

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 RALPH COLEMAN, et al.,

No. 2:90-cv-0520 KJM DB

12 Plaintiffs,

13 v.

ORDER

14 GAVIN NEWSOM, et al.,

15 Defendants.
16
17

18 Defendants have filed a motion for an extension of time to implement six
19 components of the California Department of Corrections and Rehabilitation (CDCR)
20 telepsychiatry policy the court provisionally approved, based on the parties' stipulation, on March
21 27, 2020, ECF No. 6539. ECF No. 6833. Plaintiffs oppose the motion. ECF No. 6836. As
22 requested, the court has considered defendants' motion on an expedited basis. For the reasons
23 explained below, the motion is denied.

24 I. BACKGROUND

25 The court has set out the relevant history leading to the adoption and provisional
26 approval of defendants' telepsychiatry policy in its orders of October 10, 2017, July 3, 2018 and
27 March 27, 2020 orders, ECF Nos. 5711, 5850, and 6539, among others. *See also* Special
28

1 Master's August 2, 2018 Report on the Proposed Telepsychiatry Addendum, ECF No. 5872.
2 That history is incorporated by reference in this order.

3 II. RELEVANT PROVISIONS OF THE MARCH 27, 2020 STIPULATION AND ORDER

4 On March 27, 2020, the court approved the parties' stipulation agreeing to a
5 provisional period of eighteen months following "full implementation" of CDCR's telepsychiatry
6 policy (hereafter policy) before incorporation of the policy into the Program Guide. ECF No.
7 6539 at 2. The eighteenth month period is intended to permit monitoring of the efficacy of the
8 policy prior to its formal adoption as part of the Program Guide. *See id.* at 2-3. The deadline for
9 "full implementation" was initially set for 120 days after court approval of the stipulation and the
10 policy, or July 25, 2020. *Id.* at 2; *see also* ECF No. 6789 at 1. The purpose of the 120-day period
11 was to allow defendants to "complete the internal monitoring process which will allow
12 Defendants to provide notice to Plaintiffs and the Special Master, as required by the provisional
13 policy." *Id.* The policy requires defendants to provide the Special Master and plaintiffs' counsel
14 with notice "if an EOP program does not have the on-site psychiatry required by th[e] policy for
15 30 consecutive calendar days," "if a telepsychiatrist is required to serve in an MHCB [mental
16 health crisis bed unit] for greater than 14 consecutive calendar days," and/or if a telepsychiatrist is
17 required to serve in a psychiatric inpatient program (PIP) for more than thirty days. *Id.* at 7-8.

18 The parties' stipulation provided for the possibility of an extension of the 120-day
19 period: "If Defendants believe that the 120-day period may need to be extended due to the
20 COVID-19 pandemic impacts on CDCR, they will meet and confer with Plaintiffs' counsel and
21 the Special Master concerning an extension. If no agreement is reached Defendants may seek an
22 order from the Court extending the 120-day period." *Id.* at 2. In July, the parties stipulated to a
23 thirty day extension of the 120-day period, to allow CDCR to "complete and validate the
24 Telepsychiatry Resource Management Tool, train statewide institution staff to ensure accurate
25 data entry, train headquarters staff to use the system and provide program oversight, and
26 implement to [sic] tool throughout CDCR's mental health program sites." ECF No. 6789 at 2.
27 The stipulated request did not mention any possible delay in implementation of any of the
28 substantive components of the telepsychiatry policy, including the six cited in defendants' present

1 request. The court approved the thirty day extension, *id.* at 3, thereby extending the deadline to
2 August 24, 2020. Defendants filed the pending motion on August 21, 2020, before expiration of
3 the extended deadline.

4 III. DEFENDANTS' MOTION

5 A. Defendants' Motion

6 Defendants' motion is focused on six substantive provisions of the telepsychiatry
7 policy they contend cannot be fully implemented during the novel coronavirus (COVID-19)
8 pandemic due to public health measures they say are necessitated by the pandemic. The six
9 provisions cover: site visits by telepsychiatrists; work from telepsychiatry hubs; staff that may
10 work as tele-presenters; prohibition on counting cell front contacts toward Program Guide patient
11 contact requirements; programs in which telepsychiatrists may work; and patient refusals of
12 psychiatric care based on concerns about COVID-19. *See* ECF No. 6833 at 5-7. Defendants seek
13 a variety of delays in full implementation of the policy, conditioned on continued regular
14 discussions of the status of implementation of the policy in the weekly COVID-19 Task Force
15 meetings and formal reassessment every ninety days, accompanied by a report to the court, of the
16 need, if any, for ongoing COVID-19 "alternative measures." ECF No. 6833 at 7-8. As the court
17 understands it, defendants appear to envision an open-ended process, with no particular end date.
18 The court assumes the weekly meetings defendants reference are those convened by the Special
19 Master.

20 B. Plaintiffs' Opposition

21 Plaintiffs raise a number of arguments in opposition to the motion. In essence,
22 plaintiffs contend "the express purpose of the original 120-day deferred implementation
23 period" and the thirty day extension of that period "was solely to provide Defendants time
24 to develop tracking and reporting tools." ECF No. 6836 at 2. Plaintiffs represent defendants
25 have reported that the tracking and reporting tools "are in fact now complete." *Id.* at 2. Plaintiffs
26 argue that defendants' substantive departures from the telepsychiatry policy "are wholly
27 unsurprising and indeed had already been expressly highlighted for months in the parties'
28 Program Guide departures filings." *Id.* at 4. Observing that the court has already declined to

1 approve indefinite departures from the required Program Guide level of care, *id.* at 6 (citing July
2 28, 2020 Order, ECF No. 6791, at 1-3), plaintiffs contend defendants’ motion should be denied
3 and the eighteen month period for monitoring the telepsychiatry policy should “proceed as
4 scheduled.” *Id.* at 8.

5 IV. ANALYSIS

6 The court’s resolution of defendants’ motion requires determining whether “full
7 implementation” of the telepsychiatry policy is a necessary prerequisite to the start of the eighteen
8 month provisional period for monitoring the effectiveness and adequacy of the telepsychiatry
9 policy? For the reasons explained below, the court concludes the answer is no.

10 Defendants’ request proceeds from an ambiguity in the original stipulation
11 approved by the court. In relevant part, the original stipulation provides:

12 The parties agree that this is a provisional policy that will not be
13 part of the MHSDS Program Guide, and that the provisional period
14 will last eighteen months from the date of the policy’s full
15 implementation throughout CDCR, which will occur within 120
16 days of the date of the Court’s approval of this stipulation. During
17 this 120-day period, Defendants will complete the internal
18 monitoring process which will allow Defendants to provide notice
19 to Plaintiffs and the Special Master, as required by the provisional
20 policy. If Defendants believe that the 120-day period may need to
be extended due to the COVID-19 pandemic impacts on CDCR,
they will meet and confer with Plaintiffs’ counsel and the Special
Master concerning an extension. If no agreement is reached,
Defendants may seek an order from the Court extending the 120-
day period. Defendants will provide regular updates to Plaintiffs’
counsel and the Special Master regarding the progress of
developing and implementing the internal monitoring process.

21 ECF No. 6539 at 2. Defendants’ present request proceeds from a reading of the stipulation that
22 would require “full implementation” of the policy as a condition precedent to the start of the
23 eighteen month provisional period. However, read in the broader context of the entire stipulation
24 and the subsequent stipulation for a thirty day extension, the purpose of the 120-day delay was to
25 allow completion of “the internal monitoring process,” which would allow defendants to comply
26 with the notice requirements of the provisional policy, and not to require completion of the other
27 implementation related tasks. Put another way, the parties agreed in February 2020 that the
28 telepsychiatry policy could be fully implemented and that the only reason to delay the start of the

1 eight month monitoring period was to allow defendants to implement necessary internal
2 monitoring mechanisms. The stipulation presented to the court suggested that COVID-19 might
3 delay defendants' ability to implement those internal monitoring mechanisms, but there is nothing
4 in the stipulation suggesting COVID-19 would delay "full implementation" of the policy.

5 Most importantly, defendants' motion arises from the impact of COVID-19 on
6 their ability to fully implement the policy, not COVID-19's impact on development and
7 implementation of the internal monitoring mechanisms necessary to provision of the notice the
8 policy requires. Plaintiffs represent defendants have said they have developed and implemented
9 the internal monitoring mechanisms, and defendants make no showing to the contrary. Thus, the
10 material condition for deferral of the eighteenth month period agreed to by the parties and
11 approved by the court has been satisfied and monitoring of the telepsychiatry should therefore
12 begin.

13 To the extent defendants seek the court's approval of delays in "full
14 implementation" of the policy, that request is denied. As the court has previously recognized, the
15 COVID-19 pandemic is occasioning a number of temporary departures from remedial
16 requirements in this action. *See* August 3, 2020 Order, ECF No. 6806, at 14. The court also
17 acknowledges the departures in full implementation of the telepsychiatry policy described in
18 defendants' motion, as well as defendants' plans to proceed toward full implementation and their
19 commitment to continued regular discussions of the status of telepsychiatry implementation in the
20 Special Master's weekly COVID-19 Task Force meetings and the related clinicians' small work
21 group. At the same time, the COVID-19 pandemic adds an increased level of urgency to the need
22 for assessing the extent to which telepsychiatry may or may not be effective for the delivery of
23 necessary psychiatric care to members of the *Coleman* class. With the understanding that the
24 eighteen month monitoring period will start promptly now and that defendants will follow
25 through on the commitments made in their motion, the court looks forward to the next eighteen
26 months as a fruitful and enlightening period for assessing the proper role telepsychiatry may play
27 in the delivery of mental health care to the plaintiff class.

28 /////

1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. Defendants' August 21, 2020 motion, ECF No. 6833, is DENIED.

3 2. The eighteen-month period for monitoring the provisionally approved
4 telepsychiatry policy shall start on October 1, 2020.

5 DATED: September 21, 2020.

6
7 
8 CHIEF UNITED STATES DISTRICT JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28