UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, Guardians and next friends of Bradley J. Jensen, *et al.,*

Plaintiffs

Minnesota Department of Human Services, an agency of the State of Minnesota, *et al.,*

Defendants

Civil No. 09-1775 (DWF/FLN)

Independent Consultant and Monitor

FIRST REPORT TO THE COURT

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Independent Consultant and Monitor

September 4, 2012

TABLE OF CONTENTS

Preface

Immediately after my appointment as independent consultant and monitor, I reached out to the parties' counsel, and to the Department of Human Services and the Department of Health. I also contacted the parties' consultants in the settlement process (Roberta Opheim and Colleen Wieck), and advocacy organizations, ARC Minnesota and the Minnesota Disability Law Center. These were fruitful conversations.

From the start, everyone was welcoming and fully cooperative. The initial cooperation has continued, and all concerned have been altogether responsive to my requests for background and current information. This material was excellent preparation for my introductory meetings with all the above on August 21 and my informal visit to MSHS-Cambridge on August 22.[1]

I express my appreciation for this auspicious beginning and my hope that our collective efforts will benefit those many individuals who are served by the State of Minnesota under the Settlement Agreement adopted by the federal court which I assist.

David Ferleger

[1] Appendix A lists those at my initial meetings and notes my site visit.

I. Context

Sixty-three years ago in 1949, at Anoka State Hospital, Minnesota Governor Luther W. Youngdahl presided over an unusual bonfire. It consisted of 359 straight-jackets, 196 cuffs, 91 straps, and 25 canvas mittens. The Governor declared at the time that no patient at Anoka was in restraint, the State was eliminating the use of restraint at its facilities, and urged vigilance against mistreatment of the "most misunderstood of all human beings," individuals in the state's care.[2]

Governor Youngdahl's commitment extended beyond restraint use, to community living for the residents. He declared, "we will not rest until every possible thing is done to help them [the patients] get well and return to their families."[3]

In 2008, after months of investigation, the Minnesota Ombudsman for Mental Health and Developmental Disabilities issued its "Just Plain Wrong" report finding that the Minnesota Extended Treatment Options (METO), licensed as a 48 bed residential program for persons with developmental disabilities, was using physical restraints as a "routine treatment modality," often without attempts at non-coercive alternatives. The Minnesota Department of Health, Office of Health Facility Complaints, also issued a report citing METO for violations, and the Department of Human Services Licensing Division reported additional rule violations.

METO was established in 1995 by the Legislature which directed DHS to "develop a specialized service model at the Cambridge campus to serve citizens of Minnesota who have a developmental disability and exhibit severe behaviors which present a risk to public safety."[4] The physical plant includes eight residential units in four one story buildings (two residential units per building). In 2008, the *per diem* rate for METO was $861, an annual $314,000 per client. Stays at METO were intended to be short-term, but clients were there for years, the Ombudsman found.

METO was originally certified under federal standards and the State received a 50% federal contribution under the ICF/DD program. The federal authorities in the mid-

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[2] Ombudsman for Mental Health and Developmental Disabilities, *"Just Plain Wrong," Excessive Use of Restraints and Law Enforcement Style Devices on Developmentally Disabled Residents at the Minnesota Department of Human Services Minnesota Extended Treatment Program (METO) Cambridge, MN*, (2008) at I (Statement of Governor Youngdahl, October 31, 1949). The amended complaint also noted this piece of history.

[3] *Id*.

[4] The background in this section is from *Just Plain Wrong,* at 11 ff.

2000s determined that the clients placed at METO did not need an institutional level of care and that certification was not appropriate.

The Ombudsman observed that, although METO was designated for individuals who were a "risk to public safety," "[t]here are many existing examples of clients with challenging behaviors who are living in the community and are successful when given the appropriate supports by well-trained support staff."[5]

Among the conclusions and recommendations in the 2008 report were that alternative community resources should be developed to return METO residents to community life:

> DHS should look for opportunities to divert clients with less challenging behaviors to alternative resources in the community. If none exists, State Operated Community Services should look at developing those services.
>
> DHS should begin a process of evaluating why there are not adequate resources in the community and why they are not being developed.
>
> METO clients deserve to receive treatment and supports that fully incorporate them into the fabric of our communities as equal and participating members.[6]

The publication of the several Minnesota government agencies' investigations into METO was followed by the filing on July 10, 2009 of the pending class action civil rights lawsuit under the Constitutions of the United States and Minnesota, the Americans with Disabilities Act, and on other legal grounds.

II. Court's Adoption of the Settlement Agreement

The pledges made in this litigation have paralleled the dual components of the 1949 and 2008 reform efforts: a dual track of ending institutional mistreatment and supporting community integration.

Two and a half years of negotiation resulted in a landmark settlement agreement. On December 5, 2011, the Court issued its order approving the Class Action Settlement Agreement in this case.[7] The Approval Order established a $3,000,000 fund to compensate individuals subjected to physical and mechanical restraints at the METO

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[5] *Just Plain Wrong* at 45.

[6] *Just Plain Wrong* at 46-47.

[7] Final Approval Order for Stipulated Class Action Settlement Agreement, December 5, 2011, Dkt. 136 ("Approval Order"). The Settlement Agreement, dated June 23, 2011, is at Dkt. 104.

institution, and also required implementation of extensive systems elements which will impact care of people with developmental disabilities state-wide.

A State goal in this lawsuit is to "extend the application of the provisions 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 successors."[8] In addition, the Settlement obligates the State to state-wide systemic relief.

At the settlement approval hearing before the Court, Plaintiff Class Counsel declared:

> Perhaps the most important aspect of this Settlement, Your Honor, is that it is going to benefit not only all Class Members, but the approximate 100,000 people with developmental disabilities in this state and their families.

Tr. at 7 (Shamus O'Meara). The State agreed that the Settlement would have great state-wide, and even national, impact would be great:

> . . . it will greatly improve the quality in care of the lives of a large number of persons with disabilities, not only in Minnesota, but we have people that come through Minnesota. And it will impact them, as well. And we think that this agreement will set the tone for other states, as well.

Tr. 27 (Steven Alpert). The State's intent is that the benefits would extend beyond the Court's active jurisdiction.[9]

The State in this lawsuit has embraced both institutional reform (ending needless use of restraint) and a broad commitment to community services. Beyond the changes at METO, and its successors, the State emphasized the Settlement's commitment to state-wide support of prevention of institutional placement, and expansion of community services. On behalf of Department of Human Services Commissioner Lucinda Jesson, Deputy Commissioner Anne Barry told the Court:

> Most importantly, we are inside of the agency leading with an approach

[8] Settlement Agreement at ¶ 4.

[9] The intent is

> . . . to make sure that the spirit and intent of this agreement, not just the words of this agreement, will be implemented going forward. Not just for the two years, but at the end of the two years, we believe the Court, as well as everyone else, will be satisfied that the positive nature of this Agreement will go forward beyond that two-year period of time.

Tr. 29 (Steven Alpert).

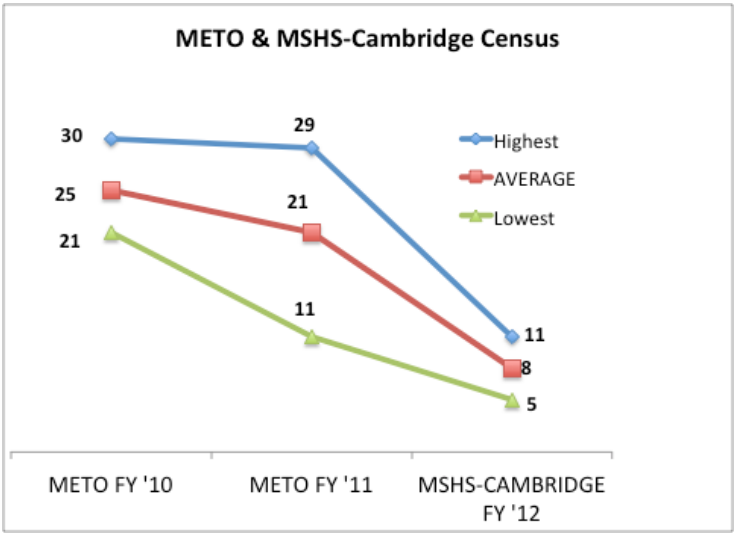
> that moves us towards preventing institutional placement in the first place. That we are really moving to get upstream, that people with disabilities can and should live in their communities, really, within the Olmstead Court decision.[10] * * *
>
> So, finally, we look forward to implementing all of the terms of the Settlement and taking the positive steps that we believe are a part of it. And most importantly, meeting people where they live so that they can live in the community -- disabled people, so that they can live in the community, live in dignity and achieve their highest potential.[11]

To be sure – and to the State's great credit – the Minnesota Department of Human Services for many years has supported, and has expanded, community services for people with developmental disabilities, including people which significant support needs. More needs to be done, as the parties recognize. The parties evidently decided that embodying certain mechanisms and obligations in a judicial order would facilitate and hasten fulfillment of the intentions so eloquently expressed to the Court at the fairness hearing.

More than seven months into implementation of the Settlement, the Court appointed the undersigned "independent advisor to the Court to assess and monitor the implementation of the Settlement Agreement."[12]

III. MSHS-Cambridge

The settlement closed the METO program at Cambridge, effective June 30, 2011. Clients are now served in some of the same residential/program buildings, in what is now called MSHS-Cambridge, which opened the next day, July 1, 2011.[13]



Far fewer individuals live at Cambridge now than during

[10] Tr. 71.

[11] Tr. 73.

[12] Order of July 17, 2012 at 11 (explaining reasons and authority for the appointment).

[13] Settlement, Section IV ("Closure of the METO Program"). DHS was not required to maintain a program at Cambridge; however, "[a]ny successor to METO" must meet the standards in Section IV.

the METO period. There were 9 residents at the time of the monitor's visit on August 21, 2012.

The population is fluid, with clients moving to MSHS-Cambridge to and from other state-operated facilities (including mental hospitals), as well as to community programs. For example, since the Settlement Agreement was filed June 23, 2011:

> 1 client was transferred to AMRTC which discharged him to another program (KA).
>
> 1 client was transferred to St. Peter CBHH 10/14/2011 and returned to MSHS-Cambridge on 10/26/11 (JR).
>
> 1 client who was admitted to MSHS-Cambridge 1/24/12, was discharged 1/29/12 and returned to MSHS-Cambridge 5/7/12 (BB). B was then transferred to AMRTC on May 10, 2012
>
> 1 client, who was admitted 5/17/12, was transferred 6/7/12 to AMRTC (JJ).
>
> 1 client, who was admitted 6/12/12, was transferred 6/12/12 to AMRTC [*same day*] (TK).
>
> 1 client, who was admitted 3/13/12, was transferred 4/12/12 to Annandale CBMH and then to AMRTC (KG).

A number of the above moves appear to be to more restrictive placement, and some involved very short (as short as one day) time at Cambridge.

Three individuals' had multiple moves into and from METO/Cambridge, some within a very short time period:

> BB
>
> | | |
> |---|---|
> | 1/24/12 | Admitted to MSHS-Cambridge |
> | 1/29/12 | Transferred to Annandale CBHH |
> | 5/7/12 | Returned to MSHS-Cambridge |
> | 5/10/12 | Transferred AMRTC |
>
> KA
>
> | | |
> |---|---|
> | 2/25/09 | Admitted to METO |
> | 12/10/10 | Left METO to ____ [?] |
> | 12/28/10 | Admitted to METO |
> | 6/30/11 | Off METO rolls to MSHS-Cambridge rolls next day |

7/1/11	Admitted to MSHS-Cambridge
7/15/11	Transferred to AMRTC which discharged him to Stepping Stones

JR

7/1/11	Admitted to MSHS-Cambridge
10/14/11	Transferred to St. Peter CBHH
10/26/11	Admitted to MSHS-Cambridge
12/19/11	Discharged to REM

The monitor draws no conclusions regarding any clinical or transition planning regarding any of these clients; he has not reviewed their records or met with the clients or their caretakers. It may be that, upon review of this information by DHS, DHS may find lessons for improvement in its processes regarding a, discharges, transfers and diversion.[14] The Independent Consultant and Monitor urges DHS to undertake that review.

2010 data published in 2012 shows the average resident daily expenditures (*per diem* cost) per client provided by Minnesota to people with developmental disabilities:

$331	Public residential settings with 1 to 6 residents
$----	Public residential settings with 7 to 15 residents (data not available)
$851	Public residential settings with 16 or more residents [15]

For ICF/DD facilities and the "Waiver" programs (Home and Community Based Services) in Minnesota funded with state-federal dollars, the state's *per diems* are:

$263	ICF/DD
$184	HCBS[16]

MSHS-Cambridge's *per diem* rate for FY 2013:

$1,264

While the State generally receives 50% federal dollar reimbursement for ICF/DD and HCBS, and some other care, MSHS-Cambridge is funded with 100% state dollars.

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[14] *See* Formal Recommendation No. 1 below.

[15] *Residential Services for Persons with Developmental Disabilities: Status and Trends Through 2010*, Sheryl Larson, *et al.,* Research and Training Center on Community Living Institute on Community Integration/UCEDD College of Education and Human Development University of Minnesota (2012), at Table 1.9, page 13.

[16] *Id.* at Table 3.14, page 125 (*per diems* calculated from total state data).

IV. Monitoring Process

At my initial meetings, it was agreed that there will be monthly parties' meetings with the monitor. Also invited will be the settlement consultants (Colleen Wieck and Roberta Opheim). Defendants will file bi-monthly reports with the Court in the status report format established by the monitor and to which the Defendants and Plaintiffs had no objection.[17] Documentation for verification will be made available by Defendants either electronically or, accompanying the report, on paper.

The monitor will file regular reports, after sharing a draft of each with the parties for review and comment. The monitor's filed report will include the parties' comments and corrections, if any.

The status report format includes 100 "Evaluation Criteria," each taken directly from the text of the Settlement Agreement. Compliance will be measured against these "ECs." Some items are susceptible to relatively clear and, for some, one-time action to achieve compliance; other items, especially those related to systems change and/or treatment and client process, will require a determination by the monitor of "sustained compliance," which will involve compliance over a year; that time period, it is suggested, will be sufficient to assure the Court that there is enough momentum for confidence that compliance will continue.

Progress by Defendants should be recognized and rewarded. Quite important, in the monitor's view, is that compliance determinations be made incrementally as we proceed. Once Defendants are in compliance with an EC, there is no reason to wait months before an EC is released from active judicial oversight. Therefore, from time to time, the monitor will formally request the Court to release specific ECs from active oversight. Thereafter, the Defendants' reporting on that item will either cease altogether or will be subject to less intensive scrutiny, depending on the item.

The Settlement Agreement contemplates a quarterly report from the External Reviewer under the aegis of the Department of Health. That reviewer is not yet in place. Therefore, the September 5, 2012 quarterly report need not be filed. The monitor will work with MDH to develop the process and format for these reports. Logistically, MDH will file these quarterly reports directly with the Court, with the monitor transmitting the reports for filing.

[17] The initial Defendants' report, due September 17, 2012 under the Order of July 17, 2012, will be discussed at the next following parties' meeting, so that any questions, clarifications or suggested revisions can be addressed.

V. Further Discussion

The various initial discussions, and written materials, suggest a number of topics for future parties' and other meetings and for decision-making within DHS and between the parties, with the monitor's oversight. These are listed here as forward-looking "brain-storming" items.

- *Olmstead Committee.* Its role during the period after it submits the recommended plan and the DHS adoption of a plan, and the follow-through implementation.

- *Rule 40 Committee.* Scope/coverage of the modernization of requirements. Noting that the same individuals may be served at various times in different programs, the issue of potentially inconsistent practices regarding those applicable to individuals who meet standards for MSHS-Cambridge and those, for example, at Anoka, Minnesota Security Hospital, and in the community.

- *MSHS-Cambridge Standard*. The meaning of the "developmental disabilities" and "risk to public safety" standard, and its relationship to programs/facilities serving individuals, and to the *Olmstead* requirements.

- *Transition Planning* under the Settlement Agreement.

- *Treatment modalities* at MSHS-Cambridge.

- *Definition of "Behavior Analyst"* under the Settlement. The State believes there should be some adjustment.

- *Timing of notice of restraint use*. A drafting inconsistency in the Settlement will need to be addressed; the parties agree on the needed adjustment.

- *The External Reviewer*. A likely candidate for the behavioral psychologist role has been identified. The mechanisms to fulfill the Settlement requirements likely need an adjustment.

- *MSHS-Cambridge Licensing Variance*. Plaintiffs have expressed concern over the DHS license under which the program is operating, and stated that they were not given notice by Defendants of the variance request or the granted variance.

VI. Formal Recommendation No. 1: Client Movement to and from MSHS-Cambridge

Concerns and interest were expressed by the parties and the settlement consultants regarding the standard for admission to MSHS-Cambridge under the Settlement Agreement,[18] and the place of Cambridge among other DHS state-operated services which also may serve individuals who might share similar or identical characteristics as those who might enter or leave Cambridge.

DHS has established a process for frequent top-level reviews of MSHS-Cambridge Admissions and Diversions, to track referrals and actions, including county and court activity, regarding possible moves to Cambridge. This is a valuable effort and, assuming it works well, is likely to assist the Department in compliance with the settlement.

For monitoring purposes, to begin to establish baseline data and a basis for further discussion with the parties on this issue, and to enable the monitor to follow Defendants' efforts, the following recommendation is made.

> ***Formal Recommendation No. 1.***
> *It is respectfully recommended that Defendants provide the monitor with written notice of proposed, rejected, and granted admissions to MSHS-Cambridge. For discussion with the monitor, Defendants are requested to suggest the nature, timing and activity for providing this notice which may work well within Defendants existing decision-making activities. Plaintiffs are also invited to comment or make proposals in this regard.*

[18] Section IV(4): The program shall "only serve "Minnesotans who have developmental disabilities and exhibit severe behaviors which present a risk to public safety" pursuant to METO's original statutory charge under Minn. Stat. § 252.025, subd. 7."

VII. Conclusion

This report and its recommendation are respectfully submitted to the Court pursuant to the Order of July 17, 2012.

A draft of this report was provided to the parties on August 24, 2012 with a request for comments in letter format by August 31. No comments or objections have been received.

Respectfully Submitted,

/s/ David Ferleger
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Independent Consultant
and Monitor

September 4, 2012

APPENDIX A

Jensen v. Department of Human Services
No. 09-cv-1775

Initial Meetings & Site Visit
August 21-22

August 21

7:15	Chris Bell Maureen O'Connell
8:30	Roberta Opheim, Ombudsman Office Colleen Wieck, Governor's DD Council Steve Larson, Arc of Minnesota Pamela Hoopes, Disability Law Center Anne Henry, Disability Law Center
10:15	James G. Koppel, Deputy Commissioner, Dept. of Health Darcy Miner, Director, Compliance Monitoring Division Stella French, Manager, Office of Health Facility Complaints
11:15	Mike Tessneer, Compliance Office Richard Amado, Ph.D., Internal Reviewer Gregory Gray, Chief Compliance Officer Doug Seiler
1:45	Shamus O'Meara, Esq., Johnson-Condon Annie Santos, Esq., Johnson-Condon
3:15	Anne Barry, Deputy Commissioner, DHS Maureen O'Connell, Assistant Commissioner Patricia Carlson, Interim CEO, State Operated Services Amy Akbay, Chief General Counsel for Minn. DHS Steve Alpert, Attorney General's Office Scott Ikeda, Attorney General's Office Gregory Gray, Chief Compliance Officer

August 22

9:00	Minnesota Specialty Health System Cambridge 1425 East Rum River Drive South Cambridge, MN 55008 (763) 689-7200