UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOY EVANS, *et.al*.,	)	
Plaintiffs,	)	
And	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor	)	**Civil Action No. 76-93 (ESH)**
v	)	
VINCENT GRAY, *et al*.,	)	
Defendants.	)	

SPECIAL MASTER'S REPORT AND RECOMMENDATION REGARDING PROTECTION FROM HARM—Part II[1]

Introduction

The 2010 Plan identifies nine topical areas into which existing court orders have been organized for the purpose of assessing the Defendants' compliance, in accordance with the Procedures for Certification of Compliance (Dkt. #1332, filed August 16, 2012). This Certification deals with Protection from Harm. The 2010 Plan establishes a threshold of "high" compliance, generally exceeding 90%.

The Court has previously approved a Report and Recommendation from the Special Master finding that the Defendants had achieved compliance with five of the 12 criteria contained in the 2010 Plan regarding Protection from Harm. (Dkt. # 1412, filed September 16, 2013, regarding outcome criteria vi, vii, ix, x and xi).

[1] 2010 PLAN FOR COMPLIANCE AND CONCLUSION OF *EVANS V. FENTY*, Goal D. 1 (Document #1200), ("2010 Plan"); Related Court Orders: 1978 Final Judgment and Order, sections I.2 and III.14.a.

On January 31, 2014, the Director of the Department on Disability Services ("DDS") submitted a Certification of Compliance with the remaining seven criteria. As has been the case with most of the certifications to date, much of the evidence of compliance is drawn from the results of a joint monitoring process conducted by a team supervised by the Court Monitor with representatives from the Quality Trust and DDS. The joint monitoring process was conducted from mid-November 2013 through mid-January 2014, and generally examined Defendants' performance during the period June 1, 2013 to October 28, 2013. The team reviewed a random sample of 26 investigations of Serious Reportable Incidents ("SRI") completed during this period, representing a 10% sample of such investigations. The 26 investigations involved 24 class members and 12 provider agencies. In addition, over the Defendant's objection,[2] the Court Monitor also obtained and reviewed survey reports from the District's Health Regulations and Licensing Administration ("HRLA"), which has regulatory responsibility over licensed providers, for the period between October 2012 and October 2013. The Court Monitor submitted a report on the joint monitoring findings on January 17, 2014, and an amended report on January 31, 2014. (Appendices 1 and 2, to the *Director's Certification of Compliance*, "Joint Monitoring Report")

The 2010 Plan also permits the District of Columbia to submit any additional relevant evidence drawn from various sources including their data systems, and licensing, certification and monitoring activities. (2010 Plan, ¶ 7) The Defendants have done so and included three appendices to the Certification of Compliance. (Appendices #18-20)

Reflecting the overall progress that has been made in meeting the requirements of the 2010 Plan and the underlying court orders, Plaintiffs and Plaintiff-intervenor, the United States Department of Justice, (hereinafter "Plaintiffs") generally concede that the evidence submitted by the Defendants supports a finding that the Defendants have met the compliance standard as to five of the seven criteria covered by this Certification, and limit their objections to the remaining two criteria.

[2] The essence of Defendants' objection is that these documents extend the review period farther backwards from June 1, 2013 to include a period during which Defendants had not claimed to be in compliance.

Special Master's Findings and Conclusions

In this section, this report will discuss each of the seven criteria, summarize the evidence submitted, the Plaintiffs' objection, if any, and the Special Master's findings, conclusions and recommendations to the Court.

> *i. All incidents (as defined in District of Columbia regulations and policies) are reported in accordance with the policy. Abuse, neglect and mistreatment are clearly prohibited by defendants' policies and procedures.*

District law specifically prohibits mistreatment, neglect or abuse in any form, and requires the reporting and investigation of all alleged instances of such behavior. (D.C. Law 2-137, codified as amended at DC Official Code §7-1301.01 *et seq* (2008 Repl.) The requirements of this law are implemented through the Incident Management and Enforcement Policy and the Incident Management and Enforcement Procedure of June 1, 2013. (Appendix #18 to the *Director's Certification of Compliance*) The results of the Joint Monitoring Questionnaire administered by the monitoring team indicated that 96% of the Serious Reportable Incidents were filed timely. The Joint Monitoring Report identifies one incident that occurred on July 18, 2013 which had not been reported. (Joint Monitoring Report, p. 7)

Plaintiffs agree that the evidence supports a finding of compliance with this criterion. Despite this concurrence, they expressed concern about a few incidents that surfaced in the Monitor's review of HRLA documents but which had not been reported as required by the laws, policies and procedures cited above. Plaintiffs correctly note that the reporting of an incident is an essential first step not only for the correction of the specific underlying problem, but also for preventive measures that might be needed for other consumers in the DDS system.

Despite the occasional instances of noncompliance, the evidence on the whole supports a finding of substantial compliance with this criterion.

> *ii. Family members and/or guardians, the Court Monitor and the Quality Trust are notified of all serious incidents (as defined in the District of Columbia policies) within 24 hours of the defendants becoming aware of such incidents.*

During the joint monitoring process, the monitoring team attempted to contact family members, guardians and attorneys representing class members to determine whether they had

been informed of SRIs in the sample, within 24 hours of discovery. This process was unsuccessful in producing reliable information regarding the Defendants' level of compliance with this criterion. First, for a variety of reasons, the team was able to reach only a small number of respondents. Second, some of the respondents did not have a clear recollection of when they were informed. Third, the inquiry conflated the question of whether the respondent received notification of the incident, which is what the criterion requires, with an inquiry into whether the respondent was notified of the outcome of the investigation, which is not required by this criterion.

The Defendants concluded that they could not rely upon this evidence to support their Certification of Compliance with this criterion. Instead, they reviewed the available data from the Immediate Response Committee analyzed by the Quality Management Division for the 26 SRIs in the sample, and for *all* incidents involving class members from June 23, 2013 through January 30, 2014. As a result of this review, Defendants reported that 69% of the sample incidents had a timely notification. From the larger review of all incidents involving class members, 89% had a timely notification, with the performance improving steadily from 23% in June 2013 to in excess of 90% for the months of September, October, November and December 2013. (*See*, appendices #s 19 and 22 *Defendants' Certification of Compliance*) Defendants attribute this improved performance to quality assurance activities that identified the reasons for the initial low level of compliance, followed by staff training and close vigilance of performance and documentation of the notifications made. Despite the success of their efforts in dramatically improving the level of compliance with this criterion, Defendants candidly acknowledge that their efforts have fallen slightly short of the required 90% compliance.

In light of the evidence and the Defendants' acknowledgment, Plaintiffs could advance an argument for a finding of noncompliance. However, they have elected to eschew an insistence on technical compliance and focus on the success achieved by the Defendants' proactive response to the results of their critical self-examination. Although they do not challenge the Certification Compliance with this criterion, Plaintiffs point to continuing examples of cases involving serious incidents where families and guardians of class members were not notified of emergency hospitalizations, and the need for continuing vigilance regarding the required notifications.

I find that the evidence on the whole supports a finding of substantial compliance with this criterion. However, Defendants are directed to submit to the parties, the Court Monitor and the Special Master quarterly reports for the first two quarters of 2014 regarding the rate of compliance with the requirements for timely notifications of serious incidents.

> *iii. All serious incidents are reported within the timeframe established by the policies, and thoroughly investigated by trained investigators. All other incidents are investigated in accordance with the policy requirements.*

There is some overlap between this criterion and criterion one above regarding the reporting of serious incidents. The joint monitoring data clearly indicates that the Defendants' performance meets the requisite compliance threshold. Although the Plaintiffs agree that Defendants are in compliance with this criterion, they voice their disagreement with Defendants' policy that assigns responsibility for investigating incidents other than "serious reportable incidents" to providers. Plaintiffs are concerned that "providers cannot or will not conduct effective investigations or produce reports that are critical of fellow staff or their own agencies, as evidenced by their performance in looking at those SRI's for which they are responsible." (*Plaintiffs' Response to Director's Certification of Compliance*, March 4, 2014, p. 3, "*Plaintiffs' Response*") In support of their concerns, Plaintiffs cite several examples of deficient investigations performed by providers. (*Id*. pp.3-4)

Defendants' policies recognize the importance of ensuring timely, competent and credible investigations. All SRIs are investigated by trained investigators employed by DDS/DDA but less serious incidents are assigned to provider agencies for investigation. There is nothing inherently wrong with placing primary responsibility upon a provider agency, which has been entrusted with and paid to provide for the care and safety of class members, to immediately respond to incidents which jeopardize such safety. Such agencies must have the capacity to investigate what went wrong in their programs, to attend to the safety of people who have been entrusted to their care, and to examine root causes of the incident under investigation and to implement preventive, corrective and disciplinary actions as warranted. The case examples cited by the Plaintiffs are reminders of the need to hold providers accountable for the performance of critical functions with which they have been entrusted. Although the Defendants have instituted requirements for competence-based training for provider investigators, these cases demonstrate

continued shortcomings in some cases. The deficiencies in the provider investigations cited by the Plaintiffs were identified as a result of the review of investigations by the DDS Investigations Management and Enforcement Unit and/or surveillance of provider agency performance by HRLA, which is evidence that providers are being supervised and held accountable for their performance of investigations. This is evidence that Defendants have not made an unfettered delegation to providers of this important responsibility for conducting investigations into incidents of lesser severity, but that there are systems in place to monitor how providers are fulfilling their obligations and to identify and correct deficiencies should they arise.

I find that the evidence supports a finding of substantial compliance with this criterion.

> *iv. Investigation reports identify appropriate preventive, corrective and disciplinary actions needed to protect MRDD consumers from harm.*

The joint monitoring report found that investigations consistently addressed factors that potentially caused or contributed to the occurrence of the incident. Plaintiffs concur that Defendants are in compliance with this criterion. I find the evidence sufficient to substantiate a finding of substantial compliance.

> *v. All serious incident investigation reports are reviewed by quality assurance staff in DDS/DDA. All other incidents are reviewed for patterns and trends by quality assurance staff in DDA and the Quality Improvement Committee.*

This criterion was not subject to the joint monitoring process. In support of the Certification, Defendants have submitted extensive information regarding their quality assurance program. (*Director's Certification of Compliance*, pp. 17-19) This information describes the manner in which incidents are reviewed for patterns and trends, information submitted to the Quality Improvement Committee, regularly shared with the Plaintiffs and published on the DDS website. Pursuant to the Joint Stipulation on Quality Assurance Documents, Defendants have been submitting on a quarterly basis various reports to the Plaintiffs and the Court Monitor including Quality Management Division Quarterly Report, which addresses Serious Reportable Incidents and other incidents.

Plaintiffs concur that Defendants are in compliance with this criterion. I find the evidence sufficient to substantiate a finding of substantial compliance.

> *viii. For all serious incidents, case managers[3] follow up on recommendations and ensure that there is prompt implementation of appropriate preventive, corrective or disciplinary action, and document their actions. For all incidents, case managers follow up to ensure that all consumers are safe and protected from harm. Based upon the quality assurance review of patterns and trends of consumer incidents, DDS/DDA shall ensure that there is prompt implementation of whatever preventive, corrective or disciplinary actions are necessary to protect the consumers from harm.*

This criterion has three separate requirements. First, that for Serious Reportable Incidents, case managers follow up and document prompt implementation of recommendations. Second, that for all incidents, case managers follow-up to ensure that consumers are safe and protected from harm. Third, that based upon a quality assurance review of patterns and trends of incidents, DDA ensures there is prompt implementation of whatever preventive, corrective or disciplinary actions are necessary to protect consumers from harm.

The joint monitoring process produced relevant data regarding two of the three elements of criterion viii. Question 192 addresses the first element, the follow-up of serious reportable incidents by a compliance specialist[4] to ensure prompt implementation of recommendations for appropriate preventive, corrective or disciplinary action, with appropriate documentation. There was 100% compliance. Another question, #276, asks whether there was evidence of follow-up by the service coordinator "within 48 hours." This produced an 84% compliance score.

Regarding the second element dealing with all incidents, question 193 asks whether the service coordinator followed up to ensure that the individual was safe and protected from harm. It produced a score of 84%.

None of the questions specifically address the third element which addresses quality assurance activities and more systemic preventive and corrective actions to protect consumers from harm, drawn from a review of patterns and trends of incidents. Neither the Defendants' Certification of Compliance nor the Plaintiffs' Response specifically addresses this element of criterion viii. Perhaps this is because there is some degree of overlap between this criterion and

[3] Case managers are also referred to as support coordinators.

[4] Subsequent to the 2010 Plan, a change in DDS/DDA policy transferred the follow up responsibility from the case manager to a compliance specialist. The parties agreed that the joint monitoring process would review the actions of the compliance specialist instead.

criteria v and xii, and there is information in the Defendant's Certification that is of relevance to this element. The Defendants' Certification describes how all incidents are aggregated and reviewed for patterns and trends on a quarterly basis, reports are submitted to the Quality Improvement Committee, and recommendations are made for further investigations, inquiries or system improvements. It further describes how the implementation of recommendations is followed up by the work of various committees within DDS/DDA. (pp. 17-19)

The Certification evidence submitted does not discretely address these three elements, but combines them into a single argument about compliance or noncompliance. Defendants argue that the Joint Monitoring Report improperly combined the results of two questions, 193 and 276, and imported the 48 hour timeliness requirement of question 276 to question 193 for the service coordinator's follow-up, resulting in an 84% compliance rate. They argue that without this improper importing, the correct rate of compliance for question 193 is 92%. Second, they argue that for the four cases where it was determined that the support coordinator did not follow-up to ensure that the individual was safe and protected from harm, in two of these cases a DDS nurse did the follow-up, and there was no adverse effect upon the class members. In the other two cases where the service coordinators' follow up occurred outside the 48 hour time frame that had been improperly imported into question 193, the service coordinator nevertheless *had* followed up within a few days and there was no significant adverse impact upon the class members involved. Finally, Defendants report that DDS has implemented a process whereby service coordination supervisors conduct a daily check of incidents to ensure that proper service coordination of SRIs occurs within 48 hours of the incident.

The Plaintiffs' Response, while continuing to object to the Defendants' methodology of averaging scores, emphasizes that all four of the serious reportable incidents in the sample that did not get proper service coordination pertain to emergency or unplanned inpatient hospitalizations of members, one of whom was involved in two of the four incidents at issue. While agreeing with the Joint Monitoring Report that it was appropriate for DDS nurses to perform follow-up visits in two of the four cases, Plaintiffs argue that it is not a substitute for service coordination.

> Much as the nurses were doing their jobs, service coordinators must perform their jobs. It is critical that class members' service coordinators conduct timely follow-up reviews within two business days of the incident as mandated in the defendant's own policy. Service coordinators, along with their supervisors, must oversee the needs and services of class members, especially when they experience SRI's. (*Plaintiffs' Response*, p. 6)

It is inevitable in a case that covers so much ground that, despite the best efforts to craft discrete areas of Certifications of Compliance, some of the subject areas and their compliance criteria overlap with others. (See, e.g. overlapping requirements regarding Staffing, Adequate Budget and Case Management. *Special Master's Report and Recommendation Regarding Staff Training,* Dkt. # 1318, July 6, 2012, and Dkt. # 1338, September 28, 2012; *Special Master's Report and Recommendation Regarding Adequate Budget,* Dkt. #1341, October 5, 2012; *Special Master's Report and Recommendation Regarding Case Management,* Dkt. #1374, March 25, 2013) It is therefore important to focus in each certification on the core interest of class members that is being addressed. It must be kept in mind that this is a certification about Protection from Harm and not about the performance of case managers, which is the subject of a separate certification. The essential interest of class members that this criterion was intended to protect is their safety. The implementation of recommendations for prevention, correction and discipline furthers that interest in being protected from harm. From that perspective and for this certification, it is of lesser importance to the class member whether critical functions are performed by service coordinators, compliance specialists or DDS nurses – what matters is that these functions are performed in a reasonably timely manner. This is not to say that the performance by case managers of their duties is unimportant –far from it, they are an essential safeguard for class members in a service system where all of the critical responsibilities for service provision have been assigned to private contractors. But this is not the place to evaluate the performance by case managers of their duties.

In two of the cases cited as evidence of noncompliance, the follow-up visit was performed by a nurse while the class member was still in the hospital. In the third case, which is cited as evidence of noncompliance because the service coordinator's visit took place at least two days beyond the 48 hour window for follow-up, the class member was also in the hospital. In each of these cases, the class member was in a location where his or her safety and protection was entrusted to the hospital staff, and there is no evidence that the class member was exposed to

any additional risk of harm due to inconsequential delays in service coordinator follow-up, or that the follow-up was performed by a nurse rather than the service coordinator. The fourth case cited as evidence of noncompliance involves the failure of a service coordinator to conduct a follow-up visit for a week after the class member had been discharged from an emergency inpatient hospitalization due to blood in her stool. The IMEU made a finding of neglect against the provider direct support and nursing staff for failing to adequately monitor the class member's bowel movements during the time leading up to her hospitalization. In this case, the lack of timely follow-up by the case manager may well have been responsible for a slower response and correction of conditions at the class member's home.

Despite this deficiency, the evidence overall establishes substantial compliance with the requirement that there is follow-up of incidents to ensure that class members are safe and protected from harm, that serious reportable incidents are followed up to ensure the implementation of recommendations for preventive, corrective or disciplinary action, and that Defendants ensure that there is prompt implementation of preventive, corrective or disciplinary actions emanating from quality assurance reviews of patterns and trends of incidents.

> *xii. In the event that private providers do not comply with these performance expectations, appropriate authorities within the District government will take whatever immediate actions are necessary to protect consumers, and take such further actions as may be necessary to correct the deficiency, including but not limited to the provision of training or technical assistance to provider staff, and/or the imposition of sanctions designed to assure compliance, including, where necessary, termination of provider agreements, contracts and licenses.*

This criterion describes the obligation of the Defendants for enforcement actions to ensure that providers meet the performance expectations laid out in law and policy for protecting class members from harm. The Director's Certification of Compliance describes the several systems that are in place to report SRI's to other District agencies with oversight responsibilities, the follow up by the Department of Health Care Finance and through the DDS Provider Certification Review process on recommendations that have been made. It further describes the training and technical assistance that is an outgrowth of monthly Incident Management Coordinators meetings with providers, and the work of the DDA Health and Wellness staff, and

Quality Improvement Specialist, as well as the annual development of Continuous Improvement Plans by the Provider Resource Management unit for each provider. The certification states:

> DDS employs the Do Not Refer List, Enhanced Monitoring, Provisional PCR Certification and Recommendations for Termination of Medicaid Agreements as sanctions designed to assure compliance with DDS policy to ensure protection from harm. During the time frame covered by the joint monitoring team's review, sanctions were necessary for only one provider . ... As a result, . . .was placed on the Do Not Refer and Watch List . . .[and] later remedied the basis for the sanctions and was removed from both of these lists. (*Director's Certification of Compliance*, pp.19-20)

In their response, Plaintiffs acknowledge that the Defendants have developed systems to identify deficiencies and issue sanctions to poorly performing providers, and that they have taken actions against providers consistent with their policies. (*Plaintiffs' Response*, pp. 7-10) However, their essential objection to the Certification of Compliance for this criterion is that the Defendants' enforcement actions have not been effective and that they "continue to allow providers with demonstrated deficiencies to support class members. As a result, class members' health needs suffer and they are at risk of harm." (*Id*., p. 7) After describing a series of long-standing deficiencies at several different provider sites, and the actions taken by the Defendants, Plaintiffs object that "the actions they have taken have still not corrected the deficiencies as required under Goal B.b.xii and class members are still not protected from harm."(*Id*., p. 9)

Plaintiffs conclude:

> Outcome criterion xii requires more than monitoring and the development of sanctions. It requires swift action to **correct** deficiencies to ensure that class members are protected from harm. Yet, class members still remain with substandard providers who have demonstrated for far too long that they cannot meet the needs of class members. As a result, class members suffer. Therefore, plaintiff's contest the defendants' certification of compliance with this criterion. (*Id*. p. 10)

Prominent among the examples cited by the Plaintiffs is the case of Individual Development Inc. ("IDI"), a provider agency with which the Court is familiar as its performance has been the subject of several reports by the Court Monitor and discussion at parties' meetings and status conferences. The long-standing deficiencies at this provider agency, which operated 11 intermediate care facilities and two support living homes and served approximately 42 class

members, and the lack of success of progressive enforcement actions in achieving durable correction of the problems, eventually led the District to consider legal proceedings to terminate its operations. A report to the Court by the Defendants on April 6, 2012 described the history of enforcement actions which culminated in a plan to transition the operations of IDI to three other providers, and to provide for enhanced independent monitoring during the transitional process (Dkt. #1309-1, April 6, 2012)

Unfortunately, as noted by the Plaintiffs, "Even after these class members transitioned to three well-established providers, they continue to receive the same substandard care as they did when they were supported by IDI." (*Id*, p. 7)

The Plaintiffs' Response describes the numerous steps taken by the Defendants to address the ongoing problems affecting the class members after the transition.

1. DDS performed a 45 day review of the class members.
2. On September 30, 2013, DDS issued a Provider Plan of Correction Performance Review comparing performance of the three providers on key measures to the earlier review.
3. As a result of this review, all three providers were placed on the Do Not Refer list, which prevents new admissions.
4. The Defendants increased their own monitoring of these homes and provided training and technical assistance to the three providers.
5. The Court Monitor's review in the fall of 2013 indicated that many of the deficiencies persisted.
6. IMEU conducted investigations into individual cases of alleged neglect and serious reportable incidents.
7. HRLA conducted surveys of the homes in October, November and December 2013 and identified deficiencies in implementing class members' ISPs and health care plans.

The Plaintiffs also cite the example of another provider that supports 36 class members which has been on the Do Not Refer list for 27 months for a variety of problems including continuing concerns about health and wellness and inadequate oversight by management. While placement on this list may have prevented new admissions to this provider for more than two

years,"it has not protected the class members and DDS consumers stuck in those poorly performing residential placements." (*Id*., p. 9)

It is clear from this record that the Defendants have taken a variety of enforcement actions of varying levels of severity when confronted with deficient practices by providers. In the enforcement process, Defendants must be given some latitude in determining the most effective course of action to produce compliance, before invoking drastic options that may require class members to undergo the trauma of a forced relocation or transfer to a new provider and a new staff. As the experience of IDI illustrates, even this option is no guarantor of a successful result. Although responsibility for the class members and other consumers was transferred to other well-established provider agencies, the performance problems persisted.

The question which arises is to what standard should Defendants be held? The obligation to take action to address serious deficiencies cannot be satisfied by a process alone, without regard to the effectiveness of the result it achieves on behalf of vulnerable class of people. Although, on paper, it appears that there is a veritable arsenal of tools available to enforce safety and quality standards applicable to provider agencies, these tools seem to work best with provider agencies that are both competent and strongly motivated to deliver a high level of quality and safety. They have proven less effective, and even ineffective, in environments that have had a prolonged experience of deficient care that has permeated the organization.

To support a finding of compliance, there must be evidence that when confronted with persistent deficiencies, Defendants are vigilant in using the tools at their disposal to improve provider performance. And the tools themselves must be tools that work effectively to produce the desired result within a reasonably prompt time, given the severity of the problem to be corrected. As the language of the criterion states, Defendants must "take such further actions as may be necessary to correct the deficiency."

Although the Defendants have implemented several systems for enforcement of their expectations for providers, the evidence does not demonstrate the effectiveness of these systems in correcting deficiencies that affect a substantial number of class members' interests in

protection from harm. I find that the Defendants have failed to carry their burden of proof of compliance with this requirement.

In conclusion, I find that the Defendants have met their burden of proof of compliance as to criteria I, ii, iii, iv, v, and viii, and have failed to meet their burden of proof as to criterion xii.

Pursuant to the Supplemental Order of Reference (Dkt. #920), the parties may file objections to this report within 30 days.

/s/_____

Clarence J. Sundram

Special Master
April 2, 2014