

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

Civil No. 09-1775 (DWF/FLN)

Plaintiffs,

v.

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

Defendants.

RECOMMENDATIONS TO THE PARTIES:

**STAFF TRAINING ON FEDERAL FINAL RULE
FOR HOME AND COMMUNITY-BASED SERVICES (HCBS) SETTINGS**

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SUMMARY

The Settlement Agreement's community services and transition plan provisions emphasize both person-centered planning and the characteristics of the "most integrated setting" under *Olmstead*. So too do the State's *Olmstead* Plan and the pending Comprehensive Plan of Action.

Most Minnesota community services for people with developmental disabilities overseen by DHS are funded through federal-state Home and Community-Based Services (HCBS) Waivers. The federal government on January 16, 2014 issued the *Final Rule for Home and Community-Based Services (HCBS) Settings*, effective March 17, 2014. The Rule specifies requirements for community settings, requires person-centered planning, and mandates minimum requirements for person-centered plans and process.

The draft of the Court Monitor's formal recommendation proposed that a) treatment teams at MSHS-Cambridge, MSH and AMRTC be trained on the new Federal Final Rule on community settings and person-centered planning, and b) MSHS-Cambridge/successor staff training under the Settlement Agreement on person-centered planning be revised to address the requirements of the Final Rule.

The Department of Human Services disagrees with the recommendation, and urges that nothing occur until CMS provides "final guidance" and that a) until then, MSH and AMRTC be entirely excluded from any training on the Federal Rule, and b) Cambridge/successors' training be similarly delayed.

The Department's response misses and misconceives the nature of the recommendation. Cambridge, MSH and AMRTC are not community waiver programs, of course. The intent of the recommendation is that facility staff become knowledgeable in the community requirements for which they participate in planning. For Cambridge, the intent is that the settlement-mandated training should be revised to reflect the Federal Rule. Both recommendations are consistent with DHS policy, the Federal Rule and the orders in this case, including the *Olmstead* Plan. Attention to this issue at the "front-end" may avoid "hindsight" inquiries during compliance verification and monitoring. The "Final Rule" is final. There is no need for delay in raising staff awareness of these matters.

It is disappointing that DHS rejects these straightforward, forward-looking relevant recommendations. As applicable under the orders in this case, the content of the Final Rule will be considered by the Court Monitor.

No action by the Court is required at this time.

BACKGROUND

The Settlement Agreement provides for staff training in Person-Centered Thinking and Person-Centered Planning, as well as Positive Behavior Supports.¹ At the time the Court adopted the settlement, the staff training requirement applied to staff at the MSHS-Cambridge facility and, then, to a “transitional” three-person facility nearby in Cambridge. The Settlement Agreement also provides for Transition Planning, with implications for movement of individuals to new homes and services in the community.²

Under the provisionally approved *Olmstead* Plan, the state intends to further reduce the census of large facilities through community placement. The *Olmstead* Plan has specific quantitative goals for movement to the community of residents of Anoka Metro Regional Treatment Center (AMRTC) and Minnesota State Hospital (MSH).

MSHS-Cambridge is now closing. METO’s former role and that of MSHS-Cambridge are intended to be fulfilled by dispersed small community homes. The Settlement Agreement applies to METO/Cambridge successors. In addition, individuals who might previously have come to MSHS-Cambridge are being assisted both through the Department’s Community Support Services program and by Cambridge staff deployed to support providers and families in the community who care for those individuals.

These settlement-specific developments are occurring in the context of substantial investment in community services state-wide. Minnesota’s programs and services for people with intellectual and developmental disabilities (IDD) are largely funded through joint state-federal spending in the community under the Home and Community-Based Services (HCBS) mechanism. Of the \$1.58 billion public spending in FY 2011, \$964 million was in federal funds.³

¹ Settlement Agreement, §IX.A. Attachment B to the Settlement Agreement generally describes the training. DHS in 2012 adopted specific content for that training and for assessing staff competence in the areas trained.

² Settlement Agreement, §VIII (Transition Planning) (“The State shall use person-centered planning principles at each stage. . .”).

³ These and the figures cited in the following paragraph are for FY 2011 from Braddock, *et al.*, *The State of the States in Developmental Disabilities* (Coleman Institute and Dept. of Psychiatry, University of Colorado, 2013). <http://stateofthestates.org>.

There were 18,367 residents in funded settings, with 17,033 served in residences with 6 or fewer persons. 793 individuals are in settings with a 16+ census. In addition, Minnesota provides family support, supported living and supported employment thousands of others.

THE RULE ON SETTINGS & PERSON-CENTERED PLANNING

The U.S. Dept. of Health and Human Services, Center for Medicaid and CHIP Services recently issued the Final Rule for Home and Community-Based Services (HCBS) Settings.⁴ CMS' fact sheets are Exhibit B to these Recommendations.

It is likely, if not certain, that most former residents of METO/Cambridge protected under the settlement receive or have received services under the HCBS waiver programs. The same is true for the planned placements from MSHS-Cambridge, AMRTC and MSH.

The rule sets forth qualifications for all Waiver home and community-based settings, both with regard to the setting itself and their location. Also, the rule includes requirements for provider-owned or controlled settings. The rule applies to all settings where HCBS are delivered, not just to residential settings.

CMS specifies that service planning for participants in HCBS programs under sections 1915(c) and 1915(i) must be developed through a person-centered planning process; minimum requirements for person-centered plans and the process are set forth.

The Final Rule's requirements are relevant to DHS' implementation of the orders in this case. Treatment teams considering the appropriateness of continued institutionalization of a client need to be aware of protections and requirements in HCBS settings. System-wide common understanding of

⁴ Published in the Federal Register January 16, 2014, and effective March 17, 2014, the title of the rule is *Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers*.

<https://www.federalregister.gov/articles/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider>

person-centered planning as articulated in the Final Rule will facilitate quality client care.

THE DEPARTMENT'S RESPONSE

The Department seeks delay of any action, and narrowing of the scope of the recommendations.⁵ By email on January 14, 2014, the Department responded to the Monitor's recommendation:

Dear David,

Thank-you for the opportunity to comment on your draft recommendations to the parties.

We propose an amendment to recommendation #1 and #2 as follows:

1. *Treatment teams at facilities, including MSHS-Cambridge and its successors, ~~AMRTC and MSH~~ will be trained regarding the Final Rule requirements as soon as final guidance is provided by CMS. Staff planning transition for AMRTC and MSH clients into the community will be trained in the application of the Final Rule as final guidance is provided by CMS.*

[Rationale: We understand the Final Rule to exclude AMRTC and MSH. In addition, it is standard practice to wait for final guidance from CMS before operationalizing implementation of a new rule. Initiating training before receiving the final guidance may lead to confusion if the final guidance has a different interpretation of the rule or changes elements of the requirements of the Final Rule.]

2. *The MSHS-Cambridge/successor staff training under the Settlement Agreement on person-centered thinking and person-centered planning will be revised promptly to incorporate the person-centered thinking and person-centered planning the requirements of the Final Rule as soon as final guidance is provided by CMS.*

*Thank-you.*⁶

⁵ The parties were provided a draft of this Recommendations document on February 7, 2014. The Department responded on February 14, 2014.

The Department misses and misconceives the nature of the recommendations. Cambridge, MSH and AMRTC are not community waiver programs, of course. The intent of the recommendations is that facility staff become knowledgeable in the community requirements for which they participate in planning. For Cambridge, settlement-mandated training should be revised to reflect the Federal Rule. Both recommendations are consistent with DHS policy, the Federal Rule and the orders in this case, including the *Olmstead* Plan and the pending Comprehensive Plan of Action. Attention to this issue at the “front-end” may avoid “hindsight” inquiries during compliance verification and monitoring.

There is no reason to await what the Department calls “final guidance” before addressing the Final Rule’s implications. The Final Rule is “Final.” It is effective March 14, 2014. There is no provision in the Rule permitting states to ignore the Rule pending “final guidance.”⁷ The Rule requires Minnesota to submit a transition plan for existing waivers within one year, for CMS’ approval. Absent consideration of the Court Monitor’s recommendation, the Department may not adequately include compliance with *Jensen*-related requirements in its transition plan to CMS, and further delay may occur.

DHS has not provided a rationale for delaying training under the Final Rule, and for failing to even begin revision of the settlement-mandated Cambridge training. Establishment and implementation of such training efforts takes time; waiting longer to begin means time lost. Attention to this issue at the “front-end” may avoid “hindsight” inquiries during compliance verification and monitoring.

It is disappointing that DHS rejects these straightforward, forward-looking relevant recommendations. As applicable under the orders in this case, the content of the Final Rule will be considered by the Court Monitor.

⁶ Email from Christina Baltes, Jensen Compliance Officer, Commissioner’s Office to David Ferleger, February 14, 2014.

⁷ CMS has not indicated it will issue “future guidance” altering or interpreting the substance of the Final Rule. “Future guidance” will be on other matters: “review” of states’ compliance, “requirements for transition plans,” and on “the process for operationalizing person-centered planning in order for states to bring their programs into compliance.” CMS Fact Sheet at 2, 7 (attached hereto).

RECOMMENDATIONS

The Court Monitor has attached time frames to the recommendations which were not in the draft *Recommendation to the Parties*. The one year for AMRTC and MSH training is consistent with the Final Rule's one year transition plan provision. The 90 days to revise the MSHS-Cambridge training recognizes the importance of such training for the successors as the institution closes within that time period.

In consideration of the above and the record of this case, the Court Monitor respectfully recommends that:

1. Within one year, treatment teams at facilities including MSHS-Cambridge, its successors, AMRTC and MSH will be trained regarding the Final Rule requirements.
2. Within ninety (90) days, the MSHS-Cambridge/successor staff training under the Settlement Agreement on person-centered thinking and person-centered planning will be revised promptly to incorporate the requirements of the Final Rule.

No action by the Court is required at this time.

Respectfully submitted,

David Ferleger

Court Monitor

February 18, 2014