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

10 RALPH COLEMAN, et al.,

11 Plaintiffs,

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

12 vs.

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

15 Defendants.

ORDER

16 This matter is before the court on a report and recommendations from the special
17 master concerning defendants' November 24, 2010 court-ordered plan to "reduce or eliminate the
18 wait lists for inpatient [mental health] care and, in the interim, to better serve the treatment needs
19 of Coleman class members placed on such lists." Plaintiffs have responded to the report and
20 recommendations, and defendants have filed objections .

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1 In March 2010, following completion of the second assessment of unmet needs
2 for inpatient care for class members conducted in this action¹, the court held a status conference
3 to

4 hear from defendants concerning the steps they have taken and are
5 taking to ensure that the referral and transfer of inmates to higher
6 levels of care is proceeding in a way that will avoid the need for
any future special assessments of unmet need and will ensure that
those who required inpatient care are referred and admitted in a timely manner.

7 Order, filed January 27, 2010, at 7. Following the status conference, the court issued a written
8 order with two provisions, both relevant to the matter at bar, as follows:

9 1. The special master shall monitor defendants' implementation of
10 their policies and practices regarding referral and transfer of
Coleman class members for inpatient care. This monitoring shall
11 include, as necessary, collection, review and analysis of relevant
12 data. If at any point during monitoring it becomes apparent to the
special master that the sustainability of defendants' inpatient
13 referral process is jeopardized by deficiencies uncovered during
monitoring, he shall take all steps necessary to ensure that
14 defendants correct such deficiencies. The special master shall
report to the court on defendants' identification and referral
15 process by the end of the year, either in his regular monitoring
report or in a special report.

16 2. Within ninety days, under the guidance of the special master
defendants shall work together to develop a plan to reduce or
17 eliminate the wait lists for inpatient care and, in the interim, to
better serve the treatment needs of Coleman class members placed
18 on such lists. The special master shall consult with plaintiffs as
appropriate during this process. The plan shall be filed with the
19 court within one hundred twenty days from the date of this order.

20 Order filed March 31, 2010, at 3-4.

21 ¹ The first Unidentified Needs Assessment (UNA) was conducted pursuant to an order of
22 this court filed October 5, 2004. The UNA was completed in March 2005, and defendants then
23 "reported to the special master that 400 inmates were identified through UNA who otherwise
would not have been referred to higher levels of care." Special Master's Report on Defendants'
24 Plan Re: Intermediate Care Facility and Acute Inpatient Wait Lists, filed June 13, 2011 (hereafter
report), at 5. The second assessment, identified as the Mental Health Assessment and Referral
25 Project (MHARP), was conducted pursuant to an order of this court filed March 31, 2009 and
completed in December 2009. That assessment resulted in the referral of nearly 1,000 inmates to
26 a higher level of care who otherwise would not have been. See Defendants' Request for
Temporary Relief, filed December 31, 2009, at 7.

1 After receiving an extension of time, on November 24, 2010, defendants filed
2 their Plan Re: Intermediate Care Facility and Acute Inpatient Waitlists (hereafter plan). The plan
3 contains five elements: an Extended Enhanced Outpatient Program Care Plan (EECP); enhanced
4 Utilization Management strategies involving conducting prospective, concurrent and
5 retrospective reviews to “optimize inpatient care”; increased used of the Health Care Placement
6 Oversight Program (HC-POP); activation of a new inmate patient information system called
7 SharePoint; and the construction projects, both short and long-term, identified in defendants’
8 previously filed bed plans.

9 On February 25, 2011, plaintiffs filed objections to the plan and on March 18,
10 2011, defendants filed a response to plaintiff’s objections. By order filed April 28, 2011,
11 defendants’ plan was referred to the special master for a report and recommendations in light of
12 plaintiffs’ objections and defendants’ response thereto.

13 The special master makes four recommendations, as follows:

14 1. That defendants’ Plan Re: Intermediate Care Facility and Acute
15 Inpatient Wait List be approved. All parts of the plan should be
16 implemented immediately with the condition that no inmates who
are accepted and placed in the EECP shall be removed from the
wait list.

17 2. That the special master should be ordered to monitor and
18 conduct a review of the EECP, including but not limited to
19 staffing. The special master should be ordered to report to the court
20 either in his regular monitoring report or in a special report,
whether inmates transferred to the EECP should be removed from
the wait list.

21 3. The Court should set this matter for an evidentiary hearing for
22 defendants to show cause why the 50 beds at Coalinga State
Hospital designated for *Coleman* class members, as well as any
23 other vacant beds at the facility, cannot be filled with high-custody
CDCR inmates.

24 4. The defendants should be ordered to conduct a further
25 assessment to determine whether there are unmet needs for
inpatient care among the plaintiff class. The assessment should be
26 modeled after MHARP which was conducted in 2009, and only at
the original twelve identified male institutions and two female
institutions and under the guidance of the special master. As part

1 of this process, the special master should also be directed to
2 monitor the continued implementation and sustainability of
3 defendants' policies and practices regarding referral and transfer of
4 *Coleman* class members for inpatient care. The special master
5 should be ordered to report to the court on defendants'
6 identification and referral process either in his regular monitoring
7 report or in a special report.

8 Report at 54.

9 In response to the first two recommendations, defendants have withdrawn the
10 EECP from their plan. Defendants contend this moots the last sentence of the first
11 recommendation and all of the second recommendation. It is unclear whether defendants are
12 abandoning the EECP altogether or, instead, whether it will continue but they are no longer
13 relying on it to meet their obligations under this court's March 31, 2010 order. Good cause
14 appearing, defendants will be directed to inform the court in writing within ten days whether the
15 EECP will continue.²

16 Defendants object to the special master's recommendation that the court conduct
17 an evidentiary hearing concerning the use of vacant beds at Coalinga State Hospital (Coalinga)
18 for Coleman class members on the wait list for inpatient care. The special master's
19 recommendation is based on his finding that "the inaccessibility to DMH facilities is a primary
20 cause of inmates lingering on the wait list" and that "[t]he only way to achieve any meaningful
21 reduction of the wait list is by placing these inmates into inpatient beds." Report at 44. He

22 ² In his report, the special master found that defendants' plan "complies with the spirit
23 and intent of the March 31, 2010 court order to work under the guidance of the special
24 master" to develop a plan to reduce the wait list. Report at 25. Given the special master's
25 finding that the EECP played a central role in defendants' plan, see Report at 26, and the
26 defendants' decision to withdraw the EECP following the filing of the special master's report, it
is no longer clear whether defendants have in fact complied with the March 31, 2010 order. At
this time, the court will not adopt the special master's recommendation to approve defendants'
plan in its entirety. Instead, the court will approve the second, third and fourth parts of the plan
and will direct that those elements be implemented forthwith. Defendants' construction projects
are the subject of separate court orders. Approval of section III of the plan concerning interim
treatment provided to inmate on the waitlists, and a final determination of whether defendants
have complied with the March 31, 2010 order will be deferred pending clarification by
defendants as to whether they intend to continue the EECP.

1 reports that the California Department of Mental Health (DMH) had 183 beds available at
2 Coalinga as of June 8, 2011, id., that in April 2011 there were a total of 84 low-custody beds
3 available at Atascadero State Hospital (ASH) and in the inpatient programs run by DMH for
4 CDCR inmates, and that the 50 beds dedicated to Coleman class members at Coalinga State
5 Hospital (Coalinga), another DMH facility, “have been vacant for nearly a year.” Id. at 26.

6 Defendants contend that setting such an evidentiary hearing would be
7 “disregarding the wide deference given to prison officials in matters of prison security and
8 safety.” Defendants’ Response and Objections to Special Master’s Report on Defendants’ Plan
9 Re: Intermediate Care Facility and Acute Inpatient Wait Lists (Objections), filed July 11, 2011, at
10 5. The court cannot agree with defendants’ contention. The case law holding that prison
11 officials are entitled to “wide-ranging deference in the adoption and execution of policies and
12 practices that in their judgment are needed to preserve internal order and discipline and to
13 maintain institutional security”, Bell v. Wolfish, 441 U.S. 520, 547 (1979), does not insulate the
14 exercise of that judgment from judicial review. Rather, it sets the standard of review that applies
15 when the exercise of that judgment conflicts with constitutional guarantees: ““Such
16 considerations [safety and security] are peculiarly within the province and professional expertise
17 of corrections officials, and, *in the absence of substantial evidence in the record to indicate that*
18 *the officials have exaggerated their response to these considerations, courts should ordinarily*
19 *defer to their expert judgment in such matters.*”” Id. at 548 (quoting Pell v. Procunier, 417 U.S.
20 817, 827 (1974)) (emphasis added). The special master’s recommendation and the foundation on
21 which it is based demonstrates that, in view of the Eighth Amendment considerations at stake,
22 testing defendants’ exercise of that judgment through an evidentiary hearing is warranted at this
23 time. Moreover, given the crisis nature of the wait list the court is not satisfied that “ordinary”
24 rules should apply.

25 Defendants also assert that the court’s March 31, 2010 order “does not require that
26 Defendants eliminate the waitlist nor does it specify that Defendants reduce the waitlist to a

1 number that the Special Master believes is ‘reasonable’; it requires that Defendants develop a
2 plan that, in the interim, better serves the treatment needs of the inmate-patients placed on the
3 SVPP waitlist.” Objections at 7. Defendants misread the March 31, 2010 order: reduction or
4 elimination of the wait lists was to be an essential component of the plan. See Order filed March
5 31, 2010, at 3.

6 As the special master describes in his report, “[t]he longstanding issues of lack of
7 access to higher levels of care for seriously mentally ill inmates in CDCR predated the UNA
8 study and have existed since the beginning” of this action. Report at 5. A report prepared for the
9 California Department of Corrections dated February 16, 1993 and offered into evidence at the
10 trial of this matter “termed access to acute inpatient care a ‘major problem’ with wait times of
11 several months for transfers to Atascadero State Hospital for inpatient hospitalization in 1992.”
12 Report at 5-6 (citing Coleman v. Wilson, 912 F.Supp. 1282, 1309 (E.D. Cal. 1995). It has now
13 been almost twenty years since those findings, and the problem of access to inpatient care,
14 evidenced in part by the wait lists for inpatient care for seriously mentally ill inmates and the
15 length of stay on those lists, continues. Further delay in resolution of this problem, particularly
16 when empty inpatient beds exist, is unconscionable.

17 Defendants also contend that converting Coalinga into a place to safely house the
18 inmates on the wait list is not a practical short-term solution – in essence, that it would be too
19 expensive and take too much time to convert the hospital from dorms to celled housing, which
20 they contend these inmates require. The special master’s recommendation is that defendants be
21 ordered to show cause at an evidentiary hearing why beds at Coalinga cannot be filled with high-
22 custody CDCR inmates to alleviate the problem of inpatient wait lists. Defendants may tender
23 any evidence relevant to resolution of that question at the evidentiary hearing.³

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25 ³ Defendants also challenge the special master’s finding that the Salinas Valley
26 Psychiatric Program wait list “would remain relatively stagnant between 172 and 187” inmates
until the new correctional health care facility is completed in 2013. Objection at 9 (citing Report
at 42). The special master’s finding is taken directly from section IV of defendants’ plan. See

1 The special master's final recommendation is for a further assessment of unmet
2 needs for inpatient care. Defendants also object to this recommendation, on two grounds.
3 Defendants' first objection is that this recommendation is not properly included in the report and
4 recommendation before the court, ostensibly because it exceeds the scope of the task delegated to
5 the special master by the court's April 28, 2011 order. This objection is without merit.

6 As noted above, defendants' obligation to submit the plan that is the subject of the
7 report and recommendations stems from the March 31, 2010 court order that followed the status
8 conference held after conclusion of the 2009 MHARP. In that order, the court found that
9 defendants had "taken 'incremental steps toward establishing a sustainable process of
10 identification and referral for those inmate-patients who need a higher level of care.'" Order
11 filed March 31, 2010, at 2. The court further found that "[a]t this juncture, it is critical that
12 defendants continue that progress." *Id.* Accordingly, as noted above the court directed the
13 special master to monitor defendants' implementation of their policies and practices regarding
14 referral and transfer of class members for inpatient care. *Id.* In relevant part, the order provides
15 that "[i]f at any point during monitoring it becomes apparent to the special master that
16 deficiencies in defendants' implementation of said policies and practices threaten the
17 sustainability of the process, he shall take all steps necessary to ensure that defendants correct
18 such deficiencies." *Id.* (emphasis added). The special master's decision to include in the current
19 report concerns about the status and efficacy of defendants' referral process and to make a
20 recommendation to the court thereon are entirely within the ambit of the March 31, 2010 order.⁴

21 Moreover, the relevant history of this litigation demonstrates that questions
22 concerning the adequacy of defendants' referral process cannot be separated from the ongoing
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24 Report at 42 n.33; Plan at 25, Table Columns 12/15/2011 through 3/15/2013.

25 ⁴ In March of this year, in his twenty-second round monitoring report, the special master
26 signaled his concern about whether defendants' referral process had taken hold. *See* Twenty-
Second Round Monitoring Report, filed March 9, 2011, at 438.

1 problem of inpatient wait lists – which, after all, are stark and ongoing evidence of defendants’
2 inability to meet for over twenty years their constitutional obligation to provide timely access to
3 necessary and adequate mental health care to members of the Coleman class in need of inpatient
4 hospital care. The special master’s report sets forth the history of unidentified need for inpatient
5 mental health care that has plagued this litigation since its inception. The report provides
6 particular detail on the concentrated efforts since the year 2000 of the special master, his staff,
7 and defendants to break the cycle of unidentified need for inpatient hospital care. The special
8 master has once again appropriately focused the court’s attention on the likelihood that there is
9 still significant unidentified need among members of the Coleman class for inpatient care.

10 Defendants also object that a repeat of the 2009 MHARP is unnecessary because
11 they have “developed and implemented multiple steps to manage and sustain the referral
12 process.” Objection at 14. They contend that this is reflected in the rate of referrals to inpatient
13 care since the special master completed his 2010 follow-up to MHARP. Id.⁵ In response to the
14 special master’s decision to recommend a further MHARP, on June 8, 2011, defendants sent a
15 letter to the special master outlining an alternative proposal for assessing unidentified need. See
16 Ex. B to Report. Then, apparently after the special master’s recommendation was pending before
17 this court, defendants commenced that alternative assessment process. This alternative process
18 differs significantly from the MHARP process. Compare Ex. A to Report with Ex. B to Report.
19 Using apparently the same criteria as used in MHARP to determine whether an inmate’s record
20 should be examined for consideration of referral to inpatient care,⁶ and drawing from the fourteen
21

22 ⁵ Defendants dispute the average monthly referral rate for the period from August 2010
23 to April 2011, reported by the special master as 54.7. Report at 49. Defendants contend their
24 data shows an average rate for the same period of 80.22 referrals per month. Objections at 22.

25 ⁶ The criteria identify Enhanced Outpatient (EOP) inmate-patients who had one or more
26 of the following (1) three or more admissions to a mental health crisis bed or placement in an
outpatient housing unit (OHU) during the last six months; (2) an average of less than five hours
of weekly programming for the last three months; and (3) three or more closed CDCR 115-MH
Rules Violation Report: Mental Health Assessments during the last three months.

1 institutions the special master proposed to assess, defendants generated a list of inmate-patients.
2 That list contains 2083 names meeting one or more of the relevant criteria. Of those, 1408
3 inmate-patients were randomly reviewed at the fourteen institutions. The institutions reported
4 that the appropriate referral process had been completed for just 201 of the individuals. For 628
5 inmate-patients, the process was not completed, and the institutions have been given until the end
6 of July to review these records and take further steps. The remaining 579 inmate-patients had
7 transferred, paroled or did not meet the clinical indicators after review. There is no indication
8 whether any follow-up was directed for those who had transferred to another institution.

9 The special master's fourth recommendation is based on his finding that the bed
10 need identified in MHARP more closely approximates the actual inpatient bed need than the
11 referrals to inpatient care that are currently being generated. See Report at 2 (the numbers
12 identified in the MHARP referral process "capture a more accurate picture of the true need for
13 higher levels of care.") Although defendants dispute the special master's data on referrals, the
14 numbers generated by defendants' own preliminary attempt at assessment, if anything, would
15 seem to support this finding. Moreover, the initial results of defendants' assessment cast serious
16 doubt on whether their referral process is working adequately to resolve the problem of
17 unidentified need for inpatient care, a problem which has only become cyclical rather than
18 constant as a result of the two assessments undertaken under the special master's supervision.


19 The data resulting from defendants' initial steps in conducting their own
20 assessment was not available to the special master when he filed his report. It appears from the
21 record that given the steps defendants have taken in June, it may be redundant to start a further
22 assessment process from the beginning. It further appears from the record, however, that the
23 special master's concerns may be well-founded. Given the urgent need to ensure that all
24 Coleman class members in need of inpatient care are properly identified and referred for such
25 care, the court will set this matter for hearing on the assessment described by defendants in their
26 objections and whether said assessment is appropriate to adequately identify Coleman class

1 members in need of inpatient care who should have but were not identified through defendants'
2 referral process. Said hearing will be consolidated with the evidentiary hearing concerning use of
3 beds at Coalinga State Hospital.

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

- 5 1. The June 13, 2011 recommendations of the special master are adopted in part;
- 6 2. The second, third, and fourth parts of defendants' Plan Re: Intermediate Care
7 Facility and Acute Inpatient Wait List are approved and shall be implemented immediately;
- 8 3. Within ten days from the date of this order defendants shall inform the court in
9 writing whether the EECF will continue;
- 10 4. This matter is set for evidentiary hearing before the undersigned on August 17,
11 2011 at 10:00 a.m. in Courtroom # 4. At the evidentiary hearing, defendants shall show cause
12 why the 50 beds at Coalinga State Hospital designated for *Coleman* class members, as well as
13 any other vacant beds at the facility, cannot be filled with high-custody CDCR inmates. At the
14 same time, the court will take evidence on the assessment described by defendants in their
15 objections and whether said assessment is appropriate to adequately identify Coleman class
16 members in need of inpatient care who should have been but were not identified through
17 defendants' referral process.

18 DATED: July 22, 2011.

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21 
22 LAWRENCE K. KARLTON
23 SENIOR JUDGE
24 UNITED STATES DISTRICT COURT
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