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United States District Court, District of Columbia.

Joy EVANS, et al., Plaintiffs,  
United States of America, Plaintiff–Intervenor,

v.

Marion BARRY, et al., Defendants.

No. CA 76–293 SSH. | Aug. 02, 1996.

## Opinion

### **ORDER ADOPTING PROPOSED FINDINGS OF FACT OF SPECIAL MASTER**

STANLEY S. HARRIS, District Judge.

\*1 On January 22, 1996, the Special Master appointed by the Court in October 1995 to assist the Court in developing remedies for defendants’ continuing contempt submitted her 90–day remedial plan. Defendants and plaintiffs submitted their comments thereafter. On June 17, 1996, the Special Master submitted a supplement to her January Report, detailing changes that had occurred over the intervening period of time.

Defendants have submitted objections to the Special Master’s Supplemental Report; plaintiff-intervenor has submitted comments to the supplemental report as well. Upon consideration of the Special Master’s January Report and Supplemental Report, and of the entire record, the Court adopts the proposed findings of fact of the Special Master, to be detailed below.<sup>1</sup> In addition, and in conjunction with these Findings of Fact, the Court issues this date a Remedial Plan which adopts in great part the recommendations of the Special Master and which, in time, are expected to enable defendants to come into compliance with the terms of this Court’s multiple Consent Orders.

<sup>1</sup> The relevant facts in this 20–year–old case are contained in the Court’s Findings of Fact and Conclusions of Law issued on October 11, 1995, and, to a lesser extent, its Order of Reference appointing Margaret G. Farrell as Special Master, issued the same date. Accordingly, the Court will not repeat them here.

## **FINDINGS OF FACT**

### **I. PAYMENT OF CARE PROVIDERS**

The Court adopts the Special Master’s proposed findings of fact contained in her January 1996 Report regarding the continued and unacceptable delays in payment of *Evans* care providers, both those paid through Medicaid and those paid from the Mental Retardation and Developmental Disabilities Administration (MRDDA). In her Supplemental Report, the Special Master adds:

Since the filing of the January 1996 Report, neither Medicaid payments nor payments from MRDDA to *Evans* providers have met the requirement of the 1983 Consent Order, para. IX, section 10, that defendants pay acceptable invoices within 30 days of their submission.

Suppl.Report at 2. The Supplemental Report does note that defendants “have shortened the time in which they paid many providers and eliminated much of their backlog of overdue payments.” *Id.* In addition, the Supplemental Report notes that defendants, while providing the Special Master with some information about the status of MRDDA and Medicaid payments, have failed to provide her with accurate (or, in some cases, understandable) documentation chronicling those payments. Suppl.Report, Ex. A.

The Court adopts those further proposed findings of fact contained on pages 3 and 4 of the Special Master’s Supplemental Report regarding defendants’ failure to timely pay *Evans* care providers. The Court notes especially the Special Master’s representation that, should the District fail to obtain soon from Congress authority to borrow up to \$600 million, “defendants will become increasingly unable to make timely payment to *Evans* providers.” Suppl.Report at 3.

In addition, the Court adopts in full the further proposed findings of fact enumerated in the Special Master’s Supplemental Report, regarding defendants’ concession

that many class care providers (or vendors) do not have contracts with the District of Columbia government. Instead, many care providers have temporary contracts with the city, which expire after 120 days and which must be renewed through MRDDA. On May 2, 1996, the District of Columbia City Administrator revoked the authority of the DHS to contract with private vendors and placed contracting authority with the District's Procurement Task Force, which reports to the City Administrator. This recent development has thrown, or at the least has the potential to throw, the contracting process into further upheaval. *See* Suppl.Report at 5-6.

## II. CASE MANAGEMENT RATIOS

\*2 The Court adopts in full the proposed findings of fact set forth by the Special Master in her January Report and her Supplemental Report. In her January Report, the Special Master noted (and defendants do not dispute) that the ratio of case managers to MRDDA clients was far higher than the 1:60 ratio required by multiple Consent Orders in this action. January Report at 17-18. In her Supplemental Report, the Special Master informs the Court that the situation has not changed: defendants still, as of that date, employed the same number of case managers that they did in January. Suppl.Report at 7.

## III. IMPLEMENTATION OF INDIVIDUAL HABILITATION PLANS

The Court adopts in full the proposed findings of fact submitted by the Special Master in her January Report regarding the requirement that defendants develop and regularly review class members' individual habilitation plans. *See* January Report at 19-21. (The Supplemental Report included no further or updated proposed findings of fact on this subject.)

## IV. GENERAL RECOMMENDATIONS

In addition to her proposed findings and recommendations on specific areas of non-compliance, the Special Master included general recommendations, pursuant to the requirement in the October 11, 1995, Order of Reference, that she include dates in the proposed Remedial Plan by which defendants must satisfy each element of the Plan and specific monetary penalties for non-compliance. *See* January Report at 23-24; Suppl.Report at 8. The Court adopts in great part the

general recommendations of the Special Master, as detailed in Part IV of the Remedial Plan, issued this date.

## V. CONCLUSION

Defendants have, for over two years, chronically and unapologetically violated the terms of nearly every aspect of this Court's multiple Consent Orders. Defendants' unrelenting contempt of this Court's orders, and their seeming inability to bring themselves into compliance therewith, have created chaos for the care providers vested with day-to-day responsibility for the members of this plaintiff class. The plaintiffs comprising this class, as defendants well know, are ill-equipped to adjust to or defend against the city's failure to assist their care providers in giving them the care and treatment they desperately need.

The months since this case was reassigned to the undersigned have been months of transition for the District of Columbia, in which the Financial Control Board and the Chief Financial Officer have been striving to achieve degrees of discipline, competence, and order in the District's affairs which have been all too lacking. They have been difficult months for the Court, torn between its obligation to assure that the needs of the plaintiff class are met and its awareness that proper responsiveness to those needs has been difficult to achieve. Now, the point has been reached beyond which this Court will not tolerate further and continuing incidences of contempt by defendants. Any further noncompliance with this Court's longstanding Consent Orders, and noncompliance with the Remedial Plan issued this date, must be expected by defendants to result in serious consequences.

## REMEDIAL PLAN

\*3 In accordance with the accompanying Order adopting the proposed findings of fact contained in the Special Master's January Report and Supplemental Report, the Court establishes the following Remedial Plan.

### I. REMEDIES FOR DEFENDANTS' CONTINUING CONTEMPT IN FAILING TO MAKE TIMELY PAYMENT TO CLASS CARE PROVIDERS

**A. Medicaid Waiver Application**

In her January Report, the Special Master recommends that defendants be required to apply to the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services for a home-and-community Medicaid waiver, pursuant to Pub.L. 94-35, sec. 2176. In her Supplemental Report, the Special Master informs the Court that defendants submitted an application to HCFA for a home-and-community Medicaid waiver on April 30, 1996. Accordingly, this portion of the Special Master's recommendations has been satisfied and is not adopted by the Court in this Remedial Plan.

**B. Payment of Invoices and Medicaid Reimbursement**

The Court adopts the Special Master's recommendations as to requiring timely payment of care providers by MRDDA and by the District of Columbia Health Care Finance Commission (HCF). Accordingly, it hereby is

ORDERED, that defendants shall pay all acceptable invoices from *Evans* care providers within 30 calendar days of their submission. It hereby further is

ORDERED, that defendant MRDDA shall reject or accept and present to the Controller of the Department of Human Services ("DHS Controller"), all undisputed payment invoices within seven working days of submission by the Provider. It hereby further is

ORDERED, that the DHS Controller shall accept or reject such invoices (except that the DHS Controller may not reject such invoices due to unavailability of funds), assign voucher numbers to the invoices, and present the accepted vouchers to the District of Columbia Treasurer for payment, within five working days of their submission to the DHS Controller by MRDDA. It hereby further is

ORDERED, that the D.C. Treasurer, or the Chief Financial Officer, shall pay all vouchers submitted by MRDDA and accepted by the DHS Controller within eight working days thereafter. It hereby further is

ORDERED, with respect to Medicaid payments, that the HCF shall require, consistent with current practice, that claims for Medicaid payment submitted by class providers on or before the fifth day of each month will be processed by First Health Service, Inc. ("First Health"), or any other Medicaid processing contractor, by the fifteenth of that month, so that a Medicaid "check register" may be

transmitted to HCF by that date. It hereby further is

ORDERED, that HCF shall submit the Medicaid "check register" to the D.C. Treasurer within seven days of its receipt from First Health or any other Medicaid processing contractor. It hereby further is

ORDERED, that the D.C. Treasurer, or the Chief Financial Officer, shall cut and mail checks to all providers listed on the Medicaid "check register" as eligible for Medicaid reimbursement, for the full amount of that reimbursement (or that amount which is undisputed, for reasons other than unavailability of funds), no later than the fifth day of the next month.<sup>2</sup> It hereby further is

<sup>2</sup> This means, in effect, that no more than 30 days shall elapse between a care provider's submission of a request for Medicaid reimbursement and the mailing of a check for the full amount of that reimbursement, provided that the care provider submits its request on or prior to the fifth day of the month (and that the amount is undisputed).

\*4 ORDERED, that defendants maintain their Vendor Hotline and shall provide accurate, current information to care providers about the status of their invoices on the Vendor Hotline, to the greatest extent possible, until defendants demonstrate to the Court that maintaining the Vendor Hotline is no longer necessary.

**C. Administrative Measures**

To assure that care providers receive timely payment on their invoices or requests for Medicaid reimbursement, the following steps also shall be taken: It hereby is

ORDERED, that beginning 30 days after the date of this Remedial Plan, the Director or Controller of the DHS, or the Chief Financial Officer, or his or her designee, shall submit to the Court (with copies to the Court Monitor and the Special Master), no later than the last day of each month, a signed statement, made under oath and notarized, containing each of the following:

1. A list of care providers for the class who have not been paid full Medicaid reimbursement within 30 calendar days after the submission of their invoices to First Health or another Medicaid processing contractor. The list shall indicate for each unpaid care provider the

amount of overdue payment and the number of days by which the payment is overdue.

2. A list of all other class care providers to whom payment has not been made within 30 calendar days of their submission of acceptable invoices to MRDDA, or any other agency of the District of Columbia, for services provided to plaintiffs ordered by the Court's several Consent Orders. As with requirement (a) above, the list shall contain for each care provider the amount of overdue payment and the number of days by which the payment is overdue. (A provider invoice submitted to MRDDA is "overdue" if it has not been paid within 8 working days or 15 calendar days, whichever is longer, after the DHS Controller has assigned the invoice a voucher number.)

3. A statement that, to the best of his or her knowledge, the affiant has made a concerted and good-faith effort to determine the payment status of all provider invoices for court-ordered services in this case, and that the affiant knows of no other undisputed claims for which the District of Columbia owes payment to any vendor providing services to the plaintiff class.

It hereby further is

ORDERED, that HCF auditors shall conduct desk audits of provider accounts at least once a year, and shall conduct field audits, as required by federal regulations, every third year. Field audits may not be conducted more than every three years unless, in the professional judgment of HCF, circumstances indicate that an on-site, extensive audit is necessary to determine a provider's reasonable costs.

**D. Sanctions for Nonpayment of Care Providers**

The Court adopts the Special Master's recommendations contained in her Supplemental Report, and, to the extent the recommendations do not conflict, the recommendations contained in her January Report, regarding sanctions for defendants' failure to timely pay class care providers. Accordingly, it hereby is

\*5 ORDERED, that should defendants fail to purge their contempt by paying acceptable provider invoices within 30 days of submission, as required by this Remedial Plan, at the end of the first month in which defendants report that there are outstanding Medicaid payments due but not paid within 30 days of submission of an acceptable

invoice, defendants shall be assessed a coercive civil fine of \$5,000 a day, until the overdue payments are made. The amount overdue shall be determined from the sworn submission of the Chief Financial Officer or the Director or Controller of the DHS, or his or her designee, and, if necessary, from supplemental submissions from the Special Master and/or the Court Monitor. (Payments are considered "made" on the date that they are mailed to providers. If, at any time, the Court is informed that defendants are not mailing payments to providers on the date they represent those payments are mailed, the Court will consider setting a prompt contempt hearing for those individuals involved.) It hereby further is

ORDERED, that with respect to non-Medicaid payments found to be overdue, defendants shall be assessed a coercive civil fine of twice the amount overdue. The amount overdue shall be determined from the sworn submission of the Chief Financial Officer or the Director or Controller of the DHS, or his or her designee, and, if necessary, from supplemental submissions from the Special Master and/or the Court Monitor. It hereby further is

ORDERED, that civil fines shall be paid to the Clerk of the Court and placed in a segregated account, from which the Court, at the recommendation of the Special Master, may order payment to providers. It hereby further is

ORDERED, that the Special Master may hear the claim of any class care provider whose undisputed or accepted claim, as described in the 1996 Remedial Plan, has not been paid by defendants within 30 days of the date of submission to the appropriate agency. The Special Master may then recommend to the Court findings of fact and conclusions of law regarding whether the claimant-provider should be paid with funds from the civil fines account. *See* Fed.R.Civ.P. 71 ("When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party....").

**E. Negotiating Long-Term Contracts with Providers**

The Court fully adopts the recommendations contained in the Special Master's Supplemental Report regarding accelerating the negotiation of long-term contracts between the District and class care providers. In addition, the Court adopts the Special Master's general recommendation, contained at page 24 of her January Report, that defendants be required to renegotiate its

contract with DC Arc for the continued services of the Court Monitor, if this Remedial Plan increases or otherwise modifies the current obligations of the Court Monitor. Accordingly, it hereby is

\*6 ORDERED, that the City Administrator, as the individual to whom the city's Procurement Task Force reports, shall, after consultation with the Special Master and the Court Monitor, establish a process for the negotiation and final conclusion of contracts with all vendors providing services to the *Evans* class, so that all *Evans* care providers have contracts of at least one year's duration with the District government, by October 31, 1996. It hereby further is

ORDERED, that defendants shall conclude contracts with all class care providers by October 31, 1996. It hereby further is

ORDERED, that with respect to any contracts uncompleted by October 31, 1996, defendants shall submit uncompleted contracts to binding arbitration of disputes arising in contract negotiations, before an arbitrator appointed by the Court. It hereby further is

ORDERED, that if defendants fail to conclude all outstanding contract negotiations or submit uncompleted contracts to binding arbitration by October 31, 1996, defendants shall be fined \$1,000 per day for each vendor providing services to class members without a contract (not including temporary contracts). Fines shall be deposited with the Clerk of the Court in defendants' civil fines account, as discussed above. It hereby further is

ORDERED, that to the extent that this Remedial Plan meaningfully modifies the monitoring responsibilities of the Court Monitor, defendants shall renegotiate their contract with DC Arc for the Court Monitor.

## **II. REMEDIES FOR DEFENDANTS' CONTINUING CONTEMPT IN FAILING TO MAINTAIN PROPER CASE MANAGEMENT RATIOS AS REQUIRED BY PAST CONSENT ORDERS**

The Court adopts the Special Master's recommendations contained in the January Report and the Supplemental Report, although the Court changes the dates by which defendants must come into compliance with the case management ratios set out in past Consent Orders, to account for the passage of time between the Special Master's submissions and the issuance of this Remedial

Plan. Accordingly, it hereby is

ORDERED, that no later than September 30, 1996, defendants shall obtain the case management services that would be provided by at least four additional full-time case managers in the MRDDA, to bring the total to 29. Defendants may do so by hiring four full-time case managers as employees of the DHS, or contracting for the private provision of at least four full-time equivalent case management positions. It hereby further is

ORDERED, that by September 30, 1996, defendants shall have achieved the capacity to provide a sufficient number of full-time case managers, or full-time equivalent case managers with whom the city has privately contracted, to create the one-to-sixty ratio of case managers to clients which long has been agreed to and is part of the Consent Orders. It hereby further is

ORDERED, that every three months, beginning October 1, 1996, defendants shall submit to the Court Monitor a list of each case manager employed by or under contract with the MRDDA, and the names and/or other identifying indicia of MRDDA clients assigned to each case manager. (This requirement includes MRDDA clients who are not members of the plaintiff class; without disclosure of every MRDDA client assigned to a case manager, the Court Monitor cannot discern whether defendants are in compliance with the ratio required by this Court's multiple Consent Orders.) It hereby further is

\*7 ORDERED, that if defendants should fail to provide sufficient case managers to come into compliance with the required ratio by September 30, 1996, the Court will levy a coercive civil fine of \$1,000 a day, to be paid into the same civil fines account discussed above, until defendants can establish that they are in compliance with the required ratio. It hereby further is

ORDERED, that if defendants are still in non-compliance with the required ratio of case managers to MRDDA clients by October 31, 1996, the civil fine shall increase to \$3,000 a day, beginning November 1, 1996.

## **III. IMPLEMENTATION OF INDIVIDUAL HABILITATION PLANS**

The Court adopts in great part the recommendations of the Special Master contained in the January Report. Accordingly, it hereby is

ORDERED, that no later than sixty days after the date of this Remedial Plan, defendants shall purchase, lease, or contract for sufficient copying capacity to make individual habilitation plans ("IHP's"), or an accurate summary indicating changes in any IHP since the last review, available to persons concerned with the provision of services to MRDDA clients. Such individuals shall include, but are not limited to, the Special Master, the Court Monitor, family of the class member, day program providers, and residential providers. It hereby further is

ORDERED, that every six months beginning September 30, 1996, MRDDA shall compile and shall submit to the parties, the Court Monitor, and the Special Master:

- (1) an overall assessment of MRDDA's aggregate client habilitation needs;
  - (2) a recitation of the kind of services required to meet the habilitation needs of the MRDDA clients, as indicated in their IHP's; and
  - (3) a listing of all habilitation needs indicated in the IHP's of MRDDA clients for which service has not been provided or is not available.
- It hereby further is

ORDERED, that to the greatest extent feasible, defendants shall inform (in writing) attorneys appointed to represent *Evans* class members in Superior Court commitment proceedings that they are responsible for representing their clients' rights under the *Evans* Consent Orders and any applicable District of Columbia legislation. It hereby further is

ORDERED, that to the greatest extent feasible, defendants shall request (in writing) each attorney representing *Evans* class members to report any deficiencies found in the implementation of their clients' IHP's to the clients' case managers at MRDDA and to the Court Monitor. This request, and the requirement of the preceding sub-part, may be combined in one document to be sent to the attorney. It hereby further is

ORDERED, that to the extent she does not already do so, the Court Monitor shall include in her reports to the Court, a summary of any deficiencies found in the implementation of the IHP's of *Evans* class members and any action taken to rectify those deficiencies. It hereby further is

ORDERED, that the Court Monitor shall verify

defendants' compliance with the Court's Consent Orders by evaluating a random sample of at least 100 IHP's each year, to determine whether such individual assessments and the IHP's of which they are a part meet professional standards, including relevant standards of the Accreditation Council (formerly the Accreditation Council for Services for Mentally Retarded and other Developmentally Disabled Persons), as required by the past Consent Orders.

#### IV. GENERAL RECOMMENDATIONS

\*8 The Court adopts the recommendations set forth in the Special Master's January Report and Supplemental Report, although the Court changes the dates by which defendants must submit to the Court its uniform IHP form and its proposed order for the continuing timely payment of class care providers. Accordingly, it hereby is

ORDERED, that on or before October 31, 1996, defendants, in conjunction with the plaintiffs and the Special Master, shall submit to the Court a proposed order for the timely, predictable, and full payment of *Evans* care providers. This requirement does not in any way delay or remove defendants' obligation to pay *Evans* vendors within 30 days of submission of acceptable invoices or requests for Medicaid reimbursement, nor does it serve to delay the imposition of sanctions should defendants fail to meet this requirement, as discussed in part I(D) of the Remedial Plan. It hereby further is

ORDERED, that on or before October 31, 1996, defendants shall submit to the Special Master a simplified, reduced, uniform and automated IHP, to be used for all MRDDA clients, that will permit ready comparison of the needs identified and the services provided to meet those needs. It hereby further is

ORDERED, that unless another date for compliance is indicated in this Remedial Plan, with a related amount of coercive civil fine for non-compliance, for failure to meet an obligation under this Remedial Plan after January 1, 1997, defendants shall be subject to a civil penalty of \$2,000 per day for each day of violation. (This amount is not to be multiplied by the number of violations.) It hereby further is

ORDERED, that the DHS Controller, or the City Administrator, shall be responsible for supervising defendants' compliance with the requirements of the Remedial Plan. It hereby further is

ORDERED, that if the DHS Controller, or the City Administrator, is unable to bring about the compliance of defendants with this Remedial Plan, he or she shall identify by name and position those individuals in the District of Columbia government whose action or inaction precludes defendants' compliance. Such information shall be provided in a report to the Court, with copies to the parties, the Special Master, and the Court Monitor, within 30 days of each instance of noncompliance. It hereby further is

ORDERED, that from the date of this Remedial Plan forward, any party seeking emergency relief from the Court regarding immediate payment of an overdue, acceptable invoice from defendants must present that claim first to the Special Master. It hereby further is

ORDERED, that after an emergency petition for payment is filed with the Court and presented to the Special Master, the Special Master shall hold an informal hearing within three working days of the date the emergency petition is filed. It hereby further is

ORDERED, that within three working days of the date of the hearing on any emergency petition for payment, the Special Master shall file recommended findings of fact and conclusions of law regarding the claim with the Court.

\*9 SO ORDERED.