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

UNITED STATES OF AMERICA	**PLAINTIFF**
V.	**CIVIL ACTION NO.: 3:16-CV-00622-CWR-FKB**
THE STATE OF MISSISSIPPI	**DEFENDANT**

THE STATE OF MISSISSIPPI'S PRELIMINARY
RESPONSE TO REPORT OF SPECIAL MASTER

The State of Mississippi preliminarily responds to the Report of the Special Master (ECF 269) (Report) as follows:[1]

I. Peer Support.

Paragraph 44.b. of the Report reads as follows: "By the end of FY22 the State will implement a plan to provide Peer Support Services at other e.g., satellite CMHC offices, including those offices that provide services five days a week."[2]

[1] Mississippi incorporates by reference its Response to Court's Order (ECF 253) and states the following: First, Mississippi respectfully maintains and preserves the arguments it has made in this case (including regarding the Special Master – *e.g.*, ECF 237, 246, and 254), does not waive or forfeit any of its arguments, and maintains that it is not liable for (among other reasons) the reasons summarized on pages 89-90 of Mississippi's Proposed Findings of Fact and Conclusions of Law (ECF 232). Second, even if the Court remains of its prior view on liability based on the evidence at trial, the Court still should order no relief because Mississippi is now in substantial compliance with Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12134 (ADA), and has addressed or will imminently address the violations the Court believed to exist. Mississippi rejects the Report's representation that there are several areas where the parties agree on additional services that are needed. ECF 269, Special Master's Report, ¶¶ 10, 32.c. and d. Third, if the Court does decide to order relief despite those first two points, the Court should order relief in light of certain important considerations – *i.e.*, judicial oversight of a State's systems is problematic and needs to be limited – in time and in qualitative extent – to what is absolutely necessary; any remedy order must account for the problems inherent in the sort of oversight presented in this case; any prospective injunctive relief must account for the current state of affairs in Mississippi's mental health system; in ordering a remedy under the ADA, the Court should not read or apply the ADA (including issuing a remedy under it) in a way that would create serious and ongoing federalism problems (*e.g.*, by issuing sweeping relief that invades the inner, day-to-day workings of State government); and any relief ordered must be consistent with Mississippi's fundamental alteration defense. See ECF 262.

[2] ECF 269, Special Master's Report, ¶ 44.b.

The trial record does not support this recommendation, especially if the Special Master is suggesting that Mississippi provide Peer Support Services at all satellite CMHC offices.[3] Certainly no DOJ expert testified at trial that Mississippi should do so. DOJ expert Robert Drake testified that "[t]here's no standardized way of providing peer support so it varies a lot from one program and one intervention to another," that 90% of adults with SMI do not use peer support services, and that some portion of that 90% do not find them useful. (Tr. at 137 and 221).

Nothing in the trial record expressly states or purports to show that a State is not in compliance with the ADA unless it has Peer Support Services available at CMHC satellite offices, especially at all such offices. Based on the evidence adduced at trial, Peer Support is the least effective service of the Core Services in reducing hospitalizations. DOJ expert Robert Drake testified that there is a lack of data regarding the effectiveness of Peer Support Services in reducing hospitalizations, so no conclusions can reliably be made in that regard. (DX-235; Tr. at 222 and 224). In an environment of finite resources, Peer Support should not receive funding disproportionate to its uncertain effectiveness.[4]

II. Permanent Supported Housing.

Paragraph 45.b. of the Report reads as follows: "Mississippi will fund an additional 250 CHOICE housing vouchers in FY 22 and additional 250 CHOICE housing vouchers in FY 23 and sustain funding for these services."[5] The parties stipulated that as of 2018, it cost approximately $8,000 per person, per year to provide a CHOICE housing voucher.[6] DOJ expert Kevin O'Brien

[3] Because no such evidence was offered by DOJ at trial, Mississippi did not put on evidence regarding how many satellite CMHC offices there are in Mississippi or how much it would cost to have Peer Support Specialists at those offices. On June 4, 2021, the Court instructed the parties not to submit further evidence when they respond to the Special Master's Report, so Mississippi will not share that information with the Court at this time.

[4] According to DOJ expert Melodie Peet, "[r]esources are finite in every state. It will always be a challenge to find additional resources to devote to the funding of community programs." (PX-407 at 29). That is so "because state governments operate within a fixed set of resources and the legislature and governor are always looking at competing needs when they're making allocation decisions." (Tr. at 1464).

[5] ECF 269, Special Master's Report, ¶ 45.b.

[6] ECF 231-1, Amended Trial Stipulation No. 245.

testified that the annual cost of a CHOICE housing voucher is $8,100.93. (Tr. at 1461; PX-409 at 14, ¶ 41).

At a cost of $8,000 per voucher, the Special Master's recommendation of 250 additional vouchers in FY22 would cost $2,000,000, as would his recommendation for another 250 vouchers in FY23. Thus, beginning in FY23 and extending into perpetuity, Mississippi would incur at least $4,000,000 more per Fiscal Year than it was incurring for CHOICE housing vouchers as of the evidentiary cutoff date of December 31, 2018. An additional $4,000,000 per year has fundamental alteration implications. *See, infra*, Section VIII, p. 8.

III. Post-Trial Clinical Review Process.

Paragraph 57 of the Report reads in pertinent part as follows: "….the State will design, with the participation of the DOJ and the Monitor, a Clinical Review Process to assess receiving Core Services and/or State Hospital care."[7] This recommendation is not supported by the record. No such post-trial Clinical Review Process was discussed at trial, so Mississippi had no opportunity to address the staffing requirements or costs associated with the newly recommended process.[8] Since the commencement of this case, no party has presented any authority to the Court purporting to show that a State is not in compliance with the ADA unless it has an ongoing Clinical Review Process similar to the process described in paragraph 57 of the Report.

IV. Implementation Plan.

Paragraphs 59-60 of the Report require Mississippi to develop an Implementation Plan after a remedial order is entered.[9] The trial record does not support this recommendation nor does the ADA require a State to develop an Implementation Plan in connection with a remedial order.

[7] ECF 269, Special Master's Report, ¶ 57.
[8] On June 4, 2021, the Court instructed the parties not to submit further evidence when they respond to the Special Master's Report, so Mississippi will not share this information with the Court at this time.
[9] ECF 269, Special Master's Report, ¶¶ 59-60.

That proposition itself has serious federalism implications because how a State implements a remedial order regarding its mental health system should be left to the State. It should not be subject to a process – after a remedial order is entered – that effectively requires a State to obtain the approval of DOJ and a Monitor regarding how the State will implement the order. DOJ did not seek bifurcation of liability and remedy. If an Implementation Plan is a necessary part of a remedial order, then DOJ should have put on expert evidence at trial to that effect and submitted a proposed Implementation Plan with its proposed remedial order. It did not do so.

V. Termination.

Paragraph 61 of the Report reads in pertinent part as follows: "This Order shall terminate when the State has attained substantial compliance with each paragraph of this Order and maintained that compliance for one year as is determined by the Court."[10] This recommendation is essentially the same as DOJ's recommendation. It should be rejected for at least three reasons.

First, the term "substantial compliance" is not defined. "Substantial" modifies "compliance," but to what extent is not specified. Without a clear, objective definition of "substantial compliance," Mississippi cannot know what it must do to attain termination.

Second, requiring Mississippi to attain "substantial compliance with each paragraph of this Order" is an impossibility. The only paragraphs in the Special Master's Proposed Remedial Plan that can objectively be attained are the capacity and funding provisions – *i.e.*, paragraphs 38.b., 39.b.-d., 40.a., 41.a., 42.a., 43.b and d., 44.a., 45.a-b., and 46. All other paragraphs of the Proposed Remedial Plan are subjective.

For example, paragraph 36.a. requires CMHCs to identify individuals with SMI in need of mental health services; paragraph 49.a. requires State Hospitals, during discharge planning, to "[i]denitfy the person's strengths, preferences, needs, and desired outcomes." How is it to be

[10] ECF 269, Special Master's Report, ¶ 61.

determined whether Mississippi is in compliance with paragraph 36.a. and 49.a.? The Report does not say and there is no objective way for the Court, Mississippi, DOJ, or a Monitor to make these determinations. This exercise can be repeated for every paragraph in the Proposed Remedial Plans submitted by DOJ and the Special Master except for only the capacity and funding paragraphs.

Third, if the Court orders a remedial plan, it should provide a clear, specific, and objective path to termination, but the Report's proposal, like DOJ's, does not do so. The Report proposes that whether Mississippi is in "substantial compliance" with a paragraph of the order is ultimately "as determined by this Court."[11] Intending no disrespect whatsoever to this Court, the standard for whether a party is in "substantial compliance" with every paragraph of a remedial order – especially one involving the operation of a complex, state-wide mental health system – should not be left to the exclusive determination of the trial court. Mississippi should know exactly, without ambiguity or subjectivity, what it must do to terminate the order. Instead, the Report proposes that Mississippi is in "substantial compliance" with a paragraph exclusively and only whenever the Court says it is. That plainly is insufficient to put Mississippi on notice of what it must objectively do to terminate the order. The Court should reject this proposal because it is a formula for a perpetual or near-perpetual order with no objective way out. *See Connor B. v. Patrick*, 985 F.Supp.2d 129, (D. Mass. 2013) (declining to commit the court to the near-perpetual oversight of an already complex child-welfare regime). The Report states that it is proposing a plan that "will be finite with respect to the services Mississippi must expand."[12] But the proposed plan is not finite because it does not provide a clear, specific, and objective path to termination.

[11] ECF 269, Special Master's Report, ¶ 61.
[12] ECF 269, Special Master's Report, ¶ 32.d.

VI. Monitor.

The Report recommends that the Court appoint a Monitor "to assess the State's compliance with this Order," and that the Court "issue a separate Order setting forth a schedule and process for selecting the Monitor and for determining the Monitor's duties, compensation, and authority."[13] This recommendation is verbatim with DOJ's proposal regarding a Monitor.

The proposals for a Monitor before the Court should be rejected. That the parties proposing a Monitor, after years of investigation and litigation and two years after the trial, have not specified in their proposed remedial plans what they believe the duties, compensation, and authority of a Monitor should be, shows that no Monitor is needed. Simply put, if you want a Monitor at this late stage of this litigation, then tell the Court with specificity what you are proposing the Monitor should do. Because that has not been done, no Monitor should be appointed.

The Report asserts that "[m]onitoring is the pathway to demonstrating that the State is meeting the requirements of the ADA …."[14] The Report does not identify the "requirements of the ADA" or what purportedly constitutes compliance with the ADA.

The Report notes that "[t]he major element of avoiding unnecessary institutional admissions is establishing adequate Core Services, so that the capacity exists to meet people's needs appropriately in their community."[15] There is no need for a Monitor to assess the capacity and funding provisions in the proposals from DOJ (ECF 265-1) and the Special Master (ECF 269) or the Report from Mississippi (ECF 262-1), which are the only provisions capable of objective assessment. Although, as the Report notes, DOJ proposes that a Monitor should be appointed to validate implementation of services,[16] a Monitor plainly is not needed to validate that which is

[13] ECF 269, Special Master's Report, ¶ 62.
[14] ECF 269, Special Master's Report, ¶ 17.d.; see also ¶¶ 32.c. and d.
[15] ECF 269, Special Master's Report, ¶ 27.
[16] ECF 269, Special Master's Report, ¶ 12.

self-validating. For example, either Mississippi has 10 PACT teams or not. A Monitor adds nothing to that assessment. The Report also states that Mississippi itself should review data to validate its services.[17] In such instances, there is no role for a Monitor. The Report further states that "the Court needs to validate that the improvements which are required have been made,"[18] but it does not explain why or how a Monitor will aid the Court's ability to do so.

VII. If The Court Issues A Remedial Order, The Order Should Include Complete Relief.

DOJ and the Special Master propose a process for the development of an Implementation Plan that could take a year and propose that the details regarding a Monitor be deferred to a separate order. At this stage of the litigation, the Court should rule on the remedy issues and promptly enter a final judgment that includes complete relief regarding liability and remedy. To have a complete record, no matters – such as an Implementation Plan or the duties, compensation, or authority of a Monitor – should be deferred.

VIII. The Fundamental Alteration Defense.

There are many things in the proposals by DOJ and the Special Master that are not in the trial record, so Mississippi did not have the opportunity at trial to address them or the burden and cost of attempting to implement them. Therefore, Mississippi has not had a fair and complete opportunity to make its fundamental alteration defense. This is problematic in and of itself, but it also raises federalism concerns because institutional reform injunctions, such as the one being contemplated here, involve areas of core state responsibility – *e.g.*, a State's mental health system. *Horne v. Flores*, 557 U.S. 433, 448 (2009). "Federalism concerns are heightened when … a federal court decree has the effect of dictating state or local budget priorities. States and local governments

[17] ECF 269, Special Master's Report, ¶¶ 20.f. and 21.c.
[18] ECF 269, Special Master's Report, ¶ 31.

have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Id*. (citation omitted).

Conclusion

To the extent, if any, a remedial order is entered, it exceeds appropriate limits if it is not limited to reasonable and necessary implementations of federal law. *See Horne*, 557 U.S. at 450 (citation omitted). "If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." *Id*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 21, 2021, I electronically filed this document with the Clerk of the Court using the ECF system, which sent notification of such filing to all ECF counsel of record in this action.

/s/ James W. Shelson
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