NEW HORIZON ACADEMY

March 9, 2017

Minnesota Department of Human Services
Commissioner Emily Piper
540 Cedar Street
St. Paul, MN 55101

Dear Commissioner Piper,

We have reviewed your letter to Representative Mary Franson (regarding HF0904) and feel it is a misrepresentation of the Jensen Settlement Agreement, the process of developing the Positive Supports Rule and neglects to share that family child care and center providers were entirely excluded from the process before the rule became law.

New Horizon Academy has been serving Minnesota families since 1971 and we provide early learning educational services to a diverse number of families. We do not discriminate for or against any family on the basis of race, color, religion, creed, age, gender, national origin, marital status, pregnancy, disability, economic status or sexual orientation. We will make every attempt to reasonably accommodate any child with a disability unless doing so would cause an undue hardship to our company and not serve the best interests of the child.

The scope of the Jensen Settlement Agreement was specifically limited to the Minnesota Extended Treatment Options (METO) program as well as all state operated locations serving people with developmental disabilities with severe behavioral problems or other conditions that would qualify for admission to METO, its Cambridge, Minnesota successor, or the two new adult foster care transitional homes – there is no statement from the Commissioner in the letter to this point.

> The scope of DHS obligations regarding people with developmental disabilities in this agreement pertain only to the residents of the Facility, with exception of the provisions of Recitals, Paragraph 7, and Section X, "Systemwide Improvements."[1]

It even further states that “the State also agrees that its goal is to utilize the Rule 40 Committee and Olmstead Committee process described in this Agreement to extend the application of the provisions in this Agreement to all state operated locations serving people with developmental disabilities with severe

[1] Jensen Settlement Agreement, https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6919-ENG

behavioral problems or other conditions that would qualify for admission to METO, its Cambridge, Minnesota successor, or the two new adult foster care transitional homes." Child care centers and family child are not referenced by the settlement agreement, as they are not state operated facilities.

The settlement language, when agreed to in 2011, would not have brought notice to family child care or center based providers regarding new requirements because Rule 40 has never applied to their programs. In fact, child care centers are provided an annual guide from licensing of the rules and statutes applying to child care centers. Rule 40 is not included, even in the most recent published version that became effective October 2016.

In January 2012, an advisory committee was assembled to modernize Rule 40. The advisory committee consisted of 15 members, none of them representing family child care or center based providers. The first time we, as center providers, were notified that the rule applied to us was after the rule was already in effect in summer 2015 when we were told we must immediately comply. However, no specific training to meet requirements had yet been developed, and any response from DHS about when that training would be available was ambiguous, at best.

Still, once we were notified in 2015, we cooperated every step of the way. First, the Minnesota Child Care Association (MCCA) invited DHS representatives to headline our fall 2015 state conference to discuss the Positive Supports Rule. Later MCCA wrote a bill to temporarily exempt child care providers from the Positive Supports Rule so that we could spend a year working together with DHS to ensure consistent implementation tailored to the needs of very young children. We pulled that bill, however, when DHS asked us to do so. DHS officials said that they believed such an exemption would put the Department out of compliance with the Jensen Settlement, and promised to work with us to make new requirements appropriate for child care settings.

Upon introduction of our temporary exemption bill in the spring of 2016 DHS quickly arranged a meeting between an MCCA representative and DHS staff across several divisions. At this meeting specific concerns of child care providers were discussed, and we agreed to schedule one or more additional meetings with a larger group of MCCA board members to continue the dialogue. We were told that DHS never intended for the Positive Supports Rule training requirements to add 8-14 hours of training over and above what is already required via child care licensing. Encouraged by this, we agreed to share information with DHS about the trainings some of our members currently offered their staff to begin to "cross-walk" already-existing training with new requirements. It is important to note that the required training would be completely unrelated to the work of child care: appropriate and inappropriate uses of shackles, handcuffs, chemical restraint (medications) to control behavior, solitary confinement, etc. Much is explicitly prohibited in child care regulations already.

A follow up meeting with DHS did not occur until fall 2016, when we contacted the Department over concerns raised by our members that licensors were beginning to ask about compliance with Positive Supports Rule training. We hoped this meeting would be a time to review where we were in terms of overlapping training content and to take concrete steps forward to figuring out how child care providers could comply with this rule without adding to their training burden. Unfortunately, at that meeting we learned that the training cross-walk was still not finished and we were no closer to figuring out how to move forward. We were also told that that the financial impact of the rule would be greatest for child care providers even though our settings are the DHS-licensed programs likely serving the fewest number of children meeting the rule's definition. This is because child care also had the least existing training that would meet the requirements (as opposed to other sectors where clients with disabilities covered by the rule are more prevalently served). Then this week, hours before a scheduled bill hearing, we see a letter to legislators that leaves a false impression that this process was exhaustive and providers had fair notice.

DHS is well aware that MCCA is the go-to voice for center based providers, with DHS staff having an almost standing invitation to present at our industry conferences. As soon as DHS knew the rule would apply to child care providers (and centers specifically), we, the Association, should have been notified and given the opportunity to comment on the rule. It is a principle of rulemaking that state agencies reach out to those groups most affected by proposed changes. As child care centers were not previously affected by Rule 40, we were not tracking upcoming changes related to Rule 40.

We are very optimistic that Administrative Law Judge Lipman will be sympathetic, as he already said he was concerned about the financial implications of the proposal, and the Governor mentioned that individual programs could appeal. Never did anyone say, however, that this could affect at least one business in Minnesota (New Horizon Academy, as an example) by costs of more than a half million dollars per year, nor did they ever tell the chief judge that there are likely only 6-12 children out of 9,000 cared for in that business that would meet this definition.

New Horizon Academy is proud to be one of the few child care providers in the state that has been able provide services to children that likely meet this definition when we are reasonably able to do so. However, due to the new training requirements under this rule, it will become unduly burdensome for us to reasonably accommodate these children. We operate 68 centers in Minnesota serving over 9,000 children per day. Families are able to enroll and dis-enroll at any time. Because of the fluidity of enrollment, we never know when we will have a child with a diagnosed disability enroll in one of our centers or in what age group that child would be served. Accordingly, the only way that we can serve these children would be to require that all of our teaching staff complete the required 8-12 hours of training; our management staff complete 14 hours of training; and thereafter, all staff complete 4 hours of annual refresher training. With approximately 2,000 staff, this will cost our company approximately $538,560.83 in year 1 and then approximately $269,385.10 each year thereafter.

In 1996, the U.S. Court of Appeals for the Eighth Circuit decided in favor of KinderCare in Apple Valley, Minnesota, when it was determined that KinderCare did not fail to reasonably accommodate a child's disabilities because those accommodations (including one-on-one care) would have imposed an undue burden on KinderCare and would have required a fundamental alteration of their child care services.

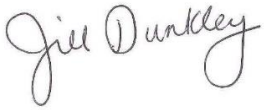
Because the vast majority of children with a developmental disability or related condition require much lower staff-to-child ratios than required under MN licensing rules and regulations, most child care centers are unable to reasonably accommodate them because the cost of hiring additional staff makes it unduly burdensome. As a result, family and licensed child care serve very few of children with these types of diagnosed disability.

As such, it is our legal opinion that a court would conclude that the cost to New Horizon Academy to provide training in compliance with the Positive Supports Rule would be unduly burdensome for the significantly small of number of children that meet this definition and that we would not be legally obligated to enroll these children.

In the end, applying this rule to child care centers and family child care will eliminate options for families with children with certain developmental disability diagnoses. Unless an exemption is granted, New Horizon Academy will need to immediately stop enrolling children meeting the definition, as will most of MCCA's member providers.

Sincerely,

Chad Dunkley, Esq.
CEO, New Horizon Academy
President, Minnesota Child Care Association



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