

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

V.

CAUSE NO. 3:16-CV-622-CWR-FKB

STATE OF MISSISSIPPI

DEFENDANT

ORDER

The State of Mississippi has moved for clarification of the Special Master’s forthcoming report. Docket No. 254. It specifically asks that the Special Master’s report: (1) be in writing; (2) not deviate from the existing trial record; and (3) adhere to Federal Rule of Evidence 408. With the response and reply now submitted, the full briefing indicates that the only issue in need of clarification is issue two: whether the Special Master’s report can deviate from the trial record.

The Special Master’s authority is grounded in Federal Rule of Civil Procedure 53 and principles of equity. *See* Wright et al., 9C Fed. Prac. & Proc. § 2601 (3d ed. Oct. 2020 update). The position exists “for the purpose of aiding the trial judge to obtain the facts and arrive at a correct result in a litigation pending before his or her court, particularly with regard to complicated matters.” *Id.* The Special Master “occupies a position of honor, responsibility, and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended.” *Newton v. Consol. Gas Co. of N.Y.*, 259 U.S. 101, 105 (1922).¹

It is with that confidence that this Court appointed Dr. Michael Hogan to be the Special Master for remedies. The Order of Appointment asked Dr. Hogan to focus on how the State of

¹ See generally Mark A. Fellows et al., *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800 (1991).

Mississippi can comply with the integration mandate of the ADA “in a manner that is practical and safe.” Docket No. 241 at 2.

Dr. Hogan is well-suited for this task. As the Order explained,

Dr. Hogan has more than 40 years of experience in this field. Twenty-five of those years were spent leading statewide mental health systems—first in Connecticut, then in Ohio, and finally in New York. The New York mental health system had a \$6 billion budget, served 650,000 individuals annually, and was composed of 24 state-operated facilities and 2,500 community care, residential, and inpatient programs. Dr. Hogan has published dozens of articles, book chapters, and reports on the issues the Court is placing in his hands. He can provide unique insight into the time it should take a state to achieve compliance with the ADA.

Id. at 3.²

The Order of Appointment adopted almost all of the State’s proposed framework for the Special Master’s work. The Court agreed that additional discovery and consultants were not needed because “Mississippi’s mental health needs are well-known” and “the services to expand have already been defined.” *Id.* In a statement that still rings true today, the Court found that “many of the challenges and remedies are not disputed.” *Id.* Rule 408 was specifically endorsed.

Id. at 4.

The question now is one of the record. Rules 53(c) and (f) contemplate, at least in some situations, that a Special Master receive evidence, evaluate evidence, and issue findings of fact. Rule 53(f)(1) then says that parties may introduce evidence when objecting to a Special Master’s report.³

² “[A] generalist judge must have the authority to appoint experts in unusually complex or technical cases to ensure fairness and justice.” Pushaw, 86 IOWA. L. REV. at 854; *see also Cobell v. Norton*, 237 F. Supp. 2d 71, 80 (D.D.C. 2003). At the end of the day, this Court will make the decision. *See Beth V. v. Carroll*, 155 F.R.D. 529, 535 (E.D. Pa. 1994).

³ Upon appointment, a Special Master “assume[s] the duties and obligations of a judicial officer.” *In re Gilbert*, 276 U.S. 6, 9 (1928). If a Special Master errs in his report, the parties may object and ask the Court to correct the error. *See* Fed. R. Civ. P. 53(f)(2).

This Court does not think those Rules particularly helpful to this case. We had a lengthy trial, have a voluminous record, and can rely upon many expert reports about the need for community-based mental health services. What we lacked was “a seasoned executive to propose a timeline for the State to reach full compliance.” *Id.* at 3. That is why this Court appointed Dr. Hogan.

Dr. Hogan necessarily must use his judgment and professional experience to propose such a timeline. If that constitutes record evidence, and this Court thinks it does, so be it. Special Masters add to the record all the time. *See, e.g., Kimberly v. Arms*, 129 U.S. 512, 517, 523 (1889); *In re: Deepwater Horizon*, 824 F.3d 571, 576 (5th Cir. 2016); *S.E.C. v. Sharp Cap., Inc.*, 315 F.3d 541, 543 (5th Cir. 2003); *Gary W. v. State of La.*, 601 F.2d 240, 245 (5th Cir. 1979); *PIC Grp., Inc. v. LandCoast Insulation, Inc.*, No. 1:09-CV-662-KS-MTP, 2011 WL 2669144, at *3 (S.D. Miss. July 7, 2011); *Turner v. Murphy Oil USA, Inc.*, 582 F. Supp. 2d 797, 805 (E.D. La. 2008).

The State’s reply brief hedges somewhat on this point, conceding that “Dr. Hogan can rely (generally) on his experience to assert that, based on the record, Mississippi can do X in Y years.” Docket No. 260 at 3. The Court agrees.⁴ To the extent the existing record lacks this kind of expertise, Dr. Hogan’s report should “fill the gap” and provide it. Or, to the extent the record contains a more aggressive timeline for system reform than what Dr. Hogan thinks is safe for patients—for patients have to be the heart of the system—then the Court encourages Dr. Hogan’s

⁴ The State then claims that Dr. Hogan “cannot . . . rely on his experience to assert that Mississippi can do X in Y years because New York did X in Y years” Docket No. 260 at 3. While that is sound practical advice for the Special Master, the Court is not so sure it is a correct statement of law. What Dr. Hogan learned about the expansion of community-based services in rural areas of Ohio and New York may be relevant to his report.

In any event, the Court will not permit the last stage of this case to become a mini-trial about other state systems. Certainly we will not be doing any more discovery. In *Deepwater Horizon*, the Fifth Circuit explicitly declined to adopt the proposition that “a party affected by a Special Master’s report [must] be given an opportunity to examine all of the evidence relied upon by the Special Master in making his recommendations.” 824 F.3d at 580.

disagreement with the trial record, in the name of treading more carefully. Either way, we are supplementing the record, and appropriately so.⁵

For these reasons, the motion for clarification is granted as to issues one and three,⁶ and granted in part and denied in part as to issue two.⁷

SO ORDERED, this the 31st day of March, 2021.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

⁵ Dr. Hogan has been asked to use all tools available to him to provide the best recommendation. Those tools include his training, experience, expertise, and what he has learned about Mississippi's mental health system from his year-long engagement in this case.

⁶ Although the lawyers and the Court all agree that Rule 408 applies to the Special Master's report, the undersigned nevertheless encourages the parties to confer and see if they can provide the Special Master with a relevant article about how non-lawyer experts can comply with the Rule.

⁷ With this latest skirmish, it appears that the parties will not be submitting an Agreed Order proposing a remedial plan to the Court, which is unfortunate. Obviously by submitting an Agreed Order it stands to reason that the chances of the Special Master submitting something objectionable would be significantly reduced.