

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

UNITED STATES OF AMERICA

PLAINTIFF

V.

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

THE STATE OF MISSISSIPPI

DEFENDANT

**THE STATE OF MISSISSIPPI'S REBUTTAL IN
SUPPORT OF RESPONSE TO MONITOR'S PROPOSED BUDGET**

This Rebuttal is submitted of Mississippi's Response to Monitor's Proposed Budget (ECF 325). The Monitor should not be permitted to incur any costs – directly or indirectly – in connection with the provisions of the Remedial Order that are stayed for the reasons set forth below.

Paragraph 23 of the Remedial Order requires Mississippi to design a Clinical Review Process, but that requirement is stayed.¹ Because paragraph 23 of the Remedial Order is stayed, Mississippi asked the Court to rule that the Monitor cannot incur any costs in connection with the Clinical Review Process.² The United States alleges that “[t]his argument conflates a core aspect of monitoring with a stay process for continuous quality improvement.”³ The United States is incorrect for several reasons.

First, the United States wrongly treats the Order of Appointment (ECF 279) as amending the Remedial Order. The Court should in no way permit that. The Order of Appointment sets forth the Monitor's authority with respect to the Remedial Order, but the Order of Appointment does not alter, amend, or modify the Remedial Order. No remedial obligations whatsoever are set forth in the Order of Appointment.

¹ ECF 291, Order Granting Partial Stay.

² ECF 325, Mississippi's Response to Monitor's Proposed Budget.

³ ECF 330, United States' Response to Mississippi's Objections to the Monitor's Proposed Budget, p. 1.

Second, the only mention of a clinical review in the Remedial Order is in paragraph 23 of that Order, and paragraph 23 is stayed. The delineation of the Monitor’s authority in the Order of Appointment does not allow the Monitor to conduct a clinical review process that is not authorized by the Remedial Order. The Remedial Order allows one – and only one – Clinical Review Process. It does so in paragraph 23 and that paragraph is stayed.

Third, the United States is asking the Court to adopt a “make-it-up-as-you-go” interpretation of the Remedial Order that the Court should summarily reject. The United States attempts to distinguish the Clinical Review Process addressed in paragraph 23 of the Remedial Order by stating that it “expect[s] that the Monitor-led review will occur on a smaller scale than the State run clinical review that is stayed.”⁴ The United States’ expectation is completely made up. It does not exist in the text of the Remedial Order. The Remedial Order says nothing at all about a “Monitor-led review.” Nor does the Order of Appointment, which states that the Monitor shall “participate in the annual Clinical Review required by the Remedial Order.”⁵ The “annual Clinical Review required by the Remedial Order” is the Clinical Review Process set forth in paragraph 23 of that Order. A “Monitor-led review” is not authorized by the Remedial Order. Again, the only Clinical Review Process contemplated by the Remedial Order is the Clinical Review Process in paragraph 23 of that Order and that paragraph is stayed.

Fourth, the United States’ position that a “Monitor-led review” is a “critical aspect” of monitoring and a “core function” of the Monitor is brand new. The United States never mentioned a “Monitor-led review” during trial, in its 121-page Proposed Findings of Fact and Conclusions of Law (ECF 233), or in its Proposed Remedial Plan (ECF 265-1). Indeed, the only mention of a “clinical review” in the United States’ Proposed Remedial Plan is for Mississippi, not the Monitor,

⁴ ECF 330, United States’ Response to Mississippi’s Objections to the Monitor’s Proposed Budget, p. 3.

⁵ ECF 279, Order of Appointment, ¶ 2.

to conduct “a clinical review of a sample of individuals served at State Hospitals in the year prior to the review.”⁶ Once again, the only mention of a “clinical review” in the Remedial Order is in paragraph 23 of that Order and that paragraph is stayed.

Fifth, the United States’ position that the Order of Appointment supersedes the Remedial Order is contrary to the Monitor’s testimony during the hearing on July 12, 2021 regarding a remedy. The United States now claims that “[t]he Monitor’s ability to look behind summary data on service provision is vital to validating the State’s performance under the Remedial Order. Summary data will not suffice to demonstrate that the required services, processes, and programs are working as intended.”⁷ But the Monitor previously testified that “the monitor would be charged not with assessing independently the State’s performance but serving as some kind of an independent reviewer *of the State’s own data* that it would develop and submit essentially to serve as eyes and ears of the Court so Your Honor doesn’t have to go through the fine print of all of that.”⁸ As between the United States’ expansive view of the Monitor’s role in reviewing the State’s data and the Monitor’s much narrower view, the Monitor’s view should prevail. The extensive bureaucracy of monitoring suggested by the United States should not be allowed to overtake the delivery of the Core Services.

Sixth, the United States’ position that the Order of Appointment supersedes the Remedial Order, and its expansive interpretation of both Orders, are contrary to law. A federal court decree exceeds appropriate limits if it is aimed at eliminating a condition that does not violate the statute at issue or does not flow from such a violation. *M.D. v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018)

⁶ ECF 265-1, United States’ Proposed Remedial Plan, ¶ 47.

⁷ ECF 330, United States’ Response to Mississippi’s Objections to the Monitor’s Proposed Budget, p. 2. The United States references paragraphs 6.b. and 7.b. of the Remedial Order to support its position, but paragraph 6.b. addresses a fidelity scale for PACT and paragraph 7.b. addresses a fidelity scale for ICORT. Those paragraphs say nothing about a clinical review or that a review of “summary data will not suffice” or words to that effect. The United States also failed to explain whether it now views fidelity scales merely as “summary data,” which would be a new position for the United States in this lawsuit.

⁸ Transcript of July 12, 2021 Hearing, p. 69 (emphasis added).

(citation omitted). The United States' cites no authority for the proposition that a "Monitor-led review" is required for compliance with Title II of the Americans With Disabilities Act. Nor does the United States attempt to show that a "Monitor-led review" is aimed at eliminating any statutory violation identified in the Court's Opinion and Order (ECF 234).

Seventh, the United States' claim that a "Monitor-led review" would not defeat the purpose of the stay of paragraph 23 of the Remedial Order⁹ is incorrect. The United States fails to explain why there should be two clinical reviews – the Clinical Review Process addressed in paragraph 23 of the Remedial Order and the "Monitor-led review" first raised by the United States in its Response (ECF 330) on November 15, 2021 – when the Remedial Order calls for only one clinical review – *i.e.*, the Clinical Review Process in paragraph 23. The Remedial Order allows only one Clinical Review Process, that provision is stayed, and allowing a separate "Monitor-led review" is merely an attempt to work around the stay of paragraph 23 of the Remedial Order.

Finally, on an administrative note, the Monitor's proposed budget includes the following request: "To cover cash flow for the Monitor, e.g. to allow timely payment to staff, Mississippi to make initial \$25,000 payment to Hogan Health Solutions LLC (HHS) to establish a cash flow reserve." Mississippi cannot make such an initial payment without a Court order, so the Court should order Mississippi to make the initial \$25,000 payment requested by the Monitor.

Relief Requested

In approving the Monitor's proposed budget, the Court should permit Mississippi to object to any of the Monitor's invoices as and when they are received, and order the Monitor not to incur any costs – directly or indirectly – in connection with the provisions of the Remedial Order that are stayed.

Dated: November 22, 2021.

⁹ ECF 330, United States' Response to Mississippi's Objections to the Monitor's Proposed Budget, p. 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 22, 2021, 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. A copy was also emailed to the Monitor.

/s/ James W. Shelson

JAMES W. SHELSON