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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS,
BRENDA RUIZ TOVAR, LAWRENCE
MWAURA, LUCIANO GONZALO
MENDOZA JERONIMO, CORAIMA
YARITZA SANCHEZ NUÑEZ, JAVIER
ALFARO, DUNG TUAN DANG,

Petitioners-Plaintiffs,

v.

DAVID JENNINGS, Acting Director of the
San Francisco Field Office of U.S. Immigration
and Customs Enforcement; MATTHEW T.
ALBENCE, Deputy Director and Senior
Official Performing the Duties of the Director
of the U.S. Immigration and Customs
Enforcement; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; GEO GROUP,
INC.; NATHAN ALLEN, Warden of Mesa
Verde Detention Facility,

Respondents-Defendants.

CASE NO. 3:20-CV-02731-VC

**PLAINTIFFS' OBJECTIONS TO
DEFENDANTS' WRITTEN PLAN TO
IMPROVE MEDICAL ASSISTANCE
FOR COVID-POSITIVE DETAINEES
AT MESA VERDE**

CASE NO. 3:20-CV-02731-VC

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' WRITTEN PLAN TO IMPROVE
MEDICAL ASSISTANCE FOR COVID-POSITIVE DETAINEES AT MESA VERDE

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I. INTRODUCTION

Defendants have effectively flouted this Court’s order, ignored its guidance, and refused to engage with Plaintiffs or their experts. On August 21, 2020, this Court ordered Defendants to create a “written plan to improve their system of monitoring, caring for, and responding to medical assistance requests from detainees who have tested positive and who have health conditions that the CDC has identified as creating an elevated risk of complications.” Dkt. 595 at 1. This Court expressed a strong “hope[] and expect[ation]” that the plan could be agreeable to all parties, after meaningful consultation, but permitted Plaintiffs to file objections should there be a dispute. *Id.* at 1-2. Because Defendants failed to meaningfully engage with Plaintiffs and produced a Medical Plan which is nothing more than an attempted formalization of its inadequate practices and an opposition to an invisible motion, Plaintiffs object.

The Medical Plan is too vague even to describe meaningfully the current practice at Mesa Verde, let alone provide for improvements to practices recognized as deficient. Instead, it attempts to dress up the ineffective protocols that have been in place for months that failed to anticipate a readily foreseeable outbreak, prevent its spread, protect those most medically vulnerable, and respond to the dire and growing medical needs of class members. Defendants make no effort to rebut reports of their deficiencies and instead rely on the medical overseer of Mesa Verde who has seemingly never visited the facility since the onset of the COVID-19 pandemic.

Rather than heed the Court’s explicit guidance, Defendants have opposed a straw-man injunction that was neither requested nor ordered. Contrary to Defendants’ assertions, Plaintiffs have not sought further injunctive relief on medical care. Instead, they had hoped to work with Defendants, consistent with the Court’s expectation, to reach meaningful change that would

recognize the time-sensitive need for improvement. Having been rebuffed, and in response to the express instructions of this Court, Plaintiffs outline objections to Defendants' Medical Plan in the hope that Defendants will incorporate Plaintiffs' suggestions to obviate the need for further motion practice on medical care at Mesa Verde. However, due to Defendants' unwillingness to engage in meaningful negotiation, the Court should grant Plaintiffs prompt discovery on the medical care at Mesa Verde to permit Plaintiffs to seek timely injunctive relief if warranted.

II. BACKGROUND

A. Defendants Submitted an Outdated, Incomplete Draft Medical Plan for Plaintiffs' Review.

Prior to last week, Defendants had no written plan to respond to COVID-related medical needs at Mesa Verde. *See* Bernwanger Dec. ¶ 2, Exh. A. On August 26, 2020, in response to this Court's Order, Defendants produced three documents constituting a "draft of the medical plan" that was still "awaiting additional input from [ICE Health Service Corps]" (hereinafter "Draft Medical Plan"). Bernwanger Dec. Exhs. B-D. First, Defendants produced GEO guidance from February 28, 2020 concerning COVID-19 management. *Id.* Exh. B. That guidance was not specific to Mesa Verde and was outdated; for example, it advised staff that "clinical observations" for diagnosing COVID required "a history of recent travel to China (within 14 days)." *Id.* at 1. Second, Defendants provided a one-page "Brief Summary of CDC's Recommendations for High-Risk Patients Living in Congregate Housing to Prevent COVID-19." *Id.* at Exh. C. This document was also not specific to Mesa Verde and appears written to provide guidance to individuals in custody, not to translate CDC guidance to Facility personnel as a plan would.¹ Finally, Defendants provided a three-page comparison document listing "CDC treatment

¹ This document is a modification of a document produced by CDC for "Living in Shared Housing," such as "apartments, condominiums, student or faculty housing," etc. It is not clear if or how this document was used at Mesa Verde.

guidelines for COVID-19” alongside “Wellpath Medical response/treatment” (hereinafter “Wellpath Response/Treatment Document”). Defendants sent no further drafts or edits to Plaintiffs.

B. Defendants Failed to Meet and Confer, Contrary to the Court’s Order.

After sending Plaintiffs the three documents described above, Defendants refused to engage in the court-ordered process for developing the plan. Specifically, the Court ordered that Defendants (1) submit a draft plan to class counsel, (2) “confer in detail about the draft,” (3) “give serious consideration” to Plaintiffs’ suggested improvements, and (4) file a final draft of the plan. Dkt. 595 at 2. Defendants’ Medical Plan—which they appear to have spent significantly less energy on than a legal brief and declaration arguing that they do not need a plan—is the product of their refusal to meet the Court’s expectations at every turn.

Defendants *never* supplemented their initial draft plan with Plaintiffs, despite multiple requests from Plaintiffs to meet and confer as Defendants revised their draft. *See* Bernwanger Dec. ¶¶ 6-7. Within hours of receiving the Draft Medical Plan, Plaintiffs notified Defendants that the Draft was outdated and generic, failing to comply even with the broadest requirements of the Court’s order. Bernwanger Dec. Exhs. E, F. *Compare Id.* Exhs. B-D (including policy dated February 2020) *with* Dkt. 595 (ordering a plan to “improve” care “designed to deal with the current situation at Mesa Verde.”). Although Defendants ultimately added additional documents when they filed their Medical Plan with the Court, Defendants failed to share them with Plaintiffs for consultation or feedback, contrary to the Court’s order.

For example, Defendants decided to include August 2020 IHSC Guidance in support of their plan, but never shared that document with Plaintiffs. *See* Dkt. 645-2 at 10.² And although Defendants informed Plaintiffs that they were consulting on the Medical Plan with Wellpath and Dr. Medrano, at no point did Defendants share any proposals from Wellpath or Dr. Medrano, any draft declarations from Dr. Medrano, or offer a chance to engage with Dr. Medrano’s apparent

² The document was dated August 7, 2020, and thus was readily available when Defendants provided Plaintiffs with their Draft Medical Plan.

rejection of Plaintiffs’ proposals. For example, although Dr. Medrano apparently disagreed with Plaintiffs’ recommendation, drawn from multiple expert opinions, that an adequate medical plan must provide protocols for consistent identification of COVID-19 symptoms and determining when hospitalization is appropriate, Plaintiffs did not learn of that disagreement until the declaration was filed on the docket. *Compare* Dkt. 645-2 ¶ 13 (“I do not feel it is appropriate to set specific criteria or list the symptoms to trigger specific care or a certain diagnosis. . . . Similarly, it is not appropriate to dictate that detainees should be sent to the hospital if they have certain symptoms or complaints. . . .”) *with* Bernwanger Dec. Exh. F (citing to expert declarations to propose nursing protocols that list COVID-19 symptoms to aid proper diagnosis and that set standards for hospitalization).

Plaintiffs repeatedly informed Defendants that they were available to meet and confer concerning the Medical Plan, but Defendants agreed only to a single phone call. *See* Bernwanger Dec. ¶¶ 5-7, Exh. E. During that phone call, Defendants’ counsel declined to discuss any of Plaintiffs’ proposals. *See* Bernwanger Dec. ¶ 5. In sum, Defendants stonewalled Plaintiffs and ignored their attempts to participate in crafting the Medical Plan.

C. Defendants Submitted An Unresponsive Medical Plan in Defense of its Current Practices.

Defendants’ final Medical Plan was only slightly modified from the draft version which Defendants had previously described as preliminary. Despite its deficiencies, the Wellpath Response/Treatment Document is incorporated wholesale into Defendants’ final Medical Plan. Dkt. 645-1 at 4-6. Defendants added five new sections:

- (1) a general, aspirational description of their commitment to “providing excellent health care services,” Dkt. 645-1 at 1;
- (2) a mislabeled page on “Before Infection: High Risk Non-Positive Patients,” which largely states general affirmations regarding, for example, social distancing, “enhanced cleaning,” population decreases, etc.; the only point relevant to high-risk patients is that “a nurse will make rounds on a daily basis to high risk patients who

have CDC listed preexisting conditions monitoring for elevated temperature and symptoms.” Dkt. 645-1 at 2³;

- (3) an expanded section on the “sick call process”, Dkt. 645-1 at 3;
- (4) “criteria for hospital sendout”; and
- (5) a definition of COVID-19 “recovery” including a vague expectation of “ongoing care” once an individual is deemed “recovered.” Dkt. 645-1 at 7 (“High risk patients will continue to be monitored by a medical provider at an appropriate interval deemed appropriate by the medical provider.”).

In support of their final Medical Plan, Defendants produced a supplemental declaration from Dr. Richard Medrano, the Regional Director for Wellpath, who “oversee[s] facilities in the area including Mesa Verde and Adelanto ICE Detention Facilities.” Dkt. 645-2 (Medrano Decl.) at 1 ¶ 1. Defendants also produced an IHSC guidance document concerning “COVID-19 Detainee Care,” dated August 7, 2020. Dkt. 645-2 at 10 (IHSC Guidance, Exh. A to Medrano Decl.). Dr. Medrano asserted in his declaration that Wellpath “continue[s] to implement IHSC guidelines . . . including the August 2020 IHSC [sic] recommendations.” Dkt. 645-2 (Medrano Decl.) at 2 ¶ 3. In fact, there is no evidence that Defendants *are* implementing these IHSC recommendations at Mesa Verde, and there are certain recommendations clearly *not* being implemented—and even in conflict with Defendants’ Medical Plan.⁴

³ This section also cites to apparent “CDC guidelines . . . for high risk patients in congregate housing,” but the citation referenced actually does *not* address high-risk patients. *See* Dkt. 645-1 at 2 (citing <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/shared-housing/index.html>).

⁴ Even assuming that the IHSC Guidance could stand alone as an operational care plan for Mesa Verde—a notion this Court has rightly rejected (*see* Dkt. 595 at 1)—many IHSC recommendations are open to discretion and interpretation. *See, e.g.*, Dkt. 645-2 at 14 (instructing that detention centers “[c]onsider more frequent vital sign collection if the patient is medically vulnerable” without offering concrete instruction). Defendants’ Medical Plan also includes plain contradictions of the IHSC Guidance, such as waiting until oxygen saturation dips below 90% to seek hospitalization whereas the IHSC Guidance instructs detention centers to consider hospitalization anywhere below 95%. *Compare* Dkt. 645-1 at 7 (Medical Plan) *with* Dkt. 645-2 at 14 (IHSC Guidance). *See also* CDC, “Discharging COVID-19 Patients,” Aug. 10, 2020, at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-hospitalized-patients.html> (defining “severe illness” to include an oxygen saturation level less than 94%). *But see* Dkt. 591-6 (Keller Dec.) ¶ 57 (class member with oxygen reading of 93% did not have another oxygen reading for eight hours and had “no further action/evaluation . . . until the next day”). Defendants’ *practice* also conflicts with IHSC recommendations in other concrete ways. For instance, Defendants do not: “[c]ohort all new arrivals, preferably in a cell by themselves, for 14 days after their arrival,” “[c]ohort detainees who refuse testing for 14 days

* * *

It is telling that seven months into an unprecedented global pandemic, and one month into a Facility outbreak resulting in multiple class members facing medical emergencies, Defendants only developed a written plan for providing medical care in response to the Court's order. *See* Dkt. 591-4 (Greifinger Dec.) ¶ 33 (Defendants' failure to establish a detailed plan "to respond to the needs of COVID-infected individuals at Mesa Verde is a striking example" of their "indifference to the obligation to mitigate the risk of COVID transmission..."). Yet, rather than using the time they had to meaningfully engage with Plaintiffs or to draft a professional medical plan to protect those in their care, Defendants chose to devote their time and energy to attack the Court's order.⁵ *See* Dkts. 645, 645-2; *see also* Dkts. 581, 585 (legal briefs in response to Court's factual questions regarding medical care).

III. PLAINTIFFS' SPECIFIC OBJECTIONS TO DEFENDANTS' MEDICAL PLAN

Plaintiffs object to Defendants' medical care plan on the following grounds:

First, Defendants' Medical Plan fails to address key questions raised by the Court. *See* Dkt. 595. The Court ordered that, at a minimum, the plan should address "how the defendants will provide information to detainees (including non-English speaking individuals) about managing and responding to symptoms, and how the defendants will ensure that they respond promptly to sick detainees requesting medical assistance." *Id.* With regard to responding to the needs of class members with limited English proficiency, Defendants only provide that "[t]he

and monitor for symptoms consistent with COVID-19," place symptomatic individuals "under medical isolation," or ensure that "[a]ll new intakes . . . receive testing prior to release to general population." *See* Dkt. 645-2 at 12, 13, 14, 16, 18. The bald assertion that the IHSC recommendations guide decisions at Mesa Verde, or can otherwise be incorporated by reference into an otherwise deficient plan, is false.

⁵ Although Defendants frame their unsolicited legal brief as an opposition to a future order for injunctive relief, which Plaintiffs have not at this time sought, Defendants appear to actually be challenging the order the Court *already* issued requiring Defendants to work with Plaintiffs to develop a plan for COVID-related medical care at Mesa Verde. *See* Dkt. 595. To the extent that Defendants ask the Court to revisit that order, they have improperly moved for reconsideration without seeking leave to do so. *See* Civ. L.R. 7-9(a) (requiring leave of court to file a motion to reconsider interlocutory order). Nor have Defendants met the standard here. Civ. L.R. 7-9(b).

detainees are [] educated, in their language, for better understanding their underlying illnesses,” and that detainees are provided translation assistance at the time of a positive COVID test. Dkt. 645-1 at 1, 4. With regard to prompt response to medical needs, Defendants outline a “sick call policy” which provides that “urgent matters” may be seen up to 24 hours after they are identified. Dkt. 645-1 at 3 (sick calls are collected at midnight and then “scheduled to be seen within 24 hours for urgent matters”).⁶ Defendants do not provide a meaningful description of how they intend to provide class members with information about managing COVID symptoms, other than a vague commitment to “educate detainees regarding serious and concerning symptoms” and a reference to CDC posters about COVID-19. Dkt. 645-1 at pp. 2-3.

Second, Defendants’ Medical Plan confirms their unwillingness to make any changes to their existing medical care. Indeed, the Plan does not acknowledge any shortfalls in the provision of medical care, nor does it list any facility-specific steps Defendants will take to address the delayed and substandard medical care that has endangered class members’ lives. *See* Dkt. 591-6 at ¶¶ 36, 50, 58, 62 (Keller Decl.). Defendants’ Medical Plan reinforces that Defendants have not taken seriously either the Court’s order or the deficiencies in medical care elaborated by Plaintiffs which preceded the Court’s order. *See, e.g.*, Dkts. 591, 591-2, 591-3, 591-4, 591-5,

⁶ As Plaintiffs previously elaborated, the practice described by Defendants under which known COVID patients are required to fill out “sick call slips” or “kites” as the main mechanism for accessing medical care is “an entirely unsafe and inappropriate practice” and is “dangerous because such patients should be constantly monitored and not have to take the initiative to seek care. Dkt. 591-2 (S. Allen Dec.) ¶¶ 21-23; Dkt. 591-4 (Greifinger Dec.) ¶¶ 7, 25-27.) *See also* Dkt. 591-6 (Keller Dec.) ¶¶ 41-42, 54-56 (“Despite suffering symptoms classic for acute COVID infection, the request was triaged as being ‘routine’ rather than urgent” and the class member was seen two days after the request and, by that time, with symptoms deteriorating so severely that he was sent to the emergency room on the same day); Dkt. 591-3 (Beaty Dec.) ¶¶ 4-9. Further, despite express concerns about the failure to *require* in-dorm custody officers to communicate urgently with medical personnel if a class member has a medical issue, Defendants’ Medical Plan entirely ignores the role of in-dorm custody officers and leaves in place the existing policy which leaves it up to the officer’s discretion whether to seek medical care. *See* Dkt. 591-4 (Greifinger Dec.) ¶¶ 28-30; Dkt. 591-3 (Beaty Dec.) ¶¶ 10-19.

591-6. The plan to continue the status quo will only result in putting vulnerable class members at the mercy of a medically negligent care plan.

Third, Defendants’ Plan lacks the basic criteria for a plan in response to the pandemic. *See* Dkt 591-4 at ¶ 18 (Greifinger Decl.) (“COVID-19 presents unique challenges that cannot be met without specialized planning...”). Defendants’ Plan lacks the central elements needed in any meaningful response to the pandemic in a detention setting, including: 1) explicit nursing protocols for class members in different states (i.e. intake quarantine, close contacts, infected and medically vulnerable); 2) explicit protocols for detainees with Limited English Proficiency; 3) protocol for the care of medically vulnerable class members, infected or uninfected with COVID; and 4) protocol for immediate attention to pressing health concerns. *See* Bernwanger Decl. ¶ 5, Exh. F. While Defendants vaguely refer to “nursing protocols,” as being “in place” to address “positive symptom screens” and “implement immediate interventions,” these supposed protocols were not included, leaving Plaintiffs unable to probe their adequacy. *See* Dkt. 645-1 at 3, 6. The Medical Plan also lacks critical details, such as the definition of “severe” COVID-19, which goes unmentioned in the entire Plan.

Defendants cling to general CDC and IHSC guidance as a stand-in for operational protocol. But even the CDC acknowledges that its guidance is not intended to serve this purpose. The CDC directs correctional facilities to, *i.e.*, make plans to “disseminate critical information to incarcerated/detained persons” about COVID, and isolate, test, and provide medical care for infected individuals. *See* Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional & Detention Facilities, available at:

<https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (“Review existing influenza, all-hazards, and disaster plans, and

revise for COVID-19. . . Train staff on the facility’s COVID-19 plan.”). Medical and correctional health experts affirm that relying on general guidance does not substitute for on-the-ground planning. *See* Dkt. 591-4 at ¶ 18 (Greifinger Decl.) (“It is insufficient to rely on the general guidance from the CDC and the IHSC.”); Dkt. 591-1 at ¶¶ 19-20 (Allen Decl.) (“The fact that no written police specific to Mesa Verde exists reflects a concerning lack of preparation.”). Thus, Defendants’ recitation that they follow generic public health guidance does not assuage concerns that poor *facility* planning could result in permanent injury or death.

Fourth, Defendants *still* have neither shared with Plaintiffs nor filed publicly a number of documents that appear integral to fully understanding their Plan. The Medical Plan itself makes several references to separate documents or policies related to ostensible COVID-19 precautions and care, including “Operations” related to “enhanced cleaning” in the facility (Dkt. 645-1 at 2), “nursing protocols” for sick calls (*Id.* at 3), “nursing practice protocols” for moderately ill patients (*Id.* at 6), information on “the monitoring and management of COVID-19 symptoms” (*Id.* at 4, mentioning “written or verbal communication”), and information on “how to request care should symptoms arise or worsen” (*Id.* at 4, also mentioning that information may be “written or verbal”).⁷ Defendants neither shared these documents with Plaintiffs nor filed them with the Court. The Court should order Defendants to provide the missing documents.

Fifth, the declaration of Dr. Richard Medrano, Wellpath’s Regional Medical Director, does not support the Medical Plan. As a threshold issue, Dr. Medrano does not practice medicine at Mesa Verde. *See* Dkt. 645-2 ¶ 1 (“I visit Mesa Verde at least every two months. . . In 2016, I briefly filled in at Mesa Verde. . .”); *see also* Dkt. 591 n.1 (Dr. Medrano’s professional web

⁷ The Medical Plan also refers to a number of documents that may have bearing on their COVID-19 response which Defendants did not produce to Plaintiffs or file with the Court, including a medical history evaluation (*id.* at 1), a review of symptoms (*id.*), a process for identification of “high risk” detainees (*id.* at 2), an “access to care memo” provided to newly-arrived detainees (*id.* at 4), and a “code blue” process for emergencies (*id.* at 4, 5).

presence mentions only practice outside Mesa Verde). Dr. Medrano states that he is “often on-call” or a “backup Physician for Mesa Verde.” *See* Dkt. 645-2 ¶ 1. But the declaration does not indicate when he last visited, whether his scheduled visits continued into the pandemic, when he last was called into Mesa Verde as an on-call or backup physician, or indeed whether, since 2016, he has *ever* been called into Mesa Verde as an on-call or backup physician. Dr. Medrano can state with no specificity the capacity in which he has been involved in the provision of medical care at Mesa Verde at all. Dr. Medrano states that “[w]e” implement IHSC and CDC guidelines without stating who “[w]e” is or where the guidelines are being implemented. *Id.* ¶ 3.

Aside from reciting CDC and IHSC guidelines, Dr. Medrano offers no credentials related to viral or other infectious diseases, nor does he mention ever actually treating anyone diagnosed with COVID-19. He refers to “experience and observation” regarding “obtain[ing] appointments” for COVID-19 tests, but offers no further information about when or where this experience or observation occurred. *Id.* ¶ 10. Dr. Medrano fails to establish “the standard of community care in the United States.” *Id.* ¶ 4.

Also relevant, as Plaintiffs discussed previously, *see* Dkt. 591 at 3, Dr. Medrano appears to have been employed in a leadership role over the Adelanto Detention Facility at the time the DHS Office of Inspector General (OIG) issued a scathing report finding that “[d]elayed and [i]nadequate” medical care “[i]ncreased [h]ealth [r]isks” for detainees.⁸ Dr. Medrano nowhere defends the actual medical care provided to class members. He does not explain the decision to forgo detainee testing, the refusal to administer rapid testing, the wait time for COVID test results, or the decision to cohort detainees with pending test results.

⁸ *See* Dkt. 591-1 Exh. 1 at 7-8 (DHS Office of Inspector General, “Management Alert - Issues Requiring Action at the Adelanto ICE Processing Facility in Adelanto, California, September 27, 2018, available at: <https://www.oig.dhs.gov/sites/default/files/assets/Mga/2018/oig-18-86-sep18.pdf>) (hereafter “OIG Report”).

The Court should not credit the testimony of a supervising doctor who has apparently never visited the facility during a massive outbreak.

* * *

Overall, the Medical Plan is too vague to be useful. *See, e.g.*, Dkt. 645-1 at 3 (“treatment for moderate illness is very vast and depends on the presenting issue”). It lacks the kind of actionable and explicit guidance indicative of a plan.⁹ Nor does it outline who is responsible for enacting the plan or how it will be implemented. Defendants have demonstrated they have no plan to respond to medical needs in the midst of a novel pandemic and significant outbreak.

IV. DEFENDANTS’ CONTRACT FOR THE PROVISION OF MEDICAL CARE REQUIRES MORE MEDICAL PLANNING AND PREPAREDNESS BUT INCENTIVIZES LIMITING CARE.

Since the parties’ prior briefing on this issue, Plaintiffs have been able to review the contract regarding the provision of medical care at Mesa Verde (“Mesa Verde Contract”).¹⁰ On the one hand, Defendants’ own contract seems to require more medical planning, epidemic preparedness, and prompt and effective medical care than Defendants have provided. On the other, the Mesa Verde Contract disincentivizes the provision of such care with a payment structure that rewards its medical care contractor for limiting its expenditures.

The existing contractual obligations compel Wellpath, Mesa Verde’s medical care contractor, to provide responsive and effective care. Bernwanger Dec. Exh. H (GEO 12911-12).¹¹ They also compel Wellpath to plan for and respond to emergencies such as the COVID-19

⁹ A plan is defined as “a detailed formulation of a program of action.” Dictionary, Merriam Webster, <https://www.merriam-webster.com/dictionary/plan>.

¹⁰ The Mesa Verde Contract, as defined here, includes the original contract as well as amendments, statements of work, and other incorporated documents.

¹¹ Among other things, the Mesa Verde Contract requires compliance with

Bernwanger Dec. Exh. H (GEO 12911-12)

pandemic. *See* Bernwanger Dec. Exh. H (GEO 12861) [REDACTED]

[REDACTED]; (GEO 12909) [REDACTED]

[REDACTED]; (GEO 12927-28 [REDACTED])

Such medical

care and planning is also required by the ICE Performance-Based National Detention Standards (“PBNDS”). *See* Bernwanger Dec. Exh. H (GEO 12844, 12902, 12909).¹² The PBNDS require that “detainees have access to appropriate and necessary medical . . . health care, including emergency services.” PBNDS at 257. To meet this goal, a facility must, among other things, have a “plan that address[es] the management of infectious and communicable diseases, including screening, prevention, education, identification monitoring and surveillance, immunization (when applicable), treatment, follow-up, isolation (when indicated) and reporting,” and provide 24-hour emergency medical services to all detainees. *Id.* at 261.¹³ Despite the obligations of the Mesa Verde Contract and the PBNDS, Defendants lack a meaningful plan and have failed to implement effective medical care in response to the pandemic.

The failure to develop and implement effective emergency medical planning in response to COVID is perhaps unsurprising in light of the compensation structure for the provision of medical care at Mesa Verde. Wellpath, the nation’s largest for-profit health care provider for correctional facilities, is paid [REDACTED]

[REDACTED] *See* Bernwanger Dec. Exh. H (GEO 13036-37) (current

¹² The PBNDS establish a set of “mandatory requirements to which a facility is bound.” ICE, Progress in Implementing 2011 PBNDS Standards 5 (Jan. 17, 2017), <https://www.hsdl.org/?abstract&did=818058>.

¹³ The PBNDS also require that CDC “guidelines for the prevention and control of infectious and communicable diseases [] be followed.” PBNDS at 258. The CDC requires updating emergency plans to account for COVID. *See* Dkt. 591-4 (Greifinger Decl.) ¶ 24; Dkt. 591 at 6.

compensation structure).¹⁴ *See also id.* (GEO 12844, 12876-77, 12882). At the same time,

Wellpath is “ [REDACTED]

[REDACTED].¹⁵ Bernwanger Dec. Exh. H (GEO 12849, 12855, 12858). With such a compensation structure, Wellpath is incentivized to provide fewer medical services at the lowest possible cost. As a for-profit business, Wellpath’s return to its investors depends on how economically it can deliver care. As Wellpath is not compensated for greater effort, it is able to garner greater profits from minimizing resource expenditure.¹⁶

V. CONCLUSION

The Court ordered Defendants to work with Plaintiffs in the service of what should be an urgent and common goal: protecting current and future class members infected with COVID-19 from suffering serious illness and dying. Instead, in a repeat of their performance two weeks ago when this Court first requested information about medical care at Mesa Verde, Defendants devoted their time and energy to mounting a legal defense against a motion that Plaintiffs have

¹⁴ CCS became Wellpath following a merger with a competitor. *See* Bernwanger Dec. Exh. H (GEO 12882-84) [REDACTED]. *See also* Blake Ellis & Melanie Hicken, “Please Help Me Before It’s Too Late,” CNN, Jan. 25, 2019, at <https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/> (“Recently renamed Wellpath after being acquired by a multibillion-dollar private equity firm and combined with a smaller competitor, it is the nation’s largest for-profit provider of health care to correctional facilities.”). Notably, Mesa Verde contractors were highly capable of creating a detailed plan for the transition of medical services from CCS to Wellpath. *Compare* Bernwanger Dec. Exh. H (GEO 12884-94) with Dkt. 645-1.

¹⁵ Defendants have previously asserted that hospitalizations are compensated by ICE. However, that is not clear from Plaintiffs’ review of the contract. *See, e.g.*, Bernwanger Dec. Exh. H (GEO 12858) [REDACTED]

[REDACTED] Defendants have stated that this information may be included within an ICE-GEO contract.

¹⁶ This compensation structure dictates “a focus on ‘cost containment’” which critics around the country have decried as contributing to “substandard care that has led to deaths and other serious outcomes that could have been avoided.” *See* Blake Ellis & Melanie Hicken, “Please Help Me Before It’s Too Late,” CNN, Jan. 25, 2019, at <https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/> (extensive investigation into Wellpath practices and complaints at correctional institutions around the country).

not filed and responding to questions the Court did not ask. *See* Dkts. 581, 585. Because Defendants have refused to meaningfully engage in the meet and confer process with Plaintiffs ordered by this Court, submitted a vague and incomplete plan, and supported their plan with a declaration lacking any foundation of personal knowledge or competence, Plaintiffs remain at a serious information deficit regarding the provision of medical care at Mesa Verde. Plaintiffs therefore respectfully request that the Court:

(1) Order Defendants to file all documents referenced by the Medical Plan filed on August 31, but not filed concurrently with the medical plan, on the public docket by 5:00 PM on September 8, 2020, including:

- a. “Operations” related to “enhanced cleaning” in the facility (Dkt. 645-1 at 2);
- b. “Nursing protocols” for sick calls (*id.* at 3);
- c. “Nursing practice protocols” for moderately ill COVID-19 patients (*id.* at 6);
- d. Written information provided to detainees on “the monitoring and management of COVID-19 symptoms” (*id.* at 4); and
- e. Written information provided to detainees on “how to request care should symptoms arise or worsen” (*id.* at 4);

(2) Order Defendants to file all existing documents related to the following practices mentioned in the medical plan:

- a. Medical history evaluation (*id.* at 1);
- b. Review of symptoms (*id.*);
- c. Process for identification of “high risk” detainees (*id.* at 2);
- d. “Access to care memo” provided to newly-arrived detainees (*id.* at 4); and
- e. “Code blue” process for emergencies (*id.* at 4, 5).

(3) Order Defendants to promptly respond to Plaintiffs' discovery requests related to the provision of medical care at Mesa Verde, including but not limited to interrogatories, requests for document production, and depositions.

Dated: September 2, 2020

Respectfully submitted,

/s/ Emilou MacLean
Manohar Raju
Public Defender
Matt Gonzalez
Chief Attorney
Francisco Ugarte
Genna Ellis Beier
Emilou H. MacLean
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS,
BRENDA RUIZ TOVAR, LAWRENCE
MWAURA, LUCIANO GONZALO
MENDOZA JERONIMO, CORAIMA
YARITZA SANCHEZ NUÑEZ, JAVIER
ALFARO, DUNG TUAN DANG,

Petitioners-Plaintiffs,

v.

DAVID JENNINGS, Acting Director of the
San Francisco Field Office of U.S. Immigration
and Customs Enforcement; MATTHEW T.
ALBENCE, Deputy Director and Senior
Official Performing the Duties of the Director
of the U.S. Immigration and Customs
Enforcement; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; GEO GROUP,
INC.; NATHAN ALLEN, Warden of Mesa
Verde Detention Facility,

Respondents-Defendants.

CASE NO. 3:20-CV-02731-VC

**DECLARATION OF BREE
BERNWANGER IN SUPPORT OF
PLAINTIFFS' OBJECTIONS TO
DEFENDANTS' WRITTEN PLAN TO
IMPROVE MEDICAL ASSISTANCE
FOR COVID-POSITIVE DETAINEES
AT MESA VERDE**

CASE NO. 3:20-CV-02731-VC

BERNWANGER DEC. I/S/O PLAINTIFFS' OBJECTIONS TO DEFENDANTS' WRITTEN
PLAN TO IMPROVE MEDICAL ASSISTANCE FOR COVID-POSITIVE DETAINEES AT
MESA VERDE

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Attorneys for Petitioners-Plaintiffs

**Admitted Pro Hac Vice*

I, Bree Bernwanger declare:

1. I am a member of the bars of the States of California and New York. I am one of the attorneys representing Plaintiffs in this action. The following facts are set forth based on personal knowledge.
2. Attached hereto as **Exhibit A** is a true and correct copy of an email chain including a message from counsel for GEO, dated August 18, 2020 recognizing that despite having considered and discarded draft plans, Defendants had “[n]o written policies formalized for COVID care.”
3. In response to the Court’s order that Defendants produce a written plan concerning medical care at Mesa Verde, *see* Dkt. 595, on Wednesday, August 26, 2020, Defendants emailed class counsel three documents and stated in a cover email that the documents comprised “a draft of the medical plan.” Defendants stated that they were “still awaiting input from IHSC, so this draft is not final.” Defendants told Plaintiffs that their input and suggestions were welcome. The “draft of the medical plan” consisted of three documents: 1) GEO February 28, 2020 guidance concerning COVID-19 management, a true and correct copy of which is attached hereto as **Exhibit B**; 2) a one-page “Brief Summary of CDC’s Recommendations for High-Risk Patients Living in Congregate Housing to Prevent COVID-19,” a true and correct copy of which is attached hereto as **Exhibit C**; and 3) a three-page comparison document listing “CDC treatment guidelines for COVID-19” alongside “Wellpath Medical response/treatment,” a true and correct copy of which is attached hereto as **Exhibit D**. A true and correct copy of the email correspondence attaching the plan, which continued through August 31, 2020 as described below, is attached hereto as **Exhibit E**.

4. On Wednesday, August 26, 2020, at 5:14 PM, I responded to Defendants noting that we had shared the draft plans with expert witnesses and reiterating the concerns with the draft plan that Plaintiffs voiced during the case management conference that day: that it did not appear responsive to the Court's order even at a general level, because it did not include any provisions specific to Mesa Verde and it did not include any provisions that improved care. Defendants responded requesting that Plaintiffs "make some constructive suggestions." I let Defendants know that we would provide a number of concrete suggestions the following day. I asked Defendants what additional input they were seeking internally and what additional steps they expected to take before reaching a final draft, aside from seeking Plaintiffs' input. Defendants did not respond to this question, but reiterated their request that Plaintiffs provide concrete suggestions that could be shared with Defendants' clients. A true and correct copy of this correspondence is included in the email chain attached hereto at **Exhibit E**.

5. On Thursday, August 27, 2020, Plaintiffs emailed Defendants a list of deficiencies in Defendants' plan, as identified in consultation with expert witnesses who have provided testimony in this case. The list was described as an "Initial Response to COVID 'Medical Plan,'" as Plaintiffs had the "expectation that Defendants will produce a revised draft plan that will allow for [Plaintiffs' counsel] to provide more concrete and detailed recommendations" prior to the presentation of the plan to the Court as "Defendants stated that this is a preliminary draft that does not yet reflect complete input from ICE." A true and correct copy of this correspondence, including Plaintiffs' attached responses to Defendants' plan is attached hereto as **Exhibit F**. At 5:00 PM that day, Emilou MacLean and I met and conferred with counsel for Federal Defendants Sara Winslow and Shiwon Choe, along with counsel for Defendant GEO Susan Coleman and Royal Oakes. During this meet and confer, Attorney MacLean asked Defendants what the process for

continued review and editing of the plan would be. Defendants informed us that Dr. Medrano and Wellpath were working on the plan. Plaintiffs asked if a more developed draft would be circulated for Plaintiffs' input. Defendants' counsel told us that they would let us know when they could. Aside from a limited discussion about medical supplies, Defendants did not respond to or discuss Plaintiffs' feedback in writing or orally. Attorney MacLean told Defendants we were available to continue meeting and conferring, including over the weekend, as they continued to develop their plan.

6. After Thursday evening's meet and confer call, Defendants did not reach out to Plaintiffs regarding the medical plan. Defendants sought no further discussion of Plaintiffs' concerns or proposals, did not share further drafts, and did not otherwise engage Plaintiffs in the plan's conception or drafting.
7. On the morning of Monday, August 31, 2020, I emailed Defendants to reiterate our concern about their existing draft and to state that Plaintiffs continued to be available to meet and confer, although the short turnaround time before Defendants' deadline would make any meaningful collaboration quite difficult. Counsel for Federal Defendants promptly responded that Plaintiffs' comments had been "passed ... on to the medical professionals at ICE and GEO who are working to finalize the draft that will be filed in court today." A true and correct copy of this correspondence is included in the email chain attached hereto as **Exhibit E**. Plaintiffs received the final draft of the medical plan when it was filed on the public docket.
8. Attached hereto as **Exhibit G** is a true and correct copy of an email from Defendants' counsel, stating that on August 8, 2020, according to LVN Guzman from Wellpath Medical, COVID-positive class member Jose Ruiz "began to feel better and ceased coughing" after being "provided additional education on using his inhaler." Medical

records for Mr. Ruiz later indicated that he had been diagnosed with pneumonia in both lungs before this interaction.

9. Attached hereto as **Exhibit H** is a true and correct copy of excerpts from the contract between Defendant GEO and Wellpath Medical, as produced to Plaintiffs by GEO.

I declare under penalty perjury that the foregoing is true and correct.

Executed on September 2, 2020 in Berkeley, California.

/s/ Bree Bernwanger
Bree Bernwanger

EXHIBIT A

FW: Topics for today's call**Maclean, Emilou (PDR)** <emilou.maclean@sfgov.org>

Wed 9/2/2020 1:27 AM

To: Bree Bernwanger <bbernwanger@lccrsf.org>

📎 4 attachments (644 KB)

COVID Report20200816115547 (2).pdf; IHSC Interim Reference Sheet COVID-19.pdf; Hospitals and Specialty Care.pdf; IHSC COVID-19 ASSESSMENT algorithm.pdf;

From: "Coleman, Susan E." <SColeman@bwsllaw.com>**Date:** Tuesday, August 18, 2020 at 4:25 PM**To:** Bill Freeman <wfreeman@aclunc.org>, "Winslow, Sara (USACAN)" <Sara.Winslow@usdoj.gov>**Cc:** "Maclean, Emilou (PDR)" <emilou.maclean@sfgov.org>**Subject:** RE: Topics for today's call

Telling detainees in B dorm:

They have been advised verbally that they are positive for COVID. The provider has now seen all detainees as of 8/17/20 and shared this information with them. Copies of medical records cannot be issued directly to detainees.

Cardiotropic results – attached

Zamora – stable and is anticipated to be discharged tomorrow. Info provided already.

Lin – currently in RHU on suicide watch.

Medical care policies –here is some additional info received from Wellpath regarding their policies and IHSC policies relied upon.

Susan E. Coleman | Partner

444 South Flower Street, Suite 2400 | Los Angeles, CA 90071-2953

d - 213.236.2831 | t - 213.236.0600 | f - 213.236.2700

scolem@bwsllaw.com | [vCard](#) | bwsllaw.com

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From: Bill Freeman [mailto:wfreeman@aclunc.org]**Sent:** Tuesday, August 18, 2020 3:50 PM**To:** Winslow, Sara (USACAN); Coleman, Susan E.

Cc: Emilou Maclean
Subject: RE: Topics for today's call

[EXTERNAL]

Sara and Susan,

In connection with one of the questions that the Court has asked the parties to address concerning health care re possible "financial disincentives to hospitalizing detainees" (see ECF 563), Plaintiffs request that Federal Defendants and/or GEO promptly provide us with copies of ICE's (or GEO's) contract(s) with Wellpath that control the provision of medical services at Mesa Verde. Thank you.

Bill

From: Winslow, Sara (USACAN) <Sara.Winslow@usdoj.gov>
Sent: Tuesday, August 18, 2020 3:43 PM
To: Emilou Maclean <emilou.maclean@sfgov.org>; Coleman, Susan E. <SColeman@bwslaw.com>; Bill Freeman <wfreeman@aclunc.org>
Subject: RE: Topics for today's call

Emi,

Regarding your 3rd bullet point below, we are gathering these citations and anticipate including them in our filing tomorrow.

Best,
Sara

From: Maclean, Emilou (PDR) <emilou.maclean@sfgov.org>
Sent: Tuesday, August 18, 2020 2:02 PM
To: Coleman, Susan E. <SColeman@bwslaw.com>; Bill Freeman <wfreeman@aclunc.org>; Winslow, Sara (USACAN) <SWinslow@usa.doj.gov>
Subject: Re: Topics for today's call

Thank you, Susan.

If you have no policies regarding COVID-specific health care, can you please send:

- Any policies regarding emergency care,
- Any policies regarding general access to care, and
- Whatever specific CDC and IHSC guidance the Facility follows.

Best,
Emi

From: "Coleman, Susan E." <SColeman@bwslaw.com>
Date: Tuesday, August 18, 2020 at 1:57 PM
To: Bill Freeman <wfreeman@aclunc.org>, "Winslow, Sara (USACAN)" <Sara.Winslow@usdoj.gov>
Cc: "Maclean, Emilou (PDR)" <emilou.maclean@sfgov.org>
Subject: RE: Topics for today's call

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

I am checking on some of this. Zamora is still at hospital and stable. Will see if I can get more info. Not sure about what B dorm people and they've been told – checking. Will ask what healthcare providers are telling them but again, this is a third party entity.

No staff hospitalizations.

I don't believe we have results yet from the initial round of tests sent to Cardiotropic. Will let you know upon receipt even though these are superseded by more recent tests.

- Medical records – requests are being routed from ICE to Wellpath
- Policies – we follow CDC and IHSC recommendations. No written policies formalized for COVID care – you've seen drafts in the email production but none were implemented.
- Here is a GEO policy re calling 911, – one given to detainees and one for custody. Medical staff relies on training/experience/knowledge/discretion for when to send to hospital.
- Checking on oxygen info.

Susan E. Coleman | Partner

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From: Bill Freeman [<mailto:wfreeman@aclunc.org>]

Sent: Tuesday, August 18, 2020 12:12 PM

To: Winslow, Sara (USACAN); Coleman, Susan E.

Cc: Emilou Maclean

Subject: Topics for today's call

[EXTERNAL]

Dear counsel,

Here are today's topics. We can start at 4:45 pm with a hard stop at 5:30. Thanks.

- Information about medical status of Dorm B class members: Class members who are in Dorm B have expressed concern that they have not been told that they have tested positive for COVID, or have not been shown evidence that they have tested positive, or not been provided information about their medical status. Can you please confirm that Defendants have shared the COVID-positive status, and confirmation of that, with each of the class members in Dorm B? Can you please also confirm that the healthcare providers

are instructed to answer class members' questions about their medical status, test, results, medical care, etc.?

- August 3/4/5 tests: Can you please inform us of the status of the August 3/4/5 tests? Plaintiffs would like those tests whenever they are available.
- Staff COVID hospitalizations: Please inform us whether any staff have been hospitalized due to COVID (since the beginning of the pandemic) and inform us if any staff become positive moving forward.
- Mr. Zamora: Please provide an update on the status of Mr. Margarito Zamora, the individual class member who is currently hospitalized.
- Mr. Lin: Please provide an update on what happened with Mr. Wei Lin, who was transferred from D to B and then apparently back to D. We also noticed on the report yesterday that he does not appear anywhere in the list of detainees at the facility. Please confirm where he is presently in addition to providing further details about what happened on the day that he was transferred into B temporarily.
- Information concerning medical treatment: Please provide, as instructed by the Court, information we need in order to address issues related to medical care for those who are COVID-positive in Dorm B:
 - Medical records (both from Mesa Verde and from any hospital visits) for the four individuals (identified in the prior email) who were sent to the hospital as COVID-positive (whether or not Defendants identified them as "hospitalized").
 - Written policies for treating Covid-positive detainees
 - Written policies for requesting medical care
 - Written policies for hospitalization of detainees
 - The number of oxygen monitors available at Mesa Verde
 - The number of oxygen tanks and nasal cannula set ups available at Mesa Verde.
- Transfers for removal: We request that opposing counsel share with class counsel the plan for removing class members who are "transferred for removal" or "released for removal," including:
 - What detention facility the person is being transferred to;
 - As of the time of transfer, the date of the planned removal;
 - A copy of the travel documents;
 - Confirmation that the transfer complies with the transfer checklist ICE produced at Dkt. 324-1; and
 - With 24 hours after the removal, confirmation after the removal has occurred.
- We also request that Defendants' counsel provide this information now with regard to Lateef Animawun (A 207046678), who was "transferred for removal" on August 10, 2020 but who class counsel understands has not been removed, and for whom class counsel has not received confirmation that travel documents exist.
- Outstanding issues: We also have as outstanding issues:
 - Whether we have a revised proposal for bail applications and oppositions that would work for both parties;
 - Whether Defendants are ready to discuss and resolve any issues concerning Dr. Greifinger's site visit

Bill



William S. Freeman

Senior Counsel

Pronouns: he/him

ACLU Foundation of Northern California

39 Drumm Street, San Francisco, CA 94111

415-293-6335

EXHIBIT E

Bree Bernwanger

From: Bree Bernwanger
Sent: Monday, August 31, 2020 12:41 PM
To: 'Winslow, Sara (USACAN)'; 'Coleman, Susan E.'; Maclean, Emilou (PDR)
Cc: Bill Freeman; Garbers, Wendy (USACAN); Zack, Adrienne (USACAN); Choe, Shiwon (USACAN); Marty Schenker; Sean Riordan; Judah Lakin; Newman, Michael A.S.; Oakes, Royal F.; Weinstein, David S.
Subject: RE: Zepeda Rivas - draft medical plan

Understood. Thank you, Sara.

From: Winslow, Sara (USACAN) [mailto:Sara.Winslow@usdoj.gov]
Sent: Monday, August 31, 2020 10:04 AM
To: Bree Bernwanger <bbernwanger@lccrsf.org>; 'Coleman, Susan E.' <SColeman@bwslaw.com>; Maclean, Emilou (PDR) <emilou.maclean@sfgov.org>
Cc: Bill Freeman <wfreeman@aclunc.org>; Garbers, Wendy (USACAN) <Wendy.Garbers@usdoj.gov>; Zack, Adrienne (USACAN) <Adrienne.Zack@usdoj.gov>; Choe, Shiwon (USACAN) <Shiwon.Choe@usdoj.gov>; Marty Schenker <mschenker@cooley.com>; Sean Riordan <SRiordan@aclunc.org>; Judah Lakin <judah@lakinwille.com>; Newman, Michael A.S. <mnewman@hinshawlaw.com>; Oakes, Royal F. <roakes@hinshawlaw.com>; Weinstein, David S. <DWeinstein@hinshawlaw.com>
Subject: RE: Zepeda Rivas - draft medical plan

Bree,

We received your comments in writing and orally on Thursday, and we have passed those on to the medical professionals at ICE and GEO who are working to finalize the draft that will be filed in court today.

Best,
Sara

From: Bree Bernwanger <bbernwanger@lccrsf.org>
Sent: Monday, August 31, 2020 9:34 AM
To: 'Coleman, Susan E.' <SColeman@bwslaw.com>; Winslow, Sara (USACAN) <SWinslow@usa.doj.gov>; Maclean, Emilou (PDR) <emilou.maclean@sfgov.org>
Cc: Bill Freeman <wfreeman@aclunc.org>; Garbers, Wendy (USACAN) <wgarbers@usa.doj.gov>; Zack, Adrienne (USACAN) <AZack1@usa.doj.gov>; Choe, Shiwon (USACAN) <SChoe@usa.doj.gov>; Marty Schenker <mschenker@cooley.com>; Sean Riordan <SRiordan@aclunc.org>; Judah Lakin <judah@lakinwille.com>; Newman, Michael A.S. <mnewman@hinshawlaw.com>; Oakes, Royal F. <roakes@hinshawlaw.com>; Weinstein, David S. <DWeinstein@hinshawlaw.com>
Subject: RE: Zepeda Rivas - draft medical plan

Dear Counsel:

You asserted during the Wednesday case management conference that the medical plan you produced to us was a draft that was still in the process of internal review. On Thursday, we sent recommended requirements for a medical plan, supported by our experts. We also expressed in a call on Thursday afternoon a willingness to

review subsequent drafts, and to further meet and confer (including over the weekend) after you had the opportunity to discuss further internally with your clients. Despite that, you are due to produce the medical plan to the Court today, and we have heard nothing further from you about your medical plan since our Thursday afternoon call.

We remain willing to meet and confer regarding the Mesa Verde medical plan, as compelled both by the Court and the current health crisis at Mesa Verde. However, we regret that any meet and confer at this stage is unlikely to be productive given the short time that remains and our need to consult with our experts about any proposal. We remain deeply concerned about the fact that months into the pandemic, and at least one month into the outbreak at Mesa Verde, Defendants lack any meaningful plan to respond to the health needs of class members.

Please let us know how you propose to move forward.

Best,
Bree



Bree Bernwanger (she/her)
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From: Coleman, Susan E. [<mailto:SColeman@bwslaw.com>]
Sent: Thursday, August 27, 2020 10:18 AM
To: Bree Bernwanger <bbernwanger@lccrsf.org>; Winslow, Sara (USACAN) <Sara.Winslow@usdoj.gov>; Maclean, Emilou (PDR) <emilou.maclean@sfgov.org>
Cc: Bill Freeman <wfreeman@aclunc.org>; Garbers, Wendy (USACAN) <Wendy.Garbers@usdoj.gov>; Zack, Adrienne (USACAN) <Adrienne.Zack@usdoj.gov>; Choe, Shiwon (USACAN) <Shiwon.Cho@usdoj.gov>; Marty Schenker <mschenker@cooley.com>; Sean Riordan <SRiordan@aclunc.org>; Judah Lakin <judah@lakinwille.com>; Newman, Michael A.S. <mnewman@hinshawlaw.com>; Oakes, Royal F. <roakes@hinshawlaw.com>; Weinstein, David S. <DWeinstein@hinshawlaw.com>
Subject: RE: Zepeda Rivas - draft medical plan

Any written suggestions before/outside of the conference are appreciated. As you know, we need to include our clients in any decisions so there is a process to go through.

Susan E. Coleman | Partner
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From: Bree Bernwanger [<mailto:bbernwanger@lccrsf.org>]

Sent: Wednesday, August 26, 2020 5:42 PM

To: Coleman, Susan E.; Winslow, Sara (USACAN); Maclean, Emilou (PDR)

Cc: Bill Freeman; Garbers, Wendy (USACAN); Zack, Adrienne (USACAN); Choe, Shiwon (USACAN); Marty Schenker; Sean Riordan; Judah Lakin; Newman, Michael A.S.; Oakes, Royal F.; Weinstein, David S.

Subject: RE: Zepeda Rivas - draft medical plan

[EXTERNAL]

Dear Susan,

We are working with our experts and plan to be prepared with a number of concrete and specific suggestions tomorrow, assuming we are all able to speak at our standing 5:00 PM time.

At this point, as laid out in my prior email, it is difficult to provide concrete feedback, as the proposed plan does not depart in any discernable way from what was happening in Mesa Verde prior to the Court's order on Friday and does not include any provisions specific to the conditions and outbreak at Mesa Verde.

We also understand that this is not a final draft and that ICE is continuing to provide input to GEO. On our end, it would be helpful to know from you all what additional steps Defendants expect to take before reaching a draft that reflects both GEO and ICE's input—which is the point where it seems input from us would be most productive. Which individuals and entities have already reviewed the plan and provided input, and which individuals and entities are you still awaiting input from?

Best,
Bree



Bree Bernwanger (she/her)

Senior Staff Attorney

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From: Coleman, Susan E. [<mailto:SColeman@bwslaw.com>]
Sent: Wednesday, August 26, 2020 5:15 PM
To: Bree Bernwanger <bbernwanger@lccrsf.org>; Winslow, Sara (USACAN) <Sara.Winslow@usdoj.gov>; Maclean, Emilou (PDR) <emilou.maclean@sfgov.org>
Cc: Bill Freeman <wfreeman@aclunc.org>; Garbers, Wendy (USACAN) <Wendy.Garbers@usdoj.gov>; Zack, Adrienne (USACAN) <Adrienne.Zack@usdoj.gov>; Choe, Shiwon (USACAN) <Shiwon.Cho@usdoj.gov>; Marty Schenker <mschenker@cooley.com>; Sean Riordan <SRiordan@aclunc.org>; Judah Lakin <judah@lakinwille.com>; Newman, Michael A.S. <mnewman@hinshawlaw.com>; Oakes, Royal F. <roakes@hinshawlaw.com>; Weinstein, David S. <DWeinstein@hinshawlaw.com>
Subject: RE: Zepeda Rivas - draft medical plan

Please make some constructive suggestions for us to consider.

Thanks,

Susan

Susan E. Coleman | Partner

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From: Bree Bernwanger [<mailto:bbernwanger@lccrsf.org>]
Sent: Wednesday, August 26, 2020 5:14 PM
To: Coleman, Susan E.; Winslow, Sara (USACAN); Maclean, Emilou (PDR)
Cc: Bill Freeman; Garbers, Wendy (USACAN); Zack, Adrienne (USACAN); Choe, Shiwon (USACAN); Marty Schenker; Sean Riordan; Judah Lakin; Oakes, Royal F.; Weinstein, David S.
Subject: RE: Zepeda Rivas - draft medical plan

EXTERNAL

Dear Counsel:

As discussed in today's case management conference, we have reviewed the proposed medical plan and have serious concerns. We are still consulting with our experts regarding details, but have two major areas of global concern. First, we see no meaningful difference between the proposal and the level of care prior to the court's order. Second, we see nothing in the proposal specific to the outbreak or to Mesa Verde at all. It appears that this proposal is thus not responsive to the Court's order requiring Defendants to *improve* their system of care and to do so with the particular crisis situation in Mesa Verde in mind. *See* Dkt. 595.

We welcome the opportunity to meet and confer but do not expect that doing so would be fruitful until significant changes are made to bring the plan in line with the broad contours of the Court's order. We will nonetheless continue to engage with our experts, and would like to reserve tomorrow afternoon's 5:00 PM standing call to discuss the medical plan.

Sincerely,
Bree



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From: Coleman, Susan E. [<mailto:SColeman@bwslaw.com>]
Sent: Wednesday, August 26, 2020 11:37 AM
To: Winslow, Sara (USACAN) <Sara.Winslow@usdoj.gov>; Maclean, Emilou (PDR) <emilou.maclean@sfgov.org>
Cc: Bill Freeman <wfreeman@aclunc.org>; Garbers, Wendy (USACAN) <Wendy.Garbers@usdoj.gov>; Zack, Adrienne (USACAN) <Adrienne.Zack@usdoj.gov>; Choe, Shiwon (USACAN) <Shiwon.Cho@usdoj.gov>; Marty Schenker <mschenker@cooley.com>; Sean Riordan <SRiordan@aclunc.org>; Bree Bernwanger <bbernwanger@lccrsf.org>; Judah Lakin <judah@lakinwille.com>; Oakes, Royal F. <roakes@hinshawlaw.com>; Weinstein, David S. <DWeinstein@hinshawlaw.com>
Subject: RE: Zepeda Rivas - draft medical plan

Counsel – attached is a draft of the medical plan. We are still awaiting additional input from IHSC, so this is not yet final; however, we welcome your input and suggestions.

Best,

Susan

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EXHIBIT F-1

Bree Bernwanger

From: Maclean, Emilou (PDR) <emilou.maclean@sfgov.org>
Sent: Thursday, August 27, 2020 12:58 PM
To: Coleman, Susan E.; Bill Freeman; Newman, Michael A.S.; Oakes, Royal F.; Weinstein, David S.
Cc: Winslow, Sara (USACAN); Choe, Shiwon (USACAN); Zack, Adrienne (USACAN); Garbers, Wendy (USACAN); Marty Schenker; Bree Bernwanger; Sean Riordan; Angelica Salceda; Judah Lakin
Subject: [Zepeda] Initial comments on draft medical plan and call today
Attachments: 2020.08.27 Medical Plan Initial Recommendations.pdf

Dear Counsel:

We expect to spend the bulk of today's 5pm call discussing the draft medical plan. To that end, please see attached a list of some of the deficiencies we identify that we hope can assist Defendants in the production of a more constructive and final draft. We also seek information about the process by which Defendants will engage to reach a final draft, and the parties involved in that process.

Please see below additional issues. We hope to receive information in advance of the call on these issues so that we can reserve the call for the medical plan to the extent possible.

1. Mesa Verde related requests for information:
 - a. Please confirm that class members have received, and will continue to receive, written COVID test results pursuant to Judge Chhabria's order.
 - b. Please clarify movement between dorms that we understand has been ongoing over the past 24 hours.
 - c. Please provide names of individuals who are symptomatic, an update on Margarito Zamora Guzman, and the names of any individuals suffering from severe COVID.
2. Yuba-related requests for information and testing:
 - a. Please confirm which dorms are currently being occupied by ICE detainees (and have been occupied over the past 2 weeks) in Yuba County Jail;
 - b. Please confirm that there are thus far (i) no tests of detainees in Yuba besides the two that were done on new arrivals months ago; and (ii) no known positive tests of detainees at Yuba; and (iii) only the two positive COVID staff tests previously identified by Federal Defendants
 - c. We request that Defendants test for COVID Jose Cruz ORTEGA GARCIA, A 206-149-562, a detainee at Yuba County Jail with COVID symptoms: body aches, congested, no olfactory sense, trouble swallowing food, burning sensation in his throat, a dry cough, headaches, nausea and respiratory distress.

Best,
Emi

EXHIBIT F-2

To: Defendants ICE, GEO and Nathan Allen
From: Plaintiffs, *Zepeda Rivas et al. v. Jennings et al.*
August 27, 2020

Initial Response to COVID “Medical Plan” Presented August 26, 2020

The Court ordered that Defendants “create a written plan to improve their system of monitoring, caring for, and responding to medical assistance requests from detainees who have tested positive and who have health conditions that the CDC has identified as creating an elevated risk of complications.” Dkt. 595 at 1. In particular, the Court ordered that the written plan address, “at a minimum, how the defendants will provide information to detainees (including non-English speaking individuals) about managing and responding to symptoms, and how the defendants will ensure that they respond promptly to sick detainees requesting medical assistance.” *Id.*

Defendants produced three documents on August 26, 2020 constituting a “draft of the medical plan” that was still “awaiting additional input from [ICE Health Service Corps]” (hereinafter “Draft Plan”). The three documents are:

- GEO Correctional Health Services, “Chapter: Infection Control,” “Title: Coronavirus (COVID-19) Management,” Number 531-A, effective date Feb. 28, 2020 (hereinafter “GEO Feb. 28 Guidance”)
- A one-page “Brief Summary of CDC’s Recommendations for High-Risk Patients Living in Congregate Housing to Prevent COVID-19” (hereinafter “CDC Congregate Housing COVID Summary”)
- A 3-page comparison document listing “CDC treatment guidelines for COVID-19” and “Wellpath Medical response/treatment” (hereinafter “Wellpath Response/Treatment Document”)

Defendants stated that this is a preliminary draft that does not yet reflect complete input from ICE. Putting aside that this does not comply with the terms of the Order, Plaintiffs offer the following observations. Among other things:

- The GEO Feb. 28 Guidance is extraordinarily outdated, produced at a time when much less was known about COVID, its identification, and its management. As but one example, under the section on “Clinical Observations,” it includes “a history of recent travel to China (within 14 days)” as a prime factor identifying the existence of COVID, even though in August 2020, COVID faces uncontrolled spread virtually everywhere in the United States, including Kern County, the site of the Mesa Verde Detention Facility.
- None of these documents appear specific to Mesa Verde; none even mention Mesa Verde. It is possible that the Wellpath Response/Treatment Document is intended to be specific to Mesa Verde, but that is not evident from anything in the document. The other two documents are definitively *not* specific to Mesa Verde.
- The WellPath Response/Treatment Document is written in shorthand that is unclear even to knowledgeable outsiders.
- None of the documents suggest that Defendants have taken seriously either the Court’s order of the deficiencies in medical care elaborated by Plaintiffs which preceded the

Court's order. *See, e.g.*, Dkts. 591, 591-2, 591-3, 591-4, 591-5, 591-6. To the extent that the Wellpath Response/Treatment Document is specific to Mesa Verde, it appears to merely elaborate what the existing practice is, and not suggest any improvements upon that practice.

- The Draft Plan, as produced, lacks basic elements that should be included in any plan responsive to the Court's order, including, i.e., 1) explicit nursing protocols for detainees in different states (i.e., intake quarantine, close contacts, infected and medically vulnerable, etc.); 2) explicit protocols for detainees with Limited English Proficiency; 3) protocol for the care of medically vulnerable detainees, infected or uninfected with COVID; 4) protocol for immediate attention to pressing health concerns; and 5) protocol for being deemed "recovered" from COVID.

In the interest of providing constructive input in a timely fashion to achieve better health care for class members in the middle of a COVID outbreak at Mesa Verde, Plaintiffs offer the following recommendations to address the Draft Plan's deficiencies with the expectation that Defendants will produce a revised draft plan that will allow for us to provide more concrete and detailed recommendations. Where relevant, Plaintiffs also cite to expert declarations previously produced.

A final medical plan should include, at a minimum:

- 1) **Explicit nursing protocols and care plans**, specific to the situation and resources at Mesa Verde and the particular needs of detainees, including specifically for detainees in:
 - a) 14-day intake sequestration,
 - b) close contact quarantine,
 - c) known infected isolation for lower-risk detainees,
 - d) known infected isolation for aged and otherwise vulnerable detainees, and
 - e) known infected isolation and with moderate or severe COVID, or otherwise in deteriorating health.

These protocols should include timing of assessments and instructions as to when to access a higher level of care, such as a physician or hospital. These should include a staffing roster with clearly defined roles. A registered nurse (RN) should perform or review assessments on a contemporaneous basis. Roles must be assigned consistent with licensure and there should be sufficient staff to carry out the duties outlined in the appropriate timelines. A general statement that Defendants will rely only on the CDC and IHSC Guidelines is insufficient. There should be Facility-specific guidance that incorporates these more general guidelines.

See Dkt. 591-4 (Greifinger Decl.) ¶¶ 12-13, 18; Dkt. 591-2 (Allen Decl.) ¶ 9

- 2) **Explicit protocols for detainees with Limited English Proficiency**

All elements of the plan that involve communication with detainees must include a clear plan for using necessary language interpretation, including the use of medical interpreters.

See Dkt. 591-6 (Keller Decl.) ¶¶ 12.g, 49.

3) Instructions for how to perform CPR in the face of COVID-infection

4) Thresholds for higher level care such that custody and health care staff know when to refer COVID-19 positive individuals to what level of care

- o *See* Dkt. 591-4 (Greifinger Decl.) ¶ 18. *See also* Dkt. 591-2 (Allen Decl.) ¶ 9 (“Every medical facility responsible for treating COVID patients should have a plan in place specific to their facility which includes...what criteria will be used to transfer the patient for higher level of care.”).

5) Protocol to ensure immediate attention for urgent (as opposed to emergent)

conditions. Mesa Verde must have a system for responding within minutes to a class member who develops symptoms or shows signs of deterioration, including:

- a) A plan for having a dedicated trained officer to the COVID-infected dorm (Dorm B) 24/7.
- b) Training for the officer to identify signs and symptoms requiring urgent treatment (which should be done by a medical professional).
- c) Clear requirements that the officer summon medical professionals in response to medical requests and under other clearly-defined circumstances.
- d) Medically-appropriate definitions of what constitutes an emergency in the COVID context, including:
 1. Difficulty breathing
 2. Persistent pain or pressure in chest
 3. New confusion
 4. Inability to wake/stay awake
 5. Bluish lips/face
- e) On-call medical professional who can immediately report for evaluation when an issue is flagged.
- f) Clear plan and timelines for responding to oral requests for care.

See Dkt. 591-4 (Greifinger Decl.) ¶¶ 7-10, 27. “Mesa Verde should have an officer in Dorm B at all times (24/7) to monitor whether any detainee needs immediate medical intervention. That officer must be provided with appropriate training to be able to identify the signs and symptoms that require urgent or emergent evaluation and treatment. It is not enough to have general emergency practices in place, or for custody officers to know that they can call the medical department in case of an emergency. What constitutes an emergency, in the context of a dorm full of COVID-19 positive individuals, must be well-defined.” Dkt. 591-4 (Greifinger Decl.) ¶ 8. *See also* Dkt. 591-5 (Hernandez Decl.) ¶ 7 (importance of identifying “warning signs for health deterioration); Dkt. 591-2 (Allen Decl.) ¶ 11 (“There must also be a system in place for life support or “Code Blue” situations.”).

- 6) Protocol to ensure minimal delay for transport to emergency care, including:**
- a) Clear, streamlined process for summoning emergency assistance.
 - b) No obstacles to summoning emergency care.
 - c) Deference to medical staff on all situations requiring medical or nursing judgment.

See Dkt. 591-4 (Greifinger Decl.) ¶¶ 9, 11. Dkt. 591-2 (Allen Decl.) ¶ 11

- 7) Protocol to inform COVID-positive detainees how to self-identify COVID-19 medical emergencies**

Training should be provided by medical staff and include the provision of clear information on how to identify, but not treat, a COVID medical emergency.

See Dkt. 591-4 (Greifinger Decl.) ¶ 16.

- 8) Protocol to provide basic health information to detainees, including test results for those who have been tested for COVID**

See, e.g., Dkt. 591-5 (Hernandez Decl.) ¶ 20.

- 9) Protocol for vaccination against influenza and testing for other respiratory illnesses**

Dkt. 591-2 (Allen Decl.) ¶ 25.

- 10) Protocol to respond to surge in COVID-positive detainees (in addition to plan for responding to and caring for individual patients)**

See Dkt. 591-4 (Greifinger Decl.) ¶ 18.

- 11) Protocol to describe when COVID-19 positive individuals are deemed “recovered”**

Dkt. 591-2 (Allen Decl.) ¶ 18.

- 12) Protocol and criteria for COVID-19 point-of-care testing of symptomatic detainees**

See Dkt. 591-6 (Keller Decl.) ¶ 23.

- 13) Protocols and criteria for contact tracing**

- 14) Training for medical staff and line staff, including:**

- a) Health care staff training on mode of transmission, use of containment, and signs and symptoms of disease and deterioration.
- b) Security staff training on when to summon medical professional and when to call 911.

See Dkt. 591-4 (Greifinger Decl.) ¶ 15.

15) Mechanism to evaluate the quality of compliance with the policies and training in the plan

See Dkt. 591-4 (Greifinger Decl.) ¶ 17.

16) Protocol to minimize risk of transmission *via* staff and *to* staff

See, e.g., Dkt. 591-5 (Hernandez Decl.) ¶¶ 15, 16

17) Detailed plan for provision and use of personal protective equipment (PPE)

Dkt. 591-2 (Allen Decl.) ¶ 9 (“Details as to how healthcare providers should be containing spread of the infection should be very clear, including which masks should be worn, and how PPE is to be donned and doffed. Healthcare personnel should be fit-tested for N-95 masks, and if the N-95 mask cannot be documented to be adequate for the healthcare provider, access must be available for the provider to be trained and to wear a powered air-purifying respirator (PAPR). Face shields should be in use in addition to N-95 masks.”). *But see* GEO Feb. 28 Guidance at 7 (“Facility Administrator/designee will assure an adequate supply of PPE is maintained on-site.”).

18) Plan to ensure hygiene and sanitation throughout the facility, including in particular among those detainees in isolation and contact quarantine

Dkt. 591-2 (Allen Decl.) ¶ 9

19) Plan to ensure sufficient medical supply level

Dkt. 591-2 (Allen Decl.) ¶¶ 4, 14

20) Protocol to ensure proper coordination with local public health officials in the case of infections, outbreaks, and hospitalizations

See, e.g., Dkt. 591-5 (Hernandez Decl.) ¶ 18

21) Alternative or contingency plans, i.e., if there is an outbreak or if hospitalization is needed and there are insufficient beds available at the local hospital