

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

2010 REVISION
OF
2001 PLAN FOR COMPLIANCE AND CONCLUSION OF
EVANS V. FENTY

SUBMITTED BY
CLARENCE J. SUNDRAM
SPECIAL MASTER

WITH THE COLLABORATION, COOPERATION AND AGREEMENT OF
THE PARTIES IN THIS ACTION

JULY 2010

Table of Contents

<u>Introduction</u>	4
<u>The Plan Structure</u>	5
<u>A. Goal -- Appropriate individualized habilitation and treatment in the community in the least separate, most integrated and least restrictive settings. (1978 Final Judgment and Order, section, I.1, I.3)</u>	8
<u>1. Individualized Habilitation Plans</u>	8
a. Related Court Orders	8
b. Specific Outcome Criteria for Determining Compliance	10
c. Standard of Compliance	12
d. Method of Assessing Compliance	13
<u>2. Provision of Residential, Vocational and Day Services</u>	13
a. Related Court Orders	13
b. Specific Outcome Criteria for Determining Compliance	14
c. Standard of Compliance	15
d. Method of Assessing Compliance	15
<u>3. Staff Training</u>	15
a. Related Court Orders	15
b. Specific Outcome Criteria for Determining Compliance	16
c. Standard of Compliance	16
d. Method of Assessing Compliance	16
<u>4. Restricted Control Procedures (Includes medications, use of restraints and time-out)</u>	17
a. Related Court Orders	17
b. Specific Outcome Criteria for Determining Compliance	17
c. Standard of Compliance	19
d. Method of Assessing Compliance	19
<u>B. Goal-- Consumers must be kept free from harm (1978 Final Judgment and Order, section I.2)</u>	20
a. Related Court Orders	20
b. Specific Outcome Criteria for Determining Compliance	20
c. Standard of Compliance	21
d. Method of Assessing Compliance	21
<u>C. Goal-- Safeguarding each consumer's personal possessions (1978 Final Judgment and Order, section II.7.G; 1983 Consent Order, section VII)</u>	22
a. Related Court Orders	22

b. Specific Outcome Criteria for Determining Compliance	22
c. Standard of Compliance	22
d. Method of Assessing Compliance	22
<u>D. Goal B Monitoring B (1978 Final Judgment & Order, section II.5.d)</u>	23
1. <u>Case Management</u>	23
a. Related Court Orders	23
b. Specific Outcome Criteria for Determining Compliance	23
c. Standard of Compliance	24
d. Method of Assessing Compliance	24
2. <u>Quality Assurance Program & Fiscal Audits</u>	24
a. Related Court Orders	24
b. Specific Outcome Criteria for Determining Compliance	25
c. Standard of Compliance	25
d. Method of Assessing Compliance	25
<u>F. Goal -- Adequate Budget (1981 Court Order, section 2.d)</u>	26
a. Related Court Orders	26
b. Specific Outcome Criteria for Determining Compliance	26
c. Standard of Compliance	27
d. Method of Assessing Compliance	27

**LEGAL FRAMEWORK OF THE PLAN FOR COMPLIANCE & CONCLUSION OF
*EVANS V. WILLIAMS***

In his February 10, 1999 Order, Judge Stanley Harris ordered the Special Master, in cooperation and conjunction with the parties, if possible, to develop a plan for the conclusion of this action, addressing the disposition of the fines paid by defendants and including suggestions for post-litigation mechanisms to ensure the protection of the plaintiff class' continuing interests in adequate habilitation. *Evans v. Williams*, 35 F. Supp.2d 88, 97 (D.D.C. 1999).²

Among other things, the Plan is to address:

- a. A summary and articulation of the goals of this lawsuit;
- b. The status of compliance with various Court Orders;
- c. The quality assurance methods to be developed and implemented by the defendants to monitor the performance of public and private providers of service;
- d. The standards, including outcomes standards to be developed and implemented by defendants, that should be used to determine defendants' continued compliance with Court-ordered requirements, and the way in which compliance with such standards should be measured;
- e. The degree of compliance that should be required with each of the standards recommended;
- f. The steps necessary to establish permanent, objective, efficient, and effective post-termination monitoring of the programs serving consumers by independent entities; and
- g. The steps necessary to coordinate existing mechanisms and to develop needed

¹ This plan was conceived, shaped, and drafted significantly by expert to the Special Master, Clarence J Sundram, former Chairman of the New York State Commission on Quality of Care for the Mentally Disabled, who worked closely with the Special Master and parties over the two years of its development.

² The existing orders in this case only reference the *Evans* class members (i.e., those individuals who have at one time resided at Forest Haven), and therefore, do not include all individuals with developmental disabilities in defendants' service delivery system. This plan refers to "consumers" rather than "class members" throughout. Consumers shall refer to all individuals with developmental disabilities, including all *Evans* class members, that the District of Columbia government and defendants serve in their service delivery system. This nomenclature does not expand the court's jurisdiction to non-class members and Defendants' compliance with the outcome measures and related court orders will not be measured by reference to non-class members..

mechanisms for the advocacy of the interests of consumers on an individual and community-wide basis.

THE PLAN STRUCTURE

The Plan has the following structure:

1. It recognizes that there is already in place a declaratory judgment and permanent injunction recognizing a federal constitutional right to receive individualized habilitative care and treatment in the least separate, most integrated, and least restrictive settings, and to be kept free from harm. It also recognizes that there are Court Orders, which are outdated or no longer relevant, which need to be disposed of.³

2. Under each of the broad goals of the Court Orders, it summarizes the specific provisions of outstanding Court Orders that must be complied with as they relate to these broad goals. These Court Orders are grouped so that all related Court Orders are included under the goal to which they most closely relate.

3. The parties anticipate that periodic progress reports to the Special Master will be required as the process of implementation progresses, and that status conferences will be scheduled with the Court at least bi-monthly, and more frequently as the Special Master or the Court determines to be warranted. Thirty days prior to the scheduled date for a status conference, the Special Master will establish an agenda for the conference, and require a written progress report from the defendants on the items on the agenda. Such progress report will be provided within 14 days, with copies to the plaintiffs and plaintiff-intervenor. The plaintiffs and plaintiff-intervenor will have 10 days from the receipt of the progress report to file any comments on such report with the Special Master, with copies to the defendants.

4. For each set of actions, the Plan identifies specific outcome criteria for determining compliance with the related group of Court Orders. These criteria put the parties on notice about the results that must be achieved to satisfy the standard of compliance. The ultimate test of compliance will be in satisfying all of the related outcome criteria. The parties agree that if the Court finds that defendants have satisfied the outcome criteria, the defendants will also be in compliance with the related Court Orders pursuant to this Plan, and the Court may vacate the related Court Orders subject to the provisions in paragraph 7 below. In any event, pursuant to paragraph 7 below, the Court will ultimately decide whether or not the defendants have complied with the outcome criteria.

5. Measuring compliance does not lend itself to a mathematically precise formula. The measure of compliance depends on the nature of the interest at stake and the degree to which the defendants' noncompliance affects that interest.⁴ It is evident that some of the Court

³ The parties shall attempt to reach agreement on what orders may be vacated and shall submit a joint motion to that effect to the court.

⁴ *Fortin v. Commission of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 795 (1st cir. 1982); *Joseph A. By Wolfe v. N.M. Dep't of Human Services*, 69 F.3d 1081 (10th cir. 1995), cert. Denied, 517 U.S. 1190 (1996).

Orders are of more importance to the protection of critical interests of plaintiffs than others and therefore will require a higher threshold of demonstrated compliance.

For each set of actions, the Plan assigns a standard of compliance, consistent with the Court Order of February 10, 1999.⁵ The three threshold levels proposed are:

1) Full Compliance. This threshold level essentially requires full compliance (95 percent) with specific, objectively measurable requirements contained in the Court Order itself.⁶ Where there is specificity in the Court Order, obviously it cannot be disregarded lightly. This threshold anticipates that the defendants will completely meet these specific legal obligations, although it would give the Court and the Special Master discretion to disregard minor and inconsequential failures of total compliance which: (i) do not affect substantial interests of the plaintiff class; and (ii) are due to genuinely unanticipated or unforeseeable circumstances; or (iii) are due to the actions of independent actors outside the control of the defendants which occurred despite the best good faith efforts of the defendants. Generally speaking, this level of compliance will be expected in implementing the structural aspects of the Court Orders which are essential conditions to implementing the programmatic aspects of the Court Orders.

2) High Compliance. 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.

3) Significant Compliance. This threshold requires compliance with the indicator at a rate generally exceeding 80 percent compliance. Where instances of noncompliance with the indicator are found which involve a serious and substantive violation of the Court Order with significant adverse impact upon class members, this threshold may nevertheless be met if, in the judgment of the Court and Special Master, these instances were sporadic or isolated in nature and promptly addressed by effective corrective action.

6. The Plan identifies the method by which the Special Master, and ultimately the Court, will assess compliance for each set of outcome criteria. Thus, the parties will be aware at the outset of the manner in which different types of data will be evaluated in determining whether

⁵ This provision of the plan has been the subject of on-going and substantial discussion between the parties and the Special Master and, ultimately, the parties did not reach an agreement on it. The position of the plaintiffs and plaintiff-intervenor is that there should be two levels of compliance: full (100 percent) and high (90 percent). The defendants accept the three tiered structure and recommend different threshold levels for compliance: full (85 percent): high (80 percent) and significant (75 percent). After carefully considering the positions of the parties, the Special Master recommends the structure and threshold levels contained in the plan.

⁶ This threshold is set at 95 percent to accommodate the defendants' concern not to be penalized for occasional and temporary slippage in total compliance levels.

the standard of compliance has been met as to particular areas of the Court Orders.

7. The Plan provides that as the implementation process proceeds, defendants will utilize information generated from internal monitoring processes to determine when they believe they have met the standards for compliance with the identified outcome criteria for each set of actions related to a group of Court Orders. At this point, defendants shall approach the plaintiffs and plaintiff-intervenor to see if they concur that there is compliance with the set of actions and outcome criteria. If there is no agreement, the defendants can move the Special Master for a finding of compliance as to these Court Orders and can seek to have the related Court Orders vacated and dismissed.⁷ In doing so, the defendants, who have the burden of proof of establishing compliance, will offer evidence of compliance with the outcome criteria. In addition to the Methods of Assessing Compliance described in each section of the Plan, the Defendants may submit any additional relevant evidenced drawn from various sources including their data systems, and licensing, certification and monitoring activities. If the plaintiffs and plaintiff-intervenor do not challenge the evidence of compliance within 30 days, the parties may move jointly for an Order vacating and dismissing the related Court Orders. The plaintiffs and plaintiff-intervenor may contest the contention of compliance within 30 days, by filing written reasons for their objections with the Special Master. After such filing, the plaintiffs and plaintiff-intervenor will have an additional 45 days to submit evidence in support of their objections. The plaintiffs and the plaintiff-intervenor shall have the right to access all persons, residences, facilities, buildings, programs, services, documents, records and materials necessary to determine if defendants have complied with existing Orders in this case or the provisions of this Plan that are related to class members or the care and/or services provided to class members in this case.

Such access shall include all departmental and/or individual class member records. The Special Master shall schedule a hearing on the issue of compliance and may retain independent consultants to evaluate the status of compliance. If independent consultants are retained by the Special Master, upon receipt of the report of the independent consultants, the parties will have 30 days to file their comments. Any party may challenge the findings and conclusions of these consultants, leading to a fact-finding hearing before either the Special Master or the Court. Upon the conclusion of such hearings, the Special Master shall present the Court with proposed findings of fact and conclusions of law consistent with Fed. R. Civ. P. 53. The parties and the Special Master may agree upon alternative and less formal procedures for determining Defendants' compliance with the court orders and for the submission of reports and recommendations by the Special Master to the Court. The ultimate decision on whether particular Court Orders are to be vacated and/or whether this case is to be dismissed rests with the Court and not the Special Master. Unless there is a joint motion to vacate particular Court Orders, no Court Order shall be vacated without a hearing before the Court at which evidence of compliance with the Order is provided.

8. The Plan anticipates that, over time, the defendants will meet the specified outcome criteria in order to successfully move the Court to vacate and dismiss the related Court Orders, except the declaratory judgment on the constitutional rights of the consumers to receive

⁷ In *Freeman v. Pitts*, 503 U.S. 467 (1992), the United States Supreme Court held that federal court decrees can be terminated in stages. In dealing with a long-standing school desegregation case, it approved the partial dismissal of portions of the case in which the school district was in compliance, while retaining jurisdiction over non-compliant aspects of the court orders.

individualized habilitation in the least separate, most integrated and least restrictive environment and to be protected from harm. It is also anticipated that in the course of implementation, the existing District of Columbia statutes will be revised and a new set of updated legal standards will be adopted, incorporating the goals of the Court Orders, and will be enforceable in Superior Court and that plaintiff class members will have access to legal representation services as described in the Plan to enforce their rights. The permanent injunctions shall not be vacated until all other Orders are vacated.

9. The Plan itself generally is not intended to be an enforceable document. However, class members have a great interest in ensuring that the agreed upon outcomes identified in this Plan are in fact achieved in a timely manner by the defendants to secure the benefits and protections provided for by the Court Orders. Until the Plan is implemented and the compliance standards are met as described above and related Court Orders are vacated and dismissed as provided for in the Plan, the underlying Court Orders continue to remain enforceable in federal court. More specifically, in the event that the defendants do not implement the provisions of this Plan effectively and on a timely basis, plaintiffs and plaintiff-intervenor retain the right to seek appropriate judicial relief, based on this evidence of noncompliance with the Court Orders, including Orders requiring specific performance of the Plan.

10. Once the Court Orders are vacated and dismissed, as described in paragraphs 7 and 8 above, the Plan anticipates that the Quality Trust will assume full monitoring responsibilities for class members and that any cases involving individual rights violations will be litigated in Superior Court under District of Columbia statutes and with the assistance of the legal representatives and lay advocates provided under the Plan. The Plan does not anticipate that plaintiffs or the plaintiff-intervenor will seek recourse to the federal court to litigate individual violations of rights in this case pursuant to the declaratory judgment which will remain unless: (1) there are systemic violations of the declaratory judgment; or (2) legal remedies are unavailable in Superior Court (e.g., due to repeal of the statutes); or (3) there is a failure to adequately fund the Quality Trust pursuant to the Consent Order dated January 19, 2001.

A. GOAL⁸ -- APPROPRIATE INDIVIDUALIZED HABILITATION AND TREATMENT IN THE COMMUNITY IN THE LEAST SEPARATE, MOST INTEGRATED AND LEAST RESTRICTIVE SETTINGS. (1978 FINAL JUDGMENT AND ORDER, SECTION, I.1, I.3)

1. Individualized Habilitation Plans

a. Related Court Orders

- i. Defendants shall develop and provide for each class member a written individualized habilitation plan, based upon individualized assessments and formulated in accordance with*

⁸ The court order of February 10, 1999 requires that, in preparing this plan, the Special Master must articulate the goals of this lawsuit (35 F. Supp.2d at 97-98).

professional standards (as set forth in the Joint Commission on Accreditation of Hospitals, Accreditation Council for Services For Mentally Retarded and other Developmentally Disabled Persons, Standards for Services for Developmentally Disabled Individuals [1977]) with the participation of the retarded person, his or her parents, guardian, advocate, and parent surrogate if there is one; and to provide for each an individualized habilitation program designed in accordance with the plan, to provide annual periodic review of the plan and program, and the opportunity to each member of the plaintiff class and his or her parent, guardian, advocate, and surrogate parent, if there is one, to participate in such review. (1978 Final Judgment and Order, Section II.5.A a; 1983 Consent Order, section I.1) Defendants shall ensure that each consumer's assessment and habilitation plan are revised annually. (1981 Consent Order, section 2.a)

- ii. Priority in implementing IHPs shall be given to class members who have been identified as assaultive, self-injurious, self-abusive, mentally ill, or who have acute medical needs or identified needs for physical rehabilitative services (e.g., physical therapy, occupational therapy, surgery). (1981 Consent Order, section 2.e)*

- iii. Services required by consumers shall be identified in writing in full in all assessments and habilitation plans, whether or not such services are currently available. Defendants shall specify which consumers need particular services that are not being provided. This "needs assessment" shall be continuously updated, showing the additional resources, including staff, supplies and equipment, and transportation resources required by consumers, and shall be issued to the parties every six months. Every six months, defendants shall compile and submit to the Special Master, the Monitor and the parties an overall assessment of aggregate consumer habilitation needs; a recitation of the kind of services required to meet the habilitation needs of the consumer as indicated in their IHPs, and a list of all habilitation needs indicated in the IHPs for which service has not been provided or is not available. (1981 Consent Order, section 2.c.; 1983 Consent Order, sections I.2, I.3; 1996 Remedial Plan, section III)*

- iv. Defendants shall ensure that IHPs are disseminated in a timely fashion, i.e., within 30 days of the IHP team meeting.*

- v. *Defendants shall provide a program of medical, dental and health related services for class members which provides accessibility, quality and continuity of care for physical illness or injury. All injuries and illnesses which require a doctor's attention shall be immediately reported to the class member's parent or guardian. (1978 Final Judgment and Order, section III.14. j.)*

- ii. *Defendants shall provide each physically handicapped class member with individualized adaptive equipment as needed, including wheelchairs, walkers, braces, feeding apparatus, and auxiliary sensory devices such as hearing aids. Each and every class member shall be immediately evaluated to ascertain the need for such equipment. (1978 Final Judgment and Order, section III.14.k)*

- vii. *Defendants shall ensure that consumers who require 1:1 staffing are provided with such coverage when needed. (1983 Consent Order, section III.7)*

b. Specific Outcome Criteria for Determining Compliance⁹

- i. Consumers will have ISPs developed or revised in accordance with professional standards at least annually.
- ii. ISPs will be reviewed whenever there is a significant change in circumstances.
- iii. ISPs will be based upon individualized assessments.
- iv. ISPs will be developed with the active participation of the consumer, case manager, advocate, staff who know the consumer best and any available family members or guardians, at a minimum.
- v. ISPs will be disseminated to members of the planning team and placed in the consumer's chart within 30 days of the planning meeting.
- vi. Defendants shall notify the Court Monitor and the counsel for the plaintiffs of the dates of the assessments and the ISP meetings for all class members on an annual basis.

⁹ The February 10, 1999 order requires the plan to provide for the standards, including outcome standards to be developed and implemented by the defendants, that should be used to determine the defendants' continued compliance with court-ordered requirements *Id.* At 98.

- vii. The defendants shall notify parents/guardians when serious injuries or serious illness require a doctor's attention.
- viii. Consumers receive the services and supports identified in the ISP on a timely basis.
- ix. Consumers receive the services and supports identified in the ISP in the least separate, most integrated and least restrictive environment.
- x. ISPs must address the consumers' need for:
 - A. suitable living arrangements, together with community-based day programs and services;
 - B. employment as appropriate;
 - C. recreation;
 - D. medical, dental and health and mental health services which provide for accessibility, quality and continuity of care.
- xi. If the person has decision-making incapacity, the ISP will provide for decision-making by a guardian or other appropriate surrogate decision-maker.
- xii. For persons with physical disabilities, the ISP must provide for individualized adaptive equipment, as needed, based on appropriate professional evaluations of the need for such equipment.
 - A. An assessment of the need for adaptive equipment is completed within 30 days of a request therefor.
 - B. Acquisition and repair of adaptive equipment occur within 60 days from the date the need is determined, unless the District can demonstrate that the acquisition or repair of the adaptive equipment in a specific case was not reasonably possible due to circumstances outside its control, such as lack of availability of the equipment or repair service needed. In such cases, the District will make all reasonable efforts to provide such equipment or repair services as soon as possible.
 - C. Medical and dental services are being provided within professionally acceptable timeframes.
 - D. Class members are provided with one-to-one staffing when required by their ISP.

- xiii. All unmet needs of consumers are clearly identified in their ISPs whether or not services are currently available. An action plan formulated in accordance with professional standards is developed and implemented to meet those needs within professionally acceptable timeframes.
- xiv. Unmet needs of class members will be identified from various sources including but not limited to: ISPs; incident investigations; monitoring by support coordinators, plaintiffs, plaintiff-intervenor, the Court Monitor and the Quality Trust for Individuals with Disabilities; complaints; HRLA reports; MMIS (Medicaid) claims data; and provider performance reviews.
- xv. Every six months, such unmet needs will be aggregated and a report will be prepared analyzing the causes of those unmet needs to determine specific strategies and develop systemic plans, including necessary funding strategies, to address service delivery delays for class members. The report will be provided promptly to plaintiffs, plaintiff-intervenor, the Court Monitor, the Special Masters and the Quality Trust for Individuals with Disabilities. Funding strategies will be implemented within the next budget cycle.
- xvi. The completeness and appropriateness of all ISPs will be subject to Quality Assurance reviews at least annually.
- xvii. In the event that private providers do not comply with these performance expectations in paragraphs (i)-(xii), appropriate authorities within the District of Columbia government will take action necessary to ensure provider compliance, including the provision of technical assistance, or will impose sanctions designed to assure compliance, including, where necessary, termination of provider agreements, contracts and licenses, fines and termination of reimbursement arrangements.

c. Standard of Compliance¹⁰

High Compliance

¹⁰ The February 10, 1999 order provides that the plan should identify the degree of compliance that should be required for each of the standards recommended. *Id.*

d. Method of Assessing Compliance¹¹

- i. Review the computerized database to verify that annual ISP plans/reviews have been completed; that unmet needs have been identified in the semi-annual reports prepared by DDS/DDA; and that such needs have been incorporated into planning and budgeting processes.
- ii. Review Quality Assurance documents regarding compliance with ISP standards and for documentation of corrective actions, disciplinary actions and enforcement actions taken as needed to correct any identified problems.
- iii. Direct observation of a random sample of 10 percent of consumers' residential and day programs,¹² record reviews and interviews¹³ with consumers and families/guardians to determine the adequacy and appropriateness of their ISPs and services and supports provided to these persons.
- iv. Conduct interviews with case managers and advocates assigned to consumers in the sample above regarding the adequacy of the ISP process and the availability and appropriateness of services to consumers. Interviews with the Quality Trust staff should be included in the process.

2. Provision of Residential, Vocational and Day Services

a. Related Court Orders

¹¹ It also provides that the plan should identify the way in which compliance with such standards should be measured. *Id.*

¹² In this and other sections of the plan where sample sizes are described, when it is necessary to assess the services and supports to subsets of consumers where the numbers in the subset are too small for random sampling to be an appropriate methodology, purposive non-random selection of a sample of at least 25 cases will be utilized to assess services and supports to consumers in the subset. Such subsets shall include: persons needing adaptive technology; persons for whom restrictive control procedures are used; persons who reside in nursing homes or other large facilities; persons involved in serious incidents; and persons "at risk" due to serious medical conditions.

¹³ Where interviews are included among the methods of assessing compliance, the purpose of the interviews is to inform the reviewers of issues or concerns that require further investigation. The interviews may guide the reviewers to examine particular documents or other sources of information that are relevant to the issue of compliance. The reviewers shall make every effort to obtain independent verification of assertions made by respondents in the course of interviews.

- i. *Defendants must provide the class members with community living arrangements suitable to each, together with such community-based day programs and services in the least separate, most integrated and least restrictive community settings. (1978 Final Judgment and Order, section II.5. b)*
- ii. *Defendants shall provide at least five hours of programming daily to class members. Independent evaluation is required for those residents not receiving five hours of programming, with a projected date for the initiation of this requirement. (1983 Consent Order, section VIII.4)*
- iii. *Defendants shall plan to provide opportunities for alternative employment as necessary and appropriate, including training for employment in community programs. (1978 Final Judgment and Order, section II.7.h)*
- iv. *No class member shall be fed in any position less than the maximum upright position consistent with his or her capabilities and handicaps. (1978 Final Judgment and Order, section III.14.m)*
- v. *Each consumer shall receive a nourishing, well-balanced diet and assistance in development of proper eating habits. Denial of a nutritionally adequate diet shall not be used as punishment. (1978 Final Judgment and Order, section III.14.1)*

b. Specific Outcome Criteria for Determining Compliance

- i. All class members are served in day or employment programs that are the least restrictive, most integrated settings appropriate to their needs. Class members also are provided with adequate supports to allow their participation in integrated recreation and social activities in their communities.
- ii. No consumers are placed in or remain in large institutions or nursing homes inappropriately, or because appropriate community alternatives are not available.
- iii. Any placements into nursing homes or any other residential facilities serving more than eight people are preceded by an independent evaluation which supports such a placement.
- iv. Class members are fed according to their individual needs by adequately trained staff.
- v. Each class member has access to an adequate and nourishing diet. Class members have access to visitors, telephones and mail.

- vi. In the event that private providers do not comply with these performance expectations, appropriate authorities within the District of Columbia government will take action necessary to ensure provider compliance, including the provision of technical assistance, or will impose sanctions designed to assure compliance, including, where necessary, termination of provider agreements, contracts and licenses, fines and termination of reimbursement arrangements.

c. Standard of Compliance

High Compliance

d. Method of Assessing Compliance

Review of all placements of consumers in nursing homes and a 10 percent random sample of consumers in large congregate day programs and in residential programs to determine whether the placements comply with the criteria and procedures adopted in compliance with the Plan.

3. Staff Training

a. Related Court Orders

- i. *Defendants shall insure that all BCS [Bureau of Community Services] staff are trained in the concepts of delivery of services in the community and philosophy of normalization for mentally retarded persons. (1983 Consent Order, section IX.9)*
- ii. *Defendants shall require all staff currently assigned to any residential setting in which class members have been placed to attend training programs designed or approved by the defendants and complete its training on or before September 30 1983. Thereafter, defendants shall require all such staff to receive this training before commencing their duties. (1983 Consent Order, section 9.8) Appropriate training programs for all staff shall be developed and implemented. Such programs shall help ensure that each consumer is provided with habilitation and care in a safe, humane environment. (1978 Final Judgment and Order, section III.14.s; 1983 Consent Order, section IX.8; 1981 Consent Order, section 1.h)*
- iii. *Defendants shall submit a report to the Court Monitor and to the plaintiffs and the United States each quarter describing the training to be provided in the next quarter for all direct care staff, listing the staff who are to attend such training. (1983 Consent Order, section VIII.7; 1981 Consent Order, section 1.h)*

- iv. *Defendants shall recruit, hire and train a sufficient number of qualified community staff to prepare individual community habilitation plans for each consumer and upon completion of such plans to assist in the execution of the responsibility to create, develop, maintain and monitor the community living arrangements, programs and other services required. (1978 Final Judgment and Order, section II.7.c)*
- v. *Training programs shall be provided to staff who administer drugs to class members. (1978 Final Judgment and Order, section III.14.g)*

b. Specific Outcome Criteria for Determining Compliance

- i. The District has a system in place to ensure that all new employees assigned to residential and day treatment programs attend orientation and preliminary skill-training prior to assignment to a work site. All staff, including transportation staff, must receive on-going training throughout the course of their employment to develop, acquire or maintain the knowledge and skills required for their positions. No staff person may be permitted to undertake any direct care duties or responsibilities with consumers without direct supervision until they complete training and acquire required competence and pass competency tests.
- ii. All staff employed by the District and provider agencies will have attended required training programs and satisfactorily demonstrated competence in the skills required for the positions they hold (e.g., by passing a post-training test or evaluation to demonstrate the acquisition of the required skills).
- iii. All employees who are authorized to administer drugs are credentialed to do so after attending training programs and demonstrating their competence in the skills required for this responsibility (e.g., by passing a post-training test or evaluation to demonstrate the acquisition of the required skills).
- iv. All case managers are trained in individualized service planning and demonstrate competence in the skills required for their positions (e.g., by passing a post-training test or evaluation to demonstrate the acquisition of the required skills).

c. Standard of Compliance

High Compliance

d. Method of Assessing Compliance

- i. Review of documents to verify staff attendance at training and evidence of acquisition of competencies in the skills taught (e.g., passing scores in post-training tests).
- ii. Review of grievances and unusual incident reports and related investigations and other quality assurance documents to determine whether lack of training is identified as a cause of incidents and grievances, and if so, whether corrective actions were taken and were adequate.
- iii. Interview a random sample of 10 percent of consumers, their families, guardians and staff of the residential and day treatment programs regarding training issues.
- iv. Interview a random sample of advocates and case managers assigned to the consumers in the sample regarding staff competencies.

4. Restricted Control Procedures (Includes medications, use of restraints and time-out)

a. Related Court Orders

- i. Written policies and procedures governing the safe administration and handling of medications shall be established. (1978 and Final Judgment and Order, section III.14.h)*
- ii. Administering excessive or unnecessary medications to class members is prohibited. (1978 Final Judgment and Order, section III.14.d)*
- iii. Using medications as punishment, for the convenience of staff, as a substitute for programming, or in quantities that interfere with a class member's individual developmental program is prohibited. (1978 Final Judgment and Order, section III.14.e.)*
- iv. Monitoring of each class member's medications and provision for at least monthly review by a physician of each resident's medication are required. (1978 Final Judgment and Order, section III.14.i)*
- v. Only appropriately trained and qualified staff are permitted to administer drugs to class members. (1978 Final Judgment and Order, section III.14.)*

b. Specific Outcome Criteria for Determining Compliance

- i. All MR/DD consumers for whom Restricted Control Procedures are used have individualized behavior support plans.

- ii. Restricted Control procedures are used when alternative techniques have failed and only when they are determined to be the least restrictive alternatives.
- iii. Such behavior support plans clearly identify the proactive, positive approaches that will be used to minimize and/or ameliorate the need for control procedures.
- iv. No consumers are subject to PRN medication, seclusion, time-out, or use of aversives.
- v. If consumers are restrained, they will be checked every 30 minutes and a record kept contemporaneously with the check.
- vi. Defendants have developed and implemented a policy governing the safe administration and handling of medications.
- vii. When medication is used for sedation prior to medical appointments, desensitization plans describing the positive, proactive approaches that will be utilized to reduce the need for sedation, will be implemented.
- viii. All individualized behavior support plans will contain documentation, including a functional analysis of the target behavior and that adequate behavioral data was collected and considered prior to determining that Restricted Control Procedures are the least intrusive measures to address the specific behaviors, and authorizing the use of such procedures.
- ix. In all cases where psychotropic medications are used:
 - A. there is documentation in the record of a mental health diagnosis (DSM-IV);
 - B. there is documentation in the record of the intended effects and side effects of the medication;
 - C. there is documentation in the record of informed consent or substituted consent;
 - D. there is documentation in the record of a termination date for the prescription of not more than 30 days; and
 - E. the prescribing physician receives regular information regarding the effects of the medication to enable him/her to make a decision to reduce or discontinue the medication as warranted.
- x. An interdisciplinary team, including a physician, must complete a review of the use of psychotropic medications at a minimum of every 90 days, but the frequency of the reviews should be determined by the individual's clinical status.
- xi. A tardive dyskinesia screen, such as the AIMS, must be conducted and documented at baseline and every six months.

- xii. All persons who initiate the use of Restricted Control Procedures meet credentialing requirements and have met the training requirements in the policy.
- xiii. All the direct care staff who support consumers for whom Restricted Control Procedures have been ordered meet the training requirements in the Restricted Control policy, and have been trained on the individual behavior management plans. All such staff have received training in positive means of managing behavior.
- xiv. All cases in which Restricted Control Procedures have been initiated are reviewed annually by a DDS Review Committee and the results of such review are sent to the Court Monitor and Quality Trust.
- xv. In all cases where Restricted Control Procedures are to be initiated, DDS will provide the Court Monitor and Quality Trust adequate advance notice of the meeting along with the names of the consumers affected.
- xvi. When monitoring uncovers noncompliance with the policies by providers, prompt corrective action is taken to remedy the noncompliance. In the event of noncompliance that threatens the safety or well being of a consumer, the defendants will take whatever immediate action is necessary to protect the consumer, and to correct the deficiency including, where necessary, imposing sanctions to assure compliance, and/or termination of provider agreements, contracts and licenses.

c. Standard of Compliance

High Compliance

d. Method of Assessing Compliance

- i. Document review of a random sample of 10 percent of the cases, or 25 cases, whichever is more (see footnote 17), in which Restricted Control Procedures were used, to determine compliance with the policy.
- ii. Interviews with case managers and advocates assigned to the sample cases in which Restricted Control Procedures were utilized.
- iii. Interviews of the persons in the sample for whom Restricted Control Procedures were used, including interviews with their residential and day program staff, parents or guardians, and the clinicians who ordered the use of the control procedure.

B. GOAL-- CONSUMERS MUST BE KEPT FREE FROM HARM (1978 FINAL JUDGMENT AND ORDER, SECTION I.2)

a. Related Court Orders

- 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)*

b. Specific Outcome Criteria for Determining Compliance

- 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 MRDD 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 takes appropriate action for prevention and correction.
- x. The Court Monitor and the Quality Trust receive 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 receive 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.
- viii. 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.

c. Standard of Compliance

High Compliance

d. Method of 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 QT, 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 10 percent sample of residential and day program sites to ensure that all incidents are being reported in compliance with the policy.

C. GOAL-- SAFEGUARDING EACH CONSUMER 'S PERSONAL POSSESSIONS (1978 FINAL JUDGMENT AND ORDER, SECTION II.7.G; 1983 CONSENT ORDER, SECTION VII)

a. Related Court Orders

- i. Defendants shall submit a plan to safeguard each class member's personal possessions including money, including but not limited to provision for depositing each class member's funds in an interest-bearing account and for withdrawal of such funds. (1978 Final Judgment and Order, section II.7.G.)*
- ii. Defendants shall provide the Court Monitor and plaintiffs each year a report detailing status of the defendants' plan for safe keeping the funds of all class members. (1983 Consent Order, section VII)*

b. Specific Outcome Criteria for Determining Compliance

- i. All consumers have individual consolidated, interest-bearing accounts.
- ii. Consumers are remunerated in full for all monies to which they are entitled.
- iii. Consumers' funds and personal possessions are safeguarded.
- iv. All ISPs have an individual financial plan that accurately reflects each consumer's financial status and describes a plan for the use of existing and/or anticipated funds based on the individual's preferences. IFPs also describe the supports each consumer requires to manage his/her funds in the least restrictive manner possible.
- v. Annual audits are performed of each consumer's account and the results forwarded to the Court Monitor and the Quality Trust.

c. Standard of Compliance

Significant Compliance

d. Method of Assessing Compliance

Review of relevant documentation for a random sample of 10 percent of the consumers' accounts, including ISPs and IFPs.

D. GOAL-- MONITORING (1978 FINAL JUDGMENT & ORDER, SECTION II.5.D)

1. Case Management

a. Related Court Orders

- i. Defendants shall provide all necessary and proper monitoring mechanisms to assure that community living arrangements, programs and supportive community services of the necessary quantity and quality are provided and maintained. (1978 Final Judgment and Order, section II.5.d)*
- ii. Defendants shall recruit, hire and train a sufficient number of qualified community staff to prepare individual community habilitation plans for each consumer and upon completion of such plans to assist in the execution of the responsibility to create, develop, maintain and monitor the community living arrangements, programs and other services required. (1978 Final Judgment and Order, section II.7.c)*
- iii. The defendants shall exert their maximum efforts to fill each staff vacancy at the Bureau of Community Services within sixty days from the time such vacancy occurs. Vacancies shall be filled with qualified personnel. (1981 Consent Order, section I.A)*

b. Specific Outcome Criteria for Determining Compliance

- i. Case managers and their supervisors have successfully completed the required competency-based training. Case managers participate in the development of the ISPs for all consumers on their caseload.
- ii. Case managers ensure that the consumers on their caseload receive all of the services and supports identified on the ISPs, and where problems are encountered in obtaining access or in the quality or timeliness of the receipt of services and supports, that they document them, attempt to resolve them and, where appropriate, make prompt referrals to the Court Monitor and the Quality Trust for assistance in resolving the problem expeditiously.
- iii. In all cases where a consumer on their caseload has been the subject of an incident or a recommendation for corrective or preventive action, the case manager follows up to ensure implementation of appropriate actions for the safety and protection of the consumer.

- iv. Defendants maintain a case management caseload of 1:30. Defendants may create lower ratios for individual case managers based on a determination of the intensity of needs for case management services by the consumers on the caseload.

c. Standard of Compliance

High Compliance

d. Method of Assessing Compliance

- i. Review the case manager roster to determine compliance with the caseload ratios and with criteria for assignment of individual case managers to lower ratios.
- ii. Review training logs to determine that all case managers have completed required training and demonstrated required competencies.
- iii. Review the records of a random sample of 10 percent of the consumers served to determine the adequacy of case manager services, interview the advocates assigned to these persons, as well as residential and day program staff and families/guardians.

2. Quality Assurance Program & Fiscal Audits

a. Related Court Orders

- i. Defendants are enjoined to provide all necessary and proper monitoring mechanisms to assure that community living arrangements, programs and supportive community services of the necessary quantity and quality are provided and maintained. (1978 Final Judgment and Order, section II.5. D.)*
- ii. Defendants shall prepare a plan for the creation, development and maintenance of mechanisms to monitor a system of community services to assure the community living arrangements, programs and other services of necessary quality and quantity are continuously provided to class members in the least separate, most integrated, least restrictive settings. (1978 Final Judgment and Order, section II.7.d)*
- iii. The Bureau of Community Services and the Developmental Disabilities Professional shall regularly monitor each and every community placement to ensure that residential arrangements and programming are provided*

appropriate to the individuals need and shall document the results of such monitoring. (1981 Consent Order, section 4.D)

b. Specific Outcome Criteria for Determining Compliance

- i. An annual plan of monitoring is prepared and implemented, monitoring the safety, quality and effectiveness of services and supports to consumers. Quality Assurance recommendations for prevention, correction and improvement are implemented and documented.
- iii. Implementation of the Quality Assurance recommendations is monitored by quality assurance staff or case managers and is documented.
- iii. When monitoring uncovers noncompliance with required standards by providers, prompt corrective action is taken to remedy the noncompliance. In the event of serious noncompliance that threatens the safety or well-being of consumers, the defendants will take whatever immediate actions are necessary to protect consumers. Such actions shall include measures to correct the deficiency, including training and technical assistance for provider staff, relocation of consumers to appropriate short-term respite facilities which can provide for individual support and service needs, and their health and safety, and/or the use of sanctions to ensure compliance with standards including the termination of provider agreements, contracts and licenses.
- iv. In addition, see the section on Protection from Harm and case management.

c. Standard of Compliance

High Compliance

d. Method of Assessing Compliance

- i. Review of Quality Assurance documents (i.e., aggregate reports, recommendations made by Quality Assurance staff and committees, documentation of follow up action for prevention and correction, Fatality Review Committee minutes and reports, etc.).
- ii. Review of the annual Quality Assurance plan and implementation activities.
- iii. Review of corrective and enforcement actions initiated as a result of Quality Assurance activities.
- iv. Interviews with case managers and advocates assigned to a random sample of

10 percent of the consumers, as well as consumers, families and guardians, regarding the Quality Assurance program.

F. GOAL -- ADEQUATE BUDGET (1981 COURT ORDER, SECTION 2.D)

a. Related Court Orders

- i. Each fiscal year, the defendants shall submit to the parties and the Court a report which shall detail the resources affecting class members (including the numbers and types of staff, the amounts and types of supplies and equipment, the numbers and types of vehicles, and all other resources provided for in the budget submission) which the budget would provide if fully funded. The report shall be accompanied by the most recent needs assessment and shall be in a format which permits ready comparison of resources needed versus the resources sought. If the budget seeks less resources than needed by class members, the report shall explain the reason therefor and how and at what future date the defendants propose to obtain the additional resources required. Nothing herein shall preclude the plaintiffs from contending at any time that defendants are required, at that time, to seek sufficient resources to meet all identified needs. (1981 Court Order, section 2.d.)*
- ii. If the plaintiffs or the Court Monitor believe that the report is not complete, the defendants must re-submit the report in an agreed-upon fashion within fifteen days. (1983 Consent Order, section II.3.)*
- iii. Every six months, 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 IHPs; and 3) a listing of all habilitation needs indicated in the IHPs of MRDDA clients for which service has not been provided or is not available. (1996 Remedial Plan, section III)*

b. Specific Outcome Criteria for Determining Compliance

- i. Defendants will maintain a ratio of one service coordinator for every 30 consumers; retain sufficient staff for investigations of incidents to meet a ratio of 10 investigations per month per investigator; and retain sufficient staff capacity to conduct eight provider certification reviews per month.*
- ii. As specified under Goal A (1), every six months, unmet needs will be aggregated and a report will be prepared analyzing the causes of those unmet needs to determine specific strategies and develop systemic plans, including*

necessary funding strategies, to address service delivery delays for class members. Funding strategies will be implemented within the next budget cycle. Defendants will maintain sufficient budget to allow the transition of class members to the Medicaid waiver as recommended in the ISP process.

c. Standard of Compliance

Full Compliance

d. Method of Assessing Compliance

Actual provision of this information to the Special Master, Court Monitor, plaintiffs and plaintiff-intervenor or their successors as described above for two successive years, demonstrating that the staffing ratios and computerized ISP process are being utilized to determine the budget for the support of DDS/DDA consumers.

* * *

Pursuant to the Court's directive to the Special Master in June 2010 and with agreement of the parties to this action indicated below, the Special Master and the parties submit and recommend approval of the foregoing amendment to the 2001 Plan for Compliance and Conclusion of *Evans v. Fenty*.

Respectfully submitted,

CLARENCE J. SUNDRAM
SPECIAL MASTER

For the Plaintiffs:

CATHY E. COSTANZO (MA Bar 553813)
Center for Public Representation
22 Green Street
Northampton, MA 01060
413-586-6024

SANDY BERNSTEIN (D.C. Bar 455355)
University Legal Services
220 I. Street, N.E.
Suite 130

Washington, D.C. 20002
(202) 547-0198

PAUL J. KIERNAN (D.C. Bar 385627)
STEPHEN F. HANLON (D.C. Bar 481751)
LAURA FERNANDEZ (D.C. Bar 500258)
Holland & Knight, LLP
2099 Pennsylvania Ave., N.W.
Suite 100
Washington, D.C. 20006
(202) 663-7276

For the Plaintiff Intervenor:

JUDY C. PRESTON
Acting Chief
Special Litigation Section

MARY R. BOHAN
Acting Deputy Chief
Special Litigation Section

WILLIAM G. MADDOX (D.C. Bar 421564)
Senior Trial Attorney
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave, NW
Washington, D.C. 20530
(202) 514-6255
William.maddox@usdoj.gov

For the Defendants:

PETER J. NICKLES
Attorney General for
the District of Columbia

GEORGE C. VALENTINE
Deputy Attorney General

Civil Litigation Division

ELLEN EFROS
Chief, Equity I (D.C. Bar 250746)
Office of the Attorney General, DC
441 Fourth Street, N.W.
6th Floor
Washington, District of Columbia 20001
(202) 442-9886