

**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 TO ORDER REGARDING
MONITOR ROLE AND CANDIDATE**

Pursuant to the Court's July 14, 2021 Order, ECF No. 273, the United States submits the following response regarding the role of a monitor. Further, the United States proposes that Dr. Michael Hogan, who served as the Special Master in this case, serve as the monitor going forward. The Parties reached consensus in proposing Dr. Hogan.¹

I. Role of Monitor

Four principles anchor the United States' proposal for the role of a monitor: access, efficiency, independence, and transparency. To assess and validate compliance with the Court's Order, the monitor will need access to the data, records, facilities, and people that reveal the State's progress. To preserve, as much as possible, the State's resources for the services that prevent unnecessary hospitalizations, the monitor should work efficiently. Toward this same end, the monitor should make recommendations and provide technical assistance to guide the State toward compliance. To ensure that the monitor's assessments are credible, the monitor must remain independent and serve as an agent of the Court. Finally, to provide the Court and

¹ On August 6, 2021, the Court clarified to the Parties by email that they need not submit multiple candidates for the monitoring role if they reached consensus on a monitor.

the people of Mississippi with a clear picture of the State’s progress toward compliance and the steps the State is taking to prevent unnecessary hospitalizations, the monitor must regularly and publicly report on the State’s compliance.

Guided by the principles of access, efficiency, independence, and transparency, the United States recommends that the Court order the following provisions for the role and authorities of the monitor in this case.²

Monitoring and Reporting on Compliance

1. The Monitor shall assess compliance with each obligation in this Order and shall provide the State with technical assistance as necessary to support the State in reaching compliance.
2. While conducting the Monitor’s regular assessment, the Monitor shall review and validate data and information, speak with State officials, providers, and individuals receiving services, and participate in the annual Clinical Review required by this Order.

² Consistent with this Court’s Order, ECF No. 273, district courts have the power to appoint monitors to ensure compliance with court orders. *See, e.g., Local 28 of Sheet Metal Workers’ Int’l Ass’n v. E.E.O.C.*, 478 U.S. 421, 481-82 (1986) (affirming that “appointment of an administrator with broad powers to supervise [the defendants’] compliance with the court’s orders . . . was well within the District Court’s discretion”); *Shakman v. Clerk of Cook Cty.*, 994 F.3d 832, 838 (7th Cir. 2021); *United States v. City of New York*, 717 F.3d 72, 97 (2d Cir. 2013) (ruling District Court was entirely warranted in ordering significant affirmative relief, including appointing a Monitor to oversee the FDNY’s long-awaited progress toward ending discrimination); *United States v. Phillip Morris USA Inc.*, 566 F.3d 1095, 1150 (D.C. Cir. 2009) (affirming that a district court may appoint a monitor to “report on a defendant’s ‘compliance with the district court’s decree and . . . help implement that decree.’”) (quoting *Cobell v. Norton*, 344 F.3d 1128 (D.C. Cir. 2003)); *Sierra Club v. Babbitt*, 81 F.3d 155 (5th Cir. 1996) (per curiam) (noting “the long-established power of federal courts to appoint an agent to supervise the implementation of decrees”); *Stone v. City and County of San Francisco*, 968 F.2d 850, 859 n.18 (9th Cir. 1992) (dismissing federalism concerns regarding the appointment of a special master because “[f]ederal courts repeatedly have approved the use of special masters to monitor compliance with court orders and consent decrees”); *Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988); *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir.) (approving of the federal court’s power “to appoint an agent to supervise the implementation of its decrees that has long been established”) *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Hoptowitz v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982); *Reed v. Cleveland Bd. Of Ed.*, 607 F.2d 737 (6th Cir. 1979); *Morgan v. Kerrigan*, 530 F.2d 401, 425 (1st Cir. 1976) (affirming appointment of masters to assist in implementation of desegregation plan) *cert. denied sub nom. White v. Morgan*, 426 U.S. 935 (1976).

3. The Monitor shall provide written reports on the State's compliance with this Order every six months. Each report shall describe the State's level of compliance (e.g. noncompliance, partial compliance, or substantial compliance) as to each obligation in the Order and include a summary of the data that led to the Monitor's assessment of compliance.
4. The written reports shall be filed on the Court's docket and the Court will hold a status conference following submission of each report. The Parties shall establish procedures for review and comment on draft reports by the State and the United States before the reports are filed with the Court.

Monitor's Authority

5. The Monitor may retain staff to assist the Monitor in carrying out the Monitor's responsibilities. The Monitor shall pay for these services out of the Monitor's budget.
6. The Monitor may engage in *ex parte* communications with any Party, third party, or with the Court as necessary to carry out the terms of this Order.
7. The Monitor may require the State to provide reports and data needed to assess compliance and may convene meetings of the Parties.
8. The Monitor may testify in this matter in connection with enforcement of this Order.
9. The Monitor and any of the Monitor's retained staff shall be immune as agents of the Court from any civil claim, lawsuit, or demand, to the extent permitted under federal law. This paragraph does not apply to any proceeding for payment under contracts into which they have entered in connection with their work under this Order; any such proceeding shall take place solely before this Court.
10. The Monitor shall be appointed for a period of three years from the date of entry of this Order, subject to an evaluation by the Court of whether to renew the Monitor's appointment until the termination of this Order or for each three-year period until the termination of this Order – whichever happens first. In evaluating the Monitor, the Court shall consider the Monitor's performance under this Order, including whether the Monitor is completing their work in a cost-effective manner and on budget, and is working effectively with the Parties to facilitate the State's efforts to comply with the Order, including by providing technical assistance to the State.
11. The Monitor shall be subject to supervision by the Court.
12. The Monitor may be removed for good cause, including that the Monitor has exceeded their authority or failed to satisfactorily perform the duties required by this Order, on motion by any of the Parties or based on the Court's own determination.
13. If selection of a new Monitor becomes necessary, the Parties shall meet and confer to identify suitable Monitor candidates to propose to the Court. If the Parties are unable to

agree within 30 days, each of the Parties may propose up to three qualified candidates to the Court.

Payment of the Monitor

14. The Monitor shall submit an annual budget to the Court for approval. Costs of the Monitor for performing all of the Monitor's duties under this Order shall not exceed that budget, absent a finding by the Court that additional funds are necessary for the Monitor to fulfill their duties under the Order and that the increase is not due to a failure in planning, budgeting, or performance by the Monitor. The State or the United States may raise objections to the proposed budget with the Monitor and with the Court within two weeks of receiving the budget.
15. The cost of the Monitor, including the cost of any staff or consultants to the Monitor, shall be borne by the State in this action, but the Monitor and the Monitor's staff or consultants are not agents of the State.
16. The Court retains the authority to resolve any dispute that may arise regarding the reasonableness of fees and costs charged by the Monitor.
17. The State shall deposit \$100,000.00 into the Registry of the Court as interim payment of costs incurred by the Monitor. This deposit and all other deposits pursuant to this Order shall be held in the Court Registry Investment System.
18. The Monitor shall submit monthly statements to the Court, with copies to the Parties, detailing all expenses the Monitor incurred during the prior month. The Court shall order the clerk to make payments to the Monitor. Upon receipt of an Order from the Court directing payment, the clerk shall ensure timely payment of all approved statements. Within 45 days of the entry of each Order directing payment, the State shall replenish the fund with the full amount paid by the clerk in order to restore the fund's total to \$100,000.00.

Access of the Monitor and the United States

19. The Monitor, including any staff retained by the Monitor, and the United States shall have full access to persons, employees, residences, facilities, buildings, programs, services, documents, records (including medical and other records in unredacted form), and any other materials necessary to assess the State's compliance with this Order.
20. Access will be exercised in a manner that is reasonable and not unduly burdensome and upon reasonable notice, except in situations that present an immediate threat to life, health, or safety of individuals.

II. Candidate for Monitor

When assessing candidates for the monitoring role, the United States sought individuals with experience managing mental health systems and deep knowledge of the services that form the backbone of the remedy in this matter. The United States also sought candidates with extensive knowledge of how states across the country have implemented service systems that prevent unnecessary hospitalizations. This knowledge and experience will enable the candidate to (1) effectively and efficiently assess the State's compliance with this Court's Order and (2) provide technical assistance to the State to the extent necessary to promote compliance.

After a broad search, the United States concluded that Dr. Michael Hogan is the best candidate for the monitoring role. Dr. Hogan is a familiar figure to the Court, having served capably as the Special Master in this matter. Dr. Hogan is eminently qualified when measured against the qualifications listed above and has a problem-solving temperament that will promote progress toward termination. That the Parties reached consensus in proposing Dr. Hogan is a testament to his work as Special Master.

Dr. Hogan has more than 40 years of experience in the mental health field, including 25 years leading state mental health systems. He served as Commissioner of the New York State Office of Mental Health, Director of the Ohio Department of Mental Health, and Commissioner of the Connecticut Department of Mental Health. In each of those roles, he oversaw statewide systems of care, including community provider networks and state-operated facilities. In 2002, he served as Chairman of the President's New Freedom Commission on Mental Health. He has a PhD in Administration of Special Education from Syracuse University. Dr. Hogan's updated resume is attached as Exhibit A.

As demonstrated through his work as Special Master, Dr. Hogan has the skills, qualifications, and experience to fulfill the role of monitor. He is a national authority on the community-based services that the State must implement and sustain to comply with the Court's Order. His experience overseeing the successful implementation of similar services in other states would allow him to effectively assess and validate the State's compliance, including by engaging with stakeholders, evaluating data reported by the State, and helping to design and execute the annual Clinical Review. Dr. Hogan is fair, independent-minded, solution-focused, and an effective communicator, qualities that would help him guide the State toward compliance by providing technical assistance as needed. His steady leadership and commitment to forging consensus would continue to serve the Parties and the Court well during the implementation phase.

III. Conclusion

For the foregoing reasons, the United States respectfully requests that the Court adopt the role for a monitor set forth above and appoint Dr. Michael Hogan to that role.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 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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