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December 12, 2016

Via NextGen ECF With Permission[1]

The Honorable Donovan W. Frank
U.S. District Court Judge, District of Minnesota
724 Warren E. Burger Federal Building
and U.S. Courthouse
316 North Robert Street, Suite 724
St. Paul, MN 55101

Re: ***James and Lori Jensen, et al. v. Minnesota Department of Human Services, et al.***
U.S. District Court File No. 09-CV-01775-DWF-BRT

Dear Judge Frank:

The Minnesota Department of Human Services (DHS) prepared the enclosed "Response to Court Monitor's Compliance Assessment (Doc. No. 604) Pursuant to October 26, 2016 Order (Doc. No. 599) Filed December 12, 2016" ("Response"). At the request of DHS and the Court, DHS's Response is enclosed for filing.

Sincerely,

s/ Anthony R. Noss
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Attorney for State Defendants

Enclosure

cc: Shamus P. O'Meara, Esq., Class Counsel *(via ECF)*

[1] The Court's Oct. 26, 2016 Order [Doc. No. 599] gives Defendants permission to file a response to the Court Monitor's compliance report.

Minnesota Department of **Human Services**

December 12, 2016

The Honorable Donovan W. Frank
United States District Court
District of Minnesota
316 North Robert Street
St. Paul, Minnesota 55101

Re: *Jensen, et al. v. Minnesota Department of Human Services, et al.*
Court File No.: 09-CV-01775 DWF/BRT

Dear Judge Frank:

Enclosed please find the Department's response to the Court Monitor's Compliance Assessment Report (Doc. No. 604). This response is filed pursuant to the Court's October 26, 2016, Order (Doc. No. 599).

Sincerely,

Emily Piper
Commissioner

Encl.

cc: Shamus O'Meara, Plaintiffs' Class Counsel
Colleen Wieck, Executive Director for the Governor's Council on Developmental Disabilities
Roberta Opheim, Ombudsman for Mental Health and Developmental Disabilities

Jensen Settlement Agreement Comprehensive Plan of Action (CPA)

Response to Court Monitor's Compliance Assessment (Doc. No. 604)

Pursuant to October 26, 2016 Order (Doc. No. 599)

Filed December 12, 2016

Minnesota Department of **Human Services**

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INTRODUCTION

On September 29, 2016, the Court ordered the Court Monitor to provide the Court "with a report that assesses substantial compliance with regard to all components of the JSA and CPA based on his review" of the *Jensen Settlement Agreement Comprehensive Plan of Action (CPA) – August 2016 Semi-Annual Compliance Report* ("August 2016 Report"; Doc. No. 589), as well as prior reports that addressed ECs not covered in the August 2016 Report. (Doc. No. 595.) After receiving the Court Monitor's report, the Court directed the Court Monitor to (1) meet about the substance of Court Monitor's compliance assessment report with the parties or party representatives," (2) "amend his compliance assessment report as he finds appropriate after the meet and confer,"; and (3) "file his compliance assessment report (as amended) on or before November 28, 2016." (Doc. No. 599) The Court also stated that the defendants may file a response to the Court Monitor's amended compliance assessment report by December 12, 2016. (*Id.*)

Pursuant to this Order, representatives from the Minnesota Department of Human Services ("Department") met with the Court Monitor on November 10, 2016, to discuss the substance of the Court Monitor's report. The Department representatives provided the Court Monitor with an EC-by-EC review and highlighted numerous concerns with a substantial portion of the Court Monitor's findings and conclusions. These concerns included, but were not limited to, unsupported and misleading statements, factual errors, reliance on out of date information, historical statements that have no relevance to what the Court ordered, and misinterpretations of the ECs themselves. The Court Monitor's amended Compliance Assessment Report ("Assessment"; Doc. No. 604) was filed November 29, 2016.

As permitted by the Court's Order (Doc. No. 599), the Department submits this response to the Court Monitor's Assessment (Doc. No. 604). This response first discusses general concerns raised by the Assessment, and then more specifically responds to the Court Monitor's Assessment of each Evaluation Criteria ("EC") deemed "non-compliance" or "inconclusive."

OVERARCHING CONCERNS

Applicable Standard—Substantial Compliance

The first concern with the Assessment is that the Court Monitor does not define the standard against which he is assessing the Department's compliance with the JSA and CPA, much less provide any legal authority for that standard. The Court Monitor states that he "adopts an exceptionally lenient approach to the Court's direction to assess compliance with the Court's orders." (Doc. No. 604 at 7, 21.) As an initial matter, the Court Monitor does not even state that he is applying the standard the Court directed him to apply, *substantial* compliance.[1] (Doc. No.

[1] The Department does not concede that "substantial compliance" is the appropriate standard in this case. To the contrary, the *Jensen* Settlement Agreement establishes that the relevant inquiry is whether the Department engaged in a "pattern and practice of substantial noncompliance with Attachment A." (Doc. No. 136-1 at 39.) For purposes of this response, however, the Department

595.) Moreover, the only explanation the Court Monitor provides for the subjective and unknown standard applied in his assessment is that, if he concluded he did not have sufficient information to assess compliance with a particular EC, he categorized the EC as "inconclusive" instead of "noncompliant." (Doc. No. 604 at 7-8, 21.) This is not a reasonable explanation of the standard against which the Department is being assessed or the basis for that standard.

"Substantial compliance" has acquired legal meaning from the federal courts in the context of institutional reform cases. Although substantial compliance is "not susceptible of a mathematically precise definition," federal courts have emphasized that substantial compliance is not strict or literal compliance. *See Jeff D. v. Otter*, 643 F.3d 278, 284 (9th Cir. 2011); *R.C. ex rel. the Ala. Disabilities Advocacy Program v. Walley*, 475 F. Supp. 2d 1118, 1127 (M.D. Ala. 2007); *see also Langton v. Johnston*, 928 F.2d 1206, 1223 (explaining that "officials operating under a public law decree are required to employ good faith efforts to satisfy its demands, and fault should not be found if they have implemented its dictates to the extent practicable"). The "touchstone" of the substantial compliance inquiry, which is derived from contract law principles, is whether the defendants "frustrated the purpose of [the agreement]—i.e. its essential requirements." *Joseph A. ex rel. Wolfe v. N.M. Dep't of Human Svcs.*, 69 F.3d 1081, 1086 (10th Cir. 1995). Substantial compliance does not mean that a problem will never arise, but that there are internal mechanisms in place for identifying and addressing problems. *See Walley*, 475 F. Supp. 2d at 1182-83 (explaining that "the end of court oversight does not mean the end of oversight" because "[i]t was expected that DHR would establish mechanisms which would allow it to monitor and promote compliance with the Consent Decree and, similarly, pinpoint and correct problems, which undoubtedly will occur in a department the size of DHR").

This kind of analysis is not reflected in the Court Monitor's Assessment. The substantial compliance inquiry first requires identifying the "essential requirements" of the agreement and then assessing whether any failure of strict compliance on the part of the defendants "frustrates the purpose" of those essential requirements. The Court Monitor, however, engages in an assessment that fails to identify the essential requirements of the JSA, much less analyze whether the Department is frustrating the purpose of those requirements.

In fact, the Court Monitor frequently goes beyond the scope of what is required by the JSA and CPA. For example, the Court Monitor labels many ECs as "non-compliance" or "inconclusive" based on a perceived failure by the Department to take or report on an Action under the EC. This is inconsistent with the language of the CPA, which specifically states that Actions are not enforceable requirements and that the Department may satisfy an EC's requirements through "alternate actions."[2] (Doc. No. 283 at 1.) The Court Monitor also does not consistently

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discusses and applies the concept of "substantial compliance" because that is what the Court ordered the Court Monitor to assess. (Doc. No. 595 at 3.)

[2] In reference to the CPA Actions, the Court Monitor states that "Doing it another way is acceptable through the established modification process." (Doc. No. 604 at 18.) This is in conflict with the plain language of the CPA, which does not tie the Department's ability to achieve satisfaction of an EC through "alternative actions" to the modification process. The CPA states, without qualification, that the Department may satisfy an EC through "alternate actions." (Doc. No. 283 at 1.) That sentence refers to "actions" in a general sense—as indicated by the lack of

recognize that certain ECs are subject to a "best efforts" standard and do not constitute requirements under the CPA.[3]

As will be discussed in the following sections, the Department's reports establish that the Department is in fact in substantial compliance with the four corners of the JSA and CPA.[4] Even if we were to accept the Court Monitor's EC-by-EC approach as the appropriate way to assess substantial compliance, the Department's recent compliance reports demonstrate either that the Department is in substantial compliance with the ECs or that, with some ECs, there is a need for clarification in the next scheduled compliance report that does not require the Court Monitor to conduct "maintenance follow up," conduct interviews, or review documents.

Continuing Court Monitoring is Inappropriate

As a threshold matter, the Department reiterates its position that ongoing court monitoring is not appropriate in this case. (*See* Doc. No. 590 at 1.) Even if ongoing court monitoring was not inappropriate in this case as a general matter, nothing in the Court Monitor's Assessment supports his continuing involvement in this case. Throughout his Assessment, the Court Monitor requests additional information or proposes follow-up that does not relate to the requirements of the EC, that ignores or unnecessarily duplicates the Department's internal oversight and verification efforts, and that is unnecessary in light of the Department's substantial compliance as evinced by recently-filed compliance reports. There certainly is no evidence or motion practice demonstrating substantial non-compliance.

In his Assessment, for example, the Court Monitor advocates "maintenance follow-up" of 35 ECs that he deems to be in compliance.[5] But many of these ECs are also ECs that, per Court Order, the Department is no longer obligated to report or that are subject to exception reporting

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capitalization. By contrast, the following sentence discussing the modification process refers to "the Actions" under the ECs, which are not enforceable and merely represent one way of establishing compliance with a particular EC. (*See id.*)

[3] These ECs include ECs 68-75. (Doc. No. 283 at 2; Doc. No. 136-1 at 16.)

[4] The Court Monitor states that the CPA provides "verbatim, modified, restated and, in some cases, expanded *Jensen* Settlement Agreement requirements, and additional relief" (Doc. No. 604 at 17), implying that the CPA added to or changed the essential requirements of the Settlement Agreement. But this assertion is inconsistent with the Court's own description of the CPA as an "implementation plan."[4] (*see, e.g.*, Doc. No. 284 at 2). The plain meaning of "implement" in this context is "to give practical effect to and ensure of actual fulfillment by concrete measures." *Merriam Webster Dictionary* (online). Moreover, the Court noted in its January 22, 2014, Order that both the Defendants and Plaintiffs were concerned about ensuring that the CPA was consistent with the provisions of the Settlement Agreement. (*See* Doc. No. 266 at 4.)

[5] The following ECs are listed by the Court Monitor as requiring "maintenance follow-up": 5, 7, 10-24, 28-30, 31-37, 40-41, 62, 73-74, 76-77.

only (*see* Doc. No. 545-1).[6] By the Court Monitor's own assessment, these ECs have been satisfied. Ongoing monitoring is, therefore, not necessary.

As another example, the Court Monitor claims that he must review documents and conduct interviews before he can determine whether the Department is in substantial compliance with EC 39, which requires that the Department "designate[] one employee as Internal Reviewer whose duties include a focus on monitoring the use of, and on elimination of restraints." (Doc. No. 604 at 55-56.) In its August 2016 Report, the Department notes the December 1, 2015, hiring of the current Internal Reviewer and describes the process by which the Internal Reviewer's duties, consistent with EC 39, focus on monitoring the use and elimination of restraints. (Doc. No. 589 at 20-23.) The Department also notes that the Internal Reviewer summarizes these activities in his monthly reports, which are submitted to the Court, Court Monitor, Plaintiffs' Counsel, and the Consultants. (*Id.* at 20, 23.) The Court Monitor, however, claims that he needs more information on "the content of communications between MLB staff and the Internal Reviewer, or on the molding of final recommendations" and states that "discrepancies on the number of 911 calls . . . should be examined" before he can make an assessment regarding compliance. (*Id.* at 55.) Such information is unnecessary to assess substantial compliance in light of the information reported by the Department and the fact of the Internal Reviewer's monthly reporting. Moreover, the Court Monitor does not explain what "discrepancies" he identified in the number of 911 calls or how any such discrepancies, even if they existed, would negate the Department's substantial compliance with the requirements of EC 39.

In effect, it seems as though the Court Monitor is attempting to move this case backwards, advocating a greatly increased role for himself that is self-serving and unnecessary to assess substantial compliance. Additionally, the Court Monitor tries to justify expansion of his duties by rehashing issues with reporting in years past (*see, e.g.*, Doc. No. 604 at 18-19), and by stating that the "Court's mandate has consistently been for independent factual inquiry" by the Court Monitor (*id.* at 18, sidebar). The Court Monitor goes beyond the scope of what the Court ordered him to do in this Assessment, mainly, to review recent compliance reports and to assess substantial compliance. The Court did not order the Court Monitor to question the Department's veracity based on years-old concerns that are inapplicable to, or not raised by, the Department's recent Semi-Annual Report (Doc. No. 589) and reports subsequent to it (Doc. Nos. 531, 553-1, 572). The Court Monitor's attempt to create a basis for more extensive involvement in this matter by, in part, bringing up history that has not been shown to have repeated itself demonstrates his lack of objectivity and impartiality.

Indeed, the Department has made numerous changes over the intervening years with respect to internal oversight and quality assurance. These changes have been described in the Department's recent reports (*see, e.g.*, Doc. Nos. 531, 553-1, 589), and include the following: the

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[6] The following ECs are listed by the Court Monitor as requiring "maintenance follow-up" and are, per Court Order (Doc. No. 545-1), no longer reported: ECs 15-21, 31, 34, 37. The following ECs are listed by the Court Monitor as requiring "maintenance follow-up" and are, per Court Order (Doc. No. 545-1), subject to exception reporting only: 5, 7, 10, 11-14, 22-24, 28-30, 32, 33, 35, 36, 40.

Jensen Office's[7] move from the Community Supports Administration to the Compliance Office, which was accompanied by a shift in focus to quality assurance and compliance monitoring; expanded Internal Reviewer activities; establishment of the Agency-wide Quality Assurance Leadership Team; and establishment of a pool of independent subject matter experts. The Court itself has recognized that implementation of these changes has the potential to "improve [the Department's] compliance efforts and ultimately improve the lives of individuals with disabilities throughout the state." (Doc. No. 551 at 4.) The *Jensen* Office also developed a process to supplement the verification efforts of the program areas, which it described and began to implement in the Department's August 2016 Report (Doc. No. 589). This process is, per the Court's recommendation, modeled after the Olmstead Subcabinet's verification protocol. (*See* Doc. No. 589; *see also* Doc. No. 578.)

If issues arise, both internal and external parties can trigger review by an independent subject matter expert (SME)—a process that was explained in the August 2016 report (Doc. No. 589 at 10-11) and in a document sent to the Consultants and Plaintiffs' counsel. The Consultants and Plaintiffs' Class Counsel also are permitted to submit written comments to the Court following the Department's submission of a report (Doc. No. 545 at 5), which provides another avenue for expressing concerns about what the Department has or has not reported. Notably, Plaintiffs' Class Counsel and the Consultants have neither initiated an SME review nor have they submitted comments to any of the Department's recent reports.[8]

The Court Monitor also fails to take into account his own changed circumstances and the current scope of his duties. The Court Monitor refers back to prior orders of the Court that directed him to engage in independent factual inquiry (Doc. No. 604 at 6, 18)—disregarding the fact that the Court, for purposes of this Assessment, specifically directed him to assess substantial compliance based on review of the Department's most recent reports. (Doc. No. 595 at 3.) The Court Monitor was not given carte blanche to go beyond the Department's reports in his Assessment; instead, if the Court Monitor determined that additional information was needed, he was directed to explain to the Court what information he needed and how he proposed getting that information. (*Id.*) But the Court Monitor's request for additional information on numerous ECs he finds to be "inconclusive" goes well beyond the scope of the Court's Order.

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[7] In February 10, 2016 the *Jensen* Implementation Office moved from the Department's Community Supports Administration to the Department's Compliance Office and was renamed the *Jensen*/Olmstead Quality Assurance and Compliance Office. (Doc. No. 589 at 5.) Because the reports assessed by the Court Monitor cover the time periods both before and after this name change, this document uses the term "*Jensen* Office" to refer to both the former *Jensen* Implementation Office and the current *Jensen*/Olmstead Quality Assurance and Compliance Office.

[8] Plaintiffs' Class Counsel has also not brought any motion alleging that the Department is in substantial non-compliance with any part of the JSA or CPA.

Errors, Misleading Statements, and Unsupported Conclusions

The Court Monitor's Assessment also contains numerous instances of factual errors, misreading of the Department's reports or the CPA, misleading statements, and broad, unsupported assertions. These will be addressed in more detail in the EC-by-EC discussion below, but a few examples are provided here:

- The Court Monitor acknowledges that the information reported in the Gap Report (Doc. No. 531) establishes compliance with EC 85, but then deems the EC "inconclusive" because "EC 85 is not limited to class members" and "the Department does not mention whether there were other people with developmental disabilities at AMRTC who were not class members." (Doc. No. 604 at 108.) The Court Monitor disregards the fact that the Department's reporting on EC 85 is not limited to class members; in fact there is no mention of class members in the Gap Report update for EC 85. (*See* Doc. No. 531 at 56-57.) Moreover, the Court Monitor's proposed follow-up—"Information on commitments of people with developmental disabilities to MSH" (Doc. No. 604 at 109)—has no relation to EC 85.[9]
- With respect to EC 103, the Court Monitor takes issue with the fact that discussions between the Department and the Consultants are ongoing, asserting that "there is a cost to delay in resolving the matter; individuals intended to benefit from the Adopted Rule may be receiving aversive interventions that would be prohibited if the Rule were otherwise." (Doc. No. 604 at 130.) The Court Monitor provides no support for such a claim.
- The Court Monitor repeatedly asserts that the Department failed "to report the arrest of a staff person for sexual abuse of a *Jensen* class member." (*E.g.*, Doc. No. 604 at 5 n.1, 16, 46, 49.) This is factually incorrect and misleading. First, the *Jensen* Office sent out a notification about this incident on November 25, 2015, to the Court Monitor, Consultants, and Plaintiffs' Counsel. However, this incident is not within the scope of reporting for EC 25-27, as the Court Monitor claims, because these ECs apply to allegations of abuse or neglect at the Facility. The Court Monitor's statement that the Department failed to report the arrest of a "staff person" implies that the incident involved a Department employee when in fact the "staff person" referenced was the employee of a private provider.

It also should be noted that, in the first version of his report, the Court Monitor found ECs 81, 82, and 99 to be in compliance, but his amended report labels these ECs "inconclusive." The Court Monitor also initially found EC 26 to be "inconclusive," but his amended report labels EC 26 as "noncompliance." These changes are striking given that the Court Monitor is supposed to be assessing substantial compliance based on the Department's most recent reports, which have not changed in content in the time between the two versions of the Court Monitor's report.

[9] This issue was brought to the attention of the Court Monitor by Department representatives at the meeting on November 10, 2016. The following two examples were added to the report after the November 10 meeting.

Verification

With respect to verification, the Court Monitor effectively takes the position that the Department's efforts are generally inadequate; that the *Jensen* Office's use of sampling and spot-checking strategies is not acceptable; and that, for a number of ECs, verification could only be accomplished by interviewing persons served, guardians, case managers, and providers. There are several problems with this position. First, and as stated above, the Court Monitor is clearly going beyond the scope of the Court's order. Second, verifying every individual data point for every EC is not logistically or practicably feasible, nor is it an efficient use of state resources. Notably, the use of sampling and spot-checking strategies to monitor compliance and verify that program areas are reporting accurate and valid data forms the basis of the Olmstead Implementation Office's verification protocol, which the Court recommended that the Department use as a guide in drafting its own verification protocols. (*See* Doc. No. 578.) Third, much of the Court Monitor's criticism relating to the Department's reporting and verification is premature given that the draft verification protocol the Department described in its August 2016 Report (Doc. No. 589 at 5-9) was in the process of being phased-in, tested, and refined at the time of that report, and given that significant parts of the Court Monitor's assessment are based solely on information from the 2015 Gap Report (Doc. No. 531), prior to implementation of the *Jensen* Office's verification procedures.[10]

EC-BY-EC DISCUSSION

"Compliance" ECs

Although the Department does not necessarily agree with the Court Monitor's reasoning or comments regarding the 44 ECs assessed as "Compliance," the Department agrees that it is in substantial compliance with these ECs and will not address the substance of the Court Monitor's assessment of these ECs in this document. The following sections will instead focus on the ECs labeled "non-compliance" and "inconclusive."

The Department, however, disagrees with the Court Monitor's assertion that 35 out of the 44 ECs deemed to be in compliance require "maintenance follow-up." As explained in more detail above, the Court Monitor's advocacy for ongoing monitoring ignores the Department's internal oversight and quality assurance efforts and goes beyond the scope of what he was directed to do by the Court—namely, assess the Department's substantial compliance with the JSA and CPA and, if additional information is required to assess substantial compliance, specify what information is needed and how the Court Monitor proposes to obtain this information. (Doc. No. 595 at 3.) Furthermore, most of the ECs deemed to require "maintenance follow-up" are ECs that, per Court Order, are no longer reported or are subject to exception reporting only.[11] (*See* Doc.

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[10] As was explained in the Department's May 31, 2016, Report to the Court (Doc. No. 572), prior to February 9, 2016, the *Jensen* Office "functioned mainly to coordinate and report efforts to comply with the *Jensen* Settlement Agreement and the Comprehensive Plan of Action. In that role, the [*Jensen* Office] relied on the program areas and reporters to verify the information provided. . . . [R]eporters accordingly signed affidavits attesting to those efforts." (*Id.* at 32.)

[11] The following ECs deemed in need of "maintenance follow-up" are, per Court Order (Doc. Nos. 545, 545-1), no longer reported: ECs 15-21, 31, 34, and 37. The following ECs deemed in

Nos. 545 and 545-1.) Therefore, the ongoing follow-up proposed by the Court Monitor is not appropriate.

Additionally, it should be pointed out that the Court Monitor originally deemed 47 ECs to be in compliance but in his amended report switches the classification of the following three ECs from "compliance" to "inconclusive": ECs 81, 82, and 99. Given that the Court Monitor's assessment of substantial compliance is supposed to be based on the Department's most recent reports (*id.*), it is difficult to understand how the Court Monitor could first conclude that the information in these documents established that the Department was in compliance with ECs 81, 82, and 99, and then, in the amended report, conclude that there is not enough information to assess the Department's compliance with those ECs.

"Non-Compliance" and "Inconclusive" ECs

Evaluation Criteria 1 ("Inconclusive")

The Court Monitor labels EC 1 "inconclusive," primarily taking issue with the "conclusory" nature of the updates for EC 1 in the 2015 Annual Report (Doc. No. 553-1) and Gap Report (Doc. No. 531) and his perception that no verification by the *Jensen* Office occurred. (Doc. No. 604 at 25-26.) The Court Monitor asserts that he cannot ascertain compliance without additional information, including information about "the individualization, appropriateness and completeness of" persons' plans. (*Id.* at 26.)

In the 2015 Annual Report, which is the most recent report to address EC 1, the Department describes how Minnesota Life Bridge provides, consistent with the requirements of EC 1, individualized, person-centered treatment and programming that addresses integration and community engagement. (Doc. No. 553-1 at 7-8.) The Department does not simply provide conclusory statements, as the Court Monitor asserts, but instead summarizes how Minnesota Life Bridge individualizes treatment by engaging with residents on an ongoing basis to enrich and refine their person-centered plans and assess progress toward meeting goals. (*Id.*) The Department also explains that the Internal Reviewer plays a compliance monitoring role related to the essential requirements of this EC through his review of residents' progress toward their goals. (*Id.* at 8.)

The Department acknowledges that the specificity of reporting for EC 1 could be improved to better illustrate the full extent of Minnesota Life Bridge's efforts with respect to community engagement. Notably, EC 1 is subject to annual reporting (Doc. No. 545-1), which means that the Department has not had the opportunity to report on EC 1 since the Department enhanced its reporting and verification process (*see generally* Doc. No. 589). For the 2016 Annual Report due in March 2017, the Department will have the opportunity to apply these enhanced processes to the update for EC 1. Notwithstanding this opportunity for improvement in reporting, there is sufficient information in the Department's reports to determine that the Department is in substantial

need of "maintenance follow-up" are, per Court Order (*id.*), subject to exception reporting only: ECs 5, 7, 10-14, 22-24, 28-30, 32-33, 35-36, 40.

compliance with EC 1—meaning that any failure of strict compliance on the part of the Department does not "frustrate the purpose" of the EC.

Evaluation Criteria 2 ("Inconclusive")

The Court Monitor labels EC 2 "inconclusive," on the basis that the Department "[d]oes not provide data for all the individuals in the facilities," provides "no outcome information," reports inadequate verification efforts, and self-reported that sections of transition plans were incomplete for some residents. (Doc. No. 604 at 28.)

Contrary to the Court Monitor's assertions, the information reported by the Department in the August 2016 Semi-Annual Report establishes that the Department is in substantial compliance with the requirements of EC 2—that the Facilities "utilize person-centered planning principles and positive behavioral supports consistent with applicable best practices"—by describing, in detail, how Minnesota Life Bridge incorporates use of person-centered planning principles and positive behavioral supports at all stages of the process. (Doc. No. 589 at 14-15.) The Department also provides a client-specific example for illustration purposes. (*Id.* at 15.) The Court Monitor's assertion that he cannot assess whether the Department is in substantial compliance with EC 2 without "outcome information" or "data for all individuals" is misguided; the Department squarely addresses the process-oriented requirement of the EC—*utilization* of person-centered planning principles and positive behavior supports—and explains how the program area and the *Jensen* Office engaged in verification efforts to ensure that these processes were being applied consistently. (*Id.* at 15-16.) The fact that the Department self-identified and reported opportunities for improvement (*see id.*) does not suggest non-compliance; to the contrary, it is evidence that the Department has a functioning oversight and verification system.

Evaluation Criteria 3 ("Inconclusive")

The Court Monitor labels EC 3 "inconclusive" because the Department did not explain why the referral agency believed each person met criteria for MLB admission "or whether MLB denied admission for another reason," and because "there was no verification by [the *Jensen* Office] of whether admissions meet the EC standard, or whether those denied admission would meet the EC standard." (Doc. No. 604 at 29-30.)

Contrary to the Court Monitor's assertions, the information reported by the Department in the August 2016 Semi-Annual Report established substantial compliance with EC 3 by describing the process and resources that the Minnesota Life Bridge Admissions Team uses to determine whether a person meets the EC 3 criteria for admission to Minnesota Life Bridge; explaining which referrals were deemed to meet the EC 3 criteria; and confirming that all individuals who were admitted to MLB met the EC 3 criteria. (Doc. No. 589 at 16-19.) The Court Monitor's claim that he requires information about why MLB denied admission to persons who met the EC 3 criteria goes beyond the scope of the EC—which *limits* admissions to MLB instead of requiring that persons who meet criteria be admitted to MLB—and also demonstrates a failure to understand the

concept of diversion.[12] Additionally, the Court Monitor's claim that "there was no verification" by the *Jensen* Office with respect to MLB admissions disregards the verification efforts reported by the Department. (*See* Doc. 589 at 19.) See also the more general discussion of verification above, on page 10.

Evaluation Criteria 4 ("Inconclusive")

The Court Monitor labels EC 4 "inconclusive," stating that "[n]o results, aggregate data, or action plan of surveys were provided" and asserts that, in order to ascertain the Department's compliance with EC 4, he must conduct document reviews and interviews to obtain additional information—namely, "[s]urvey documents (forms and responses) and [Department] analysis and description of any action taken in response to survey feedback." (Doc. No. 604 at 31.)

In its most recent update for EC 4, the Department reports that Minnesota Life Bridge sends surveys to persons receiving services, team members, and concerned parties annually and at the time of the person's transition; that the surveys are in the relevant language; and that the surveys include notification that responders can offer comments in multiple ways. (Doc. No. 553-1 at 8.) The Department also reports on the number of Minnesota Life Bridge surveys that were sent out and returned during the reporting period and explained that the *Jensen* Office reviewed and verified the Minnesota Life Bridge surveys completed during the reporting period. (*Id.* at 9.) This information establishes substantial compliance with EC 4, which specifically requires that the "Facilities *notify* legal representatives and/or family to the extent permitted by law, at least annually, of their opportunity to comment in writing, by e-mail, and in person, on the operation of the Facility." (Doc. No. 283.) Contrary to the Court Monitor's assertion, ascertaining substantial compliance with this EC does not require the Court Monitor to review results, aggregate data, or actions plans—the EC only references notification[13]. Moreover, the Court Monitor's proposed follow-up is not only unnecessary, but is duplicative of the verification and compliance monitoring activities conducted by the *Jensen* Office. (*See* Doc. No. 553-1 at 9.)

Evaluation Criteria 6 and 8 ("Inconclusive")

The Court Monitor labels ECs 6 and 8 "inconclusive." In his discussion of EC 6, the Court Monitor notes that, in the Gap Report (Doc. No. 531), the Department "reports that during the reporting period there was no use of prohibited restraints or techniques at the Cambridge successors," but then finds EC 6 to be "inconclusive," apparently based on the Department's description of two incidents of *manual* restraint that occurred *prior* to the reporting period for the Gap Report. (Doc. No. 604 at 33-34.) The Court Monitor asserts that, in order to ascertain compliance with EC 6, he must be allowed "document review and interview with person who was

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[12] When a person is referred to Minnesota Life Bridge, the first step is to determine if there is an alternate, more integrated situation that would meet the person's needs—regardless of whether the person meets the EC 3 criteria for admission.

[13] The Department does not intend to diminish the importance of the information obtained through these surveys, only to point out that the requirements of this EC are not focused on such information.

restrained and any witnesses; review of individuals' program, behavioral and related plans." (*Id.* at 34.) For EC 8, the Court Monitor simply cross-references and repeats his discussion for EC 6. (*Id.* at 36.)

As the Court Monitor himself acknowledges, the Department reports that there was no use of prohibited techniques or use of manual restraint during the reporting period—establishing substantial compliance with both EC 6 and 8. (Doc. No. 531 at 13, 16.) The two incidents involving emergency use of manual restraint (not a prohibited technique) that the Court Monitor references occurred prior to the reporting period for the Gap Report. (*Id.*) Moreover, these incidents do not implicate EC 6, which specifically applies to "prohibited techniques," and the Court Monitor makes no claim that the incidents, which are described in detail in the Gap Report (*id.* at 13-15), were inconsistent with the EC 8 requirement that manual restraint only be used in an emergency.

Additionally, the Court Monitor's proposed follow-up is unnecessarily duplicative of the existing system of incident reporting and oversight. In his Assessment, the Court Monitor acknowledges that he "receives and reviews" the restraint reports required by ECs 31-37 and "knows that such forms continue to be in use and completed since the 2015 Gap Report's reference." (Doc. No. 604 at 52.) In its August 2016 Semi-Annual Report, the Department describes the process by which the Internal Reviewer monitors restraint use at the Facilities. (Doc. No. 589 at 20-23.)

Evaluation Criteria 9 ("Inconclusive")

The Court Monitor labels EC 9 "inconclusive," stating that the Department "reports no information for the data analysis requirement" and reports no data regarding staff training on prohibited techniques. (Doc. No. 604 at 37.)

Because the Court's Order for Reporting on Settlement Agreement (Doc. Nos. 545, 545-1) made EC 9 subject to exception reporting only, the most recent report to provide an update on EC 9 is the Gap Report (Doc. No. 531 at 17.) In the Gap Report update for EC 9, the Department explained that there were no incidents of manual restraint during the reporting period, that Minnesota Life Bridge will continue training to ensure staff awareness of prohibited and permitted techniques, and that the *Jensen* Office will verify that staff training on prohibited techniques continues to take place at new employee orientation and annual staff training sessions. (*Id.*) No other information is necessary to establish substantial compliance with the enforceable requirement of EC 9, which is that the "Policy" (Attachment A to the JSA) was followed in each incident of manual restraint.[14]

[14] The Court Monitor erroneously treats the Action under EC 9 as an enforceable requirement. Moreover, even if the Action was an enforceable requirement, there were no incidents of manual restraint during the reporting period—meaning there was no relevant information to "collect, review, and analyze." As noted above, the Court Monitor also ignores the existing system of restraint reporting and oversight discussed above in the response to ECs 6 and 8. Additionally, the

Evaluation Criteria 25 ("Non-compliance")

The Court Monitor labels EC 25 "non-compliance," stating that the Department reports no information about "the circumstances, any commonalities or differences, or how the abuse or neglect was addressed by [the Department] or the providers;" "no information on whether [the Department's] OIG investigators, interviewers, and writers received the required training;" and no information on an electronic data management system or whether substantiated allegations are documented in the individuals' Facility records. (Doc. No. 604 at 45-46.) In a separate text block captioned "Unreported Staff Arrest for Sexual Abuse," the Court Monitor states that "a staff person was arrested between October and November, 2015 for sexual abuse of a *Jensen* class member" and that "[t]his arrest and abuse are not reported in Defendants' compliance reports to the Court." (*Id.* at 46.)

EC 25 applies to allegations of abuse or neglect at the Facilities, requiring that all such allegations are fully investigated, that individuals conducting such investigations do not have a direct or indirect line of supervision over the alleged perpetrators, and that individuals conducting investigations receive competency-based training in specified areas. Consistent with the enforceable[15] requirements of EC25, the Department contracted with Greg Wiley, an outside attorney, to conduct independent investigations of allegations of abuse or neglect at the Facilities; and Chief Compliance Officer Gregory Gray provided peer review of these investigations. Mr. Wiley and Mr. Gray's involvement in EC 25 investigations, as well as their completion of the required competency-based training, is noted in the Gap Report, which states that the Department "continue[d] to contract with Greg Wiley as needed, to conduct independent investigations," that Mr. Wiley "completed the required competency-based training," and that "peer quality reviews of investigations" were provided by Chief Compliance Officer Gregory Gray, who "continue[d] to meet the qualifications" to do so. (Doc. No. 531 at 23.) The Court Monitor himself acknowledged that the Department "contracts with Greg Wiley for employee investigations and that Mr. Wiley's training experience has been presented to the Court Monitor in the past." (Doc. No. 604 at 46 n.15.)

At the same time, the Department recognizes that there is a need for clarification regarding EC 25 in the next scheduled compliance report. The Gap Report update for EC 25 discussed investigations and reports that were outside the scope of EC 25 because they did not relate to allegations of abuse or neglect at the Facilities. This inclusion of unnecessary information seems to have contributed to confusion about the role of Mr. Wiley versus the Office of Inspector General with respect to EC 25 investigations.[16] The need for clarification, however, does not require the

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Court Monitor's focus on staff training with respect to this EC is misplaced; staff training is specifically addressed in ECs 54-58.

[15] The Court Monitor treats the Actions under EC 25 as enforceable requirements—which they are not.

[16] Under statute, allegations of abuse or neglect of a vulnerable adult are to be referred to the Common Entry Point (the MAARC system). Minn. Stat. § 626.557. Additionally, the Licensing Division of the Office of the Inspector General is statutorily obligated to complete maltreatment investigations in DHS-licensed settings, which includes the Facilities. *See id.* Collectively, this

Court Monitor to conduct interviews or review documents, as he proposes. Instead, the Department can provide clarification in its next scheduled compliance report, which is due to the Court in February 2017. (*See* Doc. No. 545.)

The Department also objects to the Court Monitor's misleading statements regarding an "unreported staff arrest for sexual abuse" of a *Jensen* Class Member. As previously explained, the Department sent out a notification about this incident on November 25, 2015, to the Court Monitor, Consultants, and Plaintiffs' Counsel—contradicting the Court Monitor's characterization of this incident as "unreported." More broadly, the incident occurred at a private provider and thus is not within the scope of reporting for EC 25. Even if it were within the scope of EC 25, EC 25 is no longer subject to regular reporting, (*see* Doc. No. 545-1), which is why later reports do not provide updates for EC 25. Additionally, the Court Monitor's statement that the Department failed to report the arrest of a "staff person" implies that the incident involved a Department employee when in fact the "staff person" referenced was the employee of a private provider.

Evaluation Criteria 26 ("Non-compliance")

The Court Monitor states that the Department "fails to report on any discipline or other action" related to the substantiated allegations of abuse or neglect involving *Jensen* class members referenced in the Gap Report update to EC 25. (Doc. No. 604 at 47-48.) The Court Monitor also cross-references his discussion of the "unreported staff arrest for sexual abuse" in EC 25. (*Id.* at 48.)

EC 26, like EC 25, applies to allegations of abuse or neglect at the Facilities. In the Gap Report,[17] the Department reported, consistent with the requirements of EC 26, on the progress of disciplinary action taken against three Minnesota Life Bridge employees who were found to have committed neglect prior to the reporting period. (Doc. No. 531 at 24.) The Court Monitor's assertions regarding what is not included in the reports on EC 26 do not establish that the Department frustrated the essential requirements of EC 26 because none of the substantiated allegations of abuse or neglect he references, including the "unreported" incident of sexual abuse discussed in EC 25, involved the Facilities. Accordingly, the Court Monitor fails to establish that the Department was not in substantial compliance with EC 26. No follow-up is necessary to assess the state of compliance. Furthermore, additional follow-up by the Court Monitor is not appropriate because EC 26 is an EC which, per Court Order, is no longer reported. (*See* Doc. Nos. 545 and 545-1.)

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means that allegations of abuse or neglect at the Facilities are referred to the MAARC system and subject to investigation by the Licensing Division. However, for purposes of compliance with EC 25, Mr. Wiley simultaneously conducted separate investigations of allegations of abuse or neglect at the Facilities during the relevant time periods.

[17] The Department has not reported on EC 26 since the Gap Report (Doc. No. 531) because, under the Court's Order for Reporting on Settlement Agreement (Doc. Nos. 545, 545-1), EC 26 is no longer subject to regular reporting.

Evaluation Criteria 27 ("Inconclusive")

The Court Monitor labels EC 27 "inconclusive," stating that it is "insufficient" for the Department to state that there were "no known referrals" when there were nine instances of substantiated maltreatment involving *Jensen* class members during the reporting period. (Doc. No. 604 at 49.) The Court Monitor also cross-references his discussion of the "unreported staff arrest for sexual abuse" in EC 25, stating that the Department "omitted" reporting this incident. (*Id.* at 46, 49.)

As with ECs 25 and 26, EC 27 applies to allegations of abuse or neglect at the Facilities. In the Gap Report,[18] the Department stated that "[t]here were no known referrals of suspected abuse or neglect sent to the county attorney for criminal prosecution during the reporting period." (Doc. No. 531 at 24.) The nine instances of substantiated maltreatment and "staff arrest for sexual abuse" referenced by the Court Monitor did not involve the Facilities.[19] Accordingly, the fact that the Department reports "no known referrals" does not call into question the Department's substantial compliance with EC 27. Moreover, as explained above for EC 25, the Court Monitor's repeated references to the "unreported staff arrest for sexual abuse" are not only outside the scope of the CPA but are also factually inaccurate and misleading. No follow-up is necessary to assess the state of compliance. Furthermore, additional follow-up by the Court Monitor is not appropriate because EC 27 is an EC which, per Court Order, is no longer reported. (*See* Doc. Nos. 545 and 545-1.)

Evaluation Criteria 38 ("Inconclusive")

The Court Monitor labels EC 38 "inconclusive," stating that the Department does not report on activities under Actions 38.1 to 38.6 and does not provide sufficient or useful data regarding restraint reviews and incident trends. (Doc. No. 604 at 53.) The Court Monitor asserts that he cannot ascertain substantial compliance with EC 38 without "review of underlying data, minutes and other presentation in committees, analyses of trends and patterns, and interviews of management and other staff responsible for these functions." (*Id.* at 54.)

In its most recent update for EC 38, the Department provided an overview of the ways in which incidents and restraint use at the Facility are reported, reviewed and analyzed (Doc. No. 553-1 at 10-11)—establishing substantial compliance with EC 38's requirement that "other reports, investigations, analyses, and follow up were made on incidents and restraint use." Among other things, the Department's 2015 Annual Report references review of incidents by the Minnesota Life Bridge Operations and Clinical Directors and the *Jensen* Internal Reviewer; review and analysis of BIRF data in collaboration with the Disability Services Division; staff review of incidents at Incident Review Meetings; and technology changes to allow the *Jensen* Office to

[18] The Department has not reported on EC 27 since the Gap Report (Doc. No. 531) because, under the Court's Order for Reporting on Settlement Agreement (Doc. Nos. 545, 545-1), EC 27 is no longer subject to regular reporting.

[19] It should not be inferred that referrals for prosecution in these instances did not occur, only that they are not reported on because they do not relate to this EC.

receive direct notification of incident reports within 24 hours of submission. (*Id.*) The Court Monitor goes beyond the scope of the EC by focusing on the unenforceable actions and prescribing the form that the Department's reports, investigations, and analyses should take. No follow-up is necessary to assess the state of compliance.

Evaluation Criteria 39 ("Inconclusive")

The Court Monitor labels EC 39 "inconclusive," acknowledging that the Department has an Internal Reviewer but stating that "[t]here is little information reported on the content of the communications between MLB staff and the Internal Reviewer, or on the molding of final recommendations" and that "the discrepancies on the number of 911 calls—which discrepancies were not identified by [the *Jensen* Office], even in the current report—should be examined." (Doc. No. 604 at 55.)

EC 39 requires that the Department "designate[] one employee as Internal Reviewer whose duties include a focus on monitoring the use of, and on elimination of restraints." In its August 2016 Report, the Department notes the December 1, 2015, hiring of the current Internal Reviewer and describes the process by which the Internal Reviewer's duties, consistent with EC 39, focus on monitoring the use and elimination of restraints. (Doc. No. 589 at 20-23.) The Department also explains that the Internal Reviewer summarizes these activities in his monthly reports, which are submitted to the Court, Court Monitor, Plaintiffs' Counsel, and the Consultants. (*Id.* at 20, 23.) The information the Court Monitor claims to need is unnecessary to assess substantial compliance in light of the information reported by the Department and the fact of the Internal Reviewer's monthly reporting. Moreover, the Court Monitor does not explain what "discrepancies" he identified in the number of 911 calls or how any such discrepancies, even if they existed, would negate the Department's substantial compliance with the requirements of EC 39.

Evaluation Criteria 47 ("Inconclusive")

The Court Monitor labels EC 47 "inconclusive," engaging in a lengthy critique of the Department's failure to mirror the exact phrasing of EC 47, highlighting statements in a previous report that community capacity and the expectations of some treatment teams are challenges, and characterizing the Department's verification efforts as inadequate. (Doc. No. 604 at 60-62.)

The Department's most recent update for EC 47, and the EC 48-53 updates incorporated by reference into the update for EC 47, describe the processes by which the Department ensures that persons are served in the most integrated setting possible while they are at Minnesota Life Bridge and that they are being assisted to move toward discharge to a more integrated setting. (Doc. No. 589 at 26-35.) The EC 47 update also explains that eight persons were served at Minnesota Life Bridge during the reporting period and that, of those eight persons, two were discharged to community-based homes during the reporting period.[20] (*Id.* at 26.) This information establishes substantial compliance with the "best efforts" required by EC 47.

[20] The update for EC 47 also noted that four out of the eight persons served at Minnesota Life Bridge during the reporting period were admitted during the reporting period.

The Court Monitor, however, focuses on form over substance—emphasizing the wording of two sentences while largely ignoring the substance of what is reported regarding Minnesota Life Bridge's efforts and successes with respect to transition planning and discharge to the community. The Court Monitor does not acknowledge the steps the Department has taken to address the challenges he references (*see* Doc. No. 589 at 27) or the Department's successes despite those challenges (e.g., recent discharges) and instead suggests that the Department's acknowledgment of challenges should be held against the Department. This misunderstands not only the best efforts standard applicable to this EC, but also the concept of substantial compliance. *See, e.g., Langton v. Johnston*, 928 F.2d 1206, 1223 (1st Cir. 1991) ("[O]fficials operating under a public law decree are required to employ good faith efforts to satisfy its demands, and fault should not be found where they have implemented its dictates to the extent practicable."). The Court Monitor, however, proposes using consultants to engage in follow up that is not only unnecessary to determine substantial compliance, but also goes beyond the scope of the EC by advocating for assessment of private providers rather than focusing on the efforts of the Department. (*See* Doc. No. 604 at 62.)

Evaluation Criteria 48 ("Inconclusive")

The Court Monitor labels EC 48 "inconclusive," incorporating by reference his discussion of EC 47; criticizing the Department's verification efforts; and taking issue with the Department's focus on transition planning in its reporting for EC 48. (Doc. No. 604 at 63-64.)

As an initial matter, the Court Monitor's criticism of the Department's focus on transition planning is misplaced. The process of transition planning is central to the Department's active pursuit of appropriate discharge for Facility residents, informing the steps taken to identify and explore potential providers, homes, and communities, as well as to determine the services, supports and protections necessary to facilitate a successful transition. (*See* Doc. No. 589 at 28-29.) Transition planning is critical to defining what an "appropriate" discharge looks like for each person and to making sure that the needs and preferences of the person is at the center of the entire process of pursuing discharge. The CPA itself recognizes this; notably, the Actions under this EC 48 (which are not enforceable requirements but, if taken, establish the Department's compliance with the EC) focus on transition planning. (*See* Doc. No. 283 at 48.1, 48.2.)

In this context, what the Department reports for EC 48 in the August 2016 Semi-Annual Report establishes substantial compliance with the EC. Among other things, the Department explains the transition planning process at Minnesota Life Bridge; provides examples of the ways in which Minnesota Life Bridge ensures that residents have the opportunity to explore potential homes, communities, and providers; and reports on the *Jensen* Office's spot check verification review of transition plans for Minnesota Life Bridge residents. (Doc. No. 589 at 28-30.) The Department also provides information about the two persons who transitioned from Minnesota Life Bridge to community-based homes during the reporting period, assessing their transition plans, explaining how their new placements are consistent with their preferences, and noting that Community Support Services provided support to both individuals during their transitions. (*Id.*) Additional information—much less review by consultants brought in by the Court Monitor—is unnecessary to determine that the Department is not frustrating the essential requirements of EC

48 and is, accordingly, in substantial compliance with the EC. Moreover, as explained above (see discussion on page 10), the Court Monitor's criticism of the Department's verification efforts is misplaced; notably, the *Jensen* Office's identification of areas for performance improvement for EC 48 (*see id.* at 30-31) provides evidence of a functioning internal oversight and verification system.

Evaluation Criteria 49 ("Inconclusive")

The Court Monitor labels EC 49 "inconclusive," stating that the *Jensen* Office "did not verify any of [the] information;" that the responsible party "verified compliance solely through review" of documents; that no individuals, families/guardians, case managers, or provider staff were interviewed; that "no community homes or day/work programs were visited;" and that "[t]he family's information and opinions are needed for a full and accurate representation of compliance." (Doc. No. 604 at 65.)

In its August 2016 Semi-Annual Report, the Department describes, with several client-specific examples, how Minnesota Life Bridge goes to great lengths to encourage and accommodate residents' preferences regarding planning—especially with respect to enabling involvement of family members, guardians, and other people of importance to residents. (Doc. No. 589 at 31-32). This information is sufficient to establish substantial compliance with EC 49, which is focused on the involvement of each resident and the resident's legal representative and/or family in the planning processes.

The Court Monitor does not analyze the substance of what the Department reports but instead deems the Department's reported verification efforts inadequate without pointing to any basis for questioning the veracity of the Department's reporting for EC 49.[21] See page 10 for a broader discussion of the issues with the Court Monitor's Assessment regarding verification.

Evaluation Criteria 50 ("Inconclusive")

The Court Monitor labels EC 50 "inconclusive," stating that the Department's report "includes no information on fundamental elements of this EC and its Actions that are not in other ECs"—specifically pointing to Actions 50.1, 50.4, and 50.5—and appears to takes issue with the fact that the Department cross-references information reported in related ECs about use of person-centered planning principles at each stage of the transition planning process. (Doc. No. 604 at 67-68.)

EC 50 requires that the Department "use person-centered planning principles at each stage of the [transition planning] process to facilitate the identification of the resident's specific interests, goals, likes and dislikes, abilities and strengths, as well as support needs." (Doc. No. 283.) Consistent with the enforceable requirements of EC 50, the August 2016 Semi-Annual Report describes how person-centered planning principles are used by Minnesota Life Bridge at every stage of the transition planning process, beginning on admission. (Doc. No. 589 at 32-33.)

[21] It is also unclear how the Court Monitor's statement that "no community homes or day/work programs were visited" is relevant to assessing substantial compliance with EC 49.

Because the Department's updates for EC 2, 48, and 49 in the August 2016 Semi-Annual Report explain in detail the person-centered planning and transition planning processes at Minnesota Life Bridge, these are incorporated by reference to avoid restating large portions of text. The Court Monitor fails to identify how what the Department reports fails to establish substantial compliance with the *enforceable* requirements of EC 50; instead, the Court Monitor focuses on unenforceable Actions. No follow-up is necessary to assess the state of compliance.

Evaluation Criteria 51 ("Inconclusive")

The Court Monitor labels EC 51 "inconclusive," stating, "An example of one individual is provided" which "does not mention any activities; it describes the individual's reactions and desires about planning activities," and criticizes the Department's verification efforts (Doc. No. 604 at 69.)

EC 51 requires that each resident "has been *given the opportunity to express a choice* regarding preferred activities that contribute to a quality life." (Doc. No. 283; emphasis added.)[22] Consistent with this requirement, the update to EC 51 in the Department's August 2016 Semi-Annual Report explains the ways in which residents are given the opportunity to express such a choice; the client-specific example referenced by the Court Monitor provides a more concrete illustration of this process, describing how Minnesota Life Bridge facilitates S2's expression of choice regarding their preferred activities. (Doc. No. 589 at 33-34.)

The Department acknowledges that the specificity of reporting for EC 51 can be improved to better illustrate the extent of the Department's efforts in this area and give full credit to the work that happens on a daily basis at Minnesota Life Bridge. What has been reported, however, is already sufficient to establish substantial compliance with the enforceable requirements of EC 51.

It should be noted that the follow-up proposed by the Court Monitor (*see* Doc. No. 604 at 69) is not only unnecessary to assess substantial compliance, but is also duplicative of the Department's oversight and verification efforts, including the *Jensen* Internal Reviewer's compliance monitoring activities, which are described in the August 2016 Semi-Annual Report (Doc. No. 589 at 23-24) and summarized in the Internal Reviewer's Monthly Reports.

Evaluation Criteria 52 ("Inconclusive")

The Court Monitor labels EC 52 "inconclusive," stating that the Department has not described and demonstrated how best efforts were exercised with respect to this EC. The Court Monitor further states that the Department "reports two accomplishments only"—that two persons transitioned to the community and that residents had opportunities to explore potential future communities and providers—and that "other elements of the EC are not addressed." (Doc. No. 604 at 70-71.)

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[22] The Department does not intend to diminish the importance of follow-through with a resident's expressed choice, only to point out that the requirements of this EC are not focused on such follow-through.

In the update for EC 52 in the August 2016 Semi-Annual Report, the Department reports on the two Minnesota Life Bridge residents discharged to the community during the reporting period, their transition plans, and the supports provided by Community Support Services to facilitate their transitions. (Doc. No. 589 at 34-35.) The Department also describes the individualized efforts to help current residents identify potential future home communities and service providers that would meet their needs and preferences. (*Id.*) This establishes substantial compliance with EC 52, which sets out the "goal that all residents be served in integrated community settings and services with adequate protections, supports and other necessary resources" and states that "*best efforts* will be utilized to create the appropriate setting or service" through an individualized process. (Doc. No. 283 at EC 52; emphasis added.) The Court Monitor does not identify how additional information is needed to determine that the Department is in substantial compliance with EC 52—which would mean that the Department is not frustrating the essential requirements of the EC. Instead, the Court Monitor trivializes the Department's efforts (stating the Department "reports two accomplishments only") and focuses on the unenforceable Actions under the EC ("other elements of the EC are not addressed"). (Doc. No. 604 at 71.)

Evaluation Criteria 53 ("Inconclusive")

The Court Monitor labels EC 53 "inconclusive," stating that "information is needed requiring [sic] all elements of this EC, most of which are ignored in the [Department's] report" and "[e]choing [the Department] . . . references and incorporates the discussions at EC 48-53 above regarding areas needing additional information." (Doc. No. 604 at 72-73.)

In the update for EC 53 in the August 2016 Semi-Annual Report, the Department details how Minnesota Life Bridge implements the requirements of the transition planning ECs in accord with the *Olmstead* decision, explaining that transition planning is person-centered and that all efforts are directed at moving residents toward more integrated settings, consistent with residents' needs and preferences. (Doc. No. 589 at 35.) The Department also confirms that no person transitioned to a more restrictive setting during the reporting period; that Minnesota Life Bridge provides residents and their support teams with the information necessary to make an informed choice for future placements; that Minnesota Life Bridge encourages transition to more integrated settings; and that Minnesota Life Bridge works to maintain relationships with community providers who are willing and able to provide customized, person-centered supports to persons with complex behaviors and needs. (*Id.*) This establishes substantial compliance with EC 53's requirement that "the provisions under this Transition Planning Section have been implemented in accord with the *Olmstead* decision."

The Court Monitor does not identify how additional information is needed to determine that the Department is in substantial compliance with the enforceable requirement EC 53, and instead makes a vague claim that most of the elements of the EC "are ignored." (Doc. No. 604 at 73.)

Evaluation Criteria 54-57 ("Inconclusive")

The Court Monitor labels EC 54-57 "inconclusive," stating that the Department reports a number of improvements and changes regarding staff training that are in process but not completed. (*E.g.*, Doc. No. 604 at 74, 76). The Court Monitor states that compliance cannot be assessed without "independent review and verification" of these changes, "[e]specially in light of the history of non-compliance with training requirements." (*Id.* at 74, 76.) With respect to EC 56, the Court Monitor highlights the Department's exception reporting in the August 2016 Semi-Annual Report, which noted that some training hours remained outstanding at the end of the 2015/16 training year. (*Id.* at 77.) The Court Monitor takes issue with the Department's statement that all active staff had completed outstanding EC 56 training requirements as of the date of the report. (*Id.*) The Court Monitor also asserts that the Department's reporting method and language "is confusing and obfuscating" and that tracking training hours should be a "simple matter" given the "relative few" Facility staff. (*Id.*)

What the Department has reported in its recent report is in fact sufficient to establish substantial compliance with ECs 54-57:

- EC 54: This EC requires that Facility treatment staff receive training on specified topics: positive behavioral supports, person-centered approaches, therapeutic interventions, personal safety techniques, crisis intervention and post crisis evaluation. (Doc. No. 283 at EC 54.) In the 2015 Annual Report, the Department describes how the Minnesota Life Bridge staff training curriculum covers each of these topics. (Doc. No. 553-1 at 13-14.)
- EC 55: This EC requires that Facility staff training be consistent with applicable best practices and be competency-based. (Doc. No. 283 at EC 55.) In the May 2016 Report, the Internal Reviewer evaluated Minnesota Life Bridge's training curriculum to determine whether the training is consistent with applicable best practices and is competency-based. (Doc. No. 572 at 5-13.) The Internal Reviewer's assessment of the staff training curriculum found that it was generally consistent with best practices and that all trainings except the Crisis Intervention/Post Crisis Intervention and Assessment course had a competency assessment. (*Id.*) The Internal Reviewer recommended minor changes to five of the training courses, including the addition of a competency exam for the Crisis/Post Crisis training. (*Id.*) In the May 31 Report, the Internal Reviewer reported that all of his suggested changes to the Crisis/Post Crisis training, including the addition of a competency exam, had already been implemented. (*Id.* at 11.) In the August 2016 Semi-Annual Report, the Internal Reviewer confirmed that all of his recommendations had been addressed. (Doc. No. 589 at 77-78.)
- EC 56: This EC requires that "Facility staff receive the specified number of hours of training" in Therapeutic Interventions, Personal Safety Techniques, and Medically Monitoring Restraint. In the August 2016 Semi-Annual Report, the Department provided an exception report for EC 56, self-reporting that some training hours remained outstanding at the end of the 2015/16 training year. (Doc. No. 589 at 65-66.) However, the vast majority of Facility staff had in fact completed the required training hours (*see id.* at 66). Moreover, the concerns regarding training hour completion were self-identified by the Department and the Department reported its efforts to both remedy the situation and prevent recurrence. (*Id.* at 66, 68-69.)

- EC 57: This EC requires that, "[f]or each instance of restraint, all Facility staff involved in imposing restraint received all of the training in Therapeutic Interventions, Personal Safety Techniques, Medically Monitoring Restraint." (Doc. No. 283 at EC 57.) In the 2015 Annual Report the Department reported that there were two instances of manual restraint during the reporting period and that, in each instance, the *Jensen* Office verified that all staff involved in imposing restraint had received the training required by EC 57. (Doc. No. 553-1 at 17.)

The Court Monitor generally does not focus on assessing the substance of what the Department reported for these ECs, but instead tries to justify the need for his "independent review and verification" by stating that "improvements are in process but not complete" and making statements about "the history of non-compliance with training requirements." (*E.g.*, Doc. No. 604 at 74, 76.) In fact, most, if not all, of the changes referenced by the Court Monitor were reported to be complete in the May 2016 Report or the August 2016 Semi-Annual Report (Doc. No. 572 at 5-13; Doc. No. 589 at 68, 77-78.) Also, the Court Monitor goes beyond the scope of what the Court ordered him to do—to review previous compliance reports and assess substantial compliance—and cites no current basis to question the Department's veracity, to try to paint the Department's reporting as "confusing and obfuscating,"[23] or to disregard the substance of what is reported. The Department's reporting is complete and transparent and no follow-up is necessary to assess the state of compliance.

Evaluation Criteria 58 ("Non-compliance")

The Court Monitor labels EC 58 "non-compliance," pointing to the concerns the Department self-identified in its exception report for EC 58 in the August 2016 Semi-Annual Report, including outstanding training hours for some staff at the end of the 2015/16 training year and opportunities for performance improvement identified through the *Jensen* Office's verification and compliance monitoring activities. (Doc. No. 604 at 79-80.)

The Court ordered the Court Monitor to assess substantial compliance which, as case law explains, is not strict or literal compliance. *E.g.*, *Jeff D. v. Otter*, 643 F.3d 278, 284 (9th Cir. 2011). Substantial compliance does not mean that problems will never arise, but that there are internal mechanisms in place for identifying and addressing problems. *See R.C. ex rel. the Ala. Disabilities Advocacy Program v. Walley*, 475 F. Supp. 2d 1118, 1182-83 (explaining that "the end of court oversight does not mean the end of oversight" because "[i]t was expected that DHR would establish mechanisms which would allow it to monitor and promote compliance with the Consent Decree and, similarly, pinpoint and correct problems, which undoubtedly will occur in a department the size of DHR"). Applying the legal meaning of substantial compliance, what is reported establishes that the Department substantially complied with the enforceable requirements of EC 58—that Facility staff receive the specified number of hours of training in Person-centered

[23] The March 12-March 11 training year is how training has been reported previously and is based on the date upon which the CPA was approved (March 12, 2014; *see* Doc. Nos. 283-84); it is not "confusing" or "obfuscating," but is instead a matter of continuity and consistency with prior reports.

Planning and Positive Behavior Supports. As the Department reports in the August 2016 Semi-Annual Report, the vast majority of Facility staff completed all required hours by the end of the 2015/16 year. (*See* Doc. No. 589 at 68.) The self-identification of concerns and the opportunities for performance improvement discussed on pages 68-69 of the August 2016 Report, as well as the Department's reported efforts to remedy these concerns, are not evidence that the Department has frustrated the essential requirements of the EC. To the contrary, it is evidence that the Department has developed a functioning system of compliance monitoring and oversight. Accordingly, the Department is in substantial compliance with EC 58 and the Court Monitor's proposed follow-up (*see* Doc. No. 604 at 80) is unnecessary.

Evaluation Criteria 59-61 ("Inconclusive")

The Court Monitor labels ECs 59-61 "inconclusive," stating that the Department "provides no information on number(s) of visitors or on the number/nature of any limits by the Team or Court Order." (Doc. No. 604 at 81.)

The Department's most recent update for ECs 59-61 establishes substantial compliance with these ECs, stating that all 15 people served during the reporting period had no limits on visitor access to living areas, that friends and family were allowed to visit when they wanted, that both scheduled and unscheduled visits were allowed, and that, if there are any limits on visitors based on the Interdisciplinary Team determination or by Court Order, this is noted in the person's person-centered plan and/or Facility records. (Doc. No. 553-1 at 19-20.) There is no requirement in any EC that the Department record and report the number of visitors.

The Court Monitor criticizes the Department's verification efforts, stating that there were no interviews with individuals or families in connection with these ECs. (Doc. No. 604 at 81.) The Court Monitor, however, disregards the survey responses reported in the 2015 Annual Report from persons, family members or legal representatives regarding visits, reasonable hours, and unrestricted access to living areas. (Doc. No. 553-1 at 19.) No follow-up is necessary to assess the state of compliance.

Evaluation Criteria 63 ("Inconclusive")

The Court Monitor labels EC 63 "inconclusive," stating that the bulletin adopted in 2014 expired in 2016 and is in the process of revision, and that "it would be unreasonable and a waste of resources to assess compliance based on" the 2014 Bulletin. (Doc. No. 604 at 83.) "Under Areas Needing Additional Information," the Court Monitor states "Review of expected Bulletin and Manual page revisions" and "Check-in with plaintiffs and court consultants." (*Id.* at 84.)

Although the Bulletin had not yet been finalized at the time the Court Monitor completed his Assessment, the revised Bulletin has since been published and is available on the Department's website.[24]

[24] Bulletin No. 16-76-02: http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs-291254.pdf.

The Court Monitor's proposed follow-up goes beyond the scope of EC 63 by requesting review not only of the Bulletin but also of "Manual page revisions" (Doc. No. 604 at 82), which are not part of the EC's requirements. Additionally, the Court Monitor states that he needs to "check-in" with Plaintiffs' Class Counsel and the Consultants in order to ascertain compliance, suggesting that their review or approval of the Bulletin is required for purposes of EC 63. (*Id.* at 83; *see also* "The Bulletin Draft Process" textbox at 82.) Again, there is no such requirement in EC 63. Furthermore, EC 63 is an EC which, per Court Order, is no longer reported. (*See* Doc. Nos. 545 and 545-1.) Therefore, additional follow-up by the Court Monitor is not appropriate.

Evaluation Criteria 64 ("Inconclusive")

The Court Monitor labels EC 64 "inconclusive" because the Minnesota Life Bridge Bulletin and corresponding Community-Based Services Manual page are being revised. (Doc. No. 604 at 84.)

In the August 2016 Semi-Annual Report, the Department stated Minnesota Life Bridge's mission, which has not changed and is consistent with the JSA and CPA (Doc. No. 589 at 36)—establishing substantial compliance with EC 64. The Bulletin (and Manual page) do not determine Minnesota Life Bridge's mission. Accordingly, no follow-up is needed.

Evaluation Criteria 65-66 ("Inconclusive")

The Court Monitor labels ECs 65-66 "inconclusive" because the Department reports "that three versions of a Bill of Rights are posted, but does not provide information on the posting of the other required information" and because the Department does not fully address Action 66.1. (Doc. No. 604 at 85-86.)

In its 2015 Annual Report, the Department reports that there are three versions of the Minnesota Life Bridge Rights Notice, which contain either the Minnesota Department of Health Patient, Resident and Home Care Bill of Rights or the Department's Home and Community-based Services Service Recipient Bill of Rights; that all three versions are posted in each Facility; and that a copy is provided to the person and family/guardian at admission. (Doc. No. 553-1 at 21-22.) The Department also reports that one of the versions includes pictures and simpler text and that the notice can be provided in other languages, if needed, establishing substantial compliance with the enforceable requirements of EC 66—that the posting be in a form and with content which is understandable by residents and family/guardians. (*Id.* at 22.) Contrary to the Court Monitor's assertion, the Actions under EC 66 are not enforceable requirements. (See discussion of Actions on page 5 and in footnote 2.)

The Department acknowledges, however, that the specificity of reporting for these ECs could be improved to clarify how Minnesota Life Bridge meets the EC 65 requirement that the following information be provided on the Bill of Rights posting—the name and phone number of the person within the Facility to whom inquiries about care and treatment may be directed, and a brief statement describing how to file a complaint with the appropriate licensing authority. (*See* Doc. No. 283 at EC 65.) Notably, ECs 65-66 are subject to annual reporting (Doc. No. 545-1),

which means that the Department has not had the opportunity to report on these ECs since the Department enhanced its reporting and verification process (*see generally* Doc. No. 589). For the 2016 Annual Report due in March 2017, the Department will have the opportunity to apply these enhanced processes to the updates for EC 65-66. Accordingly, there is no need for the Court Monitor to conduct the follow up he proposes.

Evaluation Criteria 67 ("Inconclusive")

The Court Monitor labels EC 67 "inconclusive," stating that the Department did not evaluate the "outcome sought in EC 67," that the Department does not address the Actions under the EC, and that "the data reported is based solely on document review" aside from e-mail contact with a Community Support Services ("CSS") case worker on two cases. (Doc. No. 604 at 88.) The Court Monitor states that, in order to ascertain compliance with EC 67, he needs to use consultants to obtain information on the operations of CSS "at both the individual case level and the organizational level" through interviews and sampling, selected site visits, and document review." (*Id.* at 89.)

In its May 2016 and August 2016 Reports (Doc. Nos. 572, 589), the Department has established substantial compliance with the enforceable requirement of EC 67, which is that community services are expanded to allow "for the provision of assessment, triage, and care coordination to assure that persons with developmental disabilities receive the appropriate level of care at the right time, in the right place, and in the most integrated setting." (Doc. No. 283 at EC 67.) In the August 2016 Semi-Annual Report, the Department explained that, during the reporting period, CSS mobile teams provided assessment, triage, and care coordination to 298 persons with developmental disabilities. The Department provided client-specific examples of CSS supports (*id.* at 37-38) and explained that, for a random sample of persons served, the *Jensen* Office reviewed case notes documenting the services provided—observing that supports spanned multiple months, involved frequent interactions with the person and their team, were person-centered and addressed to the person's specific situation, needs, and preferences. (*Id.* at 38-39.) Additionally, in the May 2016 Report, the *Jensen* Internal Reviewer conducted a "substantive performance report" for CSS, observing, among other things, that survey responders express a high degree of satisfaction with CSS services, that CSS staff engage in a wide variety of activities with persons and their teams, and that the flexibility of these activities is a strength of the CSS model of assistance. (Doc. No. 572 at 15-17.) The Court Monitor himself acknowledges the Internal Reviewer's performance report on CSS as "admirable and detailed." (Doc. No. 604 at 88.)

In concluding that more information is needed to determine whether the Department is in substantial compliance with EC 67, the Court Monitor focuses on form over substance, criticizing the Department for failing to specifically state that supports were provided in "the right time, in the right place, and in the most integrated setting" when the information reported by the Department and Internal Reviewer clearly establishes that this is the case. The Court Monitor also goes beyond the scope of the CPA and his assigned task, focusing on the Actions under the EC, which are not required, and criticizing the Department's verification efforts without articulating any reasonable basis to believe that these efforts are insufficient. Moreover, as explained above (see page 10), the Court Monitor's criticism of the Department's verification efforts is premature;

the Department is continuing to build on and refine the processes noted in the August 2016 Report and this will be reflected in upcoming reports. Accordingly, there is no need for the Court Monitor to conduct the follow up he proposes.

Evaluation Criteria 68 ("Inconclusive")

The Court Monitor labels EC 68 "inconclusive." As in his discussion of EC 67, the Court Monitor criticizes the Department for its perceived failure to provide information on "the outcome sought" by the EC and for failing to address Actions under the EC. (Doc. No. 604 at 90.)

As an initial matter, EC 68 is subject to a "best efforts" standard (Doc. No. 283 at 2)—a fact that the Court Monitor does not acknowledge or assess. What the Department reports in its May 2016 and August 2016 Reports (Doc. Nos. 572, 589) establishes substantial compliance with the enforceable requirement of EC 68—that the Department engage in "best efforts" to identify and provide "long-term monitoring" of persons with clinical and situational complexities to help avert crisis reactions, provide strategies for service entry changing needs, and to prevent multiple transfers. (Doc. No. 283 at EC 68.) In the August 2016 Report, the Department explained that 61 people received long-term monitoring from CSS during the reporting period and provided examples of the supports provided and the person's progress. (Doc. No. 589 at 39-40.) In the May 2016 Report, the *Jensen* Internal Reviewer conducted a "substantive performance report" for CSS that, among other things, evaluated long-term monitoring activities by CSS. (Doc. No. 572 at 16-17.) The Internal Reviewer observed that "CSS staff interact with the persons and their teams utilizing a variety of methods"; that in-person contact was used in all cases reviewed; that "CSS staff engage in a wide variety of activities with [the] Long-Term Monitoring group," essentially functioning as an outside team member; and that the flexibility of activities is a strength of the CSS model of assistance. (*Id.*)

Again, the Court Monitor fails to assess the substance of what the Department reports and instead focuses on Actions which are not required and the Department's verification efforts. As explained for EC 67, this does not justify a need for the Court Monitor to conduct the follow up he proposes.

Evaluation Criteria 69 ("Non-compliance")

The Court Monitor labels EC 69 "non-compliance," stating that "the discrepancy between 61 and 75 is sufficient for the non-compliance assessment," that the Department "does not assert in their reports that there are no more than 61 individual who meet the criteria," and that the Department does not provide information on the Actions under the EC. (Doc. No. 604 at 91.)

As in EC 68, the Court Monitor fails to recognize and address the fact that EC 69 is subject to a "best efforts" standard. (Doc. No. 283 at 2.) The Court Monitor also arbitrarily sets a standard when he states, without any support for such a conclusion, that "the discrepancy between 61 and 75 is sufficient" for a non-compliance finding. Additionally, the Court Monitor focuses on the Actions under the ECs, which are not enforceable requirements.

That being said, the Department acknowledges that it could have provided more context in its update for EC 69 (Doc. No. 589 at 41) to allow the reader to better assess whether the Department is substantially complying with the "best efforts" standard for this EC. The need for clarification, however, does not require the Court Monitor to conduct interviews, review documents, or utilize consultants, as he proposes. Instead, the Department can provide clarification to the Court in its next scheduled compliance report, which is due in February 2017. (*See* Doc. No. 545.)

Evaluation Criteria 70 ("Inconclusive")

The Court Monitor labels EC 70 "inconclusive," apparently based on his conclusion that survey results referenced in the Department's most recent update for EC 70 are "incomplete and of questionable utility." (Doc. No. 604 at 92-93.)

As an initial matter, EC 70 is subject to a "best efforts" standard (Doc. No. 283 at 2)—a fact that the Court Monitor does not acknowledge or assess. What the Department reports in its August 2016 Report (Doc. Nos. 589) establishes substantial compliance with the enforceable requirement of EC 70—that the Department engage in "best efforts" to provide "CSS mobile wrap-around response teams are located across the state for proactive response to maintain living arrangements." (Doc. No. 283 at EC 70.) More specifically, the August 2016 Report explains that CSS maintains 9 mobile wrap-around response teams and 23 office locations around the state, explained the outreach services provided by these teams to prevent and resolve behavioral crises, and explained how these teams are staffed and receive administrative and managerial support. (Doc. No. 589 at 41-42.)

As the Court Monitor notes, the Department provides a sampling of results from CSS Consumer Satisfaction surveys for context. (*Id.* at 42.) Contrary to the Court Monitor's assertions, however, the additional information he seeks related to the surveys is unnecessary to assess substantial compliance with the enforceable requirements of EC 70.

Evaluation Criteria 71 ("Inconclusive")

The Court Monitor labels EC 71 "inconclusive," taking issue with the fact that "CSS starts the 3-hour time computation from receipt of a written 'signed consent,' " and that the Department "does not provide information on the time lag between the initial call for crisis intervention and the receipt of the written consent." (Doc. No. 604 at 94.)

As an initial matter, the Court Monitor does not recognize and address the fact that EC 71 is subject to a "best efforts" standard. (Doc. No. 283 at 2.) What the Department reports in its August 2016 Report (Doc. Nos. 589) establishes substantial compliance with the enforceable requirement of EC 71—that the Department engage in "best efforts" to arrange a crisis intervention within three hours from the time the parent or legal guardian authorizes CSS' involvement. (Doc. No. 283 at EC 71.) More specifically, the August 2016 Report explains that that, in nine out of twelve cases, CSS arranged for a crisis intervention within three hours from the time the CSS received signed consent from the parent or guardian authorizing CSS' involvement. (Doc. No.

589 at 43-44.) The Court Monitor's objection to how the Department computes time for this EC is misplaced; there is no authorization of CSS involvement, as required by this EC, until CSS receives the signed consent from the parent or guardian. Moreover, the Court Monitor's assertion that he requires "information on the time lag between the initial call for crisis intervention and the receipt of the written consent" goes beyond the scope of the EC, which only references the time period between authorization of CSS involvement and the point at which CSS "arranges a crisis intervention." (Doc. No. 283 at EC 71.)

Evaluation Criteria 72 ("Inconclusive")

The Court Monitor labels EC 72 "inconclusive." (Doc. No. 604 at 96.) Although the Court Monitor acknowledges that the Department "reports collaboration with other crisis intervention services, and meetings with lead agencies across the state," and that the Department "is available to provide CSS services if needed by a lead agency in the community," the Court Monitor states that the Department "does not provide any information on Action 72.2." (*Id.* at 95.)

As an initial matter, the Court Monitor does not recognize and address the fact that this EC is subject to a "best efforts" standard. (Doc. No. 283 at 2.) What the Department reports in its August 2016 Report (Doc. Nos. 589) establishes substantial compliance with the enforceable requirement of EC 71—that the CSS engage in "best efforts" to partner "with Community Crisis Intervention Services to maximize support, complement strengths, and avoid duplication." (Doc. No. 283 at EC 72.) More specifically, the August 2016 Report explains CSS' collaboration with other crisis intervention services, including the Metro Crisis Coordination Program, and lead agencies. (Doc. No. 589 at 45.) The additional information the Court Monitor claims to need in order to assess substantial compliance with EC 72 relates to an Action under the EC, which is not required.

Evaluation Criteria 75 ("Inconclusive")

The Court Monitor labels EC 75 "inconclusive," stating that he needs information regarding "review of tracking currently done" and will need to review the results of ongoing process improvement efforts with respect to data management. (Doc. No. 604 at 98-99.)

As an initial matter, the Court Monitor does not recognize and address the fact that EC 75 is subject to a "best efforts" standard. (Doc. No. 283 at 2.) What the Department reports in its August 2016 Report (Doc. Nos. 589) establishes substantial compliance with the enforceable requirement of EC 75—that CSS engage in best efforts to target their mentoring and coaching efforts to increase community capacity for supporting individuals in their communities. (Doc. No. 283 at EC 75.) More specifically, the August 2016 Report explains that, during the reporting period, CSS provided augmentative training sessions to 526 members of community support networks and that CSS mentors and coaches persons' support networks by providing the outreach services described in ECs 67-69. (Doc. No. 589 at 48.) The Court Monitor does not disagree with this information, but instead focuses on CSS' discussion of process improvement and capacity enhancement efforts related to data management. (*See* Doc. No. 589 at 48.) The first issue this raises is that the information the Court Monitor requests is unnecessary to assess substantial

compliance with the enforceable requirement of EC 75, which is focused on CSS' mentoring and coaching efforts. Second, even if these efforts directly relate to the enforceable requirement of EC 75, ongoing process improvement efforts do not suggest non-compliance and do not require the Court Monitor to review documents and conduct interviews; an update on these efforts could simply be provided in an upcoming report.

Evaluation Criteria 78 ("Inconclusive")

The Court Monitor labels EC 78 "inconclusive," stating that the Department does not mention or provide information about the co-signing of plans and supervisors' responsibility for plans and their implementation. (Doc. No. 604 at 101.)

The Department's August 2016 Report (Doc. Nos. 589) establishes substantial compliance with the requirements of EC 78, confirming that, as of May 31, 2016,[25] all CSS supervisors providing clinical oversight of FBAs and Behavior Plans possessed nationally recognized certifications. (Doc. No. 589 at 50-51; *see also* Doc. No. 572 at 26-27.) The Court Monitor asserts that this information is not sufficient to assess compliance with EC 78, apparently taking the position that the Department's use of the phrases "clinical oversight of FBAs and Behavior Plans" and "supervisors responsible for co-signing FBAs" in its report does not address EC 78's requirements relating to co-signing and responsibility for plans and their implementation. (Doc. No. 589 at 50-51; Doc. No. 604 at 101.) The fact that the Department does not restate the language of EC 78 in its reports or use the Court Monitor's preferred phrasing does not negate the evidence of the Department's substantial compliance with EC 78. No follow-up is necessary to assess the state of compliance.

Evaluation Criteria 81-82 ("Inconclusive")

The Court Monitor labels both EC 81 and 82 "inconclusive," on the basis that O1[26] "entered MSH in violation of the CPA during the reporting period and that [the Department] is in the process of discussing what it can do to prevent similar situations." (Doc. No. 104.)

In the August 2016 Report, the Department established substantial compliance with EC 81 and 82, confirming O1's discharge from the Minnesota Security Hospital ("MSH") to a community home and confirming that there are no persons at MSH who were transferred to or placed at MSH based solely on a commitment as a person with a developmental disability. (Doc. No. 589 at 70.) The fact that the Department reported quality assurance activities to evaluate what could be done to prevent future situations like O1's does not negate the information establishing the Department's substantial compliance and does not require Court Monitor follow-up. To the contrary, the

[25] As reported, one CSS supervisor has had an application pending for the nationally recognized NADD-CC credential since February 2015; this supervisor attained the NADD-CC credential on May 31, 2016. (Doc. No. 589 at 51; *see also* Doc. No. 572 at 26-27.)

[26] Refer to the Identifier Key for the August 2016 Semi-Annual Report (Doc. No. 589), which was filed under seal pursuant to the Protective Orders in this matter (Doc. Nos. 57, 114, 190, 239) and was provided to the Court, Plaintiffs' Class Counsel, and the Consultants.

Department's reported quality assurance activities provide further support for the conclusion that the Department, consistent with the requirements of EC 81, engages in "best efforts to ensure that there are no transfers to or placements at the Minnesota Security Hospital of persons committed solely as a person with a developmental disability." (Doc. No. 283 at EC 81.)

Two additional items should be noted about the Court Monitor's assessments of ECs 81 and 82. First, in the previous version of the Court Monitor's Assessment, these ECs were labeled "compliance." The changes to "inconclusive" are perplexing given that the Court Monitor is supposed to be assessing substantial compliance based on the Department's most recent reports (*see* Doc. No. 595 at 3), which have not changed in content in the time between the two versions of the Court Monitor's Assessment.

Second, the Court Monitor's statement that he "discovered" that O1 "was at CPA [sic]" and that this was not reported by the Department to the Court Monitor, Plaintiffs or Consultants, is false. The Court Monitor was notified by email prior to O1's placement at MSH that the Department was considering this course of action due to emergent circumstances. That email was forwarded to the Court Consultants the same day.[27] O1 was placed at MSH approximately five days after this email. Two days later, the Court Monitor and one of the Court Consultants participated in a conference call regarding the matter. Shortly thereafter, the Department motioned the Court for relief.

Evaluation Criteria 83 ("Inconclusive")

The Court Monitor labels EC 83 "inconclusive." The Court Monitor acknowledges that the Department "reports that there have been no commitment changes in violation of this requirement" but then states that he requires "information on commitments of people with developmental disabilities at the facility." (Doc. No. 604 at 106.)

The Department has established substantial compliance with EC 83, reporting in the 2015 Annual Report that "[t]here has been no change in commitment status of any person originally committed solely as a person with a developmental disability without proper notice to that person's parent and/or guardian and a full hearing before the appropriate adjudicative body." (Doc. No. 553-1 at 25.) The Court Monitor offers no explanation of why additional information would be needed to ascertain substantial compliance other than to cross-reference his discussion at EC 81, which the Department responded to in the previous section.

Evaluation Criteria 84 ("Inconclusive")

The Court Monitor labels EC 84 "inconclusive" on the basis that the Department's updates for this EC discuss *Jensen* Class Members at MSH; the Court Monitor states that EC 84 is not limited to class members. (Doc. No. 604 at 107.)

[27] The body of the email indicates that it was also copied to Plaintiffs' Class Counsel, but his e-mail address does not appear in the address field.

The Department agrees that EC 84 is not limited to class members. The discussion of class members at MSH in the Department's response to EC 84 is merely supplemental information that does not directly relate to compliance with this EC. As the Department explains in the 2015 Annual Report, EC 84 was completed prior to the CPA's adoption with the transfer out of MSH of all persons "presently confined" who had been committed solely as a person with a developmental disability." (Doc. No. 553-1 at 25.) No additional information is necessary to ascertain the Department's substantial compliance with EC 84.

Evaluation Criteria 85 ("Inconclusive")

The Court Monitor labels EC 85 "inconclusive," acknowledging that the information reported in the Gap Report (Doc. No. 531 at 56-57) establishes compliance with EC 85, but then deeming the EC "inconclusive" because "EC 85 is not limited to class members" and "the Department does not mention whether there were other people with developmental disabilities at AMRTC who were not class members." (Doc. No. 604 at 108.) The Court Monitor disregards that the Department's reporting on EC 85 is not limited to class members; in fact there is no mention of class members in the Gap Report update for EC 85.[28] (*See* Doc. No. 531 at 56-57.) Moreover, the Court Monitor's proposed follow-up—"Information on commitments of people with developmental disabilities to MSH" (Doc. No. 604 at 109)—has no relation to EC 85.[29]

Evaluation Criteria 89 ("Inconclusive")

The Court Monitor labels EC 89 "inconclusive," stating that the Department provides no data to support its conclusion that the requirements of EC 89 are satisfied and states that there is no verification of compliance with EC 89 "aside from document review." (Doc. No. 604 at 112.)

The Department's reports establish substantial compliance with EC 89, which focuses on the experience and qualifications of Facility staff hired for new positions or to fill vacancies (Doc. No. 283 at EC 89). In the May 2016 Report, which is the most recent report to address EC 89, the *Jensen* Internal Reviewer verified that all of the Facility hires and transfers during the reporting period had the requisite prior experience for compliance with the requirements of EC 89. (Doc. No. 572 at 27.) The Court Monitor criticizes the Internal Reviewer's use of resume reviews to assess compliance, but provides no basis for questioning the veracity of the Internal Reviewer's conclusions or need for additional follow-up.

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[28] The Gap Report is the most recent report to address EC 85 because under the Court's Order for Reporting on Settlement Agreement (Doc. Nos. 545, 545-1), EC 85 is subject to exception reporting only.

[29] This issue was brought to the attention of the Court Monitor by Department representatives at the meeting on November 10, 2016.

Evaluation Criteria 90 ("Inconclusive")

The Court Monitor labels EC 90 "inconclusive," stating that the report does not provide data regarding integrated vocational options, including customized employment, and instead refers only to "exploration" of vocational options. (Doc. No. 604.)

In the most recent report to address EC 90, the Department reported on Minnesota Life Bridge's efforts to encourage and facilitate pursuit of vocational experience by residents. (Doc. No. 553-1 at 27-28.) The *Jensen* Internal Reviewer and the *Jensen* Office, however, have identified this EC as one that presents opportunities for improvement; in order to facilitate improvement, the Internal Reviewer and the *Jensen* Office are in the process of initiating review by an independent subject matter expert to develop recommendations for Minnesota Life Bridge in the area of integrated vocational options. The Court Monitor's proposed follow-up would be unnecessarily duplicative of this review.

Evaluation Criteria 91 and 92 ("Inconclusive")

The Court Monitor characterizes ECs 91 and 92 as "inconclusive" stating that the Department "reports the conclusion that this EC is satisfied but no data regarding that conclusion and no verification activities regarding that conclusion." (Doc. No. 604 at 114-115.)

The 2015 Annual Report (Doc. No. 553-1) was the most recent report to provide updates on ECs 91 and 92, which are annual reporting ECs (*see* Doc. No. 545-1). The Annual Report provides a high-level overview of the Department's commitment to and process for meeting the CPA requirements with respect to person-centered planning (EC 91) and transition planning (EC 92). (Doc. No. 553-1 at 28-29.) The Department acknowledges that these updates do not provide a significant degree of specificity. The requirements of these ECs, however, overlap with the other ECs relating to person-centered planning and transition planning, mainly, ECs 2 and 47-53. The updates for ECs 2 and 47-53 in the Department's August 2016 Semi-Annual Report describe, in detail, how the Department meets the CPA's person-centered planning and transition planning requirements (Doc. No. 589 at 14-16, 26-36)—making the Court Monitor's proposed follow-up unnecessary to ascertain substantial compliance and duplicative of the Department's efforts.

Evaluation Criteria 93 ("Non-compliance")

The Court Monitor labels EC 93 "non-compliance." (Doc. No. 604 at 116.) The basis for that finding is not clear from the Court Monitor's Assessment. The Court Monitor states "[o]n the first sentence of this EC, *see* EC 67-69" and then discusses the fact that the Department did not address a comprehensive data analysis in its August 2016 Semi-Annual Report. (*Id.*) In his proposal of obtaining information, the Court Monitor states, without explanation, that "[n]othing further is needed on the non-compliance matter." (*Id.*) With respect to the data analysis, the Court Monitor proposes that he conduct document review and interviews. (*Id.*)

As the Court Monitor notes, the Department acknowledges that, in the focus to address the Court's questions relating to EC 93 (Doc. No. 578 at 5 & n.2), the Department did not report on the comprehensive data analysis required by EC 93. The Department will address the

comprehensive data analysis piece in its next scheduled report, which is due to the Court in February 2017, making it unnecessary for the Court Monitor to, as he proposes, review documents and conduct interviews on this topic.

Notwithstanding the failure to report on the comprehensive data analysis, the Department has established that it is in substantial compliance with EC 93. Substantial compliance is not strict or literal compliance, *e.g., Jeff D. v. Otter*, 643 F.3d 278, 284 (9th Cir. 2011); the "touchstone" of the substantial compliance inquiry is whether the defendants frustrated the essential requirements of the agreement, *Joseph A. ex rel. Wolfe v. N.M. Dep't of Human Svcs.*, 69 F.3d 1081, 1086 (10th Cir. 1995). What is missing from the Department's most recent update on EC 93 does not frustrate the essential requirements of the Agreement, or even of the EC itself when the focus of the EC is on providing diversion supports and supports to those supporting the person. The Department's update for EC 93 describes how the Department is providing such supports through CSS' mobile teams, incorporating by reference the broader discussion of CSS mobile team supports in ECs 67-69, and then, consistent with the scope of EC 93, describing in more detail the mobile team supports provided to persons who have a connection to the Facilities. (*See* Doc. No. 589 at 53.) The Court Monitor's vague reference to "the non-compliance matter," (Doc. No. 604 at 116) does not explain how what the Department reports establishes that the Department is frustrating the essential requirements of the Agreement or the EC.

Evaluation Criteria 94 ("Inconclusive")

The Court Monitor labels EC 94 "inconclusive," stating that the Department "does not report any data regarding EC 94." (Doc. No. 604 at 117.) The Court Monitor asserts that he must conduct document reviews and interviews to obtain "licensure and registration information." (*Id.*)

The Department's most recent update for EC 94 states that Minnesota Life Bridge has and will continue to maintain appropriate licensure for all community settings, and states that the *Jensen* Office verified that licenses are timely and appropriate by confirming program licensure through the Department's publicly available Licensing Lookup web page. (Doc. No. 553-1 at 29.) It is difficult to understand how this information does not establish substantial compliance with EC 94. Moreover, even if what the Department has reported did not establish substantial compliance, the Court Monitor's proposed follow-up is unnecessary given that information regarding licensure is publicly available.

Evaluation Criteria 96 ("Inconclusive")

The Court monitor labels EC 96 "inconclusive", pointing out that this EC was erroneously copied in the Department's Gap Report as EC 95.[30] (Doc. No. 604 at 119.)

The Department acknowledges this error and will ensure that it is corrected in future reports. Given that the Department is scheduled to provide an update on this EC in the 2016

[30] EC 96 is an Annual reporting EC (Doc. No. 545-1), so the last report that would have addressed this EC was the 2015 Annual Report (Doc. No. 553-1).

Annual Report due to the Court in March 2017, this EC will be addressed in the near future, making the Court Monitor's proposed follow-up unnecessary.

Evaluation Criteria 98 ("Inconclusive")

The Court Monitor labels EC 98 "inconclusive," stating that "[m]ajor changes are occurring" with the Successful Life Project and that the Department "is not yet able to provide more than anecdotal information responsive to the Court's interest on whether individuals' lives are being improved by the Department's efforts." (Doc. No. 604 at 120.) The Court Monitor also criticizes the Department's verification efforts as inadequate, stating that "interviews with individuals, families/guardians, providers and case managers are essential." (*Id.* at 122.) Under "Areas Needing Additional Information" the Court Monitor states that "results of the many changes occurring need to be evaluated" and that an "analysis needs to consider whether there are others who, had they been attended to, had a need for follow-up." (*Id.*)

The Department's most recent update for EC 98 in the August 2016 Semi-Annual Report establishes that the Department is in substantial compliance with EC 98. This update describes the different levels of service provided to members of the therapeutic follow-up group, depending on their needs; data regarding the number of people who received supports from the Successful Life Project ("SLP") during the reporting period and the setting in which these individuals resided; several examples of how SLP supports have improved persons' lives; and data regarding movement to other settings, which suggests positive stability for most people served. (Doc. No. 589 at 63.) The Department also noted a number of process improvement efforts being implemented by SLP, including updates to SLP staff position descriptions to better clarify roles and responsibilities; efforts to identify and monitor persons at potential risk to provide early intervention; efforts to improve service coordination for therapeutic follow-up group members; and development of a consumer satisfaction survey that will address the quality of clinical supports provided by SLP. The fact that the Department reports on process improvement activities that aim to improve the efficiency and efficacy of SLP services does not negate the information establishing the Department's substantial compliance and does not require Court Monitor follow-up. To the contrary, these efforts demonstrate that the Department has a functioning internal oversight and quality assurance system as well as a commitment to providing effective and proactive supports to persons in the therapeutic follow-up group.

With respect to the Court Monitor's criticisms about verification, see the discussion on page 10.

Evaluation Criteria 99 ("Inconclusive")

The Court Monitor labels EC 99 "inconclusive," asserting that "questions have arisen regarding whether the use of mechanical restraint and seclusion in MSH, AMRTC and other settings is consistent with the rule and the CPA generally." (Doc. No. 604 at 123.) The Court Monitor states that ascertaining compliance requires document review and interviews to obtain "information regarding the use of mechanical restraints and seclusion at MSH, AMRTC and other locations." (*Id.* at 125.)

The Department established substantial compliance with EC 99 in the Gap Report, explaining that promulgation of the Positive Supports Rule, Minnesota Rules, Chapter 9544, was complete on August 17, 2015 and that the rule became effective August 31, 2015. (Doc. No. 531 at 66.) The Court Monitor provides no factual or valid legal basis for his claims that "questions have arisen" regarding the scope of the rule, its consistency with the CPA, and practices at MSH or AMRTC. (*See* Letter to the Court from Deputy Commissioner, dated April 9, 2016.)

Evaluation Criteria 103 ("Pending Resolution")

The Court Monitor does not assign a label regarding compliance to this EC, but nonetheless engages in commentary on this EC, stating "[w]hile discussion of this issue has understandably taken place there is a cost to delay in resolving the matter; individuals intended to benefit from the Adopted Rule may be receiving aversive interventions that would be prohibited if the Rule were otherwise." (Doc. No. 604 at 130.) The Court Monitor provides no support for such a serious claim. The Court Monitor also appears to misunderstand the function of EC 103 – potentially incorporating elements of Advisory Committee recommendations into the Olmstead Plan – when he references "if the Rule were otherwise." As reported in the August 2016 Semi-Annual Report, discussions with the Court Consultants are progressing. (Doc. No. 589 at 64.) EC 103 contains a provision for presenting issues to the Court should any of the named participants feel it necessary. No additional follow-up by the Court Monitor on EC 103 is appropriate—certainly not conducting interviews, as he proposes.

Evaluation Criteria 104 ("Inconclusive")

The Court Monitor labels EC 104 "inconclusive" stating that EC 104 imposes two obligations on the Department—to implement the Positive Supports Rule and "take other steps" to implement the recommendations of the Rule 40 Advisory Committee"—and that "neither the September 2015 Gap Report not the August 2016 Report cover compliance with these two obligations." (Doc. No. 604 at 130.) To the contrary, the Gap Report lists numerous activities of the Department towards implementing the Rule and notes that the Department continues to work with the Court Consultants on Advisory Committee recommendations and implementation of the Rule. (Doc. No. 531 at 69.) Furthermore, EC 104 is an EC which, per Court Order, is no longer reported. (*See* Doc. Nos. 545 and 545-1.) Therefore, additional follow-up by the Court Monitor is not appropriate.

CONCLUSION

As the preceding discussion demonstrates, the Department, once again, finds itself in the position of paying tens of thousands of taxpayer dollars for substandard work - a report filled with inaccurate, irrelevant, and misleading information which fails to accomplish or stay within the parameters of the assigned task. The Court Monitor has already submitted an invoice for the first version of his Assessment, to which the Department has objected. (*See* Doc. No. 603.) Following direction from the Court and consultation with the Department, the Court Monitor now submits

this amended Assessment. Unfortunately, even the amended Assessment is careless, continues to assert errors and misleading information, and repeatedly makes conclusory and unsupported statements and allegations. Although the Court Monitor did correct a few plainly erroneous items, albeit leaving numerous inconsistencies in the text, the bulk of changes in the amended Assessment actually expand on irrelevant history and baseless assumptions. The Court Monitor did not use his opportunity to confer with the Department and amend his Assessment to engage in any meaningful attempt to improve the accuracy and usefulness of his Assessment, but instead took this as an opportunity to further advocate for his own interests at the expense of advancing an objective understanding of the state of compliance in this case. The Court Monitor goes even further by seeking a tremendous amount of unnecessary and inappropriate follow-up work, all at taxpayer expense. The Department continues to take issue with the Court Monitor's current invoice and awaits the Court Monitor's next invoices to learn how much the taxpayers of Minnesota will be charged for these pointless exercises.

Despite the lack of meaningful assessment from the Court Monitor, the Department has satisfied the requirements of the JSA and CPA and has implemented a robust system of internal oversight relating to the JSA, CPA, and provision of services to persons with disabilities. Given all of the progress made, the Department is confident that an objective reviewer would conclude that the Department is in substantial compliance with the JSA and CPA. It is the position of the Department that employing this Court Monitor in the future would serve no beneficial purpose.