

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,

Plaintiffs,

No. 2:90-cv-0520 LKK JFM (PC)

vs.

EDMUND G. BROWN, JR.,
et al.,

Defendants.

ORDER

Defendants have filed a request to vacate the evidentiary hearing set for August 17, 2011, set by this court in an order filed July 22, 2011. Plaintiffs oppose the request.

The purpose of the evidentiary hearing is for defendants to show cause why fifty beds at Coalinga State Hospital (Coalinga) designated for Coleman class members, as well as any other vacant beds at the facility, cannot be filled with high-custody CDCR inmates, and for the court to take evidence on whether the alternative assessment process described by defendants in an earlier filing is appropriate to adequately identify Coleman class members in need of referral to inpatient care. Defendants seek a period of ninety days to work with the special master on a supplemental plan to reduce the wait list for inpatient mental health care and to present their alternative referral assessment process to the special master for evaluation. Defendants represent that if at the end of that ninety day period there is no agreement with the special master on a plan

1 to further address the wait list issues the evidentiary hearing should be reset at a time at least
2 thirty days thereafter.

3 As all parties to this action know, defendants were ordered over sixteen months
4 ago to work with the special master to come up with a plan to reduce or eliminate the wait list for
5 inpatient care and to better serve the treatment needs of inmates on the wait list. See Order filed
6 March 31, 2010, at 3. The original time frame for development of the plan was ninety days. See
7 id. In August 2010, the parties stipulated to a one hundred twenty day extension of time for
8 development and filing of the plan, and the stipulation was approved by this court in an order
9 filed August 4, 2010. Defendants filed their plan in November 24, 2010, almost eight months
10 after the March 31, 2010 order was filed.

11 The first element of defendants' plan was an Extended Enhanced Outpatient
12 Program Care Plan (EECP) "designed to provide treatment interventions targeted to the subgroup
13 of EOP inmate-patients who exhibit serious *and* persistent mental illness, and whose level of
14 functioning is insufficient to allow general population placement." Defendants' Plan Re:
15 Intermediate Care Facility and Acute Inpatient Waitlists, filed November 24, 2010, at 4. At the
16 time they filed their plan, defendants had identified 68 inmate-patients on the waitlist as meeting
17 criteria for EECP placement. Id. at 5. The EECP was also part of defendants' plan to provide
18 better mental health treatment for inmates on the waitlist. Id. at 23; but cf. Defendants' Response
19 to Court's July 22, 2011 Order Re: EECP, filed August 4, 2011, at 3.

20 In objections filed February 25, 2011, plaintiffs contended, inter alia, that the
21 EECP was not supported by sufficient staff or other resources to justify removing inmates from
22 the waitlist for intermediate inpatient hospital care. Plaintiffs' Objections to Defendants' Plan to
23 Address Waitlists for Inpatient Care and to Reduce Harms Inflicted on Class Members on
24 Waitlists, filed February 25, 2011, at 9-11. By order filed April 28, 2011, defendants' plan was
25 referred to the special master for review of its adequacy and whether, in light of objections raised
26 by plaintiffs, any modifications to the plan should be required.

1 The special master filed his report and recommendations on June 13, 2011, noting
2 the large role that the EECP played in defendants' wait list plan. See Special Master's Report on
3 Defendants' Plan Re: Intermediate Care Facility and Acute Inpatient Wait Lists, filed June 13,
4 2011 (Report), at 26. In his first two recommendations, the special master recommended that no
5 inmates placed in the EECP be removed from the wait list, and that he be ordered to monitor and
6 review the EECP including staffing and to report to the court thereafter on whether inmates
7 transferred to the EECP should be removed from the wait list. Id. at 54.

8 After eight months of work by defendants as well as the special master and his
9 staff, and an additional forty-five days spent by the special master and his staff reviewing the
10 EECP and other components of the wait list plan, defendants' response to the special master's
11 recommendations was to withdraw the EECP from their wait list plan. The asserted reason for
12 withdrawal of the EECP from the wait list plan was that the special master's first
13 recommendation "defeats the purpose of the EECP" while the second recommendation for
14 monitoring was "redundant." Defendants' Response and Objections to Special Master's Report
15 on Defendants' Plan Re: Intermediate Care Facility and Acute Inpatient Wait Lists, filed July 1,
16 2011, at 4. The special master's recommendation that inmates transferred to the EECP remain
17 on the waitlist was clearly intended as part of the process of evaluating the efficacy of the EECP
18 as an alternative to inpatient hospital care. See Report at, e.g., 51-52. Thus, defendants'
19 assertion that the special master's recommendation "defeats the purpose of the EECP" was
20 unfounded.

21 Moreover, pursuant to court order, defendants have subsequently represented that
22 they "still intend[] to provide EECP-type services to EOP inmate-patients with chronic mental
23 illness whose symptoms have stabilized but whose level of functioning is insufficient to allow
24 general population placement" and that they will continue with the "interim process to treat
25 inmate-patients on the SVPP waitlist who can safely program at the four EECP institutions with
26 existing EECP inmate-patients." Defendants' Response to Court's July 22, 2011 Order Re:

1 Extended Enhanced Outpatient Program Care Plan, filed August 4, 2011, 2. To the extent that
2 the EECP may serve as an alternative to inpatient hospital care for some members of the
3 Coleman class, defendants should be tracking whether in fact the EECP adequately serves that
4 function as part of their overall obligation to ensure that all members of the plaintiff class receive
5 timely access to necessary mental health care.¹

6 In their opposition to defendants' request, plaintiffs inform the court that data
7 provided by defendants shows that the wait list has grown to 171 inmate-patients as of July 29,
8 2011. Plaintiffs represent that there are 400 empty hospital beds at Coalinga and 73 empty
9 hospital beds at Atascadero State Hospital (ASH). Plaintiffs' evidentiary hearing brief, filed with
10 their opposition, is a powerful condemnation of defendants' failure to meet their constitutional
11 obligations to some of the most seriously ill members of the plaintiff class. It also suggests non-
12 compliance with orders of this court and defendants' own representations about efforts to address
13 this crisis.

14 It appears from the record before the court that defendants have wasted a
15 substantial amount of the special master's time and efforts, and their own, on a plan to reduce or
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17 ¹ In the July 22, 2011 order, the court deferred approval of section III of defendants' plan
18 concerning interim treatment for inmates on the wait list and a final determination of whether
19 defendants have complied with the March 31, 2010 order pending clarification by defendants as
20 to whether they intend to continue the EECP. Order filed July 22, 2011 at 4 n.2. The record
21 before the court suggests that defendants have wasted a substantial amount of the special
22 master's time supervising, reviewing, and assessing the EECP as part of the overall effort to
23 solve the ongoing problem of access to inpatient care. Defendants' August 4, 2011 filing
24 suggests that they intend to continue at least some part of the EECP. Defendants' obligation
25 under the March 31, 2010 order is to devise a plan that will reduce or eliminate the wait list for
26 inpatient care and better serve the treatment needs of class members placed on the wait list.
Order filed March 31, 2010 at 3. In that order, the court specifically noted that defendants' short-
term bed projects would not eliminate the wait list and the long-term bed projects were then three
years from activation. *Id.* The focus of defendants' efforts over the next ninety days must be on
developing strategies that will increase **in the near term** the number of hospital beds available to
class members in need of inpatient care and that will provide better care for any class members
who must still wait for admission to a hospital bed. Should those efforts fail to yield concrete
results, the court may have no alternative but to order full implementation of the EECP, and to
make such further orders addressing defendants' continued failure to address their constitutional
obligations as may be required.

1 eliminate the wait list that, as it stands, is insufficient. The opposition to the request at bar
2 request suggests a failure to timely provide available solutions to the ongoing crisis of inadequate
3 access to inpatient care and its sequelae. Against that backdrop, the court must now decide
4 whether to grant defendants even more time to work with the special master on a supplemental
5 plan.

6 If the request leads to a serious plan, it should be granted. If the result is more
7 delay without solution it cannot be countenanced. As the court noted in its July 22, 2011 order,
8 the serious problem with access to inpatient hospital care has plagued seriously mentally ill
9 inmates under defendants' jurisdiction for over twenty years and is ongoing. The court meant
10 what it said: further delay in resolution of this problem is unconscionable.

11 The remedial phase of this litigation has been guided by the court's core view that
12 the obligation to comply with the Constitution rests with the defendants and that it is defendants
13 who must choose and implement the mechanisms for meeting that obligation. But the court's
14 patience is nearing its limit. The crisis of a lack of adequate access to inpatient care must be
15 solved.

16 The special master has informed the court that within defendants' request there
17 are some proposals that warrant further consideration prior to a hearing on the use of beds at
18 Coalinga, including the possibility of having the Department of Mental Health provide additional
19 clinical care at certain prison institutions, including California State Prison-Sacramento, to
20 inmates on the wait list, and the ongoing review of the inmate classification system. See Request
21 at 7. In addition, on July 20, 2011, defendants reported to the three judge court on their initial
22 population reduction², which raises the question of whether celled housing units at Salinas Valley
23 State Prison or any other appropriate prison institution might be converted to hospital units to
24 reduce the wait list. The special master also reports that the 45-bed hospital unit at California

26 ² Docket No. 4043.

1 Institution for Women scheduled to begin patient admissions in January 2012 may be a unit that
2 could house male inmates if sufficient inpatient beds were available to female inmates at Patton
3 State Hospital. The evidence tendered by plaintiffs concerning Coalinga must also be given
4 serious consideration, as must plaintiffs' suggestion that the wait list can be reduced through
5 identification and transfer of inmate-patients, stabilized at the Salinas Valley Psychiatric Program
6 (SVPP), to ASH or Coalinga.

7 Given the possibility that there are solutions to the wait list problem not reflected
8 in defendants' current plan, and good cause appearing, defendants' request will be granted. The
9 court will not, however, vacate the evidentiary hearing entirely. By this order, the hearing will be
10 reset to December 14, 2011 at 10:00 a.m. The court will not entertain any request to continue the
11 hearing further and will only entertain a request to vacate the hearing if such a request is
12 accompanied by a supplemental plan to reduce the wait list that has been approved by the special
13 master. Moreover, given the urgency of the matter at bar and the necessity of avoiding further
14 wasteful delays, the court will direct defendants to file a status report every thirty days until the
15 time of the evidentiary hearing. If after reviewing any status report the court finds that
16 defendants are not moving in good faith and making adequate progress toward development of a
17 substantive supplemental plan, the court will terminate the ninety day period and reset the
18 evidentiary hearing to an earlier date. The court also expects defendants to implement during
19 that ninety day period any step approved by the special master that will make hospital beds
20 immediately available to inmates on the wait list.

21 Defendants also seek an additional ninety days to demonstrate to the special
22 master that their alternative assessment process for referring inmates to inpatient hospital care is
23 adequate. As the court found in the July 22, 2011 order, the adequacy of the process used to refer
24 inmates to inpatient hospital care is intertwined with the ongoing problem of inpatient wait lists
25 and delays in access to inpatient care. What is at stake here is whether seriously mentally ill
26 inmates who need hospitalization to treat their mental illness are being timely identified and

1 referred for such care. The record suggests that once again they are not: according to
 2 defendants' July 1, 2011 response, institutional review of 628 inmates who met initial criteria for
 3 referral to inpatient care was to be completed by the end of July.³ Defendants now "expect" to
 4 complete this review by the end of August.

5 Seriously mentally ill inmates who need hospital care should not languish in
 6 conditions where their treatment needs cannot be met. They must be identified as needing that
 7 care, they must be referred for that care, and they must be transferred to receive that care. It is
 8 past time for defendants to remedy this longstanding crisis. Defendants must develop and fully
 9 implement an adequate referral process that will ensure that all class members in need of
 10 inpatient care are timely identified, referred, and transferred to such care. The court cannot
 11 permit an additional ninety day delay solely to determine whether defendants' proposed
 12 assessment process is adequate. For that reason, defendants will be directed to work with the
 13 special master so that an assessment process that meets his approval has been conducted and
 14 completed by December 9, 2011.⁴ The assessment process shall include referrals for all inmates
 15 identified as needing inpatient care and, as appropriate, transfers to hospital beds. All such
 16 referrals shall be completed within the timelines set by the Revised Program Guide, and, as
 17 appropriate, all transfers shall be completed within said timelines. Defendants shall report to the
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 20 ³ Defendants actually generated a list of 2083 inmates meeting one or more of the
 21 relevant criteria for consideration of referral to inpatient care. Of those, they elected to review
 22 1408 inmate-patients as part of an audit of the alternative referral process they are developing.
See Order filed July 22, 2011 at 8-9 and evidence cited therein.

23 ⁴ Pursuant to the Order of Reference referring the remedial phase of this action to the
 24 special master, "[t]he principal responsibilities of the special master, ..., are to provide expert
 25 advice to defendants to ensure that their decisions regarding the provision of mental health care
 26 to class members conforms to the requirements of the federal constitution and to advise the court
 regarding assessment of defendants' compliance with their constitutional obligations." Order of
 Reference, filed December 11, 1995, at 2. The special master shall report to the court forthwith
 should there be any dispute remaining thirty days from the date of this order about the
 assessment process to be followed. See Order of Reference at ¶ 11.

1 court on the results of the assessment process, including referrals and transfers, at the time of the
2 evidentiary hearing.

3 It is impossible to overstate the urgency of this matter. The court is not granting
4 defendants' request merely to permit them to consider alternatives. The court is granting the
5 request to allow defendants to make substantive progress toward meeting their constitutional
6 obligation to provide timely access to inpatient care for all members of the plaintiff class in need
7 of such care.⁵

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

9 1. Defendants' August 9, 2011 request is granted in part.

10 2. The evidentiary hearing set for August 17, 2011 is reset to December 14, 2011

11 at 10:00 a.m.

12 3. During the next ninety days, defendants shall work with the special master to
13 develop a supplemental plan to reduce or eliminate the inpatient wait list and to better serve the
14 treatment needs of inmates on the wait list. During that ninety day period defendants shall
15 implement any step approved by the special master that will make hospital beds immediately
16 available to inmates on the wait list.

17 4. Defendants shall work with the special master so that an assessment process
18 that meets his approval has been conducted and completed by December 9, 2011. The special
19 master shall report to the court forthwith should there be any dispute remaining thirty days from
20 the date of this order about the assessment process to be followed. Defendants shall report to the

21 ⁵ The court expects that defendants' efforts, guided by the special master, will be
22 successful. However, if after **sixty days from the date of this order** the court is not satisfied
23 that defendants are making meaningful progress toward an adequate supplemental plan,
24 defendants will be required, by further court order, to develop within forty-five days a plan to
25 provide adequate security at Coalinga in the event that the court determines that empty beds there
26 must be used for Coleman class members in need of hospital care. Should defendants be
required to develop that plan, it will be developed under the guidance of the special master and,
in developing the plan, defendants will be required to give serious consideration to the evidence
tendered by plaintiffs in Opinion 1 of the Declaration of Joseph L. McGrath, filed August 11,
2011.

1 court on the results of the assessment process, including referrals and transfers, not later than
2 December 14, 2011.

3 5. Defendants shall report to the court on the status of the development of the
4 supplemental wait list plan and the assessment process every thirty days from the date of this
5 order until the time of the evidentiary hearing. The first status report shall be due on September
6 9, 2011, and each subsequent report shall be filed thirty days thereafter. If after reviewing any
7 status report the court finds that defendants are not moving in good faith and making adequate
8 progress toward development of a substantive supplemental plan, the court will terminate the
9 ninety day period for development of a supplemental wait list plan and will reset the evidentiary
10 hearing to an earlier date.

11 6. Plaintiffs shall be included in the foregoing processes at the discretion and
12 direction of the special master.

13 DATED: August 15, 2011.

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16 LAWRENCE K. KARLTON
17 SENIOR JUDGE
18 UNITED STATES DISTRICT COURT
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