

**COLD, HARSH, AND UNENDING RESISTANCE:
THE DISTRICT OF COLUMBIA GOVERNMENT'S
HIDDEN WAR AGAINST ITS POOR AND ITS HOMELESS**

A REPORT BY
THE WASHINGTON LEGAL CUNIC
FOR THE HOMELESS
Washington, D.C.

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November 22, 1993

Since 1986, the Washington Legal Clinic for the Homeless has provided assistance to families and individuals who are homeless or at risk of homelessness in the District of Columbia. Founded on the principle of making free legal services easily accessible to its clients, the Legal Clinic, through more than 250 volunteers from over 130 law firms and organizations, takes its services into the community -- seeing clients at ten different shelters, soup kitchens and day centers on a weekly or bi-weekly basis. While many of its clients seek assistance with public benefits, shelter, and other poverty law issues, many others present questions stemming from a wide range of civil legal matters.

Since its inception and as a result of its direct service work, the Legal Clinic's initial role has broadened. Through first-hand knowledge acquired through contact with homeless clients, the Legal Clinic has identified systemic problems and mobilized resources to address them. This work has made the Legal Clinic a major force in protecting the rights of people who are poor or homeless in the District of Columbia.

The Legal Clinic's systemic advocacy takes many shapes: class action litigation, administrative and legislative advocacy, and community coalition work. The Legal Clinic is uniquely positioned to pursue in any number of arenas the best possible solution for its clients' needs. It has been involved in lawsuits challenging conditions in and closings of shelters, cut-backs in public benefits, and improper implementation of the food stamp and public housing programs. It has provided testimony to both the D.C. Council and Congress about the shelter and permanent housing needs of those it serves. The Legal Clinic has worked in coalition with other providers of services to homeless people to provide the best possible services to its clients.

In April 1993, the work of the Legal Clinic was honored with a citation from President Clinton in the President's Volunteer Action Awards Program.

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The Washington Legal Clinic for the Homeless

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INTRODUCTION AND SUMMARY

COLD, HARSH, AND UNENDING RESISTANCE:
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INTRODUCTION AND SUMMARY

To paraphrase Shakespeare's Richard III, this has surely been the "Autumn of Our Discontent." In the early Fall, District residents were collectively stunned by a crescendo of violent activity culminating in two illustrative and chilling acts of wanton conduct. A four year old girl was fatally wounded by random gunfire while watching a pick-up football game at a Southeast elementary school. Almost simultaneously, there was a brutal armed robbery -- graphically captured on a hidden video camera -- of a jewelry store on Georgia Avenue. Three gun-wielding thugs pistol-whipped clerks and fired shots into the back of the store owner laying prone on the floor. By late October, the District had declared a "crime emergency." On November 1, 1993, The Washington Post ran a front-page story, "Getting Ready to Die Young," which focused on dozens of District of Columbia youngsters, so conditioned to fatal, random acts of violence that they have carefully planned their own funerals. On Sunday, November 7, 1993, the Post ran a front-page story sadly demonstrating these children's foresight. The article concerned a young father, who, when suddenly forced to stop his car at night in Anacostia, grabbed his one year old daughter to escape. While running away from their pursuers, the father was shot in the back and the head, and his daughter was hit in the leg, probably by a bullet that passed through her father's chest. The article reported that "[r]escuers had to pry the wailing child from [her

father's] grasp" and that "[t]he shooting was one of seven attacks during five hours Friday night that left four people dead and nine wounded. Three of the dead were teenagers"^Y On November 5, 1993, the Post reported that a young woman brought up in D.C.'s foster care program fatally beat her two year old niece. Although the child was not in a foster care placement at the time, she was an at-risk child and, therefore, coincidentally would have been a member of a class action suing the District for its grossly inadequate foster care services. Neighbors reported having made repeated calls to warn of possible child abuse to the Department of Human Services' child protective services unit and the youth division of the police department.

Mayor Sharon Pratt Kelly has responded to these violent episodes with a series of short-term crime fighting measures, including unsuccessfully requesting from the Federal government the right to call out the National Guard. However, the most insightful comment about the violence came from D.C. Police Chief Fred Thomas. He called the D.C. Government's plans to respond to the recent violence no more than

"[a] quick fix. [The problems] will be back next week, next year, because we're not getting at the core of the problem. Until we get at the core . . . the apple will continue to rot." Remarks of D.C. Police Chief Fred Thomas at Ward 3 Anti-Crime Armory (WJLA, September 29, 1993, 11 p.m. News).

The "core," according to the police chief, are the adverse social and economic conditions within the District leading to crime. Short of leading to crime, these conditions, borrowing from the words of Federal District Judge William B. Bryant, certainly "degrade and

^Y See also Castenada, "Baby Who Was Injured In Shooting Goes Home," The Wash. Post, Nov. 10, 1993, at D3.

dehumanize" individuals to such an extent that they are lost as productive and contributing members of society.

This Report by the Washington Legal Clinic for the Homeless ("Legal Clinic"), to use the words of Chief Thomas, deals with "core" problems. It concerns the District's refusal and/or inability to administer its own social programs to ensure that poor families and especially poor children are properly cared for and properly sheltered. The Report is about District-funded shelters in which individuals and families needlessly lived among rats, lice, and scabies; in beds with unwashed blankets stained from human excrement and blood and pus from open sores; and with toilets clogged and backed up into living areas. It concerns the District's failure to access millions of dollars of federal funds for housing rehabilitation while hundreds of vacant District-operated housing units remain empty and families needlessly spend winter nights in the freezing cold. It is about homeless children who cannot get to the public schools because of the District's refusal to provide the required transportation. It is about Food Stamps and Medicaid benefits being improperly withheld while poor families and children go hungry and suffer from life-threatening diseases. It concerns children who are improperly shelved for years in the District's foster care system, and in juvenile detention facilities crawling with snakes and vermin. It is about the District's prisons, which, because of negligent administration, have, among other things, become a prime breeding ground for drug abuse, local tuberculosis, AIDs, and hepatitis epidemics. In short, this Report shows that, through gross maladministration, there has been a complete breakdown in the District's provision of social services, the result of which is the dehumanization and degradation of thousands of District residents, some of whom

are robbed of the opportunity to function as fully productive participants in the District. In sum, the "core" is thoroughly "rotten."

The Report examines all of these problems through the prism of litigation brought by poor and homeless residents of the District against the D.C. Government. The litigation concerns, inter alia, homeless shelters, public housing, emergency assistance, Food Stamps, Medicaid, public benefits, school transportation, foster care, prisons, mental health services, and juvenile facilities. These cases highlight the District's long-standing serious shortcomings in its provision of social services, as well as its enormous waste of scarce resources, and the attempts of the victims of these deficiencies to seek redress in a peaceful manner through negotiation and judicial intervention. The Legal Clinic has received the help of dozens of D.C. lawyers who have prepared, or assisted in the preparation of, case summaries in this Report examining well over 30 lawsuits against the District.

The case summaries include harsh criticisms from dozens of Federal and local judges uniformly excoriating the District Government for its handling of social programs. Examples of the judges' comments are:

- "The District's dereliction of its responsibilities to the children in its custody is a travesty."Y "[D]efendants have failed to exercise professional judgment"3/
- "The conditions in which inmates are housed at the D.C. Jail constitute cruel and unusual punishment These are conditions which turn men into animals, conditions which degrade and dehumanize. . . . Imprisonment in conditions such

Y LaShawn A. v. Dixon, 762 F. Supp. 959, 998 (D.D.C. 1991), aff'd and remanded, 990 F.2d 1319 (D.C. Cir. 1993) (Hogan, J.) (emphasis added).

3/ Id. at 977.

as these absolutely guarantees that the inmates will never be able to return to civilized society, will never feel any stake in playing by its rules."^{4/}

- "[N]othing is done except at the end of a cattle prod ... [T]he cattle prod is a motion for contempt.S'
- "The [children housed in the District's detention facilities] are housed in institutions in which lawless behavior by those responsible for caring for, and protecting, them is tolerated.Y
- The District's homeless shelters are "virtual hell-holes.v" The steps taken by the District to remedy the problems with District shelters were "executed so slowly and/or ineptly that they create problems at least as bad as those they were meant to resolve; other such steps were only taken in response to this lawsuit; and even those steps started earlier are the classic example of 'too little and too late.'"^{8/}
- "[District] [d]efendants' continued wholesale violations of Order B [mandating the development of a continuum of care plan] are discouraging to the Court, dangerous for the citizens

Inmates of DC Jail v. Jackson, 416 F. Supp. 119, 122-23 (D.D.C. 1976) (Bryant, J.).

^{5/} Campbell v. McGruder, C.A. No. 1462-71, and Inmates of D.C. Jail v. Jackson, C.A. No. 75-1668, Transcript of Hearing on Plaintiffs' Motion for an Order to Show Cause Why the Defendants Should Not Be Held in Contempt at 10 (D.D.C. Apr. 6, 1993) (characterizing the District's own description of its efforts to comply with court orders to remedy conditions at the Jail) (Bryant, J.).

^{6/} Jerry M. v. District of Columbia, C.A. No. 85-1519, Mem. Order P (Apr. 30, 1993) (adopting Special Master's report, In re: Staff Physical Abuse at 2, finding staff physically abuse juveniles despite prohibition of such abuse in 1986 decree) (Urbina, J.).

^{7/} Atchison v. Barry, C.A. No. 88-1976, Supplemental and Expanded Findings of Fact at 5 (D.C. Super. Ct. Jan. 12, 1989) (emphasis added) (Taylor, J.).

^{8/} Id. at 9.

of this city, and most importantly, neglectful and wasteful insofar as the plaintiff class is concerned."^{9/}

- In response to court-ordered reports depicting health care at the D.C. Jail as "deplorable and 'at times dangerous'" and its infirmary as "filthy and roach-infested," the Court ordered the District government to improve medical and mental health services at the Jail "within five working days."^{10/}

In response to these criticisms, the District has repeatedly argued that it is without the funds necessary to correct these deteriorating conditions. There can be no dispute that financial resources are scarce, a situation aggravated by Congress' unfortunate failure to give the District of Columbia full voting representation in the Senate and the House. Yet the Report's case summaries graphically demonstrate that a lack of financial resources is rarely the determinative problem in any individual piece of litigation. For example, the summaries chronicle situations where the District has failed to seek or qualify for hundreds of millions of dollars already appropriated for social services.

- At the time of the trial in the foster care case, the District was losing about \$14 million a year in federal funds because it had failed to establish eligibility under the Adoption Assistance and Child Welfare Act, and \$7 million because it had failed to establish and maintain Medicaid eligibility for children in its care. (LaShawn A., p. 34)!!! "[T]he District is currently losing millions of dollars in available federal funds because of its serious management and systematic deficiencies." LaShawn A., supra, 762 F. Supp. at 980 (Hogan, J.).

^{9/} Jerry M., supra, Mem. Order J at 50 (Aug. 21, 1991) (commenting on the District's failure to develop community-based programs as less restrictive confinement alternatives for juvenile offenders) (Urbina, J.).

^{10/} "Judge Gives D.C. Jail 5 Days to Improve Inmate Health Care," The Wash. Post, Nov. 11, 1993, at D3; Campbell and Inmates of D.C. Jail, supra, Order (Nov. 9, 1993) (Bryant, J.).

!!! Citations to "____, p. ____" are to the various case summaries included in this Report.

- The night before the hearing on a preliminary injunction that would have required the District to comply with federal law and place eligible families in shelter, the District retroactively withdrew its local emergency shelter program from the Federal Emergency Assistance program. This mooted the preliminary injunction because the District was no longer subject to federal law, but it also resulted in a loss by the District's own estimate of \$1.4 million a year in federal shelter funds. (WLCH v. Kelly, p. 64.) Our estimate is that the District will lose at least \$2.5 million.
- The District has failed to obtain federal reimbursement for Emergency Assistance expenditures for which it could be eligible. According to HHS documents, the District routinely files for reimbursement two years late, and HHS defers payment until it can audit District records. Thus, almost \$5.7 million in federal reimbursement for fiscal year 1991 has been deferred. In addition, as of August 1993, the District had not yet applied for federal reimbursement for fiscal year 1993, and it only recently applied for reimbursement for fiscal year 1992. (Feeling v. Barry, pp. 199-200.)

In other cases, the District has failed to obligate or spend existing funds for social services programs. The District's administration of its public housing program presents what may be the worst example of its failure to use existing resources.

- In the litigation concerning vacant public housing units, it was shown that over 2200 units, 19% of all D.C. public housing units, are vacant while more than \$158 million in funding designated to eliminate the vacancies is unobligated and unspent. (Pearson v. Kelly, p. 120.) By way of contrast, HUD figures show that 3% of public housing units nationwide are vacant with only 1% of available units in New York City vacant. Moreover, in the District, vacant units remain empty for an average of 1,033 days versus HUD's standard of 30 days. (Id.) The District's problem is compounded because, as Federal auditors have estimated, the vacant public housing units cost the District \$4.8 million in lost rental income in 1992 alone. (Id. at 122.)

Finally, other cases document frivolous and wasteful financial practices.

- The 1990 Rivlin Commission, established to study the District's financial crisis, concluded that the District was providing education, health and social services too expensively, and was not taking full advantage of available federal funding. The Commission's recommendations would have created savings of \$64.9 million in the first year and \$511.9 million over five years in the administration of education, health and social services. (Quattlebaum v. Kelly, p. 221.)
- By 1991, the District had the highest administrative costs of any AFDC program in the country, which were nearly two and one-half times the national average. (Quattlebaum, p. 222.)
- "Federal officials, who have long called the District's housing department one of the worst in the country, are continuing to pressure [the Mayor] to improve management there. A federal audit last year found that the District had wasted millions . . . on overpriced contracts for housing repair." Sanchez & Castenada, "At Midterm, Kelly Lags in Aiding Poor," The Wash. Post, Feb. 4, 1993, at A1.

Wasteful practices include fines incurred due to the District's own failure to heed court orders.

- The District has been assessed more than \$1.7 million in fines for its failure to comply with court orders mandating essential improvements in the District's correctional institutions. (Overview of Prison Cases, p. 302.) Since 1988, the District has been required to pay more than \$800,000 in fees and expenses to support court-appointed Special Officers. (Id. at 303.)
- As a result of a contempt citation in the case concerning unsafe and unsanitary shelters (Atchison), the District paid fines of up to \$10,000 per day for a year and a half, totalling \$4 million. Some of the violations for which the District was cited could have been remedied by federal funds that had already been appropriated. The \$4 million in fines certainly could have been put to immediate use to renovate the shelters and bring the District into compliance with the consent decree. The fines were placed in a privately run trust fund for public housing improvements. (Atchison, pp. 53-54, 56.)

The District has also attempted to escape blame for its bureaucratic morass through a well-orchestrated public relations campaign that blames the Federal and local judges, the poor and homeless plaintiffs, and the plaintiffs' lawyers for the breakdown of the District's services to the poor. The lawsuits tie the District's hands, the argument goes, and if the litigation would end, the District would be able to put its house in order. Yet the case summaries also demonstrate the complete disingenuousness of these allegations. They graphically detail the abundant human suffering caused by the District long before the lawsuits commenced. For example:

- Because of the District's failure to comply with the Medicaid Act in processing applications and recertifications, plaintiffs have alleged that children eligible for benefits have been unlawfully denied care. Poignant illustrative allegations concern a child with epilepsy whose mother could not afford the necessary medication, and another child with a neurological condition similar to cerebral palsy who was threatened with termination of medical services because his parents could not pay for his care while his application for benefits was pending. (Wellington, p. 206.)
- Aubrey P., a thirteen year old homeless child, was struck by a car on his way from school to the Budget Motor Inn shelter where his family was being housed. He spent four months in the hospital as a result of his injuries. Although the District subsequently instituted a pilot transportation program to transport children staying at the Budget Motor Inn to and from school, which improved attendance overall, the program was cut because the increased attendance was not statistically significant. (Lampkin v. District of Columbia, pp. 91-92.)
- The District took custody of Tyrone F. when he was seven years old after an allegation that his mother burned his hands. The District placed him in a series of unqualified foster homes. After these unsuccessful foster home placements, the District attempted to place Tyrone in St. Elizabeths. Tyrone had serious psychological problems but did not require hospitalization. He ended up in a restrictive residential facility despite

the fact that the institution advised the District that such placement would be detrimental to the child and that he did not require such a restrictive environment. The District's planning goal for Tyrone was to return him home but, in violation of law, no services were provided to his mother and no determination was made that she would be able to reassume responsibility for him. The District failed to determine whether an alternative permanent plan was appropriate. (LaShawn A., pp, 26-27.)

- An applicant, whose landlord had threatened to rape her, was told that, in order to obtain emergency shelter, she had to obtain a notarized letter from that landlord indicating that she could no longer stay in that apartment. (WLCH, pp. 60-61.)
- Homeless people in District-run shelters faced serious physical injury from beatings, rat bites, tuberculosis, and other infectious diseases. The shelter conditions were unbearable: windows were broken for months; showers didn't work or had no hot water; men slept in urine on the floor due to overflowing, stopped-up toilets. There were no sheets and the few blankets provided were laundered only once the previous winter. (Atchison, pp. 49-50.) "Cots or mattresses and blankets retain blood and pus from open festering wounds, or vomit, phlegm, sputum and the like from those with illness of short or long duration." Atchison, supra, Supplemental & Expanded Findings of Fact at 5 (Taylor, J.).
- Juveniles confined in District detention facilities were physically abused by staff. (Jerry M., p. 264.)
- A prisoner was brutally raped, sprayed in the face with cleaning fluid by other prisoners, and died of a bronchial spasm. The jury heard testimony that correctional officials saw the rape and allowed the inmate to lie naked and injured on his cell floor for several hours before they made any effort to assist him. An award of \$1,030,002 was made to the decedent's family. (Overview of Prison Cases (Finkelstein), p. 304; "\$1 Million Award Against D.C. Upheld," The Wash. Post, Mar. 28, 1990, at B3.)

The case summaries also show that, rather than being unnecessarily litigious, the lawyers bringing the cases in question often sought settlement with the District before

complaints were filed. Conciliatory gestures of this type were routinely rebuffed. (Indeed, the District has traditionally refused help from private service providers to correct the problems complained of. For example, the Johnson case demonstrates that, when the Community for Creative Non-Violence was prepared to take over and run a shelter being closed by the District, the District rejected the offer without explanation. (Johnson, p. 101. See also Spolar, "Uncertain Fate of D.C.'s Homeless," The Wash. Post, Aug. 5, 1991, at D1.))

Moreover, the case summaries often show that plaintiffs' lawyers resorted to litigation only when it was their sole remaining means of getting the District's attention and achieving essential improvements in the delivery of social services -- and it has often been only through such litigation that improvements, however small, have been obtained. In fact, after many of these cases were filed, the District, confronted with the plaintiffs' allegations and pleadings, entered into consent decrees. See, e.g., Atchison, p. 51; Feeling, p. 187; Dixon, pp. 241-42; Jerry M., p. 258. Yet many of these decrees were then largely ignored by the District, leading to the continuous filing of motions for contempt and often leading to costly fines imposed upon the District government. E.g., Atchison, pp. 52-54; Feeling, pp. 190-95; Dixon, pp. 242-50; Jerry M., pp. 266-68. See also, e.g., Editorial, "No Retreat on Children's Rights," The Wash. Post, Nov. 11, 1993, at A22 (criticizing DHS and the Corporation Counsel for "trying to gut [the LaShawn A.] remedial order . . . negotiated by the Kelly administration . . ."). Indeed, because of these compliance difficulties, the District has recently adopted a policy of refusing to discuss settlement with plaintiffs no matter how meritorious the case.

Finally, there are no better testimonials to the fact that it is the District, rather than impoverished plaintiffs or their public interest lawyers, that is at fault for the governmental chaos in question than the comments about the District's behavior by the many judges handling these cases. See supra pp. 6-8. These judges also have been critical of the District for ignoring consent decrees voluntarily entered into, and for otherwise resisting on a massive scale the efforts by federal and local courts to bring the District into compliance with the law. For example:

- "In the past three years, the federal courts have been forced to sanction the District repeatedly for flagrant abuses of discovery. . . . The District obviously remains tempted to exploit the full panoply of discovery abuses for which it has received severe sanctions, including default, in the past.... The District of Columbia cannot be permitted to achieve, whether through obduracy or sheer incompetence, tacit exemption from the Rules that bind all other litigants in the federal courts." "The District of Columbia has sought to crush the spirit and exhaust the resources of its opponents through a pattern of total nonresponsiveness. Such dilatory tactics must be deterred. If defendants' conduct in this case were not severely punished, future litigants might rationally conclude that the advantages accruing from abusing discovery outweigh the risks."12/
- The District is "impervious to all but the most staggering of monetary sanctions."^{13/}
- "[The District's] efforts [to comply with the 1992 Consent Order it spent six months developing collaboratively with plaintiffs] have not been lacking, but they have been

^{12/} Coleman v. Long, C.A. No. 86-1029, Memorandum and Order at 14-16 (D.D.C. Apr. 8, 1993) (Bryant, J.).

Jerry M., supra, Mem. Order J at 66 (Urbina, J.).

insufficient, ineffective and untimely."^W The Court then appointed a Special Master in the mental health litigation at issue.

- "[T]he Court is concerned that the department's efforts to improve may have been motivated only by this litigation and, without continued litigation or a court order, the motivation for continued restructuring and improvement will subside."^{15/}

The case summaries are important for another reason. They demonstrate the lengths to which the District will go to affect litigation and obliterate court-ordered responsibilities. Potential witnesses for plaintiffs are reluctant to testify out of fear of retaliation by the District. Fountain, pp. 86-87; WLCH, pp. 67-68. Plaintiffs' lawyers have been handcuffed, threatened with arrest, and verbally abused for advising clients seeking shelter in the District's homeless facilities. WLCH, pp. 61-62; Fountain, p. 86. Perhaps most significantly, the District has unabashedly attempted to use its legislative powers to remove certain of its obligations to its neediest citizens. Atchison, pp. 55-56; Fountain, pp. 79-80; Feeling, pp. 195-98; Dixon, pp. 250-51; Samuels, pp. 137-38.

The District's record raises questions as to the depth of its recent commitment to the HUD-D.C. Initiative -- a major proposal advanced by HUD, and agreed to by the District, to address the problems of the District's homeless individuals and families. As noted below, infra, pp. 321-324, the Initiative is an ambitious undertaking which, if it is to

^{14/} Dixon, C.A. No. 74-285, Findings of Fact and Conclusions of Law at 7 (D.D.C. May 14, 1993) (Robinson, J.) (emphasis added) (finding violation of Consent Order and Service Development Plan -- the fourth consent order it had violated in the history of the litigation). See also "Judge Names Official for Mental Services," The Wash. Times, May 18, 1993, at B2; "Court Takes Over D.C. Mental Services," The Wash. Post, May 18, 1993, at A1.

LaShawn A., supra, 762 F. Supp. at 982 (Hogan, J.).

have any hope of succeeding, will require extensive local legislation and local planning as well as the help of all District entities, including nonprofit and private service providers. In implementing this important Initiative, the Legal Clinic calls upon the District to adopt a policy of inclusion and to seek the assistance of all interested parties, including litigants who have demonstrated considerable expertise on Initiative issues.

Finally, the Legal Clinic vowed when it undertook this effort that it would not simply criticize, but that it would also provide constructive suggestions for improvement. Accordingly, most case summaries recommend proposed corrective measures to be undertaken by the District. There is also a final chapter, "Themes and Recommendations," which summarizes and expands upon these proposals. (Infra, p. 327.)

The final chapter notes that it is not just the leaders of the District government that need to pay better attention to these problems. The Legal Clinic hopes that this Report will serve as a call to arms to all segments of the community to ensure that the poor and the homeless residing in the District are given the benefits and funding required by law. There can be little doubt that if the human suffering experienced in the District were taking place in any foreign country, law abiding and concerned citizens would seek every conceivable international human rights remedy available in the tribunals of civilized nations. Somehow, even though this human suffering is taking place right before our very eyes, it has for incomprehensible reasons largely been swept under the rug. While a tremendous debt of gratitude is owed to the private service providers, the public interest and anti-poverty lawyers, and the substantial number of D.C. private law firms engaging in this fight,

their labors and the plight of their clients go largely unnoticed by the District's responsible institutions and media. Thus, this is a "hidden" war.

As Justice Brandeis so aptly stated: "Sunlight is said to be the best of disinfectants." Brandeis, Other People's Money 92 (New York: Frederick A. Stokes Company 1932). While litigation has certainly gone a long way towards helping the disenfranchised, the human suffering will only be alleviated with the help and attention of community, civic and religious institutions, by the glare of media attention, and by the concern of the D.C. Bar (which includes in its membership all of the District's lawyers). If District residents are made aware of the plight at hand and the prospect it raises for an even more violent future, political and social forces may ably assist, indeed may even replace, the efforts ongoing in the courts.

Finally, it is important to emphasize that there is among the lawyers and the providers who have labored so mightily on this Report no interest in bringing about reform through litigation. Everyone's preference is to work closely with the District Government to help it obtain and manage funds for social services and otherwise to administer social service programs in an efficient manner. In this regard, the Legal Clinic implores the District government's leaders to end the District's hidden war and its politics of exclusion. They should allow the provider community the opportunity to share the enormous burden under which the District suffers. However, if the Legal Clinic cannot work with the heads of the District government, then, in order to maintain a civilized society, it must keep up the fight in every available forum.

In that vein, the Legal Clinic and the other providers involved in this Report pledge that, by one format or another, they shall, on a yearly basis, sponsor programs and/or further reports continuing the evaluation of the District's handling of its legal obligations to the poor and the homeless. The Legal Clinic owes at least that much to the provider constituents and to those District citizens who will be exposed to the increasing senseless and random violence within the District. Again, in the words of Justice Brandeis: "If the Government becomes a law-breaker, it breeds contempt for law; it invites every [citizen] to become a law unto himself; it invites anarchy." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (emphasis added). This Autumn has seen a reign of virtual "anarchy" in the District's poor neighborhoods. Substantial improvements in this situation will no doubt come if we all work to bring the District into compliance with the law and with basic standards of justice and human decency.

I.

FOSTER CARE

FOSTER CARE

LaShawnA. v. Kelly
762 F. Supp. 959 (D.D.C. 1991 -- Judge Thomas F. Hogan),
affirmed and remanded, 990 F.2d 1319 (D.C. Cir. 1993 --
Chief Judge Abner J. Mikva, and
Circuit Judges David B. Sentelle and A. Raymond Randolph)

by Barbara K. Kagan, Esq.
Steptoe & Johnson-'

Lawyers for Plaintiffs/Appellees:

Before the District Court: Christopher Dunn and Marcia Lowry of the Children's Rights Project, American Civil Liberties Union, New York City; Elizabeth Symonds of the ACLU of the National Capital Area; Of Counsel: Arthur B. Spitzer of the ACLU of the National Capital Area.

Lawyers for Defendants/Appellants:

Before the U.S. District Court: Eugene Adams of the Office of Corporation Counsel for the District of Columbia. Before the U.S. Court of Appeals: Beverly J. Burke, John Payton, Charles L. Reischel and Donna M. Murasky, all of the Office of Corporation Counsel for the District of Columbia.

I. INTRODUCTION

This class action was brought in 1989 by the American Civil Liberties Union on behalf of the approximately 2,500 children in the custody of the District of Columbia's

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Department of Human Services ("DRS" or the "Department").¹ It was initiated after years of suffering by scores of children whose lives have been destroyed by the failure of the District's foster care system to provide them with the care and services mandated by federal and local law.

II. INDIVIDUAL CASE HISTORIES

The histories of the named juvenile plaintiffs in this action present stories of a Dickensian nature. During their years in the system, the needs of these young children were never addressed on an individual basis. It is precisely as a result of this neglect that their individual stories are so compelling. These children are merely a sampling, albeit a representative one, of the thousands of similarly situated children in the District of Columbia. Their cases are at the center of the action brought on their behalf."

LaShawn A.

When LaShawn was merely 30 months old, her mother, homeless, suffering from emotional problems and unable to care for the baby, voluntarily turned her over to the District's foster care system. Rather than providing services in an effort to enable the natural family to remain intact, DRS placed LaShawn in the foster care of a 60 year old woman who had no intention of adopting her. LaShawn had no contact with her natural family for two years, and limited subsequent contacts did not go well. Two and a half years

¹/ The suit was also brought on behalf of the thousands of children who, while not in the physical or legal custody of the Department, are the victims or likely victims of abuse and neglect who have been or should have been identified by DRS.

²/ The facts described in the case histories are drawn from the testimony of four child psychiatrists as set forth in LaShawn A. v. Dixon, 762 F. Supp. 959,983-985 (D.D.C. 1991), and allegations presented in the Complaint filed on June 20, 1989.

after the District took charge of the child, a psychiatric evaluation was conducted. The results indicated that LaShawn may have been subjected not only to excessive physical punishment in her foster home, but also to possible sexual abuse. Almost two years later, LaShawn was still in the same foster home.

Approximately four years after entering the foster care system, LaShawn was examined by a child psychiatrist. Although she appeared physically well, LaShawn was found to be frenetically hyperactive and developmentally delayed. At six and a half years old she could not draw a straight line. She told the doctor, when asked, that no one loved her, and that her foster mother hated her and beat her. The psychiatrist found LaShawn's prognosis to be grave. She would likely experience serious bouts of depression throughout adulthood. While recognizing that the child had evidenced psychological problems prior to entering the foster care system, the psychiatrist nevertheless concluded that the manner in which she had been treated by the system played a role in her disorders. The absence of a caring environment and appropriate services for LaShawn's special needs contributed to her problems of hyperactivity, attention deficit, and depression.

Demerick B.

Demerick B. entered the District's custody when he was eleven months old. He was placed in a short-term, institutional emergency care facility rather than being placed in a foster home. Despite warnings from the facility that the child was being damaged both emotionally and developmentally because of his extended institutionalization, Demerick was still in this emergency care status at the time this action was initiated -- almost three years after he was placed there. **In** those three years, visits by Demerick's DHS caseworker were

extremely scarce, his mother did not visit him at all, and the Department did virtually nothing to find him an adoptive family.

Leo C.

Leo C., the child of a mother with severe psychological problems, came into the foster care system at two and a half months old. Leo was readily identified as a candidate for adoption. Instead of taking the necessary steps toward adoption, however, DHS returned Leo to his mother after six months. A few months later, his mother entered into psychiatric hospitalization, beginning a foster care odyssey for Leo which included six different placements, including a return to his mother for a few months until she was hospitalized for depression.

At seven years of age, Leo required treatment with psychoactive medication to control his behavior. By the time this litigation began, Leo's behavioral problems were so severe that he faced expulsion from grade school. The psychiatrist who evaluated Leo when he was eight years old believed that the instability of his living arrangements and his relationship with his mother created problems for Leo that will continue into adulthood. Had the boy been adopted prior to the time he was three, according to the child psychiatrist, he would not have suffered the same attention deficit and developmental disorders.

Robert D.

When Robert D. was 14 months old, his grandmother reported that he had been neglected and he was placed in foster care for a little over nine months. He was returned to his mother and remained in her care for approximately four and a half years, at which

time he reentered the system on an emergency basis. Despite the family history and more recent reports to the Department about problems in the home, there had been no apparent social worker involvement or review of the family situation in the intervening years.

Robert was placed in a foster home where he was beaten. He was then placed in a second foster home where he resided for three years. During this time, Robert's case plan called for adoption. His mother executed a written relinquishment of parental rights which was never processed because it was lost. A year later, Robert's case plan was switched to family reunification, and then, at the age of ten, changed again to long-term foster care. He was later put in a group home.

An evaluating psychiatrist found that Robert exhibited low self-esteem and an unusual distrust of people. He suffered from depression, adjustment disorders, and learning disabilities. It was the doctor's opinion that, had Robert had the benefit of a long-term foster home or been adopted at an earlier age, his prospects for adulthood would be considerably better. However, as a result of the problems caused by the absence of a relationship with any single caregiver, the psychiatrist believed Robert would be incapable of successfully undertaking normal life activities as an adult.

Kevin E.

When a child psychiatrist examined 10 year old Kevin, he found a child suffering from poor impulse control, low self-esteem, difficulty trusting people and delayed speech and language. Kevin had been in the foster care system for almost his entire life. Although Kevin's case plan called for adoption for much of the time, he was not freed for adoption until he was eight years old, and had never been referred for adoption placement.

From the time he entered the District's custody at 20 days old, he had been in a variety of foster homes, group homes, residential treatment facilities and hospitals. Kevin experienced 11 different placements. The examining psychiatrist believed that Kevin thought each change was his own fault. Kevin was continually moved from setting to setting, and, on top of this, was not prescribed the medication needed to treat his hyperactivity and depression at an appropriately early age. Kevin's behavior included running away from home, suicidal thoughts, head banging, auditory hallucination and temper tantrums. The psychiatrist concluded that had the child's special needs been addressed at an early age, his prognosis would have been brighter.

Tyrone F.

DRS took custody of Tyrone F. when he was seven years old as a result of an allegation that his mother had burned his hands. Although DRS knew that Tyrone suffered from serious psychological problems, the Department nonetheless placed him in a series of foster homes in which the parents did not possess the qualifications or training to care properly for the child, and were not provided the necessary support services to do so. After these unsuccessful foster home placements, DRS attempted to place Tyrone in St. Elizabeths psychiatric hospital, despite the fact that he did not require hospitalization. After another foster home placement failed simply because of DRS paperwork problems, the Department placed Tyrone in a restrictive residential facility despite the fact that DRS was advised by the institution not merely that he did not require such a restrictive environment, but, more importantly, that this placement would be detrimental to him.

While Tyrone was in the custody of DRS, the planning goal was to return him to his mother. No services were provided to the child's mother, however, and no determination made that she would be able to reassume responsibility for him and that no further abuse would occur. Furthermore, the Department failed to determine whether an alternative permanent plan would be appropriate.

III. THE LITIGATION

This suit grew out of an action by a small coalition of attorneys and public interest organizations to reform DRS' emergency care system, which allows parents to voluntarily place children with the Department on a temporary basis during a time of family crisis. When it became apparent that their informal efforts would prove unsuccessful, the attorneys concluded that the matter should proceed to litigation. At that time, a decision was made to expand the action to encompass the entire foster care system out of concern that any remedial action achieved through litigation with respect to the emergency care system would be accomplished only by draining the administrative and financial resources of other programs within the child welfare system.

Plaintiffs' Complaint for Injunctive Relief alleged that the District's operation of its foster care system violated the Federal Adoption Assistance and Child Welfare Act of 1980,^{3/} the Federal Child Abuse Prevention and Treatment Act,^{4/} the District of Columbia Prevention of Child Abuse and Neglect Act of 1977,^{5/} the District of Columbia Youth

^{3/} Pub. L. No. 96-272 (1980), 42 U.S.C. § 602 et seq. (the "Adoption Assistance Act").

^{4/} Pub. L. No. 93-247 (1974), 42 U.S.C. § 5101 et seq. (the "Abuse Prevention Act").

^{5/} D.C. Law 2-22 (1977), D.C. Code Ann. § 2-1351 et seq. (the "Abuse and Neglect Act").

Residential Facilities Licensure Act of 1986,^{6/} the Child and Family Services Division ("CFSD") Manual of Operations (September 1985), reasonable professional child welfare standards, and the due process clause of the Fifth Amendment to the United States Constitution. The complaint also contained a request for certification of the class of thousands of children whose lives were affected by the actions and inactions of DHS, and sought declaratory and injunctive relief to remedy the alleged statutory and constitutional violations.

A. The District Court's Rulings

1. Findings of Fact

After a trial spanning two weeks in which plaintiffs presented extensive evidence that was in large part unrebutted by defendants," the District Court found that the District had violated the rights of the children in its foster care system. The Order issued in the case included extensive findings of fact that depicted a foster care system in shambles.s' Specifically, the Court found that:

- (a) The District failed to initiate and complete investigations into reported abuse and neglect in a timely fashion.

DHS routinely failed to meet its statutory obligations to initiate investigations into reports of abuse or neglect within twenty-four hours and to complete investigations within

D.C. Law 6-139 (1986), D.C. Code Ann. § 3-801 et seq. (the "Licensure Act").

^{7/} One of the more remarkable aspects of this litigation was the passive role assumed by the District through the trial of the case. The District presented no vigorous defense to the claims raised and the evidence presented at trial. Indeed, the Judge's order in the case is replete with references to stipulations by the parties and uncontroverted testimony.

^{8/} LaShawn A. v. Dixon, 762 F. Supp. 959, 967-982 (D.D.C. 1991).

a two week period. 762 F. Supp. at 986. Each uninvestigated case represented a child at risk of harm. Yet the Department did not take the steps necessary to remedy the backlogs generating the delay in initiating investigations. In particular, the Department failed adequately to address staffing shortages and lack of access to resources, such as automobiles necessary to conduct investigations. Id. at 969-70.

- (b) The District failed to utilize "emergency care" appropriately.

District of Columbia law permits parents or guardians to voluntarily place their children in the temporary custody of the DHS for up to 90 days, after which time either the child must be returned home or the Department must request the filing of a neglect petition. Id. at 962. However, once placed in this temporary "emergency care," children became trapped in foster care limbo. The Department neither returned them to their families nor sought legal custody within the legally mandated time period. Id. at 971.

- (c) The District failed to provide preventive services.

After a report of abuse or neglect has been made, both Federal and D.C. law require that appropriate services, such as emergency financial aid, shelter, medical care, and counseling, be provided to enable children either to remain with their families or to reunite with them as quickly as possible in the event temporary placement has been necessary. Id. at 970. The District failed to provide these preventive services, which, the Court found, resulted in "an increased risk of arbitrary or inappropriate placements as well as an increased cost to the District." Id. at 970-71.

- (d) The District failed to place children appropriately within the foster care system.

The Court found that children in the care of the Department were "spending much of their foster care experience in inappropriate placements." Id. at 971. Rather than placing children in the least restrictive setting consistent with their needs and in the closest possible proximity to their families, children were being placed in facilities which were over-restrictive and, in some instances, hundreds of miles away from their homes. Id. at 972. **In** addition, the Department did not directly operate any therapeutic foster homes for children with special needs, nor did it make any effort to develop such homes. Id. **In** other cases, children were returned to the care of unfit parents. Id.

Furthermore, after the Department placed children, it "consistently failed to ensure that [they] ... receive(d) timely judicial and administrative reviews regarding the continued necessity and appropriateness of placement." Id. at 986. Moreover, the Department regularly failed to monitor and inspect the foster homes and institutions in which it placed children. Id. at 987.

- (e) The District failed to develop appropriate planning goals and to prepare and execute written case plans.

The law requires the timely preparation of individualized case plans for children in foster care. These case plans, which incorporate specific and achievable goals, are necessary to ensure that children are placed in appropriate settings and do not remain in foster care longer than necessary. Id. at 972. The Court found that children in the foster care system were given "totally inappropriate" case planning goals. Id. at 973. For example, while the planning goal of "independent living" is suitable only for children over

the age of sixteen where all other permanent options have been eliminated, over one-third of the children with a goal of independent living had been assigned that goal prior to their fourth birthday, and almost half prior to their sixteenth birthday. Id. And while "continued foster care" is only appropriate for children younger than thirteen years old where all other permanent options have been ruled out, twenty-nine percent of the children with such a goal had been assigned it before their first birthday, and almost half by the time they were four years old. Id. Furthermore, the Court found, in almost half of these cases, no evidence of any efforts to return the child to his or her family, and, in a majority of these cases, no evidence that the Department had considered adoption. Id.

In addition, apart from the appropriateness of a child's particular planning goal, the Department also consistently failed to prepare written case plans for the children. These plans, setting forth goals, strategies, and timelines, are necessary to enable the children to realize their goals. Id. at 973-74, 986. However, these goals were not becoming a reality for the children in foster care. The Judge found that, for children with the goal of "return home," over half had that goal for eighteen months or more, forty-one percent for two or more years, and twenty-three percent for three or more years. Id. at 973.

Where adoption was indicated as the appropriate goal, the Department did little or nothing to bring about the child's adoption. The Court found that DHS failed even to refer adoptable children to its adoption unit to be matched with prospective adoptive parents. Id. at 975, 986.

(f) The District failed to conduct periodic case reviews.

The Court found that DHS failed to assure that the cases of the children in its custody received legally mandated, periodic reviews.^V These case reviews are critical to a determination of the child's need for continued foster care, the appropriateness of a placement, compliance with the child's case plan, the progress towards alleviating the circumstances that led to the child's removal from the family home, and the projected date for the child's return to the family home or placement in an adoptive home. Id. at 974, 986.

(g) The District failed to provide adequate, trained staff.

DHS failed to maintain adequate staff to discharge its legal responsibilities. Because of large numbers of vacancies, the caseloads of the individual social workers were so high that they could not fulfill their obligations to the children in the foster care system. Despite an awareness of this problem and its detrimental effect on the safety and well-being of children and the preservation of families, D.C. and DHS officials consistently refused to remedy the situation. Id. at 977-78. In addition, DHS neither provided sufficient training to the social workers it did employ, nor supervised its workers adequately. Id. at 978-79.

(h) The District failed to maintain an adequate case-tracking information system.

The system used by DHS to track the children in its foster care system was wholly substandard. As of 1990, the Department had no information system that could identify

42 V.S.c. § 675(5)(B) and D.C. Code Ann. § 16-2323(a).

all the children in foster care. Computerized data were not available (DRS social workers used thousands of three-by-five inch index cards to track information), and children were frequently lost in the system. Id. at 976.

- (i) The District failed to minimize expensive and unnecessary placements.

According to trial testimony prepared by the Center for the Study of Social Policy in 1990, the vast majority of DRS' child welfare budget was spent on expensive out-of-home care for children.¹⁰ In 1987, the most expensive form of out-of-home care, that provided in a residential treatment facility (often out-of-state), cost an average of about \$50,000 per child per year.¹¹ In the years immediately preceding the trial, the District placed approximately 390 foster children per year in these facilities, at a total annual cost of \$24 million.¹² The District spent approximately \$17,000 per year for each child in specialized foster care and group homes and between \$5,000 to \$6,000 per family for preventive services.¹³

^{10/} "Children and Family Services in the District of Columbia," prepared by the Center for the Study of Social Policy (Sept. 1990) [hereinafter "Children and Family Services Report"].

^{11/} 762 F. Supp. at 980 (citing June 1988 Briefing Overview by DRS to then-Mayor Marion Barry). Virtually the same figures were presented by the Department in a June 1989 Briefing Overview to the Mayor. The Children and Family Services Report (at 62) identified the average cost as \$60,000 per child per year.

^{12/} Children and Family Services Report, supra n.10, at 62.

^{13/} 762 F. Supp. at 980 (citing 1988 and 1989 Briefing Overviews by DRS to then-Mayor Marion Barry). The Children and Family Services Report (supra n.10, at 62) stated that the District spent approximately \$28,000 per year for each child housed in group homes and \$10,070 per year for each child in foster care.

In contrast, the Department devoted few financial resources to in-home and community-based services which could have helped prevent the need for costly, extended out-of-home placements or for adoption-related services. Id. at 980. Apart from the tremendous financial cost, such an approach to foster care is contrary to the intent of the Federal Adoption Assistance Act and the District's Abuse and Neglect Act, which call for the preservation of intact families where possible, and permanent substitute living arrangements in all other cases.

Furthermore, according to the uncontroverted testimony of Judith Meltzer, plaintiffs' expert in the financing and operation of child welfare services, as of the time of the trial in this case, DRS was losing an estimated \$14 million a year in potential funding for failing to properly establish eligibility under the Adoption Assistance Act for all children entering the system, failing to properly document operating costs, and failing to comply with proper procedures in filing claims. Id. at 981. In addition, DRS was losing another \$7 million a year in Medicaid funding for failing to establish and maintain eligibility for the children in its care. Id.

2. Conclusions of Law

The Court held that "[i]n almost every area of the federal law, the District's child welfare system is deficient." Id. at 989. The Court found that the District had violated the District of Columbia Prevention of Child Abuse and Neglect Act, supra n.5, and the Federal Adoption Assistance Act, supra n.3, and had deprived plaintiffs of their constitutionally protected liberty interests created by District statutes and regulations. 762

F. Supp. at 987-90, 996-98. The Court held the District liable under 42 U.S.c. § 1983 for both the constitutional and the federal statutory violations.

In evaluating defendants' alleged constitutional violations, the Court asked whether they had "exercised competent professional judgment in the administration of the District's child welfare system." Id. at 996. In ruling that they had not, the Court found that the defendants failed to use their best judgment to protect the plaintiffs from physical, psychological and emotional harm. Id. For example, DHS workers neglected to make appropriate placements, to prepare case plans, to monitor placements, or to ensure that they would find permanent homes for the various plaintiffs when it was clear that these children would never be reunited with their families. According to the Court, the defendants' liability was proven in part by their own admissions. In testimony, District defendants admitted that DHS medical screening facilities for children were inadequate, adoption referrals for children who could not be returned to their families were neglected, and an effective central tracking system for children who had already been placed in foster care was nonexistent.¹⁴ District defendants also admitted that a large part of the problem was due to overloaded caseworkers. In his ruling, Judge Hogan stated:

^{14/} The Court found that former Mayor Marion Barry was aware of most of "the serious deficiencies in the child welfare system" but that, "[d]espite this knowledge, the administration did virtually nothing to improve the dire situation within the [Child and Family Services Division of DHS]." 762 F. Supp. at 997 n.30.

"That the system's outrageous deficiencies may be the result of staff shortages and excessive caseloads is no help to defendants, whose knowledge of these problems and refusal to take action confirm that the problems are not isolated incidents, but amount to 'a persistent, pervasive **practice**.'"^{15/}

As stated succinctly by the Court, "[t]he District's dereliction of its responsibilities to the children in its custody is a travesty."^{16/}

B. Relief Obtained

Based upon Judge Hogan's finding of liability on the part of the District of Columbia, the American Civil Liberties Union and DHS negotiated a "LaShawn A. v. Dixon Proposed Final Order" to remedy the defects in the foster care system, which was adopted by the Court on August 28, 1991. In agreeing to the terms of the "Proposed Final Order," however, the District did not waive its right to appeal the Court's decision.J"

The Final Order set forth procedures and time frames for fundamentally improving each aspect of the system litigated in the suit, including the initiation of investigations into cases of alleged abuse and neglect; the provision of preventive, community-based services to families and children; the use of the emergency care system; the appropriate placement of children in the system and the monitoring of these placements; the development of proper case plans for the individual children; the procedures for adoption of children in the system; case reviews; adequate staffing and case worker caseloads, qualifications and training; the screening and review of contracts with private foster care providers and

^{15/} Id. at 997.

^{16/} Id. at 998.

^{17/} Pursuant to the Proposed Final Order, however, the District could not seek a stay of the Order during the appellate process. Proposed Final Order at 84.

agencies; adequate departmental information systems; and the maximization of available federal funding.

The Final Order also appointed a Monitor, the Center for the Study of Social Policy, to assure systematic and ongoing compliance with the Final Order. As set forth in the Final Order, the Monitor was responsible for working collaboratively with the parties to formulate procedures and a schedule for implementation of the Order's corrective measures.¹⁸ Pursuant to the Final Order, the resulting January 31, 1991, "Implementation Plan for Improving Child Welfare Services in the District of Columbia," which the parties and the Monitor developed, was binding on the parties.¹⁹

The appointment of the Monitor has had a profound effect on the post-judgment stage of this proceeding. Without the expertise and continued oversight of the Monitor, who has complete familiarity with the District's child welfare system, the litigated victory would likely not have produced the improvements which have taken place.

C. Enforcement Record

Plaintiffs have been aware from the outset that improvements to the child welfare system would be years in the making. It is in this context of pragmatism that compliance with the Final Order must be assessed. As with so many of the District's social programs, the problems are systemic. While there have been changes in the infrastructure of the child welfare system, these changes have yet to result in meaningful improvements in the care and services DRS provides to children.

¹⁸ Id. at 75-82.

¹⁹ Id. at 78.

However, there has been some progress. In particular, the reliability of DHS' information system has improved. DHS has completed a case review assessing the status of every child and family in the system and now knows the number and location of children in its care. There has also been an increase in personnel, including a substantial increase in the number of social workers, and improvements in their training. Other accomplishments include increased payments to foster care providers and greater efficiency in the processing of prospective adoptive parents. In addition, an intensive family preservation program has been initiated.

Nevertheless, the quarterly reports submitted by the Monitor to the Court demonstrate that the system is still plagued by many of the problems that gave rise to the suit, such as:

- Too many children remain prisoners of a foster care system without being either reunited with their families or placed in adoptive or other permanent family settings.
- DHS continues to lose millions of dollars due to its failure to take those steps necessary to obtain federal funds for which it is otherwise eligible.
- At-risk families are not receiving sufficient services and treatment to prevent the future need for foster care services for their children.
- Greater numbers of children are being placed in foster care facilities than are authorized by their licenses, and foster care facilities and group homes are not being adequately monitored.
- Approximately 100 children are in institutional placements located over 100 miles outside the District of Columbia, the vast majority of whom should be cared for locally.
- Children with special needs who are currently in foster homes face the prospect of placement in more restrictive settings

because they are not receiving the therapeutic services they need. Adolescents in large group homes run the risk of institutional placement because they are not receiving the therapeutic services they need.

- Many children in need of permanent homes are not being adopted because of continued inadequacies in the recruitment of prospective adoptive **parents**.^{20/}

D. The District's Appeal

The District appealed Judge Hogan's decision, arguing that he erred in ruling that the District of Columbia's administration of its child welfare system violated the due process clause of the Fifth Amendment. The District also argued that any federal statutory relief was foreclosed on the basis of the Supreme Court's decision in Suter v. Artist, 112 S. Ct. 1360 (1992), handed down subsequent to Judge Hogan's ruling in LaShawn A.

On April 16, 1993, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's decision.^W The Court held that the District of Columbia's applicable statutes and regulations created a private cause of action for plaintiffs, and declined to reach the other constitutional and federal statutory issues raised in the District's appeal on the ground that the District Court's judgment was completely supportable based on District law. The case was remanded to the District Court for entry of a judgment consistent with District of Columbia law.^{22/}

^{20/} LaShawn A. v. Kelly Quarterly Progress Reports dated October 31, 1991 through the present.

LaShawn A. v. Kelly, 990 F.2d 1319 (D.C. Cir. 1993).

^{22/} On May 26, 1993, the District filed a Petition for Rehearing En Bane, asserting that the D.C. Circuit panel erred by relying on state law grounds in a case in which the state law is too unsettled to permit a federal court to exercise pendant jurisdiction over those claims.
(continued...)

E. Defendant's Motion to Modify the
Remedial Order and Implementation Plan

Acknowledging the need to avoid possible contempt sanctions due to its non-compliance, the District filed a motion to modify the terms of the Final Order and Implementation Plan on May 25, 1993. The District sought additional time to implement necessary reforms in the child welfare system, asserting that such changes could not be achieved within the mandated time frame. The District also asked the Court to eliminate the provision of the Order making the Implementation Plan developed by the Monitor binding on the parties, arguing that, although it had agreed to the provision, such authority legally rests with the Court.

In response, plaintiffs asserted that there was no reason to modify the timetable because the District was aware from the outset of the difficulties inherent in the reform process and that, contrary to the District's claims, the problems cited by the District did not meet the legal standard of significant and unforeseen changes in the law or facts that justifies modifying a consent decree.^{22/} They also argued that there was no basis to modify the Monitor's authority, pointing out that the Final Order had appointed the Monitor and authorized the Monitor to develop a binding Implementation Plan precisely because of anticipated implementation problems, and in an attempt to avoid the litigious history

^{22/}(...continued)

The District also challenged the propriety of a federal court imposing injunctive relief in this case. The D.C. Circuit denied the Petition. Order (Aug. 9, 1993). The District recently filed a Petition for Writ of Certiorari to the United States Supreme Court, No. 93-724 (Nov. 5, 1993).

See Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992).

experienced in other institutional reform cases against the District of Columbia. The Court denied the District's motion with respect to modification of the Monitor's role.^{24/} The District's request for additional time to implement reforms in the child welfare system is still **pending**.^{25/}

IV. THEMES AND RECOMMENDATIONS FOR IMPROVEMENT

The problems in the foster care system are generally due not to a lack of commitment to making necessary improvements, but rather to a shortage of caseworkers, a lack of administrative expertise and a crippling government bureaucracy. The first step toward improvement is to ensure that the necessary number of caseworkers are hired and properly trained and supervised. Fundamental improvements will not occur, however, until there is timely decision-making on issues concerning children's safety, development and need for permanent homes, and routine monitoring of each child's progress through the foster care system.

The administration of DHS would also be greatly enhanced by improving the coordination between DHS and other District agencies. For example, the Department of Administrative Services could improve the contract procurement procedures to simplify and expedite arrangements with outside contractors with which DHS does business; the

^{24/} Order (Aug. 3, 1993).

^{25/} A November 11, 1993, Washington Post editorial criticized the District's effort to vacate the LaShawn consent decree and reported that Federal District Court Judge Thomas Hogan invited the Corporation Counsel and DHS Director to explain next month "what it means to enter into a consent order and then attempt to withdraw from it on the basis of a Court of Appeals decision affirming the court's ruling." Editorial, "No Retreat on Children's Rights, The Wash. Post, Nov. 11, 1993, at A22.

Department of Personnel could give DHS greater autonomy in hiring so as to enhance its ability to meet crucial staffing needs; the Department of Consumer and Regulatory Affairs could improve the licensing system; and the Department of Public and Assisted Housing, DHS' Commission on Mental Health, and the Alcohol and Drug Abuse Services Administration could provide services necessary to keep at-risk families functioning and intact.

II.

EMERGENCY SHELTER

EMERGENCY SHELTER

Atchison v. Barry
No. 11976-CA-88 (D.C. Super. Ct. --
Judge Harriett R. Taylor)

by Lois G. Williams, Esq.
Howrey & Simon-'

Lawyers for Plaintiffs:

John W. Nields, Jr. and Lois G. Williams of Howrey & Simon.

Lawyers for Defendants:

Frederick Cooke, Roberta Gross, Carole Paskin and George Valentine, all of the Office of the Corporation Counsel for the District of Columbia.

I. FACTS

In the 1980s, the District of Columbia, like most urban centers, confronted a suddenly burgeoning problem of homelessness. Homeless advocates undertook a campaign for a voters' initiative to guarantee to the District's homeless persons "safe, sanitary, and

^{*/} Lois G. Williams is a partner in the Washington law firm of Howrey & Simon. She specializes in appellate litigation and has litigated at all levels of the federal courts, including the United States Supreme Court. Ms. Williams also teaches litigation skills to attorneys in the firm and is the partner in charge of the firm's pro bono program. The firm has actively litigated a number of cases on behalf of homeless persons, including Atchison v. Barry for which Ms. Williams now serves as Counsel to the independent trust established to fund affordable housing. Ms. Williams serves on the Board of Directors of the Washington Legal Clinic for the Homeless and the Washington Lawyer's Committee for Civil Rights and Urban Affairs. She has authored an article, "The District of Columbia's Response to Homelessness: Depending on the Kindness of Strangers," soon to appear in the new law review for the D.C. School of Law.

accessible shelter space, offered in an atmosphere of reasonable dignity.¹W The measure appeared as ballot Initiative 17 in the 1984 election.² The Mayor and the D.C. Council attempted to stop the measure, first by litigation, and then by vigorously campaigning to defeat it.³ A court later found that the District had illegally spent nearly \$7,000 of taxpayer funds campaigning to defeat the Initiative. It had printed campaign materials and distributed them on Election Day using District of Columbia **employees**.⁴ Notwithstanding these efforts, Initiative 17 ultimately passed with 72% of the vote.⁵ Thus, the District of Columbia became the first jurisdiction in the United States to legislate the right to shelter.e The Initiative became law as the Right to Overnight Shelter Act, D.C. Law 5-146, on March 14, 1985. D.C. Code §§ 3-601 to 3-607 (Michie 1988), as amended D.C. Code §§ 3-601 to 3-622 (Michie Supp. 1993).

¹ E.g., Greene, "Ballot Initiative to Propose D.C. Shelters for Homeless," The Wash. Post, Aug. 2, 1984, at C3 [hereinafter "Greene"]; Bruske, "Shelter Issue to Stay on D.C. Ballot; Suit to Block Vote on Homeless Stalled," The Wash. Post, Oct. 30, 1984, at B1 [hereinafter "Bruske"]; Barker, "Battle on Homelessness; District to Vote on Guaranteed Shelter," The Wash. Post, Nov. 4, 1984, at B3 [hereinafter "Barker"].

² Greene, Bruske, and Barker, supra n.I. See also D.C. Code Ann. § 1-1320 (1981); D.C. Mun. Regs. tit. 3 §§ 1002.5, 1004-1005, 1012.1 (1981).

³ The District asserted that Initiative 17 was an "appropriation" and, thus, an improper subject for direct voter legislation under the Home Rule Act. D.C. Board of Elections & Ethics v. District of Columbia, 520 A.2d 671, 672 (D.C. 1986). See also Bruske and Barker, supra n.I.

⁴ District of Columbia Common Cause v. District of Columbia, 858 F.2d 1, 2-3 (D.C. Cir. 1988); Barker, supra n.I.

⁵ Boodman, "Voters Approve Homeless' Right to Shelter," The Wash. Post, Nov. 7, 1984, at A4t.

⁶ Id.

Although the right to shelter was now enshrined in the law, for years it seemed to make little difference to homeless people. By Fall 1988, District shelters for men and women were dramatically inadequate, both in number and in quality of life. Mitch Snyder, of the Community for Creative Non-Violence ("CCNV"), sought the assistance of the Howrey & Simon firm to investigate the conditions in District-run shelters and to bring suit to enforce the requirements of the Overnight Shelter Act. The class action that resulted was Atchison v. Barry.

The attorneys and volunteers interviewed shelter providers and secured affidavits confirming that the shelters were overcrowded and turning away homeless persons in large numbers. They obtained affidavits from professionals attesting to the overcrowded, unhealthy, and unsafe conditions at the District's shelters. In the lawsuit that resulted, homeless witnesses spoke of being beaten and robbed in the District's shelters; of being abused by security guards; of sleeping on tables, chairs, or the floor; of clogged and overflowing toilets, even where they slept; and of rats, lice and scabies.

II. THE PLEADINGS AND SUMMARY OF THE LITIGATION

A. The Complaint

On December 20, 1988, plaintiffs filed a complaint in the Superior Court of the District of Columbia on behalf of a class of single homeless men and women seeking shelter from the District, challenging the District's failure to comply with the Overnight Shelter Act. Plaintiffs sought both a temporary restraining order and a preliminary injunction requiring the District to comply with the law. They submitted numerous

affidavits from homeless persons, shelter providers, and other professionals in support of their request for emergency relief.

B. The Litigation

In a hearing held just before Christmas 1988, Judge Michael F. Rankin denied plaintiffs' request for a temporary restraining order based on the District's assertion that it planned that very evening to open additional facilities to house the homeless. The Court also set an early date for a preliminary injunction hearing. The matter was thereafter assigned to Judge Harriett R. Taylor.

Judge Taylor held a four-day evidentiary hearing in the first week of January 1989. The hearing focused on (1) whether the existing number of shelter beds was sufficient to serve the number of homeless persons seeking shelter in the District, (2) the accessibility of those shelter beds, and (3) the safety and sanitary conditions in District shelters.

On January 7, 1989, the Court granted a preliminary injunction. Judge Taylor convened a special Saturday session to deliver her ruling, holding that (1) plaintiffs were likely to suffer "immediate and irreparable injury or loss to their health and lives" without emergency relief;" (2) plaintiffs were likely to succeed on their claims that the shelters were consistently filled to or over their capacity; and (3) the District had failed to "take reasonable steps to provide health-maintaining and accessible overnight shelter space in an atmosphere of reasonable dignity," as required by the statute.^f

^{7j} Preliminary Injunction at 1 (Jan. 7, 1989).

^{8j} Id. at 2 (quoting D.C. Code § 3-605 (1988)).

To provide an adequate number of shelters, the Court required the District to take reasonable steps to provide shelter for all homeless single persons in the District who seek it and to keep certain enumerated shelters open until further Court order.^v It further required the District to open an additional shelter when it became necessary and to publish the location of its shelters.^w

To address the substandard conditions existing in shelters, the Court required the District to bring the shelters up to "minimum standards of sanitation, safety and decency within a reasonable time," to keep the shelters open between the hours of 7 P.M. and 7 A.M., and to allow plaintiffs' representatives to inspect the shelters regularly to see that these conditions were being met.^{11/} Finally, the Court set a Spring trial date for plaintiffs' request for a permanent injunction.

Five days later, the Court issued supplemental findings of fact on the evidence presented at the hearing. The Court noted that it had conducted an "extraordinary Saturday session" in:

"recognition of the peril facing plaintiffs and plaintiff class with every passing moment of this winter weather. . . . [F]or those who do not survive the season because of their inability to obtain overnight shelter, it may truly be said that 'justice delayed was justice denied.' The Court refuse[s] to be a party to that delay."^{12/}

^{9/} Id. at 2, ¶¶ 1, 2.

^{10/} Id. at 3, ¶¶ 4, 5.

^{11/} Id. at 3-4, ¶¶ 6, 9, 10.

^{12/} Supplemental and Expanded Findings of Fact at 1 (Jan. 12, 1989) [hereinafter "1989 Supplemental Findings"].

The Court recounted the evidence of life- and health-threatening perils in the District-run shelters. While on the street, homeless people suffered frostbite, gangrene, burns (from the heat grates), hypothermia, and exacerbation of other illnesses such as diabetes or asthma. In the shelters, they faced serious physical injury from beatings and other assaults, rat bites, tuberculosis, and other serious infectious diseases. 1989 Supplemental Findings at 2. Toilets were stuffed up and overflowing; men slept in urine on the floor; windows had been broken for months; showers did not work or had no hot water; there were no sheets and the few blankets provided were laundered only once the previous winter. The results, said the Court, were predictable: "Cots or mattresses and blankets retain blood and pus from open festering wounds, or vomit, phlegm, sputum and the like from those with illnesses of short or long duration [and] became home to mites . . . , lice and other parasites." Id. at 5. In short, the Court found the shelters to be "horrendous" and "virtual hell-holes." Id. at 5, 9.

The Court also made detailed findings as to the inadequate number of beds and the conditions in the District's shelters, and found that all of the existing District-run shelters were "consistently well over capacity." Id. at 2. With few exceptions, said the Court, homeless persons were not sleeping "on the street, in abandoned cars and buildings, in doorways, on park benches . . . by choice. If there were safe, clean and accessible shelter for them, they would take advantage of it without hesitation, willingly complying with any applicable rules and regulations." Id. at 4. The Court detailed the difficulty for homeless persons in finding out what shelter space might be available and in leaving their neighborhoods and finding transportation to shelter and back. Id. at 6-9.

The Court found that the steps the District had taken in the nearly four years since Initiative 17 had passed were "executed so slowly and/or ineptly that they create problems at least as bad as those they were meant to resolve; other such steps were only taken in response to this lawsuit; and even those steps started earlier are the classic example of 'too little and too late.'" Id. at 9.

The District's immediate response to the Court's sweeping preliminary injunction was to stop providing evening meals in the shelters, claiming that it lacked the resources to provide either meals or court-ordered shelter. In a separate lawsuit, CCNV was able to stave off that draconian result, but only for a few months until the District complied with the constitutional due process notice requirements.W

The parties appeared for trial on the permanent injunction on April 14, 1989. However, at plaintiffs' behest, and with the Court's help, in lieu of trial the parties met to negotiate a settlement spelling out the District's obligation to provide emergency shelter. The parties agreed to a detailed consent decree that set forth specific, objectively measurable requirements for compliance with Initiative 17. At midnight, when counsel completed their negotiations, they left the District building, walking out among the 50 cots with sleeping homeless women who had been in the lobby every night during the winter pursuant to Judge Taylor's order. Judge Taylor, on June 27, 1989, adopted the parties'

^{13/} Community for Creative Non-Violence v. Barry, C.A. No. 02722 (D.D.C. Mar. 17, 1989).

proposals and issued a final order embodying the parties' consent decree ("1989 Consent Decree" or "Decree").^{14/}

In brief, the 1989 Consent Decree required the District to keep open its eleven existing overnight shelters, and to add new shelters as they became necessary under a triggering formula spelled out in the Decree. 1989 Consent Decree at ¶¶ 1,2, 3, 8-9. The Decree also required the District to bring each shelter into compliance with detailed, agreed-upon standards by October 1, 1989. Those standards covered maintenance, cleaning, extermination services, showers with hot water, toilets, supplies, beds, clean linens and blankets, and adequate ventilation and space. *Id.* at ¶¶ 5, 7. The Decree further required the District to publicize the location of all shelters, and to disperse the shelters geographically throughout the District to ensure their accessibility to the demonstrated population centers of homeless persons. *Id.* at ¶ 12. Other requirements included a system for resolving complaints, availability to walk-ins, shelter hours from 7 P.M. to 7 A.M. daily, adequate staff, and secure storage for belongings. *Id.* at ¶ 7. Defendants promised to provide plaintiffs with shelter census reports and to allow plaintiffs' representatives to conduct bimonthly shelter inspections. *Id.* at ¶¶ 13, 14.

C. The Contempt

Inspections to monitor the District's compliance began immediately with a cadre of volunteers from Howrey & Simon and the legal community. Almost as quickly, it became evident that the District was not going to comply with the Decree that it had negotiated. In the span of about seven months, plaintiffs filed five contempt motions, and the Court

^{14/} Atchison, Findings of Fact, Conclusions of Law and Final Order (June 27, 1989).

heard several days of evidence. After one day of hearings, the Court found the District in contempt of certain elements of the Decree.^{15/} After two more days of hearings, the Court found that plaintiffs had established "beyond any reasonable doubt" or, in some instances, by "clear and convincing evidence," that the District had violated the 1989 Consent Decree in virtually every respect.^{16/} The Court found that the District's compliance:

"has been sporadic and tardy -- frequently coerced under threat of contempt or other court action. Its violations of that Order are flagrant and inexcusable. Each such violation threatens the health and safety of homeless citizens of the District of Columbia; in combination with each other and with unquestionably foreseeable natural forces, the violations constitute an imminent danger to those citizens' very lives. Strong measures are required."^{17/}

The "strong measures" the Court ordered included daily fines, totaling up to \$30,000 per day, plus plaintiffs' reasonable attorneys' fees, and expenses incurred in bringing the contempt motions. The District could relieve itself of any of those fines by complying with the various provisions of the Decree. The daily fines began to accrue on December 26, 1989.^{18/} Pursuant to the Decree, all fines were to be placed in a "special fund for the benefit of homeless single or unattached people in the District of Columbia."^{19/}

Order at 3 (Oct. 11, 1989).

Memorandum Opinion at 2, 5 (Dec. 21, 1989).

^{17/} Id. at 8.

Order at ¶¶ 10-13 (Dec. 21, 1989).

Id. at ¶ 14. See discussion infra at 56.

By imposing these fines, the Court clearly intended to induce the District's compliance with the Decree to which it had agreed just eight months earlier. Yet, despite the heavy fines, defendants still failed to comply. That failure inspired plaintiffs to file a fourth motion for contempt on December 28, 1989. A fifth such motion followed on January 29, 1990.

Throughout this period, the District complied with some discrete portions of the Decree and chipped away at the assessed fines. For a short time, it actually paid nearly \$30,000 a day. For a year and a half, it continued to pay from \$5,000 to \$10,000 per day -- in all, some \$4 million in contempt fines, until the Overnight Shelter Act was repealed.s" This sum could unquestionably have bought full compliance with the 1989 Consent Decree.

D. The District's Strategy

Apart from token arguments that it was in "substantial compliance," the District did not and, in plaintiffs' judgment, could not mount a serious defense in Atchison. It was clearly obligated by statute to provide shelter, and, as the Court found, it had unquestionably failed to do so in every material respect. Therefore, the District's litigation strategy was to mount a series of procedural obstacles and then simply to delay and avoid meeting its obligations. The early strategy was to depose a great many members of the

^{20/} The Consent Decree required that plumbing be repaired and that showers with hot water be provided. Federal McKinney Act funds had already been appropriated and received for, among other things, the addition of showers and other renovations at the Trust Clinic at 14th & Q Streets. Those showers were never added, and, so far as plaintiffs know, those funds were never accounted for, at least not to the Court. The failure to provide those showers was one of the elements that caused the continuing fine of \$5,000 per day.

plaintiff class, and to attempt to find ways to challenge their standing, both as plaintiffs and as adequate class representatives. These tactics generally failed because, although some plaintiffs simply disappeared or became unavailable, there were always many more to step into their shoes.

The parties made some attempt at negotiating at various early stages, but no negotiation was ever undertaken that was not initiated by plaintiffs. This includes the marathon session that began and ended on April 14, 1989, the day that trial was scheduled. The Corporation Counsel himself; along with trial counsel, negotiated for the District. DHS officials were brought in, presumably to ascertain the feasibility of what was being agreed to. Yet, no sooner had the Consent Decree been approved than the District began to renege on its promises. Many months later, when all attempts at compliance had broken down, District lawyers stated repeatedly that they were not permitted to enter into any further consent decrees.

Plaintiffs have never been able to understand or explain why defendants chose repeatedly to suffer contempt, and ultimately substantial fines, rather than comply with the terms of the Decree that they themselves had negotiated. However, it became clear quite early to plaintiffs that the District was putting all of its eggs in another basket -- that of attempted repeal of the statute. The Executive Branch found willing ears on the D.C. Council. Ironically, the Executive Branch used the fact of the substantial contempt fines it was paying to pressure the Legislative Branch to repeal the law. In June 1990, the Council did just that, expressly attributing its vote to the need to reduce District spending in tight budgetary times, and stating its belief that the Right to Overnight Shelter Act "was

strangling [the District] financially.W Council members actually recited the contempt fines as the problem, the solution to which was to remove any right or entitlement. The "entitlement" to shelter had thus become the villain. District officials maintained that it was only because the homeless could demand shelter as a matter of right that the District could not find more enlightened solutions to ending homelessness. These arguments went unchallenged in the press and in the halls of government. The Council's new statute ultimately became law, after a hiatus, while voters affirmed the action through the referendum process.

The current and former administrations of the District government have successfully sold the view that litigation, court orders, and consent decrees are themselves the problem. Without those annoying obstacles, the argument goes, the District could be free to serve its needy citizens and would, of course, do so. We note that since the law has been repealed, shelter for single homeless persons has been dramatically curtailed. The District has closed the Pierce Shelter, the Trust Clinic Shelter, and the Foggy Bottom Trailer Shelter, eliminating hundreds of beds.

Ironically, the one monument to the District's unwillingness to live up to its own promises -- the vast sums it paid in contempt fines -- is now being put to the service of homeless persons. Those monies are now in the hands of the independent Trust for Affordable Housing, which is lending and giving money to nonprofit organizations to build single room occupancy housing for homeless persons in the District of Columbia.

^{21/} Abramowitz, "Council Lops 10% Off Property Tax: Members Sidestep Spending Cuts Barry Sought, End Mandatory Shelter for Homeless," The Wash. Post, June 27, 1990, at G1.

EMERGENCY SHELTER

Washington Legal Clinic for the Homeless v. Kelly
C.A. No. 93-0691 (D.D.C. -- Judge Joyce Hens Green)

by Katherine D. McManus, Esq.
Howrey & Simon"

Lawyers for Plaintiffs:

Mark D. Wegener, Katherine D. McManus, Gary L. Ivens and Jill A. Tuennerman, all of Howrey & Simon.

Lawyers for Defendants:

Jesse P. Goode, of the Office of Corporation Counsel of the Department of Human Services; John Payton, Martin L. Grossman and George C. Valentine, all of the Office of Corporation Counsel of the District of Columbia.

I. DISCUSSION OF THE FACTS

The District of Columbia has operated an emergency shelter program for families for almost ten years. The program is designed to meet the urgent needs of destitute families who have no overnight shelter and thus would be forced to spend the night on the streets or in inadequate and unsafe conditions. The program is limited to families -- parents or a single parent with minor children -- and has stringent eligibility guidelines.

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Only families with less than \$100 and with no adequate alternative shelter are eligible for emergency shelter.^y In the past, the program has operated as a combined Federal-District program subject to both Federal and District law and regulations.

A. Requirements of the Emergency Assistance Program

Under the Emergency Assistance (ilEA") provisions of the program to provide Aid to Families with Dependent Children ("AFDC"), the Federal government provides monetary assistance to states which develop and submit a state plan under Title IV-A of the Social Security Act, 42 U.S.c. § 602 (1988). States voluntarily choose whether to participate in the EA part of the AFDC program. A participating state must describe in its state plan the type of assistance it will provide and comply with the standards set forth in the applicable federal legislation and implementing regulations in order to be entitled to federal reimbursement at a rate of 50% for the costs of operating that program.^f At a minimum, Federal law requires that applicants be permitted to apply" and that eligible families be provided with assistance forthwith.^f

A District of Columbia state plan was drawn up seeking federal funding for the District's program for emergency housing and support services for homeless families. Under D.C. law, if the Mayor operates an emergency family shelter program, she is then

^y 39 D.C. Reg. 470,424-74 (1992) (to be codified at D.C. Mun. Regs. tit. 29 §§ 2502.1, 2502.3).

^{2/} 45 C.F.R. § 233.120 (1991).

^{3/} Id. § 206.10(a)(1).

^{4/} Id. § 233.120(a)(5).

obligated to seek Federal funding for the operation of that program.^F D.C. regulations were promulgated to establish eligibility criteria to be used in assessing family applicants for the program.^s The D.C. regulations require that applicants be provided with an oral and written notice of eligibility determination at the time of the determination.^F While applicants can be required to document eligibility for emergency housing, lack of available documentation is not a basis to deny services on the night of application.^F If the Department is unable to verify eligibility on the day emergency shelter is requested, the regulations require the Department to temporarily place the applicant or to make a referral for available shelter for that night." By placing EA shelter in its state plan, D.C. was entitled to seek federal reimbursement for 50% of its expenditures in operating the program and providing emergency shelter to families.

B. Filing of Litigation

The litigation, which is still pending, seeks to guarantee access to legal advocates by families applying for EA, to prevent intimidation of applicants, to ensure that the emergency shelter program follows the dictates of due process, and to ensure that the program complies with applicable federal and local laws and regulations.

^S D.C. Code § 3-206.3(a) (1981).

^{6/} 39 D.C. Reg. 470, 472 (1992) (to be codified at D.C. Mun. Regs. tit. 29, § 2502.1 et seq.).

^{7/} Id. at 470, 474 (to be codified at D.C. Mun. Regs. tit. 29 § 2502.4).

^{8/} Id. at 474 (to be codified at D.C. Mun. Regs. tit. 29 § 2503.2).

Id. (to be codified at D.C. Mun. Regs. tit. 29 § 2503.6).

The first complaint was filed in August 1992 and named as plaintiffs the Washington Legal Clinic for the Homeless ("WLCH") and the Father McKenna Center of St. Aloysius Church, on behalf of the constituents they serve, as well as several individual advocates for the homeless, and a class of homeless families. Plaintiffs sued Sharon Pratt Kelly in her official capacity as Mayor. This case addresses several serious problems in the operation of the District's emergency shelter program for families. A description of some of the critical allegations in the litigation follows.

Families who were clearly in desperate need and who met every eligibility criterion were being turned away by the District's Office of Emergency Shelter and Support Services ("OESSS"). Numerous families were being told that there was no shelter available and that they should not bother to apply.^{10/} Other families were told that they could not apply unless they had all of their children's birth certificates and social security cards.^W Some were required to seek notarized letters from family members and former landlords documenting their lack of alternative shelter.^{12/} Some had fled from physical or sexual abuse and had been warned by the police not to return to that living situation.^W In at least one instance, an applicant who had been threatened with rape by her landlord was told to obtain a notarized letter from that landlord stating that she could no longer stay in

^{10/} First Amended Complaint ¶¶ 106-8, 143, 150, 154 (July 29, 1993).

^{11/} Id. at ¶¶ 124, 153.

^{12/} Id. at ¶ 153; Affidavit of Patricia Kennedy ¶ 6 (Aug. 11, 1992).

^{13/} First Amended Complaint, supra n.10, at ¶ 104.

the apartment.¹⁶ Some families were allowed to apply, but were improperly denied shelter without written notices, and without being informed of their appeal rights.¹⁷ These families, many with infants and small children, had no alternatives but the District streets.

To assist families in exercising their legal right to apply for shelter, and to obtain review of negative determinations, volunteers (including shelter providers), lawyers from the WLCH, and area law students began visiting the OESSS intake office. The volunteers offered assistance to families who wanted help in the application and appeal processes. The volunteers also documented improper and illegal practices and reported these to supervisors at OESSS.

Volunteer outreach programs have been successful in a number of District offices. In the context of the OESSS office, however, OESSS staff were hostile to the presence of volunteers assisting applicants despite the fact that applicants are legally entitled to assistance.^w Volunteers were harassed. Law students were informed that they were "culturally incompetent" to assist applicants.¹⁷ In their moving papers, the District suggested that the volunteers could be banned from the OESSS intake office because of ethical prohibitions of in-person solicitation of clients, despite the fact that the volunteers were offering pro bono assistance to homeless families. To escape public scrutiny and to

Affidavit of Patricia Kennedy supra n.12, ¶ 7.

First Amended Complaint, supra n.10, at ¶¶ 151, 159.

Id. at ¶ 87.

^{17/} Id. at ¶ 166; Affidavit of Diann Hammer ¶ 19 (Aug. 10, 1992).

prevent families from obtaining the assistance of advocates, OESSS, acting under the authority of the Department of Human Services ("DHS") and the laws of the District of Columbia, repeatedly refused to allow advocates to assist applicants in the application process.^{18/} A staff attorney for the WLCH went to the intake office to advise families and was assaulted by an OESSS staff member and handcuffed by the police who were called to arrest him.^{19/} The OESSS staff was directed by DHS personnel not to have the attorney arrested. DHS then publicly announced its policy of banning advocates from the OESSS offices.^{20/}

The initial complaint therefore alleged that the District deprived plaintiffs of their right, under Federal law^{21/} and D.C. law,^{22/} to seek assistance from advocates in the process of applying for federal assistance. The complaint also alleged that the District deprived plaintiffs of their constitutional rights, derived from the Supremacy Clause, the due process clause of the Fifth Amendment, and the First Amendment right of access to the courts to seek assistance from advocates in the application process.

C. Memorandum of Understanding and the Second Complaint

After the first complaint was filed and at the urging of the Court, the parties discussed settlement and agreed to enter into a non-binding 90-day Memorandum of

First Amended Complaint, supra n.10, at ¶ 166, 167-171, 172-176.

Id. at ¶ 176.

Id. at ¶ 179.

45 C.F.R. § 206.10(a)(1)(iii)(1991).

39 D.C. Reg. 470 (1992) (to be codified at D.C. Mun. Regs. tit. 29 §§ 2502 et seq.).

Understanding ("MOU") in October 1992 on the condition that plaintiffs agree to a voluntary dismissal of their complaint without prejudice. Under the MOU, advocates were permitted access to the intake office during fixed times several days during the week. The MOU also created an informal dispute resolution mechanism to discuss the legal problems arising from the OESSS practices in handling emergency shelter applications.

At the expiration of the MOU, the District refused to enter into a binding settlement agreement with plaintiffs. On April 5, 1993, plaintiffs filed a new complaint asserting that attorneys for the District had stated that they would not agree to any formal settlement which was binding in any way on the District.^{23/} Furthermore, the District instituted new policies which served to deny shelter to eligible families based on the claim that no space was available.s/ OESSS caseworkers also failed to give priority to those applicants who had previously been denied assistance and were seeking a reconsideration of their eligibility status.^{25/}

The April 5th complaint again detailed the District's violation of the First Amendment rights of advocates and of family applicants seeking shelter determinations. It also detailed the arbitrary nature of the District's emergency shelter program and alleged that the District routinely violated District and Federal law in the operation of this program, and conducted the program in such a way that it violated applicants' due process

^{23/} The April 5, 1993, complaint was superseded by the First Amended Complaint dated July 29, 1993. All citations in this article are to the First Amended Complaint. First Amended Complaint, supra n.10, at ¶ 15.

^{24/} Id. at ¶¶ 106, 108, 113, 115, 116, 127, 129, 134, 140, 145-146.

^{25/} Id. at ¶¶ 74, 108-109, 145.

and equal protection rights. Plaintiffs also sought certification of a class which included all homeless families seeking determination of their eligibility under the District of Columbia state plan for emergency assistance after November 1, 1991.

In addition, plaintiffs have alleged that the District chose not to seek federal reimbursement for many of the services and expenditures for which it was qualified. Indeed, federal audits of the District's programs found that the District had failed to maintain case files to document eligibility and justify expenditures.^{26/}

D. Withdrawal from Federal Program

On July 1, 1993, plaintiffs filed a preliminary injunction motion seeking to require the District to comply with Federal law and to place eligible families in shelter. On July 19, 1993, the night before the hearing on the preliminary injunction, the District filed a supplemental brief attaching a document which had been signed that day purporting to retroactively withdraw the District's emergency shelter program from the Federal EA program. The District claimed that its withdrawal from the federal program mooted the preliminary injunction as the District no longer had to comply with Federal regulations. Rather than operate the program in conformity with federal law, the District chose to forgo available federal funding. By its own admission, the District will lose an estimated \$1.4 million a year in federal monies needed to support the EA program.j" In its papers, the

^{26/} Plaintiff's Motion for Preliminary Injunction, Review of Emergency Assistance Payments Claimed by the D.C. Department of Human Services Under Title IV-A of the Social Security Act, Exh. 1 to Exh. I (July 1, 1993).

^{27/} "D.C. Turns Down U.S. Aid for Emergency Shelters," The Wash. Post, July 20, 1993, at B1; "Homeless Suit 'Moot', City Argues," The Wash. Times, July 21, 1993, at B1. Plaintiffs believe the estimate of \$1.4 million is low.

District admitted that at least 200 families that were not currently receiving emergency shelter nonetheless met the District's criteria of having less than \$100 and no adequate shelter. The District justified its decision to leave these families unassisted and to refuse available federal money by claiming that it faced budgetary constraints and could not afford to provide emergency assistance to all needy families.^{28/}

Because the District withdrew from the Federal EA program, the Court held that the motion for a preliminary injunction was moot. However, the Court also noted that it appeared that District law required the Mayor to seek federal reimbursement. In her Memorandum and Order, Judge Joyce Hens Green stated:

"[T]he Court cannot now find that the District of Columbia continues to operate an emergency family shelter program such that the strictures of D.C. Code § 3-206.3(a) would make it likely that the District will have to opt back into the federal program. . . . Facially, the statutory language could not be more clear: If the Mayor chooses to operate such an emergency program, she must claim full federal financial participation. While federal law may

^{28/} In fact, DHS Director Vincent Gray later made the argument that, rather than losing \$1.4 million in federal funding, the District was actually saving \$5 million because it would cost the District that much to provide shelter to the additional families. Vincent C. Gray, "D.C. Can't Afford the Feds' Generosity," The Wash. Post, Aug. 15, 1993, at C8. Mr. Gray's argument hinges on the fact that federal funds cover only 50% of the housing costs for a homeless family for the first 90 days and nothing thereafter. Such an argument ignores the fact that the District's own lack of housing and services cause homeless families to stay at D.C. shelters on average for 10 months, not 90 days. Plaintiffs believe the District's own inability to move families promptly into subsidized housing is the basis for Mr. Gray's supposed savings. Additionally, Mr. Gray's argument ignores evidence that the District could provide shelter for its homeless citizens for considerably less money than it does now and ignores the fact that the District could be seeking federal reimbursement for a broader range of homeless services than it has been seeking. See Joan Alker and Frank R. Trinity, "D.C. Needs to Get Its Housing in Order," The Wash. Post, Aug. 22, 1993, at C8. See also Stephen Cleghorn, "Putting Politics Ahead of People," The Wash. Post, Sept. 12, 1993, at C8. See also Fountain case summary, infra, p. 73.

make participation in the EA program voluntary, District of Columbia law seems to mandate participation.S"

Plaintiffs amended their complaint on July 29, 1993, to require the Mayor to comply with District law and seek federal funds.

Despite their disavowals in Court, District officials have indicated that they were withdrawing temporarily from the federal program,^{30/} and would reapply in three to six months.W Thus, it is apparent to plaintiffs that the District's withdrawal from the federal program was intended to avoid federal court jurisdiction.P'

On August 27, 1993, the District filed a motion to dismiss the complaint. It claims that its withdrawal from the federal program renders moot all of the violations alleged in

^{29/} WLCH v. Kelly, C.A. No. 93-0691, Mem. Opinion and Order at 8-9 (July 30, 1993) (emphasis in original).

^{30/} First Amended Complaint, supra n.10, ¶ 17; HUD-D.C. Initiative Implementation Plan, "Working Together to Solve Homelessness" (hereinafter "Initiative") at 44. The Initiative, a proposed Federal-District plan to address homelessness is discussed infra, p.321.

^{31/} WLCH, Declaration of Tony Russo at ¶ 3 (July 22, 1993); Council of the District of Columbia, 16th (Additional) Legislative Meeting, Unofficial Transcript of Final Reading of the FY94 Budget Request Act, Amendment Act of 1993 (July 21, 1993) (comments of Council Member Linda Cropp).

^{32/} Pursuant to the Initiative, HUD would provide the District with \$20 million to fund the Initiative. The District has taken the position with the Court that renewed participation in the Federal EA program would somehow jeopardize its receipt of HUD funds under the D.C. Initiative. Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss the First Amended Complaint at 8, n.2 (Sept. 30, 1993). Defendants' representation to the Court is contradicted by the Initiative. Initiative supra n.30, at 52. Further, the language of the Act authorizing the Initiative itself evinces Congressional intent that the HUD funds should be used to provide additional or supplemental resources to existing systems for sheltering the homeless. Homeless and Community Development Amendments Act of 1993, Pub. L. No. 103-120, 107 Stat. 1144 (Sept. 27, 1993). Thus, it is arguable that maximization of all available funding sources is compatible with, and even contemplated under, the Initiative.

the complaint, and that there is no private right of action, pursuant to Suter v. Artist M., 112 S. Ct. 1360 (1992).

Plaintiffs have opposed the motion by pointing out that both D.C. law^{33/} and the AFDC program under Title IV-A of the Social Security **Act**^{34/} grant plaintiffs a private right of action under 42 **V.S.C.** § 1988. Plaintiffs further argue that the complaint is not moot because the District has not proven that its illegal conduct will not reoccur and, in fact, its current conduct toward applicants illustrates that it is highly probable that the District will continue to violate Federal and D.C. laws. A decision on the motion to dismiss is pending.

E. Retaliation Against Witnesses

Many of the applicants for EA have been concerned that the District will retaliate against them if they seek the assistance of advocates, speak with the press, or assist in the **litigation**.^{35/} Applicants who have spoken with advocates allege that they have been berated by OESSS staff and told that the advocates could not help them. One applicant claims that an OESSS staff member referred to her attorney as a "bitch" and apparently has not been reprimanded.V Families who have spoken to the press have been intimidated

D.C. Code § 3-206.3(a) (1981).

42 **V.S.C.** § 602 (1988).

^{35/} Letter from Katherine D. McManus, Counsel for plaintiffs, to George Valentine, Office of Corporation Counsel (June 30, 1993).

^{36/} Letter from Patricia Mullahy Fugere, Esq., Executive Director of WLCH, to Vincent Gray, Director of DHS (Jan. 22, 1993).

by statements made by the manager of the hotel in which DRS has placed them.^{37/} DRS refused to disavow these statements or to reassure families that they would not be retaliated against if they met with the press or with lawyers. Rather, DRS merely stated that the hotel manager was not a state actor and that she was "entitled to take the view that lawyers and the press were nuisances."^{38/}

After several instances when the press covered families who were sleeping on the streets in front of the OESSS building waiting to apply for shelter, OESSS announced that it would report families to Child Protective Services if they continued to sleep there with their children.^{39/} Thus, it appears to plaintiffs that the District is refusing to shelter families who have no alternative but to sleep on the streets, and is informing those families that if they sleep on the streets with their children, the District may institute neglect proceedings and take the children away.

II. RECOMMENDATIONS FOR IMPROVEMENT

The District could alleviate the problems inherent in its operation of the Emergency Assistance Program by implementing several strong administrative measures which would allow the District to serve more effectively the homeless individuals seeking emergency shelter, while also lowering the costs ultimately borne by the District:

Infra n.35; Deposition of Dorothy Boyd 111-114 and 124-125 (Aug. 3, 1993).

^{38/} Letter from Jesse P. Goode, Sr. Attorney of DRS, to Katherine D. McManus, Counsel for plaintiffs (July 7, 1993).

First Amended Complaint, supra n.10, at ¶ 149.

A. Inform the Public of the Facts Regarding the EA Program

- Make regular public disclosure of information such as the number of EA applicants, the number of placements, and the reasons for homelessness.
- Make regular public disclosure of meaningful (and verifiable) budget and cost figures for the program.
- Make regular public disclosure of the number of families outplaced into permanent housing.

B. Achieve Professionalism among Intake Workers

- Increase the number of intake staff and provide for regular training of all staff to improve their sensitivity toward clients. Training should focus on shelter and other applicable laws.
- Develop a procedure manual.

C. Humanize the Application Process

- Make the OESSS intake waiting room a comfortable and healthy environment for children. Include the child advocacy community in this process.
- Advise families of what to expect.
- Designate a staff person to answer questions.
- If long waits are required, accommodate families' needs to eat and attend to other important needs (e.g. ensuring children attend school and making application for benefits and housing).
- Designate a Commission on Social Services staff person to act on complaints from families (or their representatives). Advertise this through very visible means in the waiting room.

D. Ensure Fairness in the Application Process

- Implement a system to handle applications in a consistent and equitable way and inform families of this system. To the extent possible, this system should not require families to line up

before dawn every morning for days on end after having completed the application process.

E. Make the Appeal Process Meaningful

- Require same-day administrative review decisions and Fair Hearing decisions within 48 hours of adverse decisions. Ensure professionalism in the administrative review process by requiring written findings and decisions.

F. Open Up Units by Reducing Length of Stay through Effective Case Management

- Require all families to be screened immediately upon placement to identify their sources of income and other means of achieving independence.
- Provide meaningful oversight of compliance with case management requirements.
- Improve communication and cooperation between OESSS (including contract case managers) and the Income Maintenance Administration.

G. Maximize Federal Funding/Lower Costs

- Amend the State Plan to opt back into federal funding.
- Amend the State Plan to extend reimbursement period beyond 90 days.
- Submit claims for Federal Financial Participation (FFP) in a timely fashion.
- Improve quality control to ensure that a higher percentage of FFP claims are approved.
- Work with non-profit providers to develop more effective and less expensive shelter and services.
- Provide immediate, but temporary, placement for families who lack complete documentation if they are otherwise eligible.

The problems in the District's operation of its EA program, as documented above, are recurrent. It is imperative that the District remedy these problems with an intent to achieve long-lasting and meaningful structural improvements. Unless the Mayor and program administrators make sincere efforts to remedy the systemic defects in the program, families in emergency situations will continue to find themselves without the shelter or basic necessities of life that would enable them to get back on their feet. Implementing measures designed to bring the District into compliance with federal guidelines is a critical step that will benefit both the District and its residents.

EMERGENCY SHELTER

Fountain v. Kelly
C.A. No. 90-1503 (D.C. Super. Ct. -- Judge Richard A. Levie),
Affirmed, C.A. No. 91-1462 (D.C. --
Judges Frank Schwelb, John M. Steadman and William Pryor)

by Thomas J. Karr, Esq. and Steven J. Harburg, Esq.
O'Melveny & Myers-'

Lawyers for Plaintiffs:

Stephen Harburg, Thomas Karr and John Beisner of O'Melveny & Myers; Karen Dane, Nancy McFadden, Ian Hinds, Brenda Hansen and Robert Hayes, all formerly of O'Melveny & Myers.

Lawyers for Defendants:

Before the District Court: George Valentine, Benjamin Blustein, and Nancy Dunn, all of the Office of Corporation Counsel for the District of Columbia. Before the Court of Appeals: James McKay, Jr. of the Office of Corporation Counsel for the District of Columbia.

I. FACTUAL BACKGROUND

This case arose from the District's continued and expanding reliance on the use of expensive, grossly substandard hotel shelters for homeless families^Y Throughout the 1980s, the District primarily used hotel rooms as emergency shelter for homeless families.

^{*/} Thomas J. Karr is an associate at O'Melveny & Myers, where he has worked since 1989. Steven J. Harburg is a special counsel at O'Melveny & Myers, where he has worked since 1986. Mr. Karr and Mr. Harburg are lead counsel for plaintiffs in Fountain.

¹¹ The facts set forth largely reiterate the findings of Judge Richard A. Levie of the District of Columbia Superior Court in his October 12, 1990, Order granting a preliminary injunction. See Fountain v. Kelly, C.A. No. 90-1503, Memorandum Opinion and Order (D.C. Super. Ct. Oct. 12, 1990) [hereinafter "1990 Opinion"].

When this suit was filed in February 1990, five hotels were being used as shelters: Budget Motor Inn on New York Avenue, N.E.; Walter Reed Hospitality House on Georgia Avenue, N.W.; Braxton Hotel at 1440 Rhode Island Avenue, N.W.; General Scott Inn at 1464 Rhode Island Avenue, N.W.; and the Pitts Motor Hotel on Belmont Street, N.W. 1990 Opinion at 9.

Families of as many as seven persons were warehoused in individual rooms, which required multiple family members (including children of all ages and both sexes) to share beds. Id. at 10. These "welfare hotels" often were infested with rats, roaches, and other pests. E.g., id. at 11, 13, 15. They often lacked adequate heating or ventilation. E.g., id. at 10-11. These cramped, substandard living conditions adversely impacted the mental health of families, enhanced the susceptibility of family members to disease, and impeded the psychological and physical development of young children. E.g., id. at 8, 18-20.^Y

In addition, all the hotels lacked cooking and food storage facilities. Id. at 10-11. For food, the families had to go to the Pitts Motor Hotel on Belmont Street, N.W. between 14th and 15th Streets. Id. The families could take a bus to the Pitts; however, they often had to wait outside for the bus, even in snow or rain and often without proper winter clothing. Id. If they missed the bus, they had to travel to the Pitts on their own, which was a trip of several miles from some of the more remote shelters. Also, because traveling to the Pitts for breakfast often interfered with getting children to school, some parents often

^{2/} See also Testimony of Andrew D. McBride Before the D.C. Roundtable on the District's Emergency Shelter/Housing Program (Feb. 4, 1987) (Exhibit L to Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification and Preliminary Injunction); Affidavit of Sister Eileen Breen at 7-8 (Feb. 8, 1990) [hereinafter "Breen Aff."].

faced the dilemma of whether to have their children skip breakfast or miss school. Id. at 12. In addition, families were stranded at the Pitts after breakfast, especially when the weather was inclement, and had to sit in the hallways for most of the day. Id. at 11. Moreover, family members who wanted to work were unable to get jobs, because taking their children back and forth to meals and/or school consumed too much of their time.

The communal dining area at the Pitts presented an unhealthy atmosphere. Scores of homeless families, including hundreds of children, ate in the crowded, noisy dining room. Children would often run or roughhouse in the dining room. Id. at 12-13. Also, children and parents had to come to the dining room to eat, even if they were sick, unless they could get someone to bring food back to them at the hotel. Id. at 19. As a result, children (including babies as young as a week old) were exposed to people carrying illnesses.^F This facilitated the spread of colds and childhood illnesses among the homeless children. Id. at 18. As for health care, it was only available at the Pitts and the General Scott Inn. Id. It was difficult for some families, especially those housed at the Budget Motor Inn in North East Washington, to access these two facilities.

Recreational space for the homeless children was also a problem. By and large, the hotel shelters lacked any such space. Id. at 16. This problem was especially pronounced at the Budget Motor Inn, where the children could only play in the parking lot, which adjoined the busy traffic corridor of New York Avenue.

Finally, families received only sporadic assistance, at best, from District social workers. The District lagged badly in its efforts to move families out of the shelters, as a

See Breen Aff., supra n.2, at 7.

result of which some families had been in the shelters for up to three years. *Id.* at 16-17. Moreover, without needed job training or guidance in household maintenance, these families, when they were able to get out of the shelter system, were placed at greater risk of returning later to the ranks of the homeless.

What was remarkable about this grossly deficient system of sheltering homeless families was the enormous waste of money that was expended to operate it. As described by members of the D.C. Council, the hotel shelters were often operated by "profiteers" whose only motive was to get what they could from the government.^{4/} These "profiteers" charged the District up to \$2,000 per month to house families. *Id.* at 68. As Councilmember Frank Smith said in 1987, "we have all just sat here and been appalled at the amounts of money we have spent on what [are] called temporary shelters; hotels . . . that have run into the thousands of dollars per month where people are living in cramped accommodations. Hotel rooms that really weren't meant for families."^{5/}

In reaction to the combination of squalid shelter conditions, harm to homeless children, and the needless cost of these shelters, the D.C. Council passed in 1987 the Emergency Shelter Services for Families Reform Amendment Act ("1987 Emergency Family Shelter Act" or "Act").^{6/} This Act required the District to house homeless families in apartment-style shelter units that included cooking facilities and separate sleeping

^{4/} Council of the District of Columbia, 7th Per., 1st Sess., 20th Legislative Meeting at 19 (Nov. 10, 1987) (comments of Councilmember H.R. Crawford).

^{5/} Council of the District of Columbia, 7th Per., 1st Sess., 21st Legislative Meeting at 66 (Nov. 24, 1987) (comments of Councilmember Frank Smith).

^{6/} Emergency Shelter Services for Families Reform Amendment Act of 1987, D.C. Law 7-86 (1988), D.C. Code § 3-2063 *et seq.* (Michie 1988).

quarters for adults and minor children. Use of hotel shelters was limited to 15 days and only if "[u]nforeseen circumstances" left no acceptable alternatives.^{7/} The Act also required the District to provide access to adjacent outdoor play areas for the children. The Act further required the District to exhaust all efforts to find permanent housing for these families, and to set up "regional resource centers" to provide social services to help the families return to independent, self-sufficient **living**.^{8/} A compliance date of March 31, 1989, was established.

II. THE COMPLAINT

Plaintiffs filed the complaint in this case on February 12, 1990, almost a year after the deadline imposed by the 1987 Emergency Family Shelter Act, as a class action on behalf of all families in homeless shelters or at risk of entering the family shelter system. Plaintiffs also filed a motion for a preliminary injunction.

The complaint alleged violations of the 1987 Emergency Family Shelter Act, the Social Security Act and the Fifth Amendment. The Social Security Act claim was based on the District's participation in the Emergency Assistance program codified in Title IV-A of the Social Security Act. To participate in this program, the District had filed a state plan with the Federal Department of Health and Human Services ("HHS") in which the District promised to provide "emergency shelter" and other services to needy homeless children and their families. In exchange for this promise to provide emergency shelter, the District could claim millions of federal dollars each year in matching Emergency Assistance

^{7/} Id. § 3-206.3(g).

^{8/} Id. § 3-206.3(i).

funds. The Fifth Amendment claim simply alleged that the 1987 Emergency Family Shelter Act stated that apartment-style shelter "shall" be provided to homeless families, thereby creating an entitlement for those families to that shelter. The failure to provide such shelter thus constituted a denial of a property interest without due process.

III. THE LITIGATION

A. Preliminary Injunction Motion

Following the filing of the suit, the Court quickly scheduled a hearing on the motions for class certification and a preliminary injunction. Prior to the hearing, the District filed papers opposing the preliminary injunction. In those papers, the District raised two defenses to its noncompliance with the 1987 Emergency Family Shelter Act: (1) the District was trying to comply with the Act, and had substantially, if not totally, complied with it and (2) the District's ability to comply with the Act was impeded by the burden of consent decrees and injunctions entered against it in other cases.^v

In addition, the District attacked several of the affiants and named plaintiffs. These attacks were chiefly irrelevant allegations of suspicions of drug use or prior criminal histories of the heads of households of those families.^s The District also acted fairly quickly to move two of the three named plaintiff families into permanent housing or some of the then-existing apartment-style shelters, possibly in an effort to preclude class

^{2/} This latter argument moved the Court, at the hearing, to recall the story of the child killing his parents and then asking for the Court's mercy because he was an orphan. "Shelter Conditions Deplored -- Homeless Testify in Suit Against DC," The Wash. Post, Mar. 23, 1990, at B7.

^{10/} Defendants' Supplemental Opposition to Preliminary Injunction, Affidavit of Pamela Shaw at 3-5 (Mar. 6, 1990).

certification.¹¹ Finally, the District moved to dismiss the Social Security Act and Fifth Amendment claims.

B. Council Passes Emergency Legislation Amending the 1987 Shelter Act

Judge Levie held three days of hearings in late March and early April 1990, on plaintiffs' motion for a preliminary injunction. Several months after the hearing and before a decision was rendered, the City Council passed the District of Columbia Right to Overnight Shelter Act of 1984 Amendment Emergency Act of 1990 (the "1990 Emergency Amendment Act"). The 1990 Emergency Amendment Act sought to amend the 1987 Emergency Family Shelter Act by adding a new section declaring that nothing in the 1987 Emergency Family Shelter Act shall be construed to create an entitlement to shelter or support services. On June 29, 1990, then-Mayor Barry signed the 1990 Emergency Amendment Act, scheduled to expire on September 27, 1990.¹² On July 12, 1990, the City Council and the Mayor signed and then transmitted to Congress for review proposed permanent legislation, the District of Columbia Emergency Overnight Shelter Amendment Act of 1990 (the "1990 Shelter Act"), which mirrored the emergency legislation. The proposed 1990 Shelter Act reduced the District's obligation from "exhaust[ing] all efforts" to help families find permanent housing to "assist[ing]" them.¹³ It also reduced the

¹¹/ 1990 Opinion, supra n.1, at 45 & n.16.

¹²/ D.C. Act 8-226, 37 D.C. Reg. 4674 (June 29, 1990), D.C. Code § 3-206.9 (Michie Supp. 1993).

¹³/ District of Columbia Emergency Overnight Shelter Amendment Act of 1990, D.C. Act 8-228, 37 D.C. Reg. 4815 at § 3(c) (July 12, 1990), D.C. Code § 3-206.3 (Michie Supp. 1993).

number of regional resource centers from four to **two**.^{14/} Finally, the proposed legislation reduced the statutory length of stay in the shelters for homeless persons with minor children from 180 days to 90 days.^{15/}

Before the proposed law could take effect, the District's Board of Elections and Ethics received a petition in support of a referendum to reject it. This petition stayed Congressional review of the 1990 Shelter Act until a referendum was held. Referendum 005 was placed on the ballot for the November 6, 1990, general election.

C. Court Grants Preliminary Injunction

Following the filing of the petition and the lapse of the 1990 Emergency Amendment Act in September, Judge Levie on October 12, 1990, issued a 73-page opinion and order certifying the class, granting the preliminary injunction and rejecting the motion to dismiss the Social Security Act and Fifth Amendment claims. 1990 Opinion, supra n.1, at 1. In the opinion, the Court rejected, on both legal and factual grounds, the District's defense that it had "substantially complied" with the 1987 Emergency Family Shelter Act. First, the Court rejected the contention that incomplete but substantial compliance was a valid defense. Second, the Court found that the District's compliance was, nonetheless, nowhere near substantial. The Court noted that at the time the 1987 Act took effect, there were 137 apartment-style shelter units while, at the time of the hearing in March 1990,

37 D.C. Reg. 4815 at § 3(d)(I).

^{15/} Id. at § 8c, D.C. Code § 3-610 (Michie Supp. 1993). The law provides that exceptions to the limit can be made in certain situations. Nonetheless, neither the 90-day limit nor its 180-day predecessor has ever been enforced, despite the District's periodic threats to enforce the limit.

there were 146 such units, an increase of nine. Id. at 26. Not surprisingly, Judge Levie stated that "the Court is unimpressed" with the progress the District had achieved. Id. at 59.

Judge Levie further held that the hotel shelter system visited irreparable harm upon homeless children, writing that "[t]he present system . . . places [homeless] children in a living situation that fundamentally is unhealthy -- physically and emotionally." Id. at 67. Judge Levie also commented that "the Court strains to comprehend how compliance with the Act will be overly-burdensome when the District already spends as much as \$65 per night per family for a . . . room, exclusive of food, service and transportation to and from meals or social services." Id. at 68.^{16/}

Finally, regarding the District's second defense, that compliance with other court decrees and judicially-imposed fines prevented their compliance with the 1987 Emergency Family Shelter Act, the Court tersely commented that "[s]uch an argument simply is unacceptable in our society and system of laws." Id. at 67. The Court entered a preliminary injunction requiring the District to bring itself into compliance with the 1987 Emergency Family Shelter Act within 90 days, and to file with the Court within 90 days a plan for achieving compliance. The Court rejected defendants' request to stay a ruling pending the results of Referendum 005.

^{16/} At the hearing, ConServe, a nonprofit shelter and services provider, presented evidence showing that providers such as itself could provide an apartment-style shelter along with a wide array of social services for as little as \$27 per day. District of Columbia Budget Package for ConServe, Inc. (7/1/89 - 6/30/90) (Plaintiff's Exh. 7).

D. Some Compliance Before Pennanent Legislation Obviates Court Order

The District moved to appeal the Court's order. The District did, however, take some steps towards compliance with the Order, including issuing a request for proposals to housing providers for apartment-style shelter. In fact, by mid-1991, the District had added well over 300 additional apartment-style shelter units. The District also filed its plan for compliance in early November 1990.

Referendum 005 was narrowly defeated, and the 1990 Shelter Act, with its "no entitlement" language, took effect following the expiration of the Congressional review period in early 1991. The District thereupon asked the Court to vacate its October 12, 1990 Order. On November 15, 1991, the Court granted the District's motion, vacating the preliminary injunction. In its opinion, the Court vacated its earlier ruling on the Social Security Act claim on the ground that the Act did not provide an independent basis for enforcement of the 1990 Shelter Act.^{17/}

Plaintiffs appealed this ruling in December 1991. They argued that the District had pledged to provide shelter for homeless children in the state plan which it submitted to HHS, in exchange for which HHS would provide matching funds for the District's family shelters. Plaintiffs also argued that the standards for family shelter in the 1987 Emergency Family Shelter Act are tantamount to the shelter provisions of the state plan. The District responded that (1) the 1987 Emergency Family Shelter Act is not the state plan, and cannot be enforced through the state plan, and (2) the state plan is not enforceable at all,

^{17/} Memorandum Opinion and Order Granting Defendants' Rule 60(b) Motion for Relief from Grant of Preliminary Injunction at 18-19 (NOV. 15, 1991).

in the light of the recent Supreme Court decision, Suter v. Artist M., 112 S. Ct. 1360 (1992). On August 23, 1993, the D.C. Court of Appeals affirmed the Superior Court decision vacating the preliminary injunction and remanded the case for further proceedings.^W As of the date this summary went to press, plaintiffs are still awaiting action from the lower court.

E. District Relies Less On Hotels. But Overall Shelter Space Decreases

Since Judge Levie's November 1991 decision vacating his earlier order, the District has slowly been reducing its reliance on hotel shelters. Currently, the District has approximately 445 nonhotel family shelter units.^{19/} As for the welfare hotels, the Capitol City Inn in North East closed in 1988, and the Pitts closed in July 1990. After the Pitts closed, families were bused to the Mount Zion Baptist Church at 6th and N Streets, N.W., for meals, except for those families housed at the Budget Motor Inn, where they could receive meals on-site.

Since late 1990, the District has stopped using the Hospitality House, Budget Motor Inn and Family Living Center. In 1991, however, it started using the Center City Best Western Hotel. More recently, the District stopped using the General Scott Inn and the Braxton Hotel; these dislocated families either found housing on their own, were moved into public housing or were transferred to other shelters. The Center City Hotel, which

Fountain, C.A. 91-1462, Memorandum Opinion (D.C. Aug. 23, 1993).

^{19/} This figure was provided by Helen Keys, Administrator of the Office of Emergency Shelter and Support Services ("OESSS"), on Oct. 25, 1993, and Nov. 12, 1993, at meetings with members of the Coalition of Homeless and Housing Organizations and other homeless advocates.

houses 50 families, is the only hotel now being used. Families housed at the Center City Hotel continued to be bused to Mount Zion Baptist Church for meals.

In recent months, the District has begun to raise impediments to the ability of eligible homeless families to obtain emergency shelter, including refusing to shelter them on the grounds that there is no shelter available. In January 1992, the District had approximately 679 units, which included 251 hotel-style and 428 apartment-style units.^{20/} Since that time, there has been a slight increase in the number of apartment-style units, but this increase has been offset by a dramatic decrease in the number of hotel-style units. In fact, since early 1992, the size of the family shelter system has shrunk by about 184 total units.

IV. PROBLEMS IN ENFORCEMENT

Because the preliminary injunction entered in this case was in effect for only a month before Referendum 005 was rejected (and a little over a year before it was vacated entirely), it is rather difficult to gauge the District's efforts at compliance with Judge Levie's order. As discussed above, the District did begin to procure additional apartment-style shelters following the entry of the preliminary injunction in 1990. However, not until well after the order was vacated in 1991 did the District begin to make real progress in eliminating hotel shelters.

^{20/} Daily Census Report for Family Shelters (Jan. 16, 1992) (completed by Alice Bullock).

V. RECOMMENDATIONS FOR IMPROVEMENT

A. The District Should Adopt More Realistic, Practical and Less Wasteful Means of Financing Shelter

The District's main objections to the 1987 Emergency Family Shelter Act (as well as to most other laws) is that compliance will be too costly. However, this objection could be minimized if the District first focused on reducing the ridiculously wasteful systems for providing shelter. As noted above, and as detailed in a series in June 1990, by Jack Cloherty on Channel 4 entitled "The Homeless Profiteers," hotel shelters cost far more than even the most ambitious of apartment-style transitional shelters. It was noted in the Channel 4 series, for example, that, beyond the cost of the rooms themselves, the District paid more for each square foot of office space at the Pitts Hotel than what comparable office space would cost at a posh downtown office suite.

In addition, the District is years behind in procuring matching funds from HHS for its family shelter program.^W Moreover, as discovered in an HHS audit produced in response to a FOIA request, the District may stand to lose potential matching funds totalling over \$2.4 million for not properly documenting its provision of shelter to homeless families.^{22/} And, ironically, according to the audit, the District may have to return matching funds to HHS for its failure to comply with the 1987 Emergency Family Shelter

^{21/} Castenada, "No Forms, No Funds, No Shelter: D.C. Failed to Apply for Aid for Homeless," The Wash. Post, Apr. 6, 1993, at B1.

^{22/} Office of Inspector General, Audit Rep.: Review of Emergency Assistance Payments Claimed by the District of Columbia Dept. of Human Services under Title IV-A of the Social Security Act at 16-17 (May 1992).

Act.^{23/} It is clear that prompt filing for matching funds and compliance with the 1987 Emergency Family Shelter Act would reduce the District's ultimate costs for providing homeless family shelter programs without reducing the quality of services provided. Unfortunately, since the HHS audit, the District has ceased filing for federal matching funds, despite a local statute which requires it to request these funds.

B. The District Should Adopt a Cooperative and Less
Adversarial Stance with Advocates for the Homeless

The District's general reaction to Fountain, and to any outside comment on the family shelter system, has often been hostile. The most notable example of the District's hostility was its reaction to the testimony of Sister Eileen Breen, a nurse who served at the Health Care for the Homeless Project ("HCHP") clinic at the Pitts. Sister Breen provided an affidavit (and later testified) attesting to the poor conditions in hotel shelters and the adverse effects that these conditions have on the physical and mental health of the homeless children. Following the submission of her affidavit, the District complained to the HCHP about Sister Breen's involvement in the suit. The HCHP, which was in the process of renewing its contract with the District, responded with a letter noting, inter alia, that Sister Breen's affidavit represented her views and not the views of the HCHP. The District appended this letter to its opposition to plaintiffs' motion for a preliminary injunction.s" As a result of these events, HCHP health care providers have since been

^{23/} Id. at 9-10, 16-17.

^{24/} Letter from Phyllis B. Wolfe, Executive Director HCHP, to Peter Parham, Department of Human Services (Feb. 21, 1990) (Exh. O, Defendant's Opposition to Plaintiff's Motion for Class Certification and Motion for Preliminary Injunction and Declaratory Relief).

reluctant at times to assist in proceedings which criticize shelter conditions out of fear of retaliation by the District.

A second example of hostile conduct involved the treatment of attorneys representing homeless families in Fountain. Plaintiffs' counsel were often barred from meeting with their clients at the District-contracted shelters, and, on occasion, they were threatened with arrest if they did not leave the shelters.^{25/}

Third, the District's use of appropriate apartment-style family shelter and its provision of social services appear to have been hampered at times by poor relations with nonprofit shelter providers. These shelter providers, in addition to offering potential cost savings, also often provide the social services that were mandated by the 1987 Emergency Family Shelter Act. However, some of these providers have indicated that the District officials responsible for contracting for shelter have sometimes taken an almost adversarial approach to the nonprofit providers' shelter proposals, searching for reasons to reject proposals, rather than working with providers to reach acceptable terms. To the extent such adversarial posturing persists, it reduces the District's ability to fully utilize the shelter and services offered by nonprofit providers.

C. The District Should Commit Itself to Taking Prompt
 Action to Obtain Suitable Housing for Homeless Families

Despite instructions from the City Council to issue a request for proposals ("RFp") for family shelter, the District made only halting, half-hearted attempts to do so until Fountain was filed. The initial RFP, which was to have procured a sufficient number of

²⁵ Letter from Frank R. Trinity, WLCH staff attorney, to Pamela Shaw, Chief, Family Services Section, OESSS (May 22, 1990).

units by March 1989, was not issued until April 28, 1989. As noted above, by mid-1990, the District had procured only nine new units. The District only began in earnest to solicit proposals for additional apartment-style shelter after this suit was filed and Judge Levie issued a preliminary injunction order. The District's efforts at that time resulted in obtaining nearly 400 additional apartment-style shelter units.

Although the District's efforts to increase the size of the family shelter system should not be discouraged, ultimately, the District should look to renovating existing public housing for families. This option not only would be less expensive, but also would permit a downsizing of the family shelter system, while making more suitable apartment-style units available to all homeless families.

EMERGENCY SHELTER

Lampkin v. District of Columbia
C.A. No. 92-0910 (D.D.C. -- Judge Royce Lamberth)
Appeal pending, No. 92-7143 (D.C. Cir. --
Judges Harry T. Edwards, David B. Sentelle, and James L. Buckley)

by Kerrie C. Dent, Esq.
King & Spalding-

Lawyers for Plaintiffs/Appellants:

James D. Miller, Kerrie C. Dent, Evelyn S. Tang, and Jill Swerdloff Klein of King & Spalding; Maria Foscarinis of the National Law Center on Homelessness & Poverty. Of Counsel: Arthur Spitzer of the American Civil Liberties Union Fund of the National Capital Area.

Lawyers for Defendants/Appellees:

John Payton, Martin L. Grossman, George C. Valentine, Robin C. Alexander-Smith, Charles L. Reischel, and Donna M. Murasky, all of the Office of Corporation Counsel for the District of Columbia.

I. THE DISTRICT OF COLUMBIA'S FAILURE TO PROVIDE HOMELESS CHILDREN ACCESS TO AN APPROPRIATE EDUCATION

A. The Scope of the Problem

For years, public interest groups, community organizations, religious groups, and other advocates throughout the District of Columbia have called for action to improve

^{*/} Kerrie C. Dent argued the Lampkin case, on behalf of ten homeless families and the National Law Center on Homelessness and Poverty, before a panel of the U.S. Court of Appeals for the D.C. Circuit on October 21, 1993. She is a 1989 graduate of the University of Virginia School of Law and is an associate on the Special Matters team of King & Spalding's Washington, D.C. office.

school attendance among homeless children in the District. Nonetheless, surveys by the National Law Center on Homelessness and Poverty (the "National Law Center") demonstrate that 50 percent of school age homeless children regularly miss school.V Without access to education, these children have little hope of ever becoming productive, self-sufficient adults.

B. History of the Problem

The problem of homeless children in the District of Columbia being denied access to education is not new. On the first day of the 1990-91 school year, the National Law Center issued a report, Stuck at the Shelter: Homeless Children and the D.C. School System, which found that homeless children were not being provided access to schools. The report also documented the District of Columbia's failure to comply with the Stewart B. McKinney Homeless Assistance Act (the "McKinney Act" or "Act"), a Federal statute enacted in 1987 to ensure free and appropriate public education for homeless children.F

After the National Law Center's report was released, the Mental Health Association of the District of Columbia called for "united action to improve school attendance among homeless children in the District of Columbia." Numerous advocates from around the city wrote to Dr. Andrew Jenkins, then-Superintendent of D.C. Public Schools, proposing a plan to ensure that homeless children were being provided access to schools and that other

^Y National Law Center, Small Steps: An Update on the Education of Homeless Children and Youth Program at 2 (July 1991) (citing Child Welfare League of America, Homeless Children and Their Families: A Preliminary Study at 2 (1987)).

^Y National Law Center, Stuck at the Shelter: Homeless Children and the D.C. School System at 3-7 (Sept. 1990).

educational issues relating to homeless children were being addressed. In response, Dr. Jenkins held a meeting on October 12, 1990, at which he agreed to take steps to implement a transportation plan for homeless children. The logistics of the transportation plan were worked out by Dr. Jenkins and the advocates at a similar meeting on October 16, 1990. Despite Dr. Jenkins' assurances that issues related to homeless children's education would be addressed immediately, the Subcommittee on Special Populations of the D.C. Board of Education delayed implementation of the transportation plan.

Several months later -- before the promised transportation plan was implemented -- a homeless child was struck by a car and seriously injured on his way home from school to the Budget Motor Inn shelter where he and his family lived. Aubrey P., then a thirteen year old homeless child, was struck at the intersection of Bladensburg Road and New York Avenue, an intersection that the American Auto Association has described as the most dangerous in the District. Aubrey had to cross the intersection on his one-hour trip from school to the Budget Motor Inn. Aubrey suffered a broken thigh, traction for a month, and a four-month hospital stay.^{3/}

After Aubrey Po's tragic accident, the District ran a "pilot" transportation program which entailed providing transportation to and from school only for the homeless children living in the Budget Motor Inn. The District operated the pilot program from January 29 to June 14, 1991. The District's July 1991 report on the pilot program, Evaluation of the Pilot Transportation Program at the Budget Inn Shelter, concluded that "when transpor-

^{3/} A more detailed description of these events is set forth in the National Law Center's July 1991 report, supra n.l.

tation was provided to the homeless children, attendance improved for every grade level."^{4/} Nonetheless, the program was terminated on the ground that the increase in attendance was not statistically significant. Although the District acknowledged in its report that a pilot program over a longer period of time might yield more dramatic results, it has failed to conduct additional studies.

C. The McKinney Act

In 1987, finding that "the Nation faces an immediate and unprecedented crisis," Congress passed the McKinney Act, emergency federal legislation designed "to meet the critically urgent needs of the homeless."^{6/} The bill was passed with overwhelming bipartisan majorities in the Spring of 1987, and signed into law by President Reagan on July 22, 1987.

Title VI, Part B of the McKinney Act states that it is the policy of Congress that "each State educational agency shall assure" that each homeless child "have access to a free, appropriate public education" which would be provided to children who are not homeless, and that "the State will review and undertake steps to revise" residency requirements and other such laws that may act as a barrier to that free and appropriate education}!

^{4/} D.C. Public Schools, Evaluation of the Pilot Transportation Program at the Budget Inn Shelter at 6 (July 1991) (prepared by Janet M. Cathey-Pugh) (emphasis added).

^{5/} Id. at 7.

^{6/} Pub. L. No. 100-77, 101 Stat. 482, 485 (July 22, 1987) (codified as amended at 42 V.S.C.A. §§ 11421-11432 (West 1993)).

^{7/} 42 V.S.C.A. § 11431.

In 1990, Congress amended the education subtitle of the McKinney Act, strengthening its provisions and providing more specific guidelines for states and local educational agencies to comply with the Act. For example, the amendments clarified that children who become homeless during the summer should be allowed to remain in their current school during the following academic year if it is in their best interest. The amendments specified that in making a determination regarding whether it is in homeless children's best interests to continue to attend the school they attended before becoming homeless, or be transferred to a new school, consideration shall be given to a request made by a parent.s' The McKinney Act, as amended, specifically targets transportation issues and enrollment delay as problems that states must address." Finally, the McKinney Act requires that each homeless child be provided with educational services and school meals programs comparable to services offered to other students.P

Since enactment of the McKinney Act, the District of Columbia has received hundreds of thousands of dollars in federal aid pursuant to the Act. According to sources within the District of Columbia Public School System, the District received approximately \$115,400 last year and anticipates receiving approximately \$93,500 for the coming year.

^{8/} Id. § 11432(e)(3)(A) and (B).

^{9/} Id. § 11432 (e)(1)(G).

^{10/} Id. § 11432(e)(5).

II. THE LITIGATION

A. Complaint Against the District of Columbia

On April 15, 1992, the National Law Center and ten homeless parents, on behalf of homeless school-age children, filed a complaint and a motion for declaratory and injunctive relief pursuant to 42 V.S.c. § 1983 against the District of Columbia, Mayor Sharon Pratt Kelly, the District of Columbia Public Schools, and Dr. Franklin L. Smith, Superintendent of Schools for the District of Columbia. The lawsuit was filed in the V.S. District Court for the District of Columbia. The homeless children challenged, among other things, the District of Columbia's failure to comply with the McKinney Act. Specifically, plaintiffs alleged that the District of Columbia directly violated the McKinney Act because it:

- (a) failed to consider the best interests of homeless children in placing them in public schools;
- (b) failed to ensure transportation to the schools that are in the best interests of homeless children to attend;
- (c) failed to coordinate social services and public education for homeless children, and to ensure access to comparable educational services and school meals programs; and
- (d) failed to ensure access to free, appropriate public education for homeless children.

The complaint alleged that the District was contravening the stated purpose and policy of the McKinney Act to assure that each homeless child has "access to a free, appropriate public education," and that states remove barriers to the "enrollment, attendance, or success in school" of homeless children.

The complaint also alleged that the following actions and policies of the District of Columbia are in direct violation of the specific requirements of the McKinney Act:

- The District regularly fails to make best interest determinations for homeless children. As a result, these children are placed in schools regardless of, or contrary to, their best interest. Homeless children who have been transferred to schools without regard for their best interests have had their educations disrupted, relationships with teachers and others severed, and their sense of stability and continuity lost.
- Homeless parents are not being consulted, nor are their requests being considered, on which school would be in their child's best interest to attend. Homeless children, therefore, are regularly being denied access to schools which are in their best interest to attend. These children are missing days, weeks and months of their educations; some will have to repeat grades. Missing school is particularly harmful to homeless children who have already suffered educational harm and emotional trauma as a result of losing their home.
- The District of Columbia regularly fails to coordinate shelter placement with educational needs, and children are routinely placed in shelters far from their original schools. In some cases, the distance between the shelter and a homeless child's school is so great that the child must take up to three buses to get to school. Otherwise, the child must transfer to a new school mid-term, regardless of the child's best interest, and thus give up one of the few stable and familiar aspects of his or her disoriented life.
- The District provides homeless families with transportation tokens for school age children only if the school the children attend is more than 1.5 miles from the shelter. This discretionary policy acts as a barrier to enrollment of homeless children in schools selected in accordance with their best interest. Shelters are often located in commercial areas which are dangerous for children to walk to and from because of heavy traffic, lack of sidewalks, and bad neighborhoods. Thus, even if the distance is not great, some homeless children are unable to get to school.
- The District requires the whole family to be present in the shelter intake office in order to receive shelter. As a result of this failure to coordinate shelter services with homeless children's education, homeless children spend days or weeks in a waiting room instead of going to school.

- The District of Columbia has failed to coordinate social services with education and ensure that homeless children have access to school programs and other services. Homeless children and youth do not receive comparable educational services because they are denied access to school. They cannot participate in extracurricular activities or meal programs because they cannot get to and from school and because their placement in distant shelters significantly increases the amount of travel time to get to school, forcing them to miss before-school programs such as breakfast. Homeless children may also have to miss shelter meals in order to get to school on time or to participate in after-school activities.

B. The District Court's Decision

Despite the plaintiffs' supported allegations of violations of specific provisions of the McKinney Act, the Court dismissed the case, holding that, under the recent Supreme Court opinion in Suter v. Artist M.,!!! the McKinney Act does not confer on homeless children rights enforceable under § 1983.^{12/} The Court found that the McKinney Act does not require states to comply with their own plans, but requires only that states submit a proper application if they wish to receive federal funding to educate homeless children, and concluded that homeless children, therefore, have no enforceable rights under the McKinney Act.^{13/}

C. The Pending Appeal

The National Law Center and homeless parents, on behalf of homeless children, have appealed Judge Lamberth's June 9, 1992, dismissal of their § 1983 claim against the

^{11/} 112 S. Ct. 1360 (1992).

Lampkin, CA. No. 92-0910, Memorandum Opinion at 4 (June 9, 1992).

Id. at 16.

District of Columbia. The only issue on appeal is whether the Stewart B. McKinney Homeless Assistance Act confers on homeless children rights enforceable under § 1983.

The Supreme Court held in Suter that a federal statute -- whether or not it involves submission of a state plan for federal money -- can be enforced under § 1983 when the language of the statute unambiguously creates a right to such enforcement.¹⁴ The Suter Court, in fact, explicitly recognized that § 1983 is an available remedy where the underlying, substantive statute is sufficiently detailed and specific to show that Congress intended to create an enforceable right.¹⁵ The McKinney Act, plaintiffs argued in appellate briefs, is just such a statute. The appeal was heard by a panel on October 21, 1993. Plaintiffs await a decision.

III. RECOMMENDATIONS FOR IMPROVEMENT

Before filing suit against the District of Columbia, the National Law Center made recommendations for improvement in the District of Columbia's policies on education for the homeless. For example, in its July 1991 report, Small Steps: An Update on the Education of Homeless Children and Youth Program, the National Law Center made several recommendations for improvement. Now -- more than two years later -- the same general recommendations still apply:

- 1) The District should implement a transportation plan to ensure that all homeless children in the city are provided transportation to school every day. Given that public buses run throughout the city on a daily basis, the District should make

¹⁴/ Suter, 112 S. Ct. at 1362.

¹⁵/ Id.

bus tokens available to all homeless children, regardless of the distance they are required to travel to school.

- 2) The District of Columbia Public School System should designate a liaison to assist homeless children with any problems they might be experiencing.
- 3) The District should ensure that the "best interest" of the child standard is employed when a determination is made as to which school a homeless child will attend. Parents of homeless children should be consulted when the best interest determination is being made.
- 4) The District should designate someone to work with the local Office of Emergency Shelter and Support Services to consider the location of a child's "home school" when making a shelter placement.
- 5) Although administrators claim that the District has amended its policy that requires the whole family to be present in the shelter intake office in order to receive shelter, school age children continue to miss days of school waiting for decisions to be made. The District should ensure that all homeless families are aware of the District's new policy that permits school age children to attend school while their families wait in the shelter intake office.
- 6) The District should coordinate its services so that homeless children never miss shelter meals in order to get to school on time or to participate in after-school activities.

EMERGENCY SHELTER

Johnson v. Dixon

CA. No. 91-1979 (D.D.C -- Judge Thomas Penfield Jackson)

by Drew Fossum, Esq. and Tamar Snyder
Baker & Botts^{*/}

Lawyers for Plaintiffs:

Drew J. Fossum and Timothy S. Durst of Baker & Botts, L.L.P.; Frank R. Trinity and Kenneth H. Zimmerman of the Washington Legal Clinic for the Homeless.

Lawyers for Defendants:

George C. Valentine and Louise R. Phillips, both of the Office of the Corporation Counsel for the District of Columbia.

Lawyers for Intervenors:

John F. Hornick of Logan Circle Community Association.

I. DISCUSSION OF THE FACTS

In December 1978, the District of Columbia opened the Pierce School, located at 13th and G Streets, N.B., as an emergency shelter for homeless men. Shortly thereafter, the District opened another shelter, the Trust Clinic shelter, also for homeless men living near its location at 14th and Q Streets, N.W. Many of the occupants living at these shelters were mentally ill or otherwise handicapped. Both shelters provided basic necessities for the

^{*/} Drew J. Fossum, a 1987 graduate of Southern Methodist University School of Law, is an associate with the Washington office of Baker & Botts, L.L.P. He practices in the area of commercial litigation with a focus on energy regulatory matters. Tamar Snyder will receive her J.D. from the University of Virginia School of Law in May 1994. She was a summer associate with Baker & Botts in 1993.

homeless such as a clean and safe place to sleep, sanitation facilities, and, at the Pierce shelter, an evening meal. The Trust Clinic shelter was frequently used as an overflow shelter for the Community for Creative Non-Violence ("CCNV"), which operates a 1200-bed shelter and various treatment and referral programs, including a substance abuse recovery program¹

On July 11, 1991, representatives of the District of Columbia Department of Human Services ("DHS") posted notices at the Trust Clinic and Pierce shelters advising residents that the shelters would be permanently closed on August 10, 1991. The two closings were the first to follow the City Council's repeal of the right to shelter.

The closing of the Trust Clinic and Pierce shelters eliminated 300 of the City's 1,770 then-existing beds for single adults and was part of a larger scheme which would have reduced the total shelter bed count in the District to 970 beds in subsequent months. These cuts in the shelter program budget were designed to reduce the District's \$300 million deficit and came after neighborhood groups vocally opposed the shelters. A second string of cuts, which would limit the time that homeless adults could stay in shelters to 30 days and homeless families to 90 days, was also planned.²

The "NIMBY" (not in my backyard) syndrome was a driving force behind District officials' decisions to close the two shelters. Wanting "better solutions for the homeless and

^{1/} CCNV's shelter includes a "drug and alcohol" recovery program. The failure to find alcohol- and drug-free accommodations for those individuals participating in the program, for even a short period of time, risks undoing the positive benefits of the treatment which is received.

^{2/} Spolar, "Toughest Cases on the Streets; Homeless Men Hit Hardest by Cuts," The Wash. Post, Oct. 8, 1991, at B1.

... [wanting] them housed somewhere else," members of the Tollgate Neighborhood Association and the Logan Circle Community Association lobbied D.C. officials to relocate the shelters from their neighborhoods.³ However, speaking for DHS, Larry Brown stated, "[W]hile community opposition has been strong, budgetary concerns and underutilization of the two shelters are the top reasons for the closure."⁴

Because the closing of the Trust Clinic shelter made it more difficult to find accommodations for CCNY's overflow residents, the rapid shutdown adversely affected the operation of its shelter and threatened the continued success of its substance abuse program. To minimize the impact of the closing, the CCNY offered to operate the Pierce shelter if the District paid for the utilities, an offer the District did not accept.⁵ CCNY and other service providers also met with DHS Director Vincent C. Gray to discuss a potential extension of the timetable for the shelter closings so that alternative housing shelter for the affected residents could be found.⁶ Those discussions, however, were not fruitful, and the government refused to extend its August 10th closing date. In an interview, Mr. Gray stated that community opposition, in addition to budget concerns, was really forcing the closings.⁷

³/ Spolar, "Two Shelters for Homeless Close in D.C.," The Wash. Post, Aug. 12, 1991, at D1.

⁴/ Cromwell, "CCNV Sues to Halt Closure of Homeless Shelters," The Wash. Times, Aug. 8, 1991, at B4.

⁵ Spolar, "Uncertain Fate of D.C.'s Homeless," The Wash. Post, Aug. 5, 1991, at D1, D5. This offer was made informally in the press, and the cost of the utilities for the shelter was never clarified.

⁶/ Id. at D5.

⁷/ Id.

Following the shutdown of the two shelters, the D.C. government made little effort to provide alternate, accessible shelter for the approximately 150 homeless men who were forcibly displaced. Consequently, the great majority of the affected men was unable to find shelter and was forced into the streets.

Four homeless residents, Earl Johnson (Pierce shelter), Austin Jennings (Trust Clinic shelter), Asbury Maddox (Trust Clinic shelter), and Alex Lifshits (Pierce shelter), and CCNV filed suit against the District government on August 7, 1991.

II. CONTENT OF THE PLEADINGS

In their original complaint, plaintiffs alleged that the D.C. government's actions violated the Fair Housing Act;^{8/} the Hospitalization of the Mentally III Act;^{9/} the D.C. Municipal Regulations, Title 19, Chapter 25;^{10/} and the Due Process Clause of the U.S. Constitution.^{11/}

Under the Fair Housing Act of 1988, it is unlawful to discriminate against the "handicapped" as defined in the Act. A significant percentage of the residents at the Trust Clinic and the Pierce shelters were or could be perceived as mentally ill or otherwise "handicapped" under the terms of the Fair Housing Act. The complaint asserted that neighborhood opposition to the shelters was based, in part, on an effort to discriminate

^{8/} 42 U.S.c. § 3601 et seq.; Original Complaint for Declaratory Injunctive and Other Relief at ¶¶ 25-29 (Aug. 7, 1991) [hereinafter "Complaint"].

D.C. Code § 21-562; Complaint, supra n.8, at ¶¶ 30-33.

^{10/} Complaint, supra n.8, at ¶¶ 34-42.

^{11/} Id. at ¶¶ 43-47.

against the "handicapped," and that substantial efforts were taken by these groups to persuade the D.C. government to close these shelters.

Plaintiffs alleged that the D.C. government's decision to close the Trust Clinic and Pierce shelters was substantially motivated by neighborhood opposition to the shelters. Thus, by capitulating to neighborhood opposition that was "in whole or in part" based on discriminatory objectives, the government constructively adopted the intent of those persons and discriminated against the handicapped.^{12/} In addition, the closing of the two shelters had a discriminatory impact on the mentally ill and other parties who are handicapped and, therefore, constituted unlawful discrimination against the handicapped within the terms of the Fair Housing Act^{13/}.

Secondly, plaintiffs alleged that the expulsion of residents from the Trust Clinic and Pierce shelters, without provision for their continued shelter and treatment, violated the Hospitalization of the Mentally III Act, which required that residents be accommodated in proper facilities that are less restrictive alternatives to St. Elizabeths Hospital. Because many of the residents at the Trust Clinic and Pierce shelters were former St. Elizabeths patients, they were entitled "to medical and psychiatric care and treatment" under the Hospitalization of the Mentally III Act, and their expulsion from the shelters, without the availability of substitute housing, violated their rights under § 562 of that Act.^{14/}

^{12/} See B.A.S.I.C. v. City of Providence, No. 89-248(P) (1990) WL 429846 (D.R.I. Apr. 25, 1990) (Fair Housing Act applies to Domestic Shelters).

42 V.S.c. § 3604(£)(2).

^{14/} D.C. Code § 21-562. See Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975) (finding statutory duty to place eligible patients from St. Elizabeths into alternative facilities less restrictive than the Hospital).

Third, plaintiffs alleged that the District government failed to comply with the D.C. Municipal Regulations, Title 29, Chapter 25, which were published in the D.C. Register on May 17, 1991. Section 2503.6 of the Temporary Family Housing and Emergency Overnight Shelter for Individual Adults and Support Services Program (the "Emergency Rules") provides that:

"If temporary family housing or emergency overnight shelter for individual adults is denied, suspended or terminated, the Department shall provide written and oral notice stating the reasons for the denial, suspension or termination and the procedure by which the applicant may request a fair hearing to appeal the action in accordance with section 2511."

Section 2506.6 of the Emergency Rules further provides that:

"The Department shall advise the resident of the determination [regarding whether the resident shall be entitled to an exception to the 60-day maximum length of stay in an emergency shelter] orally and in writing, and case managers shall meet with homeless individuals or adult heads of households to discuss the determination and assist with alternative housing arrangements."

The emergency overnight shelter provided by the Trust Clinic and Pierce shelters was "denied, suspended or terminated" for residents on August 10, 1991. Plaintiffs alleged that the government failed to provide written or oral notice why the residents' access to emergency overnight shelter was being terminated, in violation of section 2503.6, and neglected to notify residents of the determination regarding the length of their stay, in violation of section 2506.6. In addition, affected occupants received no written or oral notice of the procedures by which they could request a fair hearing to appeal the decision to close the shelters, in violation of section 2503.6.

Plaintiffs alleged that defendants also failed to provide case managers to meet with every resident of the shelters to "assist with alternative housing arrangements," in violation

of section 2506.6. The complaint asserted that the District's neglect on this issue resulted in injury to residents and to plaintiff CCNV's efforts to provide the displaced residents with alternative housing arrangements.

Finally, plaintiffs' original complaint alleged that residents were denied their right to procedural and substantive due process under the Fifth Amendment of the United States Constitution. At a minimum, residents of the two shelters were entitled by the Fifth Amendment to notice of the planned closing of the shelters and "a reasonable opportunity to present written comments."^{15/} There was no reasonable opportunity for the residents of the Trust Clinic and Pierce shelters to present written comments because the notice posted by defendants on the doors of the shelters did not indicate that individuals aggrieved by the planned closing had any right to comment and did not provide an address where they could submit written comments. Plaintiffs alleged that their procedural due process rights were violated and that such a violation was actionable under 42 U.S.c. § 1983.

III. SUMMARY OF THE LITIGATION

A. Chronological Summary

Shortly after the closing notices were posted at the shelters, plaintiffs filed their original complaint for declaratory, injunctive, and other relief in the United States District Court for the District of Columbia. The complaint set forth in detail the allegations described above. At or around the time that the complaint was filed, plaintiffs discovered that the Trust Clinic and Pierce shelter closings were only the initial phase of a larger plan

^{15/} See Williams v. Barry, 708 F.2d 789, 791 (D.C. Cir. 1983) (homeless men contesting impending closure of several city shelters were entitled to advance notice of planned closings and a written comment procedure).

which would cut the District shelter population by half. Plaintiffs, thus, filed a motion for a temporary restraining order to postpone the closings. Judge Thomas Penfield Jackson denied the motion for a TRO on August 9, 1991. The shelters were permanently closed two days later, and residents were forced into the streets.

After a hearing, the Court denied plaintiffs' motion for a preliminary injunction and other relief. In reviewing plaintiffs' due process argument, Judge Jackson stated that no one had an "entitlement" to overnight shelter.^{16/} He flatly rejected plaintiffs' arguments that the District intended to discriminate against the homeless or that the District "'constructively adopted' the motivations of the shelters' neighbors.t'-" Furthermore, according to Judge Jackson, government officials may "assign the homeless a lesser priority than they may have had in the past . . . without any judicial second-guessing, at least by the federal judiciary."^{18/} Although Judge Jackson agreed to hear arguments on the Fair Housing Act issue, he stated that its applicability to the case was questionable.e"

Following Judge Jackson's decision denying injunctive relief, defendants filed a motion to dismiss, or in the alternative, for summary judgment. Plaintiffs responded with a cross-motion for summary judgment.

^{16/} Memorandum and Order at 7 (Sept. 5, 1991). Because Judge Jackson refused to permit homeless parties or witnesses to testify at the preliminary injunction hearing, plaintiffs submitted written proffers of their testimony.

^{17/} Id. at 10, 15-16.

^{18/} Id. at 13.

^{19/} Id. at 8. Judge Jackson concluded: "The Act . . . protects only 'buyers' and 'renters' from unlawful discrimination. Plaintiffs, and other inhabitants of the two shelters, are neither. Such accommodations as they have had at the shelters in the past have been provided gratis by the District." Id. at 8-9.

At this point in the case, District officials had made a sufficient number of public statements regarding the District's future shelter policy to convince plaintiffs that the D.C. government had withdrawn its plan to close additional shelter beds before winter. In addition, as a result of informal discussions with homeless advocates, the government had agreed to appoint a shelter task force, to include community activists, homeless advocates and other residents. This task force would be charged with conducting an internal policy review reexamining how many shelter beds were actually needed and the appropriate procedures to follow when, and if, additional shelters were closed in the future.^{20/} As the primary objective of the litigation had been met, albeit without a formal agreement by the District, plaintiffs agreed to a stipulation of dismissal without prejudice.

B. Significant Facts Obtained During the Litigation

During the course of discovery, plaintiffs learned through the deposition of Earnest Taylor, then-Chief of the Office of Emergency Shelter and Support Services, that the District had received federal funding for some of the shelters slated to be closed on the

^{20/} The Mayor's Advisory Task Force on Homelessness produced a report a year later which made 50 recommendations concerning homeless issues. Ruben Castaneda, "D.C. to Try Vouchers for Beggars; Kelly Rejects Most Task Force Proposals," The Wash. Post, Oct. 21, 1992, at F3. Mayor Kelly accepted, but failed to implement, 12 of the 50 recommendations. Id. Some of the recommendations Mayor Kelly accepted included: (1) provision of vouchers for food and services which could be given to panhandlers in lieu of cash, (2) creation of a community advisory board for each homeless facility, (3) establishment of an automated system to keep track of the particular needs of homeless individuals, and (4) creation of a better system to monitor the contracts with shelter providers. Id. Several of these recommendations have been embodied in the HUD-D.C. Initiative, proposed recently by HUD Secretary Henry Cisneros and Mayor Kelly, discussed infra, pp. 321-324.

condition that the shelters remain open for a certain number of years.^{21/} Only after plaintiffs brought this information to the D.C. government's attention, did District officials seek permission from the federal government to transfer the funds to other shelters. The litigation was terminated before plaintiffs could challenge the District's handling of these federal funds.

C. Significant Problems with Witnesses

In preparing for the preliminary injunction hearings, plaintiffs experienced difficulty in obtaining cooperation from employees of Catholic Charities and the D.C. Coalition for the Homeless -- the contractors which operated the Pierce and Trust Clinic shelters. These contractors feared that the District would retaliate against them, or their employees, and deprive them of employment or future contracts. As the individuals employed to work in the shelters had the best first-hand knowledge of the difficulties posed to shelter residents by the sudden closings, their unwillingness to assist in the litigation was a significant disadvantage.

Additionally, plaintiffs subpoenaed Dr. Robert Keisling, of the Commission on Mental Health, and DHS Director Vincent Gray. Dr. Keisling was potentially a friendly witness for plaintiffs because he was fairly candid about the District's shortcomings in its services to mentally ill persons. Vincent Gray's testimony was critical to plaintiffs' discriminatory intent argument. One of plaintiffs' witnesses had testified that Mr. Gray had stated that the District would not accept CCNV's offer because the shelters were closed as

^{21/} Deposition of Ernest C. Taylor at 86-96 (Aug. 23, 1991). The amount of federal funding received by the Trust Clinic and Pierce shelters was never quantified.

a consequence of neighborhood opposition, and not due to financial considerations.^{s/} However, in an affidavit, Mr. Gray flatly denied that he had ever made this statement, and therefore, Mr. Gray's testimony would have been extremely probative to plaintiffs' discriminatory intent argument. Unfortunately, both Dr. Keisling and Mr. Gray left town prior to the hearings and, thus, were out of the jurisdiction and subpoena power of the Court during the relevant period.

IV. THEMES AND RECOMMENDATIONS FOR IMPROVEMENT

One theme that arose during the course of the litigation was that District officials' oversight of the administration of the homeless shelter program was poor. First, in closing the shelters, the District was taking substantial risks that it might lose over \$410,000 in federal money for D.C. homeless shelters by failing to comply with the conditions that were originally attached to those funds.^{23/} Furthermore, plaintiffs discovered through the deposition of the District's shelter administrator that District officials had failed to take appropriate administrative steps to ensure that the shelter contractors were abiding by the terms of their contracts with the government.s"

District officials also failed to take reasonable steps to ensure that the homeless residents of the Trust Clinic and Pierce shelters were properly informed of the shelter closings and their rights under the law. A single notice was posted on the door of each shelter, and many residents, in confusion about the actual closing date, left the shelters

^{22/} Affidavit of Sister Veronica Daniels ¶ 6 (filed June 11, 1991). See also supra discussion at 3.

Deposition of Earnest C. Taylor, supra n.21, at 86-96.

Id. at 40-41.

right away, thus suffering an immediate disconnection from their shelter and support network. Moreover, one night prior to the scheduled closing date and without any notice, government officials required contractors to partially close the shelters, forcing some homeless residents to spend the night on park benches. **In** the future, the government should take adequate measures to ensure that individualized notice and discharge plans are provided to homeless residents in shelter closings.

Somewhere between 6,000 and 15,000 homeless people live in the District.^{25/} Although all groups have good intentions for homeless individuals, the D.C. government has been unable to coordinate its services with those provided by non-profit groups. Alice Vetter, President of the Ministries United to Support Community Life Endeavors, a non-profit housing group, has stated, "I think there is the network and institutional structure to take care of the homeless -- and somehow it's not **happening**."^{26/} The D.C. government should take advantage of the resources of the homeless advocate groups and nonprofit organizations in the District and reestablish a working relationship with these groups to improve its social programs for the District's homeless residents.

Spolar, supra n.3.

^{26/} Spolar, "The Void Mitch Snyder Left Behind; Homeless Movement Suffers Year of Defeats Since Leader's Death," The Wash. Post, July 8, 1991, at D1.

EMERGENCY SHELTER

Walls v. Barry
C.A. No. 88-1372 (D.C. Super. Ct. --
Judges Robert S. Tignor, Donald S. Smith,
and Frederick H. Weisberg)

by Lynn E. Cunningham, Esq.
Neighborhood Legal Services Program-'

Lawyers for Plaintiffs:

Lynn Cunningham, Richard Gladstein and Randal Minor, all of the Law Reform Unit of the Neighborhood Legal Services Program.

Lawyers for Defendants:

Robert Harlan, Office of the Corporation Counsel for the District of Columbia.

I. SUMMARY OF THE FACTS

Pursuant to a 1984 initiative, District voters passed the District of Columbia Right to Overnight Shelter Act of 1984 ("Overnight Shelter Act" or "Act"). D.C. Law 5-146 (1985), D.C. Code §§ 3-601 to 3-607 (Michie 1988), as amended, D.C. Code §§ 3-601 to 3-622 (Michie Supp. 1993). Section 2 of the Act gave all residents of the District of

^{*/} Lynn E. Cunningham has been the Managing Attorney for the Law Reform Unit at the Neighborhood Legal Services Program since 1980. He has worked on impact litigation involving several of the major welfare benefit programs in the District of Columbia, as well as on cases addressing conditions in public housing. He frequently testifies at D.C. Council hearings on issues affecting the District's low income citizens.

Before joining NLSP, he worked with Florence Roisman at the National Housing Law Project office in D.C. He holds degrees from Columbia Law School, Union Theological Seminary, and Cornell University, and is an ordained Episcopal priest.

Columbia the right to adequate overnight shelter. Pursuant to the Act, the District provided emergency shelter to homeless families through a program which qualified for matching grants from the United States Department of Health and Human Services under Title IV of the Social Security Act.

Many of these shelters were local tourist motels that contracted with the District to provide rooms to homeless individuals. These motels rarely had kitchens, common areas, or play areas for the children. A Congressional report described the conditions at these so-called "welfare motels" as follows:

"Although D.C. law requires family facilities for the homeless to include cooking facilities, most [welfare motels] do not allow any facilities for food. For example, the General Scott Inn includes a refrigerator in each room but does not allow hot plates or other cooking facilities. In fact, all the small stoves that were in the rooms were removed after one fell on a small child and killed him in September 1988. Rather than making the stoves more secure, they were removed, leaving an empty space."^{1/}

In a number of cases, children played next to busy thoroughfares such as New York Avenue.

One such welfare motel, the Budget Motor Inn, forced resident families into the street early in the morning and would not let them return to the units until late in the evening, leaving women and children with no safe haven against potential violence or inclement weather. To assist these families in obtaining safe and continuous shelter, the Neighborhood Legal Services Law Reform Unit filed suit on their behalf.

^{1/} House Comm. on Government Operations, Mismanagement in Programs for the Homeless: Washington, D.C., as a Case Study, H.R. Rep. No. 366, 102d Cong., 1st Sess. at 6 (1991) (footnotes omitted).

II. SUMMARY OF THE DISPUTE

When initial calls to the District's Office of Emergency Shelter and Support Services ("OESSS") concerning the families' plight were unavailing, plaintiffs abandoned their efforts to negotiate a solution and, on February 12, 1988, filed a motion for a temporary restraining order ("TRO") in D.C. Superior Court. Plaintiffs claimed that § 2 of the Overnight Shelter Act gave families a right to continuous access to their rooms in the shelter.^F They requested a declaration that the District must provide families with shelter that permits 24-hour access to rooms. Judge Tignor held the initial hearing and granted the TRO on March 11, 1988, sitting as Judge in chambers. The case was then transferred to Judge Smith's docket.

Rather than finding another motel which would provide 24-hour access, the District moved many of the families at the Budget Motor Inn to the gymnasium at the Randall School, a homeless shelter and the headquarters of the OESSS. At the gymnasium, women and children initially lived in the same building with single homeless men, and all occupants slept on cots with no physical barriers separating the men from the women and children. Later, single men were not permitted in the shelter and the District provided small partitions for the families (partitions that reached neither to the ceiling nor to the floor). The arrangement left the families with little to no privacy. One observer commented that the conditions resembled a scene from Soweto in South Africa.

^{2/} Section 2 read, "All persons in the District of Columbia shall have the right to adequate overnight shelter. Adequate shelter is that which to a reasonable degree maintains, protects, and supports human health, is accessible, safe, and sanitary, and has an atmosphere of reasonable dignity." D.C. Code § 3-601 (Michie 1988).

These conditions became the focus of the remainder of the litigation. The District Claimed that the gymnasium was a temporary measure, but refused to present a plan for more permanent housing. In response, plaintiffs amended their complaint on April 22, 1988, to add a claim that the District was violating its obligation under the Overnight Shelter Act to provide shelters affording homeless families an "atmosphere of reasonable dignity." D.C. Code § 3-601 (Michie 1988). Alleging that the gymnasium conditions did not constitute the "adequate shelter" required by the Overnight Shelter Act, plaintiffs sought a preliminary injunction that would force the District to provide decent, private shelter for the families.

Judge Smith held an evidentiary hearing and, on April 1, 1988, granted a preliminary injunction requiring the District to devise and implement a plan that would provide humane shelter for the families. Judge Smith then transferred the case to Judge Weisberg.

The District essentially ignored the preliminary injunction. It delayed implementing Judge Smith's order for six months by requesting continuances and submitting unacceptable plans. The District refused to work with plaintiffs' counselor to consider seriously plaintiffs' plans for better shelters. Negotiations to devise a permanent solution ended in an impasse. Finally, plaintiffs realized that the Court would have to hold a trial and plaintiffs would have to seek a permanent injunction.

On the eve of trial, the District inexplicably moved all the families into motel-style shelters with 24-hour access and closed the Randall School as a family shelter. Citing this action, the District moved to have the case dismissed as moot. Despite plaintiffs' argument that the cessation of illegal activity alone did not moot their claim and that the District

could reopen gymnasium-style shelters at any time, Judge Weisberg concluded that the closure mooted the complaint and, on February 7, 1989, dismissed the case.

While plaintiffs appealed, the Mayor in 1991, persuaded the District Council to amend the Overnight Shelter Act to eliminate the right to overnight shelter. D.C. Law 8-197, D.C. Code §§ 3-601 to 3-622 (Michie Supp. 1993). After the 1991 amendment, a referendum seeking to reinstate a right to shelter failed in a close vote after a heated political battle. Although plaintiffs therefore never received a final ruling on whether families must have 24-hour access to shelters, the District's family shelter contracts now provide for 24-hour access.

III. CONCLUSION

The District cannot ignore the need of homeless residents, and particularly homeless families, for dignity and safety. The District initially housed children in dangerously unsafe shelters. When the courts recognized the injustice of this arrangement, the District placed mothers and children in degrading and unhealthy conditions in a gymnasium. Although limitations on District resources may not have permitted immediate transfer to motel- or apartment-style shelters, had the District sought decent housing with the vigor with which it sought to avoid a permanent injunction, welfare motel families likely would have received safe shelter months earlier.

Repealing the District laws upon which plaintiffs rely in seeking judicial redress effectively preempts litigation, but does little to solve the underlying problems. Frustration with social mandates and fear of consent decrees do not justify eliminating legal obligations.

Such action by the D.C. Council reinforces the lack of compassion in the District of Columbia's social services system.

III.

PUBLIC HOUSING

PUBLIC HOUSING

Pearson v. Kelly
C.A. No. 92-14030 (D.C. Super. Ct. --
Judge Steffen W. Graae)

by Lynn E. Cunningham, Esq.
Neighborhood Legal Services Program"

Lawyers for Plaintiffs:

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Lawyers for Defendants:

Claude E. Bailey, Jamal A. Rashad, Shelley L. Madden, Ariel L. Mendez, Kimberly Lincoln-Stewart, Natalie E. Frazier, all of the Office of Corporation Counsel for the District of Columbia.

I. FACTS

Over 2,200 units of public housing lie vacant in the District of Columbia." These vacancies persist in a city besieged by homelessness, where the public housing waiting-list catalogs 11,300 names,^{2/} and, most disturbingly, while more than \$158 million in funds

See biography of Lynn E. Cunningham, supra p. 111.

^{1/} Office of the Inspector General, Audit Rep.: Dept. of Public and Assisted Housing, at App. B (Sept. 30, 1992) (figures from January 1991 through July 1992) [hereinafter "Audit Report"].

^{2/} The average wait for families on the public housing waiting list is seven years. Dist. of Columbia Commission on Budget and Financial Priorities, Comm. on Pub. Works and Econ. Dev., Issue Analysis -- Management and Administration of Public Housing and Rent Subsidy Program at 115.

designated to eliminate the vacancies remain unobligated and unspent.^V Although 1,400 of these vacant units require substantial renovation, 800 require only minor repairs for immediate occupancy.^f

The District's public housing program suffers in comparison to national standards. With over 2,200 of its 11,790 public housing units vacant, the District's 19% vacancy rate far exceeds the federal standard of 3% and New York City's rate of less than 1%. In the District, vacant units remain empty for an average of 1,033 days, against a U.S. Department of Housing and Urban Development ("HUD") standard of 30 days.^{3/}

Vacant public housing is not a new problem in D.C. In 1985, then-Mayor Marion Barry noted: "Each day a public housing unit remains vacant increases the financial loss to the District of Columbia, and increases the threat to public health and safety."^{6/} Mayor

^{3/} This figure includes \$69 million in available federal funds and \$89.9 million in District funds. Plaintiffs' Memorandum in Support of the Plaintiffs' Motion for a Preliminary Injunction at 13-14. The \$89.9 million in "capital authority" represents funds that the District has authorized itself to borrow in the fiscal year 1993 budget to address public housing needs. Id., Exh. 28, FY 1993 - FY 1998 Capital Improvements Plan, at 73.

^{4/} Audit Report, supra n.1, at 45 (noting that, in 1989, the D.C. Department of Public and Assisted Housing had 900 vacant units that did not require renovation) and Appendix B (graph of number of vacant units not requiring renovation). Ironically, units that require rehabilitation are vacant an average of 939 days, while units that require only minor repairs are vacant an average of 1,156 days. Id. at 24.

^{5/} Id. at 24.

^{6/} Mayor's Order No. 85-200, Declaration of a Public Exigency with Respect to the Urgent Need to Repair, Secure and Make Habitable Vacant Public Housing Units in the District of Columbia at 2 (Dec. 20, 1985) [hereinafter "Mayor's Order 85-200"].

Kelly made the identical statement in 1992.^{7/} The problem endures because "fraud, waste and abuse continue [] to plague" the entity entrusted with administering the District's public housing, the Department of Public and Assisted Housing ("DPAH" or "the Authority").^{8/} The vacancy issue epitomizes the DPAH's perennial maladministration. The HUD Inspector General recently reported:

"For the past 13 years, HUD has designated the Department of Public and Assisted Housing as operationally and financially troubled. . . . [T]he Authority experienced a high number of vacancies, long waiting lists, high tenant accounts receivable balances, deteriorating housing stock, and the lack of a preventative maintenance program. Frequent management turnover and reorganization, matched with substantial funding infusions, have not to date achieved the Authority's primary function of providing decent, safe, and sanitary public housing."^{9/}

Auditors drew similar conclusions in 1975, 1984, and 1989.^{10/} The most recent audit details the DPAH's problems in procurement and contracting, warehouse-inventory control, maintenance, temporary housing, and administrative oversight. Further, the audit makes specific recommendations to remedy the Authority's maladministration. The DPAH's former Director, Raymond Price, remarked in 1991: "It is a known fact that the Agency is a mess"^{11/}

^{7/} Mayor's Order No. 92-12, Declaration of a Public Emergency with Respect to the Urgent Need to Repair, Secure, and Make Habitable Vacant Public Housing Units in the District of Columbia at 2 (Feb. 4, 1992) [hereinafter "Mayor's Order 92-12"].

Audit Report, supra n.1, at iii.

Id. (emphasis added).

^{10/} Id. at 11, 15.

^{11/} Raymond Price, Jr., Statement at the Public Roundtable to Consider P.R. 9-10, His Nomination as the Director of the Department of Public and Assisted Housing Before the Committee on Housing of the Council of the District of Columbia at 7 (June 24, 1991).

Like housing authorities across the nation, the DPAH administers public housing under full funding from HUD. Specifically, through an Annual Contributions Contract ("ACC") with the DPAH, HUD funds the Authority in three ways: annual operating subsidies provided to operate and maintain housing developments; modernization funds to upgrade units; and development grants for constructing new units. The modernization funds are designated for major repairs and renovation, such as those required for 1,400 of the DPAH's vacant units. Since 1968, HUD has provided the DPAH with \$250 million in modernization funds; through 1992, \$69 million was unobligated and unspent. In June 1992, the DPAH's failure to use available funds to upgrade and occupy vacant units, in the face of long waiting lists, prompted the D.C. HUD office to threaten to recapture \$24.6 million if the money was not obligated immediately.^W

In addition to depriving the homeless population of housing, the existence of vacant units also costs the District, and its other residents, substantially. Federal auditors estimated that, in 1992, vacant units cost the District \$4.8 million in potential rental income.^W More importantly, illegal activity in these vacant units threatens the lives and well-being of nearby residents. Both Mayors Barry and Kelly recognized the public endangerment:

"A serious problem has been created by unauthorized persons engaging in the following conduct: (a) ripping out copper heating lines in vacant units; (b) damaging plumbing lines in vacant units; (c) causing fires in vacant units; (d) using vacant units as a hiding place when engaged in the performance of criminal activities against residents of occupied units including, but not

^{12/} Audit Report, supra n.1, at 34.

^{13/} Id. at 24-25.

limited to, the manufacture, sale and distribution of illegal drugs; and (e) frequent homicides, serious assaults, theft and robberies [in vacant public housing units]."^{14/}

Nevertheless, the vacancies continue.

During her 1990 campaign, Mayor Kelly repeatedly pledged to make vacant units habitable within her first eighteen months in office.^{15/} At a September 1991 press conference, the Mayor, along with HUD Secretary Jack Kemp and then-DPAH Director Raymond Price, announced the District's plan to renovate 2,000 vacant units by Summer 1992. HUD provided the District with \$37.6 million for this rehabilitation effort.^{16/} Mayor Kelly did not meet her promise; in the Summer of 1992, only 601 units were renovated. Moreover, the DPAH paid too much for the work because of "questionable contracting" and failed to comply with HUD's lead-based paint requirements. W Director Price attempted to justify the DPAH's improvident behavior by arguing, inter alia, that "the threat of a lawsuit" forced his department to act quickly and incur unnecessary

^{14/} Mayor's Order 85-200, supra n.6, at 1; Mayor's Order 92-12, supra n.7, at 1. See also Reilly, "Dixon Promises to Put Tenants in Vacant Units," The Wash. Times, Sept. 24, 1991, at B1 [hereinafter "Reilly"].

^{15/} Reilly, supra n.14, at B1.

^{16/} Id. (\$10 million of the grant was "funding previously withheld from the department because of former administrative mismanagement").

^{17/} Castaneda, "Kelly's Housing Pledge May Have Been Costly; Audit Questions Quick Contract Awards," The Wash. Post, Oct. 7, 1992, at D1 [hereinafter "Castaneda"]. The Audit Report details the problems with this renovation effort and concludes that DPAH "did not follow sound management practices." Audit Report, supra n.I, at 63-67.

Audit Report, supra n.1, at 63.

costs.^{19/} Furthermore, during the unsuccessful renovation, more than 600 other units were vacated and not relet. Consequently, no overall progress was made on the vacant public housing unit problem.

II. THE LITIGATION

Early in Mayor Kelly's administration, a group of attorneys approached the District to discuss the vacant public housing issue. Led by the Neighborhood Legal Services Program, the attorneys proposed that the District sign a consent decree committing it to reduce the inventory of vacant units. The District flatly refused. The failure of these negotiations, plus the Kelly Administration's inability to alleviate the problem, prompted this suit.

A. The Complaint

On October 29, 1992, plaintiffs' counsel brought this class action on behalf of the 11,300 households on the DPAH's waiting list. The complaint names as defendants Sharon Pratt Kelly in her official capacity as Mayor of the District of Columbia, Raymond Price in his official capacity as Director of the DPAH, and the District of Columbia.

Plaintiffs' primary claim is that the District violated the United States Housing Act of 1937, 42 U.S.c. § 1437, by mismanaging its vacant public housing. In general, the Housing Act creates programs to provide low income families with affordable housing. The legislation, in pertinent part, authorizes federal subsidies to public housing authorities (such as the DPAH), and restricts in some respects the manner in which the housing may be managed. Specifically, the Act states:

^{19/} Castaneda, supra n.17, at D1.

"[A public housing authority] shall not take any action to demolish or dispose of a public housing project or portion of a public housing project without obtaining the approval of ... [HUD] and satisfying the conditions specified in subsections (a) and (b) of [section 1437p]."^{20/}

Plaintiffs' legal claim is that, through neglect and abandonment, the District is demolishing vacant public housing. The District's neglect, for example, not only causes the building to deteriorate, but also permits vandals to destroy the units.^{21/} Since the District did not receive HUD's permission for these demolitions, the District violated the Housing Act.

Plaintiffs also set forth a cause of action for breach of contract. In accordance with the Housing Act, the DPAH entered into an ACC with HUD under which HUD provided the DPAH with modernization and operations funds in exchange for the DPAH's

^{20/} 42 U.S.c. § 1437p(d). Subsections (a) and (b) of section 1437p in turn set forth specific criteria that must exist before the Secretary may approve demolition. For example, the project or portion thereof must be unusable for housing purposes; the application for demolition must have been developed in consultation with the tenants; all tenants to be displaced must be relocated to other decent, safe, sanitary, and affordable housing; and the plan must provide for an additional decent, safe, sanitary, and affordable dwelling unit for each unit to be demolished.

^{21/} In fact, the District recognized this destruction. Mayor's Order 85-200, supra n.6, at 1; Mayor's Order 92-12, supra n.7, at 1 ("ripping out copper heating lines ... damaging plumbing lines ... [and] causing fires").

Plaintiffs draw strong support for their "constructive demolition" argument from Cole v. Lynn, 389 F. Supp. 99, 105 (D.D.C. 1975). Writing with respect to subsidized housing in D.C., Judge Gesell stated: "[V]andalism, empty apartments and continuing unsafe conditions would, as a practical matter, effectively accomplish demolition by a process of erosion. Only by filling the buildings with qualified needy tenants can the project remain viable. . . ." Other decisions support plaintiffs' argument as well. E.g., Henry Horner Mothers Guild v. Chicago Housing Auth., 780 F. Supp. 511,513-515 (N.D. Ill. 1991); Tinsley v. Kemp, 750 F. Supp. 1001, 1007-9 (W.D. Mo. 1990); Concerned Tenants Assoc. of Father Panik Village v. Pierce, 685 F. Supp. 316, 319-21 (D. Conn. 1988).

administration of public housing in compliance with HUD's statutory and regulatory provisions. 42 U.S.C. §§ 1437c, 1437g. In the ACC, the DPAH also agreed to:

- "[A]t all times operate each Project (1) solely for the purpose of providing decent, safe, and sanitary dwellings ... within the financial reach of Families of Low Income" (ACC, pt. 2, § 201);
- "[M]aintain each Project in good repair, order, and condition" (ACC, pt. 2, § 209); and
- "[R]econstruct, restore, or repair" any project or part thereof that is damaged or destroyed (ACC, pt. 2, § 210(A)). Although the District may determine that all or any part of such damage or destruction shall not be reconstructed, restored, or repaired, any such determination must be made "with the approval of the [Federal] Government" (ACC, pt. 2, § 210(E)).

Asserting their claim as third-party beneficiaries to the contract, plaintiffs allege that the District's actions towards the vacant housing violated each of these ACC provisions and the Housing Act itself.

As relief, plaintiffs requested a preliminary injunction requiring the defendants to:

- repair and rent all future vacant units within 30 days of the date they become vacant;
- take steps to repair and rent the vacant units as soon as practicable; and
- fund and report to a Special Master appointed to evaluate the DPAH and its progress towards repairing the vacant units.

B. The Court's Ruling

In February 1993, Judge Graae held two preliminary hearings in which he strongly encouraged the parties to settle. These efforts were to no avail.

After a third hearing in April, the Court granted plaintiffs' motion for a preliminary injunction. However, the Court did not order the full relief requested. Rather, it appointed a Special Master, James G. Stockard, "to conduct a comprehensive evaluation of the Department of Public and Assisted Housing, its operations, personnel, finances, and management, as these areas relate to DPAH's public housing program"^{22/} Pursuant to the Court's order, the Special Master's investigation will culminate in a final report that will provide the Court with

"[f]inal recommendations as to how DPAH can, in a timely manner, be brought into substantial compliance with all applicable HUD public housing laws and regulations. Such recommendations may range from a finding that DPAH is capable of achieving substantial compliance on its own, to the imposition by the Court of substantive deadlines and specific performance requirements for DPAH' to the appointment by the Court of a receiver for DPAH."^{23/}

Plaintiffs await the Special Master's report, which was due November 1, 1993, and any further relief that the Court deems necessary in light of the report's recommendations.

In June 1993, defendants moved to stay the May 1993 Order. The District argued that, inter alia, the Court did not make the requisite findings of fact, the record did not warrant the appointment of a Special Master, and injunctive relief was inappropriate because plaintiffs' "constructive demolition" claim was frivolous and the imposition of the

Order at 1-2 (May 24, 1993).

^{23/} Id. at 5. In several cities, courts have placed public housing authorities into receivership. For example, in 1979, a court order placed the Boston Housing Authority in receivership. Conditions in Boston improved such that, in 1984, the Court permitted the Mayor to carry on the receiver's restoration of the housing authority, and finally, in 1990, the Court removed its supervision entirely, finding that the City had reached substantial compliance with public housing laws and regulations. Perez v. Boston Housing Auth., C.A. No. 17222, Final Order and Judgment (Sept. 7, 1990).

Special Master's expenses would irreparably harm the defendants.e" In denying this motion, Judge Graae wrote: "Unfortunately, the assertions defendants make in their motion are so far divorced from the realities of what was said and done in the various proceedings leading up to the Court's order that one is tempted to call them frivolous, if not disingenuous. They are, in any event, without merit."^{25/}

III. CONCLUSION

Despite a list of over 11,000 individuals waiting for public housing, over 2,200 vacant units, and millions of dollars designated to renovate units and eliminate vacancies, the DPAH has made only minor inroads in reducing the 19% vacancy rate of public housing units within the District. The DPAH has been accused of being an agency that is plagued by waste and mismanagement, and that is "operationally and financially troubled."^{26/}

The problem, however, is generally not money; it is the District's inability to use available funds efficiently and productively. The District must change the DPAH's internal administration and create an effective and durable management program. A Special Master is currently evaluating the public housing program of the DPAH and, when his findings are released, the District should have a clear road map of the internal reforms needed to make the DPAH an effective public housing agency in compliance with HUD public housing laws and regulations.

^{24/} Defendants' Motion for a Stay of the Court's May 24, 1993 Order Appointing a Special Master and for Reconsideration (filed June 7, 1993).

Order (July 8, 1993).

Supra n.9 and accompanying discussion in text.

Good faith efforts to implement such recommendations will bring the DPAH a long way towards making the reforms that will enable it to meet the goals of repairing and reducing the vacant housing, adequately maintaining public housing units, and enabling individuals and families to secure much needed publicly subsidized housing.

PUBLIC HOUSING

Samuels v. District of Columbia
C.A. No. 83-2153 (D.D.C. May 10, 1984)
770 F.2d 184 (D.C. Cir. 1985 -- Judges Patricia M. Wald,
Harry T. Edwards, Daniel Friedman),
on remand 650 F. Supp. 482
(D.D.C. 1986 - Judge Barrington D. Parker)
and 669 F. Supp. 1133
(D.D.C. 1987 - Judge Barrington D. Parker)

by Joel Polin, Esq.^{*/}

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Lawyers for Defendants:

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I. INTRODUCTION

Samuels v. District of Columbia illustrates the immense struggle often required to secure the rights of poor people in the District of Columbia. In June 1983, the District's public housing tenants filed suit against the District of Columbia and government officials

^{*/} Joel Polin is a citizen of the District of Columbia, graduated from Antioch School of Law in 1980, was admitted to the District of Columbia Bar the following year, and has been associated with the Samuels case since its inception in 1983.

responsible for administering public housing through the National Capital Housing Authority (now known as the Department of Public and Assisted Housing) to secure a grievance procedure guaranteed under federal and local law. More than ten years after that filing and six years after the Court ruled that the District had systematically deprived public housing tenants of their Federal right to a grievance procedure.^V local governmental officials continue to defy the authority of the Court and deprive tenants of this critical right.

A fully functional grievance procedure is essential to public housing tenants who, because of their limited resources, are virtually precluded from bringing landlord-tenant disputes to court. These tenants are vulnerable to arbitrary housing agency decisions pertaining to such fundamental issues as the amount of rent charged^s or the repair of substandard housing conditions.^F A functional grievance procedure governed by established standards is necessary to reduce, if not eliminate, arbitrary decision-making by making public housing agency officials accountable to the rule of law.

II. UNDERLYING LAW AND FACTS

The United States Housing Act of 1937, ch 896, § 8, 50 Stat. 891 (codified as amended at 42 U.S.C. § 1437, et seq.) ("Housing Act" or "Act") and its implementing

^{1/} Samuels v. District of Columbia, 669 F. Supp. 1133, 1145 (D.D.C. 1987).

^{2/} "[Public housing authorities] are required to calculate tenant rent according to a complex statutory formula based on a tenant's adjusted family income." Samuels v. District of Columbia, 770 F.2d 184, 200 n.13 (D.C. Cir. 1985).

^{3/} In 1986, "the District of Columbia Auditor completed a review of the [District's public housing] maintenance practices and concluded that the authority failed to operate an effective maintenance program and had only addressed 44 percent of the tenants' reported complaints." 669 F. Supp. at 1139.

regulations, issued by the Department of Housing and Urban Development ("HUD"), 24 c.P.R. §§ 966.50 et seq. (1993) (originally promulgated in 1975), require all public housing authorities ("PHAs") that receive federal funds to implement grievance procedures for tenants in accordance with federal guidelines. Under the HUD regulations, the grievance procedure must be made available to any public housing tenant who disputes any action or inaction by the PHA related to the tenant's lease or the PHA's regulations. 24 c.F.R. §§ 966.53(a) (1993).

The federal regulations outline certain grievance procedures that PHAs must adopt to resolve outstanding tenant complaints. Once a tenant presents a grievance to the housing agency, the PHA first must attempt to resolve the dispute without a hearing by conducting an informal conference with the tenant. The PHA is required to provide the tenant with a written discussion of the conference, the reasons for its decision, and information about how to appeal an adverse decision.^Y Under the federal regulations, the recipient of an adverse decision must be provided the right to request a hearing in front of a hearing officer.^Y The regulations attempt to guarantee, through the grievance procedure, that landlord-tenant disputes will be resolved quickly, fairly, and in accordance with law rather than by the uncertainties of administrative discretion.

Shortly after HUD adopted its detailed regulations, the District enacted regulations creating an administrative grievance process.^s While including several debilitating

24 c.P.R. § 966.54 (1993).

Id. at § 966.55(a).

^{9/} National Capital Housing Authority Rules & Regulations at § 2.12 (July 1, 1978) [hereinafter NCHA Rules].

provisions -- most notably a ten-day statute of limitations for filing complaints -- the District's regulations generally tracked the model created by HUD.

Plaintiffs filed Samuels in 1983 because the District failed to implement even the rudiments of the federally- and locally-mandated grievance procedure. All of the named plaintiffs were denied the right to an initial informal conference because the District ignored every one of their complaints. For example, in February 1983, some tenants at the Lincoln Heights public housing project faced serious housing deficiencies that the District refused to address. These tenants had no hot water, although hot water clearly existed as evidenced by the hot water seen percolating through the macadam of an adjacent street." Five Lincoln Heights tenants filed administrative grievances for the District's failure to supply hot water, as required in their leases. When the District failed to respond to or even to acknowledge their grievances, the tenants requested administrative hearings. The District failed to respond to these hearing requests prior to the filing of the Samuels action.^f

Tenants at the Fort Dupont and Syphax housing projects suffered similar experiences. For example, a plaintiff from Fort Dupont attempted to have a written complaint delivered to her building manager. The complaint detailed her problems with an inoperable commode, a leaking roof, peeling paint, crumbling plaster under her sink, and a basement door which didn't shut properly, allowing rodents to enter her unit. The building manager refused to accept the complaint, and the tenant's problems remained unresolved.

^{7/} 770 F.2d at 191 n.I.

^{8/} 669 F. Supp. at 1135.

III. CONTENT OF THE PLEADINGS

In June 1983, tenants from the Lincoln Heights, Fort Dupont, and Syphax public housing facilities filed suit on behalf of a class of all current and future public housing tenants in the District. Plaintiffs sued the District of Columbia, then-Mayor Marion Barry, and individual government officials involved in the administration of public housing on the ground that defendants had systematically failed to implement the grievance procedure mandated by federal law. Specifically, plaintiffs alleged a violation of 42 U.S.C. § 1983 for the deprivation of federal rights conferred by the Housing Act, its implementing regulations, and the Due Process Clause of the u.S. Constitution.

IV. SUMMARY OF THE LITIGATION

A. The District's Motion to Dismiss

The District attacked both the factual and the legal bases of plaintiffs' complaint. Defendants denied that they had failed to implement the grievance procedure and contended that the unfortunate events befalling the named plaintiffs were merely isolated incidents. Defendants also argued that plaintiffs had no right to litigate their claims in federal court.^{2/}

The Court refused to accept defendants' assertion that they had developed a grievance procedure, citing affidavits from numerous tenants to the contrary.^{1/} The Court

^{2/} Defendants' Motion to Dismiss (Sept. 9, 1983); Defendants' Opposition to Plaintiffs' Motion for Class Certification (Sept. 16, 1983); Defendants' Second Motion to Dismiss (Oct. 27, 1983).

^{1Q/} Order of Dismissal 2, 5 (May to, 1984).

agreed with defendants' contention, however, that the complaint failed to state a federal cause of action.^W The Court dismissed plaintiffs' action in May 1984.

B. Plaintiffs' Successful Appeal to the D.C. Circuit

Plaintiffs appealed the dismissal. On appeal, the District pressed its original argument and added a new one: under 42 U.S.c. § 1437(d)(k), the grievance procedure is limited to challenges of "proposed" adverse agency action, i.e., to those situations where the District affirmatively proposes to effect an adverse action. Because a PHA does not "propose" to affect dilapidated public housing, the District argued, it does not have to employ the grievance procedure to redress lease violations relating to substandard housing conditions.^W During the appeal, however, the District finally conceded that its processing of tenant complaints through the grievance procedure was seriously flawed.^{13/}

In August 1985, the U.S. Court of Appeals for the District of Columbia Circuit rejected the District's position, reversed the trial court, and held that plaintiffs stated a valid federal claim.^{14/} In its decision, the Court rejected the District's argument based on "proposed" adverse agency action, declaring that the "massive exclusion" from the grievance procedure that would result was contrary to Congressional intent.^{15/} The Court ruled that the jurisdiction of the grievance procedure embraced all tenant disputes arising from the

Id. at 4-5.

^{12/} Brief of Appellees at 9-18 [hereinafter "Brief of Appellees"].

^{13/} Id. at 18-19.

770 F.2d at 19B.

Id. at 200.

lease or the District's regulations, including those disputes involving substandard housing conditions.W

C. Remand to the District Court

In early 1986, the attorneys for plaintiffs and the District entered into settlement negotiations and were able to resolve all issues save one: the authority of grievance procedure hearing officers to order equitable relief, including the repair of substandard housing.V' By agreement, the parties submitted this issue to the District Court. On November 26, 1986, the Court granted plaintiffs' motion for partial summary judgment and ruled that "hearing officers are empowered to order all necessary remedies including equitable relief and money **damages**."^{18/} The District then withdrew from all settlement negotiations and litigation recommenced in earnest.

Soon thereafter the District promulgated new regulations which would have had the effect of seriously undercutting the Court's order of partial summary judgment.^{19/} Under the new regulations, the District's Administrator of public housing was authorized to set

^{16/} Id. at 199-200.

^{17/} In its appellate brief, the District advanced the contrary argument, that hearing officers did not have authority to grant monetary damages. Brief of Appellees, supra n.12, at 19.

Samuels, 650 F. Supp. 482, 483 (D.D.C. 1986).

^{19/} These new rules, effective January 1987, were published at 33 D.C. Reg. 7973 (Dec. 26, 1986). Seven months after their promulgation, the Court abrogated the offensive portions of these regulations as contrary to governing federal law. 669 F. Supp. at 1143-1144.

aside any hearing officer decision which the Administrator found to be "uneconomical" or "impractical."^{20/}

After a contentious and difficult discovery effort, plaintiffs filed for summary judgment. On August 14, 1987, Judge Barrington D. Parker granted plaintiffs' motion on all remaining issues. The Court first addressed plaintiffs' claim that the District had failed to implement the grievance procedure. Judge Parker found that: "61.8 percent of the complainants never received any response from the housing authority [and]... 31.4 percent [of complainants] who received a response from the District were required to wait for an average of 353 days, before obtaining a final resolution of their grievance."^{21/} He also found that the District "never monitored the grievance procedure to evaluate performance and refused to appoint additional hearing officers to handle the grievances," and "offer[ed] no plausible explanation for failure to properly redress the grievance problems."^{22/} The Court concluded that the housing agency's past record is "abysmal," and "that defendants have ignored and walked away from their responsibilities to public housing tenants."^{23/}

In addition, the Court held that several NCHA regulations violated federal law. Specifically, the Court found that the City's ten-day limit for filing complaints violated the mandate to provide a "reasonable" period in which to file complaints. The Court stated the ten-day rule "underscores [defendants'] continued hostility to the grievance procedure and

669 F. Supp. at 1144.

^{21/} Id. at 1138 (emphasis in original).

^{22/} Id. at 1138-39.

^{23/} Id. at 1145.

[their] determination to cut-off and deny ready access to the procedure," and "must be struck down."^{24/} The Court also ruled that defendants had failed to provide tenants with notice of the grievance procedure and ordered them to do so at the time tenants lodged a complaint.^W The Court struck down defendants' procedure for selecting hearing officers as violative of federal law.^{26/} Finally, the Court ruled that NCHA Rule § 1113.1(c), conferring authority upon the Administrator "to overrule the decision of a hearing officer on the grounds that it is 'impractical' or 'uneconomical'" to implement, exceeded the Administrator's expressly limited basis for review as specified in the federal regulations and, thus, was invalid.^{27/}

The Court issued a comprehensive Judgment and Decree and ordered the District to comply fully with federal law within six months. The 1987 Decree required the District to: 1) be bound by all the NCHA Rules, including their timetable for completing a grievance procedure; 2) give hearing officers the authority to provide full relief to tenants; 3) recognize as timely all complaints filed within a period of not less than one year after a cause of action arose; 4) provide tenants with written notice of the grievance procedure; 5) select hearing officers in accordance with HUD regulations; 6) treat all hearing officer decisions as binding, unless reversed or modified in accordance with HUD regulations;

^{24/} Id. at 1141.

^{25/} Id. at 1141-1142.

^{26/} Id. at 1142-43.

^{tu} Id. at 1144. HUD regulations limit the authority of NCHA to overturn a hearing officer's decision to those situations in which the grievance is not related to a tenant's lease or to PHA regulations, or the hearing officer's decision violates federal or local law. 24 C.F.R. § 966.58(b)(1) and (2) (1993).

7) keep and maintain central grievance files for inspection by plaintiffs' counsel and interested members of the public; 8) file an implementation plan describing the manner in which it would comply with the Decree; 9) submit periodic compliance reports for two years and provide plaintiffs with the documents they needed to monitor compliance; and 10) provide tenants with notice of the Samuels litigation.^{28/} The Court retained jurisdiction over the case to enforce the Decree.^{29/}

V. THE DISTRICT'S FAILURE TO COMPLY WITH THE DECREE

Although the 1987 Decree marked an important victory for plaintiffs, the District's immediate reaction did not auger well for its future compliance. Within days of its issuance, the District challenged the Decree by undertaking yet another effort to restrict access to the grievance procedure and to limit the power of hearing officers to grant monetary damages and other relief.^{30/} The Court remained steadfast, rebuffed the District's arguments, and refused either to reimpose the ten-day limitation period for the filing of tenant complaints or to narrow the power of hearing officers to grant relief.^{31/}

Since then, the District has repeatedly violated the Decree; in many instances, it has complied only after plaintiffs filed motions for contempt. For example, the Decree required the District to provide tenants subject to an adverse action with notice of the

Final Judgment and Decree §§ II-XI (Aug. 14, 1987).

Id. at § X.

^{30/} Defendants' Motion for Relief from Judgment or in the Alternative for Clarification (Aug. 24, 1987).

Memorandum and Order 1 (Sept. 30, 1987).

grievance procedure. The District wrongly withheld this notice for more than a year and relented only when confronted with plaintiffs' motion for contempt.W

Similarly, the District failed to revise its published regulations in order to notify tenants and their legal counsel that the limitation period for filing tenant complaints was one year, not ten days. Required by the 1987 Decree, this publication came only in 1991, again prompted by a motion for contempt.W

The District had also selected only half the required number of hearing officers, in violation of the Decree and its own regulations. This deficiency generated a substantial backlog of tenants awaiting grievance hearings. The District subsequently hired more hearing officers, but only after plaintiffs filed a motion for contempt-"

Under the Decree, the Court permitted plaintiffs' counsel a limited role in monitoring the District's compliance with the Decree.^{32/} The District has consistently tried to frustrate this effort. As a result, plaintiffs' counsel have been required to file a series of motions, including motions for contempt, simply to obtain mandated monitoring reports or to gain accessto the "publicly available" central grievance files and other documents.e'

^{32/} Plaintiffs' Motion for Finding of Contempt and Imposition of Sanction (June 26, 1989); Order (Jan. 29, 1990) (denying motion for contempt because of mootness, but awarding attorneys' fees).

^{33/} Plaintiffs' Motion for Finding of Contempt and Imposition of Sanctions and for Other Relief (Oct. 31, 1990).

Id.

Final Judgment and Decree, supra n.29, at IX-X (Aug. 14, 1987).

^{36/} E.g., Motion to Compel Production of Documents (May 25, 1990) (failure to provide discovery); Plaintiffs' Motion for finding of Contempt and Imposition of Sanctions and for
(continued...)

The District's own monitoring reports are particularly telling. As late as 1991, the reports demonstrated that the District had failed 85% of the time to complete the grievance procedure within the time frame mandated by the Decree. This and other fundamental failures to comply with the Decree prompted plaintiffs to file several successful motions to extend the monitoring provisions of the Decree. In 1991, plaintiffs asked the Court to appoint a special master to oversee the housing authority.^{36/} The Court denied this motion.

Providing relief is another of the District's shortcomings. Even when the District does provide the grievance procedure, it often fails to follow through in a timely manner and provide tenants with the required relief. Under Court order, the District supplied plaintiffs' counsel with documentation on its provision of relief. Assuming the accuracy and completeness of the sample examined, the District has failed more than fifty percent of the time to provide all or part of the required relief to tenants.^{38/}

Apparently undeterred by several Court orders to the contrary, the District has once again ventured to restrict tenants' access to the grievance procedure and hearing officers'

^{36/}(...continued)

other Relief (Oct. 31, 1990) (failure to maintain or to grant access to Central Grievance Files); Plaintiffs' Motion for Finding of Contempt and Imposition of Sanctions (Mar. 27, 1991) (failure to provide monitoring reports); Plaintiffs' Motion for Relief and to Compel Discovery (Aug. 6, 1991) (same); Plaintiffs' Application for Extension of Monitoring Provisions and Motions to Compel Discovery (Dec. 20, 1991) (same); Notice of Plaintiffs' Petition for Order to Show Cause (Sept. 10, 1992) (same).

^{37/} See Plaintiffs' Motion for Appointment of a Special Master (Oct. 22, 1991); Plaintiffs' Application for Extension of Monitoring Provisions and Motions to Compel Discovery (Dec. 20, 1991).

^{38/} Memorandum from Dorie Bargmann, Paralegal at the Law Office of Joel Polin, Esq., Plaintiffs' counsel, at 2 (Mar. 22, 1989).

authority to award all appropriate relief. Recently, the District has promulgated a policy that excludes from the grievance procedure all tenant complaints seeking relief for personal or property damages.s"

Effective November 1, 1993, the District has created another obstacle for tenants requesting grievance hearings on complaints arising out of substandard housing conditions. Under the new policy, these tenants (a) must file their request for hearing and pay their monthly rent at the District's central headquarters, not at the nearby local property management office, and (b) must pay into an escrow account any amount of money which the District claims as rent due for the prior year. Should any tenant fail to meet these requirements, the grievance procedure is terminated.S'

In addition, the District is again attempting to limit the authority of hearing officers to award monetary damages. The Director of the District's public housing authority recently ruled that hearing officers cannot award monetary damages unless the aggrieved tenant has independently notified the Mayor of his injuries.W Whether the District's latest effort will succeed where its forerunners have failed remains to be seen.

^{39/} "Grievance Procedures and Compliance Monitoring Manual for Low Rent Housing Managers," promulgated by the District of Columbia Department of Public and Assisted Housing, September 1993.

^{40/} Id.

^{41/} Decision of the Director, in the grievance procedure of Twanda Aull, G.025.93.04.069.H15 (filed Oct. 1, 1993).

VI. THEMES AND RECOMMENDATIONS FOR IMPROVEMENT

A. Themes

A number of related themes have run throughout the ten-year history of Samuels. First, the litigation has exposed the District's disregard for the requirements of law. Judge Parker found numerous violations of federal law, in essence called the District's promises of improvement insincere, and declared that the District had "ignored and walked away from their responsibilities to public housing tenants."^{42/} As described above, the District's disregard of law has continued almost unabated through the post-judgment period.

Second, over the last decade, several studies have documented the overall substandard condition of the District's public housing units.^{43/} Full implementation of the grievance procedure would compel the District to do what it has heretofore been either unwilling or unable to do -- maintain public housing in a decent, safe, and sanitary condition. By denying public housing tenants access to the only legal forum practically available to them, the District is able to shirk its responsibility to provide adequate housing.

B. Recommendations

The inability of the District to provide an effective grievance procedure for more than a decade demonstrates entrenched systemic flaws in the operation of the District

669 F. Supp. at 1140.

^{43/} E.g., id. at 1139 n.11 (District of Columbia Auditor, Review of the Department of Housing and Community Development's Property Management Administration, Ch. VII, at 3 (Nov. 26, 1986»); Mayor Barry's Blue Ribbon Comm'n on Public Housing, Final Report on Public Housing in the District of Columbia (Oct. 1987).

government and its public housing authority. What is necessary is a sea change in the attitudes of governmental officials administering the District's public housing. Without such a change, the District's public housing tenants are unlikely to receive either the benefits of an effective grievance procedure or safe, decent, and sanitary housing. What the District truly needs is a dedicated effort to improve the physical conditions of public housing. If the District improves its public housing, there will be far less need for, and strain on, the grievance procedure.

PUBLIC HOUSING

Stone v. District of Columbia
572 F. Supp. 976 (D.D.C. 1983 -- Judge Thomas Flannery),
vacated and remanded, 799 F.2d 773 (D.C. Cir. 1986)

by Lynn E. Cunningham, Esq.
Neighborhood Legal Services Program-'

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Lawyers for Defendants:

George O. Ackerman and Robert Harlan, both of the Office of the Corporation Counsel for the District of Columbia; Nathan Dodell, Assistant United States Attorney, Civil Division for the federal defendants.

I. FACTS AND LAW

The District of Columbia's Department of Public and Assisted Housing ("DPAH") operates a low income rental housing program using subsidies from the United States Department of Housing and Urban Development ("HUD"). The District is responsible for the administration and maintenance of the rental units, but receives operating subsidies from HUD to cover all of the shortfall between rents received and actual program costs. The United States Housing Act of 1937 ("Housing Act" or "Act") and its implementing regulations mandate that rents in subsidized housing shall be no more than thirty percent

See biography of Lynn E. Cunningham, supra p. 111.

of a tenant's income and shall include the reasonable cost of utilities for the occupied unit. Housing Act, 42 U.S.C.A. § 1437a(a) (West Supp. 1993); 24 C.P.R. § 965.470 (1993).

As of 1982, approximately 4,000 of the 11,000 units in the District's housing system had individually metered utilities, resulting in direct utility bills to the public housing tenants^{1/} Under the Housing Act and its implementing regulations, these tenants should have been charged a reduced monthly rent to account for the reasonable cost of utilities. Id. Beginning in 1979, utility rates rose rapidly in the District, but the DPAH did not make corresponding adjustments in the rent allowances as required by federal law. 24 C.P.R. §§ 965.470 to 965.480. Consequently, by 1982, the approximately 10,000 residents in the 4,000 individually metered units were paying nearly double what other public housing tenants paid for their utilities.

Prior to filing suit, plaintiffs' counsel met with DPAH officials regarding the need to adjust rental allowances and refund overpayments of rent. Although HUD would fully reimburse the rental adjustments when the District submitted an approved plan," the District claimed that it did not have the money to take these actions. Even when plaintiffs pointed out the clear regulations and plaintiffs' intent to file suit, the District refused to remedy the situation. The District's inaction forced plaintiffs to turn to the courts.

^{1/} All other units included the cost of utilities in the rent.

^{2/} In order to obtain the available subsidies from HUD, state housing authorities must submit plans to HUD which meet the requirements of the Housing Act and its regulations. 24 C.P.R. §§ 791.205, 791.305.

II. THE PLEADINGS

In the Spring of 1982, an attorney with the Neighborhood Legal Services Program and a private attorney, Joel Polin, filed suit in the United States District Court on behalf of these tenants against both the District and HUD.^{3/} Plaintiffs' claims were based on the Housing Act, 42 U.S.c. §§ 1437-1440. Plaintiffs first sought to enforce the Act's utility provision and rent ceiling through an implied right of action under the Act itself. Second, plaintiffs claimed that they could enforce the Housing Act's requirements under 42 U.S.c. § 1983. Relying on § 1983, plaintiffs claimed that the District government had deprived them of their statutory right to pay only thirty percent of their income in rent.

III. THE LITIGATION

In 1982, plaintiffs sought a preliminary injunction to order the District to comply with the Housing Act's rent and utility provisions by revising the rent allowances to reflect current utility rates and refunding tenants the amount of rent they had overpaid. Within a few weeks after the suit was filed, the District unilaterally raised the utility allowances. This increase, however, did not reduce tenants' overall expenditures to thirty percent of their incomes, and thus HUD and plaintiffs rejected it as insufficient. Between the filing and the hearing, the District worked with HUD to calculate the proper adjustments and, two days before the hearing, announced a new utility allowance plan meeting HUD's approval. The remedy was incomplete, however, because the District refused to refund

^{3/} The claims against HUD differed in that HUD is a federal agency, but otherwise followed substantially the same course as the claims against the District. Because this case summary focuses on the District, it discusses HUD's involvement only when it affected the dispute with the District.

tenants' overpayments of rent. When plaintiffs received the approved plan, they dropped the preliminary injunction request, but continued the suit to obtain the appropriate refund payments.

On June 9, 1983, the District moved to dismiss plaintiffs' complaint for failure to state a claim. Judge Thomas Flannery granted the motion on August 15,^{4/} and plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit.

At oral argument on appeal, then-Judge Ruth Bader Ginsburg simply instructed the DPAH to pay the tenants the money that it clearly owed them, and, thus, avoid further litigation. The District and HUD agreed to do so. The Court vacated Judge Flannery's decision and remanded the case without opinion.s'

It took five years of negotiations and administrative delays to enforce this victory and obtain all the refund checks. The District and plaintiffs initially argued over which tenants from which years were entitled to refunds. Even after the parties agreed in 1984 on the proper class of recipients, maladministration within DPAH impeded the complete distribution of checks for four years. The District could not accurately account for the number of units available in any year, who occupied the units, how much rent was paid, and whether and when the tenants vacated or transferred to other units in the system. Communication between the managers of the actual units and the central office was exceedingly poor. Lack of money for refunds, on the other hand, was never a problem

572 F. Supp. 976 (D.D.C. 1983).

^{5/} 799 F.2d 773 (D.C. Cir. 1986). Notably, the United States Supreme Court later held that tenants could enforce the statutory right to utilities under 42 U.S.c. § 1983. Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987).

because HUD reimbursed the District for the rebates as the District reported the distributions. Despite DPAH management's sincere commitment to the task, it took the extensive involvement of plaintiffs' counsel and continuous follow-up by agency staff to obtain the necessary information and make the appropriate refund calculations.

During the processing of the refunds, a new dispute arose. Some tenants' utility bills were greater than thirty percent of their income. In these cases, tenants were entitled to a check from the DPAH to help pay their utilities. Without this subsidy, their housing costs exceeded the statutory thirty percent of household income limit for public housing. During negotiations in 1986, DPAH refused to implement a program to subsidize these tenants' utilities. As a consequence, plaintiffs filed a second suit.^{7/} Within a few weeks after that complaint was filed, the District, lacking any justification for refusing to send out the checks for utility allowances, agreed to provide the appropriate subsidies.

IV. CONCLUSION

The District needlessly harms its public housing tenants by failing to make appropriate adjustments to rents when external influences like utilities affect the tenants' housing expenditures. The adjustments at issue in Stone were clearly achievable. When plaintiffs' counsel pressure District officials through litigation and continued negotiations, the District successfully meets its statutory obligations. A special master was appointed in 1992 to examine the administration of the DPAH and recommend improvements." The

Bonnie Lee v. District of Columbia, CA. No. 86-0170 (D.D.C. filed Jan. 13, 1986).

^{7/} The Court in Pearson v. Kelly, CA. No. 92-14030 (D.C. Super. Ct. 1992), ordered this appointment. Pearson is discussed in this Report infra p. 119.

special master's report, not yet issued, is due out in November 1993 and the non-profit community hopes that it will suggest dramatic reforms to ensure a wholesale improvement in the living conditions for tenants in all public housing units.

IV.

PUBLIC BENEFITS

PUBLIC BENEFITS

Franklin v. Kelly
C.A. No. 90-3124 (D.D.C. -- Judge Stanley Sporkin)

by: Douglas Kendall, Esq. and
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Lawyers for Defendants:

Herbert O. Reid, George C. Valentine, Jesse P. Goode, Beverly Burke, and Martin L. Grossman, all of the Office of the Corporation Counsel for the District of Columbia; Jay B. Stephens, United States Attorney for the District of Columbia.

I. INTRODUCTION

Although approximately one out of every nine persons in the District of Columbia was receiving Food Stamps in 1990,^{1/} thousands of other eligible persons were not receiving this assistance because the District of Columbia government through its admin-

^{*/} Douglas Kendall is an associate in Crowell and Moring's Litigation Department and a graduate of the University of Virginia School of Law. Laura Smith was a summer associate with Crowell and Moring in 1993 and is a third-year law student at George Washington University. Crowell and Moring has recently begun assisting the Washington Legal Clinic for the Homeless and the Neighborhood Legal Services Program in assessing the District's current compliance with the requirements of the Food Stamp Act.

^{!!} Office of Policy and Program Development, Indices, A Statistical Index to District of Columbia Services at 3 and 236 (Dec. 1991).

istering agency, the Department of Human Services ("DHS"), failed or refused to process applications in a timely manner and discouraged or prevented eligible persons from applying for assistance. Plaintiffs filed Franklin v. Kelly in 1990 to compel the District and the United States Department of Agriculture ("USDA") to comply with the basic requirements of the Federal Food Stamp Act of 1964 ("Food Stamp Act" or "Act") and to provide this essential assistance to eligible persons.

II. BASIS OF THE LITIGATION: THE FOOD STAMP ACT

Through the Food Stamp Act, as amended, 7 U.S.C. §§ 2011 et seq. (1988), and its implementing regulations, 7 C.F.R. §§ 271 et seq. (1993), Congress created a program through which low income households can receive assistance in the form of Food Stamp coupons to purchase nutritionally adequate food.^Y The federal government, through USDA, pays 100 percent of the program's benefits and 50 percent or more of its administrative costs. States and the District of Columbia administer the program and pay the remaining percentage of administrative expenses.

Certain categories of households (e.g., those in which each member receives public assistance, such as Supplemental Security Income ("SSI"), Aid to Families with Dependent Children ("AFDC"), or General Public Assistance ("GPA")» are automatically eligible for Food Stamps, unless they are otherwise disqualified.^Y Other households are eligible for

^{2/} "Household" is defined at 7 C.F.R. § 273.1.

^{3/} 7 U.S.c. § 2014(a); 7 C.F.R. § 273.2(j)(2)(i).

Food Stamps only if their monthly income, after specified deductions and exclusions of certain financial resources, falls below the poverty line.^{4/}

Under the Act, households shall receive Food Stamps either within thirty days of making application (hereafter "regular **benefits**"),^{5/} or shall receive a special one-month Food Stamp allotment within five days of application (hereafter "expedited" benefits), if they satisfy specific standards that demonstrate particularly severe economic hardship. Homeless persons who meet the income and resource criteria for Food Stamps are categorically eligible for expedited benefits.^{7/} Both regular and expedited benefits are awarded retroactively to the date of application.^f

^{4/} The standards for determining the eligibility of these households, which take into account relevant factors such as whether a household includes disabled persons or individuals 60 years or older, are set forth at 7 U.S.c. § 2014. Monthly income for purposes of determining Food Stamp eligibility does not include income in the form of nonmonetary or in-kind benefits, such as free food or clothing or public housing. 7 C.F.R. § 273.9(c)(1).

7 U.S.c. § 2020(e)(3); 7 C.F.R. § 273.2(g)(1).

^{6/} Applicants are eligible to receive Food Stamps on an expedited basis if they: 1) have \$100 or less in cash, money in the bank, and similar resources, and less than \$150 in gross monthly income; 2) have gross income and liquid resources totaling less than their monthly rent or mortgage plus utilities; 3) are part of a household which is homeless; or 4) are migrant farm workers, have \$100 or less in cash, money in the bank, and similar resources, and are destitute. 7 U.S.c. § 2020(e)(9); 7 C.F.R. § 273.2(i). See also Food Research and Action Center's (FRAC) Guide to the Food Stamp Program at 3 (Oct. ed. 1993) [hereinafter "FRAC Guide"].

^{7/} 7 U.S.c. § 2020(e)(9)(B); 7 C.F.R. § 273.2(i)(3).

7 C.F.R. §§ 273.2(a), 273.10(a)(1)(ii).

DRS is required under the Act to inform applicants of their rights and responsibilities under the Food Stamp Program.s to make application forms readily available.s" and to post signs which explain the application process and individuals' right to apply for Food Stamps on the day of their initial contact with nas.W All program information must be available in languages other than English.!Y

III. THE LITIGATION

A. Plaintiffs' Complaint for Declaratory and Injunctive Relief

In December 1990, plaintiffs brought a class action suit against the District of Columbia, the Mayor, the Director of DRS (collectively the "District defendants") and the USDA seeking to declare their actions violative of the Food Stamp Act and to compel their compliance with the Act.^{13/} Supported by numerous affidavits, plaintiffs charged the District with violating the Act by:

- failing to screen applicants' eligibility for expedited benefits;
- failing to inform eligible applicants, such as homeless persons, of their right to expedited benefits;

^{9/} Id. § 272.5(b)(2).

^{10/} Id. § 273.2(c)(3).

^{11/} Id. § 273.2(c)(4).

^{12/} Id. § 272.5(b)(3).

^{13/} The USDA is the agency responsible for administering the Food Stamp Program. Plaintiffs alleged that the USDA violated the Food Stamp Act by failing to enforce its provisions and to issue Food Stamp coupons retroactively as required by 7 U.S.c. § 2020(g). Complaint at ¶¶ 48-49. This case summary focuses only on the District defendants whose actions were the principal focus of the lawsuit.

- failing to make applications available and to give accurate information to potentially eligible persons;
- generally discouraging eligible persons from applying for or pursuing benefits under federal law by employing arbitrary application procedures;
- failing to process applications in a timely manner so that eligible recipients did not receive benefits within the required time periods;
- failing to provide coupons retroactively from the date of application; and
- wrongfully delaying the receipt of Food Stamps by eligible applicants.s"

Plaintiffs emphasized that the District's maladministration of the Food Stamp Program was particularly harsh on the often-malnourished homeless population, and asserted that DRS caseworkers, who were specifically responsible for helping homeless families in District-funded shelters achieve self-sufficiency, failed, with alarming frequency, to inform those families of their rights under the Food Stamp Act.^{15/}

Plaintiffs sought an order (1) declaring the District's practices illegal, (2) enjoining it from engaging in future violations of the Act, (3) directing defendants to provide Food Stamps retroactively to those persons wrongfully denied them, and (4) requiring defendants to establish procedures to monitor their compliance with the requirements of the Act. The District defendants categorically denied plaintiffs'allegations and insisted that any errors

^{14/} Complaint at ¶¶ 36, 42.

^{15/} Id. at ¶ 41.

that might have occurred in the administration of the Food Stamp Program were isolated events and not system-wide problems.^W

B. 1991 Settlement Agreement

At the Court's urging, the parties entered into settlement negotiations and, after several months, reached a settlement agreement. On June 13, 1991, the Court entered an order certifying the class, and approving a Settlement Agreement scheduled to remain in effect until June 13, 1992.

The Settlement Agreement required the District to:

- screen all applicants for expedited assistance and to interview those found potentially eligible on the day they applied for assistance, if possible, or on a priority basis the following working day;
- provide Food Stamps to those applicants eligible for either regular or expedited benefits within the time mandated by the Food Stamp Act;
- encourage and permit applicants to file Food Stamp applications at any DRS intake center at any time during office hours;
- refine its operating procedures to reduce waiting times and facilitate the completion of applications by, among other things, providing checklists of the documentation needed to verify eligibility and informational posters in all intake centers; and
- provide Food Stamps retroactively from the date of application to those eligible applicants who were wrongfully denied Food Stamps.^I

^{16/} Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 2-3 (Jan. 8, 1991) .

^{17/} Settlement Agreement Part I at ¶¶ 1-3, 5-6, 13-17; Part IV at ¶ 2.

Finally, and perhaps most significantly, the Agreement required the District to monitor its compliance with the Food Stamp Act and the Settlement Agreement at eight centers to be designated by plaintiffs and to issue compliance reports for all eight centers by June 1992.^{18/} The Settlement Agreement also required the parties to conduct bi-monthly meetings to discuss defendants' compliance with the Agreement.W

The Agreement also contained enforcement provisions. First, the District was required to certify by June 13, 1992, that it had complied with every provision of the Settlement Agreement at all intake centers. If it was not in compliance by the end of the year, the Agreement was to be automatically extended for an additional six months during which time the District would have to conduct additional monitoring at all noncompliant centers. If the District still had not fully complied with the Agreement by the end of this six-month period, the Agreement could be extended for a second six-month period with the concurrence of the District. Finally, the Agreement authorized plaintiffs to file a motion to enforce at any time after the parties had conferred about noncompliance issues.^{20/}

C. The District's Noncompliance with the Settlement Agreement

The District's performance throughout the first year of the Settlement Agreement was completely unsatisfactory. It continued to violate federal law and to disregard the Settlement Agreement's mandates. On numerous occasions, the District turned away Food Stamp applicants from intake centers, failed to make Food Stamps available to eligible

^{18/} Id. Part I at ¶ 21.

^{19/} Id. Part IV at ¶ 4.

^{20/} Id. Part IV at ¶¶ 5-6.

households within the periods mandated by statute, and, at some centers, failed to provide even the most basic information to Food Stamp applicants. In addition, the District failed to produce any of the eight required monitoring studies.

Plaintiffs wrote to and met with District representatives to discuss these violations of the Settlement Agreement, but to no avail. In the light of the District's failure to comply with the mandates of the Agreement, plaintiffs filed a motion to compel compliance with the terms of the Settlement Agreement.

In their May 4, 1992, Motion for Summary Enforcement of the Settlement Agreement ("1992 Motion"), plaintiffs documented the cases of thirteen eligible applicants who had not received benefits within the timetables set by the Act because of the District's noncompliance with the Food Stamp Act and the Settlement Agreement. 1992 Motion at 6-17. Plaintiffs' motion also addressed the District's failure to complete even one of the eight monitoring studies it had agreed to undertake at the designated intake centers. Id. at 18-19. After plaintiffs filed their motion, the District rapidly produced two of the required studies.^W

These two studies clearly demonstrated the District's continuing violations of the Food Stamp Act. Combined, the studies showed that the District had provided expedited benefits to only 31% of the applicants found eligible within the required five-day period and regular benefits to only 82% of the applicants found eligible within the required thirty-

^{21/} Defendant's Opposition to Plaintiffs' Motion for Summary Enforcement, Exhibits 2-3 (May 20, 1992).

day period. These figures do not include the applicants who were improperly denied expedited status.^{22/}

In opposing plaintiffs' motion, the District claimed that the thirteen cases documenting wrongfully denied benefits were isolated incidents. The District rebutted the results of the monitoring studies by providing data showing an inflated compliance rate.^{23/} The District further argued that its ability to comply with the Agreement in a timely manner had been hindered by a District hiring freeze that had created a staffing shortage and by the implementation of a new computer system, the Automated Client Eligibility Determination System ("ACEDS"), designed to help input application data, track applications, and prepare progress reports on all applications. Finally, the District pledged that DHS would complete all five monitoring studies designated by the plaintiffs by June 13, 1992, the Agreement's expiration date.

In supplemental filings, plaintiffs submitted seventeen additional declarations that documented the District's failure to comply with the Agreement and a report prepared by the USDA Food and Nutrition Service ("FNS Report") that confirmed the continuing existence of system-wide problems in the administration of the Food Stamp program. Plaintiffs' supplemental findings also responded to three monitoring studies that the District had produced in mid-June. Plaintiffs pointed to the studies' findings that only 27% of

^{22/} Franklin Compliance Monitoring Studies, Study 1 (Congress Heights Service Center) at 3-4, Study 2 (Kennedy Street Service Center) at 3-4.

^{23/} The rate of compliance for providing regular benefits was greater than that for providing expedited benefits. By combining the two rates, the District managed to raise its claimed compliance rate to one that it perceived to be more acceptable.

those approved for expedited benefits at the 645 H Street intake center had received their Food Stamps within the required five-day period^{24/} and that only 54.8% of all those only eligible for regular assistance at all five centers had received Food Stamps within the required thirty days.^{25/} Plaintiffs emphasized that the monitoring studies also showed that the District was not providing basic information to potential Food Stamp applicants, as demonstrated by the complete lack of official informational handouts at certain centers and the frequent lack of bilingual information at all centers.^{26/}

In response, the District claimed that plaintiffs were exaggerating the rate of noncompliance and that it was in the process of implementing an unprecedented corrective action plan which the plaintiffs should allow time to take effect.

D. The 1992 Court Order and Appointment of a Special Master

On September 23, 1992, Judge Sporkin ruled that the District was in violation of the Settlement Agreement and that the resulting severe hardship visited on the class necessitated the appointment of a Special Master. In so ruling, the Court found that the District was: (1) providing Food Stamps within the thirty-day statutory period to only 55% of those applicants eligible for regular benefits, (2) failing to screen many applicants to determine their eligibility for expedited benefits, and (3) not providing expedited benefits to eligible persons within the required five-day period.j" The Court appointed attorney Benjamin

645 H Street Study at 4.

Plaintiffs' Supplemental Brief at 7-9.

^{26/} Id. at 9-10.

^{27/} Order at ¶ 6 (Sept. 23, 1992).

Greenspoon as Special Master and charged him with investigating and monitoring the operation of the District's Food Stamp Program and making recommendations to the Court for bringing the Program into compliance as promptly as **possible**.^{28/}

E. The Special Master's Report

On November 19, 1992, the Special Master issued his report. The Report confirmed the serious nature of the District's noncompliance with the Food Stamp Act and the Settlement Agreement, and issued recommendations for improving the District's administration of the Food Stamp Program in three basic areas: processing of Food Stamp applications, provision of information to potential applicants, and training of DRS employees.s"

Although the Report supported the implementation of the ACEDS, it pointed out that broader supplemental measures were necessary to refine the process for reviewing and approving applications for expedited benefits. To accomplish this goal, the Report recommended that the District place a "screener" at every intake center whose role would be to determine the purpose of a client's visit and to evaluate his or her eligibility for expedited benefits. To further streamline and standardize the procedure for processing and approving applications, the Report also recommended that the District improve the courier system between intake centers, use overtime to ensure the timely input of applications, and establish a direct computer link between the data processing centers.^{30/}

^{28/} Id. at 7-9.

^{29/} Report and Recommendations of the Special Master (Nov. 19, 1992).

^{30/} Id. at 4, 7-8, 10.

The Report made several recommendations designed to improve the quality of information provided to potential Food Stamp applicants. Specifically, it called upon the District to establish a hotline to provide applicants with current, accurate information regarding the status of their applications, and to place at each intake center a receptionist to answer applicants' questions and a supervisor to answer questions and direct client services.W

The Report also suggested ways to increase the level of education, motivation, and training of DHS workers. It recommended that workers receive additional training on Food Stamp rules and policy, Food Stamp eligibility determination and verification issues, and screening and interview skills in order to standardize eligibility determinations.^{32/} Finally, the Report stated that it might be necessary to resort to ongoing monitoring and court orders to achieve compliance with its recommendations.W

After discussions with the parties, during which the District indicated a willingness to comply with the majority of the recommendations in the Report of the Special Master, Judge Sporkin, rather than issuing an order, suggested at a December 10, 1992, status conference that the parties negotiate an amended settlement agreement. Negotiations began immediately.

^{31/} Id. at 11-13.

^{32/} Id. at 30-31.

^{33/} Id. at 15-16.

F. Breakdown in Negotiations

Throughout the Spring of 1993, the parties attempted to negotiate an amended settlement agreement; however, by June 1993, they had reached an impasse. Although many issues remain unresolved, the key areas of disagreement involve staffing levels and monitoring.w

IV. CONCLUSION

Recent contact with class members indicates that the District continues to violate many of the requirements of the Food Stamp Act. Although plaintiffs continue to negotiate with the District in the hope of obtaining its voluntary compliance with the Act, the history of Franklin indicates it is likely that plaintiffs will be forced to file an amended complaint and seek additional injunctive relief to ensure that the District ultimately fulfills its obligations under the Act.

V. RECOMMENDATIONS

The recommendations that follow consist of ideas that have been suggested throughout the litigation as well as some new ideas that may also improve the District's administration of the Food Stamp Program.

- Ensure sufficient staffing of intake centers and conduct training at regular intervals.

^{34/} A third area, implementation of the ACEDS, has been a cause of concern since the beginning of this litigation. The District has alternately characterized the ACEDS as a panacea and a plague to its efforts to improve the Food Stamp program. After several delays, the District has very recently completed setting up the system. Attention will now need to focus on whether the ACEDS is being used effectively to bring about its promised benefits.

- Designate a client ombudsperson for each Food Stamp office and intake center.
- Cut down on unnecessary paperwork and bureaucratic procedures (e.g., applicants must return to intake centers more often than is necessary to complete lengthy certification forms because the District often certifies applicants' eligibility for a period less than that permitted under the Act).
- Encourage DHS division heads to work actively to increase the morale and motivation of employees.
- Review and, if necessary, amend disciplinary and civil service procedures and protections to facilitate corrective action against workers who are not able to meet reasonable performance standards.
- Provide regular public disclosure of each individual center's compliance with the five-day and thirty-day processing standards to encourage early and specific detection and resolution of problems.
- Increase the number of bilingual workers and provide bilingual forms and notices to promote access to the system for the Hispanic population.
- Provide prompt replacement Food Stamps in instances of agency error.
- Publicize and make available emergency food assistance to households that are denied Food Stamps through no fault of their own.
- Improve notices to recipients to ensure that assistance is not unnecessarily interrupted.
- Ensure that full federal reimbursements are obtained promptly.

PUBLIC BENEFITS

Little v. Kelly
C.A. No. 91-14119 (D.C. Super. Ct. -- Judge Cheryl Long)
Appeal pending, C.A. No. 92-1448 (D.C.)

by L. Anthony Sutin, Esq.
Hogan & Hartson"

Lawyers for Plaintiffs:

Randal Minor and Lynn E. Cunningham of the Neighborhood Legal Services Program; John C. Keeney, Jr.; L. Anthony Sutin, Susan Herlick and Kathryn Woodruff, all of Hogan & Hartson; and solo practitioner Robert Berlow. Of Counsel: Arthur Spitzer of the American Civil Liberties Union of the National Capitol Region; Patricia Mullahy Fugere and Frank R. Trinity of the Washington Legal Clinic for the Homeless; Joan Christopher of IPACHI; Faith Mullen of the Legal Counsel for the Elderly.

Lawyers for Defendants:

George C. Valentine of the Office of the Corporation Counsel for the District of Columbia; Jesse P. Goode of the Office of General Counsel of the Department of Human Services.

I. THE LITIGATION

On November 6, 1991, Elnora Brown, Lillie Mabry, Bivens Little and Francis Hall, on behalf of themselves and all other persons who were terminated from the General Public Assistance ("GPA") program after July 1, 1991, on the ground that they were not disabled, filed Civil Action No. 91-14119 in the District of Columbia Superior Court against

^{*/} L. Anthony Sutin is a partner in the law firm of Hogan & Hartson, where he practices in the areas of civil litigation and election law. He graduated summa cum laude from Brandeis University and cum laude from Harvard Law School and served as a law clerk to United States District Judge Barefoot Sanders in Dallas, Texas. He became co-counsel to the plaintiff class during his tenure in Hogan & Hartson's Community Services Department and now serves as lead counsel in the Little v. Kelly case.

Mayor Sharon Pratt Kelly; Vincent C. Gray, Director of the Department of Human Services; James Butts, Administrator of the Income Maintenance Administration; and the District of Columbia. The lawsuit sought to challenge the implementation of changes in the District's GPA program brought about by D.C. Law **9-27**.^{1/}

A. Background of the Case

GPA is a long-standing public assistance program available to needy District residents. It provides assistance of truly last resort; to be eligible, an applicant may not have any cash resources in excess of \$300.^{2/} GPA provides a monthly payment, currently at the level of \$265 per person.

Prior to the changes that took effect on July 1, 1991, individuals were eligible for GPA if they were unemployable, due either to temporary incapacity or permanent disability. Individuals were deemed to be incapacitated when they had "a physical or mental defect, illness, or impairment . . . of such a debilitating nature as to reduce substantially or eliminate . . . [their] ability . . . to care for or support [themselves] and [such impairment could] be expected to last for a period of at least 30 days."^{3/} Approximately 3,000 individuals were receiving benefits on this basis prior to July 1, 1991, the effective date of the change in the law.

^{1/} See 3 D.C. Code §§ 3-201.1 et seq. (1993 Supp.).

^{2/} Government of District of Columbia Department of Human Services General Public Assistance for Adults Policy Manual § 4190.

3 D.C. Code § 3-205.42(1)(B) (1988).

Individuals were deemed to be disabled when they had disabling impairments which had lasted or were expected to last for twelve or more months or result in death.^v Such individuals were expected to apply for and eventually receive Federal Supplemental Security Income ("SSI") benefits, from which the District could recoup GPA benefits paid during the pendency of an SSI application.^e

If a GPA applicant was deemed eligible for benefits by reason of an incapacity, the applicant then had to seek recertification of benefits every six months by providing updated medical and social information.^v It was common for "incapacitated" recipients to be recertified for consecutive six-month periods for many years, yet not be reclassified as disabled.

Effective July 1, 1991, the distinction between incapacity and disability was eliminated." GPA eligibility was narrowed to those individuals who meet the federal disability standard defined in the SSI provisions:

"An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months],]"^{8/}

^{4/} Id. at § 3-205.42(2).

^{5/} The Social Security Act provides, at 42 U.S.c. § 1383(g)(1), for reimbursement to states of amounts paid for "interim assistance" financed from local funds to individuals who are deemed eligible for SSI.

^{6/} 3 D.C. Code § 3-205.53(b).

^{7/} 3 D.C. Code § 3-205.42 (1993 Supp.),

^{8/} 42 U.S.c. § 1382c(a)(3)(A) (1993 Supp.).

The increased restrictiveness of the new medical standard was not necessarily intended by the D.C. Council to result in the elimination of a large number of individuals from the GPA program. Rather, the Council's apparent intent was to shift those individuals onto a track destined for SSI and federal reimbursement to the District of interim GPA payments. The legislative history to D.C. Law 9-27 states that "many of those [formerly designated as incapacitated] should probably will [sic] meet the eligibility criteria for SSI since physicians often do not make a clear distinction between an incapacity and a disability. If the person then becomes eligible for SSI, the District will receive federal reimbursement."^{2/}

In addition to equating the medical eligibility standard for the GPA program with that of SSI, and thus terminating benefits for people who were found not to meet the new standard, the 1991 legislation severely curtailed the due process rights of GPA recipients. Contrary to prior law, a recipient's timely request for a hearing under the new law no longer ensured the continuation of benefits pending the appeal. D.C. Law 9-27 provided that benefits would not be continued "beyond the effective date of termination if the sole basis for the individual's appeal of the termination is the failure to meet the disability standard[.]"^{3/}

District law requires that a termination notice explain the reasons for the termination, the law and regulations supporting the termination, and information regarding

^{2/} Memorandum to Members of the Council from H.R. Crawford, Chairman, Committee on Human Services, at 5 (Apr. 25, 1991).

^{3/} 3 D.C. Code § 3-205.53(c) (1993 Supp.).

the right to a hearing and circumstances under which benefits will continue pending a hearing.W The plaintiff class members received termination notices that stated conclusorily that "[t]he reason for this termination is because, based on the medical evidence you provided, you are not determined to be disabled. The District of Columbia Manual citations concerning these changes are 3205.42." The notice provided no individual fact-specific reason for termination. The "Manual" referred to was presumably the DRS GPA Policy Manual, although neither that document nor any other known publication contains a section 3205.42. The notice also contained contradictory information regarding the availability of continued benefits pending appeal. One section of the notice stated that benefits would not continue, while another stated that a timely request would preserve receipt of benefits.

The implementation of D.C. Law 9-27 was harsh. Much of this harshness was avoidable. As Judge Long later found in the preliminary injunction proceeding, most, if not all, GPA recipients were unaware of the changes in the law. At no time prior to or during the recertification process did GPA recipients or their evaluating physicians receive a notice from the District warning of or explaining the new medical eligibility standard. This lack of notice undoubtedly resulted in a substantial number of inadvertent and unnecessary terminations based upon medical reports that had been filled out as they had been for years. Under the new restriction of aid pending appeal, recipients had no opportunity to rebut or forestall a finding of non-disability before their benefits were

Id. at § 3-205.55(a)(2) (1988).

terminated. Even then, the boilerplate conclusion of nondisability left a terminated recipient without guidance as to the focus of an appeal.

GPA benefits enabled class members to exist precariously on the margins of society. Through affidavits of class members, plaintiffs demonstrated that, upon termination of benefits, those plaintiffs who were somehow able to rent rooms faced the immediate threat of eviction because of their inability to pay even modest rent. Those plaintiffs who were already homeless were stripped of any chance of obtaining independent housing. Plaintiffs were unable to purchase medication or clothing, or to pay for transportation to medical appointments. The deprivation of any meaningful ability to contest what, in many cases, appeared to be erroneous determinations posed a true threat of irreparable injury. The number of GPA terminations no doubt exceeded the level envisioned by the D.C. Council in the enactment of D.C. Law 9-27.

B. The Complaint

Plaintiffs' complaint contained numerous counts. Count I alleged a violation of the Fifth Amendment of the U.S. Constitution by depriving GPA recipients of their property interest in the continued receipt of benefits without adequate notice and an opportunity to be heard. Count II sought a declaration that the new law prohibiting the receipt of benefits pending appeal was unconstitutional. Count III sought a declaration that the termination notices did not meet the mandates of D.C. law. Count IV sought a declaration that the provision of D.C. Law 9-27 precluding pretermination hearings violated other portions of

District law. Count V requested a declaration that the District did not apply Federal SSI criteria (as required by the new law) in determining that plaintiffs were not disabled.W

The complaint sought the award of damages in the amount of benefits illegally denied, declarations that the terminations were unlawful, and preliminary and permanent injunctions prohibiting further unlawful terminations of GPA benefits. In addition, a request for attorneys' fees was included under 42 U.S.c. § 1988.

C. Rulings by the Superior Court

Motions for class certification and a preliminary injunction were filed shortly after the case was filed. The Court granted class certification on January 29, 1992, and heard oral argument on the motion for a preliminary injunction on January 17, 1992. In briefs and argument, plaintiffs emphasized the cases of Goldberg v. Kelly, 397 U.S. 254 (1970), and Mathews v. Eldridge, 424 U.S. 319 (1976), which set forth the due process requirements for the termination of welfare benefits. Plaintiffs argued that, under these cases, it is clear that needs-based public assistance benefits may not be terminated on the basis of individualized factual determinations without an opportunity for a pretermination hearing, in light of the potential for extreme deprivation and the significant risk of erroneous deprivation. The District argued that no due process rights attached to an "across-the-board" program change, citing Atkins v. Parker, 472 U.S. 115 (1985), and that the "old" GPA program had ended, negating any protected property interests in a defunct

^{12/} A sixth count related to violations of the Food Stamp Act. These violations were corrected shortly after filing of the suit and were not further litigated.

program. The District also contended that its precarious fiscal condition posed a tremendous hardship, outweighing any harm to the plaintiff class.^{13/}

On March 9, 1992, Judge Long issued a 57-page opinion granting the preliminary injunction. In concluding that plaintiffs were likely to prevail on the merits and had satisfied all other elements necessary to receive preliminary injunctive relief, the Court found "as a matter of law that to satisfy due process requirements mandated by Goldberg the defendants must provide individualized notice to each member of the plaintiff class and if a plaintiff is found not to be disabled, a pre-termination hearing must be held."^{14/} Judge Long rejected the District's contentions that the GPA terminations constituted an "across-the-board" change or that an "old" program was replaced by a "new" one such that no due process protections attached.W

The preliminary injunction contained a fairly restrictive scope of relief, ordering the reinstatement of benefits only to those class members who had appealed their terminations as of the date of the order. Upon balancing the equities, the Court declined to include in the preliminary order an award of retroactive benefits to restore assistance that had been improperly withdrawn.w

Following issuance of the preliminary injunction, the parties filed cross-motions for summary judgment. Plaintiffs argued for an extension of the injunction's scope of relief,

^{13/} Opposition of Defendants to Plaintiffs' Motion for a Preliminary Injunction at 28 (Dec. 6, 1991).

Memorandum Opinion at 27-28 (Mar. 9, 1992).

Id. at 32-34.

Id. at 50-53.

while the District essentially reiterated its earlier arguments. On September 8, 1992, Judge Long issued another lengthy opinion and entered a detailed permanent injunction. The opinion declared that the provision of D.C. Law 9-27 denying pretermination hearings was unconstitutional, rejected again the District's argument that GPA recipients should have no more rights to the program than new applicants, and noted the "myriad constitutional deficiencies" in the "grossly misleading" termination notices.^{17/}

The permanent injunction required reinstatement to the GPA program of all those persons who had appealed a termination at any time or who had reapplied anew to the program following termination and appealed the denial of that reapplication. The Court also ordered the payment of retroactive benefits to such persons for the period between their termination and reinstatement of benefits. The order also detailed the elements of an adequate termination notice, including the necessity for a fact-specific individualized reason for the determination of nondisability. In addition, the Court required the District to send a "simple notice" to those class members who neither appealed their termination nor subsequently reapplied in order to advise them of a right to reinstatement upon their request. Strict time frames were imposed for the reinstatements, mailings of notices and other actions to be taken by the District.^{18/}

D. Appeals

The District filed an appeal from the permanent injunction and obtained a stay from the Court of Appeals of that portion of the order requiring the payment of retroactive

^{17/} Opinion and Order at 11-21 (Sept. 8, 1992).

Permanent Injunction at ¶¶ 3-7 (Sept. 8, 1992).

benefits.s" Plaintiffs cross-appealed the denial of relief to those class members who had unsuccessfully reapplied for GPA after their termination, but who had not taken the additional step of appealing that denial. These appeals are pending.

E. Preliminary Injunction: Problems of Enforcement

In what would prove to be a recurring quest by the District for delay, one day before the deadline for completing the reinstatement of ongoing benefits to the victorious class members, the District filed a motion for enlargement of time for compliance, citing various purported logistical and substantive obstacles to fulfillment of the Court's mandate.^{20/} Plaintiffs cross-moved for a finding of contempt. The Court accepted the District's protestations and eventually extended the time for the District to comply with various portions of the injunction.

During the post-injunction period, the District's delay was accompanied by frequent pleas of bureaucratic limitations. The District often claimed that ostensibly simple tasks of locating files, ascertaining addresses, mailing notices and reviewing records would require inordinate numbers of days or weeks of District personnel time. These requests for extensions of time, postponements and similar relief were difficult for plaintiffs to challenge and tempting for an overtaxed court to accept.

Little v. Kelly, C.A. No. 92-1448, Order (D.C. Jan. 22, 1993).

^{20/} The District sought a delay in compliance from October 30, 1992, to February 26, 1993. Its logistical problems included an alleged inability to promptly produce mailing labels and to gather closed files from a District records facility. Its substantive problems related to supposed confusion on how to interpret the Court's injunction.

In reviewing the Court-ordered reports and lists relating to the District's actions taken pursuant to the permanent injunction, plaintiffs determined that the District had failed to extend relief to a group of approximately 100 persons who were terminated under the label of "employable," rather than "not disabled." Other than this semantic difference in coding, most of these persons were terminated in a manner factually and legally indistinguishable from the remainder of the plaintiff class. Accordingly, on April 2, 1993, plaintiffs filed a second motion for contempt based on this evasion of the requirements of the injunction. As of November 1993, this motion was pending before Judge Long.^{21/}

II. THEMES AND RECOMMENDATIONS FOR IMPROVEMENT

Several lessons can be drawn from the experience with the GPA program:

(1) Having decided that it needed to make budgetary reductions from the District's public assistance programs and that the bases for GPA eligibility should be restricted, the District had two choices: Either it could purge the rolls through an unpublicized bureaucratic sleight of hand, denying recertification to unsuspecting persons who had been found "temporarily incapacitated" for years, or it could direct the Department of Human Services to work aggressively with GPA clients to apply for Federal SSI disability benefits, from which the District could recover its cost in providing interim GPA benefits.^{22/} The Council's legislative history for D.C. Law 9-27 suggests that it did not intend for large numbers of "incapacitated" persons to be dropped from the rolls, but rather that the

^{21/} Count V of the Complaint, relating to the District's failure to properly apply SSI criteria in making determinations of disability, was not litigated as part of the preliminary and permanent injunctions and also remains pending.

See 42 U.S.c. § 1383(g).

program would become a true bridge program to SSI.^{23/} The District selected the course of the least bureaucratic resistance, although its second option would have been far more humane and, if pursued diligently, less expensive.

(2) The District's calculations of "savings" to be realized from the change in GPA eligibility standards has failed to account for the true costs of its actions. It was predictable that the GPA terminations would result in significant numbers of evictions and displacements of very vulnerable residents already in marginal situations. Yet the District, in calculating savings from GPA cutbacks or lamenting the cost of reinstatements, failed to make any effort to acknowledge the true social costs of its actions.

(3) The "grossly misleading" original termination notices, with fictitious legal citations, contradictory appeal information and conclusory boilerplate explanations of individualized termination determinations, appear to have been spawned by simple ineptitude. These notices, which gave plaintiffs an easy-to-grasp and compelling piece of evidence with which to make their constitutional case, simply could have been avoided had someone simply read them before they were issued. Failing that, the District should have seen the wisdom of admitting its error and sent out new, corrected notices before it was ordered to do so.

(4) When dealing with a very vulnerable client population, the District should take great care in developing and communicating explanations of complex and legalistic changes in programs. The affidavits submitted by plaintiffs in this case attest to the confusion

^{23/} Memorandum to Members of the Council from H.R. Crawford, Chairman, Committee on Human Services, supra n.9, at 5.

among the ranks of DHS caseworkers concerning the changes brought about by D.C. Law 9-27, which, in turn, engendered confusion among the plaintiffs. For example, depending on who they spoke with, clients were given contradictory information about whether to appeal a termination or to reapply for GPA, or whether both actions were futile and a waste of time. As a result, it appears that entitlements to relief for a significant number of individuals may have been lost based on misunderstandings or confusion engendered by incomplete or erroneous information communicated by DHS.

PUBLIC BENEFITS

Feeling v. Kelly
C.A. No. 82-2994 (D.D.C. -- Judge John H. Pratt)

by Robert Berlow, Esq.^{*/}

Lawyers for Plaintiffs:

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Robert Berlow, Esq.

Lawyers for Defendants:

Jesse Goode of the Office of General Counsel of the Department of Human Services;
George Valentine of the Office of the Corporation Counsel for the District of Columbia.

I. INTRODUCTION

In 1967, the Social Security Act was amended to allow states to establish programs to make "emergency assistance [payments] to needy families with children . . . to avoid destitution.W Emergency Assistance ("EAS") can be the lifeline that enables a person to pay a security deposit on a new apartment, avoid eviction or utility cut-offs, or purchase new clothes after a fire or theft. In 1982, plaintiffs in this case filed a class action challenging the long-standing failure on the part of the D.C. Department of Human

^{*/} Robert Berlow is an attorney in private practice specializing in public benefits law. Mr. Berlow worked as a staff attorney at the Neighborhood Legal Services Program of the District of Columbia from 1976 to 1984 and as a staff attorney at the Center on Social Welfare Policy and Law from 1984 to 1990.

^v Social Security Amendments of 1967, Pub. L. No. 90-248, § 206 (1967); 42 U.S.C. §§ 603(a)(5), 606(e) (1988) (part of the Aid to Families with Dependent Children law).

Services ("DHS") to administer EAS in a timely and proper manner. The complaint alleged, inter alia, that DRS often denied EAS to eligible applicants based on arbitrary, unwritten rules; unlawfully delayed application decisions; and failed to provide expedited hearings to those people whose applications were denied. Plaintiffs sought to enjoin the District from continuing these unlawful practices.

This litigation is a story of delay and broken promises. The District agreed to a Consent Judgment in 1986, but has never substantially complied with its timeliness requirements. The District's noncompliance has led plaintiffs to file three contempt motions, two of which resulted in new court orders which the District has, in turn, violated. It is the plaintiffs' view that the District is now moving beyond noncompliance to seek actively to undercut the court orders through litigation and legislation. Eleven years into the litigation, longstanding problems in the administration of EAS continue to undermine compliance with the 1986 Consent Judgment.

II. THE EMERGENCY ASSISTANCE PROGRAM

The purpose of the Emergency Assistance program authorized by federal law is to provide assistance to families with children under age 21 to prevent "destitution." 42 U.S.c. § 606(e). To this end, the U.S. Department of Health and Human Services provides federal matching funds to reimburse states for 50% of approved expenditures. 42 U.S.c. § 603(a)(5). States which accept such federal funding must operate their programs in conformity with federal law." In the District, EAS is also provided to single adults aged

^{2/} Blum v. Bacon, 457 U.S. 132 (1982).

60 and over, and to childless couples where at least one spouse is 60 or older. D.C. Code § 3-1003 (Supp. 1993). No federal funding is available for these latter grants.

States have considerable flexibility in determining which services and types of emergencies they will cover under EAS. In the District of Columbia, EAS provides assistance for a wide range of emergencies.^{3/} EAS is most often used to provide funds to prevent evictions and utility cutoffs and to pay security deposits and rent for the first month of occupancy of new apartments. EAS is also available to pay for furniture, mortgages, clothing, large appliances, burials, employment necessities, home repairs and other emergencies. D.C. Code §§ 3-1015 to 3-1028 (Supp. 1993). Various divisions within DHS have responsibility for administering EAS and for issuing checks and providing fair hearings.

III. COMPLAINT, SETTLEMENT NEGOTIATIONS, AND CONSENT JUDGMENT

A. The Complaint

In 1982, plaintiffs filed a class action on behalf of all District of Columbia residents who had applied or might apply for benefits under the District's EAS program against the Mayor, the Director of DHS, and administrators and employees from various divisions of DHS.^{4/} Plaintiffs' amended complaint alleged, in essence, that the District was precluding

^{3/} In this case summary, EAS refers to the program set out in D.C. Code § 3-1001 et seq. The District also operates an emergency shelter program. That program is presently the source of litigation in Washington Legal Clinic for the Homeless v. Kelly, discussed supra pp. 57-71.

^{4/} Defendants included administrators and employees from the following divisions of DHS: the Commission on Social Services, the Child and Family Services Administration, the Income and Maintenance Administration and one of the EAS service centers located
(continued...)

some people from applying for EAS, delaying EAS decisions and fair hearings, arbitrarily denying EAS applications, and failing to provide adequate notice of denials.^f

The Feeling plaintiffs first alleged an implied right of action under Title IV-A of the Social Security Act, 42 U.S.c. § 603(a)(5) and its implementing regulations, 45 C.F.R. § 233.120(a)(5). They charged that by failing to render decisions on EAS applications "forthwith," the District was violating such implementing regulations. In their second claim, plaintiffs alleged that defendants violated the same regulations by failing to provide assistance "forthwith" once applications had been approved. In their third and fourth claims, plaintiffs charged that, by failing to provide assistance and decisions "forthwith," the District was denying plaintiffs due process of law under the Fifth Amendment and 42 U.S.C. § 1983.

Plaintiffs also claimed that, by making arbitrary decisions on EAS applications and by failing to provide expedited hearings to EAS applicants whose applications had been

^{4/}(...continued)

in the District. All such defendants are referred to herein as "DHS." Complaints against all defendants except the Mayor and the Director of DHS were dismissed as part of the Consent Judgment.

^{5/} The case of Viola Crawford typified the experiences and allegations of plaintiffs. Viola Crawford applied for EAS after she was sued by her landlord for not making her August 1982 rent payment. Ms. Crawford had only one kidney, terminal blood diabetes, hypertension, and a heart problem. Her sole income was from Social Security disability payments which were supplemented by Medicaid and Food Stamps. In the beginning of August 1982, Ms. Crawford's Medicaid was wrongfully terminated and she needed to use her disability payments, which normally covered her rent, to pay for her life-supporting medication. Ms. Crawford therefore applied for EAS. Although she was clearly an eligible applicant, she had received neither benefits nor a denial of EAS more than two months after she filed her application. Feeling, Amended Complaint for Declaratory and Injunctive Relief, pp. 9-10, ¶¶ 28-36.

denied, DHS was violating plaintiffs' due process rights under the Fifth Amendment and § 1983.^{6/} Plaintiffs similarly charged that the District was violating the District of Columbia Administrative Procedure Act, D.C. Code § 1-1501 et seq. (Supp. 1983), by denying applications on the basis of unwritten and arbitrary rules, and was violating D.C. Code § 3-206.1 (1981) by denying applications without providing written reasons for denial and notice of the right to a fair hearing." Finally, plaintiffs alleged that the District was violating the Fifth Amendment due process rights of EAS applicants not covered by federal regulations (applicants without eligible children) by not providing assistance forthwith to approved applicants.^f

B. Settlement Negotiations and Consent Judgment

After conducting discovery, the parties began what would become protracted settlement negotiations. Over a three-year period, the parties exchanged no fewer than 12 draft agreements, meeting frequently to hammer out their differences. As a result of these extensive negotiations, the United States District Court for the District of Columbia, on March 11, 1986, approved a Consent Judgment which provides in pertinent part as follows:

1. Time for processing applications. DHS must provide Emergency Assistance to approved applicants "not greater than eight working days" from the date of

^{6/} This claim was based on the experiences of eligible EAS applicants whose applications were denied based on unwritten and arbitrary agency rules.

^{2/} A fair hearing is essentially the equivalent of an on-the-record administrative hearing under Goldberg v. Kelly, 397 U.S. 254 (1970).

^{3/} Until 1991, the District provided EAS to childless adults for which it received no matching federal funding. The District subsequently narrowed EAS in cases where it does not receive federal matching funds to those adults who, either singly or as one member of a couple, are aged 60 or over.

a completed application (hereafter the "eight-day rule").^{2/} Consent Judgment ¶ 2. However, DHS is also required to take all reasonable steps to provide assistance in time to prevent an emergency from actually occurring if the emergency is "imminent."^{10/} Generally, EAS is considered to have been provided when a check is mailed or hand-delivered to the vendor.

2. Individuals must be allowed to apply. DHS is required to allow all persons appearing at a DHS intake office to fill out an application form on the day they appear. DHS must interview the applicants no later than the following day, and must conduct the interview on the date of application if a "crisis is immediate." Consent Judgment ¶ 3.

^{2/} The date an application is "complete" and what constitutes "complete" are two extremely important concepts. The Consent Judgment states that an application is "complete" when the written application form is filled out and signed and when all necessary documentation is supplied by the applicant. The documentation must be requested by the Agency and listed on a checklist provided to the applicant at the time of application. Delay is often caused because applicants have trouble contacting their caseworkers to hand in requested documentation. For example, a perennial complaint of clients is that workers do not return their telephone calls. Delay is also caused when workers fail to ask for all required documents on the date of application and, when the mistake is discovered at a later date, ask applicants to provide more documentation.

^{10/} Imminent, for purposes of this paragraph pertaining to initial application decisions, means an emergency "that is presently occurring or will occur prior to the point at which emergency assistance could be issued in accordance with the [eight-day] time frame." Consent Judgment ¶ 2. A slightly different definition of "imminent" -- that the emergency will occur before the end of the forty working day process -- is used for appeals. In several cases known to plaintiffs' counsel, applicants have been evicted when, after giving DHS caseworkers eviction notices which indicated that the tenants could be evicted the next business day or within a few days, the caseworkers failed to take reasonable steps to stop the eviction. Caseworkers have, for example, sent applications through interagency mail rather than using the telephone or hand-delivery to obtain higher levels of approval.

3. Time for processing appeals of denials. When an applicant appeals a denial of EAS, defendants have a maximum of 40 business days to issue a final hearing decision and, where favorable, to render payment. Final hearing decisions are those "recommendations" of the hearing officer from a fair hearing procedure which are approved by the Director of OHS.W In imminent emergencies, DRS must take all reasonable steps to complete the process in time to "forestall the emergency." Consent Judgment ¶ 4.

4. Arbitrary decision-making prohibited. DRS can only make EAS decisions based on federal regulations and validly promulgated local regulations. Consent Judgment ¶ 6.

5. Written notice of rights to applicants. The District must provide each applicant, at the time of application, with a written notice of the applicant's legal rights and DRS's legal responsibilities in the EAS program. Consent Judgment ¶ 8(a).

6. Written denial notices. When EAS applications are denied, defendants must provide applicants with clear, concise statements of the reasons for denial, their rights under the administrative review and fair hearing process, and the steps the applicant must take to obtain review. Consent Judgment ¶ 8(b).

7. Posted notices about the EAS program. Defendants are required to post simple notices about the rights set forth in the Consent Judgment in all DRS offices where people who might need EAS could appear.

^{11/} Although formal hearing decisions are not final until approved by the Director, the vast majority of cases are resolved prior to a formal hearing and without the need for a decision by the Director.

The Consent Judgment also incorporates an appendix which sets forth in some detail procedures for processing EAS applications. Consent Judgment ¶ 5. The appendix provides, among other things, that an EAS application cannot be denied so long as the applicant is attempting to obtain required information and has so informed DRS. The appendix also directs DRS to determine, on the date of application, what information must be supplied by the applicant and what information the Agency must obtain. The District cannot require applicants to obtain information which one of the divisions of DRS can obtain more easily (e.g., information already in other DRS files).

The Consent Judgment also requires the District to submit monthly reports on its compliance to plaintiffs' counsel, provides a process for modifying the Judgment to conform to changes in law, and states explicitly that the Court will retain jurisdiction.

IV. POST CONSENT JUDGMENT ACTIVITY: CONTEMPT MOTIONS

Since entry of the Consent Judgment, plaintiffs' counsel have monitored the District's compliance and have constantly urged the District to take steps to correct noncompliance. Plaintiffs' counsel have attempted to work informally with defendants and their attorneys to assure compliance. In the first year, plaintiffs' counsel repeatedly called, wrote to and met with defendants' counsel simply to obtain monitoring documents. In subsequent years, plaintiffs' counsel have continued their monitoring and informal attempts to bring about compliance with the Consent Judgment, meeting with defendants' attorneys and other representatives on no fewer than 30 occasions. These efforts notwithstanding,

the District never achieved compliance with the eight-day rule.^{12/} The District's noncompliance with the Consent Judgment led plaintiffs to file three contempt motions, two of which have resulted in new court orders.

A. 1987 Contempt Motion and Resulting DHS Internal Order

Although it took a year, in 1987, the District finally supplied required monitoring documents. When those documents and a statistical study revealed that DHS was complying with the eight-day rule in only 8% of approved cases, plaintiffs filed their first contempt motion.^{13/} In opposing the motion, defendants admitted that they were not in compliance, but asked the Court to deny the motion, or postpone a ruling, because they allegedly had taken steps to bring about compliance.

At the Court's urging, the parties spent several months attempting to reach a settlement. As a result, in December 1987, DHS issued an internal order (Department of Human Services Organization Order No. 159), setting forth steps to be taken to bring about compliance with the Consent Judgment. In January 1988, the Court entered an order directing DHS to fully implement Organization Order No. 159.

Organization Order 159 appeared, at the time, to be a sincere and comprehensive attempt by DHS to get its house in order. It required the District, among other things, to

^{12/} The timeliness requirement essentially has two prongs, the requirement that DHS provide EAS to approved applicants not later than eight days following receipt of a completed application, and the requirement that DHS take all reasonable steps to provide EAS in time to prevent an emergency from occurring when it is imminent. Plaintiffs have focused primarily on achieving compliance with the eight-day aspect of the timeliness requirement.

^{13/} June 24, 1987 Affidavit of Barbara H. Linden, National Social Science and Law Center, Deputy Director and Senior Research Associate ¶ 17.

establish a Task Force, chaired by a Consent Decree Coordinator (a DHS employee), and composed of people responsible for administering various aspects of the EAS program (e.g., application processing, check drafting and mailing, fair hearings, and administrative reviews). Plaintiffs' counsel had suggested the need for a task force and coordinator when it appeared that no one at DHS was taking charge of diagnosing causes and prescribing cures for violations of the eight-day rule; that no one at DHS understood the inter-relationship between various aspects of the EAS program; and that no person or DHS division could supervise the whole EAS program, identify problems, and assure that necessary corrective actions were taken.^{14/}

In addition to coordinating defendants' compliance efforts, the Consent Decree Coordinator was required to meet periodically with plaintiffs' attorneys, report to the DHS Commissioner of Social Services, and make recommendations for changes designed to bring about compliance with the Consent Judgment. The Coordinator was also given the responsibility of addressing specific problems, such as staff shortages, identified during the course of the contempt litigation.W

The 1988 Court Order also modified the system of monthly reporting to plaintiffs' counsel, requiring DHS, among other things, to conduct monthly audits of samples of EAS cases for the purpose of identifying causes of eight-day rule violations, and directing defendants to report to the Court on compliance in six months.^{16/}

^{14/} Organization Order 159 at § I, III.

^{15/} Id. at § II.B.1, 9, to.

^{16/} Id. at § II.B.6.

B. 1990 Contempt Motion

Plaintiffs filed their second contempt motion in 1990 after informal efforts to bring about compliance with the 1988 Order failed. The motion charged that defendants had failed to supply required monthly statistical reports to plaintiffs' counsel, to maintain a Consent Decree Coordinator at all times, and to conduct regular Task Force meetings. As a result of the motion, DHS recommenced supplying the monthly statistical reports, appointed a new Coordinator, and set up a schedule for Task Force meetings. The contempt motion was denied because of defendants' compliance efforts, even though this practice on the part of the District was part of a familiar pattern whereby the District took steps towards compliance only when plaintiffs filed a contempt motion.

C. 1993 Ruling of Contempt

Plaintiffs filed their third contempt motion in May 1992, alleging that DHS continued to violate the eight-day rule and that, with rare exceptions, the District was not performing required monthly audits. The few audits performed by the District in 1988 and 1989 had identified numerous problems, from staff shortages to caseworker misunderstanding of procedures. Plaintiffs alleged that, without continuous audits, the utility of which was extolled to the Court by DHS itself, the District's efforts to identify the causes of eight-day rule violations were being seriously compromised.

Even though the District's own monthly EAS Center Reports revealed levels of noncompliance with the eight-day rule ranging from 20% and 30% on a regular basis to as high as 50% in some months, the District argued that contempt was inappropriate

because its level of compliance was improving and because plaintiffs had failed to prove that they were injured by the noncompliance.

Defendants' improvement argument not only was irrelevant as a matter of law (because improvement is not a defense to contempt's) but also, in the view of plaintiffs, was seriously misleading. To establish a claimed "steady climb" in compliance rates, the District presented figures for October 1991 through March 1992 and argued that those rates were representative of a year-long trend. The District offered no evidence to establish that rates for one six-month period could be so projected or that the variations in monthly rates were statistically significant. The District omitted rates for the immediately preceding six-month period which, when viewed with the rates presented, showed that the level of compliance was fluctuating.^W

Defendants' "no injury" argument revolved around their oft-repeated claim that confirmation letters (advising vendors that payment has been approved and that checks will be mailed later) allegedly issued to vendors within the eight-day time period prevented evictions, utility cutoffs, and other calamities. Plaintiffs argued that, as a matter of law, the presence or absence of injury was irrelevant in a civil contempt motion seeking to coerce

^{17/} E.g., Motley v. Yeldell, No. 74-13 (D.D.C. July 25, 1985) (District AFDC delays); Fortin v. Commissioner, Mass. Dept. of Pub. Welfare, 692 F.2d 790, 797 (1st Cir. 1982) (AFDC delays); Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc., 793 F.2d 1529, 1534 & n.5 (11th Cir. 1986) (trademark litigation).

^{18/} Defendants quoted the following rates from the October 1991 through March 1992 EAS Center Reports: 65.4%, 64.7%, 77.9%, 72.7%, 82.1%, and 81.3%. Defendants omitted these rates: 78.7%, 78.5%, 75.6%, 74.9%, 81.6%, and 68.9%. In an affidavit, a statistician retained by plaintiffs stated that the variations were not statistically significant. (July 20, 1992 Declaration of Elizabeth Quinn, Research Associate, CSR Inc. ¶ 6).

compliance. Plaintiffs argued alternatively that even if injury was relevant, a hearing on the material facts was required. Plaintiffs also challenged the factual showing the District made, and pointed out that, although landlords must stop evictions when full payment is tendered.¹⁹ they are not required to forego evictions based on letters which contain only DRS's promise to pay. There is evidence of record that these confirmation letters do not always work to prevent evictions.²⁰

Despite the District's vigorous opposition, the Court, on March 2, 1993, ordered that the District be held in contempt of both the 1986 Consent Judgment and the 1988 Court Order. The Court held that plaintiffs clearly demonstrated that DRS continued to violate the eight-day rule in 15-30% of the cases, and ordered the District to comply with the eight-day rule within ninety days and to provide plaintiffs with timely copies of monthly monitoring reports and audits.²¹

V. DEFENDANTS' LATEST LITIGATION TACTICS

Since being held in contempt, the District has filed several substantive motions seeking to be temporarily or permanently relieved of its obligations, and the Mayor has submitted legislation to the D.C. Council in an attempt to obviate the District's responsibilities. All such action occurred shortly before or after June 6, 1993, the date by

¹⁹ E.g., Trans-Lux Radio City Corp. v. Service Parking Corp., 54 A.2d 144 (D.C. 1947).

²⁰ Feeling, Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Order to Show Cause and for Contempt Judgment (filed July 20, 1992), at 14-15; Plaintiffs' Supplemental Memorandum in Reply to Defendants' Response to Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Order to Show Cause and for Contempt Judgment (filed Nov. 19, 1992), at 2-6.

Feeling, Order (Mar. 2, 1993).

which the District had been ordered to purge its contempt and prove compliance to the Court.

A. Motion to Vacate the Consent Judgment

On May 26, 1993, defendants filed a motion to vacate the Consent Judgment and a motion to stay all proceedings pending the outcome of the motion to vacate. The District argued that the Consent Judgment should be vacated because, under intervening caselaw, Suter v. Artist M., 112 S. Ct. 1360 (1992), plaintiffs no longer had a cause of action under 42 U.S.c. § 1983. Plaintiffs opposed the motion to vacate, arguing that Suter did not change the "analytical framework" for determining whether a § 1983 cause of action exists, and that, even if it did, the District could not raise this issue in a Rule 60(b) motion to vacate. Plaintiffs also argued that even if Rule 60(b) relief was appropriate on their § 1983 claims, their other claims were not affected by Suter. The motion for a stay pending the motion to vacate was denied on July 8, 1993. The motion to vacate the Consent Judgment was argued and taken under advisement on July 15, 1993.

B. Motion to Enlarge Time to Achieve Compliance

On May 27, 1993, the District filed a motion to enlarge the time to establish compliance with the eight-day rule, claiming that DHS lacked the ability to achieve compliance before September. The motion was denied in part and granted in part on July 8, 1993, with the Court ordering DHS to establish compliance by July 13, 1993, a date later extended to July 15, 1993.

C. Legislation to Modify the Consent Judgment

At the same time that the District was filing its motion to enlarge the time to achieve compliance, the Mayor was submitting legislation to the D.C. Council seeking both to change the eight-day rule to a twelve-day rule and to provide that, for purposes of the twelve-day rule, EAS was deemed to have been provided upon the issuance of a confirmation letter. In transmitting this legislation, the Mayor told the Council that defendants could not "meet the eight-day requirement with the present number of personnel" and needed the legislative change "to avoid further action by the Court in this case."^{22/} Thus, at the same time that the Mayor was telling the D.C. Council that compliance with the eight-day rule was impossible, the District was asking the Court for more time to demonstrate compliance with the rule.

The emergency legislation was enacted on June 8, 1993, D.C. Act 10-36, and virtually identical language was embodied in temporary legislation, D.C. Act 10-52, enacted on July 16, 1993.^{23/} On July 15, 1993, the District submitted a Notice of Filing to the Court in an apparent effort to comply with the requirement to establish compliance by that date. The District appended to its Notice a computer printout, an affidavit, and a memorandum. These three documents did not attempt to show compliance with the eight-day rule by June 6, 1993 (the date specified by the contempt Order), or by any other date.

^{22/} Letter from Mayor Sharon Pratt Kelly to the Honorable John A. Wilson, Chairman of the D.C. Council at 1 (Apr. 7, 1993).

^{23/} D.C. Act 10-52 is valid for 225 days after its effective date. Additional legislation would be needed to transform the provision into permanent legislation. As of the date this summary went to press, no such additional legislation had been enacted.

Rather, the documents contained information purporting to establish compliance with the new twelve-day rule. Moreover, the documents covered months (March and April of 1993) before the June 8, 1993, effective date of the emergency Act. Therefore, even if the new law were automatically to modify the Consent Judgment, the proofs submitted were facially deficient.

D. Motion to Vacate Contempt Order

Based on the July 15 Notice of Filing and the June 8 emergency legislation, the District moved to vacate the March 2, 1993, Contempt Order. The District did not ask the Court to modify the Consent Judgment to reflect the changes contained in the emergency Act, but instead took the position that the changes took effect automatically and that the documents filed establish compliance with the newly-enacted twelve-day rule. Plaintiffs opposed the motion to vacate and defendants submitted their reply on September 10, 1993. The motion is currently pending before the Court.

VI. CONCLUSIONS AND RECOMMENDATIONS

The problems in the EAS program are longstanding ones. This does not mean that they are unsolvable or even that they are complex. Solutions, however, require a commitment that the District has, heretofore, been unwilling to make.

The District needs to evaluate fully the EAS program, identify the problems causing delays, and devise remedies to address such problems. Although plaintiffs' counsel cannot identify with assurance the actual causes of the Consent Judgment violations, there are several possibilities. Defendants' documents show that staff shortages have been a perennial problem. Although DRS promised the Court that it would hire more staff, as

recently as September 1992, eleven of forty-nine caseworker positions were vacant. Other possible causes are absenteeism (which in turn requires expensive use of overtime), lack of training, and poor supervision.

Additional staff and increased training would, of course, cost money, but such funds may well be available. Although in passing the emergency legislation discussed above, the D.C. Council determined that funds were not available to hire more staff, there are reasons to question this finding.

First, since eleven of forty-nine caseworker positions were listed as vacant in September 1992, questions arise as to whether those positions were still vacant in April 1993, when the Mayor wrote to the D.C. Council, and whether they had been funded, but not filled, in the fiscal year which began on October 1, 1992. If funded and not filled, what happened to the money which was supposed to be spent to hire those staff people?

Second, the District has repeatedly failed to obtain federal reimbursement for EAS expenditures for which it may be eligible. This, in turn, affects its ability to hire more staff and take other steps to achieve compliance with the Consent Judgment. According to the U.S. Department of Health and Human Services ("HHS"), the District routinely files requests for federal reimbursement two years late, at which point HHS defers payment pending on-site reviews.^{24/} HHS has so deferred nearly all the \$5.629 million claim for federal reimbursement sought by the District for EAS expenditures made in fiscal year 1991

^{24/} May 13, 1993 Memorandum to Charleen Tompkins, Director, Division of Formula Entitlement and Block Grants, Administration for Children and Families, OFM/ACF from the Assistant Regional Administrator, OFM/ACF, Region III.

(October 1, 1990 - September 30, 1991).^{25/} The District did not ask for reimbursement for most actual EAS expenditures made in fiscal year 1992 until October 1993, and requests for most actual fiscal year 1993 expenditures have not yet been filed.^{26/} For fiscal years 1988 and 1989, after conducting an on-site review, HHS is now disallowing \$1.8 million of the \$8 million the District claimed in federal reimbursements (a decision that is appealable by **DHS**).^{27/} Thus, for fiscal years 1988, 1989, and 1991, the District spent \$7.5 million for which it has not been reimbursed and may never be reimbursed, and which is therefore not available to hire more staff.

The District should determine ways to improve its funding procedures in order to maximize federal reimbursement. HHS auditors have perennially deferred or disallowed funding because of DHS' failure to maintain its records properly. The institution of remedial actions could decrease the deferral and disallowance of federal funds and improve compliance with the Consent Judgment.

^{25/} Nov. 23, 1992, Feb. 24, 1993 and May 24, 1993 Memoranda to Charleen Tompkins, Director, Division of Formula Entitlement and Block Grants, Administration for Children and Families, OFM/ACF from Regional Administrator ACF, Region III.

^{26/} Aid to Families with Dependent Children Program, Financial Report, U.S. Dept. of Health and Human Services, Form ACF-231 (filed Oct. 29, 1993).

^{27/} July 14, 1993 Affidavit of James D. Butts, Administrator of the Income Maintenance Administration, Commission on Social Services, Department of Human Services ¶ 4. The amounts quoted represent DHS's requests for federal reimbursement for all EAS payments. Recent quarterly expenditure reports submitted to HHS indicate that approximately half of DHS's claimed expenditures have been used to pay for temporary housing (emergency shelter) and half for other EAS payments, such as payments to landlords and utility companies.

PUBLIC BENEFITS

Wellington v. District of Columbia
C.A. No. 93-0452 (D.D.C. -- Judge Norma Holloway Johnson)

by Rochelle Bobroff, Esq.
Terris, Pravlik & Wagner-'

Lawyers for Plaintiffs:

Principal attorneys are Bruce J. Terris and Rochelle Bobroff of Terris, Pravlik & Wagner; Lynn E. Cunningham and April I. Land of the Neighborhood Legal Services Program.

Lawyers for Defendants:

Wayne C. Witkowski, Lead Counsel, of the Office of the Corporation Counsel for the District of Columbia.

I. INTRODUCTION

Wellington v. District of Columbia was brought by eleven families who are eligible for Medicaid benefits under the Social Security Act. The lawsuit was brought because of plaintiffs' belief that the District of Columbia government has failed to comply with federal laws governing the administration and implementation of the Medicaid program. Plaintiffs claim that the District's failure to comply with such laws has resulted in lengthy delays in the processing of applications, the cessation of benefits to eligible individuals and families with no advance notice, an unduly complex and burdensome application process for needy

^{*/} Rochelle Bobroff, a 1987 graduate of Yale Law School, is currently an associate at Terris, Pravlik & Wagner. Ms. Bobroff's practice focuses on Title VII and Clean Water Act litigation on behalf of plaintiffs. Previously, she worked for the Legal Aid Bureau of Southern Maryland where she handled numerous public benefits cases, including Medicaid cases.

individuals, and the inability of families to obtain preventive health care services for children.

II. STATUTORY BACKGROUND

Medicaid is a federal program of medical assistance for the poor established by Title XIX of the Social Security Act ("Medicaid Act" or the "**Act**").^{1/} Medicaid benefits are provided to low-income families with children and to aged, blind, or disabled individuals with low incomes. Each state partially funds its own Medicaid program and qualifies for federal funds if its state program complies with the Medicaid statute and corresponding federal regulations regarding the scope of services, eligibility requirements, and procedural protections.^F If the United States Secretary of Health and Human Services finds that a state's program does not comply with the Medicaid statute, federal reimbursement may be withheld. Eligible individuals and families receive a Medicaid card entitling them to medical care from certain providers. Those providers, in turn, bill the District of Columbia's Medicaid program for the care provided.

Federal regulations require the District of Columbia's Department of Human Services ("DHS") to process the Medicaid applications of eligible families and individuals who are not disabled within forty-five days after the applications are submitted.^F When a family or individual is found to be eligible for Medicaid, benefits are initially provided for

^{1/} 42 V.S.c. § 1396 et seq.

^{2/} 42 C.F.R. § 430 et seq.

^{3/} 42 V.S.c. § 1396a(a)(8); 42 C.F.R. § 435.911(a). The Federal regulations require that the applications of disabled persons be processed within 90 days. 42 C.F.R. § 435.911(a).

a period of six months. To determine whether eligibility continues, DRS is required by federal regulation to send recipients a recertification form asking for updated information. If DRS determines that recipients remain eligible, federal regulations require DRS to provide them with uninterrupted Medicaid coverage. If DRS determines that recipients are no longer eligible for any reason, the regulations require DRS to provide those Medicaid recipients with advance notice and an opportunity for a hearing prior to the termination of benefits.^{4/}

Congress has repeatedly recognized that administrative barriers to the receipt of Medicaid have deprived eligible pregnant women and children of the health care which they urgently need.s' Congress, therefore, included in the Medicaid Act numerous provisions to ensure that eligible pregnant women and children have access both to Medicaid benefits and to comprehensive preventive health care services. For example, Congress was "concerned that, unless poor women and children are able to apply for Medicaid in locations other than welfare offices, many of them will be deterred from obtaining the health care coverage they need in order to receive preventive health services."^{6/} The Act therefore requires DRS to accept Medicaid applications not only at welfare offices, but also at many hospitals and clinics which serve a large number of families and individuals who are eligible for Medicaid)!

^{4/} 42 C.F.R. §§ 435.930, 435.919, 431.211.

^{5/} R.R. Rep. No. 881, 101st Cong., 2d Sess. 108 (1990), reprinted in 1990 U.S. Code Congo & Admin. News 2017, 2120.

Id. at 104, reprinted in 1990 U.S. Code Congo & Admin. News at 2116.

^{7/} 42 U.S.c. § 1396a(a)(55).

Congress has also found that a lack of Medicaid coverage for infants causes high infant mortality.^Y Congress stated:

"The United States ranks 19th among industrialized nations in infant mortality, behind Japan, Canada, Hong Kong, Singapore, and 14 other countries. About 40,000 American infants die each year before their first birthdays. A black infant in this country is twice as likely as a white child to die before the age of one year.

In August, 1988, the bipartisan National Commission to Prevent Infant Mortality issued a report, 'Death Before Life: The Tragedy of Infant Mortality.' The Commission called for universal access to early maternity and pediatric care for all mothers and infants. One element of the Commission's action plan for assuring universal access was upgrading coverage under Medicaid...."^{9/}

In response to the Infant Mortality Commission's report, Congress amended the Medicaid Act to target Federal resources more effectively on low-income pregnant women and infants in order to improve birth-outcomes.^W Thus, the Act requires DHS to provide automatic eligibility to newborn infants of Medicaid-eligible mothers, utilizing the mothers' Medicaid identification numbers to obtain Medicaid coverage for the newborns.^W

Finally, the Act establishes a comprehensive preventive health care system for children, known as Early and Periodic Screening, Diagnostic and Treatment Services ("EPSDT"), which includes immunizations; lead blood level assessments; and vision, dental, and hearing services. Congress has described EPSDT as the nation's largest preventive

^{8/} H.R. Rep. No. 247, 101st Cong., 1st Sess. 381 (1989), reprinted in 1989 U.S. Code Congo & Admin. News 2107.

Id.

^{10/} Id.

^{11/} 42 U.S.c. § 1396(e)(4); 42 C.F.R. §§ 435.117, 435.301(b)(I)(iii).

health program for children" which is "important to the health status of children in this country."^{12/} Pursuant to the Act, DHS must inform all Medicaid-eligible families that EPSDT is available-" and provide EPSDT program services.w

III. FACTUAL BACKGROUND

The District frequently violates each of the Medicaid provisions described above. For example, DHS does not accept applications at many District of Columbia hospitals and clinics which serve poor families and individuals. As a result, these persons suffer the inconvenience and unnecessary expense of having to travel to a welfare office that will accept their applications. Such travel is particularly onerous for indigent applicants who are pregnant, have small children, or are suffering from health problems.

In addition, DHS frequently fails to process Medicaid applications within the required forty-five days. In fact, DHS did not process a single plaintiff's application within that period. And more than half of the plaintiff families waited at least seven months after they had applied for benefits for a decision on their applications -- by which time their initial six month period of Medicaid benefits had already expired. The District's failure to comply with the forty-five day time period has had devastating, potentially life-threatening consequences. For example, for one mother, the delay in receiving a decision on a Medicaid application meant that she did not have the money to pay for the medication her

^{12/} H.R. Rep. No. 247, supra n.8, at 398-399, reprinted in 1989 U.S. Code Congo & Admin. News at 2124.

42 U.S.c. § 1396(a)(43)(A); 42 C.P.R. § 441.56.

^{14/} 42 U.S.C. §§ 1396a(a)(1O), 1396a(a)(43)(B), 1396d(a)(4)(B), and 1396d(r); 42 C.P.R. §§ 441.56(b) & (c), 441.60(a), 441.61, and 441.62.

son needed to control his epilepsy. For another mother, the delay meant being forced to use her rent money to pay for her children's medical care while awaiting Medicaid benefits, and eventually facing an eviction notice. The delay threatened a one year old child who suffers from spastic quadriplegia, a neurological condition similar to cerebral palsy, with the termination of medical services because his parents could not pay for these services while they waited for a decision on their Medicaid application. Broad-based studies reinforce these personal stories, showing that a lack of Medicaid benefits causes irreparable harm to the health and well-being of poor children while the existence of Medicaid benefits reduces infant mortality and low birth weight and improves access to a wide range of health services for children.^P

DRS also handles the recertification process improperly. In some instances, DRS fails to send recertification forms to those individuals who have received Medicaid coverage for the initial six-month period. As a result, recipients' benefits lapse at the end of the initial period without advance notice. In other instances where DHS does send the forms and recipients promptly return them, DHS then fails to process the forms in a timely manner, leaving the recipients without Medicaid coverage during the processing period. In such cases, the recipients are neither notified nor given an opportunity to be heard regarding the lapse in their coverage.

When the District fails to provide recipients with advance notice that they are losing Medicaid coverage, those recipients often go to a medical provider or pharmacy believing

^{15/} E.g., R. St. Peter, P. Newacheck, N. Halfon, "Access to Care for Poor Children: Separate and Unequal?" 267 J. A.M.A. at 2762 (May 1992).

that they have Medicaid. They are then informed by the provider or pharmacy that their Medicaid is not valid. Many doctors and pharmacies will not provide medical care and prescription medications when Medicaid coverage has ceased. This is particularly onerous for disabled individuals whose well-being depends heavily on continuous medical care and medication.

When the District delays in processing applications and recertification forms, it also prevents newborns from obtaining prompt Medicaid coverage. For instance, in July 1992, one plaintiff family that was receiving Medicaid submitted a completed recertification form and an application for a child born in that month to be added to the family's coverage. DHS did not process the recertification form and add the infant to the family's Medicaid policy until December 1992. Moreover, the infant's Medicaid number did not work until February 1993, and then only after the infant's attorney had intervened. Thus, the baby had no Medicaid coverage for the first seven months of her life. Similarly, when the applications of pregnant women take many months to be processed, their newborn babies are often born before their mothers have obtained Medicaid coverage. As a result, the newborn babies are unable to obtain the prompt Medicaid coverage mandated by law.

DHS also fails to deem newborns of mothers with Medicaid numbers automatically eligible for Medicaid coverage under those numbers. Contrary to law, this leaves such newborns with no Medicaid coverage for the first months of their lives, forcing them instead to wait several months to obtain Medicaid numbers of their own.

Finally, the District fails to notify eligible families about EPSDT, depriving children of preventive health services. While most of the 21 plaintiff children in Wellington had

been found eligible for such services at the time the complaint was filed, and others were found eligible after the complaint was filed, none of their parents were informed that EPSDT was available when they obtained Medicaid. As a result, the children were left without the comprehensive preventive health care services they sorely needed. Moreover, DRS fails to provide comprehensive EPSDT services to eligible children. For example, none of the plaintiff children received the complete array of EPSDT services. When families are not advised about EPSDT or receive inadequate services, illnesses go undiagnosed and untreated. For instance, one child who was later diagnosed as having lead paint poisoning had not been screened for lead paint as part of the EPSDT program, even though her family had applied and was eligible for Medicaid and she was, therefore, entitled to such screening as part of the EPSDT program.

IV. THE LITIGATION

A. Plaintiffs' Claims

Eleven families filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of Columbia on March 2, 1993, alleging that their rights under the Medicaid Act are being violated by the District's failure to comply with the Act and the federal regulations regarding administration of the Medicaid program.^{16/} Plaintiffs' complaint alleges that DRS violates Medicaid law by failing to:

- grant automatic eligibility to newborn children of Medicaid-eligible mothers."^{17/}

^{16/} 42 U.S.c. § 1983 provides a private remedy for violations of federal statutes and constitutional provisions.

^{17/} 42 U.S.C. §§ 435.117, 435.301(b)(1)(iii).

- accept applications at hospitals and clinics which serve poor families;^{18/}
- accept completed Medicaid applications.w
- process Medicaid applications in a timely manner;^{20/}
- provide advance notice of the discontinuation of Medicaid.W
- provide notice of the availability of EPSDT;^{22/} and
- provide comprehensive EPSDT services.^{23/}

B. Relief Sought

Plaintiffs seek a declaration that defendants have violated federal law and an injunction to prohibit future violations of Title XIX of the Social Security Act, its accompanying regulations and the Constitution. Plaintiffs also request an order requiring DHS to provide interim Medicaid benefits to persons whose applications have not been processed within the prescribed deadlines and to recipients who have not received advance notice of the discontinuance of their Medicaid benefits. Plaintiffs further seek an order requiring defendants to reimburse persons for personal funds they have had to expend to

Id. § 1396a(a)(55).

42 U.S.c. §§ 1396a(a)(8); 42 C.F.R. 435.906.

42 U.S.C. § 1396a(a)(8); 42 C.F.R. § 435.911(a); D.C. Code § 3-205.26 (1988).

^{21/} Plaintiffs allege that failure to provide such notice violates not only Federal and D.C. regulations (42 C.F.R. §§ 435.930, 435.919, 431.211; D.C. Code § 3-205.55(a) (1988)), but also the Due Process Clause of the Fifth Amendment of the United States Constitution.

^{22/} 42 U.S.C. § 1396a(a)(43)(A); 42 C.F.R. § 441.56.

^{23/} 42 U.S.c. §§ 1396a(a)(10), 1396a(a)(43)(B), 1396d(a)(4)(B), 1396d(r); 42 C.F.R. §§ 441.56(b) & (c), 441.60(a), 441.61, 441.62.

obtain health care services and medication due to defendants' failure to provide the medical coverage to which such individuals are entitled under Medicaid. Finally, plaintiffs request that the Court appoint a Special Master to report on defendants' compliance with any court orders and to determine remedies necessary to enforce the District's compliance with the Medicaid Act.

C. Pending Motions

On May 6, 1993, the District of Columbia filed a motion to dismiss the lawsuit on several grounds. First, the District contends that, under Suter v. Artist M., the Medicaid Act provisions at issue in this case do not create rights enforceable by private plaintiffs under 42 U.S.c. § 1983.^{24/} Defendants argue that the Medicaid Act only entitles recipients to a conforming State Plan and not to any specific benefits or procedures, and that since the District has such a plan, plaintiffs have no right to maintain this suit. Second, the District contends that plaintiffs lack standing to file this suit under 42 U.S.c. § 1983 because neither the District nor its officers are "persons" within the meaning of that section. The District further argues that the complaint fails to state a proper claim for relief, that plaintiffs are not entitled to due process when their benefits cease without advance notice and a prior opportunity for hearing, and that the Court should decline to exercise supplemental jurisdiction over the claims under District of Columbia law.

Plaintiffs' response argues that the case is controlled, not by Suter, but by Wilder v. Virginia Hospital Association because the Medicaid Act provisions on which plaintiffs

^{24/} 112 S. Ct. 1360 (1992). In Suter the Supreme Court held that plaintiffs do not have a cause of action under § 1983 to enforce a federal statute when such statute does not contain mandatory provisions that create enforceable rights.

rely impose binding obligations on states which private plaintiffs may enforce pursuant to § 1983.^{25/} Defendants filed their reply on September 8, 1993. Two other motions are also pending before the Court: plaintiffs' motion to certify a class of thousands of persons, including approximately 66,000 children, who receive Medicaid in the District of Columbia; and defendant's request for a protective order regarding plaintiffs' discovery requests. The Court has ruled that defendants do not need to respond to plaintiffs' motion for class certification until it rules on the motion to dismiss.

V. THEMES AND RECOMMENDATIONS FOR IMPROVEMENT

Although discovery has not been completed, it is possible to identify potential areas for improving the provision of Medicaid benefits to eligible families and individuals. If any of the suggested improvements are to be achieved, the full commitment of DRS administrators will be essential. First, plaintiffs have learned that DRS does not compile statistics regarding the number of cases which are processed in a timely manner, the number of cases which lapse while recertification forms are being processed, and the number of cases in which recertification forms have been mailed to recipients. Plaintiffs suspect that defendants may need better tracking procedures to identify and correct cases which are not processed in a timely manner. Plaintiffs believe that such compilations not only would permit the District to demonstrate its compliance with regulations, but also

^{25/} 496 U.S. 498 (1990). Wilder held that the Boren Amendment to the Medicaid Act creates a right enforceable by Medicaid providers for the adoption of reasonable reimbursement rates. The Court found that the amendment is cast in "mandatory rather than precatory" terms, that it is clearly meant to benefit Medicaid providers, and that Congressional intent was to retain providers' pre-existing right to challenge rates as unreasonable under § 1983.

would enable it to develop a tracking procedure to identify and correct cases which are not processed in a timely manner. Second, plaintiffs believe that DRS staff may need training in how to explain the EPSDT program and the benefits of preventive health care to recipients. Finally, plaintiffs believe that DRS currently does not obtain all the federal matching Medicaid funds which the District may be eligible to receive. These funds, if obtained, could supplement DRS' budget, perhaps allowing the Department to increase the number of caseworkers who process applications, thus enabling a timelier review.

PUBLIC BENEFITS

Quattlebaum v. Kelly
C.A. No. 91-8207 (D.C. Super. Ct. --
Judges Sylvia Bacon, Richard S. Salzman, and Ronald P. Wertheim)
Appeal pending, C.A. No. 92-504 (D.C. --
Chief Judge William C. Pryor,
Judges John M. Ferren and Emmet G. Sullivan)

by Elizabeth M. Brown, Esq.
and Anne R. Bowden, Esq.
Shea & Gardner-'

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Lawyers for Defendants:

Before the Superior Court: Cary D. Pollack and David Cleveland, both of the Office of the Corporation Counsel for the District of Columbia. Before the D.C. Court of Appeals: Charles L. Reischel and Karen L. McDonald, both of the Office of the Corporation Counsel for the District of Columbia.

Lawyers for Amicus Curiae (Children's Defense Fund):

Walter A. Smith, Jr., A. Lee Bentley, III, and Kathryn W. Lovill of Hogan & Hartson.

I. INTRODUCTION

In May 1991, the District of Columbia Council enacted emergency legislation, 9-159, to reduce the subsistence benefits afforded the District's neediest families under the Aid

^{*/} See Acknowledgements for biographies of Elizabeth M. Brown and Anne R. Bowden.

to Families with Dependent Children ("AFDC") program. The District claims that the cutback, which rolled back AFDC benefits to 1989 levels and suspended cost-of-living adjustments ("COLA") until 1993, was mandated by the District's budgetary crisis. The evidence suggests otherwise. Rather, the history of 9-159 demonstrates that the District Council ignored alternative sources of budgetary savings in the AFDC program, cast deaf ears upon the repeated pleas of the public interest legal community to conduct hearings on the proposed cutbacks, and justified its legislation on grounds impermissible under federal law. The effect of the Council's ill-considered and hasty action was to slash benefits for over 56,000 District AFDC recipients, more than 40,000 of whom were children, without regard to the devastating impact that this action would have on the substantive needs of its neediest constituents or their legal rights.

II. THE UNDERLYING LAW

Congress originally enacted the AFDC program as part of the Social Security Act of 1935. Under this joint federal-state cost sharing program, the federal government matches all payments provided to AFDC recipients by a participating state. The goal of the AFDC program is to provide families with dependent children the financial assistance necessary for a parent to provide needy children with food, shelter, and other necessities. The program originally was intended to provide widowed or divorced mothers with assistance that would enable them to remain at home to care for their children and be free from having to work while their children were minors^Y

^v Burns v. Alcala, 420 U.S. 575, 581-82 (1975).

Both District and Federal law provide significant procedural safeguards to poor mothers and children receiving AFDC. Under District law, the City Council must determine the amount of public assistance which "shall not be less than the full amount determined as necessary on the basis of the minimum needs of such person as established by the Council."^{2/} Federal law, in turn, requires the Council to set forth standards of assistance (i.e., minimum **needs**)^{3/} and benefit levels so that any difference between the two is explicit.^f Both the D.C. Code and Federal law also prohibit the Council from considering "[f]or all categories of assistance . . . the value of the coupon allotment under the Food Stamp Act of 1964 . . . in excess of the amount paid for the coupons."^V Finally, under both Federal and District law, the District "shall give timely and adequate notice in cases of intended action to discontinue, withhold, terminate, suspend, [or] reduce assistance . . ." to AFDC recipients.^s These procedural rights were enacted both to protect the politically weak, impoverished mothers and children from arbitrary decision-making and to ensure that the District makes decisions regarding AFDC benefit reductions in a considered fashion.

^{2/} D.C. Code § 3-205.44 (1988).

^{3/} The "standards of assistance" are the dollar amounts "necessary to provide for essential needs, such as food, clothing, and shelter." Quem v. Mandley, 436 U.S. 725, 737 (1978).

See Rosado v. Wyman, 397 U.S. 397, 408 (1970).

^{5/} D.C. Code § 3-205.12 (1988). In other words, AFDC benefit levels must be based on factors other than Food Stamp benefit levels. See also Food Stamp Act of 1964, 7 U.S.c. § 2017(b).

D.C. Code § 3-205.55(a) (1988). See also 45 C.F.R. § 205.10(a)(4)(i) (1992).

III. THE DISTRICT'S DECISION TO REDUCE AFDC BENEFITS

Mayor Dixon submitted a comprehensive budget proposal to the District Council on March 1, 1991. The proposal, on which public hearings were held on March 6-7, recommended that the 1992 COLA be suspended for AFDC recipients, but did not call for any reduction in AFDC benefits in fiscal year 1991. In fact, the budget estimated an increase in average monthly AFDC benefits from \$375 in 1990 to \$393 in 1991.¹¹

Only when Bill 9-159 was introduced in the Council on March 18 was it proposed to roll back AFDC benefits to 1989 levels. Rather than adopting the budget's estimated increase in benefits, the Bill proposed to use 1989 monthly benefit levels and to suspend the annual COLA to which recipients would have been entitled automatically. The Council conducted a meeting on the proposed budget on March 20 at which public testimony was not taken. One month later, on the day before the Bill was scheduled for mark up, the public legal services community learned of this critical change in the proposed budget for the first time. This community immediately voiced its objections and called for public hearings on the proposed cutbacks in AFDC benefits. The Council refused.^Y

As demonstrated by the statements of various Council members, it appears that they were unaware that the bill changed the Mayor's proposal. For example, on April 19, 1991, The Washington Post reported that monthly AFDC benefits were to be reduced under a "little-known provision" of "which some Council members were unaware." Councilmember

^{7/} "D.C. Budget Clause Cuts Welfare Aid," The Wash. Post, Apr. 19, 1991, at C1.

^{8/} Affidavit of Cheryl Fish-Parcham in Quattlebaum v. Dixon; d. Defendants' Response to Plaintiffs' Statement of Material Facts (Sept. 13, 1991) [hereinafter "Defendants' Response"].

Crawford, who chaired the District's Committee on Human Services, which was charged with writing up and submitting the bill to the full Council, was quoted as saying that he "wasunaware" of the provision and mistakenly insisting that "[t]here's nothing retroactive[;] . . . we're not taking back something that's been given, . . . that wouldn't be fair."^{9/}

In response to this apparent confusion at the highest levels of the District government, public interest and community groups again requested that the Council hold public hearings on the new proposal. A community group served by the "So Others May Eat" ("SOME") SouthEast Community Center submitted a petition signed by approximately 1,100 concerned residents urgently requesting a public hearing on the proposed AFDC cut. In a letter to the members of the City Council's Committee on Human Services, Cheryl Fish-Parcham, Director of the SOME SouthEast Center and former Director of the D.C. Coalition on Fiscal Accountability, explained that the proposed cuts were an ineffective means of addressing the District's fiscal crisis: "When D.C. adds up the federal match that will be lost, the administrative costs of adjusting benefits, the decreased rent payments in public housing and the effects on other public entitlements, any District dollars saved by cutting welfare benefits will be minimal.,,!Q/

Nonetheless, the Council refused to accept public testimony on the proposed AFDC cuts and, on May 7, 1991, quickly adopted emergency legislation cutting those benefits effective July 1. After the bill's passage, District officials continued to demonstrate

^{9/} "D.C. Budget Clause Cuts Welfare Aid," The Wash. Post, Apr. 19, 1991, at C1.

^{10/} Letter from Cheryl Fish-Parcham to the Committee on Human Services, District of Columbia City Council (Apr. 23, 1991).

confusion and ignorance about their action. On July 11, 1991 (after the lawsuit challenging the cuts had been filed) Mayor Kelly appeared on the radio talk show, "The Cathy Hughes Show," where she repeatedly denied that AFDC benefits had been reduced. Rather, the Mayor asserted incorrectly that the legislation had merely suspended future benefit increases. On July 14, 1991, the Council Chair made the same erroneous representation on the television news program "News Forum."!!!

In cutting AFDC benefits, the Council arguably violated several procedural rights guaranteed to AFDC recipients under District and Federal law. First, the Council failed to comply with District law requiring it to reassess and consider the minimum needs of AFDC recipients before changing their benefit levels.¹¹ The expert, independent Rivlin Commission, appointed by then-Mayor Barry to develop ways to resolve the District's fiscal crisis, had expressly recommended in 1990 against any reductions in AFDC benefits:

"The Commission is concerned about the low benefit level of the District's Aid to Families with Dependent Children program. When home rule was adopted, the benefit level was 80 percent of the poverty level. Today, it is 50 percent. . . . The lower payment level is a hardship for District recipients, especially since the District is an expensive city in which to live."¹³

¹¹/ Affidavit of C. Mario Russell; cf. Defendants' Response, supra n.8.

¹²/ Supra n.2 and accompanying text.

¹³/ The Report of the Commission on Budget and Financial Priorities of the District of Columbia at 3-20 (Nov. 1990) [hereinafter "Rivlin Commission Report"]. Indeed, James M. Corman of the Rivlin Commission, in dissent, recommended raising AFDC benefit levels:

"The most glaring weakness of the Commission report is the lack of attention given the children. Tragically a large number of the children in the District live well below the poverty level. The report acknowledges this, but recommends that nothing be done, notably in the Aid to Families with Dependent Children's program." Id. at App. A-2.

The Council and the Mayor, however, ignored this and other overwhelming evidence that AFDC benefits in the District were already at perilously low levels and made no effort to determine the minimum needs of AFDC recipients in the District or to understand the effects of the proposed cuts. Despite the pleas from the public interest community to conduct hearings for these purposes, the Council heard no testimony and conducted no deliberations regarding minimum needs.

Second, the Council arguably failed to comply with federal law requiring it to set forth minimum needs and benefit levels in any legislation changing AFDC benefits.^{14/} The Council deleted a key passage in the legislation that would have made clear that a large gap existed between the needs of AFDC recipients and the proposed benefit levels. In the past, when adjusting its AFDC benefit scheme, the District had reassessed the "standards of assistance" to reflect then-current costs and had explicitly referenced the reassessment in the D.C. Code. Thus, in 1986 for example, the date of the last AFDC adjustment, the Code noted that "[t]he standards of assistance [are] based on the February 1985 cost of living index." The District not only failed to make such a reassessment in 1991, but also obscured its inaction by deleting all references to the February 1985 cost-of-living index from the proposed legislation.^{15/} Hence, only the most knowledgeable observer could have realized that the reported standards of assistance did not reflect current needs of AFDC recipients but rather their needs of six years earlier.

^{14/} Supra *nA* and accompanying text.

^{15/} E.g., D.C. Code Ann. § 3-205.52 Amendment Note (West Supp. 1993).

Third, the District's notice to individual recipients to explain the cuts was uninformative. First, the notice did not tell AFDC recipients how much their benefits would be reduced. In addition, the notice misled AFDC recipients about their statutory right to a hearing to challenge any computational errors that may have been made in adjusting their benefits. The notice incorrectly told recipients that "if you appeal, your benefits will not be increased."^{16/} The District had, in fact, made it virtually impossible for recipients to file an appeal because, without knowing how much their benefits would be cut, AFDC recipients had no way to compute any error.

Fourth, contrary to both Federal and District law, the Council's Committee on Human Services tried to justify its reductions in AFDC benefits by arguing that increased Federal Food Stamp benefits automatically become available when AFDC benefits are reduced.^V as demonstrated by a dialogue between Chairman Crawford and Council-member Rolark on the issue:

"Councilmember Rolark noted that these types of reductions were devastating because they 'hit the most vulnerable of our population, the poor'. . . . Crawford responded . . . that some of the difference in the public assistance reductions would be off-set in the allocation of Food Stamps. . . . Council-member Rolark . . . commended the chairman for having worked hard to off-set the reductions.W

Defendants' Response, supra n.8.

^{17/} Supra n.5 and accompanying text.

^{18/} Council of the District of Columbia Committee on Human Services, Report to the 1991 Council on the Public Assistance Act of 1982 Budget Conformity Amendment Act of 1991 at 17 (quoting Minutes from Apr. 25, 1991 meeting of D.C. Comm. on Human Services) [hereinafter "Human Services Report"].

Indeed, the Committee prepared a chart for its official report that directly linked the AFDC benefit decreases to Food Stamp benefit increases.^W

In addition to violating these procedural protections, the District, though ostensibly attempting to address the District's fiscal crisis through AFDC reductions, failed to heed the recommendations set forth by the Rivlin Commission established to address that crisis.^{20/} This expert Commission concluded that the District (1) was not providing the level of education, health and social services it should be, (2) was providing such services too expensively, and (3) was not taking full advantage of available federal funding.^W It issued 35 separate recommendations that would have, in the aggregate, created savings of \$64.9 million in the first year and \$511.9 million over five years in the administration of education, health and social services. Not one of these recommendations called for cutting needed public services, let alone AFDC benefits.^{22/}

^{19/}	Household	FY 90	FY 91	AFDC Decrease	Food Stamp Increase
1		\$258	\$270	\$12	\$4
2		321	336	15	5
3		409	428	19	6
4		499	522	23	7

Human Services Report at 6. The column labeled "FY90" showed the monthly benefits AFDC recipients would receive under Bill 9-159, which rolled back benefits to 1989 levels. The column labeled "FY91" showed the monthly benefits recipients would have received had a cost-of-living increase been granted.

See discussion supra at 218.

Rivlin Commission Report, supra n.13, at 3-1.

Rivlin Commission Report, supra n.13, at xix to xxi, 3-1 to 3-38.

Had the District confronted its fiscal and social responsibilities more thoroughly, it might have adopted a sounder, more effective and longer-lasting alternative to slashing AFDC benefits: cutting administrative fat from the AFDC program. In fiscal year 1990, the District of Columbia spent \$28.4 million to administer its AFDC program, or nearly \$124 per family per month. These administrative costs were by far the highest of any AFDC program in the nation and nearly two and one-half times the national **average**.^{23/} Indeed, the District's administrative costs were so bloated that had it reduced its administrative costs for the AFDC program by the same amount as the benefit reductions it made in that program, the District's per capita administrative costs still would have been the highest in the nation.

IV. THE LITIGATION

A. Plaintiffs' Complaint and Motion for a Temporary Restraining Order

With the clock ticking down to the July 1 effective date for Bill 9-159 and the District ignoring all pleas for public hearings on the Bill, AFDC recipients' only recourse was legal action. Public interest groups quickly joined forces to draft a complaint and motion for a temporary restraining order ("TRO") on behalf of a class of AFDC recipients. On June 27, 1991, plaintiffs filed their complaint and TRO application in D.C. Superior Court against Mayor Sharon Pratt Dixon; John A. Wilson, D.C. City Council Chair; H.R. Crawford, Committee on Human Services Chair; Vincent C. Gray, Director of the Department of Human Services; and the District of Columbia. Plaintiffs' complaint alleged

^{23/} H.R. Ways and Means Committee, t02d Cong., 1st Sess., Overview of Entitlement Programs, 1991 Green Book, Table 19, at 617-18 (May 17, 1991).

that the defendants had impermissibly relied on increased Food Stamp benefits as a rationale for decreasing AFDC benefits and had failed to consult, prior to the enactment of Bill 9-159, with its Medical Care Advisory Committee ("MCAC") regarding the impact the proposed AFDC cuts would have on AFDC recipients' Medicaid **eligibility**.^{24/}

Although the Court recognized the plaintiffs' "precarious financial condition," on June 28, 1991, Judge Sylvia Bacon denied both plaintiffs' motion for a TRO and the District's motions to prospectively deny plaintiffs any right to a preliminary injunction and to dismiss portions of their complaint without further opportunity to develop their claims. The Court did, however, refer the parties to Judge Salzman, who was designated to serve as trial **judge**.^{25/}

B. Plaintiffs' Amended Complaint and Defendants' Motion for Summary Judgment

After a few days of additional research time, the plaintiffs filed an amended complaint on July 8, 1991. The plaintiffs supplemented the original complaint with three new claims charging that the District had violated AFDC recipients' legal rights by

^{24/} Federal Medicaid regulations require the District to establish a MCAC which "must have [an] opportunity for participation in policy development and program administration, including furthering the participation of recipient members in the agency program." 42 C.P.R. § 431.12. Plaintiffs argued that the District violated this requirement because any reduction in AFDC benefits necessarily would have affected many AFDC recipients' eligibility for Medicaid. The plaintiffs recognized, however, that, although numerous courts have held pursuant to this regulation that a state must consult with the MCAC before effectuating any change in Medicaid benefits, e.g., Morabito v. Blum, 528 F. Supp. 252,263-64 (S.D.N.Y. 1981), none had held that a state must consult its MCAC when the state changes a social program that might incidentally affect an individual's eligibility for Medicaid. Subsequently, the plaintiffs voluntarily dismissed this count without prejudice.

Transcript of oral argument before Judge Bacon at 22-23 (June 28, 1991).

(1) failing to set AFDC benefit levels on the basis of recipients' minimum needs as required under D.C. law; (2) obscuring the degree to which AFDC benefits fell short of needs, in violation of a Supreme Court mandate; and (3) providing inadequate notice of the cuts to the plaintiffs in violation of District and Federal law. In turn, the District filed a motion to dismiss plaintiffs' amended complaint or, in the alternative, for summary judgment.

Mer cautioning the District that he viewed this as a "serious case," Judge Salzman recommended that the case be designated Civil I, due to its legal complexity.^e On July 26, 1991, the case was designated Civil I and reassigned to Judge Ronald P. Wertheim, who ordered a supplemental round of briefing. The plaintiffs briefed four main legal issues.

1. The District's Failure to Reassess Needs Prior to Cutting AFDC Benefits

The plaintiffs argued that the District had violated D.C. Code § 3-205.44 by failing to reassess minimum needs prior to reducing AFDC benefit levels. They argued that this section, initially imposed on the District by Congress in 1962 before passage of the Home Rule Act, contains both a substantive and a procedural requirement, and that the substantive requirement mandates that the Council set benefit levels at "[no] less than the full amount" of AFDC recipients' minimum needs, while the procedural provision requires the Council to determine benefit levels "on the basis of the [recipients'] minimum needs." Although Congress has suspended the substantive requirement of § 3-205.44 in the

^{26/} D.C. Superior Court Rule 42 allows a case that is likely to raise complicated factual or legal issues to be designated for the Civil I calendar. Civil I calendar cases are heard by one of a group of judges assigned to handle complicated cases.

District's annual appropriation bill every year since 1969, the plaintiffs contended that the procedural requirement remains in force, as evidenced by the 1982 recodification of § 3-205.44. The plaintiffs argued, relying on uncontested legislative history, that the Council had failed to reassess or even consider AFDC recipients' minimum needs.

The District countered that § 3-205.44 did not contain a procedural requirement because Congress had implicitly repealed it, and that the Council itself had implicitly repealed the procedural requirement in enacting the 1991 benefit cut.^{27/} In the alternative, the District claimed that it had, in fact, reassessed minimum needs when it retained the 1986 standards of assistance (which used the February 1985 cost-of-living index) in the new legislation.

2. The District's Obfuscation of the Gap
Between AFDC Benefit Levels and Needs

The plaintiffs alleged that the District also had violated federal law by intentionally obscuring the extent to which the new AFDC benefit levels failed to meet current minimum needs by eliminating all references to the basis of its standards of assistance. As support, plaintiffs cited a line of cases beginning with Rosado v. Wyman, 397 U.S. 397 (1970), wherein the Supreme Court held that Congress's intent in requiring states participating in the AFDC program to establish standards of assistance was to force them to "face up realis-

^{27/} The latter argument raised a fundamental question regarding District self-governance. Under the Home Rule Act, Congress reserves the right to disapprove of all legislation the Council enacts. D.C. Code § 1-233(c) (1992). Thus, if the District succeeded in arguing that it had the power implicitly to repeal § 3-205.44 it would have created a substantial loophole in the Home Rule Act, a loophole identified and denounced by the Ninth Circuit recently in Tyler v. United States, 929 F.2d 451, 454 (9th Cir. 1991) ("implied repeals [cannot] serve as a detour around" the requirement that the D.C. Council must submit its home rule enactments to Congress).

tically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need" and "pay[] the political consequences."^{28/} The plaintiffs argued that the District had failed to accept the political consequences of its benefit-cutting legislation when it deleted from Bill 9-159 the very language that would have advised recipients about the gap between needs and benefits.

The District countered that federal law gives a state the discretion to set the standards of assistance and that it was immaterial that the District adopted standards based on the February 1985 cost-of-living index. Furthermore, the District claimed that it had not hidden the fact that a gap existed between benefits and needs.^{29/}

3. The District's Consideration of Increased Food Stamp Benefits

The plaintiffs next alleged, citing the Committee on Human Services **Report**,^{30/} that the District had violated § 2017(b) of the Federal Food Stamp Act, which prohibits states from "decreas[ing] any assistance otherwise provided . . . individuals because of the receipt of benefits under this chapter," and D.C. law, which requires the District "[f]or all categories of assistance [to] disregard the value of the coupon allotment under the Food Stamp Act . . . in excess of the amount paid for the coupons."^{31/}

^{28/} See also, e.g., Junghans v. Department of Human Resources, 289 A.2d 17,22 (D.C. 1972).

^{29/} Plaintiffs responded that, while the District may not have hidden the existence of a gap, it had certainly hidden the size of that gap by deleting all references to the February 1985 cost-of-living index.

See discussion supra, p. 220.

D.C. Code § 3-205.12.

In the light of the Committee's report, the District was forced to concede that Council members had been aware that AFDC reductions would be offset, in part, by an increase in Food Stamps. However, the District argued that the Council's action nonetheless was permissible because (1) states could opt out of § 2017(b)'s prohibition in their state plan,^{32/} (2) the Council had not directly used the amount of Food Stamp program increases to determine the size of its AFDC reductions, and (3) in any event, the Council had reduced AFDC benefits solely in response to the District's fiscal crisis.

4. The District's Failure to Provide Adequate Notice to AFDC Recipients of the Change in their Benefits

Finally, the plaintiffs argued that the District had violated both Federal and District law by failing to provide AFDC recipients with adequate notice of the change in AFDC benefits brought about by its 1991 legislation and of their right to a hearing to assert errors in the calculation of their benefits.^{33/}

The District responded that its notice was more than sufficient and that it did not have the capability to provide timely individualized benefit calculation notices to each AFDC recipient, but that, in any event, because the plaintiffs had been told that their benefits would be returned to 1989 levels, they could have obtained individualized informa-

^{32/} The Court rejected this argument on the ground that the District's State Plan expressly rejected any consideration of Food Stamps as income.

^{33/} 45 C.F.R. § 205.10(a)(4)(i); D.C. Code § 3-210.1. See discussion *supra*, p. 220. It should be noted that federal regulations also require the District to maintain AFDC benefits at prior levels pending a hearing on any appeal based on computational errors and lodged within 15 days from the date of postmark of the written notice. 45 C.F.R. § 205.10(a)(6)(i); D.C. Code § 3-205.59.

tion by calling their case workers.^{34/} The District also argued that, although its July 1991 notice had not outlined recipients' right to a hearing, recipients, nonetheless, had been given adequate notice of that right in a pamphlet they received when they first applied for benefits.

C. Failed Attempts at Settlement and Judicial Decisions

After the case was reassigned to the Civil I calendar in late July, the plaintiffs approached the District about settlement. In spite of the adverse publicity that the AFDC cuts were receiving and a new study issued by the Children's Defense Fund concluding that the District's poor children lived in "abysmal" conditions more commonly associated with underdeveloped countries, the District refused to negotiate.^{36/}

On April 15, 1992, the trial court granted defendants' motion for summary judgment, ruling that the District had satisfactorily complied with all its procedural obligations to AFDC recipients.^{37/}

^{34/} Citing Schroeder v. Hegstrom, 590 F. Supp. 121, 128 (D. Or. 1984), the plaintiffs countered that the District's argument "improperly place[d] on the recipient the burden of acquiring notice."

^{35/} Children's Legal Defense Fund, Bright Futures or Broken Dreams: The Status of the Children of the District of Columbia and an Investment Agenda for the 1990s (1991). See also "D.C. Children in Crisis, New Report Declares," The Wash. Post, Sept. 17, 1991, at A1.

^{36/} During June 1991, public interest groups were also making repeated requests to the District to notify necessary federal officials of the July 1991 AFDC rollback so that, effective July 1, AFDC recipients could receive the increased federal public housing benefits to which they were automatically entitled because of their reduced AFDC income. See Letter from Cheryl Fish-Parcham to Mayor Sharon Pratt Kelly (June 5, 1991). The District failed to do so.

^{37/} Memorandum Opinion, C.A. No. 91-8207, Civil I (D.C. Super. Ct. Apr. 15, 1992) (Wertheim, J.).

On April 29, 1992, the plaintiffs filed a notice of appeal of all of the Superior Court's rulings except its ruling that the District had failed to notify AFDC recipients of the extent to which the new AFDC benefit levels failed to meet current minimum needs. The Children's Defense Fund filed an amicus brief which spelled out the tragic consequences that the AFDC cuts were inflicting on poor children in the District. A ruling on the appeal is pending.

V. CONCLUSION

The District's conduct throughout Quattlebaum has been, and continues to be, confusing and troubling. The AFDC procedural safeguards were enacted to protect powerless and impoverished single mothers and their children from arbitrary governmental decision-making and to require the government to confront directly the difficult policy choices before it, thus promoting well-reasoned governmental action. Had the District engaged in a decision-making process that provided opportunity for public comment, it might well have been able to avoid reducing AFDC benefits, and acting contrary to the views of its own expert commission and the independent Children's Defense Fund, while still developing sensible means for responding to its financial crisis. Moreover, the District's actions have, in a sense, exacerbated that fiscal crisis by reducing AFDC benefits, which are matched by the federal government, and perhaps forcing AFDC recipients to seek other means of public assistance, the costs for which are not shared by the federal government, but are fully borne by the District. It is not too late for the District to reassess the injustices in the AFDC program. Were the District to follow the recommendations of

the Rivlin Commission today it could still experience a wealth of future administrative savings and make life more bearable for AFDC recipients.

PUBLIC BENEFITS

Notes on Motley and Jones

by Lynn E. Cunningham, Esq.
Neighborhood Legal Services Program"

The cases of Quattlebaum, Franklin, Little, and Feeling, all address the District's arbitrary denial of public benefits. Each recounts the same theme of maladministration in the District's provision of Aid to Families with Dependent Children, Food Stamps, General Public Assistance, and Emergency Assistance respectively. Two other cases, Motley v. Yeldell and Jones v. Barry, tell similar stories, further demonstrating the District's long history of improvident behavior.

In 1974, a class action titled Motley v. Yeldell, C.A. No. 74-13 (D.D.C.), was filed against the District of Columbia to address the mismanagement of its AFDC program. Title IV-A of the Social Security Act and the associated regulations require that state administrators process AFDC applications within 45 days and that applicants receive reasonable notice of a denial of benefits. In the state plan that the District filed with the United States Department of Health and Human Services to obtain matching grants for the program, the District committed to processing applications within 30 days. In 1974, the District was taking considerably longer than 30 days to process most applications. In response to the delays, the District's Department of Human Services ("DHS") adopted a policy of denying applications that it could not resolve within the 30-day time frame.

^{*/} See biography of Lynn E. Cunningham, supra p. 111.

Alleging that such delays and denials violated Title IV-A of the Social Security Act (the enabling legislation for the AFDC program), the Due Process Clause of the Fifth Amendment, and the District's state plan, the plaintiffs sought a temporary restraining order ("TRO"), a preliminary injunction, and summary judgment. On November 8, 1974, Judge Aubrey Robinson granted summary judgment and ordered the District to process applications within 30 days of receipt and to issue checks within 15 days after issuing a determination of eligibility. The District did not comply and the Court granted plaintiffs' motion for contempt on February 8, 1978. On February 1, 1985, plaintiffs filed another motion for contempt, and, on July 24, 1985, the Court again held the defendants in contempt. Although the District has made progress in meeting its obligations, recent monthly reports indicate that the District has yet to comply fully with the Court's orders regarding its administration of the AFDC program.

In 1982, an almost identical claim was made in Jones v. Barry, C.A. No. 82-0419 (D.D.C.), with regard to the District's arbitrary denial of General Public Assistance ("GPA"). D.C. law required the District to process applications for GPA benefits within 45 days.¹⁷ DHS, the agency entrusted with administering GPA, failed to meet this deadline. Moreover, when DHS terminated an individual's GPA benefits, it simultaneously terminated his or her Food Stamps and medical assistance benefits even though, under the law governing those programs, Food Stamp and medical assistance eligibility cannot be tied to GPA eligibility.

¹⁷ D.C. Code § 3-208.1a.

Attorneys from the Neighborhood Legal Services Program, on behalf of a class of illegally terminated GPA recipients, filed suit in federal court on February 12, 1982. Alleging violations of D.C. law, the federal Food Stamp Act, and the Due Process Clause, plaintiffs sought and ultimately obtained a TRO requiring the District to pay GPA benefits to the named plaintiffs and to cease practices that unlawfully terminated GPA recipients from the program. Subsequently, the parties initiated settlement negotiations which resulted in a Consent Decree the Court approved on June 25, 1982. Under the Consent Decree, the District agreed to process GPA applications in a timely manner, to administer a recipient's Food Stamp allotment correctly upon termination from GPA, and to report monthly on its compliance with the Decree to plaintiffs' counsel. Unfortunately, the Decree addressed only one aspect of GPA, namely the "GPA-GU" program for persons who are temporarily unemployable due to a disability. The D.C. Council abolished that program for budgetary reasons in 1991.

V.

MENTAL HEALTH

MENTAL HEALTH

Dixon v. Kelly
405 F. Supp. 974
(D.D.C. 1975 -- Judge Aubrey Robinson)

by Elizabeth M. Brown, Esq.
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Shea & Gardner-

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Leonard Rubenstein of the Bazelon Center for Mental Health Law; Peter Nickles of Covington & Burling.

Lawyers for Defendants:

John Payton and Janet Maher of the Office of Corporation Counsel for the District of Columbia.

I. INTRODUCTION

On February 14, 1974, inpatients of St. Elizabeths Hospital and individuals at risk of civil commitment to St. Elizabeths filed a class action against various Federal and District government officials and agencies to compel them to provide more suitable care and treatment for the mentally ill in settings less restrictive than St. Elizabeths.¹ The

See Acknowledgements for biographies of authors.

^{1/} Because St. Elizabeths was, at the time of filing, a federally administered mental institution, the complaint was originally captioned Robinson v. Weinberger and named Federal and District officials. Federal defendants included Department of Health, Education and Welfare, and National Institute of Mental Health ("NIMH") officials. District defendants included the District, the Mayor, and officials from the D.C. Department of Human Resources, the D.C. Department of Economic Development
(continued...)

impetus for the suit was a 1970 National Institute for Mental Health ("NIMH") study which concluded that 56% of the more than 3,600 patients confined in St. Elizabeths Hospital did not belong there and would be better served by placement in alternative care facilities.^e This case documents the continuing efforts to compel the District to live up to its court-ordered and statutory obligations to provide comprehensive community-based mental health services and particularly to abide by a comprehensive plan it agreed to in January 1992. Now, nineteen years after the original complaint in Dixon was filed, the struggle to protect the rights of D.C. residents with mental illnesses continues.

II. BASIS OF THE LITIGATION: THE 1964 ACT

Plaintiffs' suit was based on the District's civil commitment law, the 1964 Hospitalization of the Mentally III Act (hereafter the "1964 Act" or "Act"), 21 D.C. Code § 501 et seq. The 1964 Act was part of a Congressional movement to develop alternatives to custodial state mental health institutions and was intended to serve as a model for revising state hospitalization laws across the country.^f The Act's fundamental goal was

Y(...continued)

(responsible for issuing licenses to skilled nursing facilities, intermediate care facilities and foster homes), and the District Office of Budget and Financial Management (responsible for assisting the Mayor in setting budget priorities affecting the delivery of mental health care services). On October 1, 1987, authority for the Hospital was transferred from NIMH to the District government pursuant to P.L. 98-621.

^{2/} Complaint at ¶ 1. The NIMH study surveyed Hospital staff members' views of patient needs and was conducted at a time when the NIMH operated St. Elizabeths.

^{3/} S. Rep. No. 925, 88th Cong., 2d Sess., 10 (1964). The year before Congress passed the 1964 Act, it enacted the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, P.L. 88-164, which, inter alia, provided assistance for the construction of community mental health centers in order to permit the transfer of care of the mentally ill from state custodial institutions to such community centers. See H. R. Rep. (continued...)

"to return the mentally ill through care and treatment to a full and productive life in the community as soon as possible, given the patients' conditions.w To implement this broad goal, Congress established procedures for voluntary, emergency, and court-ordered civil commitments, and outlined the basic rights of mentally ill individuals. In particular, Congress provided that individuals hospitalized in a public hospital for a mental illness have a right to "medical and psychiatric care and treatment.S' The courts have construed this right as requiring suitable care and treatment in the least restrictive setting.F

III. SUMMARY OF THE LITIGATION

A. The Complaint

Plaintiffs' complaint alleged that the actions of the Federal officials responsible for the administration of Sl. Elizabeths Hospital, and of the District officials responsible for the implementation of the 1964 Act, violated the Act and the First, Fifth and Eighth Amendments to the United States Constitution by failing to provide suitable care and treatment in settings or institutions which were less restrictive than Sl. Elizabeths." Plaintiffs sought an order declaring that defendants' actions violated their duty under the 1964 Act to provide suitable and less restrictive settings in which to place class members.

^{3/}(...continued)

No. 694, 88th Cong., 1st Sess., reprinted in 1963 U.S. Code Congo & Admin. News 1054, 1064-66.

405 F. Supp. 974, 976 (D.D.C. 1975).

1964 Act at § 9(b); 21 D.C. Code § 562.

405 F. Supp. at 976-77; Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969).

^{2/} Examples of such less restrictive settings include "nursing homes, personal care homes, foster homes, and half-way homes." Complaint at ¶ 3.

They also sought an injunction compelling defendants to jointly develop a plan creating such settings and specifying detailed minimum placement standards and procedures, and to establish a timetable for the plan's implementation.^f

The District Court certified a class consisting of (1) all persons who, pursuant to the 1964 Act, are currently or may in the future be hospitalized in St. Elizabeths, and who require alternative placement in less restrictive care facilities in order to receive suitable care and treatment in the least restrictive setting possible; (2) patients who are currently or may in the future be placed on convalescent leave status from St. Elizabeths; and (3) patients who have been or may be placed in alternative care facilities that do not provide suitable care and treatment in the least restrictive setting possible.^V

B. Summary Judgment Motion

Plaintiffs quickly moved for partial summary judgment. Defendants conceded the accuracy of the 1970 NIMH study, but opposed plaintiffs' requested relief. The District argued that plaintiffs' right to treatment did not include placement in less restrictive facilities and, alternatively, that, even if such a right did exist, the Federal government had the sole responsibility to provide such facilities. The Federal government argued that plaintiffs had failed to establish that placement in alternative facilities constituted treatment in a less restrictive environment than St. Elizabeths, and that, in any event, it had no duty to provide those facilities. 405 F. Supp. at 976.

^{8/} Complaint at 22; Dixon, 405 F. Supp. at 976.

^{2/} Order (Feb. 7, 1975). The class does not include those persons confined as a result of criminal, rather than civil, commitment proceedings to John Howard Pavilion, St. Elizabeths' maximum security ward.

In December 1975, Judge Aubrey E. Robinson granted plaintiffs' motion and ruled, on statutory grounds, that St. Elizabeths inpatients (and those at risk of hospitalization) were entitled to suitable care and treatment in the least restrictive environment and not merely to custodial care. Id. at 977-79. The Court found that

"there are many individuals currently confined in the Hospital who are desperately in need of care and treatment which the Hospital staff has determined includes placement in facilities outside St. Elizabeths Hospital. The record further reflects that the named plaintiffs, at the very least, are among the individuals who are still in need of psychiatric care despite their readiness for placement in alternative facilities. Thus as to these individuals and others like them, the duty to provide such treatment by placement in alternative facilities is a joint one [shared by the District and Federal governments]." Id. at 979.

The Court ordered defendants to join forces to create a plan for the provision of less restrictive care and treatment in alternative facilities (a "continuum of community-based services") to meet the present and future needs of people confined and subject to confinement at St. Elizabeths. Id. at 979-80. The Court recognized the purpose of such alternatives to be the "reintegrat[ion of] the patient into the community and [the] develop[ment of] self-reliance and self-determination." Id. at 979 n.7.

C. The 1980 Consent Order and Implementation Plan

In 1980, the Court approved a consent order and implementation plan for implementing the 1975 decision (collectively the "1980 Final Plan" or the "Final Plan") and set December 31, 1985, as the target date for completing the Final Plan's general guidelines.^W The Final Plan was designed to provide true alternatives to hospitalization

^{10/} Findings of Fact and Conclusions of Law at 2 (May 14, 1993) (discussing history of case) [hereinafter "Dixon Findings"].

and to avoid "dumping" people unprepared into the community. To meet those goals, the Final Plan set forth case management procedures for assessing a patient's need for benefits, operational standards for community-based programs, and a placement schedule for assessing and transferring patients from St. Elizabeths to community health centers.

The Final Plan also established the Dixon Implementation Monitoring Committee (the "DIMC") to oversee and report on the progress of the federal government's efforts to identify and place class members in settings less restrictive than St. Elizabeths and the District's efforts to develop community-based housing, treatment, rehabilitation and support services. To help fulfill the monitoring duty, the Final Plan authorized the DIMC to conduct factual investigations and to screen and investigate complaints from patients, staff and private providers.^W

D. Defendants' History of Noncompliance

1. 1980-1984. As a result of the District's failure to comply with even the most rudimentary aspects of the 1980 Final Plan, plaintiffs filed a motion for contempt in 1982 and requested the appointment of a Special Master.^{P'} Only after plaintiffs filed

^{11/} Originally, the DIMC was given authority both to monitor services to ensure compliance and to help the District achieve compliance. These dual goals proved difficult to achieve in practice, and its role developed primarily into one of monitoring.

^{12/} From 1980 to 1987, the Federal government's role in Dixon was limited to identifying inpatients who were eligible for community placement and facilitating their transfer from St. Elizabeths to the District's community mental health centers. From 1980 to 1985, the Federal government also covered the costs of the DIMC. From 1985 to 1987, the Federal and District governments shared the DIMC's costs. In 1987, the operation of St. Elizabeths Hospital was transferred from the federal government to the District's Commission on Mental Health Services (eliminating the federal government as a defendant). Because of the limited nature of the federal government's role in the litigation after 1980, the remainder of this summary addresses only the District's conduct.

their contempt motion did the District agree to negotiate. Plaintiffs adopted a modest negotiation strategy, focusing on developing psychiatric crisis resolution services and mobile community outreach units. The District agreed to these requests, in exchange for which plaintiffs agreed to hold the contempt motion in abeyance.

2. 1984-1989. In November 1984, Congress enacted Public Law 98-621, the St. Elizabeths Hospital and District of Columbia Mental Health Services Act, which set a 1987 deadline for transferring the operation of St. Elizabeths Hospital to the District of Columbia. The legislation was unusual in that Congress specifically expressed its intent that, by October 1, 1991, the District have a comprehensive community-based mental health system operating in "full compliance" with the 1980 Final Plan.^{13/} Despite this explicit Congressional mandate to comply with the Final Plan, the District made only minimal progress towards compliance. By October 1986, the District still had not developed the crisis resolution and mobile community outreach services which it had agreed to establish in 1982. Hence, plaintiffs renewed their motion for a Special Master and requested a status hearing.

Prior to the hearing, the District appointed its first Commissioner of Mental Health Services, Dr. Robert Washington, and plaintiffs entered into a new round of negotiations. Plaintiffs again decided to pursue a strategy of focusing on certain specific goals to move the District towards compliance with the Final Plan. In 1987, the parties negotiated a

^{13/} Pub. L. 98-621, 88 Stat. 3369, 3370 (Nov. 8, 1984) (codified at 24 V.S.c. § 225 and 5 V.S.c. §§ 6301 et seq. and 8301 et seq.). The transfer of operations to the District was seen by both plaintiffs and the District as a means of unifying the District's mental health system, enabling better coordination of planning and integration of services.

settlement that resulted in a second consent order (the "1987 Consent Order"). In this second order, the Commission promised to set a schedule for achieving certain improvements in community mental health center staffing, community residence facilities, geriatric programs, and outreach and crisis intervention services for homeless plaintiff class members.^{14/}

3. 1989-1991. Two years after the entry of the 1987 Consent Order, the District had again defaulted on its obligations. Plaintiffs threatened to file a second motion for contempt and to renew their request for the appointment of a Special Master. Under this threat, the District negotiated a third consent order, which the Court approved in 1989. This "1989 Consent Order" set a two-year schedule for achieving the following requirements of the 1980 Final Plan: the development of community-living arrangements, a reduction in the number of hospital beds, and an increase in the resources devoted to community-based mental health care services. In addition, the 1989 Consent Order required the District either to hire additional staff or to contract with private providers to upgrade case management and other mental health services at the District's Emergency Psychiatric Response Division and outpatient mental health centers. Finally, the 1989 Order directed the District to undertake outreach efforts to homeless people and to hire a housing expert to implement a plan to transfer hospitalized Dixon class members to small residential facilities.W

^{14/} Agreement Between Plaintiffs and District of Columbia Defendants in Dixon, et al. v. Bowen, et al. (Mar. 20, 1987).

^{15/} Agreement Between Plaintiffs and the District of Columbia Defendants (entered June 18, 1989).

The District did make progress in improving its emergency psychiatric services and establishing a model program of outreach and services for homeless people, showing that, with commitment, compliance is possible. However, these elements of compliance were overshadowed by the District's failure to make the systemic changes called for in the 1989 Consent Order. In early 1991, plaintiffs again threatened to request the appointment of a Special Master and the District again agreed to engage in a new round of negotiations.

4. 1991-1993. The parties adopted a new, seemingly cooperative, strategy for the new negotiations. Rather than trying to attain minimal, class-wide goals, the parties sought to obtain a more encompassing plan, directed at developing needed new community-based services for four targeted sub-groups of the Dixon class: (1) adults at St. Elizabeths Hospital who were eligible for community placement, (2) elderly persons at St. Elizabeths Hospital who were eligible for community placement, (3) adults at high risk of rehospitalization, and (4) homeless individuals living in shelters and on the streets. During the six months of negotiations, the parties performed a needs assessment, a budget analysis, and other reviews integral to a comprehensive planning process. The District's own staff established reasonable goals and a blueprint to attain them. The resulting plan, the Service Development Plan (the "SDP"), outlined a five-year process for phasing in new cohesive services and additional housing.^{16/} The parties presented the Court with a proposed agreement incorporating the SDP. On January 28, 1992, the Court approved the proposed

^{16/} Dixon Findings, supra n.10, at ¶ 4; "A Service Development Plan for a Comprehensive System of Public Mental Health Care in Compliance with the Orders of the Court in Dixon v. Sullivan and Dixon" at 2 (July 1991).

agreement and entered it as an order (the "1992 Consent Order").¹¹¹ Unlike the previous plans and consent orders, the SDP set forth in great detail the types and numbers of programs to be developed for the targeted sub-groups, and established a road map and timetable for implementing them.^{18/} For example, by the end of 1992, the first of the five implementation years, the District was required to meet specific targets for establishing new services and activities, including establishing mobile community treatment teams, geriatric and homeless outreach teams, community residence facilities, case management teams, vocational and family support services, homeless drop-in sites, and transitional residential sites. The District was also required, by the end of the first year, to place a specified number of people from each of the four targeted sub-groups into the newly established residential, treatment, rehabilitation and support programs.W

The 1992 Consent Order and the SDP also outlined strategies to address and overcome the barriers that had impeded compliance in the past, including lack of knowledge about client groups, lack of provider management capacity, lack of interagency coordination, lack of capital financing plans for housing, and lack of a systems financing plan.^{20/} Moreover, seeking to avoid another default, the District agreed to hire both an expert consultant to facilitate compliance with the SDP and a housing specialist to initiate

^{17/} Order entering Agreement Between Plaintiffs and District of Columbia Defendants (Jan. 28, 1992).

^{18/} SDP, supra n.16, at 16-33. The 1992 Consent Order left intact the District's pre-existing obligations with respect to nontargeted members of the class.

1992 Consent Order, supra n.17, at 2-3; SDP, supra n.16, at Tables 6 & 7.

a plan for financing the development of residential services.^W In addition, the 1992 Consent Order required the District to take all necessary steps to maximize federal funding to finance services for class members. In particular, it called on the District to amend its Medicaid State Plan to elect coverage for SDP programs.^{22/} Finally, under the 1992 Consent Order, plaintiffs agreed to consider dissolving the 1980 Final Plan if, by 1996, the District had achieved substantial compliance with the 1992 Consent Order.^{23/}

Shortly after the Court entered the 1992 Consent Order, Dr. Robert Washington unexpectedly resigned as Commissioner of Mental Health Services, thus hindering the implementation effort from the start.^{24/} By mid-1992, although the District claimed that it had substantially complied with the SDP, it had, in fact, failed to meet the majority of its first-year obligations under the 1992 Consent Order.^{25/} In quarterly status hearings in the Spring and Summer of 1992, plaintiffs alerted the District and the Court that, without taking dramatic steps to implement the 1992 Consent Order, the first-year targets would

1992 Consent Order, supra n.17, at 10-12, 14-18.

^{22/} Id. at 8-10. A state may elect to have covered under Medicaid certain mental health and on-going support services, such as case management and psychiatric rehabilitation services (which help patients develop the social and life skills that are necessary for making the transition to community-based living). The SDP required the District to elect coverage for such services (which the District had not attempted previously to obtain) in order to qualify for federal reimbursements. SDP, supra n.16, at 31.

^{23/} 1992 Consent Order, supra n.17, at 21-22.

That position has now been vacant for almost two years.

Dixon Findings, supra n.10, at ¶¶ 6-10.

not be met, thus jeopardizing the entire plan.^{26/} Plaintiffs were particularly concerned about the failure to make progress towards eliminating identified barriers to the implementation of the 1992 Consent Order. Such progress would have entailed securing stable, empowered leadership within the Commission on Mental Health Services; improving the development of core services and interagency coordination; streamlining the contract and procurement process; and addressing problems within the District's licensing agency. The District responded to plaintiffs' concerns by claiming that it was on schedule and would meet its obligations.s" By October 5, 1992, plaintiffs had grown so concerned about the District's delays and ineffective action that they informed Mayor Kelly, among others, that, unless the District moved assertively towards compliance, they would file a motion to hold the District in contempt. In response, the District insisted that it was in compliance with the 1992 Consent Order.^{28/}

After being rebuffed in their informal efforts to spur District officials to take concerted action to implement the 1992 Consent Order, plaintiffs filed a motion for contempt, fines, and the appointment of a Special Master.

The Court held a hearing on plaintiffs' motion in February 1993. On May 14, 1993, Judge Robinson issued an opinion finding that, as of the end of 1992, the District (1) had developed housing for far fewer class members than required under the SDP, (2) had not

^{26/} Id. at ¶¶ 10, 13. Editorial, "The District's Latest Master," The Wash. Post, May 19, 1993, at A18 (DHS and Mayor warned that District "in danger of blowing another consent decree") [hereinafter "May 19, 1993, Editorial"].

^{27/} Dixon Findings, supra n.10, at ¶ 13.

^{28/} Id.

begun to provide new rehabilitation services or referrals for vocational services, (3) had only recently signed contracts for new residential and support services, (4) had not finalized contracts for new crisis residential, psychosocial, rehabilitation and socialization services, and (5) had created no new geriatric or mobile community outreach and treatment teams, all of which were required under the 1992 Consent Order.^{29/}

Judge Robinson ruled that the District was in violation of the 1992 Consent Order, but that its noncompliance did not rise to the level of **contempt**.^{30/} The Court recognized, however, that, in the thirteen years since the first Consent Order in 1980, its contempt powers had proven to be the most effective big stick against the District and that the appointment of a Special Master to constantly monitor the District's action would keep this big stick in the District's line of sight.^{31/} The Court therefore appointed Dr. Danna Mauch, the District's expert consultant on the 1992 Consent Order, as Special Master for a one-year term beginning June 1993. The Court authorized Dr. Mauch to confer informally and on an ex parte basis with the parties and the Court in order to facilitate, aid, oversee, and report on the District's compliance with the 1992 Consent Order and previous Court orders. The Court also authorized the Special Master to review District compliance

^{29/} Id. at ¶¶ 6-10.

^{30/} "[The District's] efforts have not been lacking, but they have been insufficient, ineffective and untimely." Id. at ¶ 7. See also "Judge Names Official for Mental Services," The Wash. Times, May 18, 1993, at H2; "Court Takes Over D.C. Mental Services; Judge Gives Reins to Outside Specialist," The Wash. Post, May 18, 1993, at A1 (characterizes decision to "take the improvement of [mental health] services out of city control" as "rare"); May 19, 1993, Editorial, supra n.26 ("city officials are lucky the court stopped short of slapping them with heavy fines and a contempt finding").

Dixon Findings, supra n.10, at 7-8.

plans, policies and procedures for conflicts with the SDP, and to require the District to respond in writing to her concerns. The Court specified that the parties were bound by any formal recommendations the Special Master issued, unless a party filed an objection within fifteen business days of its issuance.^{32/}

E. The District's Attempts to Amend the 1964 Act

The District did not seek reconsideration or appeal of Judge Robinson's order appointing a Special Master. But the Mayor criticized the move as a usurpation of her **authority**,^{33/} and quickly sought passage of emergency legislation and proposed permanent legislation on July 21, 1993, to amend the 1964 Act.^{34/} The proposed bill sought (1) to give the Mayor the sole discretion to determine what treatment, facilities, and services would be made available to the mentally ill; and (2) to repeal Pub. L. 98-621, the 1984 Congressional enactment of the 1980 Final Plan.^{35/}

On September 21, 1993, the day on which the D.C. Council was scheduled to consider the permanent legislation, it appeared that the measure would be defeated, and the Mayor withdrew the proposed legislation. Nonetheless, the Mayor has indicated that she intends to resubmit the legislation at a later date.

Order at 2-7 (May 14, 1993).

"Order on Mentally III Seems Intrusive to Kelly," The Wash. Post, May 19, 1993, at C1.

^{34/} "Omnibus Spending Reduction Act of 1993," Title III of proposed Bill 10-323, §§ 301-302.

Id. at § 301(b) and § 302(a). See also discussion supra pp. 241-42.

If it is ever enacted, counsel for plaintiffs believe that the proposed legislation would gut the District's obligation to the mentally ill under Dixon. In their view, the proposed bill would strip courts of their authority to place civilly committed individuals in the least restrictive setting and would limit least restrictive setting alternatives to those options that are currently available. The result would be unnecessary hospitalization for patients and higher costs for taxpayers. The legislation would also subordinate the medical judgment of the treating staff at St. Elizabeths to the political and budgetary agendas of the District's administrative officers who alone would decide, under the proposed legislation, whether to contract for community-based services. A decision to continue funding inappropriate hospitalization at the expense of developing more cost effective community-based services could result in millions of dollars of wasted spending each year.

IV. CONCLUSION

Overall, as the above history shows, the District's compliance with the original 1975 Dixon decision and the subsequent Court orders has been marginal at best. The most recent history, however, is perhaps the most disillusioning example of the District's unwillingness to live up to its commitment to provide decent basic human services to its citizens. The 1992 Consent Order, incorporating the SDP, was a source of great hope, since it was developed collaboratively by representatives of both the plaintiffs and the District. The parties agreed that, with the assistance of expert consultants, the District had the financial, technical, and administrative abilities to achieve compliance with the 1992 Consent Order.

After the Court approved the 1992 Consent Order, however, the Commissioner of Mental Health Services resigned. The position remained vacant, thus stymieing the District's ability to comply with the Order. Worse yet, the District refused throughout 1992 to acknowledge its inability to meet the 1992 goals. When, in 1993, the Court found the District noncompliant and appointed a Special Master to oversee the District's progress, the Mayor tried, via legislation, to overturn relevant provisions of the 1964 Act in the hope of vacating the Order. Tragically, the victims of the District's conduct -- the District's mentally ill residents -- continue to receive inappropriate care and to be denied the opportunity to lead more productive and autonomous lives.

V. RECOMMENDATIONS FOR IMPROVEMENT

The following steps are critical to improving the District's provision of appropriate care and treatment to its mentally ill citizens and to ending this litigation:

- The Mayor should promptly appoint a permanent Commissioner of Mental Health Services who is committed to achieving the goals of the 1992 Consent Order and Services Development Plan; and
- The District should promptly commit itself to complying with all provisions of the 1992 Consent Order.

VI.
JUVENILE JUSTICE

JUVENILE JUSTICE

Jerry M. v. District of Columbia
C.A. No. 85-1519 (D.C. Super. Ct. --
Judge Ricardo M. Urbina),
certain memorandum orders affirmed in part,
reversed in part, 571 A.2d 178 (D.C. 1990)

by Elizabeth M. Brown, Esq. and Anne R. Bowden, Esq.,
Shea and Gardner"

Lawyers for Plaintiffs/Appellees:

Current trial counsel are Angela Jordan Davis and David Reiser, both of the Public Defender Service for the District of Columbia, and Donna Wulkan.**/ Counsel on appeal were Kim A. Taylor, David Reiser, and James Klein, all of the Public Defender Service.

Lawyers for Defendants/Appellants:

Current trial counsel are Gail S. Miller, Office of the Assistant Corporation Counsel for the District of Columbia, and T. Britt Reynolds, Office of General Counsel for the Department of Human Services.*/ Counsel on appeal were Edward E. Schwab, Herbert O. Reid, Charles L. Reischel, and Lutz Alexander Prager, all of the Office of Corporation Counsel for the District of Columbia.

*/ See Acknowledgements for biographies of Elizabeth M. Brown and Anne R. Bowden.

*/ At the time the complaint was filed, counsel were Cheryl Long, Randolph N. Stone, and Santha Sonenberg, all of the Public Defender Service; and Steven Ney and Mary E. McClymont of the ACLU National Prison Project. During the enforcement stage, counsel included Kim A. Taylor and Allie Sheffield, Jaclyn Frankfurt, and Eli Gottesdiener, all of the Public Defender Service; and Claudia Wright of the ACLU National Prison Project.

*/ At the time the complaint was filed, defendants' counsel included Roberta Gross. During the enforcement stage, counsel were Rachel Evans and Wayne Witkowski, both of the Office of Corporation Counsel.

I. INTRODUCTION

The goals of the District's juvenile justice system are the "care and rehabilitation," rather than the punishment, of delinquent children.^Y Yet, instead of creating a system organized to provide individualized care and treatment services, the District has relied for too long on what the Mayor herself has condemned as "simply warehousing" delinquent youth.^F Physical abuse, inadequate education, arbitrary discipline, deplorable living conditions, and shoddy medical and mental health treatment have plagued the District's secure juvenile facilities for more than two decades. Furthermore, the District's juvenile corrections strategy stands in sharp contrast to the continuum of care model adopted by an increasing number of states. This model reserves secure care for violent offenders, while serving nonviolent youth with a range of community-based alternatives that provide high levels of both control and treatment.^F Under the terms of the 1986 Consent Decree in the Jeny M. case, the District was to have created just such a continuum of care. Implementation of the decree has not occurred, however. The result is a system which

^v E.g., D.C. Code Ann. § 16-2301(6) (defining "delinquent child"); Super. Ct. Juv. R. 2 (court shall provide parental "custody, care and discipline"); In re J.T., 290 A.2d 821 (D.C. 1972) (jury trials not required in juvenile cases because cases are nonpunitive); In re C.W.M., 407 A.2d 617 (D.C. 1979) (insanity defense not available in juvenile cases because criminal responsibility is not an issue of guilt or innocence, but of appropriate treatment); In re MCP., 514 A.2d 446 (D.C. 1986) (court need not adjudicate delinquency if child does not need care and rehabilitation). See also Darling, "Youthful Offenders and Neglected Children Under the D.C. Crime Act," 20 Am. U. L. Rev. 373 (1971) (describing legislative history of new juvenile system).

^{2/} Address by Mayor Sharon Pratt [Kelly], "A New Start: A War of Values to Save Our Children," Nov. 26, 1991, at 5.

^{3/} Robert F. Kennedy Memorial & National Council on Crime and Delinquency, "At the Crossroads: Juvenile Corrections in the District of Columbia," at ii (Mar. 1993) [hereinafter "RFK Report"].

provides neither adequate care and rehabilitation to children in the District's custody, nor security to the public.

District officials have long been aware of the inadequacies of the juvenile facilities. In 1970, Judge Harold H. Greene, then of the D.C. Court of General Sessions, issued an order declaring the Receiving Home for Children, one of the District's secure facilities for juveniles located in North East Washington, unsuitable for children and forbidding the future detention of any child there.^v Judge Greene also ordered changes in the disciplinary system at the Receiving Home, including the adoption of a rule protecting confined children against physical abuse by their custodians.^Y In 1978, Judge Gladys Kessler of the D.C. Superior Court initiated an investigation into conditions at the District's other secure juvenile facilities: the Children's Center's two Laurel, Maryland facilities -- Oak Hill and Cedar Knoll. As a result of that investigation, Judge Kessler ordered sweeping institutional reforms.^v

Since the 1970s, although the District government has repeatedly pledged its commitment to improve the juvenile justice system and its secure institutions for detained and committed youth, it has repeatedly failed to live up to those commitments. Despite

In re Savoy, 98 D.W.L.R. 1937 (D.C. Juv. Ct. Oct. 13, 1970).

^{§/} More than two decades later, the Receiving Home is not only still open, it remains chronically and dangerously overcrowded. 25th Report of The Monitor at 6 (July 16, 1993).

^{§/} The D.C. Court of Appeals vacated Judge Kessler's remedial order on jurisdictional grounds, holding that the trial court's institutional reform edict exceeded its authority to oversee the treatment of individual children confined by its order. In re An Inquiry into Allegations of Misconduct Against Juveniles Detained at & Committed at Cedar Knoll Inst., 430 A.2d 1087 (D.C. 1981). The Court of Appeals did not, therefore, address the trial court's factual findings regarding the deplorable conditions at the Children's Center.

attempts to negotiate improvements, and subsequent protracted litigation, the mental and physical well-being of the District's confined juveniles remains in jeopardy, and for many delinquent youth, confinement in a secure juvenile facility is merely a way station and training ground for future imprisonment at Lorton.

II. THE LITIGATION

A. The Complaint

The Public Defender Service of the District of Columbia, which provides representation in delinquency cases, D.C. Code § 1-2702, and the National Prison Project of the ACLU filed the Jerry M. suit on March 1, 1985, in D.C. Superior Court on behalf of the class of children confined in the District's secure juvenile facilities. The class included children detained pending trial or disposition.^Z as well as children committed by a court after a finding of delinquency.^F The complaint charged the District of Columbia and District officials with violating the plaintiffs' right to treatment based on the Due Process Clause of the Fifth Amendment, and additional rights derived from local and federal statutes.^V

B. The 1986 Consent Decree

Before trial, the parties reached a settlement which Judge Ricardo M. Urbina modified, approved, and entered as a Consent Decree on July 24, 1986 (the "1986 Decree")

^{7/} D.C. Code Ann. § 16-2313.

^{8/} D.C. Code Ann. § 16-2320.

^{2/} D.C. Code Ann. § 16-2301 et seq.; 20 U.S.c. § 1400 et seq. See also District of Columbia v. Jerry M., 580 A.2d 1270 (D.C. 1990)(reviewing constitutional and statutory allegations to determine availability of attorneys' fees under 42 U.S.c. § 1988).

or "Decree"). Judicial activity since 1986 has focused solely on the District's compliance with the Decree.

The 1986 Decree acknowledged the right of juveniles to be housed "in the least restrictive setting consistent with the protection of the public, the youth's individual needs and with applicable court rules, statutory and constitutional provisions," and to be free from prolonged pretrial confinement (1986 Decree at § I.A); created a panel of three experts to design a continuum of community-based alternatives to secure confinement (id. at § I.B); and ordered the closure of Cedar Knoll, the most dilapidated facility, by December 1, 1987 (id. at § I.C). For those who would remain in secure confinement, the Decree promised improved staff discipline and training, and adequate staff coverage (id. at § III); individual treatment programs, including recreation, mental health treatment, and vocational and special education (id. at § IV); protection against physical abuse and arbitrary discipline (id. at § V); protection against the improper use of physical restraints (id. at § IV); improved and safer living conditions (id. at § VII); adequate medical care (id. at § VIII); access to family members and counsel (id. at § IX); and a handbook of rights (id. at § X).

Section II of the Decree provided for the District's compliance to be supervised by a Court-appointed Monitor. The Monitor was made responsible for issuing quarterly reports on compliance, making recommendations for compliance, and mediating disputes that did not present an imminent threat to the life, health or safety of the children. Section II.O of the Decree called on the Mayor to convene semi-annual meetings of officials and agencies involved in the juvenile justice process in order to generate interagency cooperation to reform the juvenile justice system.

Section II.R of the Decree (which included the Mayor as a signatory) committed the Mayor and the D.C. Public Schools to "take all reasonable steps, employing their utmost diligence, to seek funds sufficient to implement fully the provisions of this Decree."

C. The District's History of Noncompliance
with the 1986 Decree and Subsequent Court Orders

1. Overview. Implementation of the Decree lagged from the very beginning.s" A variety of factors, including hiring freezes, inadequate funding, inadequate training, and poor coordination among District agencies impeded the District's compliance with provisions in every section of the Decree.

Plaintiffs waited until 1988 before seeking judicial enforcement of the Decree. In November of that year, Judge Urbina found that in the two years since the Decree had been entered, "the defendants have failed to comply with practically every provision of the Decree."!!! Since 1988, the Court has conducted numerous hearings to enforce the Decree, and has nearly exhausted the alphabet in labeling its remedial orders.P' Violations range from the District's chronic inability to create a roster of substitute teachers

^{10/} Engel, "Report Cites D.C. Youth Agency 'Chaos,'" The Wash. Post, Dec. 18, 1986, at A1; Barker, "D.C. to Hire 269 to Abide by Order on Youth Services," The Wash. Post, June 17, 1987, at D8; Walsh, "Monitor's Report Slams D.C. Juvenile Facilities," The Wash. Post, Oct. 27, 1987, at B1.

^{11/} Mem. Order D at 1 (Nov. 28, 1988).

^{12/} In 1988 and 1989, the District appealed from three of Judge Urbina's orders (A, B & E) seeking to enforce the District's compliance with the Decree. In 1990, the D.C. Court of Appeals affirmed these three orders, except with regard to their provisions for out-of-state placements, decentralization of secure facilities, and management controls of the Youth Services Administration ("YSA"), which it determined to be outside the scope of the Decree. YSA is responsible for the confinement of children committed by the court to the custody of the District government. District of Columbia v. Jerry M., 571 A.2d 178 (D.C. 1990).

to avoid canceling classes, to its inability to design and carry out plans for new programs. Although the parties contemplated that the Decree would be fully implemented and the monitorship dissolved within three years after the signing of the Decree (1986 Decree at § IIL), today, more than seven years later, full implementation remains a remote prospect.W

2. Enforcement measures. To enforce compliance with the Consent Decree, the Court has employed various remedial devices ranging from the mediation process established by the Decree (id. at § IID) to findings of civil contempt and the appointment of a Special Master with the power to implement orders. As a general practice, the Court has tried to guide the District into compliance by issuing specific orders aimed at resolving a particular issue and giving the District plenty of time to establish its compliance. When this strategy has failed, the Court has resorted to more coercive measures, such as holding the District in contempt.W

a. Appointment of experts. The Decree created a panel of experts to design the continuum of community-based alternatives.W and designated experts to design a vocational program and a special education **program**.^{16/} On several occasions, the Court has authorized the Monitor to hire additional experts to report on conditions and make recommendations for bringing the District into compliance. In addition, the Court

^{13/} See 26th Report of the Monitor (Oct. 21, 1993) (reporting on continuing violations of the Decree).

See, e.g., Mem. Order J at 57-64 (Aug. 21, 1991).

Decree at § IB.

Id. at § IV.H.

has appointed an expert to report on medical care^{17/} and suicide prevention measures.^{18/} and three experts to report on educational services.^{19/} The Court has used the reports of these experts as the foundation for some of its subsequent findings of contempt and remedial orders.

b. Remedial orders. The Court has often issued orders guiding the District towards specific efforts needed to resolve a particular problem. For example, in August 1988, shortly after the Consent Decree's health and safety provisions went into effect, plaintiffs filed a motion for a TRO to alleviate sweltering conditions (children lived in unventilated and overheated rooms) and to eliminate infestations of vermin and snakes at Cedar Knoll. The Court granted the motion and supplemented the general requirements of the Consent Decree with a specific action list intended to effectuate immediate compliance with a critical portion of the **Decree.**^{20/}

Similarly, after a youth in secure care committed suicide in May 1989, the Court issued a remedial order to develop a suicide prevention plan and to increase staffing to

^{17/} See Mem. Order H at 4-6 (Sept. 28, 1989) (discussing report of medical expert Dr. Mark Wade); Mem. Order L (Aug. 22, 1991) (discussing Dr. Wade's second report).

^{18/} See Mem. Order M at 4 (Aug. 22, 1991); Special Report of the Monitor Regarding Educational Services, Suicide Prevention, Medical Care and Implementation of Order B at 16 (Mar. 22, 1990).

^{19/} Mem. Order K at 16 (Aug. 22, 1991) (appointing experts); Monitor's Findings and Recommendations Regarding Defendants' Compliance with the Provisions of Memorandum Order K Regarding Implementation of the Education Plan of the Monitor's Educational Experts (Sept. 16, 1992).

^{20/} Temporary Restraining Order (Aug. 10, 1988). See also Gellman, "Immediate Relief Urged for D.C. Juvenile Center, Judge Told," The Wash. Post, Aug. 9, 1988, at B1; Editorial, "A Local Devil's Island," The Wash. Post, Aug. 11, 1988, at A20. The TRO provided only a temporary palliative. See 26th Report of the Monitor supra n.13, at 18-19.

assure adequate supervision, particularly of suicidal youth.^{21/} When the District failed for over two years to implement that plan, the Court was obliged to appoint a Special Master to do so.^{22/}

In addition, the Court entered a remedial order requiring the District to establish two new community-based facilities in order to relieve overcrowding in its secure facilities and eliminate long waiting lists for community placements.W The Court has also entered remedial orders to effectuate provisions in the Decree regarding medical care^{24/} and vocational and special education, teacher certification, and staffing levels for the institution schools.^{25/}

c. Appointment of the Monitor as Special Master. Originally the Monitor's role was limited to mediating disputes and reporting on compliance.e/ The Court has significantly expanded that role by appointing the Monitor as Special Master, a position which generally has more operational clout than a monitor, to deal with several

Mem. Order G at 16, 18 (July 27, 1989).

Mem. Order N (May 8, 1992).

Order at 6 (Oct. 14, 1988).

^{24/} Mem. Order H at 10-13 (Sept. 28, 1989). The Court was forced to enter this Order because the District had failed to heed a critical report issued by the Monitor's medical expert. Id. at 8.

Mem. Order K at 14-16 (Aug. 22, 1991).

^{26/} 1986 Decree at § II.

significant issues: physical abuse of confined children by staff, suicide prevention, and development of the continuum of care alternatives.s"

1. Prevention and discipline of physical abuse of children by staff. In July 1990, the Court designated the Monitor as Special Master for the limited purpose of finding facts and making recommendations regarding the physical abuse of children confined in the District's secure institutions.^{28/} The Special Master issued a 102-page report in July 1991 setting forth his findings of fact and recommendations.^W He credited the testimony of several children who described assaults by staff and found that other staff members had assaulted children with impunity or escaped with meaningless sanctions. The Special Master concluded that the children entrusted to the District's care "are housed in institutions in which lawless behavior by those responsible for caring for, and protecting, them is tolerated."^{30/} The Court subsequently approved the Special Master's findings and conclusions, noting that "[t]he matter of staff physical abuse has had a long, sad history."^{31/}

11. Implementation of a suicide prevention plan. In response to the May 14, 1989, suicide of a Cedar Knoll resident, plaintiffs filed a motion for a TRO demanding the development of a suicide prevention plan and increased staffing. The Court

^{27/} Mem. Order I at 25 (July 2, 1990); Mem. Order N (May 8, 1992) ; Mem. Order J at 82 (Aug. 21, 1991).

Mem. Order I at 25.

In re: Staff Physical Abuse (July 24, 1991).

Id. at 2.

Mem. Order P at 1, 8 (Apr. 30, 1993).

granted the motion and subsequently entered an order to the same effect on July 27, 1989.^{32/} On March 22, 1990, the Monitor issued a report concluding that the District had complied only to a limited extent with the Court's suicide prevention orders.^{33/} The Court subsequently found the District in violation of those orders on July 2, 1990^{34/} and again on August 22, 1991.^{35/} In May 1992, the Court appointed the Monitor as Special Master to oversee the District's compliance with the suicide prevention plan.^{36/} After a second suicide, this time at the Receiving Home, the Court found it necessary to issue yet another order directing an investigation (which again found only limited compliance) and the immediate implementation of the plan.^{37/} The Court also designated the Monitor as Special Master with the responsibility to implement a comprehensive suicide prevention plan.^{38/}

m. Development of a continuum of community-based care facilities. A key goal of the 1986 Decree was to develop and implement a continuum of community-based care as an alternative to secure confinement and a partial solution to the ongoing problem of overcrowding. On October 9, 1987, the Court approved the expert

Mem. Order G (July 27, 1989).

^{33/} Special Report of the Monitor Regarding Educational Services, Suicide Prevention, Medical Care, Order E Fines, and Implementation of Order B at 16 (Mar. 22, 1990).

Mem. Order I (July 2, 1990).

Mem. Order M (Aug. 22, 1991).

Mem. Order N (May 8, 1992).

Mem. Order O (Feb. 3, 1993).

Id. at 5.

panel's plan detailing alternatives to secure confinement.s" However, due to the District's failure to make substantial progress implementing the plan, the Court has relied on the Special Master to assist in the implementation of that critical goal. In August 1991, the Court held the District in contempt for its repeated failure to meet its own proposed deadlines to establish alternative facilities and, in the light of the District's dismal record, appointed a Special Master to oversee the District's compliance.w In response to the Court's directive, the Special Master proposed an implementation schedule in October 1991. The District proposed its own plan in November 1991. The Court took no action on these proposals. By March of 1993, virtually all of the District plan's deadlines had expired, and there were no new community-based facilities. Rather than seek to invoke the provisions of Order J, which would divest the District of responsibility for establishing alternative facilities and vest it in the Special Master, plaintiffs have asked the Court to conduct a series of hearings to monitor the District's progress on development of a continuum of community-based care.^{41/}

d. Findings of non-compliance and contempt. In spite of help from the Court-appointed Monitor and Special Masters, the Court has continually found

^{39/} Mem. Order A (Oct. 9, 1987).

Mem. Order J at 82 (Aug. 21, 1991).

^{41/} Motion to Enforce the Single Room Provision of the Consent Decree and the Court's Previous Orders to Remedy Overpopulation (June 15, 1993) [hereinafter "Plaintiffs' Motion to Enforce"].

the District in violation of the 1986 Decree and its orders^{42/} and, on several occasions, has held the District in contempt for its noncompliance. On March 20, 1989, the Court held the District in contempt for violating several provisions of the Consent Decree and Order C.^{43/} This contempt order was based not only on the District's violation of the terms of the Decree, but also on the District's failure to follow the remedial strategy that it itself had suggested. On May 24, 1989, after overcrowding had reached crisis levels and the District showed no commitment to reducing institutional populations, Judge Urbina issued Memorandum Order E imposing daily fines if the overcrowding continued. In his order, Judge Urbina, noting that Cedar Knoll, the worst of the District's secure facilities, was still in operation, prohibited the expansion of that facility after June 1, 1989.^{44/} To emphasize the seriousness of the District's noncompliance, the Court established a schedule of fines for future violations, and directed the District to submit monthly reports to the Court.^{45/} On appeal, the District of Columbia Court of Appeals affirmed Judge Urbina's remedial order and finding of contempt. District of Columbia v. Jerry M., 571 A.2d 178 (D.c. 1990).

^{42/} E.g., Mem. Order D at 1 (Nov. 28, 1988) (since 1986, "the defendants have failed to comply with practically every provision of the Decree"); Temporary Restraining Order (May 24, 1989) (violations of staffing and suicide prevention provisions); Mem. Order I (July 2, 1990) (violation of suicide prevention, medical care, and alternative care provisions of previous orders and Decree); Mem. Orders K, L, M (Aug. 22, 1991) (violations of educational, medical care, and suicide prevention orders respectively).

See Mem. Order E at 1 (May 24, 1989).

^{44/} Id. at 10.

Id. at 9-11.

To date, the District has paid hundreds of thousands of dollars in fines^{46/} and its conduct has led the Court to assert that the District appears "impervious to all but the most staggering of monetary sanctions."^{47/}

Judge Urbina again found the District in contempt on September 28, 1989, this time for failing to comply with the medical care provisions in the 1986 Decree.^{48/} The District was held in contempt yet again on August 21, 1991, for violating the continuum of care requirements.^f

3. Reasons for the District's noncompliance. There are several reasons why the District has failed to comply with the Court's orders. First, the District has been unwilling to allocate the necessary resources to reform the juvenile justice system. As the panel of experts appointed to develop the plan of community-based facilities stated in its initial report of January 18, 1990, the "biggest impediment to compliance with Order B is the city's refusal to allocate adequate fiscal and human resources for the continuum of services ordered by the court."^{50/}

^{46/} Lewis, "Judge, Tired of Waiting, May Sock D.C. With Fine," The Wash. Post, July 28, 1993, at B6. The funds accrued under Memorandum Order E have been paid into the D.C. Children's Trust, a fund created by the Court and disbursed under the supervision of the Monitor. Fine monies have been used to establish community programs, to create a new holding facility for at-risk juveniles in the Superior Court, and for other programs benefitting children in the juvenile justice system.

Mem. Order J at 66 (Aug. 21, 1991).

Mem. Order H (Sept. 28, 1989).

Mem. Order J (Aug. 21, 1991).

Monitoring Report of the Jerry M. Panel at 26 (Jan. 18, 1990).

In addition, throughout most of the history of Jerry M., the District government has been struggling financially. Budget problems have led to repeated hiring freezes, and although positions within the Consent Decree were supposed to be exempt from such freezes, staff were not, in fact, replaced.^W Consequently, frequent staff shortages led to inadequate security, education, treatment planning and other necessary services. Ironically, staff shortages have increased the actual cost of providing these services because shortages force a heavy reliance on overtime.

Part of the fiscal problem, however, stems from the District's inability to see that short-term investment in community-based programs will lead to long-term savings within the system. The Children's Defense Fund has estimated the annual cost of housing a youth at Oak Hill to be \$40,000, compared to \$12,000 per year for nonresidential community programs and \$15,000 per year for therapeutic foster care.^{52/} Thus, the District could save very significant amounts by placing youths in community programs rather than the existing "warehouses." In addition, by failing to comply with the Court's orders to develop community-based alternatives, the District has become embroiled in costly litigation that has resulted in the District's paying fines for its noncompliance, as well as substantial monitoring costs and attorneys' fees.^{53/}

E.g., 26th Report of the Monitor at 32 (Oct. 21, 1993).

^{52/} Children's Defense Fund, "Bright Futures, Broken Dreams" at 103 (1991) [hereinafter "CDF Report"].

^{53/} The 1990 Rivlin Commission Report noted that the costs of litigation "represent pure losses to the taxpayer . . . \$250,000 to \$300,000 a year in lawyers' fees." Thompson, "Judges Hold Power Over Spending, Report Cites Costs of Suits Against D.C.," The Wash. Post, Dec. 2, 1990, at B1 (referring to Financing the Nation's Capital: The Report of the
(continued...)

Lack of cooperation among District offices has also impeded the District's compliance with the Jeny M. Decree. Many aspects of the Decree require cooperation between the YSA, which is immediately responsible for the custody of detained and committed youth, and other District officials. For example, cooperation among the D.C. Public Schools, YSA, and the Department of Human Services ("DHS") is required to develop educational programs for confined youth.^{54/} Yet YSA has had trouble getting school records and has not received much help identifying learning disabled and emotionally disturbed children who are entitled to special services (for which the District could receive federal reimbursement).^{55/} In addition, the assistance of the Department of Administrative Services is needed to locate sites for community programs. That assistance has been less than effective. Past understaffing and red tape in the District's Office of Personnel and DHS' contracting review office have also hindered the District's ability to comply with the Decree. Many of these problems have been alleviated in the short run under the threat of contempt sanctions.

^{53/}(...continued)

Commission on Budget and Financial Priorities of the District of Columbia (Nov. 1990) -- the Rivlin Commission Report).

With respect to attorneys' fees, in District of Columbia v. Jerry M., 580 A.2d 1270 (D.C. 1990), the Court of Appeals upheld Judge Urbina's order awarding fees to Ms. Donna Wulkan, a solo practitioner specializing in education and treatment issues, for her work to enforce the Decree and remanded the case for a calculation of the precise amount due.

E.g., 26th Report of the Monitor at 37 (Oct. 21, 1993).

20 U.S.c. § 1400 et seq.

Another significant hurdle lies in the opposition of neighborhood groups to new community-based facilities. District officials have only recently initiated discussions with such groups in order to win support for these programs.

Finally, compliance has also been difficult to achieve because of conflicting views about the type of facilities needed. For example, in 1989, when the District's secure facilities were severely overcrowded, the District commissioned a study hoping to demonstrate that the large number of hardened juvenile offenders caused overcrowding, and not a lack of alternative, less restrictive placements.^{56/} Instead, a preliminary study, which was never released by YSA, came to the conclusion that the District's reliance on secure care was excessive, and that youth and the public would be better served by a continuum of care model.^{57/} A subsequent 1993 study conducted by the National Council on Crime and Delinquency, using a classification process based exclusively on public safety criteria, "strongly" suggested "that the District of Columbia incarcerates a much larger percentage of youth than is necessary."^{58/} Thus, contrary to the widely-held image that juvenile offenders in District of Columbia facilities are hardened and incorrigible, two recent studies have confirmed the existence of a very sizeable group of committed youths who are not hardened, and who could benefit from alternative placements.^{e/} As the Children's Defense Fund reported in late 1991:

^{56/} See RFK Report, supra n.3, at 3.

^{57/} Id.

Id. at viii.

Id.

"It's a Catch-22 situation. YSA administrators say they cannot reduce the numbers of youths in institutions because admissions are driven by the court. Judges, meanwhile, say that their dispositional decisions are a direct consequence of the lack of community-based programs and the weakness of aftercare services."^{60/}

D. The Response of the Current Administration

Several recent events offer encouragement that new community-based programs may be in the offing. First, in January 1992, Mayor Sharon Pratt Kelly appointed a new YSA administrator who has had experience with family-based services and supports alternatives less restrictive than secure confinement. Second, the District finally closed Cedar Knoll on June 1, 1993.^{61/} As a result of the closing, the District was forced, for the first time, to develop community programs as alternatives to confinement.

Nonetheless, Oak Hill and the Receiving Home remain severely overcrowded. In response to this problem, on June 15, 1993, plaintiffs asked the Court to enforce its orders regarding overcrowding and community programs by imposing a \$3 million fine on the District to defray the costs of establishing new community facilities and force action on the District's part. Plaintiffs also asked the Court to increase the daily fines imposed in Memorandum Order E for overcrowding from \$1000 per facility per day to \$1000 per child

^{60/} CDF Report, supra n.52, at 103. The findings of the CDF Report are consistent with those of the Final Monitoring Report issued by the panel of experts designated in the Consent Decree. Final Monitoring Report of the Jerry M. Panel at 5-6 (Aug. 27, 1990).

^{61/} The closure was originally ordered for December 1, 1987, in the 1986 Decree, but the District did not comply until prompted to do so by the Congressional decision to stop funding for Cedar Knoll after June 1, 1993. See "Kelly Rebuffed on Sewer Fee, Told to Close Cedar Knoll," The Wash. Post, June 24, 1992, at A1; Defendants' Report on Status of Implementation of Memorandum Order B at Tab 2.

per day.^{62/} On July 27, 1993, the Court scheduled a status hearing to address the implementation of community-based alternatives and ordered the Director of the Department of Human Services and the Superintendent of D.C. Schools to attend. The Court also directed the District's counsel to ask the Mayor herself to attend. The Mayor declined this request, but conducted a meeting at which the Monitor/Special Master delineated the barriers to implementation of the Consent Decree. Following this meeting, the Mayor made a commitment to improve cooperation and collaboration among those agencies responsible for implementing the Decree.^{63/} As a result of these events, the District has begun to make some progress developing programs that are less restrictive than secure facilities.

III. THEMES AND RECOMMENDATIONS

The 1986 Decree represented a commitment by the District to modernize its juvenile justice system. Subsequent events suggest that the District has not been consistently committed to that goal, has not committed the resources necessary to implement the Decree, and has not demonstrated the administrative ability to meet its obligations under the Decree. The District's failure to comply with the Decree has cost it many thousands of dollars in monitoring costs and attorneys' fees. The District's noncompliance has also earned it a finding of contempt by Judge Urbina, who termed the District's record in the

^{62/} Plaintiffs' Motion to Enforce, supra nA1. The District has suggested that it may claim as a defense to plaintiffs' motion to increase the fines that it is impossible to comply with the Consent Decree. Defendants' Supplement to Plaintiffs' Motion to Enforce (Sept. 10, 1993). Plaintiffs have agreed to stay further briefing and resolution of its motion while negotiations between the parties continue.

Letter from Mayor Kelly to Special Master Lewis and Ms. Cahill (Sept. 8, 1993).

five years following its signing of the Decree "derelict, unconscionable, and disobedient. Judge Urbina's contempt order voiced the true tragedy behind the District's poor record: "Defendants' continued wholesale violations of Order Bare . . . dangerous for the citizens of this city, and most importantly, neglectful and wasteful insofar as the plaintiff class is concerned."^{65/}

During the course of Jerry M., many young lives have rushed by, made worse, rather than better, by their experience in the District's secure juvenile institutions, while District officials have plodded along, only occasionally in the right direction. Although the District's recent performance shows some improvement, problems of coordination with other agencies persist, and progress remains slow.

The District's leaders need to make swift improvements in the District's juvenile justice system a priority. Everyone is concerned about the surge of violence in our community, and one place to stem the tide is with the teenagers now entering the juvenile justice system. While more resources should be devoted to developing effective secure programs for serious offenders, the District must not lose sight of the need to develop strong community-based programs for those children who do not need secure confinement. Community-based programs will provide young people at risk a better chance to learn the skills needed to withstand the temptations of life and, thus, will provide more hope for lasting rehabilitation. Moreover, community-based alternatives will save money, because secure programs are much more costly per individual. The resources saved can then be

^{64/} Mem. Order J at 50 (Aug. 21, 1991).

^{65/} Id. at 83.

used to develop and operate more humane and effective secure facilities for violent offenders.

VII.
PRISON CONDITIONS

PRISONS

OVERVIEW OF THE CRISIS IN THE DISTRICT OF COLUMBIA'S CORRECTIONAL SYSTEM

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I. INTRODUCTION

In 1909, the District of Columbia's correctional system was described as follows:

"That men and women should be sent to these narrow and confined cells, the lazy to be fostered in laziness, the industrious to be deprived of every form of employment, in one promiscuous assembly, to corrupt and be corrupted by each other, to be fed like beasts and maintained at the public charge, with no prospect for improvement in condition, with the moral certainty that they will come out far worse than they went in, is a fact that has become a stench in the nostrils of the whole community, and ought to be felt as a shame and disgrace to the whole nation.W

Three-quarters of a century and innumerable court cases concerning District prisons later, it seems little has changed:

"the conditions in which inmates are housed at the D.C. Jail constitute cruel and unusual punishment These are conditions which turn men into animals, conditions which degrade and dehumanize. . . . Imprisonment in conditions such as these absolutely guarantees that the inmates will never be able to return to civilized society, will never feel any stake in playing by its rules."Y

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^{1/} Penal Commission Report on Washington, D.C., Message from the President, Senate doc. 648, 60th Congress, 2nd Session, Jan. 11, 1909.

^{2/} Inmates of D.C. Jail v. Jackson, 416 F. Supp. 119, 122-23 (D.D.C. 1976) (Bryant, J.).

The District of Columbia has the highest per capita incarceration rate in the United States." Since 1985, the size of the local prison population has risen dramatically due to the institution of mandatory minimum sentences for certain crimes, increased rates of re-incarceration for parole violators, and a general trend toward longer sentences.^f As a result, more than 10,500 men and women are today incarcerated in D.C. correctional facilities." As demonstrated in this Overview, despite years of litigation, these institutions continue to be overcrowded, poorly maintained and plagued with violence.

The District of Columbia Department of Corrections ("DOC") operates nine correctional institutions, each of which is involved in pending litigation or governed in some significant respect by court order.^s The proceedings in these cases have revealed that the

^{3/} In 1990, the District incarcerated its citizens at the rate of 1,148 per 100,000, more than twice that of any state. United States Department of Justice, Bureau of Justice Statistics, "Sourcebook of Criminal Justice Statistics - 1991," Table 6.72, at 637. See also, J. Miller, Hobbling a Generation: Young African American Males in D.C.'s Criminal Justice System, Apr. 17, 1992 (National Center on Institutions and Alternatives); D.C. Bar Coordinating Committee on Prisons and Prisoners, A Primer On Our Prisons at § V, Mar. 15, 1989 [hereinafter "Prison Primer"].

^{4/} The local prison population has risen from approximately 7,400 in 1985 to more than 11,000 today. Over the same time period, the number of prisoners annually being sentenced to incarceration increased by only a small amount. Office of Policy and Program Development, Indices: a Statistical Index to District of Columbia Services, 1992 at 344 [hereinafter "1992 Statistical Index"].

^{5/} Campbell v. McGruder, C.A. No. 71-1462, 216th Report to the Court at Attachment 1 (D.D.C. filed Nov. 12, 1993); Fiscal Year 1993 Budget and Revised Fiscal Year 1992 Request, Vol. III, at 220.

^{6/} For a detailed description of these institutions, see Prison Primer, supra n.3, at §§ I.A., V.B. & C. Seven correctional institutions are located in Lorton, Virginia and two in South East Washington. The prisons located in Lorton are collectively called the Lorton Correctional Complex. This Complex is located on a 3,000 acre plot of federal land that has been provided to the District to operate its correctional system. In
(continued...)

DOC is an agency that is in complete disarray, under-funded, poorly managed and in a constant state of crisis. These problems have persisted unabated for at least twenty years, despite the diligent efforts of courts and counsel for the prisoners to rectify them.

This summary chronicles the District's failure to properly manage its correctional facilities. The discussion that follows demonstrates that the District's maladministration of these facilities has created dangerously overcrowded, unsanitary, and inhumane prison conditions that are harmful to prisoners, costly to the District, and injurious to the community as a whole."

II. CORRECTIONAL LITIGATION

This section presents an overview of correctional litigation against the District. The summary tracks the Department of Corrections' history of recalcitrant conduct and illustrates how that conduct has often resulted in unconstitutional, discriminatory, and dangerous conditions that deny prisoners adequate medical and mental health care, vocational and educational programs, access to the courts, handicapped facilities, and safe and sanitary conditions of confinement. Section A describes in detail four class action

^{6/}(...continued)

addition to the District's nine prisons and jails, there are ten halfway houses which incarcerate approximately 1,000 prisoners. In addition, approximately 130 prisoners participate in a home electronic monitoring program and 215 prisoners have been sent to out-of-state prisons and jails pursuant to an interstate compact. Interstate Corrections Compact, D.C. Code § 24-1000 et seq.

^{7/} The community is at risk in a variety of ways. First, prisoners who are dehumanized and denied rehabilitation while they are incarcerated pose a threat to community safety when they are released. Second, epidemics such as tuberculosis, AIDS and hepatitis that are not addressed in the prison are brought into the community both by released prisoners and by correctional staff. Third, the families of prisoners -- especially their children -- suffer greatly from the abuse of their loved ones.

lawsuits that are particularly marked by a history of the DOC's noncompliance with legal requirements.^Y Section B highlights recurring themes that have emerged from other correctional cases.

A. The District Routinely Fails to Comply with Court Orders in
Systemic Reform Cases Involving the Department of Corrections

Because the District routinely fails to comply with court orders directing it to take remedial actions in its correctional facilities, the District is perpetually defending motions for contempt and for sanctions. During a recent hearing to determine whether the District of Columbia should be held in contempt for violating a court order concerning the conditions at the Central Detention Facility, the Honorable William B. Bryant succinctly characterized the District's own description of the extent of its efforts to comply with DOC-related court orders:

"[N]othing is done except at the end of a cattle prod. . . . [T]he cattle prod is a motion for contempt.^V

In virtually every case in which an order has been entered requiring systemic reform involving the Department of Corrections, the District has failed to comply with the terms of the order. The following sections discuss four of the most significant class action suits.

^{8/} Although the District frequently claims that fiscal problems render compliance with court-ordered obligations difficult, a lack of funds has been rejected as an excuse for violating prisoners' constitutional rights. See Stone v. City and County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992).

^{9/} Campbell v. McGruder, C.A. No. 71-1462, and Inmates of D.C. Jail v. Jackson, C.A. No. 75-1668, Transcript of Hearing on Plaintiffs' Motion for an Order to Show Cause Why the Defendants Should Not Be Held in Contempt at Vol. I, p. 10 (D.D.C. Apr. 6, 1993) [hereinafter "Transcript"]. A description of the Central Detention Facility is presented infra n.11.

1. Campbell v. McGruder and Inmates of D.C. Jail v. Jackson.^{10/} These consolidated cases challenge the totality of the conditions at the District of Columbia Central Detention Facility ("Central Detention Facility" or "Jail").^{11/} On March 21, 1975, the United States District Court for the District of Columbia found that the Jail was so overcrowded that prisoners were being subjected to "both physical and psychological damage," and held that the conditions in the Jail were unconstitutional.^P Over the next

^{10/} Counsel for the plaintiffs in Campbell, C.A. No. 71-1462 (D.D.C.), are J. Patrick Hickey, Janice Ziegler and Lori Vaughn of Shaw, Pittman, Potts & Trowbridge. Counsel for the plaintiffs in Inmates of D.C. Jail, C.A. No. 75-1668 (D.D.C.), are Edward I. Koren of the National Prison Project of the American Civil Liberties Union and Jonathan M. Smith of D.C. Prisoners' Legal Services Project, Inc.

Campbell was filed in 1971 on behalf of a class consisting of all pretrial detainees confined to the Jail. Published opinions may be found at 416 F. Supp. 100 (D.D.C. 1975); 416 F. Supp. 106 (D.D.C. 1975); 416 F. Supp. 111 (D.D.C. 1976); aff'd in part and remanded in part, 580 F.2d 521 (D.C. Cir. 1978); on remand, 554 F. Supp. 562 (D.D.C. 1982). In 1975 Inmates of D.C. Jail was filed on behalf of a class consisting of the sentenced prisoners in the Jail. A published decision in Inmates of D.C. Jail is located at 416 F. Supp. 119 (D.D.C. 1976).

^{11/} The Jail in use at the time these lawsuits were filed was constructed in 1872. That facility remained in continuous operation until the construction of the new Jail in 1976, after which time the old Jail was demolished. The current Jail, located in South East Washington, operates largely as a pretrial detention facility. It has housing units for both men and women, an infirmary and two intermediate care mental health cell blocks. Prisoners are confined in single and double cells. All persons incarcerated by the DOC are first confined at the Jail, which is under a court-imposed population ceiling of 1,684 prisoners.

^{12/} Memorandum and Order at 2 (Mar. 21, 1975). The Court in Inmates of D.C. Jail invoked the doctrines of collateral estoppel and judicial notice to grant the plaintiffs' motion for a partial summary judgment in Inmates of D.C. Jail on all issues decided in Campbell. Inmates of D.C. Jail, 416 F. Supp. at 120.

ten years, the Court conducted many hearings and entered numerous orders attempting to get the District to correct the problems.W

On July 15, 1985, ten years after the Court first ordered the District to take corrective action, the Court again found that extremely serious problems persisted at the Jail in violation of the prisoners' rights under the Fifth and Eighth Amendments to the United States Constitution.W The Court criticized the District's efforts to address the situation:

"The development of intolerable overcrowding and its negative effects on persons housed in the jail were obvious and predictable early on -- at least to this court and the Court of Appeals. In light of these predictions both this court and the Court of Appeals have oftentimes identified specific avenues by which the population pressures could be reduced, emphasized the necessity for defendants to develop a long-range, comprehensive approach to overcrowding, and warned of the legal consequences if defendants did not use their presumed expertise to rectify ongoing constitutional violations. Nevertheless, instead of a sustained drive against the effects of a population crisis, defendants' efforts have been sporadic, and largely unproductive; and conditions have steadily worsened.

^{13/} The Court entered compliance-related orders in these cases on November 5, 1975 (416 F. Supp. 100, 416 F. Supp. 106); May 24, 1976 (416 F. Supp. 111); June 9, 1980; January 14, 1981; March 8, 1982; September 15, 1982; October 8, 1982; December 17, 1982; June 27, 1983; September 30, 1983; November 29, 1983; February 3, 1984; and June 7, 1984. The Court of Appeals for the District of Columbia Circuit affirmed in part and remanded in part the District Court's November 1975 and May 1976 orders. 580 F.2d 521 (D.C. Cir. 1978).

^{14/} The Court stated:

"Viewed in the aggregate, it is clear that the serious overcrowding at the jail has created conditions which are so acute that they deny inmates the minimum of life's necessities and inflict punishment on pre-trial detainees, thus establishing plaintiffs' claims of constitutional violations." Memorandum and Order at 49 (July 15, 1985).

Time and again, defendants have requested the court to defer to their accumulated wisdom, to stay its hand and to give them more time. Time and again, these requests have been honored in the hope and expectation that defendants would solve these problems expeditiously and effectively. However, instead of matters improving they have deteriorated." Memorandum and Order at 49-50 (July 15, 1985) (citations omitted).

In the light of Judge Bryant's conclusion that extreme overcrowding caused the unconstitutional conditions (*id.* at 49), the Court ordered the District to reduce Jail population to a specified level within 40 days, and not to accept new prisoners if they would increase the population beyond that limit. Order at 1-2 (July 15, 1985).

In the wake of Judge Bryant's Order, the parties in 1985 entered into a remedial stipulation. This stipulation imposed a population ceiling of 1,684 prisoners and required the District, *inter alia*, to reduce Jail population in accordance with a specified schedule, implement programs to help reduce the population, improve health and mental health services and increase compliance reporting.¹⁵ The stipulation was filed and entered as an Order of the Court on August 22, 1985.

Despite the District's agreement to the 1985 Order, the District failed to satisfy that and other Court orders. On March 11, 1987, the Court held the District in contempt.¹⁶ On September 26, 1990, the Court ordered the District to provide detailed reports concerning compliance with its orders relating to health services. In February 1993, plaintiffs filed a motion to hold the District in contempt for failing to comply with the 1990

¹⁵ Stipulation of the Parties to Reduce the Population at the D.C. Jail at ¶¶ 2, 12, 13, 15 (Aug. 22, 1985).

¹⁶ The Contempt Order was entered on March 12, 1987.

Order and 1985 Decree.^{17/} Finally, on April 20, 1993, following three days of hearings at the conclusion of which the Court found the District was still not complying with its Orders, the Court appointed a Special Officer to monitor and report on the District's compliance.W The Court concluded:

"This is not the first time that this Court has found that the defendants have failed to comply with its orders. In light of the defendants' history of non-compliance, and given the complicated and factually intensive nature of the matters at issue, this Court determines that a Special Officer is necessary to assist the Court in effecting future compliance with its orders. This step is not taken lightly, and is based on this Court's more than twenty years experience in this litigation.v-"

On September 15, 1993, the Special Officer issued the reports of her experts on medical and mental health services and medical diets at the District of Columbia Jail.^{20/} These reports chronicle serious deficiencies in the delivery of basic health services. The experts not only identify systemic problems, but also present examples of prisoners who died or needlessly suffered because of inadequate or incompetent treatment.W Robert L. Cohen, M.D., the Special Officer's medical expert concluded:

^{17/} Plaintiffs' Motion for an Order to Show Cause Why Defendants Should Not Be Held in Contempt of Court (Feb. 17, 1993).

^{18/} Order Appointing Special Officer at 5 (Apr. 20, 1993). The Court appointed Grace M. Lopes, who is also the Special Officer in Twelve John Does v. District of Columbia, John Doe v. District of Columbia, Inmates of the Modular Facility v. District of Columbia, and Inmates of Occoquan v. Barry, each of which is discussed infra in this Overview.

Id. at 4-5 (citations omitted).

^{20/} Expert Reports on Medical and Mental Health Services at the District of Columbia Jail (Sept. 15, 1993) [hereinafter "Expert Reports"].

^{21/} E.g., Cohen, "Review of Medical Services in the Central Detention Facility (CDF)" at 59-73 (Sept. 15, 1993) [hereinafter "CDF Medical Report"].

"The quality of medical services is deplorable, the physical condition of the medical areas are horrible, and the infirmary is a disgrace.

These findings do not represent exceptions to the normal functioning of the jail, but, unfortunately characterize the current state of affairs. There are many more cases of negligent, callous medical practices with terrible outcomes which I have not included. Hopefully, this report will aid in efforts to quickly remedy the situation."^{22/}

Richard Belitsky, M.D., the Special Officer's mental health expert was similarly troubled by what he found:

"There are very serious and longstanding problems in the provision of mental health care at the Washington D.C. Jail. The physical plant is deplorable, and the mental health care that is provided is frequently substandard and at times dangerous and negligent. Particularly troublesome is that most, if not all, of the areas of deficiency noted in this report have been well known and clearly documented for years without adequate resolution. **As** a result, inmates incarcerated at the Washington D.C. jail have had inferior, inadequate and at times harmful treatment."^{23/}

On October 22, 1993, defendants filed a response to the expert reports in which they agreed to implement a large number of the reports' recommendations.^W Plaintiffs have filed a motion for emergency relief on a number of the most serious conditions.^e On

^{22/} Id. at 3-4.

^{23/} Belitsky, "An Evaluation of Mental Health Services at the Washington D.C. Jail" at 27 (Sept. 15, 1993) [hereinafter "CDF Mental Health Report"].

^{24/} Defendants' Response to the Experts' Reports on Medical and Mental Health Services at the District of Columbia Jail (Oct. 22, 1993).

^{25/} Plaintiffs' Motion for Interim Relief, an Expedited Briefing Schedule and an Early Hearing Date (Oct. 8, 1993).

November 9, 1993, in response to the expert reports, the Court ordered the District to improve medical and mental health services at the Jail "within five days."^{26/}

2. Twelve John Does v. District of Columbia.^{27/} In Twelve John Does, plaintiffs seek to address numerous serious problems at the Central Facility that give rise to dangerous and unconstitutional conditions of **confinement**.^{28/} On April 28, 1982, the parties entered into a detailed, 59-page Final Settlement and Consent Decree. The Consent Decree contains, inter alia, specific provisions that address overcrowding, the conditions in the punitive confinement cell block, security and contraband control, perimeter surveillance, correctional officer staffing, environmental health and sanitation, fire safety, access to educational and rehabilitative programs, and access to medical and mental health services. Since the entry of the Consent Decree, the Court repeatedly has found the District to be noncompliant with its obligations and has held it in contempt of

^{26/} Order (Nov. 9, 1993). The Order also gave the District 45 days to report on its compliance with, inter alia, sanitation, plumbing, dietary, and health requirements. See also "Judge Gives D.C. Jail 5 Days to Improve Inmate Health Care," The Wash. Post, Nov. 11, 1993, at D3 (DOC Medical Services Director "acknowledged that a 'significant amount' of the criticism in the court-ordered report was valid, but argued that . . . great strides had been made.").

su C.A. No. 80-2136 (D.D.C.) (Green, J.). Plaintiffs' counsel are Peter J. Nickles, Alan A. Pemberton, Eric Lasker, and Claire Elmendorf of Covington & Burling. This case is reported at 668 F. Supp. 20 (D.D.C. 1987), reversed and vacated on other grounds, 841 F.2d 1133 (D.C. Cir. 1988).

^{28/} The Central Facility was built in 1914 and serves as a medium security prison for men in the Lorton Correctional Complex. Population is limited by court order to 1,326 prisoners who are housed in large, barracks-style dormitories. Central has one dormitory for handicapped prisoners. The Central Facility has the largest number of educational and rehabilitative programs.

Court.^{29/} In 1988, the U.S. Court of Appeals for the District of Columbia Circuit wrote concerning the Twelve John Does litigation:

"Unfortunately, the consent decrees did not mark the end of this litigation. The district court's efforts over the last five years to monitor the decrees have been almost continually hampered by the failure of the District to abide by the terms of the decrees."^{30/}

Although the District has been noncompliant in a number of areas, this summary illustrates the District's compliance problems by focusing on the issues of access to health services and environmental health and sanitation.

a. Health Services

The 1982 Consent Decree contains provisions that specify mandatory medical and psychiatric staffing levels, require the purchase and maintenance of basic medical supplies and equipment, and call for the repair and maintenance of the medical facilities.^{31/} In order to measure the extent of the District's compliance with these Decree requirements, the Court's Special Officer in late 1989, with the assistance of independent correctional medical expert Dr. Robert Cohen, reviewed the health services at the Central Facility.^{32/} The Special Officer concluded:

^{29/} Twelve John Does, 668 F. Supp. at 21-22 (discussing history of case: "the Court has entertained countless motions . . . , conducted hearings, and issued numerous orders and memoranda as it has struggled to bring prison conditions . . . up to constitutionally acceptable standards.")

^{30/} 841 F.2d 1133, 1135 (D.C. Cir. 1988).

Final Settlement Agreement and Consent Decree at 27-30 (Apr. 28, 1992).

^{32/} Dr. Cohen was formerly Director of Health Services for the New York City Jail on Riker's Island.

"Dr. Cohen's findings after examining specific inmate charts and medical practices at Central led him to conclude that there are 'multiple serious systemic problems which result in inadequate care and unnecessary suffering.' (Citation omitted.) The Special Officer concurs in the finding of Dr. Cohen, and further finds that as a result of these systemic problems the quality of care at the Central infirmary is unacceptable according to any reasonable standard."^{33/}

The Court adopted the Special Officer's findings and found the District to be out of compliance with its Orders. The Court ordered the District to take specific remedial measures and, in addition, authorized the Special Officer to contract for needed services at the District's expense should such action be necessary.s"

On April 14, 1991, the Special Officer filed a second report on medical and mental health services.^{35/} Again, the Special Officer found that the District had failed to comply with the Court's orders. This report resulted in a June 14, 1991, Consent Order that required additional remedial action.

The Special Officer issued a third report on Health Services on March 13, 1992.^{36/} She concluded that the District still had not complied with the Court's Orders. The report raised a number of concerns, including:

^{33/} Third Report of the Special Officer of the Court, Report on Medical Services at 12 (Oct. 27, 1989). (Although this was the third report the Special Officer issued in the Central case, it was the first report on medical care. The Special Officer has since issued two additional reports on medical care which are discussed infra.)

^{34/} Order (Dec. 12, 1989).

^{35/} Report of the Special Officer of the Court Regarding Compliance with the December 12, 1989 Order (Apr. 14, 1991).

^{36/} February/March 1992 Report of the Special Officer on Medical Services and Mental Health Staffing at the Central Facility (Mar. 13, 1992) [hereinafter "Medical and Mental Health Report at Central Facility"].

"1. The absence of medical, administrative and nursing leadership must be addressed. The failure to institute an effective management and supervisory system contributes to virtually all of the clinical deficiencies identified by Dr. Cohen.

2. The retention of practitioners known to be incompetent is patently unacceptable. As Dr. Cohen points out, there is reliable evidence that has not been disputed which establishes that at least one incompetent practitioner severely imperiled the life of a seriously ill inmate.

3. The deterioration of the physical plant in the infirmary ... is a critical problem....

5. The chronic shortage of essential supplies ... is a grave problem

6. The violation of standard pharmacy practices must be remedied

7. The dangerous and life threatening dysfunction evident in the operation and maintenance of the emergency cart persist and must be cured

9. The failure to meet minimal standards for emergency transport is potentially a life threatening problem

10. The failure to maintain life-saving equipment in the emergency room in proper working order contributes to the grossly deficient emergency care that is available

12. The failure to meet the most basic medical needs of prisoners because of the significant delays in access to specialized services should not continue

14. The failure to provide basic treatment and diagnostic care for infirmary patients should also be remedied

15. The virtual absence of care and corresponding deterioration of the health of physically disabled prisoners is a very serious **problem.**"^{37/}

^{37/} Id. at 30-32.

The February/March 1992 Report resulted in another Consent Order in June 1992 which requires the District to take additional specific remedial **measures**.^{38/} The Special Officer and counsel for the plaintiffs are monitoring the District's compliance.

b. Sanitation and Environmental Health

Health services is not the only area in which the District has had trouble achieving compliance. There has also been extensive litigation on sanitation and environmental health issues because of the District's refusal to comply with the terms of the Decree.^{39/} In a 1989 motion, plaintiffs described their difficulty in obtaining the District's compliance with the Decree provisions on these issues:

"The torturous effort to achieve compliance with the Consent Decree has been marked by the District's repeated failures to correct environmental health and sanitation deficiencies or to establish effective management techniques to improve compliance. Repeated contempt motions and amendments to the Decree have attempted to bolster the environmental provisions and facilitate the District's **compliance**."^{40/}

Litigation on sanitation issues began only a year after the entry of the 1982 Consent Decree. On March 1, 1983, plaintiffs filed a motion for contempt after a sanitation inspection revealed serious problems. This motion was settled by an amendment to the Consent Decree on August 18, 1983.^{41/} On November 5, 1984, plaintiffs were again

^{38/} Consent Order (June 10, 1992).

^{39/} Environmental health and sanitation encompasses daily housekeeping and hygiene maintenance, quality of food services, and preventive maintenance, such as quality of plumbing or ventilation. Consent Decree, supra n.31, at 16-26.

^{40/} Memorandum in Support of Plaintiffs' Motion for Finding of Contempt, and Imposition of Sanctions, on Environmental, Medical and Mental Health Issues at 2 (Nov. 6, 1989). This motion contains a detailed history of the District's noncompliance.

^{41/} Id. at 2, n.1.

forced to file a motion for contempt. On March 4, 1985, the Decree was again modified in an effort to help the District come into compliance.^{42/} In the March 1985 modification, the District agreed to be fined \$50 per day in the event of its future noncompliance. On June 10, 1985, plaintiffs moved for the imposition of fines.^{43/} On March 5, 1986, plaintiffs again moved for contempt. On March 27, 1986, the Court held that the District was in contempt of its Orders and appointed a Special Officer.^{44/}

Unfortunately, the appointment of a Special Officer did not resolve the problems. On July 25, 1989, the Special Officer filed a report detailing numerous environmental, health and sanitation violations of the Decree. On November 7, 1989, plaintiffs moved for a finding of contempt against the District. A month later, the Court adopted the Special Officer's findings of noncompliance.^{45/}

Although the District has still not complied with its Decree obligations, its performance has improved and its payment of fines has decreased since the appointment of the Special Officer. The Special Officer has been able to help the District identify its obligations, engage in self-monitoring, and find solutions to compliance-related problems. In addition, the Special Officer has engaged highly qualified outside experts who have

^{42/} Id. at 2-3, n.1.

^{43/} On July 17, 1985, plaintiffs withdrew the motion without prejudice upon receiving assurances of future compliance from the District. Id. at 3, n.1.

^{44/} Order at 2 (Mar. 27, 1986). The Court originally appointed the Honorable John Fauntleroy. Judge Fauntleroy was replaced by Katherine Monaco who was replaced by Grace M. Lopes. Ms. Lopes is the current Special Officer.

^{45/} Order (Dec. 12, 1989).

evaluated the District's systems and helped it to develop programs and plans that will bring the District into compliance with the various Court orders.

3. Inmates of the Modular Facility v. District of Columbia.^{46/} This case was brought on March 28, 1990, on behalf of the prisoners confined to the Modular Facility.^{47/} Although the institution opened in 1986, by 1990 it had already become extremely overcrowded, dangerous, and unhealthy.^{48/} In addition, prisoners were routinely denied access to health services, rehabilitative programs, and outside recreation.^{49/}

The case went to trial in November 1990. At the completion of plaintiffs' case, the parties agreed to a Consent Decree.^{50/} The Decree contains detailed provisions concerning a number of issues, including: a population ceiling, specified staffing of health services, specified staffing of psychological services, procedures for the classification of

^{46/} C.A. No. 90-727 (D.D.C.) (Green, J.). Counsel in this case are Peter J. Nickles, Alan A. Pemberton, Benedict Lenhart and Gregory Glover of Covington & Burling and Jonathan M. Smith of the D.C. Prisoners' Legal Services Project, Inc.

^{47/} The Modular Facility is located on the grounds of the Central Facility in Lorton. It is used largely as an annex to the Jail and houses male prisoners, most of whom are pretrial detainees and misdeemeanants. One half of the prison consists of single cells and the other half of large open dormitories. There is a court-ordered population ceiling of 688 prisoners at the Modular Facility.

^{48/} The prison was designed to house no more than 400 prisoners. On the date that the lawsuit was filed, more than 900 prisoners were incarcerated there. Prisoners were being housed in makeshift dormitories in classrooms and sometimes they were being held in the gymnasium. Complaint at ¶¶ 6, 24, 26 (Mar. 28, 1990).

^{49/} Id. at ¶¶ 33, 61-62, 85-94.

^{50/} The Consent Decree was approved and adopted as an Order of the Court on December 14, 1990.

prisoners, repair of the physical plant, improvement of environmental health and sanitation, the creation and maintenance of a law library and the correction of serious fire hazards.

As with the other correctional cases, the District has, in many respects, failed to implement the terms of its agreement in Inmates of Modular Facility. Less than a year following the entry of the Consent Decree, plaintiffs were forced to file their first motion for contempt because the District was in serious violation of the Decree's health services requirements.^W In response, the Court issued a Consent Order which required specific remedial action and provided for the imposition of fines for future noncompliance.^{S'}

Despite the Consent Order, the District continued not to comply with its agreed-upon and Court-ordered obligations. Thus, on January 30, 1992, plaintiffs again moved for contempt.^W On March 5, 1992, the Court entered an order granting plaintiffs' motion and directing the District to pay fines in the amount of "\$250 per day, per inmate, for every day of delayed access" to specialty medical clinics.^{54/} The District ultimately incurred fines in the amount of \$102,500 for violations through March 31, 1992.^{55/}

^{51/} Plaintiffs' Motion for Finding of Contempt, Imposition of Sanctions, and Award of Attorneys' Fees at 1-2 (Sept. 13, 1991) (defendants failing to provide prisoners with access to medical specialists in a timely manner, staff medical unit adequately, review medication promptly).

^{52/} Consent Order (Oct. 2, 1991). The Order also prohibited the District from using unlicensed health care providers at the Modular Facility. Id. at 2.

^{53/} Plaintiffs' Motion for Finding of Contempt, Imposition of Sanctions, and Award of Attorneys' Fees (Jan. 30, 1992).

^{54/} Order at 2 (Mar. 5, 1992).

^{55/} Order (June 2, 1992) (The Court waived fines that accrued between January 1 and 29 on finding "that Defendants have made sufficient progress"): Joint Motion (continued...)

These fines, however, did not convince the District to comply with the Decree. By the Fall of 1992, the District was again out of compliance with the medical provisions of the Decree -- this time the District had dramatically reduced the number of health care providers who staffed the prison. After a period of unsuccessful negotiations in an effort to resolve the noncompliance, on February 5, 1993, plaintiffs again moved that the District be held in **contempt**.^{55/} This motion resulted in yet another Consent Order on June 8, 1993, which made small modifications to the Decree's medical staffing requirements and imposed automatic fines of \$500 per day for future violations, running from the first day of noncompliance.s"

The District violated the Consent Order the day that it went into effect, forcing plaintiffs to request that the Court impose fines.^{56/} This request is still pending.

On October 8, 1993, the Special Officer issued a report on medical staffing at the Modular Facility.^{59/} Her report identifies five areas in which the District has violated the

^{55/}(...continued)

for Determination of Fines Pursuant to the Court's Order of March 5, 1992 (filed May 18, 1992). The fines were paid into a special fund to be spent by the Court, on the recommendation of the Special Officer, for the benefit of prisoners. The fines could not be used to pay the expenses of the District to come into compliance with the Consent Decree.

^{56/} Plaintiffs' Motion for Finding of Contempt, Imposition of Sanctions, and Award of Attorneys' Fees (Feb. 5, 1993).

^{57/} Consent Order at 5 (June 8, 1993).

^{58/} Motion for Imposition of Contempt Fines (July 2, 1993).

^{59/} The Special Officer's Report and Recommendations on Medical Staffing at the Modular Facility (Oct. 8, 1993).

staffing provisions of the Decree alone.^{60/} In support of her report, the Special Officer filed an evaluation conducted by Dr. Robert Cohen, the Special Officer's medical expert, who describes serious medical staffing deficiencies.^W For example, Dr. Cohen describes one case where there was a delay of more than 20 minutes in responding to a prisoner having a heart attack. When health staff did respond, they improperly transferred the prisoner to another prison infirmary that did not have the necessary emergency equipment.^{S'} Dr. Cohen noted:

"These two critical deficiencies, the absence of any medical staff and the failure to contact 911 for a life threatening emergency are not new problems for [the Department of Corrections.] It is tragic and regrettable that the facility failed, in violation of the Court Decree, to provide the minimal medical care required to give this prisoner a chance to survive his heart attack."^{63/}

4. Green v. District of Columbia.^s" This case was brought on behalf of the class of prisoners that had been or would be transferred to out-of-state, nonfederal prisons and jails in order to ease the overcrowding in the District's **prisons**.^{65/} The lawsuit raised three

^{60/} Id. at 1-7.

^{61/} Cohen, "Report on Medical Services: Modular Facility, Lorton Correctional Complex" (Oct. 1, 1993) [hereinafter "Medical Report, Modular Facility"].

^{62/} Id. at 18-20.

^{63/} Id. at 20.

^{64/} CA. No. 90-793 (D.D.C) (Hogan, 1.). Counsel in this case are Murray Gamick, Helene Madonick, Hilde Kahn, and Cathy Hoffman of Arnold & Porter; Jonathan M. Smith of the D.C Prisoners' Legal Services Project, Inc.; and Arthur Spitzer of the American Civil Liberties Union of the National Capitol Area. The published decision in this case is located at 134 F.R.D. 1 (D.D.C 1991).

^{65/} The transfers were made pursuant to the Interstate COrrrections Compact, D.C. Code § 24-1001 et seq.

issues: access to health services, access to law libraries and legal materials, and access to educational and rehabilitative **programs**.^{66/} **As** a sanction for failing to comply with the procedural rules concerning discovery and for violating a number of discovery-related Court Orders, the Court deemed all facts alleged in the complaint to be true.^{67/}

On November 12, 1991, the Court granted summary judgment on plaintiffs' claim that they were denied access to law libraries and to other legal **materials**.^{68/} The Court ordered the District to provide a law library for District prisoners who had been transferred to out-of-state prisons and jails, as well as pens and paper, confidential legal telephone calls and access to a photocopy machine for the copying of legal **materials**.^{69/} In addition, on June 5, 1992, the Court ordered the District to submit periodic reports concerning its compliance with the Court's remedial Orders.

The District neither complied with the remedial orders nor with the order requiring periodic reporting. Plaintiffs moved that the District be held in contempt for these violations and, on September 25, 1992, the Court granted the plaintiffs' motion, and fined

^{66/} Complaint at ¶¶ 3, 31, 33-35, 37, 41, 48 (D.D.C. April 5, 1990).

^{67/} Green, 134 F.R.D. at 3, 4.

^{68/} Order (Nov. 12, 1991). The Court granted summary judgment in favor of the District on the programs claim and decertified the class on the medical claim. Id.; Order (Apr. 1, 1992). The Court later entered summary judgment against the individual plaintiffs on their medical claims. Judgment (Oct. 26, 1992). Plaintiffs have appealed the Judgment.

Order (Nov. 12, 1991); Order (Nov. 14, 1991).

the District \$50 per day for every day that it was out of compliance with the Court's Orders.^{70/}

B. Additional Correctional Litigation

The four class action suits described above well illustrate the numerous unconstitutional, discriminatory, and dangerous conditions that have existed for the past twenty years and continue to exist at the DOC facilities, and also demonstrate the struggle by prisoners, their advocates and the courts to correct those conditions. These four cases are by no means the only class actions filed to address deficiencies in the District's correctional facilities. Nor are they the only cases in which the District has been forced to defend against numerous motions for contempt and sanctions. Many other cases have been filed -- one as recently as October 1, 1993^{71/} -- against the District to attack a wide variety of problems in the DOC facilities. These cases have resulted in settlements and consent orders that require the District to take specific remedial actions and, when the District has failed to comply with those orders, have frequently produced findings of contempt.

Although the four highlighted class actions addressed conditions at the Jail, Central, and Modular Facilities, the other facilities under the DOC's control (including the Maximum Security Facility,^{72/} Occoquan's the Youth Center,^{73/} the Minimum^{74/} and

^{70/} Order (Sept. 25, 1992). The District has appealed the fines.

^{71/} Women Prisoners of the D.C. Department of Corrections v. District of Columbia, C.A. No. 93-2052 (D.D.C. filed Oct. 1, 1993) (Green, J.).

^{72/} Prisoners at the Maximum Security Facility are housed in single cells in seven cell blocks. Mobility in this facility is extremely limited, such that most prisoners cannot leave their cell blocks unless they are in restraints. Built in 1920, this prison houses a court-ordered population ceiling of 645 male prisoners.

Medium Security Facilities,^{26/} and the Correctional Treatment Facility^{27/}) are also the subject of litigation. Some of these additional cases focus on the difficulties that specific classes of prisoners face: youth, women,^{28/} potential parolees, and the handicapped. Thus, nearly every aspect of the Department of Corrections system and nearly every

^{23/}(...continued)

^{23/} Occoquan is a medium security prison for men in the District's correctional system. It is the largest facility at Lorton, housing a court-ordered population ceiling of 1,760 prisoners in large, barracks-style dormitories.

^{24/} The Youth Center houses approximately 675 male prisoners, who are either 18-22 years old at the time of sentencing and sentenced pursuant to the Youth Rehabilitation Act, D.C. Code § 24-801 *et seq.* (1985), or are adults convicted of misdemeanors. Youth Act prisoners are housed in double-bunked rooms. Adult misdemeanants are housed in separate dormitories. Correctional institutions for juveniles are operated by the Department of Human Services, not the DOC. Those facilities are themselves the subject of a court order, described in a separate case summary, Jerry M. v. District of Columbia, *infra* p. 255.

^{25/} The Minimum Security Facility at Lorton houses approximately 950 men and 160 women in large, barracks-style dormitories. To be assigned to the Minimum Security Facility, prisoners must be within 24 months of their parole eligibility date and have a good prison record. Many Minimum Security Facility inmates participate in community-based work programs.

^{26/} The Medium Security Facility at Lorton houses approximately 1,000 male prisoners in large, barracks-style dormitories. The custody classification of inmates at the Medium Security Facility is typically a bit lower than those at the other two medium security prisons, Central and Occoquan.

^{27/} The Correctional Treatment Facility ("CTF") is located in the District next to the Jail. The newest institution in the system, CfF began operation in May 1992. It contains four sections: an inpatient infirmary, an intake and diagnostic unit, a women's prison, and a drug treatment program. All prisoners convicted of a felony generally stay up to 90 days at the intake and diagnostic unit at the CfF while classification decisions are made. CfF currently houses approximately 800 inmates; women prisoners are housed in the unit originally designed as a mental health ward.

^{28/} No facility currently exists to house female inmates with long-term sentences. Women are incarcerated only at the Jail, CfF, and the Minimum Security Facility. Females between the ages of 18-22 are housed throughout the correctional system.

subgroup within that system has been forced to resort to the judicial system to remedy serious problems.

Prisoners have sought redress in these numerous other class action suits to correct the following conditions:

- prison overcrowding.^X
- inadequate access to decent medical and mental health services, including psychological care;^{80/}

^{79/} E.g., John Doe v. District of Columbia, C.A. No. 79-1726 (D.D.C.) (March 23, 1984 Final Settlement and Consent Decree § VIII, as amended July 11, 1991 and April 16, 1993, established population ceiling at the Maximum Security Facility; discussed in Twelve John Does, 841 F.2d at 1135; reported decision in John Doe at 697 F.2d 1115 (D.C. Cir. 1983); Inmates of Occoquan v. Barry, C.A. No. 86-2128, 650 F. Supp. 619, 635 (D.D.C. 1986), reversed and remanded, 844 F.2d 828 (D.C. Cir. 1988), on remand, 717 F. Supp. 854, 868-69 (D.D.C. 1989) (District ordered not to exceed June 30, 1989, Occoquan inmate population); Ellis v. District of Columbia, C.A. No. 91-3041 (D.D.C. filed Nov. 22, 1991) (pending; challenges problems in the parole system which aggravate prison overcrowding).

In a related vein, the United States brought suit, and obtained an injunction, against the District to require it to comply with D.C. Code § 24-425 under which the Department of Corrections must, at the designation of the U.S. Attorney for the District, incarcerate persons sentenced by the D.C. Superior Court to District facilities. United States v. District of Columbia, C.A. No. 88-2897, Memorandum Opinion and Order (D.D.C. Nov. 10, 1988).

^{80/} E.g., John Doe, C.A. No. 79-1726 (District required in § VI of March 1984 Final Settlement & Consent Decree to provide psychological care to Maximum Security Facility prisoners); Inmates of Occoquan, 717 F. Supp. at 867-68, 870 (District required to improve access to health and mental health services. On July 8, 1993, the Court approved settlement of plaintiffs' motion for contempt against the District for not improving access to health services.); Inmates of Three Lorton Facilities v. District of Columbia, C.A. No. 92-1208, Complaint at ¶ 1 (D.D.C. filed May 20, 1992) (pending; alleges inadequate health care services at the Youth Center and the Minimum and Medium Security Facilities) (Green, J.); Women Prisoners, C.A. No. 93-2052, Complaint at ¶¶ 47-58 (pending; challenges adequacy of medical and mental health care for female prisoners within DOC system).

- lax **security**;^{81/}
- unsanitary cells and health care **facilities**;^{82/}
- arbitrary denial of and delays in granting **parole**;^{83/}
- unequal and inadequate access to educational, vocational, and rehabilitative **programs**;^{84/}
- inadequate access to legal **materials**;^{85/}

^{81/} E.g., John Doe, C.A. No. 79-1726 (District required by § I of Final Settlement to increase security at Maximum Security Facility; discussed in Twelve John Does, 841 F.2d at 1134-35); Inmates of Occoquan, C.A. No. 86-2128 (District ordered to improve security and prisoner classification); Clark v. District of Columbia, C.A. No. 81-2027 (D.D.C. 1981) (settled upon DOC's agreement to institute certain structural improvements at the Youth Center and to employ more security and program staff).

^{82/} E.g., Inmates of Occoquan, 717 F. Supp. at 866-867, 870 (District ordered to improve environmental health and sanitation).

^{83/} E.g., Ellis, C.A. No. 91-3041 (pending; challenges Parole Board's alleged failure to render initial parole determinations and conduct revocation hearings in timely manner and its arbitrary denial of parole.).

^{84/} E.g., John Doe, C.A. No. 79-1726 (§ VII of Final Consent Decree required District to provide educational programs to Maximum Security Facility prisoners); Women Prisoners, C.A. No. 93-2052, Complaint at ¶¶ 77-100 (pending; challenges discriminatory denial of access to educational and rehabilitative programs for female prisoners within DOC system); Houser v. District of Columbia, C.A. No. 89-11625 (D.C. Super. Ct. 1989) (consent decree required District to comply with statutory mandates of the Youth Rehabilitation Act by providing educational and vocational programs to YRA women).

^{85/} E.g., Lewis v. Freeman, C.A. No. 82-1066, Consent Judgment (D.D.C. Dec. 9, 1983) (District ordered to maintain law library at Maximum Security Facility and provide access to legal materials for prisoners confined to cell blocks); Walker v. District of Columbia, C.A. No. 90-1411, Consent Order (D.D.C. Apr. 30, 1991) (District required to install and maintain a basic law library and interlibrary loan system, employ a law librarian, and provide a semi-annual law clerk training program to male and female inmates at the Minimum Security Facility).

- discrimination against handicapped **prisoners**;^{86/} and
- discrimination against **women**.^{87/}

Based on its continued extensive involvement in correctional litigation, the Department of Corrections should be aware of the deficiencies in its system and be working actively to correct them. However, new cases continue to be filed, and old cases continue to be litigated to address ongoing, severe problems in the correctional system.

III. REPERCUSSIONS OF THE DISTRICT'S FAILURE TO ADMINISTER PROPERLY ITS CORRECTIONAL SYSTEM

The cases discussed in Section II dramatically demonstrate the District's refusal or inability to address significant problems in the administration of its correctional system. As a result, the District is repeatedly forced to expend untold resources to respond to litigation. Beyond the basic expense of responding to lawsuits, the District's inattention to conditions in its correctional facilities results in other costs that are equally significant both to the welfare of the District and to that of its citizens. For example, the District's failure to address overcrowding and substandard conditions can reasonably be viewed as a major factor underlying numerous instances of prison violence, including two major prison riots
10 the last eight years.^{88/} This Section discusses the ramifications of the District's

^{86/} E.g., Hauhart v. District of Columbia, Docket No. 91-346-DC(N) (Department of Human Rights and Minority Business Development 1991) (Apr. 1992 settlement agreement required District to develop plan to improve accessibility and availability of programs and facilities to handicapped prisoners).

^{87/} E.g., Women Prisoners, C.A. No. 93-2052, Complaint (pending; seeks remedies for a variety of discriminatory conditions affecting women prisoners).

^{88/} "41 Hurt, 14 Buildings Set Afire in Day of Uprising at Lorton; Jail Crowding Crisis Worsens Drastically," The Wash. Post, July 11, 1986, at A1 (report of July 10, (continued...))

nonresponsive conduct, focusing on that conduct's effect on District finances and the provision of health services in DOC facilities.

A. Financial Costs or the District's Noncompliance

1. Fines, Attorneys' Fees, and Fees and Expenses of the Special Officer.^{89/}

In an effort to get the District to comply with court orders, courts have required the District to pay substantial fines. These fines include \$1,678,250.00 in Twelve John Does,^{90/} \$102,500.00 in Inmates of Modular Facility,^{91/} \$50,000 in Campbell,^{92/} and \$12,000 in Green.^{93/}

In addition, the District has been required to pay substantial attorneys' fees awards:^{94/} more than \$250,000 in Twelve John Does,^{95/} more than \$850,000 in Inmates

^{88/}(...continued)

1986, riot at Occoquan Facility during which numerous buildings were set on fire); "Slain Prisoner's Estate Sues D.C," The Wash. Post, Mar. 24, 1989, at B4 (report of litigation arising out of January 20, 1989, riot at Central Facility during which administration building was burned, a prisoner murdered, and numerous prisoners seriously injured.).

^{89/} The discussion below does not include fees and costs the District has paid in individual civil rights corrections-related cases that have been successfully litigated against the District.

^{90/} Twelve John Does, CA. No. 80-2136, Orders (Dec. 13, 1988; June 29, 1989; Aug. 7, 1989; Aug. 15, 1989; Dec. 17, 1989; and June 30, 1992).

^{91/} See Inmates of Modular Facility, CA. No. 90-727, Order (June 2, 1992) and Joint Motion for Determination of Fines Pursuant to the Court's Order of March 5, 1992 (May 18, 1992). A motion for the imposition of additional fines is pending.

Campbell, CA. No. 71-1462, Order at ¶ 2 (Sept. 30, 1983).

^{93/} Green, CA. No. 90-793, Order (Sept. 25, 1992).

^{94/} Prevailing plaintiffs in cases brought under the civil rights laws are entitled to the payment of their attorneys' fees by the defendant. 42 U.S.C § 1988. Each of the major class action lawsuits are such civil rights cases.

of Occoquan,^{95/} more than \$500,000 in Campbell and Inmates of D.C. Jail;^{27/} and more than \$350,000 in Inmates of Modular Facility.^{98/}

Finally, since 1988, the District has been required to pay more than \$850,000 for the fees and expenses of the Office of the Special Officer.^{99/}

2. Tort cases

The failure to properly operate its prison system also results in substantial tort damage awards against the District. For example:

^{95/}(...continued)

^{95/} Twelve John Does, C.A. No. 80-1236, Orders (Nov. 17, 1988; June 25, 1980; Oct. 8, 1991).

^{96/} Inmates of Occoquan, C.A. No. 86-2128, Orders (Oct 1, 1990; Oct 10, 1991; Nov. 13, 1992; Dec. 11, 1992; July 8, 1993).

^{97/} campbell, C.A. No. 71-1462, Orders (June 7, 1984; Nov. 2, 1988; Jan. 17, 1989). Substantial additional fee demands are pending.

^{98/} Inmates of Modular Facility, C.A. No. 90-727, Orders (Jan. 8, 1991 and Mar. 4, 1992).

^{99/} This figure includes the fees and costs of the Special Officer and her assistants, as well as those of the experts engaged by the Special Officer. The Special Officer submits a request for fees simultaneously for all her cases and the court issues orders to reimburse the Special Master on a collective basis. See, e.g., Orders dated March 1, 1989, March 6, 1989, May 11, 1993, October 10, 1989, November 7, 1989, December 8, 1989, December 21, 1989, January 25, 1990, February 7, 1990, March 14, 1990, April 5, 1990, April 24, 1990, May 31, 1990, June 20, 1990, September 10, 1990, October 2, 1990, October 18, 1990, November 7, 1990, December 17, 1990, February 15, 1991, March 1, 1991, March 28, 1991, April 26, 1991, July 9, 1991, August 15, 1991, August 16, 1991, September 26, 1991, October 30, 1991, November 13, 1991, November 26, 1991, January 13, 1992, January 29, 1992, February 11, 1992, March 11, 1992, April 7, 1992, May 11, 1992, June 10, 1992, July 9, 1992, August 3, 1992, September 9, 1992, October 21, 1992, November 16, 1992, December 14, 1993, February 12, 1993, March 11, 1993, April 5, 1993, June 7, 1993, July 8, 1993, August 10, 1993, October 13, 1993.

- The District paid a \$500,000 settlement to the family of a prisoner who complained for three days of excruciating abdominal pain, but was seen only by unlicensed physician assistants who diagnosed him as suffering from an upset stomach. Finally, a compassionate correctional officer arranged for the prisoner's transfer to the D.C. General Hospital where his condition was immediately diagnosed as a small bowel obstruction. The prisoner died within 24 hours of arriving at the hospital. His condition could have been diagnosed easily by qualified staff at the prison and it is likely that he would have survived had he received prompt treatment.^{100/}
- A prisoner who was paralyzed after being stabbed and beaten by other prisoners won a \$950,000 judgment against the District.^{101/} The Court found the District negligent in failing to protect this prisoner from assault.
- Another prisoner who was paralyzed in a similar assault won \$1,000,000.^{102/} The Court found that the District had also negligently failed to protect this prisoner from assault.
- Another prisoner was awarded \$250,000 for serious injuries that he suffered as a result of the DOC's failure to maintain the prison's physical plant and to treat his injuries in a timely fashion.^{103/}
- The family of a prisoner, who died of a bronchial spasm after having been brutally raped and sprayed in his face with cleaning fluid by three prisoners, was awarded \$1,030,002.^{104/} Evidence in the case included testimony that correctional

^{100/} Asare v. District of Columbia, C.A. No. 90-1520 (D.D.C. 1990).

^{101/} District of Columbia v. Sterling, 578 A.2d 1163, 1164 (D.C. 1990).

^{102/} District of Columbia v. Bethel, 567 A.2d 1331, 1332 (D.C. 1990). See also "D.C. Jury Gives \$1 Million to Stabbed Inmate; 2nd Prisoner to Win Such," The Wash. Post, Oct. 1, 1987, at B1.

^{103/} District of Columbia v. Mitchell, 533 A.2d 629, 633 (D.C. 1987).

^{104/} Finkelstein v. District of Columbia, 1990 WL 36598 (D.C. 1990). See also "\$1 Million Award Against D.C. Upheld," The Wash. Post, Mar. 28, 1990, at B3.

officials observed the rape, and then later saw the prisoner lying naked on the floor of his cell for several hours before taking any action to assist him.

- In another case, the District paid \$150,000 for delaying over a two-year period to diagnose as cancerous a lump on a prisoner's **scalp**.^{105/}

Unfortunately, these are only a few examples of the dozens of cases that are filed annually against the District and either are successfully litigated to judgment or result in a monetary settlement. The District of Columbia paid \$4.4 million in 1992 alone for claims arising out of the operation of its prisons and jails.^{100/}

B. The Human Costs of Maintaining a Constitutionally Deficient Health Care System.

It is fairly easy to tally up the unnecessary fines, penalties, and sanctions that the District incurs because of its refusal to properly maintain its prisons or to comply with court orders. There are numerous additional significant consequences that arise from the District's failure to properly fund, and correctional officials' failure to properly manage, the correctional system. For example, the District has a very high rate of **recidivism**;^{107/} there have been two major riots in the District's **prisons**;^{108/} and prisoners are routinely killed, maimed, and disabled by violence and a lack of adequate health care.^{109/}

Crawford v. District of Columbia, C.A. 92-1871, Order (D.D.C. June 16, 1993).

^{106/} "District Slumps Under Liability Strain," Legal Times, Aug. 30, 1993, at 14.

^{107/} More than 1,000 parolees are returned to incarceration each year for violation of a condition of their parole. 1992 Statistical Index, supra n.4, at 350.

^{108/} See supra n.88.

^{109/} See discussion of tort cases supra at nn.104-108 and accompanying text.

A deficient and dysfunctional health care system presents another type of problem that results from the District's noncompliance with its constitutional and court-ordered obligations. Prisoners frequently have a greater need for health services than members of the nonincarcerated community. Many prisoners come from poor communities and have had little or no access to health care prior to imprisonment. At the time of their incarceration, many prisoners suffer from significant untreated, or insufficiently treated maladies, such as hypertension, diabetes and seizure disorders.¹¹⁰¹ Moreover, recent studies confirm that a high percentage of prisoners are or have been intravenous drug abusers.^W A prisoner's history of intravenous drug use places her or him at a higher risk not only for HIV infection, but also for other blood-borne diseases, and causes a deterioration in her or his general health. The HIV epidemic, the increasing incidence of tuberculosis and hepatitis in prison, and the health problems that result from poverty and chronic drug abuse create grave medical problems in the members of our local prison population.

¹¹⁰¹ The DOC does not keep statistics on the health problems of prisoners. However, the D.C. Prisoners' Legal Services Project receives a substantial number of requests for assistance from prisoners who suffer from serious chronic illnesses.

ill' See, e.g., Austin, Litsky, McCarthy, "Crimes Committed by D.C. Prisoners After Imprisonment: A Validation Assessment of the District of Columbia's Department of Corrections Community Risk Instrument" at 6, National Council on Crime and Delinquency, May 1989. This study found that 59.3% of the incarcerated District of Columbia felons in their sample "exhibit longstanding serious abuse based on documentary evidence indicating a longstanding pattern, or habitual substance abuse behavior lasting 5 years or more." The study also found that only 17.3% of the sample had no prior history of substance abuse.

Despite the serious health problems that D.C. prisoners experience, the prison health system is severely understaffed. The shortage of health care providers is exacerbated by the fact that many of the front line treatment staff are unlicensed, inadequately trained and poorly supervised paraprofessionals.^{112/} As a result of overwork and poor working conditions, many of the physicians responsible for providing treatment are overwhelmed and unresponsive to prisoners' needs.

There are numerous deficiencies in the prison health system.^{113/} These deficiencies include:

- chronic shortages of supplies and medications (at some institutions, prisoners are given expired medications, in other cases, prescriptions of necessary medications, including medications for psychiatric illnesses are periodically interrupted);
- lack of necessary emergency equipment, such as cardiac defibrillators, oxygen tanks, ambulances, and x-ray machines. Much of the available equipment is dysfunctional or in disrepair;

^{112/} The use of unlicensed medical staff has been the subject of litigation at several facilities. E.g., Twelve John Does, 668 F. Supp. 20 (D.D.C. 1987), reversed and vacated on other grounds, 841 F.2d 1133 (D.C. Cir. 1988); Inmates of Modular Facility, C.A. No. 90-727 (D.D.C.) supra at nn.51-63 and accompanying text; Inmates of Three Lorton Facilities, C.A. No. 92-1208, Complaint at § VIII.

^{113/} The deficiencies described in the text have all been identified by correctional medical experts in the context of the various class action prison cases. The most recent findings were revealed in Campbell and Inmates of D.C. Jail, Expert Reports, supra n.20; Twelve John Does, Medical and Mental Health Report at Central Facility, supra n.36 (the United States District Court subsequently adopted the Special Officer's report); Inmates of Modular Facility, C.A. No. 90-727, Trial testimony of Charles Braslow, M.D., (D.D.C. Nov. 10-24, 1990); Twelve John Does, Cohen, "Report on Medical Services, Maximum Security Facility at the Lorton Correctional Complex, District of Columbia Department of Corrections," (Jan. 25, 1993) [hereinafter "Medical Report, Maximum Security Facility").

- inadequate or nonexistent emergency response **plans**;^{114/}
- inadequate or nonexistent suicide prevention programs;
- lack of sinks in many examining rooms for physicians to wash their hands;
- lack of medically appropriate facilities to isolate prisoners with highly infectious diseases such as tuberculosis or measles;
- inadequate screening for tuberculosis;
- enormous delays in prisoners' ability to obtain treatment by specialists;
- lack of quality assurance program; and
- grossly inadequate medical record keeping system wherein records are frequently lost or misplaced because of chronic understaffing of support staff and prisoners' rights to confidentiality are not respected.

An expert engaged by the United States District Court recently described the health care provided to prisoners at the Maximum Security Facility as follows:

"The medical care system at Maximum fails to provide minimum levels of care to prisoners housed there. . . .

Every aspect of the medical system is defective, and contributes to the denial of access. Sick call is not available because medical staff do not go to the cell blocks as required. . . . Almost all the medical care at Maximum is provided by unlicensed providers whose training has not prepared them for any professional certification. . . .

^{114/} The lack of an emergency response plan has, in a number of cases, unreasonably endangered prisoners and may have resulted in unnecessary death. Medical experts who have evaluated the correctional health system have repeatedly documented instances where there have been lengthy delays in response to medical emergencies. *E.g.*, CDF Medical Report, *supra* n.21, at 124-128; CDF Mental Health Report, *supra* n.23, at 10-11; Medical and Mental Health Report at Central Facility, *supra* n.36, at 30-32; Medical Report, Modular Facility, *supra* n.61, at 20; Medical Report, Maximum Security Facility, *supra* n.113, at 19-23.

Emergency care is extremely limited. Prisoners requesting emergency care are often denied the care without being evaluated by medical practitioners Lack of adequate escort and transportation staff result in . . . unnecessary death because of delays in transportation and treatment Critically ill prisoners are sent back and forth to DCGH . . . without diagnosis or treatment, and prisoners are denied basic emergency life support via the 911 system. . . .

Dental Services are not provided in timely manner and patients with painful dental problems must wait months for evaluation and treatment Pharmacy services are inadequate^{"115/}

The consequences of these deficiencies are not abstract, but have a real and profound impact on individual prisoners. In one case involving a prisoner who had lung cancer that went undiagnosed for months, the Court's expert concluded: "The neglect is shocking. The patient had severe treatable pain for three months which was never appropriately diagnosed or treated."^{116/} Concerning another case, the Court's expert stated: "His care was totally neglectful, his severe infection was not properly diagnosed, and his death was hastened by his indifferent (almost absent) treatment."^{117/} In a third case, the Court's expert wrote: "His care was consciously deliberately inadequate to his condition, and put him at enormously high but unnecessary risk for blindness. He was deliberately refused essential therapy which compromised his sight and his life."^{118/}

^{115/} Medical Report, Maximum Security Facility, supra n.113, at 30. Although Health Services at the Maximum Security Facility are not currently under Court Order, Dr. Cohen's findings show that a state of disorder prevails in DOC-operated health services.

^{116/} CDF Medical Report, supra n.21, at 68.

^{117/} Id. at 71.

^{118/} Id. at 62.

Deficiencies in the delivery of health services are compounded by the HIV epidemic. According to statistics issued by the Center for Disease Control, the District has one of the highest incidence rates of HIV infection of any state or territory in the country.^{119/} The District of Columbia Agency for HIV/AIDS estimates in its five-year plan that 16% of the prison population is infected with HIV.^{120/} The Director of the DOC has testified that the rate is probably as high as 20%.^{121/} Although there have been no definitive local studies, studies in other jurisdictions demonstrate that the incidence of AIDS in prison is higher than the incidence of AIDS in the general population.^{122/} Other studies indicate that the rate of HIV infection among prisoners more closely approximates the infection rate among intravenous drug users.^{123/}

District of Columbia prisoners who are infected with HIV suffer a variety of significant problems, including inadequate health care, lack of confidentiality, and

^{119/} District of Columbia Agency for HIV/AIDS, Comprehensive HIV/AIDS Plan 1992-1996 at 1-1 (1992).

^{120/} Id. at 12-3.

^{121/} DOC Director Walter Ridley testified at the Department's budget oversight hearings in February 1993 that as many as 20% of all prisoners are HIV-infected at their time of intake into the correctional system. No seroprevalence study has been conducted to determine overall infection rates.

^{122/} E.g., T. Hammett and A. Daugherty, 1990 Update: AIDS in Correctional Facilities at 15 (Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice July 1991).

^{123/} E.g., Kantor, AIDS in Prison at 1, printed in San Francisco AIDS Knowledge Base (Mass. Med. Soc'y 1988).

discrimination in participation in work programs.^{124/} These problems are created by a lack of adequate resources by the District, a disturbing lack of understanding about the disease among correctional officials, and poor leadership among DOC officials. The clearest example of the DOC's failure to make a serious attempt to meet the needs of HIV-infected prisoners is its failure to identify and treat those prisoners who could benefit from care.^{125/}

IV. THE CONDUCT OF THE OFFICE OF CORPORATION COUNSEL CONTRIBUTES TO THE DISTRICT'S NONCOMPLIANCE

Improper conduct by the Office of the Corporation Counsel compounds the obstacles to obtaining the District's compliance with court orders. Compliance reporting is often inaccurate.F" and plaintiffs' efforts to obtain discovery concerning the District's

^{124/} Prisoners who are known by staff and other prisoners to be infected with HIV are frequently subjected to harassment, ostracism, and physical violence. Jane Doe v. District of Columbia, C.A. No. 92-635 (D.D.C. 1992) (case asserting right of 7 prisoners infected with HIV to have their medical information kept confidential; case recently settled).

^{125/} To compound the problem, the District frequently fails to apply for federal funds that could assist in the delivery of services to HIV-infected prisoners. For example, DOC is not taking full advantage of certain funding available under the Ryan White Care Act, 42 U.S.C. § 201 et seq., or from the Office of Substance Abuse Programs.

^{126/} Twelve John Does, Medical and Mental Health Report at Central Facility, supra n.36, at 34 ("[T]he Special Officer recommends that the defendants' monthly compliance reports be submitted under oath or affirmation [T]he defendants repeatedly submit compliance report responses that are inaccurate."). See also Campbell and Inmates of D.C. Jail, Order Appointing Special Officer, supra n.18, at 3 ("Significantly, the Court finds that defendants concealed . . . violations of the 1985 Order from the Court by not reporting them within 48 hours of their occurrence, as expressly required.").

compliance are routinely thwarted.^{127/} Judge William B. Bryant recently summed up the problem:

"You ask for certain information and you get hom-swoggled on it, you get misrepresentations, concealment. That doesn't take any money. That doesn't take any resources. All it takes is plain integrity."^{128/}

Moreover, the courts routinely sanction the District for its failure to comply with court rules and orders relating to discovery. As Judge Bryant stated:

"(T]he court takes notice of the on going struggle between the federal judiciary and the District of Columbia to bring the District, and in particular the Correctional Litigation Section in the Office of the Corporation Counsel, into compliance with the discovery Rules.

In the past three years, the federal courts have been forced to sanction the District repeatedly for flagrant abuses of discovery Comparing the discovery-related misconduct committed by the District before this court to that committed in [other cases] is a case of deja vu all over again. The District is certainly on notice as to where the problem lies: [prior cases in which discovery sanctions were ordered] all involved misconduct by counsel in the Correctional Litigation Section of the [Office of] Corporation Counsel, as does the present case. The District obviously remains tempted to exploit the full panoply of discovery abuses for which it has received severe sanctions, including default, in the past The District of Columbia cannot be permitted to achieve, whether through obduracy or sheer

^{127/} "[The Defendants' failure to file a Court-ordered] certification demonstrates, once again, how difficult it is for even this Court to obtain from the defendants reliable information necessary to monitor compliance with its orders. In this regard, the Court also finds that the defendants failed to produce in a timely manner numerous documents requested in discovery which evidenced significant problems in the delivery of medical and mental health care at the Jail. This was so even though many of these documents were clearly responsive to plaintiffs' document requests and were ordered to be produced pursuant to this Court's August 7, 1992 discovery Order." Campbell and Inmates of D.C. Jail, Order Appointing Special Officer, supra n.18, at 4.

Campbell and Inmates of D.C. Jail, Transcript, supra n.9, at Vol. I, p. 24.

incompetence, tacit exemption from the Rules that bind all other litigants in the federal courts."^{129/}

Other United States District Court judges have raised similar concerns about the District's conduct in litigation:

- "[t]he failure of the District of Columbia defendants to answer . . . amounts to either gross neglect at best, or at worst, willful misconduct"^{130/}
- "Significantly, the Court finds that defendants concealed violations of the 1985 Order from the Court The failure to report in the required manner has unnecessarily prolonged the discovery and proceedings in this case, and has hampered plaintiffs' ability to seek to enforce the orders of this Court, to the detriment of the plaintiff class."^{131/}
- "The District of Columbia has sought to crush the spirit and exhaust the resources of its opponents through a pattern of total nonresponsiveness. Such dilatory tactics must be deterred. If defendants' conduct in this case were not severely punished, future litigants might rationally conclude that the advantages accruing from abusing discovery outweigh the risks."^{132/}
- "The court in this case has granted repeated extensions of time to Corporation Counsel when the only stated reason was the 'press of other business.' In the pending motion to reconsider, the Corporation Counsel has failed to demonstrate that any corrective action whatsoever has been taken to preclude recurrence of the same derelictions in this and other cases.

^{129/} Coleman v. Long, C.A. No. 86-1029, Memorandum and Order at 14-16 (D.C.C. Apr. 8, 1993) (Bryant, J.).

^{130/} Mention v. Kelly, C.A. No. 89-405, Report and Recommendation III (D.D.C. July 22, 1993) (Robinson, Mag.).

^{131/} Campbell and Inmates of D.C. Jail, Order Appointing Special Officer, supra n.18, at 3-4 (Bryant, J.).

^{132/} Coleman, C.A. No. 86-1029, Memorandum and Order, supra n.129, at 14 (Bryant, J.).

Since sanctions are authorized for their deterrent value, they are entirely appropriate **here.**"^{133/}

- "[The District] willfully failed to comply with the Court's order requiring complete discovery responses. . . . The defendants' dilatory tactics have become part and parcel of their litigation techniques. . . . This cannot continue. Although this is not the way the Court prefers to see constitutional litigation proceed, the Court has no choice in the matter. The defendants have been repeatedly warned that a sanction like this would be forthcoming if defendants continue to ignore the Court's orders."^{134/}
- . "This court noted in [a prior case] that the Corporation Counsel may not 'fail to obey court-ordered discovery deadlines, repeatedly delay trials, and singlehandedly deny plaintiffs their rights to their day in court, and never be held accountable.' Yet this is precisely the sort of behavior which defendant has demonstrated in this case. The protracted, willful, inexcusable abuse of the discovery process by [the Assistant Corporation Counsel], the District of Columbia, and defendant has thus forced the court to enter a default judgment in this case, in order to ensure that abuses such as these will not continue."^{m!}

^{133!} Covington v. District of Columbia, C.A. No. 87-2658, Findings of Fact and Conclusions of Law on Defendants' Motion to Reconsider Sanctions at 15 (D.D.C. Feb. 20, 1990) (Lamberth, J.).

^{134/} Green, 134 F.R.D. at 3-4 (Hogan, J.) (sanctioning District under Fed. R. Civ. P. 37(b)(2)».

^{135/} Monroe v. Ridley, 135 F.R.D. I, 7 (D.D.C. 1990) (Lamberth, J.). See also Jane Doe, C.A. No. 92-635 (D.D.C. Jan. 13, 1993) (Oberdorfer, J.) (monetary sanction); Drew v. District of Columbia, C.A. No. 88-994, Order (D.D.C. Nov. 14, 1990) (Gessel, J.) (default entered under Fed. R. Civ. P. 37(b)(2), 37(d)»; Edelen v. District of Columbia, C.A. No. 88-664, Order (D.D.C. Feb. 23, 1990) (Harris, J.) (default entered).

IV. RECOMMENDATIONS

The Department of Corrections has numerous problems for which extensive recommendations could be made. The following points, however, are limited to areas that can assist the District to come into compliance with its court-ordered obligations.

1. Create an independent board -- comprised of officials from public safety agencies, citizens, and prisoners' rights advocates -- to monitor the operation of the DOC, issue reports, and make recommendations to the Mayor and the D.C. Council.

2. Establish an office in the DOC to monitor the District's compliance with corrections-related court orders, identify compliance problems, and initiate remedial action to help avoid costly contempt litigation.

3. Review the Correctional Litigation Unit of the Office of Corporation Counsel to identify the source of problems in the Unit and recommend corrective action. If problems are caused by a lack of staff, additional staff should be added to the Unit.

4. Establish an office in the DOC to identify and apply for federal and private grants and monitor the use of grant funds to ensure that future grants are not jeopardized by the misuse of initial funding. Grants could be particularly useful in dealing with HIV infection and substance abuse treatment issues.

5. Transfer the management of the correctional health care system from the DOC to the D.C. Commission on Public Health. The DOC has proven that it is not capable of running the health care delivery system. Moreover, the Commission on Public Health may be better able to provide a unified system of care, greater continuity and

opportunity to share resources among various District health care providers, and a morale boost for correctional health care providers.

6. Enact legislation that provides alternatives to incarceration and reduces or eliminates mandatory minimum sentences.

7. Develop programs to reduce recidivism -- including intensive parole supervision, drug treatment on demand, and greater vocational and educational programs for incarcerated prisoners -- as a way to decrease the prison population. The D.C. Council should also enact and fund the Model Correctional Systems Standards and Industries Act of 1993, which would provide prisoners with marketable employment skills and which is currently pending before it, as another means of reducing recidivism.

VIII.

THE HUD-D.C. INITIATIVE

COMMENTS ON THE
HUD-D.C. INITIATIVE IMPLEMENTATION PLAN:
"WORKING TOGETHER TO SOLVE HOMELESSNESS"

by The Washington Legal Clinic for the Homeless

The preceding case summaries chronicle a history of the District's failed efforts to effectively deliver social services to its poor and homeless individuals and families. A number of themes emerge from the summaries: the maladministration of social services within the District's agencies; a lack of cooperation and communication between the District's agencies and its nonprofit organizations, business community, and neighborhoods; inefficient and wasteful financial practices; a failure to take full advantage of available supplemental federal funding for social services; and an adversarial stance towards those constituencies that represent the District's poor and homeless citizens.

In the "D.C. Initiative," the District has signed on to create, in cooperation with the Department of Housing and Urban Development, a comprehensive program to address homelessness in the District." The Initiative recognizes the existence of many of the above "systemic" problems that have plagued the delivery of effective social services for decades, and commits the District to take actions to correct those problems. For example, the Initiative acknowledges that it is not enough to respond to individuals' needs for shelter; rather, a comprehensive program must confront the "variety of underlying human service

^{1/} D.C. Initiative Implementation Plan: "Working Together to Solve Homelessness" (issued Sept. 20, 1993).

requirements and economic and housing needs." Initiative at 5, **8.^{2/}** The Initiative also recognizes that long-term plans, not stop-gap measures, must be developed to address the numerous problems confronting homeless individuals and families. Id.

To address the "systemic flaws" in the delivery of services to the homeless in the District, the Initiative proposes to "replace" D.C.'s existing emergency-based system with a comprehensive "continuum of care" system that will coordinate the District's human services, housing, and educational and job training programs in order to deal effectively with the many problems homeless individuals and families confront. Id. at 5, 9. The proposed "continuum of care" system contains three elements: "(1) outreach/assessment, (2) transitional housing combined with rehabilitative services, and (3) placement into permanent housing" designed to meet the needs of particular homeless subpopulations. Id. at 5. The Initiative emphasizes, however, that while the Federal and District governments will obligate themselves "to provide assistance to the homeless" in these three areas, the homeless themselves have the "responsibility . . . to develop independent living skills to their maximum potential." Id. at 9.

The Initiative proposes to implement these goals through a "new public/private entity" to be established by the Mayor and D.C. Council. The new entity is envisioned as an "entrepreneurial and customer service driven" organization that will "consolidate and streamline housing development and services for homeless individuals and families." Id. at 5-6. This group will coordinate interagency efforts, develop a "centralized outreach

^{2/} The Initiative identifies numerous problems including mental illness, substance abuse, physical illnesses, and inadequate job skills and education. Initiative at 9, 22-23.

management information system," contract with experienced not-for-profit and other organizations to provide outreach, rehabilitative and housing services, and receive and disburse funds for programs. Id. at 5-6, 17, 50-51. The Initiative includes a "Partnership Agreement" between HUD and the District pursuant to which HUD will fund the District's efforts under the Initiative in three installments totalling \$20 million if the District satisfies specific goals by established deadlines. Initiative at 52-53.

Many of the cases discussed in this Report were brought to achieve the goals enunciated in the Initiative. For example, the goal of Pearson, Fountain, WLCH, and Stone, among other cases, has been to develop better and more transitional and permanent housing for homeless individuals and families. And the goal of Dixon, LaShawn A., Quattlebaum, and Lampkin, among other cases, has been to provide rehabilitative services to and public benefit programs for children in the foster care system, and homeless, poor, and mentally ill citizens to enable them to have solid bases on which to grow and live as responsible, fully productive citizens. The case summaries indicate, however, that the District, at every turn, has resisted making needed reforms, letting its promises substitute for performance. The Legal Clinic, therefore, while hopeful, remains skeptical about the District's pledge in the Initiative to cooperate with nonprofit groups and to embrace critical reforms that, until now, it has at worst opposed and at best simply failed to implement.

Unless the District sheds its past predilection for adversarial conduct on homelessness and poverty issues and adopts a new attitude of commitment and cooperation, people who are homeless will continue to be denied the opportunity to help themselves. The quality of social services and the performance of agencies responsible for providing

those services will improve only if District leaders directly confront bureaucratic inefficiencies and replace their adversarial attitudes with a new spirit of cooperation and inclusion. In order for the Initiative's goals to become a reality, the District must live up to its promises in the Initiative to seek the involvement of individuals and groups within the community who have demonstrated the expertise that will help the District achieve those goals and to encourage their full participation, without regard to their past interactions with the District government.

For our part, we offer the District our counsel, experience and, most of all, our support. Real progress in addressing homelessness is possible. The Initiative is a laudable first step. Now it is for the District to act upon its words.

IX.

THEMES AND RECOMMENDATIONS

THEMES AND RECOMMENDATIONS

According to estimates of the District of Columbia government, some 8,000 to 10,000 District residents are homeless.^{1/} Over 20 percent of all District residents live in poverty,^{2/} and approximately 27.3 percent of District children live in poverty, a rate exceeded by only three states.^{3/} These numbers are unacceptable and unnecessary in the capital of one of the most affluent nations in the world. Effective social welfare programs are critical to solving the "core" economic and social problems that have caused so many individuals and families to live on the edge. Were the District's leaders to dedicate themselves to developing a coordinated program of properly administered social services, they could increase the self-sufficiency of the poor and homeless, radically reduce the number of suffering people, and help establish a stronger and more peaceful community. "Until we get at the core [however] . . . the apple will continue to rot."^{4/}

As evidenced by the cases summarized in this Report, the District has been startlingly derelict in its administration of statutorily required social services. The District is currently being sued regarding its provision of public and subsidized housing, emergency shelter, child welfare services, education for homeless children, public benefits (e.g., Aid

^{1/} D.C. Department of Housing and Community Development, Comprehensive Housing Affordability Strategy of the District of Columbia 1992-1996 at 14.

^{2/} "Number of Poor Americans Rises for 3rd Year," The Wash. Post, Oct. 5, 1993, at A6 (citing 1992 Census figures).

^{3/} The Annie E. Casey Foundation, Center for the Study of Social Policy, Kids Count Data Book at 15 (1993).

Remarks of D.C. Police Chief Fred Thomas, supra p. 4.

to Families with Dependent Children ("AFDC"), Emergency Assistance (ilEA"), General Public Assistance ("GPA"), Medicaid, and Food Stamps), care and treatment for the mentally ill, and health care and other services to District prisoners. Many of these lawsuits predate the current District Administration, but the problems they seek to remedy have continued largely unalleviated.

Numerous federal and local judges have found these lawsuits to be well-founded, have chastised the District for its legally deficient and woefully inadequate provision of social services, and have castigated the District for its administrative and litigation practices. Judge Thomas Hogan, for example, characterized the Child and Family Services Division of DHS as replete with "outrageous deficiencies" and stated that the District has "failed to exercise professional judgment.S' Judge Harriet Taylor characterized District-run shelters as "virtual hell-holes" and concluded that the District had failed to "take reasonable steps to provide health-maintaining and accessible overnight shelter . . . in an atmosphere of reasonable dignity."^{6/} Judge Richard Levie dismissed as "simply . . . unacceptable in our society and system of laws" the District's argument that court orders and judicially imposed fines prevented it from complying with the 1987 Emergency Family Shelter Act.¹¹ Judge William Bryant, commenting on the District's response to discovery requests, stated that

^{5/} LaShawn A. v. Dixon, 762 F. Supp. 959, 997 (D.D.C. 1991), affd and remanded, 990 F.2d 1319 (D.C. Cir. 1993).

^{6/} Atchison v. Barry, C.A. No. 88-11976, Supplemental and Expanded Findings of Fact at 5, 9 (D.C. Super. Ct. Jan. 12, 1989) (quoting D.C. Code).

^{7/} Fountain v. Kelly, C.A. No. 90-01503, Memorandum Opinion and Order at 67 (D.C. Super. Ct. Oct. 12, 1990), vacated, Memorandum Opinion and Order (Nov. 15, 1991), affd, No. 91-CV-1462 (D.C. 1993).

when one asks the District for information, "[y]ou get hom-swoggled on it, you get misrepresentations, concealment. That doesn't take any money. That doesn't take any resources. All it takes is plain integrity."^{8/}

The District government's own reports have long focused on many of the problems addressed in these lawsuits -- yet the District has failed to heed their recommendations, preferring instead to blame the victims and their lawyers for the problems. Six years ago, for example, then-Mayor Barry's Blue Ribbon Commission on Public Housing evaluated the District's performance during the previous decade as follows:

"The failure [of the District] to address successfully the public housing program deficiencies has been documented over the last 15 years by five separate audit reports -- four by HUD and one by the D.C. Auditor. Most of the problems identified have not been resolved. To the contrary, the properties continue to decay and modernization plans languish. The backlog of repair requests and the number of vacant units increase, and the rent delinquencies grow. As this disheartening process continues, the magnitude of the effort necessary to reverse it increases further and the problems they generate are compounded.

Equally important, ... is the absence of a cohesive program and structure to promote and serve resident interests.v"

In 1990, the Rivlin Commission's verdict on the District's handling of its public housing program was much the same: "Serious operating deficiencies exist in both the management and maintenance of public housing sites Critical staff vacancies and inadequately

^{8/} Campbell v. McGruder, C.A. No. 71-1462, Transcript of Hearing on Plaintiffs' Motion for an Order to Show Cause Why the Defendants Should Not Be Held in Contempt, Vol. I at 24 (D.D.C. Apr. 6, 1993).

^{2/} Mayor Barry's Blue Ribbon Commission, Summary of Final Report on Public Housing in the District of Columbia at 3 (Oct. 1987) [hereinafter "Blue Ribbon Commission Report"]. The District's failure to address deficiencies in its public housing necessitated the filing of the Pearson lawsuit.

trained staff also impede the ability of the department to manage, renovate, and rehabilitate units."^{10/} The Rivlin Commission also found that the "process of enrolling in assistance programs . . . [is] dehumanizing and poorly coordinated with other programs," and that "the District's foster care [system] . . . does not meet standards of appropriate care and is unnecessarily expensive for the city because it does not make full use of available federal funds."!!!

Children are too often the most vulnerable victims of the District's neglect. Approximately 1,500 children go to sleep each night in District shelters, about 400 children remain in foster family homes that are unlicensed, overcrowded or both, and nearly 80 children are in residential treatment care facilities over 100 miles from their families.^{12/} More than 1,500 cases of child abuse and more than 5,700 cases of child neglect were reported in the District from January through October 1992, while the backlog of cases awaiting investigation spiraled.W

Indeed, as revealed by the cases discussed in this Report, the most disturbing aspect of the District's performance is its apparent indifference to and disregard for the human

^{10/} Financing the Nation's Capital: The Report of the Commission on Budget and Financial Priorities of the District of Columbia at 3-27 (Nov. 1990) [hereinafter "Rivlin Report"]. The Rivlin Commission was chaired by Dr. Alice M. Rivlin, the preeminent economist who currently serves as the Deputy Director of the Office of Management and Budget. Dr. Rivlin was formerly the Director of Economic Studies at the Brookings Institute and the Director of the Congressional Budget Office.

^{11/} Id. at 1-14, 3-21. The District's failure to address the deficiencies of its foster care system necessitated the filing of the LaShawn A. lawsuit.

^{12/} Children's Defense Fund, District of Columbia Office, Healthy. Housed and Safe? A Progress Report on the District's Children at 2 (1993).

^{13/} Id.

needs of its residents. The District seems to have forgotten that each of its decisions affects individual lives in the most basic ways. When the District arbitrarily denies or delays EA or Food Stamps or arbitrarily terminates GPA or Medicaid, D.C. citizens go hungry, are evicted from their homes, or lose essential medical care.^{14/} When the District fails to use available federal funding to repair vacant public housing, families who cannot get into the ever decreasing number of homeless shelters live on the streets, and the vacant houses become magnets for vandalism.W When the District neglects children in its child welfare system, many of them bear emotional and physical scars for the remainder of their lives.^{16/} When the District cuts AFDC benefits instead of administrative costs, parents are unable to provide their children with the basic necessities of life.^{17/} When the District fails to provide people who are mentally ill with living accommodations that are less restrictive than hospitalization, District citizens who are capable of living fuller, more independent lives are warehoused in hospitals or live under bridges and on the streets, and millions of public dollars are wasted.P' When the District fails to apply for funding and reimbursements to which it is entitled for EA, Medicaid, foster care or family shelter, or is denied such federal funding because it has failed to comply with federal regulations or

^{14/} Feeling, p. 183 (EA); Franklin, p. 155 (Food Stamps); Little, p. 169 (GPA benefits); Wellington, p. 201 (Medicaid). Citations to " p. ____ refer to the various case summaries in this Report.

Pearson, p. 119.

LaShawn A., p. 21.

iu Quattlebaum, p. 213.

^{18/} Dixon, p. 237.

to provide adequate documentation of its eligibility, thousands of District residents are denied the very benefits that would enable them to eat, receive essential mental health treatment, or have a roof over their heads.^{19/}

So why, after years of complaints, numerous reports, and scores of lawsuits, do these problems continue to exist? Why is the District unable or unwilling to act positively to face these problems? Contrary to the District's frequent assertions, the failure is not due primarily to inadequate funding. In fact, this Report demonstrates a history of wasteful and failed financial practices by the District itself. For example, the District lost approximately \$14 million annually because it had not established its eligibility under the Adoption Assistance Act;^{20/} the District paid "welfare motel" operators up to \$2000 per month to house a family while nonprofit operators could have provided that housing for less than \$1000 per month;^{21/} the District failed to obligate or spend more than \$158 million of Federal and District funds earmarked to renovate vacant public housing which could have

^{19/} Fountain, pp. 85-86 (District is years behind in procuring matching federal funds for family shelter program; may lose over \$2.3 million in such funding for failure to document properly provision of shelter to homeless families; District has ceased filing for federal matching funds); Feeling, pp. 199-200 (DHS routinely fails to file in timely manner for federal EA reimbursement. and HHS defers payment pending on-site reviews; District also fails to request full amount of reimbursement in quarterly applications); Quattlebaum, p. 221 (District fails to obtain full Federal AFDC reimbursement); LaShawn A., p. 34 (District denied about \$14 million in federal funding because DHS failed to establish eligibility under Adoption Assistance Act for children entering system, to properly document operating costs, and to comply with claim filing procedures; District lost about \$7 million in Medicaid funding because DHS failed to establish children's eligibility); WLCH, pp. 64-65 (District allegedly has failed to seek reimbursement under Social Security Act for 50% of its EA program operating costs; District's partial withdrawal from Federal EA program will cost it at least \$1.4 million annually).

^{20/} LaShawn A., p. 34.

^{21/} Fountain, pp. 76, 81.

housed many of these families at little cost to the District after collection of rent and payment of federal subsidies;^{22/} and the District withdrew from part of the Federal Emergency Assistance program, thereby losing, by its own estimate, at least \$1.4 million which could have funded emergency shelters.^{23/} This is not to say that poverty in the District can be eliminated with existing funding allotments or that the District does not sorely need additional funding to finance housing assistance, increase benefit levels, and fund social programs in order to help its citizens rise out of poverty. But the severity of the specific program deficiencies described in the individual cases in this Report are rarely due to a lack of adequate resources -- except when such lack is the result of the District's poor financial practices.

Nor is the failure to provide effective social services due, as the District argues, to allegedly burdensome litigation and consent decrees -- a situation one court likened to a child, having killed his parents, asking the court for mercy because he was an orphan.^{24/} If the District ran its programs lawfully, the District would not be subject to the scores of consent decrees and court orders about which it complains so vociferously. Regrettably, however, litigation too often is the only path to improvement. District residents bring suits as a last resort after exhausting informal efforts to negotiate with the District. The litigation does no more than give peaceful expression to the anger and frustration of those

Pearson, pp. 119-120.

^{23/} WLCH, p. 64.

^{24/} "Shelter Conditions Deplored -- Homeless Testify in Suit Against D.C.," The Wash. Post, Mar. 23, 1990, at B7.

living in poverty who might otherwise act with violence or give up all hope. As the independent Rivlin Report so aptly stated, the solution is in fact quite simple:

"The District should make every effort to avoid the failures in public service that have led to consent decrees. These failures cause human suffering and undermine the public confidence in the humaneness and effectiveness of the District government, as well as causing unnecessary legal and other costs. Every effort should be made to provide a level of service that will make it possible to avoid consent decrees in the **future**."^{25/}

The District's failure to provide effective and responsive services to its homeless and poor population can be corrected in large part by practical solutions that address existing bureaucratic inefficiencies and maladministration. But the crucial need is for leadership that is committed to effective, fair, and humane services for the District's neediest citizens. From the Executive offices of the District to the individual intake sites of the District's agencies, there is evident a lack of leadership that translates into governmental indifference to the needs of the District's poor residents. Without a broad-based commitment by the District government to provide necessary services, administrative improvements will be next to impossible to achieve, the efforts of individual dedicated workers will continue to be only a drop in the bucket, and the District will continue to squander millions of public dollars on fines and attorneys' fees. With strong leadership, on the other hand, problems could be confronted directly and resolved, administrative improvements would fall into line, and it would be possible to use public funds effectively and efficiently for their intended purpose -- the provision of essential social services for the poor and homeless.

^{25/} Rivlin Report, supra n.10, at 2-35.

Sections I and II below discuss the dual problems of ineffective leadership and bureaucratic maladministration. Section III then presents recommendations for addressing these problems.

I. THE DISTRICT'S APPROACH OF CONFRONTATION AND DENIAL IS COUNTERPRODUCTIVE

This Report demonstrates that, when made aware of problems in the administration of its social services programs, the District adopts an attitude of denial, confrontation, and defensiveness -- indeed, of battle. For reasons unknown to outsiders, the District has almost uniformly refused to work with nonprofit service organizations and citizens' representatives to resolve problems and create solutions. When such groups have sought to resolve a problem informally with the District, and thus avoid litigation, they have generally been rebuffed.^{26/} And in the rare instances in which the District has discussed improvements prior to being sued, it has generally done so with little real commitment to **change**.^{27/} The District's refusal to negotiate solutions has forced plaintiffs to initiate litigation -- ultimately at a much higher cost to the District, and much unnecessary suffering by D.C. residents. The District has generally refused to negotiate improvements; indeed,

^{26/} E.g., Stone, p. 148 (District's refusal to adjust rental allowances and refund overpayments of rent despite entitlement to full federal reimbursement of rental adjustments forced plaintiffs to initiate lawsuit); Johnson, p. 101 (District rejected CCNY's offer to run shelter slated for closure if District paid utilities).

^{27/} E.g., LaShawn A., p. 27 (fruitless efforts by public interest groups and family law practitioners to reach informal resolution regarding deficiencies in DHS' emergency care system for children); Lampkin, pp. 91-92 (D.C. Board of Education delayed implementation of school transportation plan for homeless children despite assurances of immediate action; District ultimately ran pilot transportation program for less than six months); Pearson, p. 123 (verbal commitment to renovate vacant public housing units not followed by any real progress).

the District has a policy of not entering into consent decrees voluntarily, regardless of the merits of a case.^{28/}

On those occasions when the District has entered into settlement agreements or consent decrees, it has generally done so under duress.^{29/} Moreover, even when it has played a major role in drafting such agreements or decrees, the District has subsequently made little real effort to comply with them.^{30/} Only repeated motions for contempt by plaintiffs,

^{28/} E.g., Atchison, p. 55 (after failing to comply with 1989 Consent Decree shelter provisions, Corporation Counsel attorneys represented they could not enter into any further consent decrees); Pearson, p. 124 (District refused to sign consent decree committing it to reduce vacant public housing); WLCH, p. 63 (District refused to enter into formal binding settlement agreement).

^{29/} E.g., Franklin, p. 160 (District entered into negotiations at Court's insistence); LaShawn A., pp. 36-37 (after court found District liable for constitutional and statutory violations within child welfare system, DHS negotiated binding implementation plan, including appointment of monitor, to correct deficiencies); Dixon, pp. 242-245 (District agreed to negotiate each time plaintiffs filed or threatened to file motions for contempt or for appointment of special master in 1982, 1986, 1989, and 1991); Atchison, p. 51 (at plaintiffs' behest and with court's assistance, parties negotiated settlement, which the District later violated, concerning emergency shelter in lieu of trial on motion for permanent injunction); WLCH, pp. 62-63 (District entered into nonbinding Memorandum of Understanding in exchange for dismissal of complaint; when District refused to enter into binding agreement, plaintiffs forced to file second complaint).

^{30/} E.g., Dixon, pp. 242-249 (despite creation of negotiated agreements in 1982, 1987, 1989, and 1992, District failed to comply with its obligations); Franklin, pp. 161-162 (District violated numerous provisions of settlement agreement; discussions with plaintiffs to resolve problems of no avail); Samuels, p. 140 (District has failed to comply with much of 1987 Consent Judgment or has complied only after threat of contempt); Stone, p. 150 (District took five years to comply with agreement to reimburse tenants for overpayments of rent); Walls, p. 114 (District ignored Judge Smith's preliminary injunction requiring District to develop plan to provide shelter for homeless families); Feeling, pp. 190-198 (although District negotiated consent judgment in 1986, it has failed to comply with critical terms; District has now sought to be relieved of having to comply with those terms and has submitted legislation designed to obviate its responsibilities under agreement). The overview of correctional facility litigation presents numerous additional examples of the District's failure to comply with the terms of negotiated agreements. E.g., Campbell, p. 283 (continued...)

contempt judgments by a court, or the appointment of a Special Master seem to generate any improvement.W **As** one Federal judge characterized the District's own summary of its actions, "nothing is done except at the end of a cattle prod [T]he cattle prod is a motion for **contempt**."^{32/}

In short, the District's strategy when confronted with deficiencies in its administration of social services has been to devote its efforts and funds, not to trying to improve services for its poor and homeless residents, but instead to denying the deficiencies

^{30/}(...continued)

(despite District's agreement to a 1985 remedial stipulation to reduce the population at the D.C. jail, District failed to satisfy any of the requirements).

^{31/} Almost every case discussed in this Report demonstrates that judicial arm twisting is required to achieve even minimal improvements in the delivery of social services. E.g., Atchison, C.A. No. 88-11976, Memorandum Opinion at 8 (D.C. Super. Ct. Dec. 21, 1989) (District's compliance with consent order "frequently coerced under threat of contempt or other court action") (Taylor, J.); Jerry M., C.A. No. 85-1519, Memorandum Order J at 66 (D.C. Super. Ct. Aug. 21, 1991) (court stated that District is "impervious to all but the most staggering of monetary sanctions") (Urbina, J.); Dixon, p. 249 (court asserted that its contempt powers and appointment of special master are most effective weapon against District's noncompliance with court's orders); Pearson, pp. 126-127 (court appointed Special Master to evaluate deficient DPAH operation and recommend strategies to bring it into compliance with HUD public housing laws); Franklin, p. 164 (District's repeated violations of settlement agreement regarding Food Stamp program forced court to appoint special master); Feeling, pp. 190-191 (despite 3-year period of negotiations which resulted in consent judgment, District has failed to comply with critical elements of judgment; hence, plaintiffs have filed three contempt motions, two of which resulted in new court orders); Samuels, pp. 140-141 (motion for contempt and sanctions filed in response to District's failure to comply with decree denied in the light of District's compliance with Decree after motion filed). The overview of correctional system litigation presents numerous additional examples of the need to use judicial powers to force minimal improvements. Overview of Prison Cases, p. 279.

^{32/} Consolidated cases of Campbell v. McGruder, C.A. No. 71-1462, and Inmates of D.C. Jail v. Jackson, C.A. No. 75-1668, Transcript of Hearing on Plaintiffs' Motion for an Order to Show Cause Why the Defendants Should Not Be Held in Contempt, Vol. I at 10 (D.D.C. Apr. 6, 1993) (Bryant, J.).

and fighting against efforts to remedy them. Most troubling is the District's predilection to take drastic action at the expense of its citizens -- to withdraw from a federal program, pass emergency legislation, or incur fines -- in order to avoid improving its social services programs. The most egregious example is the District's decision to withdraw from part of the Federal Emergency Assistance program, and hence to forego, by its own estimate, at least \$1.4 million per year in federal funding, just to deprive a federal court of jurisdiction and thus avoid having to provide emergency shelter to eligible families in compliance with federal law.^{33/} (The District has spurned such federal assistance for emergency shelter at a time when it is hoping to obtain federal funds for its homeless service programs under the HUD-D.C. Initiative.) Equally disturbing are the District's efforts to change laws after the initiation of litigation or the entry of judgment in attempts to lessen or nullify its legal obligations to improve social services.^{34/} Finally, the District has elected to pay millions of dollars in contempt fines rather than use those public funds to improve services for its

WLCH, p. 64. Plaintiffs believe that the District's estimate is low.

^{34/} E.g., Atchison, p. 55 (District obtained repeal of Initiative 17 to nullify right to shelter); Fountain, pp. 79, 82 (District amended 1987 Emergency Family Shelter Act to eliminate entitlement to shelter and support services, and to minimize District's obligations regarding same); Feeling, p. 197 (at Mayor's initiation, District Council enacted and Mayor signed emergency and temporary legislation in effort to modify Consent Judgment regarding time within which District must provide approved applicants with EA); Dixon, pp. 250-253 (in response to Judge Robinson's appointment of Special Master, Mayor proposed, but then withdrew, emergency legislation to gut District's obligation to provide mental health services; legislation may be resubmitted in future); Samuels, 669 F. Supp. at 1144 (District-promulgated regulation giving DPAH authority to nullify hearing officer decisions it found to be "impractical" or "uneconomical" struck down as violative of federal law).

citizens.^{35/} Indeed, the amount paid in fines at times could have funded in full, or at least in part, the programs the District fought against improving.

At the root of the problem lie the decisions of District leaders over the years to confront, rather than cooperate with, nonprofit service providers and citizens' representatives, and to avoid, rather than acknowledge, their obligations to the District's neediest citizens. The District's policies of resistance, obstruction, delay, and obfuscation demoralize the civil servants who are struggling to serve the public and encourage them to resist complying with the law. The District's leaders must abandon excuses and stop placing blame on the poor, their advocates and the courts.

If responsible public officials attacked the problems rather than the victims and their court judgments, if they confronted head-on the challenges described in this Report's case summaries, and if they sought to work with rather than against the poor and their advocates, many of the problems could be solved and nonprofit service providers and citizens' representatives would forego litigation in favor of their preferred goal of cooperation and mutual assistance. With its commitment to the HUD-D.C. Initiative, the District appears to be moving in the direction of such cooperative endeavors, but the depth of the District's commitment to such cooperation remains to be seen.^{36/}

^{35/} E.g., Atchison, p. 54 (District incurred over \$4 million in fines for failure to improve shelter conditions); JeTtY M., p. 268 (District has incurred hundreds of thousands of dollars in fines for failure to improve juvenile detention conditions); Overview of Prison Cases, p. 302 (District has been assessed more than \$1.7 million in fines for failure to comply with court orders mandating essential improvements in the District's correctional institutions).

^{36/} See discussion supra p. 321.

II. BUREAUCRATIC INEFFICIENCIES AND MALADMINISTRATION EXACERBATE THE DISTRICT'S INABILITY TO PROVIDE EFFECTIVE SOCIAL SERVICES

Assuming that the District is willing to change its attitude and begin working with others to improve services, the focus turns to the administrative problems that have plagued the District's programs. Again, the problems of maladministration begin at the top and seep down to each level at which services are provided.

The key areas of mismanagement and maladministration are easy to identify. The individual case summaries in this Report reveal the same problems that have been documented in previous studies performed at the District's behest. On the macro level, there is a lack of coordination and communication among the various agencies that provide social services programs and a corresponding lack of management in the provision of services.¹ On the micro level, individual agencies or offices often give applicants

¹ Rivlin Report, *supra* n.10, at 1-14 ("The process of enrolling in assistance programs was found to be dehumanizing and poorly coordinated with other programs. One family can have as many as six different case workers assigned from various agencies."); *Dixon*, pp. 247, 252 (appointment of permanent Commissioner on Mental Health Services has been pending for 2 years); *LaShawn A.*, 762 F. Supp. at 974-75 ("Part of the [Child and Family Services Division of DHS'] failure [to expedite permanent placement through adoption] can no doubt be attributed to its noncompliance with its own policy that children with a goal of adoption be referred to the [Adoption and Placement Resources Branch] within three days of setting that goal The blame . . . [also] lies jointly with Corporation Counsel."); *Feeling*, pp. 191-193 (interagency task force and task force coordinator appointed in response to plaintiffs' first contempt motion; failure of task force to meet regularly and vacancies in coordinator position led to second contempt motion); *Lampkin*, p. 96 (District's failure to coordinate social services and shelter placement with education resulted in homeless children missing meal programs or school activities in order to travel great distances to and from school); *Jerry M.*, pp. 260, 270 (lack of cooperation among D.C. Public Schools, YSA, and DHS impedes reform of juvenile justice system; understaffing and red tape in the District Office of Personnel and DHS' contracting review office hinders compliance).

(continued...)

inadequate, inconsistent, or even incorrect information regarding application processes and eligibility requirements for **programs**.^{38/} In addition, caseworkers wrongfully, and even arbitrarily, delay reviewing applications, deny applications, delay providing benefits to eligible persons, provide deficient services, and offer inadequate or even erroneous information regarding applicants' appeal **rights**.^{39/} The same deficiencies cause these

^{37/}(...continued)

In the words of the District's public health commissioner, Mohammed Akhter, "[a]nything you want to do in the city takes a long time It takes longer to put a contract, or make a hire than it takes to make a baby." "D.C. Could Face TB Epidemic, Panel Warns," The Wash. Post, Nov. 5, 1993, at B3.

^{38/} E.g., Franklin, pp. 158, 161-162 (DHS staff failed to advise eligible homeless families of eligibility for Food Stamps or of rights to expedited service, misinformed applicants about program, discouraged applicants from applying for benefits); Little, pp. 173-174 (DHS caseworkers provided potentially misleading information concerning availability of GPA benefits; mailed legally defective GPA termination notices that contained fictitious legal citations, contradictory appeal information and conclusory boilerplate explanations of individual termination decisions; and inadequately explained significance of eligibility criteria to clients); Wellington, pp. 207-209 (alleges DHS caseworkers failed to inform applicants of availability of EPSDT program); WLCH, p. 60 (alleges OESSS workers erroneously told families shelter was unavailable or that they were ineligible for shelter despite satisfaction of eligibility criteria).

^{39/} E.g., Franklin, pp. 158-159, 161-162 (DHS wrongfully denied applicants assistance in applying for Food Stamps, failed to process applications in a timely manner, and prevented applicants from receiving expedited or regular Food Stamps within statutorily mandated time periods); Motley, p. 231 (DHS workers adopted policy of denying any application they could not resolve within 30-day time frame); Jones, p. 232 (DHS denied GPA benefits arbitrarily and simultaneously terminated food stamps and medical assistance benefits in contravention of laws requiring that eligibility for such assistance not be tied to GPA benefits); LaShawn A., pp. 30-31 (DHS failed to properly provide for children in emergency care and adoption system, and placed children in inappropriately restrictive and inadequately monitored institutions); WLCH, p. 61 (OESSS staff improperly denied shelter without written notice and without informing applicants of right to appeal); Feeling, pp. 187-191 (DHS failed to provide EA within eight days from date of completed application and failed to provide written reasons for denial of EA or notice of the right to a fair hearing); Wellington, pp. 206-207, 209 (alleges DHS fails to process Medicaid
(continued...))

unnecessary errors: inadequate training and insufficient supervision of workers, staff shortages leading to overloaded caseworkers, insufficient administrative support, and misallocation of human and monetary resources.^{40/}

^{39/}(...continued)

applications within requisite 45 days; does not send recertification forms to Medicaid recipients before their benefits lapsed; and does not process recertification forms in a timely manner); Little, p. 173 (DHS provided misleading written notices to terminated GPA recipients which contained contradictory information about the availability of aid pending appeal).

^{40/} E.g., Rivlin Report, supra n.10, at 1-14, 2-18, 2-21, 2-26, 2-27, 2-35, 3-2, 3-23, 3-24, 3-35 (describing overloaded caseworkers; "countless examples of ineffective management of government resources," bloated administrative costs and overstaffing in certain offices); Office of the Inspector General, Audit Rep.: Dept. of Public and Assisted Housing [hereinafter "DPAH Audit Report"], at 24, 27, 33, 35 (Sept. 30, 1992) (excessive maintenance and administrative staffing levels at DPAH with little supervisory oversight) LaShawn A., pp. 29, 32-33 (DHS caseworkers were inadequately trained and supervised; lack of computerized tracking system; staff shortages (due in part to its failure to fill vacancies) and excessive caseloads were partly responsible for deficiencies in child welfare program; majority of DHS' child welfare budget spent on expensive out-of-home care for children rather than on less costly in-home or community-based services); Jeny M., pp. 264, 268 (abuse of juveniles in detention facilities caused in part by inadequate supervision of staff; District's refusal to allocate adequate fiscal and human resources greatly impeded its development of court-ordered continuum of services for delinquent juveniles); Motley, No. 74-13, Memorandum and Order at 3 (July 24, 1985) ("Plaintiffs established that workers were not adequately trained, properly supervised or instructed with respect to procedures. There was no current AFDC procedures manual."); Feeling, p. 198 (11 of 49 caseworker positions vacant as of September 1992); Pearson, p. 122 (DPAH failed to use HUD modernization funds to upgrade public housing units or occupy vacant units); Quattlebaum, pp. 221-222 (District cut AFDC benefits when same savings could have been achieved by cutting bloated administrative costs; District's AFDC administrative costs highest in the nation and nearly two and one-half times the national average); Dixon, p. 237 (misallocation of resources to St. Elizabeths rather than to alternative, less restrictive, community-based mental health services); Franklin, p. 165 (Special Master's report recommended additional training of workers); Overview of Prison Cases, pp. 306-307 (despite serious health problems that D.C. prisoners experience, prison health system is severely understaffed; many existing staff are unlicensed, inadequately trained, and poorly-supervised paraprofessionals).

The District has also failed to maximize federal funding opportunities.^W As the Rivlin Commission documented, "[t]here are numerous cases where federal money has gone untapped or **unspent**."^{42/} In fiscal year 1989, for example, "the lost opportunity for federal assistance was \$16.2 million."^{43/} One reason for such lost opportunities is the District's failure to coordinate and monitor the federal grant applications of its numerous agencies. Other contributing factors include time-consuming administrative procedures, staff shortages, and the enormous effort required to win and spend a **grant**.^{44/}

III. RECOMMENDATIONS

The above review of the causes of the District's failure to provide adequate social services reveals the road to improvement. Indeed, the recommendations for improvement are quite basic. First and foremost, the District should change its basic approach to the problems it faces. If the District government is to solve the ongoing bureaucratic and administrative deficiencies that lead to the violation of the legal rights of its citizens and thereby generate lawsuits, its leaders must accept the responsibility for those deficiencies that countless courts and commissions have placed at their doorstep, and commit themselves to eliminating them. The District should adopt an entirely new philosophy that emphasizes working with, rather than against, nonprofit service organizations and citizen advocacy groups to provide social services effectively, efficiently, and economically. As

^{41/} See supra p. 7.

^{42/} Rivlin Report, supra n.10, at 2-8.

^{43/} Id.

^{44/} Id. at 2-1 to 2-9.

Mayor Kelly has perceptively observed: "You have to change the whole ethic, the whole philosophy, the whole attitude, the whole **culture**."^{45/} Now the District needs to act on those words. Initiative and motivation start at the top; only individuals at that level can inspire workers to turn their agencies around and make the District a top-notch service provider. The District is not without help; private service organizations and advocacy groups are ready and eager to provide ideas and assistance. Such a public-private venture -- hardly a novel idea -- could achieve remarkable **progress**.^{46/}

On a technical level, the District should improve the administration of its social services programs in a number of ways. No new or radical recommendations are needed on this score. The consent decrees, settlement agreements and court orders in the cases summarized in this Report detail the specific reforms needed in individual programs. And the previous reports solicited by the District enumerate numerous additional recommendations for improving the District's administration of its social programs.^{S'} As

^{45/} "At Midterm, Kelly Lags in Aiding Poor," The Wash. Post, Feb. 4, 1993, at A1. (quoting Mayor Kelly in an interview regarding the District's provision of housing and human services).

^{46/} Mayor's Advisory Task Force on Homelessness Report at 60-63 (Oct. 7, 1992) [hereinafter "Mayor's Task Force Report"]; HUD-D.C. Initiative, discussed pp. 321-324; House Comm. on Gov't Operations, Mismanagement in Programs for the Homeless: Washington, D.C., as a Case Study, H.R. Rep. No. 366, 102d Congo 1st Sess. (1991) (based on study by the Human Resources and Intergovernmental Relations Subcommittee) (criticizing District's rejection of more economical homeless services provided by nonprofit organizations); Rivlin Report, supra n.10, at XV.

^{47/} Rivlin Report, supra n.10, at xvii-xxv; Blue Ribbon Commission Report, supra, n.9, at 1-8 to 1-14, 11-9 to 11-15, 111-4 to 111-5, IV-3 to IV-4, V-4 to V-6, VI-2 to VI-3, VII-2 to VII-3, VIII-7 to VIII-13; Mayor's Task Force Report, supra n.46, at 9-63 (50 specific recommendations for alleviating the homeless crisis); DPAH Audit Report, supra n.40, at 13-14, 20-21, 31, 43, 46-47, 52, 55, 58, 61, 66-67, 73.

the District itself has recently recognized in its commitment to the HUD-D.C. Initiative, the District should consolidate and streamline its provision of services, thus providing its residents with a continuum of services.^{48/} On the most practical level, the District must encourage and reinforce the good faith efforts of its workers by giving them up-to-date training in the substantive requirements of the programs they administer and providing them with critical administrative support. Finally, the District should maximize federal funding and free up additional funding for services by reducing the unwieldy, and often unnecessary, administrative components and costs of programs.^{49/}

Reform of the District's social services programs should begin with a review of the pertinent consent decrees and settlement agreements signed by the District and the past reports generated at the District's behest. The Legal Clinic recommends that the District establish a steering committee composed of beneficiaries of the programs, District officials, agency heads, advocates for the poor and homeless, business leaders and directors of nonprofit service organizations to review the plethora of existing detailed recommendations and develop a concrete and realistic plan for improving the District's provision of social services.

It is not merely the District's elected leaders, but every individual who lives or works in the District of Columbia, who has a role to play in helping the District effectively

^{48/} Rivlin Report, supra n.10, at 2-26, 2-33, 3-2, 3-28; HUD-DC Initiative, supra p. 321; Mayor's Task Force Report, supra n.46, at 14, 17-18, 20, 22, 24, 29, 30-31, 33, 43-44, 47, 49-50, 55, 58; Blue Ribbon Commission Report, supra n.9, at 13.

^{49/} Rivlin Report, supra n.10, at 2-8, 2-11, 3-21 (recommendations for obtaining and spending federal grants).

provide the social services that are critical to eliminating the "core" economic and social conditions that have forced too many of the District's residents to be homeless and even more to live in poverty. The Legal Clinic calls upon the District's governmental leaders, community and business groups, the organized bar associations, and the media to join with us to encourage and, if need be, pressure the District to improve the delivery of statutorily mandated social services. With a united concern of conscience, we can end the District's heretofore hidden war against its poor and homeless, increase the standard of living for its neediest residents, and enable all District citizens to lead safer and more productive lives.