

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

UNITED STATES OF AMERICA

PLAINTIFF

VS.

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

THE STATE OF MISSISSIPPI

DEFENDANT

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

In his Status Report dated April 23, 2020, the Special Master, Dr. Michael Hogan, recommended that he “be authorized to interact with any staff or stakeholders involved in the Mississippi mental health system, to the extent he determines is needed, to facilitate development of the Plan that the Court has directed.” The State of Mississippi (State) objects to the Special Master’s request to conduct extra-record interviews because (i) doing so untethers the remedy from the record and invites error, (ii) permits a form of discovery without safeguards, (iii) seeks to re-open discovery after the Court ruled that further discovery is not needed, and (iv) the process is working.

I. The Remedy Should Not Be Untethered From The Record.

The process proposed by the Special Master untethers the remedy from the record and invites error. The Special Master is not working on a blank canvas. His canvas is the record. He should stay on that canvas. The United States did not request bifurcation. It was not prohibited from putting on evidence regarding a remedy. The remedy should be decided on the record that was made.

The Special Master’s mandate is stated in the Order Appointing Special Master as follows: “Mississippi’s mental health needs are well-known; the services to expand have already been defined. Many of the challenges and remedies are not disputed. We do not need

additional discovery or consultants to elaborate on them. What we need is a seasoned executive to propose a timeline for the State to reach full compliance. By when can the Department of Mental Health and the Division of Medicaid deliver the necessary community-based services – realistically – and how should we measure success along the way?”¹

The Special Master’s mandate is not to design a mental health system for Mississippi, nor is the Special Master a fact finder. The Court is looking for two things from the Special Master: (i) a timeline and (ii) how to measure success. The Special Master need not have unlimited interview access to unidentified staff or stakeholders to fulfill his mandate.

II. The Special Master Is Proposing A Form of Discovery Without Any Safeguards.

The State understands the Special Master’s request to interview “staff” to mean employees of the State or CMHCs. The Special Master’s proposal to interview staff and stakeholders does not have any of the safeguards built into the discovery process under the Federal Rules of Civil Procedure. For example, the parties would not be participants in the interviews and the State would effectively be deprived of counsel when the Special Master interviewed staff.

Nor would evidentiary safeguards be available. The Court and the parties will not know who the Special Master interviewed, where the information he obtained came from, or what the Special Master utilized the information for. The Court and the parties will not be able to ascertain whether the information obtained by the Special Master is anecdotal, hearsay, or based on personal knowledge. The Special Master’s extra-record interviews will not be subject to cross examination. The Special Master’s proposal to interview staff and stakeholders risks

¹ Dkt. 241, Order Appointing Special Master, p. 3.

creating an adversarial litigation relationship between the parties and the Special Master, which is contrary to the Special Master's role to attempt to help the parties reach an agreement.

The Special Master's first role is to attempt to help the parties reach an agreement. There is no need for the Special Master to propose a plan to the extent the parties agree. The Special Master has not yet determined to what extent the parties can come to an agreement. If the Special Master later determines he must propose a plan, he should do so within the parameters of the record and the parties' proposals, and his plan should be focused on a timeline and how to measure success.²

III. The Special Master And The United States Are Seeking To Re-Open Discovery.

The Special Master is proposing to speak with an unlimited number of unidentified staff and stakeholders over an unlimited time. The United States is also seeking additional discovery from the State. It has sent the State 110 requests, many with multiple sub-parts, for additional information.³

The Special Master claims that “[a]ssessing the feasibility and relevance of recommendations requires an understanding of current operations and the resources and capabilities that are available.” That record has been made and closed. To open it back up in the manner the Special Master (and the United States) are proposing is essentially starting over.

In its Order Appointing Special Master, the Court ruled that “[w]e do not need additional discovery.”⁴ The United States did not timely seek reconsideration of that Order, nor has any

² The Special Master's role in proposing a remedy is challenging because the Special Master is not a fact finder nor can he resolve questions of law. The Court may need to clarify the standard the Special Master is to apply in proposing a remedy.

³ The United States' requests are not presently before the Court, so the State will not address them further in these Objections.

⁴ Dkt. 241, Order Appointing Special Master, p. 3.

party moved to reopen the record. Discovery is closed and should stay closed. The record is closed and should stay closed except only to extent the parties stipulate otherwise.

Under Fed. R. Civ. P. 53, the order referring a matter to a special master is the source and limit of the special master's duties and powers. The Court has ordered that discussions with the Special Master will remain confidential under Rule 408 and that additional discovery is not permitted.⁵ The intent of subjecting discussions with the Special Master to Rule 408 is, in part, to prevent the State's participation in the Special Master process from being used adversely to the State. The Court's ruling that additional discovery is not needed applies to the parties and the Special Master. The extra-record interviews proposed by the Special Master exceed the parameters of the Court's appointment of the Special Master.

IV. The Process Is Working.

The Special Master has reported to the Court that the parties are working cooperatively regarding a remedy. The Special Master has indicated that he intends to proceed in a four-week process for each core service as follows: Week 1 – meet with the parties separately, Week 2 – negotiating session with the parties, Week 3 – negotiating session with the parties, and Week 4 – attempt to reduce any agreements to writing.

The State does not oppose the Special Master interviewing staff when he meets separately with the parties as long as the State's counsel is present and, as previously ordered, the interviews are subject to Rule 408 of the Federal Rules of Evidence. If there are particular individuals (staff) the Special Master wishes to interview in that context, the State will work with the Special Master to make those individuals reasonably available. The Special Master is also

⁵ Dkt. 241, Order Appointing Special Master, pp. 3-4.

free to ask questions of staff during the negotiating sessions with the parties, which are also subject to Rule 408.

Relief Requested

For these reasons, the Special Master's request to conduct extra-record interviews should be denied.

Dated: May 6, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 6, 2020, 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, and emailed a copy to the Special Master.

/s/ James W. Shelson

JAMES W. SHELSON