

**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.

**Report to the Court
Verification Items:
DHS 4th and 5th Compliance Update Report**

David Ferleger
Court Monitor
Archways Professional Building
413 Johnson Street
Jenkintown, PA 19046
Phone: (215) 887-0123

November 25, 2014

**Report to the Court
Verification Items:
DHS 4th and 5th Compliance Update Report**

Background

In compliance with the Jensen Settlement Agreement, the Jensen Implementation Office of the Department of Human Services files bi-monthly update reports on implementation of the *Jensen* settlement agreement. Copies of the Updates are also sent to Court Monitor. Dr. Colleen Wieck and Ombudsman Roberta Opheim.

At times, Court Monitor makes formal requests to DHS for information to verify some items reported in bi-monthly update reports.

Court Monitor Request No. 2014-17, made on October 21, 2014, requested verification information on 10 items that were reported in *Defendant's Fourth Compliance Update Report* (filed with the Court on September 15, 2014, Doc. 342). Attached as Exhibit A.

Peg Booth, Executive Director, *Jensen* Implementation Office (JIO), responded on November 4, 2014 via email stating that the information requested in 2014-17 "will be reflected in the *Fifth Compliance Update Report*." The Court Monitor concurred with this request agreeing, "this is an efficient and clear way to address my request." The emails are attached as Exhibit B.

Accordingly, when the *Fifth Compliance Update Report*, Doc. 360, was filed with the Court on November 17, 2014, the Court Monitor examined the information provided by JIO in fulfillment of Request 2014-17 relating to the *Fourth Compliance Update Report*. The chart following the signature page provides the Court Monitor's conclusions as to the sufficiency of the responses provided in the *Fifth Compliance Update Report* relating to the items in Request No. 2014-17.

DHS provided additional information in the *Fifth Compliance Update Report* beyond what had been in the *Fourth* report.

Findings

The Court Monitor found that, of the 10 items, 6 could not be verified based on DHS' supplemental information. One item was verified in part. The following items were not verified:

- No evidence that investigator met eight hour annual training requirement "specific" to investigative practices.
- No evidence of a national search promised for a key position.
- Person centered plans are not being signed or co-signed by supervisor, and because the two responsible professionals do not have significant background and experience in required content.
- Learning and professional development plans for person centered processes facilitator do not meet requirements for 25 hours per year of educational activities.
- Supervisor of Functional Behavior Assessments is not certified by a recognized national association.
- Staff training is not being completed in a timely manner.

An additional item is verified in part only. While minutes of Positive Behavior Support Review meetings are provided, the minutes do not show the participation of non-clinical staff.

This report is respectfully submitted to the Court for its consideration.

/s/David Ferleger
Court Monitor

November 25, 2014

RESULTS OF VERIFICATION REQUEST TO DHS REGARDING 4th COMPLIANCE UPDATE		
Court Monitor, Request No. 2014-17 (10/21/14): (DHS requested to respond in the 5th Compliance Update regarding 4th Compliance Update)		
Verification Request from Court Monitor	DHS Submission in 5th Compliance Update (with note of any difference from 4th Update)	Court Monitor Comments on Verification
<p>ITEM 1</p> <p>EC 25.1. Verify with documentation Greg Wiley's continuing education and in-service training</p>	<p>9/15/2014 Update DHS continues to contract with an outside investigator (Greg Wiley) to conduct investigations of VA allegations. DHS uses an internal attorney (Greg Gray) to conduct peer quality reviews of the VA investigation reports. Both maintain required training to complete investigations.</p> <p>11/17/2014 Update See 9/15/2014 response. Exhibit 144 VA Investigator Training Materials</p>	<p>NOT VERIFIED.</p> <p>CPA COURT ORDER REQUIREMENT: "DHS employees having responsibility for investigative duties will receive 8 hours of continuing education or in-service training each year specific to investigative practices." EC 25.1</p> <p>COMMENT: Submission does not show compliance with the "each year specific" requirement. Material does not show which training was received each year, or number of hours each year.</p>

<p>ITEM 2</p> <p>EC 38.4 Please provide the minutes of all PBSR meetings</p>	<p>9/15/2014 Update A Positive Behavioral Supports Review (PBSR), attended by Behavior Analysts and non-clinical staff, occurs every two weeks for every individual served by the Facility for the purposes of reviewing PSTPs for current best practice, approving and monitoring the efficacy of the PSTP, and reviewing any restrictive and/or emergency interventions. 11/17/2014 Update See 9/15/2014 response. Exhibit 139 PBSR minutes. Exhibit 140 PBSR minutes. Exhibit 141 PBSR minutes. Exhibit 142 PBSR minutes. Exhibit 143 PBSR minutes</p>	<p>VERIFIED IN PART</p> <p>CPA COURT ORDER REQUIREMENT: "A facility-based Positive Behavioral Supports Review (PBSR), comprised of both behavioral analysts and non-clinical staff, will be established and maintained for the purposes of: 1) Reviewing all positive behavioral support plans to ensure they adhere to current best practice; 2) Approving and monitoring the efficacy of all positive behavioral support plans; 3) Reviewing the use of any restrictive and/or emergency interventions, i.e. restraints, 911 calls, etc. The PBSR Committee will meet on a monthly basis." EC 38.4</p> <p>COMMENT: Minutes are provided by DH. However, the EC requires non-clinical staff to be present at the meetings. The minutes identify clinical staff but no non-clinical staff are identified. Therefore, there is verification of partial compliance (the minutes) but compliance with the meeting participants requirement.</p>
<p>ITEM 3</p> <p>EC 50, 50.4. Please provide verification of Dr Stacy Danov's notice of her resignation to MN LifeBridge and DRS.</p>	<p>Exhibit 145 Provides an email indicating that Dr. Danov resigned via phone to Dr. Moore on July 21, 2014 and an email resignation from Dr. Danov on August 12, 2014. (dates in sealed exhibit 145)</p>	<p>VERIFIED.</p>

<p>ITEM 4</p> <p>EC 50.4 Please provide documentation of the search for her replacement.</p>	<p>The Updates for Court Monitor Request Items 4 5 and 6 relating to EC 50.4 are the same, and presented here.</p> <p>9/15/2014 Update</p> <p>Dr. Danov has resigned her position at MN Life Bridge. She has provided training to the clinical team at MnLB and will remain available for consultation about person centered plans, but will not be able to formally facilitate. A <i>national search to fill the position will begin in the coming weeks. In the interim, Dr. Moore and others will fill in to make sure tasks are accomplished.</i></p>	<p>NOT VERIFIED</p> <p>DHS committed to a "national search" to replace Dr. Danov but has not conducted one for this important position. While EC does not require a national search, DHS' verification consists only of a listing on MN state website does not constitute a (national) search. The vacancy has existed since July/August (see Exhibit 145)</p>
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<p>[emphasis added]</p> <p>11 /17/2014 Update Amber Maki, BA3, and Dr. Moore have been completing and updating person-centered plans as a replacement for Dr. Danov is recruited and hired. Dr. Shannon Torborg, from the JIO, has been doing assessments and reviews. CSS staff are helping conduct the initial assessments of the therapeutic follow-up group. Other staff from MLB and CSS are assisting by doing tasks, such as setting up appointments, that Dr. Danov did in the course of her job but that do not require that level of credentials and training.</p> <p>Dr. Moore has not been consistently cosigning PCPs with Maki, though he does review them. Dr. Moore has begun to review and co-sign PCPs. The plans for the clients served are included as Exhibits.</p> <p>Dr. Moore is drafting updates to the position description to more accurately reflect what the person will do.</p>	<p>VERIFIED.</p> <p>CPA COURT ORDER REQUIREMENT: "All plan facilitators will have, or function under the active supervision of a staff person who has, significant experience and background in facilitation, social devaluation and its consequences, and the principles of Normalization / Social Role Valorization, person-centered thinking, and the various and vast array of useful tools and techniques which may be of use for a particular person. Any such supervisor shall co-sign and be responsible for the plan and plan process. In this manner, a thoughtful, authentic, individualized and successful planning process will result in meaningful outcomes. Evidence of use of various, individualized techniques for different individual people will be clear in the development of person - centered plans. (PATH, MAPS, Personal Futures Planning, One Page Profiles, and Helen Sanderson's Person-Centered Thinking, are examples)." EC 50.4</p> <p>COMMENT: The "others" who are completing and co-signing the Plans are Dr. Tim Moore and Amber Maki</p>
<p>ITEM 5 EC 50.4 Dr. Tim Moore "and others" are to fulfill the role under this requirement. Who are the "others"? Please provide resumes of Dr Moore and the "others."</p>	

<p>ITEM 6</p> <p>EC 50.4 Since Dr. Danov's move to DSD, identify which clients Dr. Moore and the "others" have co-signed and been responsible for (and dates of the co-signed plans, and of their co-signing of the plans). See EC 50/50.4 ("supervisor shall co-sign plans and be responsible for the plan and plan process.") (p. 213)</p>	<p>Exhibit 125 Plans for 030 42014 Admission Exhibit 126 Plans for 97232014 Admission Exhibit 127 Plans for 07312014 Admission Exhibit 128 Plans for 07282014 Admission Exhibit 129 Plans for 09082014 Admission Exhibit 145 Danov resignation and replacement efforts Exhibit 146 Maki resume Exhibit 147 Moore resume Exhibit 148 Torborg resume</p> <p>[Under Obstacles and Next Steps," regarding search] See 9/15/14 Response."</p>	<p>NOT VERIFIED.</p> <p>CPA COURT ORDER REQUIREMENT: The requirement (see above under Item 5) is that the Facilitator have certain experience and background in order to co-sign the plans; the Facilitator is responsible for the implementation and oversight of the plans.</p> <p>COMMENT: There is no evidence presented that Dr. Moore or Amber Maki have significant background and experience required by EC 50.4.</p> <p>No signatures are present in exhibits 125-129. Of the five exhibits, which include a variety of plans for 5 people, there are 23 places for signatures. There are only 3 signatures (with dates) present, all by Ms. Maki. No signatures of Dr. Moore or anyone else are present as co-signers. DHS concedes that "Dr. Moore has not been consistently cosigning PCPs with Maki, although he does review them."</p>
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<p>ITEM 7</p> <p>EC 50.5 requires a learning and profession development plan for each of the individuals under EC 50/50.4. Please provide those plans for Dr. Moore and the "others."</p>	<p>11 /17/2014 Update</p> <p>Staff learning and professional development planning continues, to assure compliance with the Plan. Maki's plan also includes maintaining her credential as a Board Certified Behavior Analyst (36 hours every 3 years).</p> <p>Moore's plan also includes maintaining his credential as a Board Certified Behavior Analyst (36 hours every 3 years), and licensure as a psychologist in MN (40 hours every 2 years). Both Maki and Moore are slated to begin the PCT coaches and leaders training process in January 2015. The position description is being reviewed and updated to reflect expectations. The posting for the position has been created.</p> <p>Exhibit 145 Danov resignation and replacement efforts Exhibit 146 Maki resume Exhibit 147 Moore resume Exhibit 148 Torborg resume</p>	<p>NOT VERIFIED.</p> <p>CPA COURT ORDER REQUIREMENT:</p> <p>"An annual learning and professional development plan which includes the above areas will be developed with and for each facilitator of person-centered processes. It may include reading, research, formal, and informal training, mentoring, and development events. These learning and professional development plans will include a minimum of 25 hours per year of educational activities (formal and informal) focused on person-centered planning, and will be completed as planned. Attendance at professional conferences, in and out of state, will be supported and facilitated." EC 50.5</p> <p>COMMENT:</p> <p>The requirement is that there be a "minimum of 25 hours per year of educational activities (formal or informal) focused on person centered planning and will be completed as planned." Other requirements are specified as well regarding other content. There is no evidence that the three individuals meet the requirements.</p>
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<p>ITEM 8</p> <p>EC 67.2 CSS database. Please provide membership and all meeting minutes of the Workgroup.</p>	<p>11 /17/2014 Update</p> <p>CSS continues to collect data on referrals, requests, services provided, and outcomes, from multiple sources and in multiple data collection processes / locations. The purpose of the CSS Intervention & Outcomes Data Tracking Workgroup is to "develop a work plan to update CSS data collection, analysis, and reporting to strengthen our continuous improvement efforts and to implement JSA". The workgroup has met twice; the October meeting was postponed due to the need to assist MLB with Successful Life Project initial assessments. The next meeting is scheduled for 12/3/14.</p> <p>Exhibit 149 CSS database workgroup</p>	<p>VERIFIED.</p>
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<p>ITEM 9 EC 78 FBA. Those conducting FBA and supervisor. Please provide names and resumes. Provide resume of Michael Scharr (p. 100)</p>	<p>9/ 15/2014 Update Michael Scharr, MS/LP continues to lead a workgroup of behavior analysts (including BCBA's and Licensed Psychologists with behavioral expertise.</p> <p>11/17/2014 Update See 9/15/2014 response. Exhibit 150 Scharr resume Exhibit 151 CSS staff conducting FBA</p>	<p>NOT VERIFIED.</p> <p>CPA COURT ORDER REQUIREMENT: "Staff conducting the Functional Behavioral Assessment or writing or reviewing Behavior Plans shall do so under the supervision of a Behavior Analyst who has the requisite educational background, experience, and credentials recognized by national associations such as the Association of Professional Behavior Analysts. Any supervisor will co-sign the plan and will be responsible for the plan and its implementation." EC 78</p> <p>COMMENT: The requirement is that those doing the FBAs be certified or supervised by someone certified. Some of those conducting the FBAs are certified; most are not certified.</p> <p>The supervisor of all of them is Mr Scharr who is not certified with APBA. He is working toward certification.</p>
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<p>ITEM 10</p> <p>EC 54.1 How is the statement on the accuracy/completeness of the training numbers on p. 271 to be understood? See attached page.</p>	<p>11 /17/2014 Update</p> <p>To clarify this statement from the 9/15/2014 Update: "The numbers shown here do not represent the total number of staff who have taken PBS and PCT trainings in this reporting period; the numbers here show the number of employees whose training record has been updated to date." What this meant was that Pathlore had not been fully updated at the time of the Report. Since not all training was entered into the system, the Training Tracker had not been updated to reflect completed training for some staff.</p> <p><i>We continue to progress toward the annual training requirements. Delays in scheduling some training has occurred due to staff shortages. MLB recently hired some new staff and is in process to get them trained to allow better coverage. MLB still needs to hire more staff given staffing and scheduling issues. [emphasis added]</i></p> <p>Exhibit 130 Training Tracker as of 10302014</p>	<p>NOT VERIFIED.</p> <p>CPA COURT ORDER REQUIREMENT:</p> <p>"Facility staff in all positions receive annual standardized training in:</p> <ol style="list-style-type: none"> 1. Therapeutic Interventions 2. Personal safety techniques 3. Medically monitoring restraint 4. Positive Behavior Supports 5. Person-Centered Approaches 6. Crisis Intervention 7. Post-Crisis Evaluation and Assessment" EC 54.1 <p>COMMENT:</p> <p>DHS Update states that not all required training has been timely completed.</p>
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David Ferleger
ATTORNEY

October 21, 2014

To: Peg Booth
From: David Ferleger 
Re: Request No. 2014-17: Defendants' Fourth
Compliance Update Report

Please attend to the following items:

- **EC 25.1. Verify with documentation Greg Wiley's continuing education and in-service training.**
- **EC 38.4. Please provide the minutes of all PBSR meetings**
- **EC 50, 50.4. Please provide verification of Dr. Stacy Danov's notice of her resignation to MN LifeBridge and DHS. Please provide documentation of the search for her replacement. See p. 213.**
- **EC 50.4. Dr. Tim Moore "and others" are to fulfill the role under this requirement. Who are the "others"? Please provide the resumes of Dr. Moore and the "others." Since Dr. Danov's move to DSD, identify which clients Dr. Moore and the "others" have co-signed and been responsible for (and dates of the co-signed plans, and of their co-signing of the plans). See. EC 50/50.4 ("supervisor shall co-sign and be responsible for the plan and plan process.") (p. 213).**
- **EC 50.5 requires a learning and professional development plan for each of the individuals under EC 50/50.4. Please provide those plans for Dr. Moore and the "others."**
- **EC 67.2. CSS database. Please provide membership and all meeting minutes of the Workgroup.**
- **EC 78. FBA. Those conducting FBA and supervisor. Please provide names and resumes. Provide resume of Michael Scharr. (p. 100).**

Archways Professional Building
413 Johnson Street | Suite 203 | Jenkintown, PA 19046
tel: (215) 887-0123 | fax: (215) 887-0133
david@ferleger.com | www.ferleger.com

EX. A

REQUEST FOR EXPLANATION

- **EC 54.1. How is the statement on the accuracy/completeness of the training numbers on p. 271 to be understood? See attached page.**
- **EC 68.1, 68.2 (pp. 347-350). State and Regional QA Committees to review data monthly. AND EC 75.2 (p. 386) Tracking of CSS issues. There seems to be very little progress on these items. (75.2 is reported, "completed" though it is obviously not completed).**

Thank you.



From: David Ferleger david@ferleger.com
Subject: Re: Request No. 2014-17: Defendants' Fourth Compliance Update Report
Date: November 4, 2014 at 1:57 PM
To: Peg Booth (DHS) Peg.Booth@state.mn.us
Cc: Office David Ferleger of office@ferleger.com, Ikeda Scott Scott.Ikeda@ag.state.mn.us, Aaron Winter Aaron.Winter@ag.state.mn.us, Beth (DHS) Sullivan G Beth.G.Sullivan@state.mn.us, Wieck, Ph.D. Colleen colleen.wieck@state.mn.us, Opheim Roberta roberta.opheim@state.mn.us, Tessneer Mike mike.tessneer@state.mn.us, Shamus P. O'Meara spomeara@olwklaw.com, Elks Martin martinelks@aol.com, Ricardo Figueroa Rick.Figueroa@state.mn.us, Akbay Amy Esq. Amy.Akbay@state.mn.us, Friend, Maggie A (DHS) maggie.friend@state.mn.us, Martin Elks martinelks@aol.com

Dear Peg,

Thanks for the email below. I appreciate it, and agree that this is an efficient and clear way to address my request.

Thanks again.

David

PS - When you can, please include Martin Elks and office@ferleger.com among cc's

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David Ferleger, Esq.
 Archways Professional Building
 413 Johnson Street, Suite 203
 Jenkintown, PA 19046
 215 887 0123
 215 887 0133 fax

Law Office: <http://www.ferleger.com>

<mailto:david@ferleger.com>

On Nov 4, 2014, at 1:47 PM, Booth, Peg (DHS) <Peg.Booth@state.mn.us> wrote:

David

The below listed items identified in your October 21, 2014 **Request No. 2014-17: Defendants' Fourth Compliance Update Report** will be reflected in the Fifth Compliance Update Report. If you would like the documentation sent to you separately from the report please let me know.

- EC 25.1. Verify with documentation Greg Wiley's continuing education and in-service training.
- EC 38.4. Please provide the minutes of all PBSR meetings
- EC 50, 50.4. Please provide verification of Dr. Stacy Danov's notice of her resignation to MN LifeBridge and DRS. Please provide documentation of the search for her replacement. See p.

EX. B

213.

- EC 50.4. Dr. Tim Moore "and others" are to fulfill the role under this requirement. Who are the "others"? Please provide the resumes of Dr. Moore and the "others." Since Dr. Danov's move to DSD, identify which clients Dr. Moore and the "others" have co-signed and been responsible for (and dates of the co-signed plans, and of their co-signing of the plans). See. EC 50/50.4 ("supervisor shall co-sign and be responsible for the plan and plan process.") (p. 213).
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Peg Booth, Ph.D.

Director, Jensen Implementation Office
Minnesota Department of Human Services

-----Original Message-----

From: Front Office [<mailto:office@ferleger.com>]

Sent: Tuesday, October 21, 2014 2:13 PM

To: Booth, Peg (DHS)

Cc: Scott Ikeda; Aaron Winter; Sullivan, Beth G (DHS); Wieck, Colleen (ADM); Opheim, Roberta (OMHDD); Tessneer, Michael L (DHS); Shamus P. O'Meara; David Ferleger, Esq.; Martin Elks; Figueroa, Rick (DHS); Akbay, Amy K (DHS)

Subject: Request No. 2014-17: Defendants' Fourth Compliance Update Report

Dear Colleagues,

Attached you will please find: Request No. 2014-17: Defendants' Fourth Compliance Update Report.

Thank you.