

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MISSISSIPPI,

Defendant.

CIVIL ACTION NO.
3:16-CV-00622-CWR-FKB

**UNITED STATES' RESPONSE MEMORANDUM IN OPPOSITION TO
STATE OF MISSISSIPPI'S MOTION FOR CLARIFICATION
OF SPECIAL MASTER'S ROLE AND OBLIGATIONS**

The role and obligations of the Special Master in this case, as set forth in the Court's Order Appointing Special Master and described in the Court's February 24, 2021 Order, need no further clarification at this time. The specific issues raised by the State in its Motion for Clarification, ECF No. 254, are addressed by the Court's Orders. The requested relief is unnecessary at best, and has the potential to create confusion where none should exist.

I. The Special Master's Role and Responsibilities Are Clear.

On February 25, 2020, the Court appointed Dr. Michael Hogan as Special Master in this case. ECF No. 241 ("Appointment Order"). Recognizing Dr. Hogan's 25 years of experience leading statewide mental health systems and deep knowledge of the issues at hand, the Court found that Dr. Hogan "can provide unique insight into the time it should take the State to achieve compliance with the ADA." *Id.* at 3.

Dr. Hogan's charge is to work with the Parties to "propose a plan to remedy the ADA violations identified in the [Court's] September 3, 2019 Order," to include a "timeline for the State to reach full compliance" and a process for "measur[ing] success along the way." *Id.* at 3-

4. Because “Mississippi’s mental health needs are well-known [and] the services to expand have already been defined,” the Court found that Dr. Hogan would not need or benefit from additional discovery or consultants to complete his tasks.¹ *Id.* at 3. For purposes of the mediation, the Court authorized Dr. Hogan to have *ex parte* contacts with counsel of record and the Court, which it deemed necessary “as a practical matter and to help the parties find common ground.” *Id.* at 3. All such communications are protected under Federal Rule of Evidence 408. *Id.* at 3-4.

In its February 24, 2021 Order, the Court set a timeline for the submission of proposed remedial plans by the Parties, instructing the State to file its proposal first in the event that the Parties are not able to reach agreement on a joint proposed remedial order. ECF No. 253 (“February 24 Order”). The Court asked that the Special Master “weigh in on the Parties’ points of disagreement,” if any, by drawing on his “vast experience and knowledge of mental health systems,” which the Court stated was “central to his engagement” as Special Master in this case. *Id.* Citing Rule 408, the Court cautioned Dr. Hogan against relying on any statement made by a party during the negotiations. *Id.*

II. The State’s Requested Relief Is Either Unnecessary or Inconsistent with the Court’s Orders.

The State filed its Motion and supporting Memorandum on March 5, 2021,² specifically requesting that the Court clarify that:

(i) the Special Master’s input regarding any proposed remedial plan must be in the form of a written report, (ii) the Special Master cannot provide information which is outside the record regarding mental health systems, and (iii) the Special Master is prohibited from relying on or disclosing any Rule 408 information in providing his report.

¹ In foreclosing further discovery under the Appointment Order, the Court anticipated that the State may make improvements to its adult mental health system between the end of the trial and the entry of final judgment, but observed that any such post-trial developments would simply bring the State “that much closer to complying with the ADA.” Appointment Order at 3, n.2.

² The State did not confer with the United States before filing this motion or advise the Court whether there is opposition to its Motion, as required for all non-dispositive motions. L.Civ.R.7(b)(10).

ECF No. 254 at 1 (“State’s Motion”) and ECF No. 255 at 1 (“State’s Mem.”). The second request is inconsistent with the Court’s instruction that the Special Master draw on his “vast experience and knowledge of mental health systems” and should be denied. The first and third “clarifications” sought by the State are unnecessary because the issues presented are already clear from the Court’s Orders.

A. The Special Master can and should draw on his experience as a mental health systems’ administrator in making recommendations to the Court.

The State’s second request—seeking clarification that the Special Master must not “provide, introduce, or discuss in his report any information regarding mental health systems other than the State’s mental health system that was not admitted into evidence at trial”³—could frustrate the purpose behind the Special Master’s report and create inconsistency with the Court’s Orders. *See* State’s Mem. at 2. In instructing Dr. Hogan to support his recommendations “by reference to his vast experience and knowledge of mental health systems,” the Court did not invite Dr. Hogan to introduce specific facts beyond what it is in evidence, as the State seems to suggest. The Appointment Order ruled out the possibility, barring additional discovery or consultants to aid the Special Master because many of the challenges and remedies” in this case require no elaboration beyond the evidence admitted at trial. Appointment Order at 3.

The United States is concerned that the State’s request may go further, seeking to preclude Dr. Hogan from drawing broadly on his expertise as a leader of statewide mental health

³ The rationale for precluding the Special Master from introducing information about *other states’* mental health systems not in evidence applies with equal force to extra-record information about *Mississippi’s* mental health system. The trial record in this case is closed. If either Party (or the Special Master) believes that additional information should be in the record, including about developments in Mississippi’s adult mental health system since the trial, the appropriate recourse is supplementation, whether by consent of the Parties or motion.

systems in assessing and responding to the Parties' points of disagreement, if any. That was precisely the Court's purpose, as the United States understands it, in appointing a "seasoned executive to propose a timeline for the State to reach full compliance." Appointment Order at 3. It would be impossible and unhelpful for Dr. Hogan to disregard his 40 years of experience in the mental health field that qualified him for the position when making recommendations about how, and by when, the State should reach full compliance.

B. The State's other requests, while substantively consistent with the United States' position, are adequately addressed by the Court's existing Orders.

As to the remaining two issues presented in the State's Motion—whether the Special Master's input on any proposed remedial plan must be in writing and whether Federal Rule of Evidence 53 applies to settlement offers exchanged during the mediation—the United States agrees with the State's substantive position, but believes that the Court's Orders require no clarification.

The State asks the Court to clarify that the Special Master's input on any proposed remedial plan must be in writing, but that is the only logical option under the Court's Orders. The Appointment Order, which the Court issued pursuant to Rule 53, instructs the Special Master to "propose a plan" to remedy the State's ADA violations. Appointment Order at 4. As the State noted, Rule 53(e) requires that a master file and promptly serve on each party any reports required by the appointment order, and the Court's February 24 Order Court's asks that the Special Master "weigh in on the Parties' points of disagreement" by a date certain. State's Motion at 2. Given the context of the Special Master's report coming after submissions by the Parties, the logical interpretation of the Court's February 24 Order, particularly in view of the Appointment Order, is that it calls for a written report.

The State's third request—seeking clarification that the Special Master is prohibited from relying on or disclosing any Rule 408-protected information is also unnecessary. State's Mem. at 2-3. The Appointment Order is the controlling document on the question of the Special Master's role and obligations. *See Gary W.*, 601 F.2d at 245. It contemplates that the Special Master will have communications with counsel of record, including *ex parte*, for the purpose of mediation, and provides that those discussions are confidential under Rule 408. Appointment Order at 3-4. As the State notes, during the mediation the Parties have also exchanged written proposals, both with the Special Master and each other. State's Mem. at 2. Rule 408 applies to offers made to settle a claim and any statements in connection with the offers. Fed. R. Evid. 408(a)(1)-(2). Per the terms of the Appointment Order, such offers—whether made verbally or in writing—cannot be included as the basis for the Special Master's submission. Nothing in the Court's February 24 Order suggests otherwise.

III. Conclusion

For the foregoing reasons, the United States requests that the Court deny the State's Motion for Clarification.

Dated: March 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2021, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to all counsel of record.

/s/ Patrick Holkins
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