the public has a right to hold the Court to its responsibility to follow its oath and to make this Agreement mean something with the jurisdiction of the Court.

And obviously, enough people have spoken today, so it is not surprising that, obviously, many of you will have a watchful eye and careful scrutiny to see to it that this does what it says it is going to do, and what it is intended to do, and just isn’t words on a legal document.

And of course, by the agreement, the Court, by an agreement of all of the parties, the Court does reserve continuing jurisdiction for a minimum of a two-year period to enforce compliance with the provisions of the Agreement and the Judgment

([Doc. No. 146 at 75.](#))

The Agreement incorporates a Comprehensive Plan of Action (“CPA”). The CPA, sets forth Evaluation Criteria (“EC”) and accompanying Actions:

The ECs set forth the outcomes to be achieved and are enforceable. The Actions under the ECs are not enforceable requirements. Compliance with an EC will be deemed to have been achieved if the EC’s Actions are taken. However, the Departments of Human Services may undertake alternate actions to achieve satisfactions of the EC. The Actions may be modified pursuant to the modification process set forth in the Order of August 28, 2013.

ECs are indicated by whole Arabic numbers (e.g., 1, 2) and, in the original, by blue shading. Actions are indicated by Arabic numbers with consecutive decimals (e.g., 1.1, 1.2, 1.3, 2.1, 2.2, 2.3).

(Doc. No. 239 at 1.)

The parties sought an Order from the Court establishing a schedule for compliance reporting with respect to the Agreement and CPA. On February 22, 2016, this Court entered an Order for Reporting on the Agreement (“Reporting Order”).³ (Doc. No. 545.)

The Reporting Order includes the schedule and requirements for reporting.⁴ ECs 1, 4, 38, 45, 46, 55-62, 65-66, 80, 81, 83, 84, 89-92, 94, 96, 100, and 101 are subject to Annual Reporting. (*Id.*) ECs 2, 3, 39, 41, 47-53, 64, 67-79, 93, 98, and 103 are subject to Semi-Annual Reporting. (*Id.*) ECs 5-36, 40, 82, and 85 are subject to Exception

³ The Reporting Order was issued following the receipt of the parties’ separate proposals. (Doc. Nos. 537, 539.) This Order establishes the reporting requirements in advance of the Biannual Status Conference, which was continued until April 2019. (Doc. No. 704.)

⁴ Defendants have submitted multiple Reports and this Court has held multiple Status Conferences to review the Reports. (Doc. Nos. 576, 589, 611, 614-1, 621, 643, 672, 676, 683, 692, 700.)

Reporting. (*Id.*) Pursuant to the Reporting Order, “Exception Reporting has the meaning that the reporting will occur more frequently than semi-annually if concerns are noted.” (Doc. No. 545-1.) As of January 17, 2017, all reports are to “incorporate the improvements and clarifications [DHS] identified in its Response to the Court Monitor’s Compliance Assessment with respect to ECs 1, 51, 65, 66, 69, 93 and 96.” (Doc. No. 612.)

The February 22, 2016 Reporting Order also extended this Court’s jurisdiction until December 4, 2019, reserving the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of Defendants’ compliance and absent stipulation of the parties. (Doc. No. 545.) Defendants filed a formal objection to the Court’s continued jurisdiction on April 28, 2017. (Doc. No. 631.) The Court overruled Defendants’ objection on June 28, 2017. (Doc. No. 638.) Defendants appealed the Court’s decision to the Eighth Circuit on July 26, 2017. (Doc. No. 639.)

On June 6, 2017, the Court urged “the parties to come together to evaluate what essential steps remain in the implementation of the Agreement before the Court terminates its jurisdiction over this matter.” (Doc. No. 638.) To facilitate their evaluation, the Court ordered the parties to meet and confer to discuss the remaining essential steps prior to the bi-annual status conference scheduled for December 8, 2017. (*Id.*) A Case Management Conference with the magistrate judge was set to help the parties prepare a schedule for “the essential steps that remain in Defendants’ implementation of the *Jensen* Agreement before the Court can equitably terminate its jurisdiction over this matter.” (*See* Doc. No. 652.) Prior to the Case Management

Conference, each side submitted a letter to the magistrate judge. (Doc. Nos. 661, 663.) Plaintiffs noted concerns regarding many ECs.⁵ ([Doc. No. 661.](#)) Defendants took the position that, due to their appeal to the Eighth Circuit regarding this Court's jurisdiction and because Plaintiffs had not established "substantial noncompliance with the [*Jensen* Settlement Agreement]," no essential steps remained and no related deadlines were necessary. ([Doc. No. 663.](#)) The Status Conference was held on October 30, 2017, but no schedule was agreed to. Since that time, the Eighth Circuit affirmed this Court's jurisdiction. (Doc. Nos. 650, 653, 696.)

As the December 4, 2019 date approaches, 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. In order to make this assessment, the Court requires a Summary Report in lieu of the Semi-Annual and Annual Compliance Reports required pursuant to the Reporting Order.⁶

The Summary Report is due on or before March 20, 2019. Defendants must meet with the Consultants no later than January 25, 2019, regarding verification procedures for the Summary Report. Defendants must also provide a draft of the Summary Report to the Consultants no fewer than ten (10) business days before filing it with the Court. After the

⁵ Plaintiffs expressed concerns related to ECs. 1, 3, 5, 10, 13, 14, 15-21, 25, 26, 47, 48, 49, 50-60, 69, 85, 90, 93, 98, 102, 103. (Doc. No. 661.)

⁶ Under the current schedule, Semi-Annual and Annual Compliance Reports are due on February 28, 2019 and March 31, 2019, respectively. This Order modifies that schedule to permit one Summary Report adhering to the specific requirements set forth in this Order.

Summary Report is submitted, Consultants will have ten (10) business days to file statements with the Court. After the Consultants submit their statements, Plaintiffs will have seven (7) business days to file a statement with the Court.

The Summary Report must include the following:⁷

1. An update on how the DHS internal structure is working to oversee compliance with the *Jensen* Settlement Agreement and the role of the Independent Subject Matter Experts (“SMEs”) in meeting the requirements of the External Reviewer required under the *Jensen* Settlement Agreement.⁸
2. An update on Class Members⁹
 - A. Summary Table for All Class Members including:
 - i. the names of each class member;

⁷ Parts 1, 2, and any other personal reference to Class Members in the Summary Report must be filed under seal.

⁸ Defendants’ Gap Report, dated February 2, 2016, explained in detail DHS’s new internal structure to oversee compliance with the *Jensen* Settlement Agreement. (Doc. No. 531 at 5-7.) This Court’s March 18, 2016 Order discussed the new internal structure as well. (Doc. No. 551 at 4-6.) The Court specifically observed, “DHS has indicated that the JIO, the *Jensen* Internal Reviewer, the SMEs, and the Quality Assurance Committee ‘work together, and in conjunction with the Olmstead Implementation Office, to monitor and improve the quality of programs and services to ensure compliance with the Settlement Agreement.’ The Court appreciates DHS’s efforts to develop and implement new measures to ensure compliance with the *Jensen* Settlement Agreement. When the Court no longer exercises jurisdiction with the *Jensen* Settlement, quality oversight measures such as these will ensure that *Jensen*’s legacy is not left an empty promise.” (*Id.* at 5-6 (citing Doc. No. 9 at 2).)

⁹ Class Members are defined as, “All individuals who were subjected to the use of any aversive or deprivation procedures, including restraints or seclusion while a resident at the Minnesota Extended Treatment Options Program at any time(s) from July 1, 1997 through May 1, 2011. Settlement Class or Class Member does not include any individual who has properly and effectively requested exclusion from the Settlement Class.” (Doc. No. 136-1 at 23.)

ii. the names of all class members who have died since December 2011 including the: (1) date of death; and (2) cause of death; and

iii. the names of all class members whose whereabouts are unknown including the: (1) location of last known residence; and (2) date of last known residence.

B. Impact Analysis for Each Class Member Living in Minnesota including:¹⁰

i. the Class Member's Name;

ii. all residences and dates lived there from December 2011 through December 2018 (*see* EC 52);

iii. all day programs or employment programs with the dates of participation from December 2011 through December 2018 (*see* ECs 53, 90);

iv. all investigation memorandums involving the class member with a summary of the incidents and findings from December 2011 through December 2018 (*see* EC 25);

v. any arrest records, summary of charges, and current disposition from December 2011 through 2018 (*see* ECs 1-2);

vi. whether the person has been placed at Anoka or MSH-St. Peter, and if applicable, the dates of admission and discharge from December 2011 through December 2018 (*see* ECs 81, 82, 85);

vii. the total number of behavior intervention form reports with a summary of the types of restrictive procedures used from December 2011 through December 2018 (*see* ECs 5-14);

viii. a description of any intervention employed by the staff of the Successful Life Project (*see* EC 38);

ix. a summary of the person-centered-planning or transition plan and whether it meets the criteria listed in the Agreement and Comprehensive Plan of Action (*see* ECs 48-52);

¹⁰ The specific Evaluation Criteria linked to each requirement are indicated and intended to serve as a reference point for data collection and reporting.

x. the person's current placement and any concerns (*see* ECs 1-4); and

xi. any other information about the Class Member relevant to the Settlement Agreement, for example, a description of any positive or success story about the person or challenges overcome (*see* all ECs).

3. An Update on Evaluation Criteria

A. ECs Subject to Semi-Annual or Annual Reporting

ECs 1*, 2, 3, 4*, 38*, 39, 41, 45*, 46*, 47, 48, 49, 50, 51, 52, 53, 54*, 55*, 56*, 57*, 58*, 59*, 60*, 61*, 62*, 64, 65*, 66*, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80*, 81*, 83*, 84*, 89*, 90*, 91*, 92*, 93, 94*, 96*, 98, 100*, 101*, and 103 are subject to semi-annual or annual reporting. The annual ECs are noted with an asterisk.

i. ECs 1*, 2, 3, 4*, 38, 39, 41, 45*, 46*, 53, 54*, 55*, 56*, 57*, 58*, 59*, 60*, 61*, 62*, 64, 65*, 66*, 78, 79, 80*, 81*, 83*, 84*, 89*, 90*, 91*, 92*, 93*, 94*, 96*, 98, 100*, 101*, and 103 must be reported in the Summary Report with a statement indicating whether the EC has been met. If the EC has been met, the Summary Report shall include specific data to support the finding and an explanation of the actions taken to meet it. If the EC is not yet met, the Summary Report shall detail an action plan on how to meet the EC by December 2019, identifying specific persons responsible for each part of the plan, and a way to measure progress.

ii. ECs 47, 48, 49, 50, 51, 52, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, and 77 are subject to an exercise of "best efforts." (*See* Doc. Nos. 136-1, 283.) These ECs must be reported in the Summary Report with a statement indicating whether the EC has been met. If the EC has been met, Summary Report shall include specific data to support the finding and an explanation of the actions taken to meet it. If the EC is not yet met, the Summary Report shall detail an action plan on how to meet the EC by December 2019, identifying specific persons responsible for each part of the plan, and a way to measure progress.

B. ECs Subject to Exceptional Reporting

ECs 5-14, 22-25, 28-30, 32-33, 35-36, 40, 82, and 85 are subject to Exceptional Reporting.

i. Exception ECs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 22, 23, 24, 25, 28, 29, 30, 40 and 82 must be reported in the Summary Report with a statement indicating whether the EC has been met. If the EC has been met, the Summary Report shall include specific data to support the finding and an explanation of the actions taken to meet it. If the EC is not yet met, the Summary Report shall detail an action plan on how to meet the EC by December 2019, identifying specific persons responsible for each part of the plan, and a way to measure progress.

ii. Exception ECs 32, 33, 35, and 36 relate to Restraint Reporting and Management Notifications. Defendants must provide an explanation as to how they are satisfying these ECs.

iii. Exception EC 85 relates to AMRTC residents. Defendants must inform the Court whether they meet this EC.

C. ECs Not Included in the February 22, 2016 Order

The Court's Reporting chart, attached to the February 22, 2016 Order was adopted by the Court pursuant to the parties' stipulation on Reporting. ([Doc. No. 545-1.](#)) Based on the parties' stipulation, ECs 15, 16, 17, 18, 19, 20, 21, 26, 27, 31, 34, 37, 42, 43, 44, 63, 86, 87, 88¹¹, 95, 99, 102, and 104 were not included in the Reporting chart. (*See* Doc. Nos. 537, 537, 545-1.) Further, there is no EC 97. The Court notes that some of the ECs not included do not require reporting because of the nature of the EC (e.g., ECs 42, 43, 44, 63, 86, 87, 88(1), 95, and 102). Other ECs require an update.

¹¹ For the purpose of the Summary Report, Evaluation Criteria 88 shall consist of two parts: 88(1), the closing of the Cambridge facility, and 88(2), treatment homes. 88(1) requires just a one-line statement confirming when the Cambridge facility was closed; however the Court requests a detailed update on 88(2).

i. ECs 15, 16, 17, 18, 19, 20, and 21 relate to the use of Third Party Experts. Defendants must provide an explanation as to how they are satisfying these ECs.

ii. ECs 26 and 27 relate to Abuse and Neglect. These ECs must be reported in the Summary Report with a statement indicating whether each has been met. If the EC has been met, the Summary Report shall include specific data to support the finding and an explanation of the actions taken to meet it. If either EC is not yet met, the Summary Report shall detail an action plan on how to meet the EC by December 2019, identifying specific persons responsible for each part of the plan, and a way to measure progress.

iii. ECs 31, 34, and 37 relate to restraint reporting and management notifications. Defendants must provide an explanation as to how they are satisfying these ECs.

iv. EC 88(2) relates to treatment homes. Defendants must provide a detailed explanation as to how they are satisfying this EC. The explanation must include data supporting the number of treatment homes, and the specific assessment used to determine how many individuals each house accommodates.

v. ECs 99 and 104 relate to Rule 40 Modernization. These ECs must be reported in the Summary Report with a statement indicating whether each has been met. If the EC has been met, the Summary Report shall include specific data to support the finding and an explanation of the actions taken to meet it. If either EC is not yet met, the Summary Report shall detail an action plan on how to meet the EC by December 2019, identifying specific persons responsible for each part of the plan, and a system to measure progress.

In its March 18, 2016 Order, the Court discussed the need for providing better information regarding DHS's verification of its internal findings. (Doc. No. 551.) As set forth in that Order, updated reports must include verification information directly into the report. As was noted, “[p]roviding verification in the report itself will hopefully eliminate the need for the Court or the Court Monitor to independently evaluate the report content.” (*Id.*) All data included in the Summary Report must be confirmed as reliable

and valid. All statements made in the reports must be accurate, complete, timely, and verified.¹² A complete report will reduce, if not eliminate, work to be performed by the Court, the Consultants or a Court Monitor to assess compliance as required pursuant to the Agreement.

Further, Defendants must include an assessment as to whether each EC has been met (*see, e.g.*, Doc. Nos. 342, 360, 387, 396, 440). The Court notes that the reporting format was modified by Defendants in approximately February 2016 to remove conclusions as to whether each EC was met. (Doc. No. 531.) While the Court appreciates the anecdotal data and attractive format of more recent reports, Defendants must also clearly indicate whether the EC has been met in the Summary Report.

It is the Court's intent that the Summary Report serve as a tool to facilitate an equitable end to the Court's jurisdiction over this matter. The Court appreciates Defendants' efforts and hopes that the reporting exercise will identify strengths and weaknesses to ensure that systems are in place to ensure that *Jensen's* legacy is not left an empty promise.

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. In lieu of the *Jensen* Settlement Agreement Comprehensive Plan of Action Semi-Annual and Annual Compliance Reports due on February 28, 2019 and March 31,

¹² This is not a new requirement. (*See* Doc. No. 545 at 4.)

2019, respectively, Defendants shall submit one Summary Report adhering to the specifications described above.

2. Defendants shall meet with Consultants regarding suggested data collection and verification procedures that will be utilized to prepare the Summary Report no later than January 25, 2019.

3. Defendants shall provide a draft of the Summary Report to the Consultants no fewer than ten (10) business days before filing it.

4. The Summary Report shall be filed no later than March 20, 2019.

5. After the Summary Report is filed, Consultants will have ten (10) business days to file statements with the Court.

6. After the Consultants have filed their statements, Plaintiffs will have seven (7) business days to file a statement with the Court.

7. The Biannual Reporting Conference will be held on April 16, 2019, from 1:30 PM to 4:30 PM, in the 7th Floor Conference Room (accessible by buzzing Judge Frank's Chambers on the 7th Floor), Warren E. Burger Federal Building and United States Courthouse, 316 North Robert Street, St. Paul, Minnesota, before Judge Donovan W. Frank and Magistrate Judge Becky R. Thorson. The Summary Report will be discussed at that time. The Status Conference will also address the Olmstead Amendments and the Olmstead Quarterly Reports and Annual Report submitted since the last status conference.

Dated: January 4, 2019

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