

**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 THE STATE OF MISSISSIPPI'S OBJECTIONS TO
SPECIAL MASTER'S REQUEST FOR EXTRA-RECORD INTERVIEWS**

The Special Master seeks authority from the Court to communicate with employees of the Mississippi Department of Mental Health (“DMH”) and Division of Medicaid (“DOM”) who have “day-to-day responsibilities for implementing programs, monitoring quality, and working with” Community Mental Health Centers (“CMHCs”) and State Hospitals in Mississippi. Special Master’s Memorandum to the Court, May 9, 2020. The United States supports the Special Master’s request as a logical extension of his mediation duties. Informal conversations between the Special Master, counsel of record, and Party representatives are already occurring in the mediation process, and the State is willing, subject to specified conditions, to make State agency staff available for interviews. State’s Objections to Special Master’s Request for Extra-Record Interviews (“State’s Objections”), ECF No. 246, at 4-5. The United States requests that the Court modify its Order Appointing Special Master, ECF. No 241, to clarify the Special Master’s authority, including with respect to extra-record interviews and information sharing.

I. Factual Background

On February 25, 2020, the Court issued its Order appointing Dr. Michael Hogan Special Master in this case. ECF No. 241 (“Appointment Order”). Dr. Hogan’s charge, as set forth in

the Appointment Order, is “to review the record, confer with counsel of record, and 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.

The Court found that “Mississippi’s mental health needs are well-known [and] the services to expand have already been defined,” obviating the need for additional discovery or consultants to aid Dr. Hogan. *Id.* at 3. However, recognizing that certain extra-record communications are necessary “as a practical matter and to help the parties find common ground,” the Court authorized the Special Master to have *ex parte* contacts with counsel of record and the Court. Those communications are protected under Federal Rule of Evidence 408. *Id.* at 3-4.

On March 6, the United States informed the Court, via email (Ex. 1), that the Parties had reached a shared understanding regarding the provision in the Court’s Appointment Order relating to *ex parte* communications by the Special Master. Specifically, the Parties agreed that Dr. Hogan may communicate with “Party representatives in this matter if counsel of record consent to that communication,” permitting for example the Executive Director of DMH, Diana Mikula, to participate in discussions with Dr. Hogan alongside counsel of record during mediation sessions. Ex. 1. Consistent with that understanding, the mediation sessions that have occurred thus far have included representatives of DMH and DOM, in addition to Dr. Hogan and counsel of record.

On April 23, in a Status Report to the Court, Dr. Hogan asked for authority “to interact with any staff or stakeholders involved in the Mississippi mental health system,” to the extent needed to “facilitate development of the Plan the Court has directed.” Dr. Hogan described his

lack of access to staff at DMH, DOM, and the CMHCs, among other stakeholders, as a potential “barrier” to achieving a plan that both addresses the violations identified in the Court’s September 3, 2019 Order and is “practicable for the State.” Dr. Hogan reiterated his request during a Status Conference before the Court on April 27. During the Status Conference, the Court granted the United States’ request to submit a Proposed Order seeking to clarify the Special Master’s authority to receive extra-record information, his record-keeping obligations, and other related matters.

On May 6, the State filed its objections to Dr. Hogan’s request for extra-record interviews. ECF No. 246. While the State opposes allowing Dr. Hogan “to speak with an unlimited number of unidentified staff and stakeholders over an unlimited time,” it has offered to “work with [him]” to make particular “staff” “reasonably available” at Dr. Hogan’s request, provided that the communications are subject to FRE 408 and that the State’s counsel is present. *Id.* at 3-5.

On May 9, Dr. Hogan submitted a memorandum to the Court that modifies his request for extra-record interviews, seeking authority for a “more focused set of conversations” with DMH and DOM staff who have “day-to-day responsibilities for implementing programs, monitoring quality, and working with” the CMHCs and the State Hospitals. Dr. Hogan also identified a potential need for discussions with certain CMHC staff, but advised that it “may not be necessary to cross that bridge at this time.”

II. Legal Standard

In appointing a special master pursuant to Federal Rule of Civil Procedure 53, district courts have broad discretion to determine the scope of the master’s powers and responsibilities. *Agric. Servs. Ass’n, Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1071 (6th Cir. 1977). *See* Powers of Masters, 9C Fed. Prac. & Proc. Civ. § 2609 (3d ed.). Those powers

and responsibilities must be set forth in the court's order appointing the special master. Fed. R. Civ. P. 53(b)(2)(A). See *Gary W. v. State of La.*, 601 F.2d 240, 245 (5th Cir. 1979) (finding that special master's duties as factfinder, monitor, and hearing officer in case involving institutionalization of children with disabilities were clearly spelled out in appointment order and comported with the requirements of Rule 53).

Courts have on occasion authorized informal communications between the special master and third parties, particularly in the context of monitoring compliance with court-ordered remedies. *Ruiz v. Estelle*, 679 F.2d 1115, 1170 (“The special master may conduct confidential interview and meetings . . . with any prisoner or group of prisoners under the jurisdiction of the Texas Department of Corrections.”), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982); *Alberti v. Klevenhagen*, 660 F.Supp. 605, 610 (S.D. Tex. 1987) (authorizing the special master “to conduct unimpeded confidential interviews with any County employee, . . . or any inmate”); *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1420 (N.D. Cal. 1984) (authorizing the special master to interview confidentially anyone affected by the court's permanent injunction), *aff'd in part, rev'd in part, vacated in part*, 801 F.2d 1080 (9th Cir. 1986). *But see In Re: Brooks*, 383 F.3d 1036, 1044-46 (D.C. Cir. 2004) (special master appointed in connection with litigation concerning the management of Indian trust accounts should have been recused from contempt proceeding because the master had numerous *ex parte* communications with witnesses and unidentified third parties, introducing the risk of “unchecked and uncheckable partiality”).

The district court may amend an appointment order to modify the special master's powers as needed after giving the parties an opportunity to be heard. Fed. R. Civ. P. 53(b)(4). See *Conwed Corp. v. Union Carbide Corp.*, 2004 WL 45500, *5 (D. Minn. 2004) (amending

appointment order to allow for special master to take evidence, make findings, and calculate amounts payable).

III. The Special Master Should Be Permitted to Communicate with State Agency Staff in His Capacity as Mediator

Dr. Hogan's role as Special Master, as the United States understands it, is two-fold. His first task is to help the Parties reach agreement through mediation, which necessarily requires communication with and between the Parties. The mediation process is underway. As Dr. Hogan has acknowledged, the Parties' proposals for remedying the State's violations of the Americans with Disabilities Act differ widely in "substance and breadth," leaving "considerable work . . . to be done." Special Master's Status Report to the Court, April 23, 2020. If the Parties do not reach agreement, Dr. Hogan's second task is to propose a remedial plan based on the evidence in the record and in response to the Parties' proposals.

The United States supports Dr. Hogan's request, as stated in his May 9 memorandum to the Court, to interview in his capacity as a mediator certain DMH and DOM staff who have "day-to-day responsibilities for implementing programs, monitoring quality, and working with" the CMHCs and the State Hospitals. Special Master's Memorandum to the Court, May 9, 2020. Communication between Dr. Hogan, counsel of record, and Party representatives such as Ms. Mikula is already occurring through the mediation process. Indeed, the State has also provided Dr. Hogan with written information regarding Mississippi's mental health service system that is outside the trial record. The State has indicated that it does not oppose further conversations of this nature between Dr. Hogan and DOM and DMH staff, and has offered to make particular individuals "reasonably available" subject to two conditions—that Rule 408 apply and that counsel for the State be present. State's Objections at 4. The United States objects to neither condition and requests that counsel for the United States also be present for those discussions in

the interest of fairness and transparency. In addition, the United States requests that Dr. Hogan maintain a list of all State employees whom he interviews and any documents he obtains that are outside the record.

Critically, the purpose of Dr. Hogan's communications with Party representatives, counsel of record, and State agency staff is, and should remain, to guide his efforts "to help the parties find common ground." *See* Appointment Order at 3. Under the current Appointment Order, Dr. Hogan is not a fact finder and, as the State points out, does not work on a blank canvas. State's Objections at 1-2. Should the Parties disagree over any aspect of the proposed remedial order, Dr. Hogan's proposal to the Court on that point should be rooted in the record, including any evidence admitted after the trial by stipulation or otherwise. To the extent that Dr. Hogan's communications with DOM or DMH staff during the mediation process yield documents or information that he or the Parties believe should be made part of the record, the United States recommends that the Parties confer regarding a proposal for supplementation or, alternatively, raise the matter for the Court.

The United States requests that, at this time, the Court decline to expand the scope of Dr. Hogan's extra-record communications to include interviews with individuals other than Party representatives, State agency staff, and counsel of record. As Dr. Hogan has stated, he and the Parties will be in a better position later in the mediation process to assess whether conversations with CMHC staff or other third-party stakeholders will be needed. Special Master's Memorandum to the Court, May 9, 2020.

The United States has prepared a Proposed Order (Ex. 2) clarifying Dr. Hogan's authority as Special Master consistent with Rule 53, including with respect to extra-record interviews and information gathering. In an effort to avoid confusion, the Proposed Order is a full Rule 53

appointment order that incorporates the existing Order, ECF No. 241, the Special Master's authority to speak to State employees as briefed above, and provisions that the United States understands to be the Court's expectations regarding the Special Master process, Ex. 2 at Section B (communication with media), Section C (preservation and record keeping), Section D (standard of review), and Section F (reporting and Rule 53(c) duties).

IV. Conclusion

For the foregoing reasons, the United States requests that the Court permit the Special Master, in his capacity as mediator, to communicate with State agency staff in addition to Party representatives and counsel of record, provided those communications are subject to FRE 408 and that counsel for both Parties be present. The United States further requests that the Court modify the Appointment Order, ECF No. 241, to clarify the Special Master's authority as suggested in the United States' Proposed Order (Ex. 2).

Dated: May 13, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2020, 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

Patrick Holkins

Holkins, Patrick (CRT)

From: Holkins, Patrick (CRT)
Sent: Friday, March 6, 2020 4:01 PM
To: reeves_chambers@mssd.uscourts.gov
Cc: Rush, Regan (CRT); Fox, Deena (CRT); Paige, Mitzi (USAMSS); 'Jim Shelson (3724)'; hpizz@ago.state.ms.us; Mortensen, Susan (CRT)
Subject: U.S. v. Miss. (3:16-cv-622) - Ex Parte Communications by Special Master

Dear Judge Reeves,

We would like to inform you that the Parties have conferred regarding the provision in the Court's Order Appointing Special Master (ECF No. 241) pertaining to ex parte communications by the Special Master and submit the following shared understanding:

The Parties are in agreement that the provision in the Court's Order Appointing Special Master (ECF No. 241) permitting the Special Master to have "ex parte communications with counsel of record and the Court" encompasses communication with Party representatives in this matter if counsel of record consent to that communication. This would permit, for example, Diana Mikula – Executive Director of the Mississippi Department of Mental Health – to participate in discussions with the Special Master alongside counsel of record during anticipated negotiation sessions.

Please let us know if you have any concerns.

Thank you,
Patrick Holkins

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UNITED STATES OF AMERICA,

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Defendants.

CIVIL ACTION NO.
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[PROPOSED] ORDER

On February 25, 2020 this Court appointed Dr. Michael Hogan as a Special Master under Rule 53 of the Federal Rules of Civil Procedure. ECF No. 241. The Special Master submitted an affidavit disclosing no ground for disqualification under 28 U.S.C. § 455. ECF No. 242. Fed. R. Civ. P. 53 (a)(2), (b)(3). Both prior to issuing that initial appointment order and prior to issuing this Order, the Court gave the Parties notice and an opportunity to be heard. *See* Fed. R. Civ. P. 53 (b)(1), (b)(4). This Order modifies the Court’s initial appointment order, ECF No. 241.

A. Duties

As more fully described in the initial appointment order, Dr. Hogan’s charge is to “help the parties craft an appropriate remedy—one that encourages the State’s forward progress in a way that expedites and prioritizes community-based care.” ECF No. 234 at 60. *See* Fed. R. Civ. P. 53(b)(2)(A). First, Dr. Hogan must attempt to mediate a proposed agreed upon Remedial Order between the Parties. To the extent that the Parties cannot reach consensus on such a remedy, the Special Master will rely on the record in this case, including any supplemental evidence entered into the record post-trial, and his professional expertise to craft the proposed

remedy. The ultimate proposal must include a “timeline for the State to reach full compliance” with the Americans with Disabilities Act and a process for “measur[ing] success along the way.” ECF No. 241 at 3-4.

B. Communication and Materials

Throughout his work, the Special Master is authorized to have *ex parte* communications with the Court, counsel of record, and Party representatives. *See* Fed. R. Civ. P. 53(b)(2)(B). In furtherance of his mediation duties, the Special Master may also request to speak with employees of the Department of Mental Health and the Division of Medicaid and the State may make these individuals available, assuming that counsel for both Parties is provided the opportunity to participate. All of these communications are protected under Federal Rule of Evidence 408.

Similarly, in support of the mediation, the Special Master may request and consider written materials outside the record from the Parties. However, any Party providing extra-record documents to the Special Master for consideration must provide copies of any such documents to the other Party.

The Special Master shall not communicate with the media or with any legislative or investigative body not a Party, or make public comments on the merits of this action, without notice to the Parties and an opportunity to be heard, and application to and approval from the Court.

C. Preservation and Recordkeeping

The Special Master shall maintain a log and copy of any documents he reviews that are not part of the trial record. He will also maintain a list of all individuals he speaks with, including the date and subject of the discussion, and a list of other participants. *See* Fed. R. Civ. P. 53(b)(2)(C).

D. Standard of Review

The Court will review the Special Master’s proposed remedial order, any accompanying report regarding provisions contained therein, and any objections to the Special Master’s recommendations *de novo*. See Fed. R. Civ. P. 53(b)(2)(D).

E. Compensation

The Parties will share the cost of Dr. Hogan’s reasonable hourly fees and reasonable expenses equally. Fed. R. Civ. P. 53(b)(2)(E).

F. Reporting

The Special Master will regularly report to the Court on progress toward a proposed plan. See Fed. R. Civ. P. 53(e). Each Party will receive a copy of each report.

The Special Master has all authorities specified in Fed. R. Civ. P. 53(c).

The Special Master is directed to proceed with all reasonable diligence and speed.

Carlton W. Reeves
United States District Judge