

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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JOY EVANS, <i>et al.</i>,)	
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Plaintiffs,)	
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and)	
)	
UNITED STATES OF AMERICA,)	Civil Action No. 76-cv-0293 (ESH)
)	
Plaintiff-Intervenor,)	
)	
v.)	
)	
VINCENT GRAY, <i>et al.</i>,)	
)	
Defendants.)	
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ORDER

Pursuant to the “2010 Revision to the 2001 Plan for Compliance and Conclusion of *Evans v. Fenty*,” (“2010 Plan”),¹ the Special Master, Clarence J. Sundram, has submitted a Report and Recommendation regarding the “Certification of Compliance” submitted by the Director of the Department of Disability Services (“DDS”) as to the remaining seven outcome criteria for Goal B – Consumers Must Be Kept Free From Harm. (Special Master’s Report and Recommendation Regarding Protection from Harm – Part II, Apr. 4, 2014 [ECF No. 1457] (“R&R”).) As explained herein, the Court agrees with the Special Master that defendants have achieved compliance with six of the remaining criteria (i, ii, iii, iv, v, and viii), but have not demonstrated compliance with criterion xii.

¹ The 2010 Plan was filed on July 13, 2010 [ECF No. 1200], and approved on August 10, 2010 [ECF No. 1204].

BACKGROUND

The 2010 Plan groups existing court orders into nine subject areas. For each area, the Plan sets forth “specific outcome criteria for determining compliance with the related group of Court Orders,” assigns a standard of compliance (full, high, or significant), and “identifies the method by which the Special Master, and ultimately the Court, will assess compliance for each set of outcome criteria.” (2010 Plan at 5-6.) For Goal B—Consumers Must Be Kept Free From Harm, the 2010 Plan identifies two related court orders and sets forth twelve specific outcome criteria as to which defendants must meet a “high” standard of compliance.² (2010 Plan at 20-21.) The related court orders require that:

- i. Acts of physical or psychological abuse, neglect or mistreatment including but not limited to assaults, fractures, cuts, bruises, abrasions, burns, bites, lacerations, drug overdoses and verbal abuse are prohibited. (1978 Final Judgment and Order, section III.14.a)
- ii. Each and every alleged incident of abuse, neglect, or mistreatment shall be promptly investigated and a report made. The manner and mechanism of such investigation shall be developed and established by the defendants. A chronological compilation of the above reports shall be maintained by the defendants and made available to the Master and the parties. (1978 Final Judgment and Order, section III.14.a).

² “High Compliance” is defined in the 2010 Plan as follows:

This threshold requires compliance with the indicator at a rate generally exceeding 90 percent compliance. Where instances of noncompliance with the indicator are found, none can involve a serious and substantive violation of the Court Order with significant adverse impact upon class members (i.e., actual harm or a serious risk of harm) in the judgment of the Court and Special Master (e.g., excusable noncompliance may involve failure to comply with documentation or some aspect of process, without significant adverse impact). Generally speaking, this level of compliance will be expected for important programmatic aspects of the Court Orders.

(2010 Plan at 6.)

(2010 Plan at 20.) The twelve outcome criteria that defendants must satisfy for the Court to find compliance with Goal B are:

- 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.
- 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.
- 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.
- iv. Investigation reports identify appropriate preventive, corrective and disciplinary actions needed to protect [DDA] consumers from harm.
- 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.
- vi. All deaths are reported to and reviewed by the Fatality Review Committee.
- vii. Recommendations from the Fatality Review Committee for preventive and corrective actions are followed up, implemented and documented.
- viii. For all serious incidents, case managers 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.
- ix. The appropriate licensing/contracting agency is informed of all serious incidents and of the outcomes and recommendations for preventive and

corrective action from all investigations, and has taken appropriate action for prevention and correction.

- x. The Court Monitor and the Quality Trust have received incident reports of all serious incidents and all the final investigation reports, as well as all recommendations for preventive and corrective action. Each quarter, the Court Monitor and the Quality Trust have received aggregate reports on patterns and trends for all other incidents.
- xi. Incident reporting is on-line in 90 percent of residential and day treatment provider sites.
- 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.

(2010 Plan at 20-21.)

Outcome criteria vi, vii, ix, x, and xi were covered by an earlier report and recommendation. (*See* Special Master's Report and Recommendation regarding Protection from Harm, Aug. 15, 2013 [ECF No. 1402].) The Special Master concluded that defendants had satisfied those criteria, plaintiffs filed no objections, and the Court adopted the report and recommendation. (*See* Order, Sept. 16, 2013 [ECF No. 1412].)

As for the seven remaining Goal B outcome criteria, the certification process began on October 28, 2013, when the Independent Compliance Administrator ("ICA") notified the parties, the Court Monitor, and the Special Master that the DDS Director intended to file a certification of compliance for those criteria in 60 days.³ After the Court Monitor and the parties completed

³ After the adoption of the 2010 Plan, the Special Master established procedures for the DDS Director to certify compliance with outcome criteria, for his review of that certification and submission of a report and recommendation to the Court, and for the parties to submit to the

the required discussion on methodology,⁴ the Court Monitor, the Quality Trust and the Joint Monitoring Team began their review. (See Court Monitor’s Report, Review of Goal B:

Court any objections to the report and recommendation. (See Procedure for Director’s Certification of Compliance, Aug. 14, 2012 [ECF No. 1332] (“Certification Procedure”).) In brief, the certification process begins when the Independent Compliance Administrator (“ICA”) notifies the Court Monitor that defendants intend to certify compliance with a specified area of the 2010 Plan in 60 days. (*Id.* ¶ 1.) The Court Monitor then confers with the parties “to discuss and reach agreement on the methods to be employed in the Joint Monitoring in assessing defendants’ compliance.” (*Id.* ¶ 2.) The Joint Monitoring, which is conducted jointly by the Office of the Court Monitor, DDS staff, and the Quality Trust, must “adhere to compliance measurement criteria and methodology as set forth in the 2010 Plan.” (*Id.* ¶ 3.) After the Joint Monitoring is completed, the Court Monitor prepares a written report summarizing the findings, which is provided to the parties, the Special Master and the ICA. (*Id.*) The DDS Director may then file its Certification of Compliance with the Special Master. (*Id.* ¶ 4.) Although the parties have agreed that the results of joint monitoring activities will be the primary method for evidencing compliance, the certification may include “additional relevant evidence drawn from various sources including [defendants’] data systems, and licensing, certification and monitoring activities.” (See 2010 Plan at 7.) Plaintiffs and plaintiff-intervenor have 30 days to file any response to the certification (Certification Procedure ¶ 7), and then the Special Master prepares a report for the Court with “findings of fact, conclusions and recommendations.” (*Id.* ¶ 10.) The parties have 30 days to file objections to the Special Master’s report in accordance with Section V of the Supplemental Order of Reference. (*Id.* ¶ 11.)

⁴ For the Goal B outcome criteria, the 2010 Plan provides three methods for assessing compliance:

- i. Review a 10 percent random sample of serious and other incident reports and the related investigations, Quality Assurance documents, Human Rights Committee minutes, reports to the Quality Trust, documentation of case manager follow up of the implementation of recommendations, and documentation of the implementation of sanctions where warranted.
- ii. Interview case managers and advocates assigned to the consumers involved in the incidents in the sample above, regarding compliance with the policy.
- iii. Review documents and interview staff at a 10 percent sample of residential and day program sites to ensure that all incidents are being reported in compliance with the policy.

For method (i), the parties and Court Monitor agreed that the 10% sample of serious and other incident reports “would focus only on Serious Reportable Incidents, as defined in District policies,” “that the incident investigations would have been completed between June 1, 2013 and

Protection From Harm, Jan. 17, 2014 (amended Jan. 24, 2014)) [ECF 1457-3] (“Joint Monitoring Report”)).) The final Joint Monitoring Report was provided to defendants on January 24, 2014, and the DDS Director submitted a certification of compliance for Goal B outcome criteria i, ii, iii, iv, v, viii, and xii on January 31, 2014. (Director’s Certification of Compliance, Jan. 31, 2014 [ECF No. 1457-1] (“Certification”).) Plaintiffs’ response agreed that defendants had achieved compliance with criteria i through v, but challenged the certification as to criteria viii and xii. (Pls.’ Resp. to Certification, Mar. 4, 2014 [ECF 1457-2].)

Based on the evidence before him, the Special Master concluded that defendants had achieved compliance with all of the remaining Goal B outcome criteria, except criterion xii. (R&R at 13.) No objections have been filed to his recommendation that defendants be found in compliance with criteria i-v and viii. As for criterion xii, defendants raise several objections to the Special Master’s analysis and have asked the Court to find compliance based on their “substantive arguments and objections to the Report and Recommendation asserted in this

October 28, 2013,” and “that twenty-six incident investigations would be randomly selected for review from this time period.” (Joint Monitoring Report at 3.) They did not agree on the scope of “Quality Assurance documents to be reviewed,” and “the Court Monitor made the decision to review HRLA documents for a period of twelve months (October 28, 2012 to October 28, 2013) in order to ensure sufficient documentation for review.” (*Id.*) Defendants objected to this decision, but provided the necessary documents to the Court Monitor. (*Id.*) For method (ii), the parties and Court Monitor agreed that service coordinators (“case managers” is the term used in the 2010 Plan) would be asked three questions from the Joint Monitoring Questionnaire. (*Id.*) The parties and the Court Monitor discussed the questions to be asked of “advocates” (e.g. family members, guardians, attorneys), but the Court Monitor made the final decision on those questions. (*Id.*) For method (iii), the parties and the Court Monitor agreed “that the 10% sample of residential sites would not include natural homes and that the 10% sample of day program sites would not include supported employment.” (*Id.*)

filing,” their “Certification and the evidence submitted in support thereof,” and the “evidence of compliance in this filing.” (Defs.’ Objections to the Special Master’s Report and Recommendation Regarding Protection From Harm – Part II, at 6, May 5, 2014 [ECF No. 1463] (“Defs.’ Objs.”).) Plaintiffs and plaintiff-intervenors filed a response to defendants’ objections, agreeing with the Special Master’s recommendation. (Pls.’ & Pl.-Intervenor’s Resp. to Defs.’ Objs. at 4, May 14, 2014 [ECF No. 1465] (“Pls.’ Resp. to Objs.”).) The Court’s review of the Special Master’s recommendation as to criterion xii is de novo. (*See* 2007 Supplemental Order of Reference ¶ (V)(4) at 4, May 3, 2007 [ECF No. 920] (citing Fed. R. Civ. P. 53(f)(3)).)

ANALYSIS

In light of the parties’ agreement as to Goal B outcome criteria i-v and viii, the sole issue for the Court to address is whether defendants have established compliance with criterion xii.

Criterion xii provides:

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.

In analyzing what this criterion requires, the Special Master concluded that “to support a finding of compliance,” there “must be evidence that when confronted with persistent deficiencies, [d]efendants are vigilant in using the tools at their disposal to improve provider performance” and that “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.” (R&R at 13.) Applying this standard, the Special Master concluded that defendants “have failed to carry their burden of proof of compliance” because even though they have “implemented several

systems for enforcement of their expectations for providers” and “taken a variety of enforcement actions of varying levels of severity when confronted with deficient practices by 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.” (*Id.*)

In their objections, defendants argue that the Special Master has read Goal B outcome criterion xii “far too broadly.” As they see it, he has read it “*to encompass any provider deficiency* such that the defendants’ actions and sanctions activities are deemed ‘ineffective’ because poorly performing providers continue to provide services to class members.” (Defs.’ Objs. at 6.) Although the Court agrees that such a reading would be too broad, it does not believe that defendants have accurately characterized the Special Master’s interpretation. In his Report and Recommendation, the Special Master expressly limits criterion xii to deficiencies relating to the overall goal of protection from harm. (*See* R&R at 10 (criterion xii “describes the obligation of the [d]efendants for enforcement actions to ensure that providers *meet the performance expectations laid out in law and policy for protecting class members from harm*” (emphasis added).) And while the Court agrees with defendants that the “performance expectations” referenced in criterion xii must be read in light of the requirements of criteria i-xi and the “incident management system” addressed therein (*see* Defs.’ Objs. at 8), those expectations should also be construed in light of Goal B’s overall goal of protection from harm and the related orders it seeks to implement. As defendants themselves recognize, Goal B “addresses the sufficiency and *efficacy* of DDS’s incident management system” (*id.* at 6 (emphasis added)), and “the overarching ‘core interest of class members’ in Goal B is to ensure that incidents of abuse, neglect and mistreatment are reported, investigated, and reviewed, that recommendations are followed up by the appropriate entity, *and that providers who fail to meet*

‘these performance expectations’ are subjected to action to ‘assure compliance.’” (*Id.* at 8 (quoting R&R at 9-10) (emphasis added).) The Special Master’s interpretation of criterion xii accounts for all of these goals while respecting the parameters of Goal B. Accordingly, the Court does not agree with defendants that the Special Master’s interpretation “requir[es] more than contemplated by Goal B outcome criterion xii.” (*Id.* at 9.)

Defendants also object to the Special Master’s conclusion that they have not met their burden of showing compliance with criterion xii. Although the record before Court includes evidence that was not before the Special Master,⁵ the Court reaches the same conclusion. In order for defendants to demonstrate compliance with criterion xii, the record must answer the following question: are there current providers whose deficiencies persist and against whom defendants have not taken appropriate action. The record before the Court and arguments of the parties provide no satisfactory answer to this question. For example, the Special Master and plaintiffs rely heavily on the District’s handling of a former provider, IDI, as evidence that they have not proven compliance. (R&R at 11-12; Pls.’ Resp. to Certification at 7.) However, IDI is no longer a provider and, while defendants’ past actions are not irrelevant, defendants must be allowed to rely on current facts to demonstrate compliance. Another point emphasized by both the Special Master and plaintiffs is that after class members who were served by IDI transitioned to new providers, the problems did not disappear. However, while the change in providers was not a quick “fix,” defendants closely monitored the post-transition situation and the most recent data from the Court Monitor (which was not before the Special Master) shows marked improvement. (*See* Court Monitor’s Report to the Court at 4-7, June 9, 2014 [ECF No. 1468])

⁵ Defendants attached to their objections to the Special Master’s Report and Recommendation copies of a number of official policies and procedures. (*See* Defs.’ Objs. Exs. 1-12.)

(noting that while “continuation of onsite monitoring is essential,” defendants have taken “a number of actions to address the continuing deficiencies” previously identified by the Court Monitor and those actions “have resulted in commendable progress”).)

In the end, in order for defendants to prove that they are taking effective action against providers (who are deficient with respect to the goal of protection from harm), the record must include data showing what deficiencies that have been recently identified among *current* providers have led to sanctions, and what sanctions, if any, have been imposed, and the efficacy of the sanctions imposed. In addition, plaintiffs first must identify who are the *current* providers that they consider deficient and against whom they believe defendants have failed to take necessary action, what action(s) should have been taken and when, and if there are existing providers whom plaintiffs believe should be terminated, who are those providers.

CONCLUSION

Accordingly, upon consideration of the Special Master’s Report and Recommendation, and the entire record herein, it is hereby

ORDERED that the Court **APPROVES AND ADOPTS** the Special Master’s Report and Recommendation Regarding Protection From Harm – Part II [ECF No. 1457]; and it is further

ORDERED that defendants have achieved compliance with Goal B outcome criteria i, ii, iii, iv, v, and viii; and it is further

ORDERED that defendants have not yet demonstrated compliance with Goal B outcome criterion xii. The issue of defendants’ compliance with criterion xii is returned to the Special Master to allow him to consult with the parties, the ICA, and the Court Monitor and to develop a

plan, in accordance with the foregoing opinion, for defendants to resubmit their certification as to criterion xii.

/s/ Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

Date: September 10, 2014