UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DON LIPPERT, et al.,	)	
	)	
Plaintiffs,	)	No. 10-cv-4603
v.	)	
	)	Judge Jorge L. Alonso
ROB JEFFREYS, et al.,	)	Magistrate Judge Susan E. Cox
	)	
Defendants.	)	

PLAINTIFFS' FIRST OMNIBUS MOTION TO ENFORCE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Plaintiffs bring this Motion to Enforce as to four areas of the Consent Decree in which Defendants are not in compliance: (1) completion of the staffing analysis and Implementation Plan; (2) creation of a comprehensive quality assurance program and audit function; (3) agreed data and information reports required to be submitted on a regular basis to the Monitor and Plaintiffs; and (4) oversight review of Wexford Health Sources, Inc.'s "collegial review/utilization management" denials. Defendants' healthcare system is at a critical juncture. The ten-year contract with Wexford has expired, so the Department is in a position to create a better system for the delivery of healthcare. Unfortunately, critical documents and plans which, by the requirements of the Decree, should have been available now to help build this better system—a completed staffing analysis and settlement Implementation Plan, a new quality assurance system and infrastructure to support it—are among the crucial settlement areas in which Defendants have already fallen far behind in the first two years of the Decree. Court intervention is required now to address these critical failings.

Introduction and Background

1. This case was settled in December 2018; the Court gave preliminary approval to the settlement on January 10, 2019, and final approval on May 9, 2019. Dkt. 806, 1236, 1238. The overarching purpose of the settlement, as stated in the Consent Decree, is to ensure that Defendants "implement sufficient measures [ ] to provide adequate medical and dental care to those incarcerated in the Illinois Department of Corrections while ensuring the availability of necessary services, supports and other resources to meet those needs." Dkt. 1238 at 4 (§ I.F). Because of the length of time the case had been pending and the broad and serious scope of the problems the Consent Decree is designed to address, certain Decree obligations had early "due dates," including those raised in this Motion, and the Decree also provided for a Court-appointed

Monitor who would report to the Court on a regular basis—twice yearly—as to Defendants' compliance and progress towards compliance with the Decree. Dkt. 1238 at 20 (§ V.E).

2. On July 22, 2020, shortly after receiving the Monitor's Second semi-annual Report, Plaintiffs sent a letter to Defendants initiating the dispute resolution process as to six issues the Second Report described as not in substantial compliance. (Plaintiffs' July 22, 2020 letter is attached as Ex. 1.) These six issues were only a fraction of the matters which the Second Report identified as not in substantial compliance, but because of the relatively early stage of the Decree and the COVID-19 pandemic, Plaintiffs deliberately limited the issues for dispute resolution in the July 22, 2020 letter to matters which were either critical to the progress of the Decree, or which affected a relatively large number of class members and appeared to have straightforward solutions. Among these issues were: (1) the staffing analysis and Implementation Plan required by Sections IV.A-C of the Decree; (2) the comprehensive quality assurance program and audit function required by multiple Decree provisions; (3) the data and information required to be provided to the Monitoring team and to Plaintiffs on a regular basis pursuant to Section V.G of the Decree; and (4) the oversight review of all Wexford "collegial review" denials required by Section III.H.5 of the Decree.[1]

3. In accordance with the Decree, the dispute resolution process as to these matters—a written response by Defendants, a reply by Plaintiffs, and a meeting of the parties—was completed by September 23, 2020. Dkt. 1238 at 27 (§§ X.B, C) (Defendants' August 21, 2020 Section X.B response letter is attached as Ex. 2; Plaintiffs' September 1, 2020 Section X.C

[1] Two other issue areas—routine adult immunizations and colon cancer screening, and treatment for Hepatitis C—were also included in the July 22, 2020 letter and the subsequent summer/fall 2020 dispute resolution process. (*See* Ex. 1.) Because Defendants have reportedly adopted certain measures recommended by the Monitoring team which may improve the level of compliance in these areas, Plaintiffs are waiting for further Monitor reports to see whether substantial progress has been made.

reply letter is attached as Ex. 3). The parties' September 23, 2020 meeting did not resolve the disputes as to the matters in Plaintiffs' initial dispute resolution letter, although it appeared that a resolution as to the dispute about "collegial review" might be achievable (*see* discussion *below*, pp. 34-35). Defendants promised follow-up and additional information as to this and other topics raised in the process. Because of this, and because of the continuing pandemic, Plaintiffs did not immediately pursue relief from the Court as permitted by Decree Section X.D. Dkt. 1238 at 28. The Decree does not set a deadline or any specific timeframe within which relief must be sought after completion of the dispute resolution process. *Id*.

4. In correspondence and filings throughout 2020, including the August 21, 2020 letter (Ex. 2), Defendants repeatedly invoked the COVID-19 pandemic as the reason why progress on many requirements of the Decree was stalled. Although Defendants' failures of compliance raised in this Motion pre-dated the pandemic, and although the Decree contains no force majeure clause that permits suspension of its obligations, Plaintiffs were not unaware of the burdens COVID-19 placed on the IDOC Office of Health Services (OHS), including the responsibilities associated with the systemwide rollout of surveillance testing Defendants finally undertook in December 2020 as a result of Plaintiffs' Motion for Order Compelling Defendants to Initiate Employee Testing Program (Dkt. 1345) and the significant COVID-19 vaccination effort completed by IDOC in April 2021.[2]

5. With the completion of that vaccination effort, and the pandemic on the wane in Illinois and throughout the United States, Plaintiffs can no longer delay seeking enforcement of the critical Decree obligations that are the subject of this Motion. On February 15, 2021, the Court-appointed Monitor issued his Third semi-annual Report to the parties (subsequently filed

[2] *See* IDOC: COVID-19 Response: COVID-19 Vaccine, https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx (last visited May 5, 2021).

as Dkt. 1403). On the matters that are the subject of this Motion, the Third Report detailed little or no progress in the half-year since the Second Report. *See*, *e.g.*, Dkt. 1403 at 4-9. In fact, as to one of the subjects of this Motion, quality assurance, Defendants had slipped from a "partial compliance" status as to some obligations to "noncompliance" on all. *See* Dkt. 1403 at 24-32, 152-56. On March 24, 2021, Plaintiffs wrote Defendants seeking current information, if any, about the status of the staffing analysis and Implementation Plan; of "collegial review" (and the Wexford contract in which "collegial review" is embedded); and of the quality assurance program. (Plaintiffs' March 24, 2021 letter is attached as Ex. 4.) Defendants' response, on April 7, 2021, provided no firm dates, or any immediate prospect of significant progress, on any of these issues. (Defendants' April 7, 2021 letter is attached as Ex. 5.) Finally, recent communications from Defendants to the Monitor (in particular, a June 1, 2021 report, attached as Ex. 6) have confirmed that no substantial progress is being made on the issues raised in this Motion even as the COVID-19 pandemic recedes.

Legal Standard

6. The Seventh Circuit has recently reiterated that "a judicially approved consent decree is essentially a contract . . . interpreted according to principles of state contract law." *Holmes v. Godinez*, 991 F.3d 775, 780 (7th Cir. 2021) (quotation, citations omitted). In this instance, as in *Holmes*, Illinois law of contract governs, and "[u]nder Illinois law . . . the court's primary objective is to give effect to the intent of the parties," which requires "first look[ing] to the language of the contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Id*. (quotations, citations omitted). In addition, implied in all contracts under Illinois law is "the exercise of good faith" in the performance of its

obligations. *Id*. at 782 (citation omitted); *see also 4536 North Sheridan Condo Ass'n v. Maduff*, 2016 WL 6603213, at *6 (Ill. App. Nov. 4, 2016) (citation omitted).

7. In a recent decision affirming the enforcement of provisions of the long-running *Shakman* consent decrees, the Seventh Circuit emphasized that "[a]ny federal consent decree is a very serious matter" and must not be allowed to "stagnat[e]" on a court's docket. *Shakman v. Clerk of Cook Cnty*., 994 F.3d 832, 843 (7th Cir. 2021). "[W]e trust—and expect—that the violations identified by the [court] will be remedied with appropriate speed, and that, moving forward, all parties will work together to ensure swift compliance." *Id.* Unlike the *Shakman* decrees, the Consent Decree here has a specific time frame—ten years—designed to ensure that it would not "languish[]" on this Court's docket. *Id*. at 835; Dkt. 1238 at 26-27 (§ IX.B.5). That deadline adds to the urgency here. Although the COVID-19 pandemic created unexpected impediments, Defendants were already far behind schedule in meeting their Decree obligations when the pandemic began.

Staffing Analysis and Implementation Plan

8. Section IV of the Consent Decree obligated Defendants, by September 2019, to create an Implementation Plan "to accomplish the obligations and objectives in this Decree." Dkt. 1238 at 18-19 (§ IV.A, B). Before preparing the Implementation Plan, Defendants were required by the Decree to conduct a "staffing analysis"; this was a necessary prior step because one of the requirements for the Implementation Plan is that it "[d]escribe the implementation and timing of the hiring, training and supervision of the personnel necessary to implement the Decree." *Id*. at 18 (§ IV.A.2). Ultimately the Implementation Plan is to "be incorporated into, and become enforceable as part of this Decree." *Id*. at 19 (§ IV.C). Over two years into the Decree, as reported in the Monitor's Third semi-annual Report, the staffing analysis "is still

unfinished," and "the Implementation Plan is less complete than the Staffing Analysis." Dkt. 1403 at 7.

9. The Decree provisions concerning the staffing analysis and Implementation Plan state in their entirety:

> **A. Overview**. The Defendants, with assistance of the Monitor, shall conduct a staffing analysis and create and implement an Implementation Plan to accomplish the obligations and objectives in this Decree. The Implementation Plan must, at a minimum:
>
> 1. Establish, with the assistance of the Monitor, specific tasks, timetables, goals, programs, plans, projects, strategies and protocols to ensure that Defendants fulfill the requirements of this Decree, and
>
> 2. Describe the implementation and timing of the hiring, training and supervision of the personnel necessary to implement the Decree.
>
> **B.** Within 120 days from the date the Monitor has been selected, the Defendants shall provide the Monitor with the results of their staffing analysis. Within sixty (60) days after submission of the staffing analysis, Defendants shall draft an Implementation Plan. In the event the Monitor disagrees with any provision of the Defendants' proposed Implementation Plan, the matter shall be submitted to the Court for prompt resolution.
>
> **C.** The Implementation Plan, and all amendments or updates thereto, shall be incorporated into, and become enforceable as part of this Decree.

Dkt. 1238 at 18-19 (§§ IV.A-C).

10. The timing of the staffing analysis and Implementation Plan were tied to the selection of the Monitor because both were required to be created with the Monitor's assistance ("The Defendants, with assistance of the Monitor, shall conduct a staffing analysis and create and implement an Implementation Plan . . ."; "The Implementation Plan must, at a minimum:/ Establish, with the assistance of the Monitor, specific tasks, timetables, goals . . .."). Dkt. 1238 at 18 (§ IV.A, A.1.) The staffing analysis was originally due on July 26, 2019, and the Implementation Plan was due on September 24, 2019. In September and October 2019,

Defendants sought, and the Court granted, two 30-day extensions of their time to submit the Implementation Plan. Dkt. 1265, 1267, 1270, 1271. More than a year and a half has passed, but Defendants have sought no further extensions since October 25, 2019, although their Implementation Plan has not yet been submitted.

11. In the first year of the Decree, it appeared that Defendants were on track to complete the staffing analysis and Implementation Plan, if not exactly on schedule, at least within a reasonable time. The Monitor's First semi-annual Report, in November 2019, reported that from April 2019 on, the IDOC Office of Health Services had been engaged in preparing "a system-wide analysis of the IDOC health care staffing" with "ongoing input from the Monitor. Dkt. 1276 at 5. Defendants had provided an initial version of the staffing analysis to the Monitor on August 8, 2019, which the Monitor had returned to Defendants on August 29 with additional input. *Id.* On November 23, 2019—immediately before the Monitor's First semi-annual Report was due to be issued—Defendants submitted a second version of the staffing analysis to the Monitor along with their first version of the Implementation Plan, and the Monitor provided additional recommendations concerning both documents at a meeting with OHS leadership on December 10, 2019. *Id.*; Dkt. 1335 at 21.[3]

12. Defendants submitted their third version of the staffing analysis and second version of the Implementation Plan to the Monitor in June 2020—again, shortly before the Monitor's Second semi-annual Report was due to be issued. Dkt. 1335 at 7-8. The Monitor's Second Report reported that neither the draft Implementation Plan received in November 2019 nor the revised Plan received on June 12, 2020 satisfied the Decree's requirements; among other

[3] The Monitor's First Report itself records some detailed suggestions on needed elements for the staffing analysis and Implementation Plan; *see*, *e.g.*, Dkt. 1276 at 6, 13 (IT staffing), 22 (quality assurance audit teams), 27 (RN staffing for nurse sick call), 42 (need for additional dental hygienists), 48 (summary of overall suggestions for analysis and Plan already provided verbally to OHS).

issues, the Plan did not "include . . . tasks, detailed plans or timetables." Dkt. 1335 at 27. This is where matters stood at the time of Plaintiffs' initial dispute resolution letter on July 22, 2020 and, as to the Implementation Plan, it is where they stand today: although the Monitor reportedly recently received a new version of the staffing analysis, there has been no further version of the Implementation Plan since June 2020.

13. The delays in the staffing analysis and Implementation Plan have also been coupled with apparent loss of initiative within IDOC to complete them. The Monitor's First Report, in fall 2019, reflected optimism about IDOC's early efforts and commitment. A "preliminary" version of the staffing analysis had been shared with the Monitor by late May 2019—not long after the entry of the Consent Decree—and this was soon followed by the August 8, 2019 revised draft. Dkt. 1276 at 47-48. The Report noted that "[t]he preliminary version of the Staffing Analysis included a significant increase in the number of nursing personnel, additional clinical providers, and support staff that are intended to enhance access to health care and to achieve compliance with the Consent Decree," and expressed hope that the two extensions on the Plan deadline sought by Defendants and permitted by the Court would "allow[] OHS to fully evaluate the recommendations of the September 2019 'UIC College of Nursing Quality Improvement and Patient Safety Plan for the IDOC Office of Health Services' and incorporate select elements of this report" into the staffing analysis and Implementation Plan. Dkt. 1276 at 5.

14. By the time of the Monitor's Second semi-annual Report, in mid-2020,[4] however, problems had surfaced. The Monitoring team had just received a new version of the staffing

[4] The report was originally issued to the parties on July 15, 2019; the Monitoring team made a handful of revisions in response to comments from Defendants, and thus the filed version of the report is dated August, 6, 2019.

analysis and thus had not had time "to fully analyze the revised version," but noted that although "[t]he revised version recommends the creation of 357 additional positions" it still had certain gaps, in particular in IT and audit team positions. Dkt. 1335 at 7. More critically, the revised Implementation Plan that accompanied the new staffing analysis, although it "voice[d] IDOC's commitment" to goals for "addressing and improving multiple important components of the health care program," was still lacking most of the elements required by the Consent Decree. "The Monitor supports IDOC's commitment to these goals," the Report states, "however . . .:

> . . . the Consent Decree requires that the Implementation Plan include detailed tasks, timelines, and strategies to fulfill the requirements of the Consent Decree, including the timelines related to the hiring and training of personnel. The IDOC has not provided this detailed plan for how they will implement their goals. The Implementation Plan is [] incomplete. . .

Dkt. 1335 at 8-9. The Monitor's Second Report contained over ten pages of direct commentary on the staffing analysis and Implementation Plan and how they might be improved. *Id*. at 20-31. Finally, the Monitor's Third semi-annual Report, dated February 15, 2021, with no new versions of the analysis or Plan to respond to, laid out the problems of the existing drafts in more detail, along with the almost complete failure of the draft Implementation Plan to comply with the requirements of the Decree:

> While the Staffing Analysis is still unfinished, the Implementation Plan is less complete than the Staffing Analysis. In prior reports and in multiple discussions, the Monitor has communicated his recommendations on the Implementation Plan. . . . The Monitor understands the difficulties that the COVID-19 pandemic has presented with respect to completion of this project. However, even before the pandemic started the IDOC had not created an implementation plan satisfactory to the requirements of the Consent Decree. The Monitor notes that the IDOC lacks the internal resources to complete this task and needs help as this requirement is a year and a half overdue.

Dkt. 1403 at 7. The Report noted that there were "25 comments on the Staffing Analysis that IDOC has not responded to" (*Id*. at 16), and further: "The 6/12/20 IDOC Implementation Plan

fails to detail how the 95 items of the Consent Decree will be implemented. The IDOC Implementation Plan lists some goals related to some items of the Consent Decree but the specific tasks, timetables, goals, programs, plans, projects, strategies, and protocols are not established." *Id*. at 19. The only item in the list of Decree requirements that had been partially satisfied was the provision of "goals," but this was (manifestly) not enough:

> The Consent Decree requires that specific tasks, goals, timetables, programs, plans, projects, strategies, and protocols need to be provided. None of this information is provided for any of the goals . . . Thorough details of the staff necessary to implement these goals were also not provided. How these goals are related to items of the Consent Decree were not provided. As well, the timing of hiring, training, and supervision of personnel necessary to implement these goals needs to be included. The IDOC Implementation Plan [does] not fulfill the requirements of the Consent Decree.

Id. at 20. Although the Report gave a combined rating of "partial compliance" to Sections IV.A and B because of the (past) progress of the staffing analysis, as to the Implementation Plan itself it concluded, "this item is noncompliant." *Id*. at 21-22.

15. As their progress faltered, Defendants pointed elsewhere. In their August 21, 2020, dispute resolution response, Defendants indeed blamed the pandemic, but also asserted that they were awaiting "suggested edits" from the Monitor, and that "[u]pon receipt of edits," Defendants would thereafter meet with the Monitoring team to discuss implementation of . . . the suggested edits." Ex. 2 at 5, 6. When Plaintiffs' counsel subsequently communicated to the Monitor that it was Defendants' position that Defendants' progress was stalled because they were waiting for the Monitor's comments on the analysis and Plan, the Monitor incorporated the detailed comments and recommendations on the analysis and Plan made in the June 2020 Second Report into a letter to Defendants, and sent it to Defendants. Dkt. 1403 at 16 n.16 and Appendix A. Despite having the recommendations now bundled together for them in one document, and although the letter was sent in October 2020, again, as of February 15, 2021, when the Monitor's

Third Report was issued to the parties, there had been no revisions to the staffing analysis or Implementation Plan drafts since June 2020. *Id*. at 16-20. Within the past month, Defendants appear finally to have sent a new draft of the staffing analysis to the Monitor, but it appears that there is still no revised draft of the Implementation Plan. Ex. 6, Defendants' June 1, 2021 report to Monitor, at 12 (reporting that, in May, IDOC had sent an "updated draft to the staffing analysis" to the Monitor, and an "updated draft of the implementation plan *workplan*") (emphasis added).

16. Finally, Defendants' mystifying and sometimes apparently contradictory communications about the analysis and Plan during the dispute resolution process and thereafter create doubt about what Defendants' plan to achieve compliance with Sections IV.A-C of the Decree might be, or whether there is a plan at all. As noted above, in Defendants' dispute resolution response last August, Defendants insisted that they were waiting on comments from the Monitor to proceed with the staffing analysis and Implementation Plan (comments that they had already been given in the Monitor's Second Report), and also asserted that "Defendants have worked diligently in conjunction with the Monitor to finalize these documents." Ex. 2 at 5. In the same letter, however, Defendants vehemently rejected the idea that the analysis and Plan needed to be "acceptable to" the Monitor, or that they were obligated to accept *any* of the Monitor's comments in the course of finalizing these documents:

> While Defendants agree that the Staffing Analysis and Implementation Plain [sic] required by the Decree are foundational documents that serve as a roadmap for achieving compliance, Plaintiffs' introduction . . . focuses on the mistaken belief that these documents must be acceptable or approved by the Monitor. This is not a requirement of the Decree. . . . Defendants . . . are not required to accept any and all of the Monitor's recommendations.

Id.

17. Similarly, when Plaintiffs asked for an update on the status of the staffing analysis and Implementation Plan in late March, Defendants responded that "Since receiving the monitor's comments on October 28, 2020, the Department have been working to incorporate his suggested edits . . . ," and added that they anticipated submitting a further draft of the staffing analysis to the Monitor and having further meetings with him about the Plan. Ex. 5 (4/7/21 letter) at 2-3. In this letter, however, Defendants moved beyond saying that the Monitor did not need to approve the Plan to saying that the Court did not need to, either:

> Your letter also makes reference to Plaintiffs' belief that the implementation, and possibly also the staffing plan, need to be submitted to the court for approval. This is not required by the decree. Defendants do not disagree with the fact that § IV.C. states that the implementation plan will be incorporated into, and become enforceable as part of the decree. However, Defendants do not believe this requires any action from the court.

Id. at 3.

18. The condition of the Plan, from Defendants' perspective, is also a mystery. In November 2019, Defendants labelled the versions of the staffing analysis and Implementation Plan provided to the Monitor "final." Dkt. 1276 at 5 (noting that a "final Staffing Analysis and Implementation Plan dated November 23, 2019" had just been received by the Monitoring team). However, when Plaintiffs requested a copy of the *subsequent* version of the Implementation Plan—the one provided to the Monitor in June 2020—Defendants refused, characterizing it as a "draft." (*See* July 10, 2020 letter from R. Mula to N. Staley, attached as Ex. 7; July 15, 2020 letter from N. Staley to R. Mula, attached as Ex. 8.) Defendants' August 21, 2020 dispute resolution response stated both that "Defendants have worked diligently in conjunction with the Monitor to finalize these documents"— suggesting that the analysis and Plan were final or close to final—and at the same time suggested that they remained works in progress to be hammered out with the help of the Monitor (whose help they at the same time they said they did not need to

accept: "Defendants will work diligently with the assistance of the Monitor to draft a Staffing Analysis and Implementation Plan that will ensure compliance with the Decree, but are not required to accept any and all of the Monitor's recommendations.") Ex. 2 at 5. And, as already noted, Defendants' April 2021 correspondence seems to anticipate further meetings and consultations with no set end point. In late March, Plaintiffs asked point-blank when the Plan would be ready ("When will Defendants submit the Plan to the Court for approval?"); Defendants did not respond (except to reject the idea that the Plan requires the Court's approval). Ex. 4 (3/24/21 letter) at 3; Ex. 5 (4/7/21 letter) at 2-3.

19. Section IV.C of the Decree provides:

> The Implementation Plan, and all amendments or updates thereto, shall be incorporated into, and become enforceable as part of this Decree.

Dkt. 1238 at 19. In the face of this provision, Defendants' notion that the Plan does not require the Court's imprimatur is untenable. The Decree itself is a judicially enforceable document which embodies a class action settlement that required the Court's approval (a finding that it was "fair, reasonable and adequate" under Rule 23). *See* Dkt. 1236; Fed. R. Civ. P. 23(e)(2). The Decree, by its own explicit terms, provides that the Implementation Plan will become part of the Decree, and will be not just "incorporated into" it, but also "enforceable as part of" it. In any event, the Decree itself provides the mechanism by which approval of the Plan is to be obtained:

> In the event the Monitor disagrees with any provision of the Defendants' proposed Implementation Plan, the matter *shall be submitted to the Court for prompt resolution*.

Dkt. 1238 at 19 (§ IV.B) (emphasis added).

20. Defendants are thus in breach both of the timing requirements of Section IV.A of the Decree—the requirements that a staffing analysis and Implementation Plan be completed within 120 and 180 days of the selection of the Monitor, respectively—and of the requirement

that any disagreements with the Monitor as to the Plan be "submitted to the Court for *prompt* resolution." (emphasis added). Dkt. 1238 at 19. Defendants have had the Monitor's comments on the analysis and Plan since July 2020. By now, they surely know which ones they agree with, and which ones they refuse to accept. It is time for them to submit the Plan, and any open issues concerning the Plan, to the Court for "prompt resolution," so that this "roadmap for achieving compliance," which both parties agree is a "foundational document[]," can be finalized and progress towards the substantive goals of the Decree can move forward.

Quality Assurance Program and Audit Function

21. The Consent Decree contains multiple interlocking requirements directed at quality assurance:

- **§ II.B.2** (overarching requirement to monitor system, including vendor, by collecting and analyzing data);
- **§ III.L.1** (requiring, pursuant to advice under existing contract with UICCON, a comprehensive medical and dental quality assurance program to be implemented at all facilities with Monitor input);
- **§§ II.B.6.l, m, n, and o** (requiring "[e]ffective" quality assurance review; adverse event reporting; action on reported errors; and training on patient safety);
- **§§ II.B.6.i and III.M.2** (requiring morbidity and mortality review "with action plans and follow-through," and that mortality reviews (i) identify and refer deficiencies; (ii) result in corrective action as to deficiencies; with (iii) the corrective action being subject to "regular Quality Assurance review");
- **§ II.B.7** (requiring development and implementation of comprehensive set of health care performance and outcome measurements, with complementary data collection requirements); and
- **§ II.B.9** (requiring, with the assistance of the Monitor, the development of an audit function providing "independent review of all facilities' quality assurance programs").

Dkt. 1238 at 5-8, 17-18.

22. Taken together, these provisions require functioning quality assurance review for medical and dental programs both at the facility and the agency level. Quality assurance review, as set forth in the Decree, must be based on comprehensive data collection, routinely generate error reports and corrective action plans in response to the reported errors, and must also measure performance and outcomes. These review programs in their turn are to be subject to routine evaluation and audit. Dkt. 1238 at 8, 18 (§§ II.B.9, III.M.2). These multiple, overlapping provisions were crafted in response to the systemic absence, initially reported by the First Court-Appointed Expert in 2014, of any effective programs, either by IDOC or its vendor,[5] to review medical and dental errors and devise plans to correct them, including a lack of any meaningful review of deaths. Dkt. 339 at 43-45, 84, 120-21, 165-66, 202-03, 242-43, 279, 282, 317, 322, 364, 367-68. In 2018, the Second Court-Appointed Expert, although finding some "marginal" improvement since 2014, concluded, "The quality improvement program operates on a legacy system of principles that no one any longer understands or effectively implements. No one in the IDOC has experience or knowledge of contemporary quality improvement methodology or practice. The quality improvement program is ineffective statewide." Dkt. 767 at 12, 117, 119-21.

23. Defendants' healthcare programs cannot begin progressive change without systemwide quality assurance programs. Building these programs is a "long-haul" project since Defendants must start from scratch. This is why Plaintiffs chose this as one of the early dispute resolution topics. Unfortunately, in the period between the Monitor's Second Report, issued in

[5] The May 2011 IDOC contract with Wexford requires the vendor to have a "Quality Improvement Program" and also a "management information system capable of providing statistical data necessary for the . . . monitoring of medical and mental health services." Wexford contract, attached as Ex. 9, pp. 78-79 (§§7.1.1, 7.1.6; see also §§ 7.1.6.1, 7.1.6.2). Apparently these provisions have never been enforced by IDOC given the uniform reports of the lack of a program or data management capacities.

August 2020, and the Monitor's Third Report, issued in February 2021, Defendants slid from a mix of "partial compliance" as to a handful of the quality assurance provisions of the Decree, and noncompliance with the remainder, to noncompliance with *all* Decree provisions relating to quality assurance. In other words, as assessed by the Monitor, Defendants have not only not moved forward, they have moved backward on progress towards a quality assurance program in the past year.

24. This is even harder to understand since, by September 2019, Defendants had a comprehensive report specifically devoted to the problems with their quality assurance systems and how to fix them. Since IDOC lacked any internal expertise (or practical experience) with effective quality assurance programs, the most critical first step was a relationship with an entity that could help it build the programs it needs; that Defendants are incapable of doing this with their own resources has not been a matter of dispute. At the time the Decree was negotiated in December 2018, Defendants had already chosen the University of Illinois Chicago (UIC) as that prospective partner and executed a contract with the University of Illinois Chicago College of Nursing (UICCON) for a comprehensive review of its quality assurance needs. Section III.L.1 of the Decree, which incorporated that relationship, is the most overarching provision in the Decree relating to quality assurance, and in keeping with the importance of an effective quality assurance program to improving IDOC healthcare, it contained an early Decree deadline:

> Pursuant to the existing contract between IDOC and the University of Illinois Chicago (UIC) College of Nursing, within fifteen months of the Preliminary Approval Date, UIC will advise IDOC on implementation of a comprehensive medical and dental Quality Improvement Program for all IDOC facilities, which program shall be implemented with input from the Monitor.

Dkt. 1238 at 17 (§ III.L.1). The expectation reflected in this provision was that Defendants would extend the relationship with UICCON to develop their quality assurance program. This

choice made good sense given existing healthcare relationships between UIC and IDOC; UIC manages IDOC's HIV/AIDS patients and treats Hepatitis C patients referred to it by Defendants, *inter alia*. Dkt. 767 at 32-33; Dkt. 1276 at 16. *See also* September 2019 University of Illinois at Chicago College of Nursing, *Quality Improvement and Patient Safety Plan for the Illinois Department of Corrections Office of Health Services* (hereafter "UICCON Report"), attached as Ex. 10, at 16.

25. The UICCON quality assurance report—over 250 pages in total—was delivered to Defendants in September 2019 (Ex. 10). The report contained a phased implementation schedule (the report itself being Phase 1) for transformation of IDOC's quality assurance programs, with timetables starting in October/November 2019. *Id.* at 18, 81 *et seq*. By the end of October 2019, the Monitoring team had already provided detailed written input on the UICCON Report to the IDOC Office of Health Services clinical leadership, covering topics including:

> . . . the OHS span of authority, the OHS table of organization, inclusion of a physician in the quality program, the need for a data support team in the OHS, the number of regional QI consultant positions, the composition and number of audit teams, future control of physician credentialing, the use of independent physician case/medical care/mortality reviewers, the creation of clinical physician peer reviews, need to select meaningful outcome and performance measures, standardization of procedures, development of initial health system goals, creation of a more detailed health unit safety and sanitation checklist, the separation of QI and Infection Prevention and Control duties into two director positions both reporting to the OHS clinical leadership, the creation of a Quality Council, and the involvement of the correctional staff in QI program.

Dkt. 1276 at 44.

26. The Monitor's First semi-annual Report, in late November 2019, described the UICCON Report as "an extensive and comprehensive Quality Improvement and Patient Safety Plan [ ] for the IDOC Office of Health Service that outlines many of the steps required to establish an optimally functioning quality improvement program in the IDOC." Dkt. 1276 at 7.

At the same time, the Monitor's First Report reiterated the continued lack of functional quality assurance programs within IDOC, including the absence of meaningful death reviews and the absence of infrastructure needed for quality improvement. *Id*. at 7-8. The Report repeatedly urged Defendants, beyond the "advi[sing]" contemplated by Section III.L.1 "on implementation of a comprehensive medical and dental Quality Improvement Program," to formally extend its contractual relationships with UICCON:

> . . . to provide expert advice and assistance to the Quality Improvement Director, to accelerate the implementation of Quality Improvement Program in the IDOC, to staff the audit teams, and to train clinical staff in quality improvement methodology. This contractual relationship with UIC CON should continue until the infrastructure of the QI Program has been established and implemented and the OHS QI Director has had sufficient time to build internal quality improvement teams.

Dkt. 1276 at 44; *see also id*. at 7, 19, 22, 44.

27. By the time of the Monitor's Second semi-annual Report issued in August 2020, Defendants had made little or no progress either in building a quality assurance program on their own or in consolidating a relationship with UIC that would enable them to create a program. In the fourteen months since the entry of the Decree and the ten months since the delivery of the "extensive and comprehensive" advice in the UICCON Report, there had been "only minimal modifications in the existing quality assurance program." Dkt. 1335 at 9. The Second Report was somber, and reflected Defendants' inability to build a program on their own. "Performance and outcome measures have not yet been designed, developed or implemented"; to date, all Defendants had done was to "assert[] intent to use performance and outcome measures." *Id.* at 41. The "adverse event reporting system" required by Section II.B.6.m of the Decree had not yet been designed, let alone implemented. *Id.* at 42. There was no evidence of any system to monitor the vendor, as required by Decree Section II.B.2. *Id.* at 43. Even advance planning for a

functional system was inadequate and unrealistic: data management positions included in IDOC's existing staffing analysis were "significantly insufficient for the stated purpose," and the proposed staffing of an audit team or teams are "inadequate given the scope of audits." *Id.* at 38-40.

28. In the first fourteen months of the Decree, the only step towards a quality improvement program that Defendants had taken was to hire an R.N. with "no training or experience in quality improvement" for the position of Statewide Quality Improvement Coordinator. Dkt. 1335 at 36-37. The Monitoring team did not believe that this individual would be able to perform the duties of the position with even minimal success without extensive remedial education, and although the Decree requires that the "comprehensive medical and dental Quality Improvement Program" be "implemented with input from the Monitor," the Monitor was apparently not consulted about the position description or required qualifications for this person before the position was posted and the person was hired. Dkt. 1238 at 17 (§ III.L.1); Dkt. 1335 at 37 and n. 53. (In addition, the lack of qualifications of this person contravened the advice given to Defendants in the UICCON Report; *see* Ex. 10 at 22.) As a result of these and other failures, the Monitor's Second Report, as to quality assurance requirements of the Decree, rated Defendants as noncompliant with most of the requirements of Sections II.B.2, II.B.6.i, l, m, n, and o, II.B.7, II.B.9, III.L.1, and III.M.2. *See* Dkt. 1338 at 39, 41-44, 138.

29. However, because at the time of the Second Report, in mid-summer 2020, the Monitor believed there were ongoing efforts to secure the assistance of UIC[6] to build

[6] Specifically, the assistance both of the College of Nursing which had completed the quality assurance analytic report, and the School of Engineering, which the Monitoring team believed could provide essential assistance with data collection and management processes.

Defendants' quality assurance programs in accordance with the Decree, the Second Report rated Defendants as in "partial compliance" as to certain requirements of Sections II.B.2, II.B.6.l, o and III.L.1 of the Decree. *Id.* at 35. The Second Report was urgent, nevertheless, as to the need for the IDOC Director himself and the Office of the Governor (also a party to this case) to involve themselves in the negotiations with UIC to secure the assistance that IDOC needed in order to start building its quality improvement program, given reports that UIC higher administrators would need persuasion to commit to the plans. *See id*. at 9, 29, 31-32, 40.

30. This is where matters (apparently) stood when Plaintiffs sent their July 22, 2020 letter initiating the dispute resolution process. However, in their response on August 21, 2020, Defendants (1) announced that they were no longer pursuing a relationship with UIC for the quality improvement program due to a lack of interest from UIC, which Defendants claimed had been evident as far back as March 2020; (2) pointed to a contract Defendants had entered into with Southern Illinois University (SIU), where IDOC's recently departed Chief of Health Services (Dr. Steven Meeks) had taken a position in March 2020, for services at four southern IDOC prisons; and (3) stated that Defendants were "presently in preliminary discussions with other entities in order to facilitate their [quality assurance] audit function" (the "other entities" are never named). Ex. 2 at 7.

31. As of the Monitor's Third semi-annual Report, dated February 15, 2021, "SIU is still in preliminary phases of evaluation of the project," and "IDOC has not provided an outline of what SIU will be responsible for, how the program would be structured, or the staffing of their proposed program." Dkt. 1403 at 26. Accordingly, with even a *plan* for quality improvement still not "evident," the Third Report now assessed Defendants as noncompliant with all provisions of the Decree relating to quality assurance. *Id*. at 25, 27-30, 153-156. The Third Report also noted

that, although "[t]he Monitor also suggested a work group or regular meetings with SIU so that the Monitor could have input into development of the QI program," Defendants had declined this proposal in spite of the Decree's requirement of Monitor involvement in the implementation of the program. *Id*. at 26; Dkt. 1238 at 17 (§ III.L.1).

32. Defendants reacted bitterly to the Third Report's findings of noncompliance, but their own responses seem to indicate that the pivot to a relationship with SIU has resulted in a "do-over" of some, maybe much, of the work already performed by UICCON. In the March 31, 2021 response to the Third Report which the Court permitted Defendants to file, Defendants argue that the fact that the SIU "Quality Management Draft Proposal" states that SIU has "completed 25%" of the work towards a "sample centralized quality improvement dashboard" means that they should have received a "partial compliance" rating on one of the quality assurance provisions of the Decree. Dkt. 1406 at 2.[7] The UICCON Report, however, already had a "sample centralized quality improvement dashboard." *See* Ex. 10 at 17-19. As of fall 2020, SIU was apparently engaged in work on a "gap analysis" as to IDOC's quality assurance program; UIC had already performed a "gap analysis" as part of its work in the UICCON Report delivered over a year before. Dkt. 1403 at 26. (*See* Ex. 10 at 23, 27, 46-54, 57-59, 63-66, 68-69, 72-74, 77-79.) Similarly, in Defendants' March 12, 2021 letter to the Monitor responding to the Third Report, Defendants objected to the statement in the Third Report that it was "not known" whether the "UIC revised proposal"[8] was being considered by SIU in the course of its quality

[7] The March 31 Report acknowledges that the Monitor had not actually been *given* the 25% completed "sample" dashboard document, but seems to argue that Defendants are not obliged to "provide[] the Monitor with proof" until the dashboard is complete. *Id*. at 2-3. This seems problematic, again, in light of the Decree requirement that the comprehensive quality improvement program must be "implemented with input from the Monitor." Dkt. 1238 at 17 (§ III.L.1).

[8] It is not clear to Plaintiffs that the "UIC revised proposal" referred to in the statement from the Third Report (Dkt. 1403 at 26) is the same as the UICCON Report (which, as far as Plaintiffs know, was a final

assurance work with the comment that "staff from SIU have . . . reviewed UIC's report and will be incorporating *portions* of that report *into their own product*." Dkt. 1395-1 at 4 (emphasis added).

33. In late March, Plaintiffs asked whether there was yet an SIU contract for development of a quality improvement program, with timetables and deliverables to attain compliance with each of the relevant provisions of the Decree. Ex. 4 (3/24/21 letter) at 4. Defendants' April 7, 2021 response stated only that there was a "Quality Management Staffing Proposal" which was in "draft form," and that "[s]pecific timelines" were still "being developed." Ex. 5 at 2. Defendants' June 1, 2021 report to the Monitor likewise indicates that, although there is now a draft organizational chart and a draft mortality review policy, there is as yet no contract or "comprehensive . . . [p]rogram." Ex. 6 at 8; Dkt. 1238 at 17 (§ III.L.1).

34. As to Section III.L.1 of the Decree, Defendants now say that all that provision required, time-wise, was that the UICCON Report be delivered within fifteen months of the Preliminary Approval Date, which happened. To the contrary, by its plain language the provision required UICCON ("within fifteen (15) months of the Preliminary Approval Date") to "advise" Defendants on the "*implementation* of a comprehensive medical and dental Quality Improvement Program" throughout IDOC. "[A]dvis[ing]" on "implementation" indicates an ongoing relationship, and an ongoing relationship is what is clearly contemplated by this Decree provision (and anticipated in the UICCON Report as well). Moreover, pursuant to this provision, it was the UICCON-advised program ("which program shall be implemented")—not some other program—that was to be put in place. Defendants say, in essence, that this is not their fault, that they could not help it that UIC walked away from this relationship, and they were forced to turn

---

and never revised), but in any event it seems clear that Defendants' statement refers to the UICCON Report and indicates that it is being partly but not entirely used in SIU's work.

to SIU and its new correctional health program being set up by their former agency Chief of Health Services.[9] It was certainly the impression of the Monitoring team that more could have been done by Defendants, through efforts by the Director and Office of the Governor, to persuade UIC, as the Monitor urged. *See* Dkt. 1335 at 9, 29, 31. The underlying contractual obligation of "good faith" should have required Defendants to take these steps regardless of whether the Monitor had proposed them or not, given that this Decree provision was crafted in expectation of a continued relationship with UIC and *depended* upon that relationship for the anticipated swift start to building the essential "comprehensive medical and dental Quality Improvement Program." Again, UIC was the logical first choice given its network of existing relationships with and knowledge of IDOC, and by *September 2019* UICCON had provided not just a completed report but a plan for future implementation as well. If Defendants did not do everything they could to persuade UIC before turning elsewhere, then they have breached their contractual duty for that reason alone.

[9] Defendants also seem to want to blame the Monitor for being forced to pivot resources initially designated for the original "four prison" contract with SIU to the quality improvement program, complaining that they did this because the Monitor was "harshly critical" of the "four prison" plan. Ex. 6 (June 1, 2021 report) at 8; see also Dkt. 1406 at 6 (indicating that the supposedly "harsh[]" critiques were statements in the Monitor's Second Report.) The commentary by the Monitor on the original SIU contract in the Second semi-annual Report started with the observation that there were "multiple vendor relationships" within IDOC "but these relationships are not coordinated in a unified statewide strategic plan." Dkt. 1335 at 31. It then noted, as an example of this, that "[t]he SIU agreement requires the SIU Correctional Medical Director to collaborate with the IDOC Medical Director to design peer review, quality assurance, and performance evaluation programs [for four prisons]." *Id.* at 32. Yet, the contract with UICCON requires UIC to develop a system-wide quality improvement and peer review plan which is essentially the same responsibility as given to SIU for a selected group of facilities." *Id*. That Defendants need an overall strategic plan for their vendor relationships, and that the SIU contract appeared to have requirements that were duplicative of those in an (as the Monitor believed) existing, larger-scale relationship with UICCON, hardly amounts to "harsh[] critic[ism]." It was Plaintiffs' understanding that, in fact, the original SIU "four prison" contract ran aground on its requirement that SIU provide physicians at the four prisons in question (*see* description of contract at *id*.), which conflicted with the requirements of the Wexford contract (which requires Wexford-employed Medical Directors at all IDOC facilities). If this is the case, this reinforces the Second Report's concern about overlapping vendor requirements and no strategic plan.

35. At this juncture, it is probably too late to order Defendants to reopen (or at least use their best efforts to reopen) the negotiations with UIC, although, with a completed 261-page report on the one hand (*see* Ex. 10) and a miscellany of drafts on the other,[10] a renewed relationship with UIC might be still be the most expeditious way for Defendants to build the quality improvement program required by the Decree. However, it is not too late to order Defendants, by a date certain, to negotiate and enter into a comprehensive contract with SIU (or some other willing and capable partner) for the quality improvement program and, in conjunction with that contract, to provide a schedule of deliverables and dates by which the deliverables will be delivered and implemented to achieve the requirements of the multiple Decree provisions relating to quality improvement. Finally, Defendants agreed, in the Decree, that their "comprehensive medical and dental Quality Improvement Program for all IDOC facilities . . . shall be implemented with input from the Monitor." This means that Defendants must also see to it that the Monitor is included, whether by work group or regular meetings or some other routine method, in SIU's work towards the quality assurance program, as well as any work towards the development, by SIU or others, of the quality assurance program "audit function," since Defendants likewise agreed to the Monitor's involvement in the development of that audit instrument. Dkt. 1238 at 8 (§ II.B.9).

[10] So far, SIU is described by Defendants as having created a draft organizational chart, a draft mortality review policy, a partly completed "sample centralized quality improvement dashboard," and a Quality Management Draft Proposal; *see* Dkt. 1406 at 2 (and Ex. 6 (June 1, 2021 report) at 8). Defendants' Response to the Monitor's Third Report also states that the Third Report acknowledges receipt of a "GAP analysis," but the Third Report only states that the Monitor had been told that SIU was engaged in preparing one. Dkt. 1403 at 26.

Regular "data and information" reports for compliance assessment to Monitor and Plaintiffs' Counsel

36. Section V.G of the Consent Decree requires that at regular intervals (every six months for the first two years of the Decree and yearly thereafter), Defendants are to "provide the Monitor and Plaintiffs with a detailed report containing data and information sufficient to evaluate Defendants' compliance with the Decree and Defendants' progress towards achieving progress with the Decree." Dkt. 1238 at 21. "[I]n advance of the first report," Section V.G further provides, "the Parties and the Monitor" were to "agree[] on the data and information that must be included in the report." *Id*. That agreement has never been reached, either between the Monitor and Defendants or between Plaintiffs and Defendants.[11]

37. Defendants' August 21, 2020 dispute resolution letter indicated that Defendants were at that time "currently reviewing" the Monitor's list of document requests and were "amenable" to a meeting concerning that list "within the next 30 days." Ex. 2 at 8. After that, Defendants stated, "Defendants will be in a position to meet with Plaintiffs in order to discuss which documents Plaintiffs believe they are entitled to receive." *Id*.

38. At the September 23, 2020 Section X.C meeting, as in their August 21 letter, Defendants indicated that they intended to schedule a meeting with the Monitor to discuss the Monitor's Section V.G report and then reconvene with Plaintiffs. In response to a follow-up inquiry from Plaintiffs as to whether that meeting had taken place, on October 7, 2020, Defendants indicated that they had a meeting scheduled with the Monitor on October 14. *See* email chain between R. Mula and K. Presley, attached as Ex. 11. In response to Plaintiffs' further request for an update on October 16, 2020, Defendants stated on October 23:

[11] As indicated in Sections V.G and V.H of the Decree, as to the Monitor, and Section V.I, as to Plaintiffs, both the Monitoring team and Plaintiffs are entitled to data, files, and other information in addition to those encompassed by the V.G report. Dkt. 1238 at 21-23.

> Since our meeting, the Department has had two very fruitful discussions with the monitors regarding section V.G. of the Decree, the most recent conversation being yesterday. Based on our conversations, we expect that the monitor will make some minor edits to his most recent request. IDOC will then be in a position to evaluate our ability to produce the requested information. Once we arrive at an agreement on this issue, we are happy to pick up conversations with plaintiffs.

Id., 10/16/20 and 10/23/20 emails. On November 4, 2020, Defendants reported that they had not yet received a revised document list from the Monitor. *Id*., 11/4/20 email. In response to a further inquiry about this, on December 4, 2020 Defendants asserted that, although they had "multiple calls with the Monitor on this issue," they had not yet received "a revised list" from the Monitor; the "revised list" had last been "requested . . . on November 25, 2020." *See* December 3, 2020 email from R. Mula, attached as Ex. 12, and December 4, 2020 letter from N. Staley, attached as Ex. 13.

39. From the Monitor's Third Report, it appears that the revised list was provided on December 7, 2020 (described in the Report as "a revised document consistent with changes requested by IDOC"), and a further meeting between the Monitoring team and Defendants was held on January 7, 2021, but still did not result in an agreement that Defendants would provide the items on the list to the Monitoring team as the regular Section V.G report. Dkt. 1403 at 5.

40. The Third Report notes this series of lists and negotiations extends back to late 2019: a "list of data and information that the Monitor would need for his reports and would also satisfy item V.G" was provided to Defendants in December 2019 and that this list was discussed at a meeting held the same month. *Id.* at 4. Subsequent events, and the impediments created by lack of an agreement, are described as follows:

> The Monitor was in the process of finishing his 2nd Report and had to make over a hundred requests for data for that report. As a result, on 7/21/20, the Monitor sent IDOC a spreadsheet listing documents and data the Monitor would need for his next report. This list would also serve as the list of data and information that the IDOC should use in its reports. The Monitor asked for a meeting to discuss. IDOC

> scheduled this meeting on 10/14/20. At that meeting IDOC and the Monitor discussed specific details of the request by the Monitor. IDOC and the Monitor agreed to work on changes requested by IDOC.
>
> The Monitor sent a revised document consistent with changes requested by IDOC on 12/7/20 and a follow up meeting on this document was conducted on 1/7/21 but still did not result in IDOC agreeing to send the data. We ask parties to come to agreement on this document which was to have been completed a year and a half ago. This discussion is still ongoing. The Monitor asks that IDOC send the data it is capable of sending from the list requested by the Monitor three months is advance of the next Monitor's report due date because asking individually for every data item is very time consuming. The Monitor realizes that there will be many data items specially requested for each report, but agreeing upon a base data and information set will result in less requests and will result in timelier reports.

Id. at 4-5.

41. In sum, "While an agreement on data and information was to have occurred before the first report. . . the list of data and information is still not agreed to." *Id*. at 4. Defendants' March 12, 2021 letter to the Monitor responding to the Third Report (filed as Dkt. 1395-1) and Defendants' Response to the Monitor's Third Report (Dkt. 1406) do not take issue with these paragraphs of the Report. Finally, in the past weeks, as the Monitoring team is trying to gather information for their Fourth semi-annual Report, yet another round of the never-ending negotiation insisted upon by Defendants is taking place: on May 27, the Monitor provided a list of needed materials (a list that was already the result of two years' worth of negotiation) which the Defendants thereafter described as a "counter proposal." Ex. 6 (June 1, 2021 report) at 11. In other words, Defendants still have not committed to what they will provide to the Monitor.

42. Thus—almost two years into the Consent Decree—matters still stand as described in the Third Report as to the Section V.G report for the Monitor, and since agreement with the Monitor as to the Monitor's V.G report was a predicate to further discussion with Plaintiffs as to the Section V.G report to which Plaintiffs are also entitled, resolution of this matter as to Plaintiffs is nowhere in sight. Ex. 2 (8/21/20 letter) at 7 (stating that Defendants were

"reviewing" the Monitor's list of requests and "[t]hereafter [] will be in a position to discuss which documents Plaintiffs believe they are entitled to receive"). Plaintiffs have told Defendants that they are likely to seek many, and perhaps all, of the data and information provided to the Monitor in the Monitoring teams' Section V.G report, and Defendants have indicated that they believe Plaintiffs may be entitled to receive some, but not all, of these items. Until the Monitor's list is settled on, this discussion cannot advance.

43. Defendants should be ordered either to (1) provide the Monitor with the data and information he has requested, or (2) provide those data and information items they are willing to provide and explain to the Court why certain items should not be provided, so that this matter can be resolved once and for all. Once the Monitor's Section V.G. data and information report is settled, Defendants should be further ordered (3) to provide Plaintiffs' counsel with those same data and information items, or, if Defendants decline, (4) to provide Plaintiffs with those items from the Monitor's report Defendants are willing to provide, together with an explanation of any withheld items and the reasons for withholding them from Plaintiffs, and ordered to meet and confer with Plaintiffs, so that this matter can be raised with the Court as needed.

Review of Wexford "collegial review/utilization management" denials

44. Defendants' long-running contract with Wexford Health Sources which was in place when the Decree was negotiated gave Wexford almost unfettered control over whether to approve or disapprove most patient care that could not be provided on-site by existing employees or required the use of "non-formulary" medications. Through a process referred to as "collegial review" or "utilization management," Wexford could approve or disapprove routine diagnostic tests such as MRIs, simple or complex surgeries, consultations with specialists, or even the nutritional supplement "Boost" prescribed by a physician. Under the 2011 Wexford contract,

these decisions directly affected Wexford's bottom line. By denying "collegial review/utilization management" requests, Wexford saved money and increased profits on its Illinois contract. *See* Ex. 9 (Wexford contract), p. 27 (§§ 3.1.2, 3.1.2.1). In 2018 the Second Court-Appointed Expert bluntly called Wexford Utilization Management a "patient safety hazard" that should be "abandoned." Dkt. 767 at 11. The Monitor's reports have said the same: "Clinical record reviews show considerable morbidity and mortality due to lack of access and delayed access to specialty care. The Monitor continues to advocate that this process be abandoned on the basis of patient safety." Dkt. 1403 at 9.

45. The Wexford contract expired at the end of April (it had a ten-year maximum term that started in May 2011). Ex. 9. When Plaintiffs asked about the status of "collegial review" in late March, Defendants responded that they proposed to extend the contract on an "emergency" basis since there is no other healthcare vendor in place to provide the staff and services currently provided by Wexford. Ex. 5 (4/7/21 letter) at 2.

46. Because "collegial review/utilization management" was "built in" to the existing vendor contract, it could not be readily eliminated when the parties negotiated this settlement. Accordingly, the Decree includes a mandatory oversight review mechanism for any denials of treatment or consultation resulting from Wexford "collegial review." Section III.H.5 of the Decree provides:

> Within six (6) months of the Preliminary Approval Date of this Decree or until Defendants are able to fill both Deputy Chief of Health Services positions, they will make reasonable efforts to contract with an outside provider to conduct oversight review in instances where the medical vendor has denied any recommendation or taken more than five (5) business days to render a decision, including cases in which an alternate treatment plan has been mandated in lieu of the recommendation and cases in which the recommendation has not been accepted and more information is required. If no contract with an outside provider is reached, then the Monitor or his or her consultants shall conduct oversight review in instances where the medical vendor has denied any recommendation or taken more than five (5) business days

> to render a decision, including cases in which an alternate treatment plan has been mandated in lieu of the recommendation and cases in which the recommendation has not been accepted and more information is required. Once Defendants have filled both Deputy Chief positions, the Deputy Chiefs will replace any outside provider, the Monitor or his or her consultants to conduct oversight review in the instances described in this paragraph.

Dkt. 1238 at 14. This Decree provision had an early "due date" because of its significant impact on patient care and health. Defendants never sought an outside vendor to conduct this oversight review, nor did they commit it to the Monitoring team. Instead, in July 2019, they filled the two Deputy Chief of Health Services positions and committed the review to them.[12]

47. Defendants have failed to comply with Section III.H.5. Their failure has been almost complete. Using the review mechanism which Defendants themselves chose, Defendants have succeeded in reviewing no more than 5-7% of the Wexford "collegial review/utilization management" denials in the nearly two years since Section III.H.5 became effective. Dkt. 1335 at 111 ("only five to seven percent of non-approved referrals required to be reviewed in accordance with the Consent Decree were actually evaluated by OHS"); Dkt. 1403 at 107 ("The Monitor calculated that only 6.2% of all non-approved referrals required to be reviewed in accordance with the Consent Decree were actually evaluated by OHS in 2019-2020").[13]

48. In the course of the dispute resolution process leading up to this motion, Defendants attempted to justify the failure by noting that they lost one of the Deputy Chiefs at the end of March 2020 (when the Agency Chief of Health Services left and one of the Deputy

[12] The review obligation started six months after the Decree Preliminary Approval date, so as of July 10, 2019, or "until Defendants are able to fill both Deputy Chief of Health Services positions," which they did in July 2019. (*See Id.*; Ex. 2 (8/21/20 letter) at 6.)

[13] Since IDOC does not maintain a record of these denials, as described in the Second and Third Reports, in order to evaluate compliance with this provision the Monitoring team has had to piece together data to determine how many "collegial review/utilization management" denials there were during the reporting period and how many were reviewed in accordance with the Decree: Dkt. 1335 at 110-11; Dkt. 1403 at 106-07.

Chiefs became the Acting Chief of Health Services), and by pointing to COVID-19. Ex. 2 (8/21/20 letter) at 5. "Defendants' response to prevent the spread of COVID-19 has been, and continues to be, a full-time endeavor, especially for the Office of Health Services ("OHS")," Defendants say. *Id*. The problem with this explanation is that both of these conditions—only one Deputy Chief, and the "global pandemic"—only existed for two months of the total review period ending in May 2020 (when the data provided the Monitoring team ended). Defendants provided no explanation for why the review numbers were so deficient prior to March 2020 or how much of a difference these two factors would have made in an overall review rate of 5-7%.

49. There are two additional facts of note here; one concerns the type of case that has actually received oversight review, and the other concerns the percentage of those reviewed denials that have been overturned upon review. First, from the time the Deputy Chiefs were put in place and through the period covered by the Monitor's Third Report—that is, for the entire time that the review process required by Decree Section III.H.5 has been in effect—the only cases that have actually been reviewed under Section III.H.5 are those that have been "appealed" to OHS by the clinical provider (the on-site Wexford physician) who requested the treatment or service for the patient in the first place and was turned down. As described in the Third Report, "In the summer of 2019, IDOC filled two Deputy Chief positions who were tasked with the responsibility of conducting oversight review of all non-approved referrals for offsite specialty services. . . [T]he Deputy Chiefs only reviewed denials of services or ATPs that were appealed by the facilities' clinical leadership. . . . For the last ten months the single Deputy Chief has continued to review only those denials and ATPs that were appealed to OHS." Dkt. 1403 at 107. The Monitoring team was apparently given different explanations for the initial and the subsequent failures: while there were two Deputy Chiefs in place, it was "[b]ecause of the

volume of non-approved referrals and their other significant clinical leadership responsibilities," and for the period after which one of the Deputy Chiefs became the Chief of Health Services, leaving only one Deputy in place, it was because "[t]he onus of the referral oversight increased on March 27, 2020 when the Chief of Health Services resigned and one of the two Deputy Chiefs was appointed to be the Acting Chief. This leadership change coincided the initial COVID-19 outbreaks in the IDOC placing a staggering and unexpected administrative burden on the Acting Chief and the Deputy Chief. . . ." *Id*.

50. The actual fact of the matter (whatever the explanations given to the Monitor) is that what has been going on here is nothing more than business as usual under the Wexford contract. The 2011 Wexford contract explicitly provides that, in the case of a denial of either an emergency or non-emergency "consultation request," the "On-site Medical Director" (the Wexford chief physician on site) may appeal that denial to the "IDOC Medical Director" (now the agency Chief of Health Services and the deputy Chiefs), who has the "final determination." Ex. 9 at 7 (§ 2.2.3.2). So the pitiful number of cases actually reviewed (the 5-7%), and the type of cases that are actually reviewed, are already permitted review and reversal under the existing contractual relationship, and IDOC and Wexford have not had to change their conduct one bit in response to the Decree. Accordingly, the 5-7% review has nothing to do with any effort at good-faith compliance with the Decree.

51. Second, the Monitor's reports also document a staggering rate of reversal of the denials that are actually reviewed: the Second Report reports a 77% reversal rate, which had risen to 80% by the Third Report. Dkt. 1335 at 111; Dkt. 1403 at 107. Put another way, when senior State-employed physicians look at Wexford collegial review denials, they conclude that more than three-quarters are clinically unjustified. But every denial, whether appealed or not, is a

denial of treatment of care that a *Wexford-employed* physician (or dentist) thought their patient should receive. Among the 93-95% of the denials Defendants have failed to review—hundreds and hundreds of cases—in compliance with the Decree over the past two years, cases which have had no chance at reversal because they have not been reviewed, there has certainly been additional harm done during the pendency of the Decree that the Decree was designed to prevent and could have prevented if Defendants had complied with Section III.H.5.

52. The dispute resolution process on this issue for a time seemed to offer hope of a real solution, but this hope faded. Plaintiffs had urged, in their initial correspondence, that the "collegial review" process should simply be abandoned, as the Monitor had urged (and the Second Court-Appointed Expert before him). Ex. 1 (7/22/20 letter) at 4. Defendants rejected that suggestion, stating that it had "no basis or support in the Decree." Ex. 2 (8/21/20 letter) at 4. During the parties' Section X.C meeting on September 23, 2020, however, the possibility of a suspension of the collegial review process was discussed, and throughout the fall of 2020 Plaintiffs' counsel followed up on this. Ex. 11 (email chain between R. Mula and K. Presley). Finally, in early December 2020, after a further request for update, Plaintiffs' counsel were informed that, after meetings with OHS and with Wexford on the topic, "no decision had been made"; Defendants pointed to the surveillance testing program they were about to roll out systemwide ("Until the Department understands the impact of increased testing on its staffing levels, it is not in a position to make a decision on this issue."). Ex. 12 (12/3/20 R. Mula email); Ex. 13 (12/4/20 N. Staley letter) at 3. The Monitor's Third Report issued February 15, 2021 reported the same. Dkt. 1403 at 106.

53. Plaintiffs followed up on this issue at the end of March, noting that "The testing protocols have now been fully in place for over three months," and asked again whether "a

decision about the suspension of "collegial review" been made, and what is the decision?" Ex. 4 (3/24/21 letter) at 4. Plaintiffs also asked whether, in light of the pending expiration of the Wexford contract, a contractual change might be under consideration: ". . .[B]y its terms [the Wexford contract] cannot be extended beyond May 2021. Is another vendor contract 'in the works' and if so, when will it take effect? Will it include collegial review?" *Id*.

54. Defendants' response offered scant hope of change or progress, and no plan for compliance with Section III.H.5. First, Defendants stated that because the Wexford contract was shortly due to expire, the Department had "temporarily suspended" any "discussions regarding the suspension of 'collegial review.'" Ex. 5 (4/7/21 letter) at 2. Further, Defendants stated:

> The Department is working to finalize a Request for Proposal ("RFP") for a new medical vendor with the expectation for additional flexibility with the "collegial review" process. The Department has contracted with CGL Companies to assist it in drafting a RFP. The exact timeframe for posting the RFP has not been determined. The Department is currently exploring an emergency contract with Wexford at this time.

Id. Defendants rejected the elimination of collegial review as a solution without proposing any solution of their own: "Defendants are well aware of Plaintiffs' and the monitor's displeasure with the collegial review process. However, as has been previously stated, Plaintiffs' and the monitor's demands that collegial review be eliminated have no basis or support in the decree as it does not require elimination of 'collegial review.'" *Id*.

55. That Defendants have continuously failed to comply with Section III.H.5 over the course of nearly two years is by itself enough for this Motion to Enforce. But the human cost of this failure should not go unmentioned.

56. In 2014, the First Court-Appointed Expert complained of "clearly not acceptable" delays of "up to eight weeks or more" resulting from collegial review. Dkt. 339 at 28-29. The First Expert Report catalogued cases of a 45-year-old with "severe tremors and a seizure

disorder" who "continues to fall frequently and must be permanently housed in the health care unit," yet had been turned down for an offsite neurology consultation ("treat onsite," was the Wexford instruction); two women denied knee replacements for clinically unjustifiable reasons ("[u]pon reviewing [the] chart, it is abundantly clear that this patient does in fact require a knee replacement. Physical therapy will not help her"); a 41-year-old with a "slow heart rate and repeated chest pain" who was denied a stress test; and a patient with a "hilar mass" in his chest who "needs urgent follow-up" but had not received it as the only follow-up was "a collegial review [] cancelled . . . due to the Pittsburgh physician not being available." *Id*. at 150, 233-34, 267, 352.

57. In 2018, the Second Court-Appointed Expert reported the same problems and more: as to services subject to collegial review/utilization management, "[t]here was no improvement since the First Court Expert's Report." Dkt. 767 at 63. The Second Expert Report catalogued cases of a patient with "history of recurrent DVT with pulmonary emboli and a chronic draining lower extremity leg ulcer" for whom the provider ultimately requested an "infectious disease consultation for assistance with the choice of antibiotics" but was turned down by collegial review—"this patient should have been hospitalized for definite diagnostic tests and intensive treatment"; a patient with a "hard neck swelling" (a "large swollen lump" under "[left] side jaw") who had multiple collegial review denials; after an eight-month delay "The patient ultimately had surgery on 10/4/17 to remove an advanced disease tumor with metastases to lymph nodes"; and a patient with a "diabetic foot ulcer resistant to normal care for wound care" who had a previous amputation for a diabetic foot ulcer, for whom collegial review denied a referral for a wound clinic evaluation. Dkt. 767 at 78; Dkt. 767-3 at 55-56; Dkt. 767-7 at 371. Again, this is only a fraction of the damage reported. In addition, the Second Expert Report

noted that the Wexford reviewer who was the gatekeeper for dental prosthetics (dentures) and onsite or offsite oral surgery consultations, a Dr. Karanbir Sandhu, was "not [a] specialist in prosthodontics, or for that matter any other aspect of dentistry," and "neither an oral surgeon nor a specialist in any other aspect of dentistry." Dkt. 767 at 109, 116. In addition, at one IDOC site which houses a large number of older and infirm prisoners (Dixon CC), the Second Expert team discovered that, during a period when there was no physician at the site, collegial reviews were apparently not done at all. "The HCUA (health care unit administrator) discovered piles of requests for offsite referrals, apparently from mid-level providers, that were not being evaluated in collegial review." Dkt. 767-1 at 62.

58. The semi-annual reports of the Court-appointed Monitor have continued to document the risks and harms caused by "inappropriate denials of specialty referrals, tests, procedures, and clinical equipment" resulting from "collegial review." Dkt. 1335 at 114. The August 2020 Second Report, for example, catalogued delays of care for: a patient who had suddenly lost vision and for whom a specialist recommended cataract removal (after the patient was interviewed by the Monitor during a site visit did clinical leadership agree to re-refer the patient for cataract surgery)—nevertheless, "[the] delay may result in permanent loss of vision for this patient"); a patient with "an expanding mass" in his shoulder/armpit for whom three requests for surgical evaluation were denied even though "[a]n expanding mass could potentially represent a malignant growth" (the patient was finally scheduled for surgery after a delay of 11 months but "[h]is prognosis is unknown"); and two patients with post-surgical ostomies (that is, a prosthetic "pouch" designed to receive and contain excrement) whose reversal was denied by Wexford because Wexford deemed them "elective procedure[s]" ("Prolonging the use of a medically unnecessary ostomy is degrading and causes needless discomfort for the patient,

creates a preventable risk of bacterial exposure to other offenders and staff, can result in additional surgical complications, and places additional avoidable burdens on the correctional centers . . ..") *Id*. at 111-12. These two patients were part of the fortunate 5-7% and had their denials overturned by the Deputy Chiefs in the course of their Decree-required review (*id*. at 112), but a patient whose case is discussed in the Third Report was not so lucky:

> The patient had a colostomy for more than two and a half years. His colostomy reversal which is the standard of care was denied by the vendor. He had bleeding problems from the colostomy and on colonoscopy had diversion colitis, a condition that occurs in persons with ostomies. The recommended treatment for diversion colitis is colostomy closure which a gastroenterologist recommended. Initial colostomy reversal was denied by the vendor and the doctor did not subsequently refer the patient for this procedure. A pulmonary referral was also denied. These two referral denials contributed to the end conditions that resulted in the patient's ultimate death. The collegial review process should be abandoned. In this case, without collegial review this patient would have been referred for colostomy closure and to pulmonary and may have survived.

Dkt. 1403 at 177.

59. On June 1, 2021, Defendants submitted a report to the Monitor which states that IDOC has now "signed" a "90-day emergency contract" with Wexford in which the "collegial review provision was stricken" so that "[f]or the next 90 days, all offsite services will be immediately approved." Ex. 6 at 7. Since "offsite services" are only part of what the "collegial review process" covers, Plaintiffs are unsure what this means, but in any event it is only a very temporary solution. When Plaintiffs requested a copy of the emergency contract, Defendants indicated that it had not yet been fully executed, which appears to mean that although the Department has signed it, some other necessary party has not. *See* June 1-3, 2021 email chain between C. Bennett and N. Staley, attached as Ex. 14. Defendants' report, in addition, reiterates yet again Defendants' position that "removal of the collegial review process is not mandated under the Decree." Ex. 6 (June 1, 2021 report) at 7.

60. If Defendants are determined to stick to the letter of the provision they negotiated, then they must immediately ensure that the Deputy Chiefs review all collegial review denials, as required by the Decree. This is probably close to a full-time job, and, as the Monitor has repeatedly observed, not a good use of the time of these two senior State physicians. Dkt. 1276 at 9, 37; Dkt. 1335 at 12, 113-14; Dkt. 1403 at 107. The sensible alternative would be for Defendants to negotiate an amendment to the Decree that would either eliminate "collegial review" (by whatever name), since the contract that enshrined it has now expired, or (as a second best) provide a functional mechanism for ensuring the oversight review of all "collegial review" denials as Section III.H.5 contemplates.

Conclusion and Requested Relief

For these reasons, Plaintiffs respectfully request that the Court:

A. Find that Defendants have breached Sections IVA-C of the Consent Decree by failing timely to complete a staffing analysis and Implementation Plan such that any disagreements with the Monitor concerning the Plan may be promptly submitted to the Court for resolution, and the Plan may be incorporated into, and become enforceable as part of this Decree;

B. Find that Defendants have breached Sections II.B.2, II.B.6.i, l, m, n, and o, II.B.7, II.B.9, III.L.1, and III.M.2 of the Consent Decree by failing to create a comprehensive quality assurance program and audit function for the Department's medical and dental care;

C. Find that Defendants have breached Section V.G of the Consent Decree by failing to provide the Monitor and Plaintiffs with an agreed-to detailed report containing data and information sufficient to evaluate Defendants' compliance with the Decree and Defendants' progress towards achieving progress with the Decree;

D. Find that Defendants have breached Section III.H.5 of the Consent Decree by failing to conduct oversight review of all Wexford Health Sources' "collegial review/utilization management" denials; and

E. Order Defendants to submit the Implementation Plan to the Court no later than July 31, 2021, so that any disagreements with the Monitor concerning the Plan may be promptly submitted to the Court for resolution thereafter;

F. Order Defendants, within ninety (90) days, to negotiate and enter into a comprehensive contract with Southern Illinois University (SIU) and/or another appropriate vendor for the quality improvement program and audit function required by the Consent Decree, and, in conjunction with that contract or contracts, to provide a schedule of deliverables and dates by which the deliverables will be delivered and implemented to achieve the requirements of the multiple Decree provisions relating to quality improvement, and further to order Defendants to ensure that the Monitor is included, whether by work group or regular meetings or some other routine method acceptable to the Monitor, in any vendor's work towards the quality assurance program, including any work towards the development of the quality assurance program "audit function";

G. Order Defendants, within fourteen (14) days, either (i) to provide the Monitor with all of the data and information he has requested for the data and information report required to be delivered to the Monitor under Section V.G., or in the alternative, (ii) within fourteen (14) days, to provide to the Monitor those data and information items Defendants are willing to provide, and explain to the Court why the remaining items sought by the Monitor should not be provided to the Monitor, so that a determination may be made as to whether Defendants' objections are well-founded; and further to order Defendants, once the Monitor's Section V.G.

data and information report is settled, within seven (7) days, either (iii) to provide Plaintiffs' counsel with the same data and information included in the Monitor's Section V.G. report, or in the alternative, (iv) to provide Plaintiffs' counsel all those items from the Monitor's report that Defendants are willing to provide Plaintiffs, together with a list of any items from the Monitor's report that Defendants decline to provide Plaintiffs, including the reasons why Defendants decline to provide them to Plaintiffs, and order Defendants to meet and confer with Plaintiffs within fourteen (14) days thereafter to determine if any disputes can be resolved, so that this matter can also be raised with the Court as needed; and

H. Order Defendants immediately to ensure that the IDOC Office of Health Services Deputy Chiefs review all collegial review denials, or in the alternative, within fourteen (14) days, present an alternative to the Court can be incorporated as an amendment to the Consent Decree, and set a schedule for Plaintiffs and the Monitor to raise objections to the alternative proposal, if any.

Dated: June 8, 2021

Respectfully submitted,

By: /s/ Camille E. Bennett
One of Plaintiffs' attorneys

Alan Mills
Nicole R. Schult
Uptown People's Law Center
4413 North Sheridan
Chicago, IL 60640

Benjamin S. Wolf
Camille E. Bennett
Roger Baldwin Foundation of ACLU, Inc.
150 N. Michigan Ave., Ste. 600
Chicago, IL 60601

Harold C. Hirshman
Samantha Reed
Dentons US LLP
233 S. Wacker Drive, Ste. 5900
Chicago, IL 60606