UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

OSCAR SALAZAR, JR. et al., on behalf of and all others similarly situated,	
Plaintiffs,	Civil Action No. 93-452 (GK)
v.	
DISTRICT OF COLUMBIA et al.,	
Defendants.	

FILED

SEP 17 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM-OPINION

Plaintiffs have filed a Motion for an Order Pursuant to Paragraph 48(d) of the Settlement Order, requesting the Court to declare that the Defendants are not in compliance with the participant ratio for 1999 and directing them to complete those activities set forth in Table 3 of the Monitor's Report. Upon consideration of the Motion, Opposition, Reply, the Monitor's Report, and the extensive record amassed in this case, the Court concludes that the Motion should be **granted in part** and **denied in part**.

Dr. Henry Ireys is the Court-appointed Monitor in this case. At the request of Plaintiffs made pursuant to Paragraph 48(c) of the January 25, 1999, Order Modifying the Amended Remedial Order of May 6, 1997, and Vacating the Order of March 27, 1997 ("Settlement Order)", he submitted a Report on June 18, 2001, on "whether it would be reasonable and effective to direct the Defendants to take

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further actions that are consistent with the MCO contracts". In response to that Report, as provided in Paragraph 48(d) of the Settlement Order, Plaintiffs have responded by filing the pending Motion, and Defendants have responded by filing the Opposition thereto as well as by filing separate comments with the Monitor.

As already noted, Plaintiffs ask the Court to enter an Order deeming the Defendants to have failed to meet their participant ratio goal of 60% for 1999 under the Settlement Order. Defendants argue that "the clear implication of the language of Paragraph 48(d) is that the District remains in compliance with the participant ratio for 1999 unless it is reasonable and effective to direct further actions consistent with the MCO contracts", Defs' Opp. To Pltfs' Mtn at 2-3.

Throughout its oversight of this case, the Court has been meeting with counsel, the Monitor, and various District employees at the Department of Human Services, the Income Maintenance Administration, and the Department of Health, on a regular, informal, and off-the-record basis to try, by use of a non-adversarial process and environment, to achieve compliance with the Settlement Order. The Court is fully aware of what a daunting, massive, and technologically difficult task that is.

Over time, and this case has been under the Court's supervision since January 1997 when the first Remedial Order was entered, the District has gradually made greater commitments of

staff and resources to achieve the goal of providing federally-mandated early periodic, screening, diagnostic and treatment services to poor children in the City. District employees, at all professional and non-professional levels, have diligently worked many, many hours trying to create a computer and data collection system that will give us accurate and reliable information, have participated in the RFP process to ensure that MCOs would be contractually bound by the operative Orders in this case, have developed outreach programs to bring more children and families under the Medicaid umbrella, and have developed provider training programs to ensure that MCOs and their providers understood and complied with their EPSDT obligations. In short, the Court believes that the District has made a conscientious effort to comply with the operative Orders in order to achieve the participant ratios set forth in the Settlement Order;[1] indeed, significant requirements contained in the Remedial Orders of March 27, 1997, May 6, 1997, and January 25, 1999, have been met (see Paragraphs 74, 75, and 76).

Giving all due credit to the efforts made by the Defendants,

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[1] Of course it should be remembered that the District has a significant incentive to meet those participant ratios. Under Paragraph 77 of the Settlement Order, this Court's jurisdiction and oversight will cease when Defendants have reached a participant ratio for 3 consecutive years, beginning no earlier than fiscal year 1999, which meets the participant ratios contained in Paragraph 48(a) and the participant ratio is no less than 75% for the last of the 3 years.

the simple fact is that there is no evidence whatsoever that they met the required 60% participant ratio in fiscal year 1999. The main reason for that conclusion is that, despite all the work and effort just noted, there is simply, and sadly, no accurate data on which to rely. Defendants have prepared at least three different versions of the HCFA Form 416. Those forms have given participant ratios ranging from 38% to no more than 55% at best. What is even more disturbing is that Delmarva Foundation performed a medical records review in late 2000 which could document only an 11% participant ratio.

Not only is this Court in no position to conclude that the Defendants have met the 60% participant ratio requirement, but Defendants have not even submitted documentation which would support any finding above 55% In sum, it is perfectly apparent that there is no evidence to justify a finding that the 60% participant ratio was achieved.

The next question under Paragraph 48(d) of the Settlement Order then becomes whether "directing further actions consistent with the MCO contracts would be either unreasonable or ineffective in achieving a participant ratio meaningfully higher than in the previous year." Plaintiffs submit that it would be both reasonable and effective for the Court to adopt all 13 of the recommendations made by the Court Monitor and to embody them in a formal court order; Defendants oppose that request.

The Court has carefully considered this request and has concluded, for the following reasons, that some of the recommendations or variations thereof would be both reasonable and effective mechanisms for determining whether the participant ratios set forth in the Settlement Order have been reached, and for achieving that objective.

1. Accurate and reliable information is the sina qua non of any enforcement or monitoring system. In this case, the basic building block for such a system is the uniform encounter form. While Defendants have finally developed such a form--and it is a good one which captures much basic, essential data--the fact of the matter is that not only did it take an inordinately long time to develop and finalize it, but its testing and implementation by the Defendants and their contractually obligated MCOs are way behind schedule. Defendants originally promised, back in August 2000, that Medicaid providers would be trained how to use and process the encounter form in October --December 2000, and that the system would be up and running by January or February 2001. By May 2001, the Defendants were estimating the provider training would not be conducted until September 2001--January 2002, and that the system would not be fully up and running until June or July 2002.

In short, there has already been an 18-month delay in what is the single most essential component for achieving compliance with the Settlement Order's central requirement, in Paragraph 37, that

a tracking system be implemented. Without a tracking system, which must be built around a uniform encounter form, there can be no accurate information about the actual participant ratio for any given year and, therefore, no reliable method for determining whether Defendants have met the requirements for terminating the Court's oversight and jurisdiction. Consequently, pursuant to Paragraph 48(d) of the Settlement Order, the Court concludes that it will be reasonable and effective to order Defendants to require testing and implementation of the uniform encounter form by a date certain, and will so order.

2. The Court Monitor has recommended that Defendants participate in a process to establish objectives for age-specific participant ratios, in order to increase the over-all participant ratio. As the Monitor noted in his Report at 10, "[p]articipation ratios, and the strategies needed to enhance them, vary by age group. Adolescent participation ratios are known to be especially low[2]...Several of the persons interviewed for this report indicated that more attention was needed on developing age-specific objectives for participation ratios. Establishing reasonable gradients for improvement in age-specific participation ratios over the next 3 to 5 years will allow for more focused action".

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[2] It should be noted that we have direct evidence in this case supporting that observation. Defendants' HCFA forms 416 for both 1999 and 2000 show that relatively lower percentages of adolescents obtain at least one EPSDT screening per year, as compared to children 6 to 9 years old.

For understandable and sound public health reasons, much emphasis has been placed on providing preventive EPSDT services for infants, toddlers, and grammar school children. Moreover, it is more difficult to get older children, particularly teenagers, to doctors for preventive care and periodic check-ups. However, in these days of widespread problems with AIDS, STDs, teenage pregnancies, tuberculosis, etc., the preventable health problems of children in the 10 to 20-year old categories can no longer be ignored or down-played.

Given these considerations, as well as the fact that in fiscal year 2001, Defendants will be held to a much higher standard for measuring the participant ratios of those in the 10 to 20-year old category (namely an annual rather than biannual EPSDT screening), the Court concludes, pursuant to Paragraph 48(d) of the Settlement Order, that it will be reasonable and effective to identify and evaluate Defendants' specific strategies to enhance participant ratios in each age category, and will so order.

3. The Court Monitor has recommended that Defendants require the MCOs to implement provider education programs, and has suggested a variety of formats and types. As Plaintiffs point out, Paragraph 41 of the Settlement Order requires Defendants to "ensure that the MCOs train all EPSDT providers, during the first year of the contract and at least biannually thereafter, about the current requirements for EPSDT". This has not happened. While Defendants

are definitely in the process of implementing this requirement, it appears that the training does not reach all EPSDT providers and that it is voluntary. Consequently, the Court concludes, pursuant to Paragraph 48(d) of the Settlement Order, that it will be reasonable and effective to update and identify current training opportunities, and evaluate their success in increasing provider knowledge of EPSDT requirements, and the Court will so order.

4. Perhaps the most worrisome and troubling finding of the Court Monitor is contained in the last paragraph of his Report at 11.

> In sum, the EPSDT staff in the DOH is extremely thin in relation to the potential opportunities for enhancing participation ratios. Progress in implementing many important activities is slow. To assure that participation ratios are maximized to the extent possible, the DOH needs staff with experience in all key areas. In addition, it must have staff who can devote all or most of their time to addressing the complex challenges of assuring that Medicaid-enrolled children in the District receive the well child services that they are due.

In response, Plaintiffs emphasize their concern about this issue and point out that given the level of funding for the Department of Health and the number of authorized employees, there should be sufficient budget and staff for administration of the EPSDT program.[3] The Court shares this concern. In addition to the fact that no one person has sole responsibility for the DESDT

[3] Plaintiffs assert that the cost of additional staff would be partially reimbursed by the federal government, at either 50% or 75% of cost.

program, DOH has recently lost Dr. Samia Altaf, who was a most dedicated, effective, and experienced administrator.

DOH has recently hired Ms. Heather McCabe, who appears to have very relevant experience and skills. She heads up the Office of Children & Families which has primary responsibility for the EPSDT program, but that program is not her sole responsibility. She is entitled to four staff members, but those slots are not yet filled, although two have been advertised, and two will be shortly. Thus, while far more resources are being allocated to administration of the program than when this case was first tried back in 1996, there is ongoing concern about both the sufficiency of staff and the diversion of staff to other duties.

Plaintiffs have asked that DOH be ordered to submit a detailed report on the staffing of the EPSDT program. While the Court is very sensitive to the Defendants' concerns about encroachment on its executive prerogatives, and has no intention of micro-managing the Department of Health, submission of such a report can hardly be considered burdensome. Consequently, the Court concludes, pursuant to Paragraph 48(d) of the Settlement Order, that it will be reasonable and effective to submit such a report, and the Court will so order.

5. There are a number of other specific recommendations made by the Court Monitor in his Report which the Court has not directly addressed. For various reasons, the Court concluded that they were

not appropriate for inclusion in a formal Order. That does not mean that they are not good ideas worthy of implementation, and the Court hopes that Defendants will view them in that light.

WHEREFORE, it is this 14th day of September 2001, hereby

ORDERED, that the Defendants shall, no later than October 15, 2001, submit a timeline, specifying dates for testing and final adoption and implementation of the uniform encounter form by MCOs; that timeline shall require MCOs to complete testing of the uniform encounter form no later than January 1, 2002; the Department of Health shall, no later than February 1, 2002, submit a report on the results of such testing and the implications for final adoption and implementation of the uniform encounter form by MCOs; and it is further

ORDERED, that Defendants shall develop and submit a report, no later than March 15, 2002, on specific strategies to be adopted by the MCOs, for enhancing age-specific participant ratios over the next 3 years; and it is further

ORDERED, that Defendants shall submit a report, no later than May 15, 2002, updating the status of provider education programs; in particular, Defendants shall describe all current activities, shall describe plans for all future activities, and shall evaluate the success or failure of those educational activities which have taken place in terms of increasing provider knowledge and understanding of EPSDT requirements; and it is further

ORDERED, that Defendants shall submit a detailed report, no later than November 15, 2001, describing the staffing of the EPSDT program, including in particular the number of positions, and their grade level, assigned to the Office of Children & Families for administration of the EPSDT program; identification of each staff member with a description of all their duties in addition to those relating to administration of the EPSDT program; the training, education, and experience of all staff members; the number of unfilled positions and the timetable for filling them; and the percentage of federal reimbursement, if any, available for the positions assigned to the Office of Children & Families for administration of the EPSDT program.

Sept. 14, 2001
DATE

Gladys Kessler
GLADYS KESSLER
United States District Judge

Copies mailed to:

Bruce J. Terris
Kathleen L. Millian
Lynn E. Cunningham
Terris, Pravlik & Millian
1121 12th Street, N.W.
Washington, D.C. 20005

Robert C. Utiger
Office of Corporation Counsel
441 4th Street, N.W.
Room 62096
Washington, D.C. 20001

Peggy Massey
Linda Dean
Department of Human Services
801 East Building
2700 Martin Luther King Ave, SE
Washington, D.C. 20032

Nan Reiner
Wanda Tucker
825 N. Capitol St. NE
Rm. 4120
Washington, D.C. 20002

Henry T. Ireys, Ph.D.
Court Monitor
Mathematica Policy Research, Inc.
600 Maryland Avenue, SW
Suite 550
Washington, DC 20024-2512