IN THE DISTRICT COURT OF THE UNITED STATES FOR THE

MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

EDWARD BRAGGS, et al.,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION NO.**
v.	)	**2:14cv601-MHT**
	)	**(WO)**
JEFFERSON S. DUNN, in his official capacity as Commissioner of the Alabama Department of Corrections, et al.,	)	
	)	
Defendants.	)	

PHASE 2A OPINION AND ORDER
ON MONITORING OF EIGHTH AMENDMENT REMEDY

Previously, this court found that the State of Alabama provides inadequate mental-health care in its prisons in violation of the Eil

constitutional violation. The court will adopt in large part the defendants' plan--substantial portions to which the plaintiffs have agreed--with some alterations. Most significantly, the court will adopt the defendants' overarching proposal that, in light of their own admission that they lack the capacity to self-monitor, outside experts will initially monitor compliance and will draw on their expertise to develop many of the details of the monitoring plan. Defs.' Response (doc. no. 2295) at 14. Those outside experts will train and eventually hand control over to an internal monitoring team, building the capacity of the Alabama Department of Corrections (ADOC) to regulate itself. The court hopes that this monitoring scheme will help the ADOC attain timely, meaningful, and sustainable compliance with the court's remedial orders on mental-health care and bring this litigation 0.244 -162'6c0 0 0

I. PROCEDURAL BACKGROUND

The plaintiffs in this class-action lawsuit are ADOC inmates who have mental illness and the Alabama

The court has now issued remedial opinions and orders regarding, among other things, understaffing,

, No. 2:14cv601-MHT, 2018 WL 985759 (M.D. Ala. Feb. 20, 2018) (Thompson, J.), and inpatient treatment,

, No. 2:14cv601-MHT, 2020 WL 2789880 (M.D. Ala. May 29, 2020) (Thompson, J.). The court has also issued several remedial orders temporarily adopting the parties' stipulations regarding other contributing factors, , , No. 2:14cv601-MHT, 2018 WL 2168705 (M.D. Ala. Apr. 25, 2018). In March 2020, based on the parties' agreement that their stipulations temporarily satisfy the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(1)(A), the court issued an interim injunction extending these orders until, at the latest, December 30, 2020. Interim Injunction (doc. no. 2793). The issue of whether the stipulations satisfy the requirements of the PLRA beyond that date is set for a hearing in September, and the court will defer judgment as to whether the measures are warranted until that hearing has occurred.

Throughout the process of resolving each remedial issue, the question of monitoring compliance with the court's orders has repeatedly arisen. The issue of monitoring "raises important questions regarding, on the one hand, the duty of courts to avoid overly intruding into the executive matter of prison administration, and on the other hand, the duty of courts to ensure that the constitutional violations they find are effectively remedied in a timely fashion." Phase 2A Order on Monitoring (doc. no. 1927) at 2-3. In pursuit of the proper balance of these important interests, the court opted to resolve the issue of monitoring separately from all substantive remedial orders and on a global scale, rather than as to each individual order.[1] .

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1. As part of its order for immediate relief for suicide prevention, the court established an interim external monitoring scheme and required ADOC to establish a formal internal monitoring scheme. , 383 F. Supp. 3d 1218, 1282 (M.D. Ala. 2019) (Thompson, J.). Both forms of monitoring were narrowly focused on the immediate suicide-prevention relief. . However, at the request of the parties, the court stayed that order and substituted the parties' voluntary agreement. Order (doc. no. 2569) at 2. At this point, the order remains stayed pending the court's

The court also suggested to the parties that the scheme for court monitoring should include not only 'external' monitoring by experts (an 'external-monitoring team' or EMT) but eventual 'internal' monitoring by ADOC itself (an 'internal-monitoring team' or IMT). In other words, for part of the period of monitoring, the court substituted internal monitoring for external monitoring. As explained in more detail later, the model would divide the traditional period of monitoring into three parts, bringing ADOC into the process earlier and in a more substantive role than usual. In the first phase, the EMT will assess and monitor ADOC's compliance with the court's remedial orders; next, the EMT, as part of its monitoring, will train the ADOC, through its IMT, how to monitor itself; and, finally, ADOC, through its IMT, will monitor itself.

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determination of whether the parties' agreement complies with the PLRA. Phase 2A Revised Scheduling Order (doc. no. 2784) at 5.

The court adopted this model in the hope that it would facilitate a more effective, less intrusive process and avoid an indeterminate period of external monitoring. External monitoring and internal monitoring complement each other: external monitors offer an outside perspective on ongoing issues, while internal monitors have more familiarity with and investment in the remediation efforts. External monitoring will also provide valuable information for ADOC, allowing it to more effectively implement its own system of internal monitoring.

The court further believed that self-monitoring would help ADOC develop internal buy-in, resulting in more active cooperation and timely compliance. This method invites ADOC to be directly involved in the monitoring effort, encouraging collaboration and investment in reform rather than an adversarial posture. The internal monitoring team will work with and learn from the external monitoring team, building ADOC's

capacity and making the eventual termination of court oversight more seamless.

Finally, in light of the fact that the ultimate goal of this litigation is not just monitoring ADOC but adequate monitoring ADOC, this model should build ADOC's internal capacity and help it sustain compliance over the long term. Ultimately, the court hopes that this hybrid monitoring process will finally bring to an end the history of repeated litigation ADOC has confronted over its mental-health care since the 1970s, as described in the final section of this opinion. Both the plaintiffs and the defendants have agreed to this model, should the court order external monitoring.

When the court reached the monitoring issue, it first gave the defendants an opportunity to propose an overall plan and allowed the plaintiffs to respond. Defs.' Proposed Monitoring Plan (doc. no. 2115); Pls.' Response (doc. no. 2133). The court then held a hearing on the defendants' proposed monitoring plan in which it heard testimony from plaintiffs' correctional psychiatry

expert Dr. Kathryn Burns; plaintiffs' correctional administration expert Eldon Vail; Executive Director of the Alabama Disabilities Advocacy Program James Tucker; ADOC Associate Commissioner for Health Services Ruth Naglich; ADOC Commissioner Jefferson Dunn; and four individuals the defendants proposed as the external monitoring team: Larry Linton, MargaRita Pauley, psychiatrist Dr. Robert Stern, and psychologist Dr. David Clayman.

In April 2019, following the hearing and the parties' subsequent briefing on the monitoring issue, the United States Department of Justice (DOJ) issued a findings letter regarding unsafe conditions in ADOC facilities, including due to understaffing, overcrowding, and violence. DOJ Findings Letter (Pls.' Ex. 2739); SPLC Letter to Governor Ivey and Commissioner Dunn (doc. no. 2472). The parties subsequently filed a joint motion--which the court granted--to stay all matters under submission in this litigation, including the monitoring issue, for 90 days to allow the parties to

pursue a global resolution, via mediation, between the parties as well as with DOJ. Joint Notice and Mot. to Stay (doc. no. 2560); Order (doc. no. 2569). This stay was twice extended upon joint motions of the parties to allow for further mediation. Order (doc. no. 2608); Phase 2A Revised Scheduling Order (doc. no. 2720). On March 25, 2020, the parties informed the court during an on-the-record conference call that they had been unable to reach an agreement on the monitoring issue in their negotiations and that the issue was thus again submitted to the court for resolution. Phase 2A Revised Scheduling Order (doc. no. 2784). Today's opinion fully resolves the remedial monitoring issue.

Though the remedies for all seven factors contributing to the constitutional violation have not yet been reduced to final orders with PLRA findings, and though there remain some additional remedial issues for resolution (for example, segregation and inpatient treatment), the court need not wait to issue those orders prior to resolving the monitoring issue. This is because

the court's order today is not specific to any particular remedial measures in that it does not set up the means of measuring compliance; rather, the court's order establishes an overarching monitoring structure and scheme, the details of which the court leaves to be filled in by the experts, as both sides agree is appropriate.

II. THE MONITORING SCHEME

The parties are to be commended for reaching significant areas of agreement on the issue of monitoring. They agree that the monitoring scheme here has two fundamental goals: (1) to oversee compliance with the court's remedial orders and

to determine many of the details of how to carry out monitoring, including fashioning performance measures and audit tools; and (4) consist of a number of essential components of monitoring, including document review, observation, feedback, consultation, and handoff to ADOC to monitor itself going forward.

At the same time, there are some disagreements regarding specifics under each broader point of agreement. These areas of dispute are outlined below. The court will first summarize each area of dispute and then explain the court's resolution.

Overall, the defendants assert that the court should approve their plan without entering any order on monitoring because ADOC should be allowed to "voluntarily undertake culture change." Defs.' Response (doc. no. 2295) at 9. But, as described in detail in the final section of this opinion, ADOC's record as set forth in the liability opinion--and inadequate implementation of remedial orders in this case--shows that Alabama's prison officials are unable to change their system without

monitoring. While the court is encouraged by Commissioner Dunn's own admission that monitoring is needed, Dunn Nov. 26, 2018, Trial Tr. (doc. no. 2250) at 16 ("The Court desires to see certain outcomes in the department. I desire to see certain outcomes in the department. And there's a way in which we can create a monitoring structure, if you will, that will enable us to do that."), it shares the plaintiffs' concerns about allowing the defendants to implement their plan without a court order; "[m]id-litigation assurances are all too easy to make and all too hard to enforce, which probably explains why the Supreme Court has refused to accept them." , 900 F.3d 1310, 1328 (11th Cir. 2018) (affirming an injunction despite a non-binding clarification from the State), , --- U.S. ----, 139 S. Ct. 2606 (2019); , 530 U.S. 914, 940 (2000) (cautioning against accepting an Attorney General's non-binding interpretation of a state law).

The court agrees with the defendants that it is critical for ADOC to "buy in" to the process of attaining compliance with the court's remedial orders. However, this does not require that the defendants be given unfettered discretion to drive the monitoring process--buy-in can be achieved by implementing much of the defendants' plan as proposed, involving ADOC staff in monitoring efforts from the beginning, and appointing monitors in which all parties have faith.[2] These priorities are reflected in the monitoring plan described below.

But before turning to these specific areas of dispute, the court must turn to the question whether the court's monitoring order is governed by the PLRA. This statute provides that a "court shall not grant or approve any prospective relief unless the court finds that such

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2. Significantly, the court's order today does not involve a receivership and does not infringe on the autonomy of ADOC any more than the Constitution requires. Ultimately, it is ADOC that is responsible for carrying out its obligations under the Constitution, and the court's order does not shift that responsibility.

relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The plaintiffs say that, with an exception or two, the PLRA does not apply, while the defendants say that it applies fully. As explained later in this opinion, however, the court need not resolve this issue, for, whether the PLRA is applicable or not, the court finds that the monitoring scheme it has fashioned fully complies with the statute.

In discussing why each part of the court's order satisfies the PLRA's need-narrowness-intrusiveness requirement, 18 U.S.C. § 3626(a)(1)(A), the court in its analysis will largely focus on a single inquiry: Is the monitoring provision necessary to correct the constitutional violation found? As the court has discussed in prior opinions, this single inquiry is distilled from the three requirements of the PLRA--that the relief is (1) "narrowly drawn," (2) "extends no

further than necessary," and (3) "is the least intrusive

A. External Monitoring Team

The parties agree that the monitoring scheme should involve, from the outset, an EMT, but disagree about the

quarterly correctional staffing reports. Defs.' Response (doc. no. 2295) at 38-39.

b. The Court's Resolution

The court will adopt the parties' common proposal that the EMT must include at least one psychiatrist, one psychologist, and one nurse. The court will also require the inclusion of a correctional administration expert, in accordance with the opinions of both of the plaintiffs' experts.

As plaintiffs' correctional expert Eldon Vail credibly testified, improving ADOC's mental-health care requires the cooperation and compliance of not just mental-health staff, but of correctional staff as well.

Vail Nov. 29, 2018, Trial Tr. (doc. no. 2340) at 7. For example, Vail testified that: "Access to treatment is dependent oftentimes on the ability of correctional staff to escort people, make sure that they get there. Once they get there, there's issues of confidentiality that need to be understood by the correctional staff and

way that you m

Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 112-13.

At the same time, the court will not initially require the inclusion of the other members proposed by the plaintiffs on the EMT--a counselor or social worker, and a data expert--but will instead leave it to the EMT, which would be more knowledgeable than the court about such matters, to determine whether additional members or support staff are necessary. If it so determines, the EMT may ask the court to appoint additional members, either on an ad hoc or permanent basis. Accordingly, the court adds only one additional member to the defendants' proposed monitoring team structure.

The composition of the EMT, largely proposed by the defendants, meets the PLRA's need-narrowness-intrusiveness requirement. 18 U.S.C. § 3626(a)(1)(A). As described, the addition of a correctional administration expert is necessary to ensure that officers and clinical staff alike are complying with the court's remedial orders. Particularly in light of

ADOC's continued difficulties with understaffing, the court must be sure that ADOC is doing all that it can to comply with the court's orders by properly training and deploying the limited staff that it has.

The court believes there should also be a head of the EMT with the administrative abilities to coordinate monitoring efforts and to serve as a liaison with the court. Before deciding who this person should be, the court will solicit input from the parties. This additional, administrative provision meets the PLRA's need-narrowness-intrusiveness requirement because the team requires a leader to manage its operations effectively and to coordinate with the court. 18 U.S.C. § 3626(a)(1)(A).

2. Selection Process

a. Dispute

While the defendants contend that the EMT members should be selected from a pool of candidates that was exclusively proposed by them at the monitoring hearing,

the plaintiffs argue that there should be a collaborative selection process between the plaintiffs and the defendants. The defendants propose two alternative teams of external monitors: one led by individuals previously affiliated with Corizon Correctional Healthcare, the former medical care provider for ADOC, and one comprised of individuals employed by PSIMED, Inc., a company that subcontracts with Wexford Health Sources, Inc. to provide mental-health care in West Virginia prisons. Pls.' Proposed Opinion (doc. no. 2260) at 13. The defendants further assert that members of the EMT must be licensed in Alabama if they are to make recommendations based on clinical judgment that would require a license. Defs.' Proposed Monitoring Plan (doc. no. 2115) at 28. They contend that the plaintiffs essentially waived the

By contrast, the plaintiffs argue that there should be a collaborative selection process between the plaintiffs and the defendants, under which the parties first attempt to reach an agreement on the EMT members, and then, if they cannot, submit proposed candidates to

monitoring work. The court believes that such collaboration is necessary

will authorize the EMT to evaluate clinical judgments. Such an eligibility requirement could unnecessarily limit

which the court will largely adopt, is that the EMT will be responsible for filling in key details based on its members' expertise. The choice of experts, therefore, is a critical issue to ensure the success of the monitoring phase of this case, and thus ADOC's ability to provide constitutionally adequate mental-health care in the long-term. Still, the court's resolution again gives the defendants an opportunity to suggest potential experts, who will be appointed if they are satisfactory to both the plaintiffs and the court. Under this collaborative process, the defendants can work to ensure that staff members will not "come to resent" each expert chosen "as an outside critic who is not invested in the department's mission." Defs.' Response (doc. no. 2295) at 7.

"possess any supervisory authority over the [EMT's] activities, reports, findings, or recommendations." Defs.' Proposed Monitoring Plan (doc. no. 2115) at 11. Despite this, the defendants assert that ADOC should have the power to negotiate each EMT member's fees, expenses, and budget for monitoring. at 10. By contrast, the plaintiffs contend that, for the monitors to remain "neutral and independent, they should be court-appointed under Federal Rule of Evidence 706 and paid by through the court's registry rather than directly by ADOC." Pls.' Proposed Opinion (doc. no. 2260) at 23.

b. The Court's Resolution

The court will not order the EMT to be paid by the defendants through the court's registry pursuant to Federal Rule of Evidence 706. The court believes that the most efficient and least intrusive arrangement is for ADOC to pay the EMT directly, rather than through the court, which would be complex and likely more expensive. Therefore, the court will allow the defendants to

negotiate the fees, expenses, and budgets of the EMT, subject to the court's approval in the event a dispute arises. (The court has found, from past experience, that the State has been fair in such negotiations, and hopes that it will continue to be the same here. , Consent Decree (doc. no. 11) at 114, , No. 2:15cv368-MHT (M.D. Ala. June 18, 2015) (Thompson, J.)). And though ADOC will pay the EMT directly, EMT members should be introduced to ADOC employees and any other parties as neutral and totally independent. The EMT members will not be under ADOC's supervision, but under the direction of the court. (The court finds, again from past experience, that monitors of state institutions can be fair and neutral despite being paid by the state. , .) The court finds this resolution satisfies the PLRA's need-narrowness-intrusiveness requirement, as it is substantially in line with the defendants' proposal. 18 U.S.C. § 3626(a)(1)(A).

4. Conflict of Interest Rules

a. Dispute

The defendants' proposal includes a restriction that EMT members may not "testify in any other civil action or proceeding concerning or relating to any act or omission of ADOC or its employees, contractors, or agents, or testify regarding any subject or matter that any [EMT] member learned, or might have learned, as a result of his or her performance as a member of the [EMT], or serve as a non-testifying expert regarding any subject or matter that any [EMT] member learned, or might have learned, as a result of his or her performance as a member of the [EMT]." Defs.' Proposed Monitoring Plan (doc. no. 2115) at 29. The defendants contend that such a rule is necessary to ensure ADOC employees and contractors feel the EMT members are "on their side" and will not be gathering evidence against them. Defs.' Response (doc. no. 2295) at 36. The plaintiffs assert that this strict limitation would deter otherwise willing potential experts and that instead, possible conflicts of interests

of EMT members shou

testifying or serving as experts in actions involving ADOC contractors outside of Alabama. The parties may raise concerns about conflicts of interest in such cases on a case-by-case basis.

The defendants have not provided any legal basis to restrict or prevent the EMT experts from otherwise testifying in other cases if subpoenaed to do so. The court will therefore not impose that limitation.

The court finds the adoption of some restrictions on the ability of EMT members to testify, largely proposed by the defendants, meets the need-narrowness-intrusiveness requirement. 18 U.S.C. § 3626(a)(1)(A). The court's resolution loosens the defendants' proposed restriction only to the extent necessary to ensure that the parties can jointly recruit

B. Measuring Compliance

1. Establishing Performance Measures

a. Dispute

The parties agree that the monitoring scheme should empower the EMT members, who are the experts here, to

identification of inmates in need of mental-health treatment. Identification Order (doc. no. 1794-1). Despite having initially proposed these performance measures, it is clear from testimony that Commissioner Dunn and Associate Commissioner Naglich understand the defendants' proposal to allow for the EMT to modify the 259 measures proposed as it deems appropriate. Dunn Nov. 26, 2018, Trial Tr. (doc. no. 2250) at 148 (testifying that if the EMT determines the performance measures fail to adequately address the remedial orders, the EMT members "have the ability to create measures that do"); Naglich Nov. 7, 2018, Trial Tr. (doc. no. 2249) at 180-82 (testifying that the EMT should be allowed to develop and change performance measures and that there is nothing wrong with the EMT coming up with the performance measures in the first place, "as long as they're reflective of" the remedial orders).

This point of agreement is emblematic of the overall theme of the defendants' monitoring plan, in which they acknowledge that the EMT "must drive the process of

filling in the open components" of the plan. Defs.' Response (doc. no. 2295) at 14. The defendants "intentionally left open certain aspects" of their proposed plan so that the EMT could "guide ADOC in filling in these remaining details." The defendants seek to empower the EMT to fill out the details of the plan because of the EMT's "expertise." at 15. The plaintiffs agree it is appropriate to give the EMT significant authority to determine how to conduct monitoring, including as to the performance measures used.

b. The Court's Resolution

The court will adopt the defendants' plan to give the EMT authority to modify the 259 initially proposed performance measures, including by removing them, changing their language, or creating entirely new performance measures. The EMT, in exercise of its unique expertise, recognized by the defendants, is to create the performance measures necessary to evaluate the

defendants' compliance with the court's remedial orders. Once the performance measures are established but before monitoring begins, the parties will be given an opportunity to raise objections to any of the proposed measures through a standard dispute resolution process: the objection must be raised first with the EMT, then via mediation, and finally with the court if still unresolved.

The court finds that allowing the experts, rather than the court, to establish the performance measures necessary to monitor compliance meets the need-narrowness-intrusiveness requirement. 18 U.S.C. § 3626(a)(1)(A). Because the performance measures will be limited to the court's remedial orders, which must also satisfy the PLRA, they will be narrowly tailored to evaluate only ADOC's progress with regard to the remedies ordered in this case.

2. Self-Correction

a. Dispute

The plaintiffs seek a provision requiring ADOC to create corrective action plans when monitoring reveals noncompliance. Pls.' Response (doc. no. 2133) at 75-78. The plaintiffs concede that the PLRA applies to this proposed order because it does not have the goal of informing the court of ongoing violations but is intended to improve ADOC's internal capacity to comply with all remedial orders. . at 54. They assert, however, that creation and auditing of corrective action plans is absolutely necessary to ensure compliance. . The plaintiffs also urge the court to require ADOC to designate a "Compliance Coordinator" to oversee the creation and implementation of corrective action plans and other monitoring activities, and to designate additional clinical staff who are dedicated solely to internal monitoring. . at 52-53, 60-61.

The defendants state that they expect corrective action planning to be part of ADOC's response to findings

of noncompliance. Defs.' Response (doc. no. 2295) at 38 n.4. However, they assert that, "[w]hile corrective action is constitutionally required in the face of a constitutional violation, a specific corrective action is not." at 38. They argue that a requirement that ADOC create corrective action plans would therefore not meet the need-narrowness-intrusiveness requirement of the PLRA. 18 U.S.C. § 3626(a)(1)(A).

b. The Court's Resolution

The court will not order ADOC to create corrective action plans, though the court agrees with both parties that doing so will likely be a necessary step toward achieving compliance. In the event of finding a deficiency, the EMT should provide instruction to ADOC as to what corrective action should be taken, suggest how to plan for that action, and monitor whether that action has been taken. Nonetheless the court will accept, for now, Commissioner Dunn's assertion that "common sense"

will lead ADOC to self-correct when presented with evidence of its noncompliance. Dunn Nov. 26, 2018, Trial Tr. (doc. no. 2250) at 153-54. Common sense will also dictate that the court will be very concerned to learn through the monitoring process that ADOC has failed, absent a valid reason, to take corrective actions suggested by the EMT. As the defendants have repeatedly acknowledged, "self-identification and self-correction of systemwide problems is the best long-term solution." Defs.' Proposed Monitoring Plan (doc. no. 2115) at 6. Plaintiffs' expert Dr. Burns credibly testified that self-correction "is kind of the definition of continuous quality improvement: That you self-monitor, identify deficiencies, study the problem, prepare a solution, apply the solution, restudy the issue to see that it has been resolved." Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 89. The capacity to self-monitor necessarily includes an understanding of "how a system needs to change in response to internal experience." at 90. The court will not be convinced that external monitoring

is no longer needed until ADOC has demonstrated that it has the capacity to engage in both of these twin elements of self-monitoring. The experts on the EMT are best positioned to help ADOC develop this capacity and may do so through the "feedback" and "consultation" processes described below. The court finds that this resolution is narrowly tailored and meets the need-narrowness-intrusiveness requirement of the PLRA. 18 U.S.C. § 3626(a)(1)(A).

The court will also not order ADOC to designate a "Compliance Coordinator" or otherwise dictate how ADOC organizes and manages its internal monitoring staff. For now, the court will defer to ADOC to establish an IMT as it deems appropriate. The defendants have informed the court that they plan to appoint to the IMT one psychiatrist, one psychologist, two registered nurses, and any other staff deemed necessary to complete quarterly reports. Defs.' Proposed Monitoring Plan (doc. no. 2115) at 12. While the court understands the plaintiffs' concern that appointing members of the IMT

clinicians, but acknowledge, based on the testimony of Dr. Robert Stern, one of their own proposed external

This assessment will often entail evaluating whether the clinicians based their judgment on clinically relevant information, as well as evaluating the documented reasons for making the judgment. As described by plaintiffs' expert Dr. Burns, the EMT's role is not to second-guess clinicians' clinical judgments, but to see "if there's a rationale involved for the choices that are made and the interventions that are provided." Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 93. As such, the EMT cannot find that the defendants did not satisfy a performance measure because a clinician made a decision that was reasonable, but different from the decision the EMT would have made.

method or procedure by which the EMT members assess compliance with the performance measures. Defs.' Proposed Monitoring Plan (doc. no. 2115) at 15-16; Burns Dec. 7, 2018, Trial Tr. (doc. no. 2256) at 242-43. For example, the defendants' proposed performance measure 45 is that "any referral by the intake [registered nurse] must be designated as emergent, urgent, or routine." Defs.' Proposed Monitoring Plan (doc. no. 2115-1) at 4. The proposed audit tool for that performance measure--referred to as a "Method of Measurement" in the defendants' performance measures chart--is to "review a minimum of 10 charts for inmates referred for evaluation by the intake RN [registered nurse] during the applicable quarter for each identified facility."

Just as both parties propose empowering the EMT to develop performance measures, they also propose empowering the EMT to develop audit tools for evaluating compliance with their performance measures. It is not clear, however, whether the defendants agree that the EMT's authority to create the audit tools should be

complete or whether their proposal would require final approval from ADOC.

Overall, the defendants' plan also limits the EMT to evaluating no more than three facilities per quarter. This would

as with the performance measures, the parties will be given an opportunity to raise objections to any of the proposed audit tools before monitoring begins, first with the EMT, then via mediation, and finally with the court if still unresolved.

The court will also leave it to the experts to decide how many and which facilities to evaluate on a quarterly basis within the constraints of the rest of today's order. It is in the interest of all parties and the court for ADOC to achieve compliance and attain the capacity to self-monitor as swiftly and effectively as possible. Though seemingly aimed to minimize the intrusion to ADOC facilities, arbitrarily limiting the number of facilities to be evaluated each quarter could have the opposite effect, slowing ADOC's progress toward termination of the court's remedial orders and extending the duration of external monitoring.

The court finds that this resolution satisfies the PLRA's need-narrowness-intrusiveness requirement. 18 U.S.C. § 3626(a)(1)(A). Allowing the EMT to create

the tools and schedule it deems necessary to evaluate compliance is essential to ensure the EMT's expertise shapes and drives the overall monitoring scheme.

5. Contempt and Dispute Resolution

a. Dispute

The defendants' plan includes a significant limitation on the ability of the plaintiffs to initiate contempt proceedings, allowing for the plaintiffs to do so only where the monitoring team has issued three consecutive quarterly reports finding noncompliance with respect to the same performance measurement and the plaintiffs have exhausted "all reasonable efforts to resolve any sustained noncompliance through the dispute resolution process." Defs.' Proposed Monitoring Plan (doc. no. 2115) at 21. Un

respond to the plaintiffs' contempt motion), the court will order that, absent an extraordinary urgency,

The parties disagree, however, about the timeline for the phases of monitoring, as well as various components within this broader structure. The court will describe and resolve each disagreement in turn.

1. Document Review

a. Dispute

The parties agree that ADOC must produce documentation to the EMT, and that the EMT shall have ultimate authority to identify which documents to review. However, the parties disagree as to the sample size that must be reviewed. The defendants propose requiring a minimum sample size of documents to be reviewed for each performance measure (generally 10 documents), while the plaintiffs contend that the sample size should be left to the EMT's discretion. Once the responsibility for monitoring has been transferred to the IMT, the plaintiffs propose that the IMT cannot reduce or change the amount of documentation identified for review by the

EMT unless ADOC has been found in compliance with respect to a particular order.

The plaintiffs also propose that documents produced to the EMT or IMT be produced to plaintiffs' counsel, while the defendants argue that the plaintiffs should receive only "all of the documentation that the Compliance Teams actually rely upon in evaluating compliance." Defs.' Response (doc. no. 2295) at 29. Finally, the plaintiffs propose a list of types of documents to serve as a starting point for review, in addition to any others requested by the EMT. Pls.' Proposed Opinion (doc. no. 2260) at 67.

b. The Court's Resolution

With regard to document review, the court will again leave much to be decided by the experts. The parties appear to agree that the EMT may review an unlimited number of documents. Rather than set a minimum number of documents, as the defendants propose, the court will leave it to the EMT to decide both how many and which

documents to review. While the court acknowledges the defendants' concern that a review of too few documents may result in an unrepresentative and unfair sample, this is an issue that the qualified experts on the EMT will be capable of recognizing and addressing as appropriate. The court will not adopt the plaintiffs' proposed requirement that the IMT follow precisely the choices for document review made by the EMT. The issue of how to review an adequate number or scope of documents is one on which the court expects the EMT will train the IMT, as discussed below. Evidence that the IMT is failing to follow that training may support a finding that external monitoring continues to be necessary.

The court declines to adopt the plaintiffs' proposal that all documents produced to the EMT or IMT also be produced to plaintiffs' counsel.

the defendants' narrower position that plaintiffs' counsel receive "all of the documentation that the Compliance Teams actually rely upon in evaluating compliance." Defs.' Response (doc. no. 2295) at 29. Because the court has difficulty defining in the abstract the exact meaning of "actual reliance," the court will initially leave it to the defendants to interpret this language and will simply address any issues as they arise. In accordance with the defendants' proposed EMT member Dr. Stern's testimony, the EMT must also retain all documents it reviews in the event its findings are contested by either party. Stern Nov. 27, 2018, Trial Tr. (doc. no. 2415) at 111.

The court finds that this requirement regarding document review is inherently narrow, as it is adopted in large part from the defendants' proposal and the parties' agreements and again gives discretion to the experts to determine what is necessary. Thus, the court finds it meets the need-narrowness-intrusiveness requirement of the PLRA. 18 U.S.C. § 3626(a)(1)(A).

2. Observation

a. Dispute

The parties agree that site visits should be part of uach reques lT-431 or0 demfs monitoring. In broad strokes, the key difference is that, while the defendants propose that the EMT conduct site visits , the plaintiffs want to at least yearly site visits to each facility at the start of monitoring.

facility be visited by the EMT members at least once, but no more than twice, per year, unless extraordinary circumstances require more visits. Pls.' Proposed

of site visits but have repeatedly raised concerns that site visits may be distracting and intrusive.

The defendants similarly do not have a proposal regarding the scope of observation of the EMT members allowed during site visits. The plaintiffs propose that monitors be allowed to (1) observe processes, including treatment, with the permission of patients; (2) inspect areas where inmates are housed and where mental-health services and programming are performed; (3) conduct confidential interviews with inmates

b. The Court’s Resolution

The court will order regular site visits by the EMT throughout the monitoring process, rather than just at the outset. However, the court will not dictate the

facility, including prior to the start of monitoring. In recognition of the defendants' concern that overly frequent site visits may be disruptive to the facilities' operation, however, the court will limit the number of site visits by the EMT to no more than two per facility per year, unless explicitly agreed to by the parties or permitted by the court upon the monitors' request. This requirement is based on the testimony of both Dr. Burns and Vail, who stated that they would expect the EMT to conduct two site visits per facility per year, at least to start, with an emphasis on those facilities "that have the most involvement in carrying out all of the remedial plans," such as the mental-health treatment hubs. Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 64;

Vail Nov. 29, 2018, Trial Tr. (doc. no. 2340) at 25-28. Because it is up to the EMT which facilities to visit and

defendants and to inform the defendants of a proposed visiting schedule on a quarterly basis, giving no less than two weeks of notice prior to any visit. The court finds the defendants' proposal that ADOC may dispute any site visit as "unnecessary or inappropriate" overly broad. Instead, there will be a presumption that a site visit will oc

done in terms of all the various components." at 56. For example, Dr. Burns testified that compliance with the remedial order requiring that suicide-watch checks be made at staggered intervals cannot be fully evaluated without a site visit. at 165-67. The available documents regarding this remedial measure are the observation logs kept by staff. Upon review of these logs from the months prior to the monitoring trial, Dr. Burns testified that the logs noted checks at staggered times, but repeated at precisely the same times over multiple logs in different months. The explanation Dr. Burns suggested was that the logs were likely filled in, in advance. However, without a site visit "to observe the observers and their logs contemporaneous with the observation" and to watch the actual practice of staff, monitors would 2024.Ts(lefnt)-53 una

staff actions and decisions before they reach a conclusion regarding compliance. Vail Nov. 29, 2018, Trial Tr. (doc. no. 2340) at 15-16.

Both Vail and Dr. Burns agreed that interviewing inmates is another important way to detect patterns of compliance or noncompliance with remedial measures. For example, Dr. Burns testified that interviewing inmates is sometimes necessary to investigate issues such as how quickly patients are being evaluated in response to their requests for mental-health treatment and whether they are seen by mental-health staff in a confidential space. Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 55.

The court will leave the issue of including attorneys

as activity by the monitors to inform the court and parties of the defendants' with remedial orders and the Constitution. As part of this process, they may also advise defendants on best practices, policy, and more.[4] "Consultation," by contrast, refers to actions taken to ADOC how to self-monitor.

a. Dispute

In broad strokes, whereas the defendants propose that feedback essentially be limited to the quarterly reports produced by the EMT, the plaintiffs contend that feedback should also include face-to-face meetings.

4.-teach

With regard to the written reports, the parties agree that quarterly monitoring reports should be submitted to the court, and that both parties should have the opportunity to contest the reports or to provide feedback to the EMT. However, the parties' proposals include three minor discrepancies: (1) the plaintiffs propose that, during the second phase, the IMT, in addition the EMT, produce quarterly reports to learn how to do so; (2) the defendants propose that all quarterly monitoring reports as well as supporting documentation be kept under seal and treated as confidential; and (3) the defendants propose that "[n]o Quarterly Evaluation Report, or finding or recommendation of the [EMT] and/or [IMT] within a Quarterly Evaluation Report, is admissible against ADOC, its employees, contractors, or contractor's employees in any other civil action or other proceeding." Defs.' Proposed Monitoring Plan (doc. no. 2115) at 20-21.

With regard to the face-to-face feedback, the plaintiffs propose that for each site visit, there be an entrance and exit interview between the monitoring team

and the institutional staff as well as any party representatives that are present.

Finally, the plaintiffs also propose that the EMT be able to communicate with the plaintiffs and the defendants (and presumably their representatives), separately or together, at its discretion, outside of the context of a site visit. By contrast, the defendants' proposal provides for regular communication (outside of quarterly reports) only between the EMT and ADOC and prohibits the EMT from informing one party "of any decision, recommendation, or report in advance of the time it is given to all parties." Defs.' Proposed Monitoring Plan (doc. no. 2115) at 21. Specifically, the defendants' proposal provides that the EMT "may convene conference calls on a monthly or otherwise regular basis with ADOC to discuss implementation of the Remedial Orders, to obtain updates, and to address questions or concerns."

b. The Court’s Resolution

U.S. 589, 597 (1978) & , 696 F.2d 796, 802-04 (11th Cir. 1983)). As this court has stated, "Alabamians indisputably have a powerful interest in overseeing ADOC's performance." . at 1272. The defendants' proposal that the reports be inadmissible in other proceedings is due to be rejected, as the defendants do not identify any legal basis for such a requirement. The court will address in the "Consultation" section below the parties' disagreement regarding the IMT's participation in producing quarterly reports.

With regard to the face-to-face feedback, the EMT has authority, upon its request, to conduct entrance or exit interviews with ADOC personnel. ADOC shall comply with these requests, absent extenuating circumstances, such as an extreme security risk. As described, if the EMT deems participation of the parties' lawyers appropriate during these interviews, the court will permit such participation. Plaintiffs' expert Dr. Burns testified that these in-person meetings are important to

provide immediate feedback to ADOC regarding the monitor's findings and for the monitors to make suggestions of improvements where appropriate. Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 66-67. Vail testified that on-the-ground feedback

is also important to ensure that the monitors have an accurate impression of ADOC's activities and to correct any misunderstandings prior to the writing of the monitoring reports. Vail Nov. 29, 2018, Trial Tr. (doc. no. 2340) at 15. This two-way feedback, he testified, helps the monitoring process because "the people on the ground in any state know the details of their system better than an outsider ever will, no matter how good the monitor is."

Finally, with regard to communication between the parties and the EMT, the court will allow the EMT to meet with and otherwise communicate with the parties, including ADOC staff, at its discretion, separately or together. Fluid communication will aid the two-way delivery of feedback. The defendants' own proposed

monitor Dr. Stern also testified that communication between the EMT and counsel for all parties is important during the monitoring process. Stern Nov. 27, 2018, Trial Tr. (doc. no. 2415) at 54. However, if the monitors rely on information from these communications in the quarterly reports, they must cite the communication in the report. Consistent with the defendants' proposal, the court will order that the EMT may not provide the quarterly report to one party ahead of the other.

The court finds that these provisions regarding feedback meet the need-narrowness-intrusiveness requirement of the PLRA. 18 U.S.C. § 3626(a)(1)(A). Once again, the parties' agreement regarding the filing of quarterly reports is strong evidence of PLRA compliance. , 383 F. Supp. 3d 1218, 1253 (M.D. Ala. 2019) (Thompson, J.). Allowing the EMT discretion to request face-to-face feedback when they believe it is necessary will help to ensure swift and productive collaboration between the EMT and ADOC--a critical feature of this monitoring scheme. Such

meetings will be limited to what is necessary, as determined by the experts on the EMT, to limit the intrusion into ADOC's operations.

4. Consultation

a. Dispute

As used here, "consultation" refers to the EMT's actions to teach the defendants how to self-monitor. Consultation differs from "feedback" in that it is not focused on informing the parties and the court about compliance. In broad strokes, the parties agree that teaching should be a big part of the monitoring scheme. The parties' disagreement lies in how this teaching and capacity-building will take place. The distinctions in the proposed division of labor between the EMT and IMT--including the EMT's supervisory role over the IMT--reflect the parties' different proposed processes by which the EMT will teach the IMT how to monitor.

In the first phase, the parties agree that the EMT will exclusively conduct monitoring. However, the

parties' proposals differ slightly in that the plaintiffs propose that the IMT observe the EMT during the first phase, Pls.' Proposed Opinion (doc. no. 2260) at 72, whereas the defendants simply propose that the EMT make the results of its quarterly evaluations available to the IMT, Defs.' Proposed Monitoring Plan (doc. no. 2115) at 13.

In the second phase, the plaintiffs propose that the IMT observe the EMT and participate only "as appropriate," Pls.' Proposed Opinion (doc. no. 2260) at 72, whereas the defendants propose that the EMT and IMT jointly conduct the evaluations, Defs.' Proposed Monitoring Plan (doc. no. 2115) at 13-14. Unlike the defendants, the plaintiffs also propose that the IMT produce separate draft quarterly evaluations during the second phase (in addition to the evaluations produced by the EMT), which the EMT would review for accuracy, thoroughness, and efficacy. This way, according to plaintiffs, the EMT "will be able to teach the Internal Monitoring Team the skills they need to take the lead in

monitoring and will be able to evaluate the progress of the Internal Monitoring Team in developing the capacity to take over the monitoring process." Pls.' Proposed Opinion (doc. no. 2260) at 74. Another crucial difference, discussed in the "Handoff" section below, is that defendants propose that the second phase automatically end after two years of monitoring.

In the third phase, the plaintiffs propose that the EMT continue to observe the IMT and retain the authority to return monitoring to the second phase. By contrast, the defendants want monitoring in the third phase to be exclusively conducted by the IMT, without EMT supervision.

b. The Court's Resolution

The court will order that the IMT's responsibilities and involvement will be largely driven by what the EMT members, who are the experts, believe is necessary. During the first and second phases, the EMT shall be allowed to invite the IMT to observe the EMT in its

Tr. (doc. no. 2250) at 7. Consultation is "one of the ways in which the monito

responsibilities to the IMT, that is, when does monitoring move from phase two to phase three? Second, when does court monitoring terminate? The parties disagree on both issues.

a. Timing of Monitoring Phases

i. Dispute

As to the first issue of transition from phase two to phase three of monitoring, the defendants propose automatic termination of the EMT and transition to phase three after two years of monitoring--four quarters in phase one and four quarters in phase two. By contrast, the plaintiffs contend that the EMT "cannot automatically disband after two years." Pls.' Proposed Opinion (doc. no. 2260) at 52. The plaintiffs propose that the EMT conduct monitoring until the EMT determines that the IMT "has developed the competence to lead the monitoring efforts," at 72, or until the defendants demonstrate to the court "that the remedies being monitored can be terminated because they are no longer necessary to remedy

ongoing constitutional violations," at 52. The plaintiffs further assert that, in the third phase of monitoring, the EMT should continue to exercise oversight of the IMT's monitoring, including directing which facilities are to be audited.

The defendants take issue with the fact that the plaintiffs "do not propose any clear point in time for transitioning from the [EMT] to the [IMT]." Defs.' Response (doc. no. 2295) at 33. Under the plaintiffs' plan, they complain, the determination of when the IMT is prepared to assume primary monitoring responsibilities would be left "entirely to the subjective opinion of the [EMT] without holding the [EMT] accountable for training and mentoring the [IMT]." The defendants argue that the EMT would have no incentive to conclude its work and allow ADOC to take over monitoring.

ii. The Court's Resolution

The court will adopt the defendants' proposal that after one year, monitoring will automatically shift from

phase one to phase two. However, the court will order that monitoring will move from phase two to phase three--that is, the IMT will assume responsibility for monitoring--when determines, after a hearing, that the IMT is sufficiently competent that monitoring by the EMT is no longer necessary. Of course, in phase three, monitoring by the court would continue, albeit by way of the IMT, until monitoring is no longer needed.

The defendants' critique and proposal suffer from two key problems. First, the defendants' plan would in no way incentivize the IMT or ADOC to build its internal monitoring capacity. The fixed, two-year cut off sends the message that, regardless of the IMT's monitoring capacity after two years, the IMT would take over and external monitoring will end at that time. Second, and perhaps more importantly, a fixed two-year cut-off would mean that external monitoring would end regardless of the status of compliance by ADOC. As plaintiffs' expert Dr. Burns stated, under the defendants' proposal, the transition would occur "based on the passage of time, not

necessarily improvements in the system." Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 51. As explained above, external monitoring is to address ongoing constitutional violations. This is because ADOC has failed to self-identify and self-correct problems with its provision of mental-health services to inmates, , 257 F. Supp. 3d 1171, 1257 (M.D. Ala. 2017) (Thompson, J.), and because this failure has continued since the liability opinion, demonstrated by ADOC's ongoing failure to self-monitor compliance with remedial orders, as described in the final section of this opinion. Therefore, external monitoring will continue to be until the defendants have the capacity to self-monitor; that is, until the IMT has built and demonstrated its competency both to identify and correct deficiencies, or rather, ADOC itself has built and demonstrated such. The court has no reason to believe that ADOC, via the IMT, will automatically obtain competency after two years of monitoring, that is, that it will have a documented, substantial track record of

identifying successfully correcting deficiencies. Burns Dec. 6, 2018, Trial Tr. (doc. no. 2254) at 116 (estimating that in the best-case scenario, ADOC will reach constitutional compliance in five years).

The court shares the defendants' concern that monitoring may extend indefinitely. Therefore, the court will rely on the process set forth by the PLRA for making the determination that the IMT is ready to assume responsibility for monitoring--an approach that ensures external monitoring continues only as long as it is truly necessary. Accordingly, at any point at least two years after the external extern.24 0 -2at only .24 11 1039.005 -41 Tm

external monitoring remains necessary to correct a current and ongoing constitutional violation, and that the monitoring order continues to meet the need-narrowness-intrusiveness test. 18 U.S.C. § 3626(b)(3); , 231 F.3d 777, 782-83 (11th Cir. 2000). In the event of such a hearing, the court will consider, among other evidence, the opinions of the members of the EMT as to whether the IMT has developed the capacity to assume monitoring responsibilities and engage successfully in self-correction. The court expects that, through the various mechanisms in this process designed to build the IMT's capacity, once monitoring shifts into phase three, the IMT will take over monitoring for the remaining duration of the court's oversight. However, the court will reserve the authority to return monitoring to phase two a- Q q e1T (1 Tf ((smo7) -I)-o).99590.1694 cm BT0.0035 Tc 58

The court understands the defendants' concern that the experts on the EMT, who are paid for their work, may have competing interests with regard to handing over the reins to ADOC. However, this concern is insufficient to support automatic and arbitrary termination of external monitoring after two years. And regardless of the EMT's motivations, the court's resolution will provide ADOC the opportunity to show the court that it is ready to take over monitoring.

All that said, the court agrees with the defendants that the IMT would benefit from having clear goals and criteria for determining whether it has the ability t906 y TJ E

order--can be based on a finding of substantial compliance in just a few facilities, or even a one, in three, not necessarily consecutive, quarters.

The defendants propose that, even though court monitoring of a performance measure will end once there is sustained substantial compliance, ADOC will continue to monitor compliance with the performance measure at least on an annual basis as part of its ongoing continuous quality improvement activities (CQI). . at 14. Of course, the results of this CQI self-oversight would not be reported to the court or the plaintiffs. Under the defendants' plan, all court monitoring and the court's remedial orders would end as soon as sustained substantial compliance is achieved for every performance measure.

The plaintiffs disagree with the defendants' definition of substantial compliance. Their main objections are that the defendants' definition is purely numerical, rather than also qualitative, and that, as their expert Dr. Burns and the defendants' proposed

monitor Dr. Stern testified, some remedial measures must be complied with 100 % of the time, rather than 85 % of the time, to be effective. Burns Dec. 7, 2018, Trial Tr. (doc. no. 2256) at 123; Stern Nov. 27, 2018, Trial Tr.

policies are developed, staff are trained, and the policies are followed." Pls.' Proposed Opinion (doc. no. 2260) at 53. Another area of disagreement is that the plaintiffs insist that substantial compliance as well as sustained substantial compliance be measured on a facility-by-facility basis. This

such if the evidence shows that the remedial orders are no longer necessary to correct current and ongoing violations." . at 75.

ii. The Court's Resolution

The court will adopt the same approach as above with regard to the second "handoff" issue of termination of court monitoring. That is, the court will simply rely on the process set forth by the PLRA for determining when to terminate relief. Accordingly, at any point at least two years after the entry of this order, any party or intervenor may move to terminate court monitoring altogether. 18 U.S.C. § 3626(b)(1). The court will terminate court monitoring unless the plaintiffs demonstrate, at an evidentiary hearing, that court monitoring remains necessary to correct a current and ongoing constitutional violation, and that court monitoring continues to meet the need-narrowness-intrusiveness test. § 3626(b)(3); , 231 F.3d 777, 782-83 (11th

Cir. 2000). In the event of such a hearing, the inquiries will be whether ADOC is complying with the remedial orders and whether the IMT has the ability to identify and successfully correct problems without court oversight.

Accordingly, crucial evidence for determining whether court monitoring remains necessary will be whether ADOC has achieved substantial compliance with the performance measures. As both parties agree, the EMT will have the authority to define substantial compliance for each performance measure. This could include, if the EMT so determines, the ability to take into account more qualitative criteria, such as "whether policies are developed, staff are trained, and the policies are followed." Pls.' Proposed Opinion (doc. no. 2260) at 53. As proposed by the defendants, even after monitoring is transferred from the EMT to the IMT, the IMT must continue to use the EMT's definitions of substantial compliance,

unless a change is approved by the plaintiffs or the court.[7]

There is merit to the defendants' argument that

outset that substantial compliance will be crucial evidence for showing that court monitoring is no longer necessary, the defendants receive "fair notice of what standard they must reach" to terminate monitoring. Defs.' Response (doc. no. 2295) at 13.

The court need not resolve whether, as proposed by the plaintiffs, substantial compliance must be shown on a facility-by-facility basis for each performance measure, or whether sustained substantial compliance at a few facilities is sufficient to terminate monitoring of the performance measure for all facilities, as proposed by the defendants. This is because the question presented at the hearing to terminate court monitoring will be whether court monitoring remains necessary. Obviously, if the defendants present evidence of sustained substantial compliance in just one or two facilities for a performance measure, that evidence may be less compelling than if they present evidence of sustained substantial compliance throughout the system.

The EMT experts shall have the authority, without a hearing, to stop evaluating a particular performance measure at a particular facility, or stop evaluating a facility altogether, based on their own determination of sustained substantial compliance. As with the defendants' proposal that the IMT must continue to use the definitions of substantial compliance developed by the EMT, the IMT must also continue to evaluate the performance measures and facilities that the EMT is still assessing at time of transition to the IMT. The IMT may only stop assessing them upon a determination, after a hearing, that they are no longer necessary, or by consent

based on the same procedure set forth in the PLRA--that

III. MONITORING AND THE PLRA

It is a complicated question whether the PLRA's requirements apply to the court's order regarding monitoring. With regard to some of the court's monitoring provisions adopted today, the parties appear to agree that the PLRA governs. The plaintiffs admit that, "[w]here the remedy includes setting up internal processes for self-monitoring and self-correction, courts must determine whether the [PLRA's] requirement is met." Pls.' Response Regarding PLRA (doc. no. 2213) at 3. As stated, the parties disagree, however, about whether monitoring is "prospective relief" and therefore subject to the PLRA's need-narrowness-intrusiveness requirement. 18 U.S.C. § 3626(a)(1)(A). The defendants contend that it is. By contrast, the plaintiffs argue that, to the extent monitoring is limited to informing the court whether the defendants comply with court orders, the requirement does not apply because such monitoring constitutes a to

relief, as opposed to "prospective relief" within the meaning of the PLRA. .

The caselaw is unclear as to whether the need-narrowness-intrusiveness requirement applies to court monitoring. Some district courts agree with the plaintiffs that monitoring is a to relief, rather than "prospective relief," and therefore is not subject to the requirement. , , 209 F. Supp. 2d 1294, 1300 (S.D. Fla. 2002) (Hoeveler, J.) ("Clearly monitoring is not an 'ultimate remedy' and only aids the prisoners in obtaining relief.");

, 156 F. Supp. 2d 333, 342-43 (S.D.N.Y. 2001) (Baer, J.) (holding that monitoring "cannot be relief" and "[t]o find otherwise would conflate relief with the means to guarantee its provision"),

, 343 F.3d 35 (2d Cir. 2003). On the other hand, the Second Circuit stated in dictum that it was "somewhat problematic" for the district court in the case before it to conclude that monitoring is not relief within the meaning of the PLRA.

satisfies the requirement. So, to the extent monitoring must meet the requirement, it does.

Several courts have indicated that in applying the need-narrowness-intrusiveness requirement, a history of non-compliance helps justify an intrusive remedy.

, 343 F.3d at 49 (finding that an independent monitoring body with substantial responsibilities satisfied the need-narrowness-intrusiveness requirements in part because of the district court's finding that "the nearly twenty year history of incomplete compliance with the consent decrees amply attests to the need for external monitoring" (citation omitted));

, 370 Fed. App'x 168, 171 (2d Cir. 2010) (unpublished) ("The needs-narrowness-intrusiveness requirement of the PLRA notwithstanding, we find that nearly a half-decade of untruthfulness, non-compliance and inaction con

2d 1168, 1233-35 (N.D. Cal. 2010) (Breyer, J.) (stating that, in fashioning relief, courts "may take into account a history of noncompliance with prior orders," and finding that further orders satisfied the need-narrowness-intrusiveness requirements in part because of evidence of non-compliance with prior orders and because "defendants have demonstrated an inability to take remedial steps absent court intervention"). Thus, the evidence of ADOC's failure to comply with the remedial orders in this case, described in detail in the final section of this opinion, would likely justify even a far more intrusive monitoring order than the court enters today.

Nonetheless, the monitoring scheme that the court orders today is the least intrusive possible as it is largely drawn from the defendants' own plan. And the fact that

the position that the state should not be subject to monitoring or oversight on these issues? A. No."), further supports the court's finding that the overall monitoring scheme satisfies the PLRA, 18 U.S.C. § 3626(a)(1)(A); , 383 F. Supp. 3d 1218, 1253 (M.D. Ala. 2019) (Thompson, J.) (finding the defendants' agreement to a remedial provision is strong evidence of PLRA compliance).

IV. WHY COURT-ORDERED MONITORING IS NEEDED

The defendants argue that ADOC should be allowed to "voluntarily undertake culture change" without a court order.[8] Defs.'

has had ample opportunity, in this litigation and for decades prior, to correct voluntarily its failings regarding the mental-health care in its prisons, and its conduct during the course of this case has been

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coming in and, in effect, taking over a core function of the department...,' i.e. the continuous quality improvement ("CQI") process of improving the delivery of mental-health care." Defs.' Response (doc. no. 2295) at 7 (quoting Dunn Nov. 26, 2018, Trial Tr. (doc. no. 2250) at 9). The court is unpersuaded by this argument because the defendants presented absolutely no evidence of the failure of this "historical" model. They highlight that, as described below, there has been repeated litigation over prison conditions in Alabama. But that is not evidence that it was the that led to the recurrence of unconstitutional prison conditions. It is an equally plausible explanation--and, indeed, the court finds it is more likely--that the lack of effort or resources invested by ADOC to make sustainable change led to the recurrence.

The defendants also rely on Commissioner Dunn's testimony at the monitoring hearing to contend that external monitoring in California prisons has failed under the "historical" model. But Dunn's testimony is based on a few conversations he had with California prison officials. This evidence is unpersuasive--it is a hearsay account of one side of the story (the prison officials') for why there has been protracted prison litigation in California. Again, the reason for protracted litigation in California may have nothing to do with the monitoring order in that case, and everything to do with failures on the part of California prison officials or other factors.

orders in this case and thus for the court to fulfill its responsibility.

A. Liability Finding

First, the court’s monitoring order

found "repeated examples of custody staff intrusions into the provision of mental health contacts through their presence during clinical encounters and pressure on clinical staff that minimized inmate concerns and reports of suicidality." , 383 F. Supp. 3d 1218, 1277 (M.D. Ala. May 4, 2019) (Thompson, J.) (quoting Joint Expert Report and Recommendations (doc. no. 2416-1) at 16). Accordingly, the court found that "ADOC continues to violate the terms of previous remedial orders covering this issue. ADOC fails to provide adequate confidentiality during clinical encounters to inmates, comply with the agreements they made with the plaintiffs, and comply with court orders regarding confidentiality."

At that time, ADOC itself also recognized various other serious and "systemic failures to comply with court orders." at 1229 (quoting Pls. Ex. 2710 at ADOC0475738). These included systemic failures to properly document inmates' SMI designations, properly complete suicide risk assessments, place inmates on acute

1965) at 3, 5. Similarly, even after this court found ADOC's suicide-prevention practices "woefully inadequate," , 257 F. Supp. 3d 1171, 1229 (M.D. Ala. 2017) (Thompson, J.), ADOC continued to fail to properly review inmates' suicides and serious suicide attempts. Plaintiffs' expert Dr. Burns testified in December 2018 about her concerns that problems "that might have been found and corrected [via these reviews] still exist and put people at risk." , 383 F. Supp. 3d at 1279 (citing Burns Dec. 7, 2018, Trial Tr. (doc. no. 2256) at 102). Tragically, "[h]er fears were borne out: Six prisoners killed themselves since she testified; and ... their cases were rife with inadequacies in suicide prevention."

, ADOC has been unable or unwilling to take necessary steps to monitor its own practices. These failures serve as evidence that this monitoring order is necessary. , 343 F.3d 35, 49 (2d Cir. 2003) (upholding district court's finding that external monitoring satisfied the

PLRA's need-narrowness-intrusiveness requirement, "particularly in light of the district court's finding that the City's compliance with its remedial responsibilities has been consistently incomplete and inadequate"),

, 581 F.3d 63 (2d Cir. 2009). As this court has stated, "[t]he more someone fails to do something he agreed to do, the bigger the need to supervise whether he does it in the future." , 383 F. Supp. 3d at 1281.

To be sure, understaffing has posed a significant impediment both to compliance with many of the court's remedial orders and to self-monitoring. Plaintiffs' expert Dr. Burns testified that it would indeed have been a challenge for ADOC to comply with the ordered timelines of all remedial orders given "limited resources in terms of staffing." Burns Dec. 7, 2018, Trial Tr. (doc. no. 2256) at 205-208. However, Dr. Burns also testified she would have at least expected to see "a plan that identified those most significant, high-risk areas, and

focus[ed] on those, as opposed to some of the lower risk things." . at 206. Instead, ADOC had not even implemented the remedial measures that Dr. Burns characterized as "the low-hanging fruit." at 209.

C. ADOC's Own Acknowledgment

The defendants' open admission that some degree of external and internal monitoring is necessary further supports the court's order. As Commissioner Dunn testified, "we all want to get at some point in the future to a place where the department has the capacity to self-

to develop ADOC's capacities. Defs.' Proposed Monitoring Plan (doc. no. 2115) at 2; Dunn Nov. 26, 2018, Trial Tr. (doc. no. 2250) at 35. The court's order today is narrowly tailored to achieve constitutional compliance with precisely the goal of sustainability in mind.

, 559 F.2d 283, 290 (5th Cir. 1977) (requiring the installation of a monitor at each prison to observe and inform the court of ADOC's progress),

, 438 U.S. 781 (1978).

Finally, the court would again emphasize that this

D. Half-Century History of Litigation Regarding Inadequate Mental-Health Care

Finally, ADOC's long history of repeated litigation regarding the inadequacy of its mental-health care is independent evidence of its inability to sustain improvements without the type of oversight ordered today. This history serves as evidence of why court monitoring is necessary.

disturbed prisoners receive no treatment whatsoever. It

1977),

, 438 U.S. 781 (1978). In 1979, the district court again found that, despite monitoring, "nothing ha[d] been done to correct the situation." , 466 F. Supp. 628, 631 (M.D. Ala. 1979) (Johnson, C.J.). The court stated, in a finding nearly identical to this court's finding 40 years later in the present litigation:

> "There is now some effort at identification of those with mental problems. But the record of housing and treatment of such persons is one of total failure and non-compliance. What defendants deem the best facility for housing those with severe emotional and mental problems is the same 12 cell area at Kilby that was in use at the time of this Court's original hearing. Many of those with mental problems at Fountain, Holman, and Tutwiler are housed in segregation cells and in punitive isolation.
>
> ...
>
> In light of the clear mandate of the Court in this area, the minimal efforts at compliance by the Board reflect an attitude of deliberate indifference to the mental health needs of the inmate population."

at 631-32. Finding a "lack of any significant progress," despite monitoring, the court then placed ADOC into a receivership. . at 635.

Finally, in 1988, after 16 years of the court's jurisdiction over ADOC's mental-health care, the court found ADOC had achieved the objectives of the court's remedial orders and no longer required court supervision. Memorandum Opinion (doc. no. 2133-1) at 20, , Civil Action No. 3501-N, (M.D. Ala. Dec. 28, 1988) (Varner, J.) (dismissing case with prejudice).

Just four years after the court's oversight terminated, however, a new complaint was filed, alleging unconstitutional conditions for mentally ill inmates in ADOC's custody. Complaint (doc. no. 1), , No. 2:92cv70-WHA (M.D. Ala. Jan. 15, 1992) (Albritton, J.). Through a settlement reached in 2000, the litigation again significantly improved ADOC's provision of mental-health care. By the end of the agreed-upon duration of monitoring in that case, the monitor concluded that ADOC had achieved "remarkable"

(Johnson, C.J.). With the monitoring scheme created by the court's order today--largely drawn from the defendants' own proposal--the court joins the State in hoping that this will be "the last ... chapter in the history of court oversight of ADOC." Defs.' Response (doc. no. 2295) at 40.

V. CONCLUSION

In finding that each of the above monitoring provisions satisfies the need-narrowness-intrusiveness requirement--both individually and in concert--the court gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). The court finds that there is no such adverse impact and that, in fact, the court-ordered monitoring provisions, by helping to improve mental-health care for inmates, will serve only to enhance public safety and the operation of a criminal justice system.

It is clear that the court and the parties share the same goal for monitoring in this case: that ADOC acquire the tools, resources, and capacity to provide constitutionally adequate mental-health care to those in its custody court supervision. As this court has previously stated: "[T]he real success would be that it will no longer be needed for this court or any federal court to interject itself in [Alabama's] prison system.... I look forward to the day when not only I'm not necessary, but no federal court is necessary." Thompson Apr. 23, 2018, Trial Tr. (doc. no. 2689) at 4. With the defendants' own proposal and the parties' agreements forming the basis of this monitoring scheme, today's order is an important step in that direction.

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Therefore, it is ORDERED as follows:

(1) The monitoring scheme, as described above, is adopted as the order of the court.

(2) The court will, over time, issue a series of orders to enforce this monitoring scheme, beginning with an order for the selection and appointment of members of the external monitoring team.

DONE, this the 2nd day of September, 2020.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE